# *Pioneering Investment Futures: India's Path with Bilateral Treaties & Arbitration*

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**Abstract**

*"Bilateral Investment Treaties"* are essential tools for promoting international investment and creating a friendly atmosphere for it, especially in developing nations like India. The fact that BITs have become more and more commonplace throughout the world. India included over time highlights how important they are for promoting cross-border investments. In light of India's developing economy and the critical role the *"Investor-State Dispute Settlement (ISDS)*" process plays in controlling foreign investment and defending investor rights, this paper explores the complex terrain of investment arbitration. This paper attempts to examine the future implications of the dispute resolution system after "*the exhaustion of local remedies"* along with the development of BITs as well as the dynamics of investment arbitration.

It is a complex and important international law and company governance area to resolve these investment conflicts. It entails forecasting the BITs in India for future reference. India, a country with a fast-expanding growing economy and a popular location for foreign investment, has signed up to a sizable number of BITs, therefore disputes involving foreign investors are not unheard of. This paper highlights the necessity of taking proactive steps to guarantee a just and equitable investment environment and illuminates the prospects and difficulties that await BITs in India in

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the future. In the end, it provides information about how investment arbitration is changing and what that means for India's future economic growth.

Keywords: Bilateral Investment Treaties, Investor, State, Arbitration

## 1. Introduction

### [1.1] BITs in India

Bilateral Investment Treaties (henceforth BITs) have been used by India as a strategy to promote international investment. In accordance with (BITs), individuals and corporations may invest privately in another sovereign state from one sovereign state. Cross-border investments have their origins in colonial times when various investments were made all over the Indian subcontinent. However, at the time, there was no structure in place for investment arbitral courts to handle the complications and disagreements brought on by such transactions. The landscape of overseas investments has changed over time. In the modern day, investments are undertaken under legally binding contracts, and any resulting conflicts are settled by specialized investment courts formed by numerous treaties and regulations. These tribunals have the only purpose of resolving disputes involving investments and making sure that the procedure is fair.

It is a complex and important international law and company governance area to resolve these investment conflicts. It entails balancing the ideals of sovereignty and investor protection, as well as balancing the interests of foreign investors with those of the host state. India, a country with a fast-expanding growing economy and a popular location for foreign investment, has signed up to a sizable number of BITs, therefore disputes involving foreign investors are not unheard of. To encourage "*Foreign Direct Investment* (*FDI*)" and safeguard the rights of foreign investors in India, BITs have been important. The terms and circumstances governing investments made by people and organizations from one sovereign state, in this case India, into another are established by these international agreements. BITs are an essential tool for fostering economic cooperation, fostering a welcoming environment for investment, and ensuring that foreign investors are treated fairly and equally. However, just like any other type of international agreement, BITs have the potential to result in disagreements between foreign investors and the host country, in this case,

India. BITs are an essential tool for fostering economic cooperation, fostering a welcoming environment for investment, and ensuring that foreign investors are treated fairly and equally. However, just like any other type of international agreement, BITs have the potential to result in disagreements between foreign investors and the host country, in this case, India.

The researcher will give an outline of India-specific BIT dispute settlement procedures. It will go in-depth on the background of BITs in India, the types of disputes that frequently occur, and the techniques used to settle these conflicts. It will also emphasize the changes in India's BIT dispute resolution strategy as well as the opportunities and difficulties it encounters in the changing field of international investment law. In the end, this paper seeks to clarify the Future of BIT dispute resolution in India's larger economic and legal framework and its ramifications for both international investors and the Indian government

## *2. Legal Framework of Bilateral Investment Treaties in India*

### [2.1] Meaning of BITs

It is considered to be an international agreement where two countries or more than two countries come together (multilateral treaties) and establish their terms and conditions as a form of individual or as a company. Rather than suing the host state in its courts, investors whose rights under the treaty have been violated can opt for international arbitration, which is often conducted under the "*ICSID (International Centre for the Settlement of Investment Disputes)*" mechanism, which is an *alternative dispute resolution* mechanism provided by many BITs. This is what makes BITs unique. Roughly 2,500 BITs are thought to be in operation right now[3].

### [2.2] BITs in the Indian Context

India has refrained from joining the ICSID treaty, as have other developing countries. India has two main reasons for not wanting to sign the ICSID: first, the arbitration rules under the Convention are biased towards richer nations, and second, even in cases where an award violates Indian public policy, there is no jurisdiction for the Indian Court to examine the ruling.

[3] Cornel Law school, legal Informative Institute, "Bilateral Investment treaty*",* (last accessed at [https://www.law.cornell.edu/wex/bilateral_investment_treaty on Jan 27,2023, 6PM]

Since India is not a party, it is not required to use ICSID to enforce BIT awards. Consequently, India has terminated fifty-eight of the current Bilateral Investment Treaties (BITs); only six have been successful, and thirteen are still in the process of joining a model BIT. The government introduced a new "*Model Bilateral Investment Treaty* (BIT)" in 2016 (sometimes mentioning 2015 as well), which replaced the previous framework and went into force in April 2017. This shift means that going forward, all new investments made in the nation must be handled by the updated criteria[4].

[2.3] Development of India's BIT Network

Along with other nations, India has also filed ISDS and BIT contests. This is especially the case following its 2011 defeat in "*the White Industries v. India"* (discussed later) case, in which an ISDS tribunal concluded that India had broken the terms of the "*India-Australia BIT"*. "The *India-Australia (BIT)*" was invoked by Australian Investor White Industries against India in response to excessive court delays in implementing a commercial arbitration ruling against Coal India Limited in India. Among other things, White Industries contended that India had not given them "*effective means of asserting claims and enforcing rights*" (the "effective means" requirement) as a result of the court delays[5].

Interestingly, the Indian Model BIT keeps the ISDS mechanism for resolving disputes with foreign investors, but it adds a lot of requirements that an investor must fulfill in order to use ISDS. India has resisted the drastic alternative of opting out of the system, as demonstrated by the acceptance of the Model BIT with the ISDS mechanism by nations like South Africa. India desires to participate in the system, albeit on different terms.

In an effort to reduce opposition to its actions, India has modified the terms and scope of a few important Model BIT clauses[6].

In general, BITs offer a way for investors and the investment country to resolve disagreements. Arbitration is the most popular means of resolving these kinds of conflicts; in this process, parties

[4] Narendra Kumar Mishra, "Indian Bilateral Investment Treaty" (BIT – 2016) and Analysis" [last accessed at https://www.linkedin.com/pulse/indian-bilateral-investment-treaty-bit-2016-analysis-mishra on Jan 26, 2024, 6PM

[5] Allen & Overy, "India liable under bilateral investment treaty for extensive judicial delays," (last accessed on https://www.allenovery.com/en-gb/global/news-and-insights/publications/india-liable-under-bilateral-investment-treaty-for-extensive-judicial-delays Jan 26, 2024, 8PM)

[6] Prabhash Ranjan, Harsha Vardhana Singh, Kevin James, Ramandeep Singh, "*INDIA'S MODEL BILATERAL INVESTMENT TREATY IS INDIA TOO RISK AVERSE?"* August, 2018

consent to have an impartial third party the arbitrator decide their disagreement rather than taking their case to court. According to the Committee, there have been 37 letters or notifications of disagreement so far that aim to file a complaint against India under different BITs[7]. India only had to pay an arbitral award in one case, but the government had to bear a heavy financial burden as a result of the stated award. The Committee suggested prompt resolution of investment disputes by pre-arbitration consultation or talks in order to prevent similar losses in the future[8].

### *3. India's Approach towards Investor-State Dispute Settlement (ISDS)*

[3.1] Historical Perspective**:** The involvement of India with ISDS dates back to the early 1990s economic liberalisation period, during which the nation welcomed foreign direct investment (FDI). India joined multiple BITs and multilateral accords as part of this process, laying the groundwork for ISDS. India's first involvement with ISDS demonstrated a pro-investor attitude, to foster an environment that would attract foreign investment. The "*1993 Model BIT"* text contained provisions that were susceptible to broad and ambiguous interpretations by arbitral tribunals[9]. Since the Model text of BIT was first approved in 1993, there have been significant socio-economic changes, including changes in the nature of regulations governing foreign investment.

[3.2] After the exhaustion of the local remedies: The 2010 settlement of the first-ever treaty claim brought against India and the 2011 adverse award India got in White Industries v. Republic of India[10] under the India–Australia BIT brought attention to the BIT regime in India[11] . This caused BIT cases against India to pour in. There were roughly 17 known BIT claims by 2015; India was disputing each one of them. There was a call for the reduction of investor-state dispute settlement (ISDS) due to growing national concerns about the spike in BIT arbitrations brought against India.

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[7] Standing Committee Report Summary, India and Bilateral Investment Treaties, [last accessed at https://prsindia.org/policy/report-summaries/india-and-bilateral-investment-treaties , on Jan 26 2024, 6:30PM

[8] "*Id"* at *5*

[9] S&A Law Offices ,Investor-State Dispute Settlement (ISDS) in India: A Comprehensive Analysis of Approach, Developments, and Implication

[10] IIC 529 (2011)

[11] Sanjeev K Kapoor, Kartikey Mahajan, Jatan Rodrigues, Prerna Jain and Aayushi Singh,*" Investment Treaty Arbitration: India. Global Arbitration Review*," ( last accessed on https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/india# [Feb 05,2024, 6PM]

It has also entered into some "new-generation BITs," such as those with Belarus, Brazil, Taiwan, Kyrgyzstan, and Taiwan[12] all of which are generally based on the Model BIT. The most recent agreements that India has signed are the "*India–Australia Economic Cooperation and Trade Agreement* (ECTA)" with Australia on December 29, 2022, and the "*Comprehensive Economic Partnership Agreement* (CEPA)" with the United Arab Emirates on May 1, 2022. There are now 37 nations or blocks involved in various stages of talks for further BITs/IIAs[13].

[3.3] Companies' Effect on the Investment Arbitration

Presently, there exist more than three thousand investment treaties. These comprise numerous independent investment treaties, commonly known as bilateral investment treaties or BITs, and a considerably smaller yet increasing quantity of investment chapters found in larger trade and investment accords, like "*the Energy Charter Treaty (ECT*)" or "the *North American Free Trade Agreement (NAFTA)"*[14]. The subject of investment treaties has gained prominence in several nations in recent years. Public interest has been piqued by claims made under investment treaties pertaining to the regulation of fracking, nuclear power, tobacco marketing, and healthcare. An ad hoc investment arbitration panel recently granted Yukos shareholders an award of USD 50 billion[15]. A distinct set of regulations is established by several investment treaties, numbering in the thousands, which are interpreted by arbitral courts in cases filed by covered investors against governments. Certain regulations have the potential to cause company fragmentation by drastically altering commonly used corporate law and corporate governance concepts. A unique combination of provisions is provided by: "*i) accepting claims for reflective loss from covered shareholders for losses suffered by companies in which they own shares; and ii) making damages, including lost profits, generally available as a remedy for government misconduct in violation of a treaty, provided sufficient evidence is presented*"[16]. The imprecise nature of the ISDS arbitrators' decision to give priority to creditor claims further undermines the priority rule. The issue of ISDS cases is handled in a "*generally simplistic manner*," according to a prominent practitioner and

[12] Priti Patnaik, "*Deconstructing India's Model Bilateral Investment Treaty, The Wire*," (last accessed on https://thewire.in/economy/deconstructing-indias-model-bilateral-investment-treaty Feb 05,2024, 7PM)
[13] "*Id*" at '*9"*
[14] Yves Derains, Josefa sicard- Mirbal, "*Introduction to Investor-state Arbitration" [*Wolters Kluer ISBN: 978-90-411-8400-9]
[15] OECD, "*The impact of investment treaties on companies, shareholders and creditors*", Ch 8
[16] "Id" at "8"

commentator. Thus, regardless of creditors, the covered shareholder's pro rata portion of the company injury is recovered based on its percentage ownership of the share capital[17]. "*A legal rule that grants covered shareholders a claim to a pro-rata share of the company damages in preference to company creditors was argued by covered shareholder investor*s" in the recent *Micula et al. v. Romania*[18] case. Significant disagreement on the matter led to the arbitrators leaving this issue specifically open; in an uncommon footnote[19], they stated that they would have disagreed on the matter. Future arbitral rulings may provide some clarity on the legal question of whether treaties give covered shareholders a priority claim over company creditors[20].

### *4. Under Bilateral Investment Treaties' Exhaustion of Local Remedies*

An obligation to pursue local remedies may occasionally be encountered by foreign investors considering a BIT lawsuit against the host state[21]. Some modern BITs require that before starting international arbitration, the parties must first exhaust local remedies (administrative, judicial, or both) in the Host State for a predetermined amount of time. Requiring local remedies to be pursued for a specific amount of time instead of being exhausted forever is a requirement found in very few old BITs. The local remedies rule is handled differently by different BITs; some even specifically waive it.

State sovereignty is intended to be protected by this customary international law concept of the exhaustion of local remedies. The quantity of claims awarded in international arbitration and the number of conflicts can have a disastrous effect on the public budget of the host state. The host states take solace in the idea that local courts have more control over the destiny of the public

[17] "*It is in effect in a generally simplistic manner that ISDS arbitral cases have considered that a shareholder must be treated like the company itself, using its pro rata share ownership. In other words, an 80% shareholder is found to suffer 80% of the company injury and 3% shareholder, 3% of the company injury. On this issue, a more refined analysis would be welcome".*

[18] Ioan Micula et al. v. Romania, ICSID, Award (11 Dec. 2013).

[19] *Micula*, § 1245.

[20] *Micula*, § 1245 n.269 ("If the Tribunal had to address this point, it would not do so unanimously

[21] '*Bilateral Investment Treaties are agreements that protect investments by investors of one state in the territory of another state. These treaties articulate substantive rules governing the host State's treatment of the investment, and establish dispute resolution mechanisms applicable to alleged violations of those rules*': 41 Harv. Int. L.J.469, 469-470 (2000)

coffers than an international arbitration panel[22]. Initially, the state has to file the claim in compliance with all international claim regulations, including nationality requirements. In addition to addressing matters like whether continuous nationality is necessary from the moment of damage to the claim's adjudication, these rules also establish who is eligible for a state to support a claim.[23] In the second instance, "*the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted,*" meaning that the state cannot be held accountable for harm done to foreign nationals[24]. Before a state can offer diplomatic protection, the foreign national has to have used the domestic judicial system of the host nation to seek remedy. Lastly, the endorsing state retains the choice to decide whether to use diplomatic protection. For non-claim-related reasons, a state may choose not to exercise protection, especially if pursuing a claim could jeopardise other diplomatic, military, or geopolitical goals. Due to this discretionary power, a foreign investor lacks control over the international claim-making process in the absence of rights of action under international treaties. It shall be observed that IIAs[25] offer a treaty-based right to file disputes via investor-state arbitration[26].

[4.1] Considerations for Negotiating a Local Remedies Clause in Investment Contracts and Bilateral Investment Treaties

A treaty or agreement is the result of negotiations, with the quality of the negotiated terms determining how well the agreement was made. Both BITs and investment contracts between international investors and State agencies may contain clauses pertaining to local remedies. Initially, the Contracting State or the foreign investor need to evaluate the Contracting State's "*ease of doing business*" and look over its regulatory environment. These give an overview of the Contracting State's administrative and procedural effectiveness and operate as stepping stones. In

[22] Exhaustion of Local Remedies in Bilateral Investment Treaties— A Guide for Foreign Investors, (last accessed at https://www.nishithdesai.com/Content/document/pdf/Articles/180410_A_IPBA_March2018.pdf on Feb15,2024 6PM)

[23] Report of the International Law Commission, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/59/10 (2004), and F. Orrego Vicuña, "*The Changing Law of Nationality of Claims, Report for the International Law Association Committee on Diplomatic Protection of Persons and Property, 69th Conference, London 2000 at 631-645"* [Orrego Vicuña, The Changing Law of Nationality of Claims]" (Last accessed on Feb15,2024 8PM)

[24] Art. 44(b), "*International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 at 11; 2001 YBILC, Vol. II, Part 2" (last accessed on Feb16,2024 10 AM)

[25] International Investment Arbitration

[26] §1.31 regarding the development of investor-state arbitration

addition to other things, the effectiveness of a nation's administrative system's operation aids in determining the actual conditions on the ground about the operation of the investment activity[27].

## 5. Case Studies regarding Investment Arbitration Involving India

[5.1] "*White Industries Australia Limited v The Republic of India"*[28]

The "*White Industries Case"*, in which India was awarded $4.1 million in damages, was the catalyst for the backlash against investment arbitration in India. It is noteworthy that the conflict allowed investment treaty arbitrations brought against India to proceed freely.

*"The International Chamber of Commerce (ICC*)" regulations against an Indian state-owned company (SoE) gave birth to the arbitration suit, which was based on judicial delays in executing the verdict. According to "*the India–Australia BIT*," investment treaty arbitration was started since the claimant could not enforce the verdict for nine (9) years. An important aspect of that dispute was the court's decision that the delay in enforcing a commercial judgment violated India's obligation to provide an "*effective means*" of bringing claims and enforcing rights. The "*Most Favoured Nation (MFN)"* clause of Australia's Bilateral Investment Treaty (BIT) allowed for the application of the threshold under "*the India-Kuwait BIT"*, despite the fact that this pledge was not part of the original Australia-Australia Bilateral Treaty (Australian BIT). The non-treaty threshold finding, which states that adopting a beneficial substantive clause from a third-party treaty does not upset the equilibrium achieved during BIT discussions, was upheld by the court, notwithstanding India's objections[29]. Accordingly, the court awarded the appellants $4.10 million in damages[30].

[5.2]. "*Union Of India v. Vodafone"*[31]

The "*UOI v. Vodafone Group"* Plc United Kingdom & Anr. case concerned a complicated disagreement that resulted from questions about tax liabilities and the following request for

[27] *"Id"* at "*20"*

[28] LNIND 2004 CAL 309, UNCITRAL Arbitration.

[29] "*Article 4(5) of the India-Kuwait BIT provides that 'each contracting party shall…provide effective means of asserting claims and enforcing rights with respect to investments…'. Article 4(2) of the India-Australia BIT provides the MFN provision according to which, 'a contracting party shall at all times treat investments in its territory on a basis no less favourable than that accorded to investments or investors of any third country*"

[30] White Industries para 11.2.3 and 11.2.4.

[31] LNIND 2018 DEL 1815

arbitration under bilateral investment protection agreements (BIPAs). After India's Supreme Court initially ruled in Vodafone's favor in 2012, a later law was passed to retroactively impose taxes on the company. In response, Vodafone sought arbitration under investment treaties between India and other countries. The UOI challenged this move by initiating a lawsuit to prevent the arbitration proceedings. The Union of India argued that Vodafone's actions were improper and that Indian courts had the authority to issue orders prohibiting arbitration in such cases. Vodafone responded with a counterclaim that it was entitled to under international law and the BIPAs, that the UOI had consented to arbitration by designating arbitrators and that their actions were compliant with treaty provisions, that they were seeking a single avenue for arbitration and that they would be willing to combine proceedings in order to prevent duplication, and that their selection of the BIPA was predicated on the fact that tax matters were not prohibited. On May 7, 2018, the Delhi High Court DHC dismissed Vodafone's claim that the court lacked jurisdiction over arbitration disputes under "*Bilateral Investment Protection Agreements (BIPAs*)". The court stated that it had the power to step in when arbitration proceedings were being used improperly. However, the court sided with Vodafone's argument that the UOI had agreed to arbitration by appointing arbitrators. The court stressed the need to honour the terms of BIPAs and enforce them, as an injunction against arbitration would violate the goals of such agreements. To address concerns about multiple legal proceedings, DHC recognized Vodafone's plan to merge arbitration proceedings. It dismissed the argument that the Indian government (UOI) would need to participate in two arbitration sessions for the same claim. The DHC emphasized the distinction between international investment arbitration and commercial arbitration, stating that the laws governing commercial arbitration do not apply to international investment arbitration because it is governed by public international law. In the end, the ruling for Vodafone was affirmed by the DHC, which found that the second arbitration's invocation was not an abuse of process and that the UOI's requested redress was not warranted given how the BIPAs operated. The court's ruling, which emphasized the significance of upholding treaty duties, was based on its understanding of the BIPAs' goals to offer a safe investment environment and shield investors from government acts.

## 6. Conclusion

India's Position in Investment Arbitration Although investing in India carries some risk, foreign businesses looking to take advantage of Indian investment opportunities now feel far more

confident than they did a year ago that they can handle conflicts and safeguard their capital thanks to the courts' and local businesses' willingness to adopt modern dispute resolution techniques. Due to India's unfavorable experience, foreign investment arbitration has faced domestic pushback. India implemented two major policy reforms as a result.

India decided to end or let some of its investment treaties expire as part of the first reform. India has terminated 76 such BITs since 2016. It is important to remember that treaty termination does not protect India from the consequences of "sunset clauses,"[32] which implies that throughout the sunset clauses under the relevant BITs, India is subject to ISDS claims. India's present approach involves either terminating or allowing the lapse of some of its former investment accords. This is ostensibly a calculated reaction to the unfavourable rulings resulting from the (many) ISA lawsuits brought against your company. However, according to "sunset" provisions in the corresponding BITs, previous investments—that is, those made before such treaties were terminated will continue to be protected for an extra time. Further developments on Indian firefighting may be in store, given the existence of such sunset clauses and the ongoing ISA proceedings against India.

India’s BITS, especially related to the Institute of Investment Arbitration, faces a dilemma because of the interplay of domestic policies, ongoing and changing global investment law framework, and market conditions. India's approach towards BITs has gone through a substantial metamorphosis in the present few years to mirror the broader moving notion in its investment policy arena. The endorsement of Model BIT 2016 reflects the meing (rebalancing) and fine-tuning (calibrating) of the investment regime, which aims to find a balance between host countries’ regulatory liberty and the protection of public interest on the one hand, and favorable investment environment on the other side. On the one hand, India's position on investment arbitration came in a form of careful pragmatism which is seen in their involvement in formulation of dispute settlement clauses in more recent BTS and selective reviewing of older agreements. India's proactive involvement in these international talks demonstrates its dedication to reshaping investment dispute settlement in a way that promotes fair and sustainable development.

[32] BODENHEIMER IN A NUTSHELL, INVESTMENT: SUNSET CLAUSES

*“A typical feature in many BITs are “Sunset Clauses”. Under such clauses, the provisions of a BIT shall remain operative for a given time period after a possible termination. Those clauses may extend the enforcement time of a BIT for up to 20 years, meaning the Host-State will be bound by the BIT for a defined period of time, even after termination”.* (last Accessed at https://www.changing-perspectives.legal/investment/substantive-standards-of-protection/sunset-clauses/ on Mar 02,2024 6PM)

Additionally, the developing jurisprudence in India regarding investment arbitration highlights the necessity of a sophisticated and context-specific approach. In the long run, however, changes in investment standards, geopolitical dynamics, and global economic governance will all inevitably impact India's bilateral investment treaty landscape. India's proactive participation in regional and plurilateral trade agreements, like the "*Comprehensive Economic Cooperation Agreement (CECA*)" and the *"Regional Comprehensive Economic Partnership (RCEP)"*, highlights the country's dedication to creating an environment that is favorable for cross-border investment while maintaining policy leeway for domestic regulatory priorities. Furthermore, a comprehensive approach to investment policymaking is required to achieve sustainable and equitable growth. This approach should take into account social, environmental, and human rights aspects in addition to investment protection.

India's developing grasp of the intricate relationship between investment, development, and sovereignty is reflected in its changing approach to investment protection. In order to preserve its regulatory independence and goals for the public benefit, India aims to maximize the potential of foreign investment as an engine of economic growth while taking a reasonable and practical approach. India's investment arbitration landscape will be affected by ongoing national reforms, international ISDS reform attempts, and court rulings that aim to achieve a careful balance between investor protection along regulatory sovereignty. The future configuration of India's investment policy framework will be greatly influenced by the need for a sophisticated and context-specific strategy that balances conflicting interests and promotes sustainable development as the country negotiates the intricacies of the global investment landscape.

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17. White Industries Australia Limited v The Republic of India LNIND 2004 CAL 309

18. Union of India v. Vodafone LNIND 2018 DEL 1815

*19.* BODENHEIMER IN A NUTSHELL, INVESTMENT: SUNSET CLAUSES last Accessed at [https://www.changing-perspectives.legal/investment/substantive-standards-of-protection/sunset-clauses/ ]