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THE SHAKY APPROACH OF THE INDIAN JUDICIARY IN ENFORCING BILATERAL INVESTMENT TREATY AWARDS

A ABORDAGEM PREOCUPADA DO JUDICIÁRIO INDIANO NA APLICAÇÃO DE PRÊMIOS DO TRATADO DE INVESTIMENTO BILATERAL

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Abstract: With the increase in transnational transactions, the nation-states have gained foreign investments which assisted in the growth of the national economy. The investment treaties became popular to facilitate the investment mechanism between a foreign investor and the host state. The investment regime faced many twists and turns but still proved to stand in the test of time. The Bilateral Treaties are a popular instrument in which the parties opt for making investments in foreign jurisdictions. It is needless to say that the complex regime gave rise to a range of disputes and issues. The BIT itself provides for a dispute resolution mechanism in the form of investment arbitration. The significance of arbitration resides in the legality of enforcement of its award. The present Indian policies and judicial approach are uncertain and indeterminate with respect to India's position on the enforcement of investment arbitration awards. There has been no precision or coherence on the policy front on award enforcement. The Indian judiciary has further added fuel to the vague realm by giving contradictory pronouncements. The oscillating approach of the judiciary from pro-arbitration to anti-arbitration creates problems for foreign investors and can impact the economy of India. The researchers have ramified the article into chapters and sub-chapters. Initially, the paper set forth the evolution of the Bilateral Investment Treaties Regime of India. The second part of the paper enumerates the existing Indian policies and measures the adequacy of the Indian regulatory framework to deal with the enforcement of investment arbitral awards. Next comes the major part of the research which is analytical in nature and exhibits the oscillating approach of the Indian judiciary on the concerned issue. In this part, the researcher attempts to cull out lacunas in the investment award enforcement regime. Lastly, countering measures are suggested in order to mitigate the pitfalls in the enforcement of investment awards.

Keywords: BITs. Foreign Awards. Arbitration. Indian Judiciary. Investments.

Resumo: Com o aumento das transações transnacionais, os Estados-nação ganharam investimentos estrangeiros que auxiliaram no crescimento da economia nacional. Os tratados de investimento tornaram-se populares para facilitar o mecanismo de investimento entre um investidor estrangeiro e o estado anfitrião. O regime de investimento enfrentou muitas reviravoltas, mas ainda provou resistir ao teste do tempo. Os Tratados Bilaterais são um instrumento popular em que as partes optam por realizar investimentos em jurisdições estrangeiras. Desnecessário dizer que o regime complexo deu origem a uma série de disputas e questões. O próprio BIT prevê um mecanismo de resolução de disputas na forma de arbitragem de investimento. A importância da arbitragem reside na legalidade da execução de sua sentença. As atuais políticas indianas e a abordagem judicial são incertas e indeterminadas com relação à posição da Índia sobre a execução de decisões arbitrais de investimento. Não houve precisão ou coerência na política de cumprimento de sentenças. O judiciário indiano acrescentou mais combustível ao reino vago, dando pronunciamentos contraditórios. A abordagem oscilante do judiciário de pró-arbitragem para anti-arbitragem cria problemas para investidores estrangeiros e pode impactar a economia da Índia. Os pesquisadores ramificaram o artigo em capítulos e subcapítulos. Inicialmente, o trabalho apresentou a evolução do Regime de Tratados Bilaterais de Investimento da Índia. A segunda parte do artigo enumera as políticas indianas existentes e mede a adequação da estrutura regulatória indiana para lidar com a execução de sentenças arbitrais de investimento. Em seguida vem a maior parte da pesquisa que é de natureza analítica e exibe a abordagem oscilante do judiciário indiano sobre a questão em questão. Nesta parte, o pesquisador procura colmatar lacunas no regime de execução de adjudicação de investimentos. Por fim, são sugeridas medidas de combate para mitigar as armadilhas na execução de prêmios de investimento.

Palavras-chave: BITs. Sentenças Estrangeiras. Arbitragem. Judiciário Indiano. Investimentos.

1. Introduction

The arbitration arena has successfully made its place in the dispute resolution field. The shift from court reliance dissolution to arbitration is because of the advantageous model which arbitration offers over the other dispute resolution mechanism. One such luring benefit is the enforceability of the arbitration award.(Hubbard, 2020) The truth is that without the enforcement of the award, the arbitration process is futile.(Arora, 2020) Internationally, the legislation has endeavoured to provide an exhaustive framework for the proceedings and arbitral award enforcement.(Iqbal, 2020) In the corporate world, the existence of commercial arbitration is flourishing over a period of time and this has led to the creation of a decent framework for the enforcement of the award. The jurisprudence of award enforcement has slowly evolved and still grapples for the concrete setup. Nevertheless, the investment treaty arbitration requires specific attention due to the complexities contained like the existence of sovereign nations in the dispute and consequences which are wide-ranging and not limited to individuals. The area of international commercial arbitration in investment treaties is not completely empty and the regulatory frame came in the name of the Convention on the Settlement of Investment

Disputes between States and Nationals of Other States 1965 (the ICSID Convention).(OECD, 2016) The convention partly addresses the issue pertaining to arbitration in investment treaty which is undecided in the domestic regulatory framework.

The legal realm in India covers the investment issues in two ways: *first*, stand-alone investment agreements; and *second*, Comprehensive Economic Cooperation Agreements (CECA).(JNedumpara et al., 2019) This provides for a facilitator mechanism for the investment arbitration by enshrining the basic principles of fair and equitable treatment, expropriation and securing rights of investors to claim their right.(JNedumpara et al., 2019) The developing nations have been major centres for alluring foreign direct investment (FDI). India has also emerged as a growing jurisdiction in which investors are interested to invest. Liberalization, Privatization and Globalization has facilitated nations to enter into multi-lateral instruments and Bilateral Investment Treaties (BIT). These treaties gave rise to several disputes related to investor-state relations. Around 28 disputes have been registered against India by investors through invocation of Investment treaty arbitration.(Khan, 2020) Among them a few cases have been settled but majority are pending and it seems that there is urgent requirement of revisiting the award enforcing mechanism in India. Several controversies arose with the rise of Investor State Dispute Settlement (ISDS) disputes with respect to its transparency in adjudication and impartiality in decision by the ISDS Tribunals.(Thakur, 2020) The recent Model BIT brought by India also faced lot of criticisms.

2. Results and Discussion

Understanding BITs in India

Bilateral Investment Treaties are specific kind of agreement which enumerates and enforces certain dos and don'ts for the foreign investor and host state in which the investment is made.(Henry, 2014) The objective of BITs is to safeguard and fuel the cross-border investments with the intent to increase Foreign Direct Investment (FDI). The apprehension which the foreign investor encounters with regard to the security and safeguard of his investment in a foreign jurisdiction is a major hindrance to limit the scope of investment.(Baxi et al., 2020) BIT facilitates in assuring that the duties and commitments agreed by the parties will be honoured. The expectations from BIT are quite high, covering fair and equable treatment, safeguarding investment, Most-Favoured Nation (MFN) Treatment.(Desai, 2018) Under a BIT there is specific clause regarding the investor-state

arbitration which imbibes the right for the parties to invoke arbitration mechanism as a dispute resolution system as the party agreed. Majorly the investment arbitrations under BITs are ramified in two category: (i) ad hoc arbitration; and (ii) institutional arbitration.

India has attempted to cover the international investment arbitration procedure and enforcement mechanism in its domestic legislation, mainly in the Arbitration and Conciliation Act 1996 (A&C Act).(Ranjan & Raju, 2011) The last decade in Indian investment jurisprudence has witnessed many controversial instances which were approached by the judiciary in different manner.(Iqbal, 2020) India being non-signatories to ICSID convention and hence, it is deprived to make the arbitral award enforceable in the country which are signatory to the convention. Generally, certain additional facility rules become applicable to the non-signatory as specified in the UNCITRAL Rules. The said rules do not comprehensively cover the investment arbitration regime from the arbitration initiation to execution of the award. It only concerns about the process envisaged in investment arbitration and left many questions unanswered with respect to enforcing the award. Under the additional facility rules, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) becomes applicable for regulating the arena of investment treaty arbitration for its member-state.(*Anti-Arbitration Injunction... - New York Convention Guide 1958*, n.d.)

India till 2010 was in slow pace to engage in BITs but always appeared to be keen in disseminating an investor protecting layer to derive FDI. (*Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India*,2005) came in initial phase however the dispute got settled before rendering of the award. The case which brought a shift in India's approach towards BITs was the (*White Industries Australia Limited v. The Republic of India*,2011) The award in this case goes against India for the first time with respect to the investment arbitration. Latter many cases arose which triggered Indian government to endeavour for an investor friendly regime.(Mathur, 2020)

Indian Regulatory Framework for Bilateral Investment Treaty

The major part of the regulatory framework in the international arena for the enforcement of award is covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The convention provides a duty for its member nation to give due recognition to the agreement containing the arbitration clause and ensure proper enforcement of the award. The convention also provides for two

reservations: (i) to reserve the applicability of the convention to the arbitration awards which are given in other jurisdiction; and (ii) to reserve the applicability of the convention only with respect to commercial matters.(Moses, 2017) It is worthy to note that India is a member of New York Convention but also has ascended to both the limitations. The Indian legislation itself advertently mentions about the New York Convention under A&C Act. Under the Act, Section 48 enumerates the circumstances wherein the award enforcement can be denied which are aligned with Article 54 of the convention. We have also got International Centre for the Settlement of Investment Disputes (ICSID) for regulating the realm of arbitration award enforcement.(Sahani, 2019) Under the said convention an award is to be executed as domestic decree of a member state and the ground of public policy should not be opted by the member nation to reserve the enforcement mechanism.(Sahani, 2019) This implies that the horizon of path breaks for award enforcement is more in New York Convention as compared to ICSID. With respect to India's position, it has not ascended to the ICSID Convention which consequently results in that the enforcement mechanism would be governed by the New York Convention.(Abhisar Vidyarthi, 2020) The concept of investment treaty arbitration is quite distinct as investment arbitrations are not similar to general contracts. It arises of international treaty which involves a sovereign state in which the investment is made with the home state.

It becomes significant to ascertain what exactly commercial disputes are under the New York convention. Frequently, nations which have assented to the reservation under the convention takes the plea of matter to be non-commercial in nature as it involves issues which has nation-wide implications. The New York Convention fails to provide any definition to the term "commercial" and to bring any consensus on a concrete understanding of the term.(Vashistha, 2020) The Indian legal regime is bit certain in defining what exactly commercial is. In (*R M Investments and Trading Company Private Limited v. Boeing Corporation*,1994) the Apex Court defined "commercial" which covers all commercial transactions as specified in Article 1 of the Model law.(Mishra, 2020) The case also stated that the term should not be strictly interpreted as in the modern times the international trade is growing and involves catena of activities which would touch several phase.(Mishra, 2020) The vagueness in the definition of the term "commercial" raises certain uncertainties with respect exercise of New York Convention on investment treaty

awards.(Mishra, 2020) A treaty seldom provides clarity on the enforcement mechanism of the award and this brings shadow on the enforcement regime.

The next is leverage of national courts to deny the enforcement of arbitral awards on basing it on certain reasons.(Kajkowska, 2019) The range of reasons which the national courts can adopt brings more dilemmas to the enforcement environment of an award. The Convention in Article V recognises certain grounds for the purpose enforcing arbitral awards and this power can be exercised by the courts *suo moto*.(JNedumpara et al., 2019) In cases, where court observes that a dispute is non-arbitrable or the matter is against public policy then the enforcement of award rendered in such cases can be denied. In the case of (*Renusagar v. General Electric*,1994) the court has endeavoured to define public policy and stated that it encompasses fundamental policies, national interest, and public morality.(Pipes et al., 2020) In (*Shri Lal Mahal Ltd v. Progetto Grano Spa*,2014) the court observed that the Section 48 would not apply when the question of enforcement comes in arbitration proceedings and the use of public policy to refute enforcement should be not encouraged.(Desai, 2019) The ground on which the enforcement is refuted brings more burden on the investors to enforce the award which he receives after a hectic arbitral process.

The Judicial Oscillation in Investment Award Enforcement Regime

Contentious issue of enforcement of award has paralyzed the enthusiasm of investor in allocating their resources in India. The approach of the Indian Judiciary is shaky and gives rise to range of problems which are prejudicial to the interest of the investors. Certain pronouncements by the Indian courts compels to pounder over the reorganization of enforcement mechanism in India.

Louis Dreyfus Verdict

In the case of (*Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS*,2014) the Calcutta High Court took an interesting stand. A dispute arose between India and France under the India-France BIT. An anti-arbitration injunction (AAI) was sort to prohibit bringing a case under the said BIT. The facts of the case were that a contract was formed between Kolkata Port Trust and Haldia Bulk Terminals Private Limited. A substantial number of shares were owned by a French investor. By invoking the provision of BIT brought a notice against India and the dispute was seen by the High Court of

Calcutta. The question arose as to the stand of Kolkata Port Trust in the arbitration arose out of the investment because under the underlying BIT, it was not a party of concern. The court here folded their hands and remained a silent spectator by mentioning the reason of lack of jurisdiction. The judgment provided insights regarding the instances wherein the AAI remedy can be awarded. Three instances were enumerated in the present case on this aspect: a) when question pertains to existence of arbitration agreement and court finds non-existence of such agreement; (b) in cases where the agreement is void or incapable of being performed: c) where the court is also of the opining that proceeding with arbitration would lead to unconscionable.(Desai, 2018) Commenting on the position of foreign courts, it was mentioned that tribunals outside India if opines that the parallel arbitration process can cause contrary judgment then the tribunal should wait until the proceedings in the Indian jurisdiction is finished. Finally, the court awarded AAI.

Vodafone case- A Turning Point

The pertinent decision on India's regime on enforcement of BIT award can be well reflected by a key reading to the (*Vodafone* case,2018). The dispute arose underlying the India-Netherlands BIT. The Vodafone Blv. claimed that the India's statute which is imposing taxation on the company is not justified as the alteration in the legislation was made after the investment. In the meantime, the Vodafone Plc. which was the parent company brought a challenge on the taxation approach but under a different treaty India-UK BIT. It was because of the retrospective amendment that the Vodafone was required to pay the taxation amount.(Anand, 2020) The complexity arises when the Indian nation approached the domestic court praying to grant an Anti-arbitration injunction countering the claims of Vodafone Plc. made in the arbitration. The government of India regarded the arbitration invoked under India-UK BIT as oppressive and hence, the case was filed in 2017. Another suit was instituted in Delhi High Court to prohibit initiation of arbitration. Interestingly, initially the domestic court refused to touch upon the issue and stated that the court lacked jurisdictional power. The court highlighted that there is limited capacity of the court in granting such injunctions and the court can only grant such remedy in two cases: (i) when the party reaches the court in pure good faith; and (ii) where no other substituted remedy exists.(Tying Wei Chiang, 2018) Delhi High Court adopted a different approach discussed about Indian judiciary position on the enforcement of the BIT awards. It was observed that the BIT contained an arbitration clause; however, there is no implication of

International Commercial Arbitration under the domestic legislation between the investor and the State. Basically, the court attempted to state that there lies a distinction between International Commercial Arbitration and investment arbitration. In the present case, the dispute was not commercial in nature and hence, attributing it as international commercial arbitration would not do justice to the parties.(Kachwaha, 2013) The reference was made at the New York Convention in which India has opted for the commercial reservation which implies that only in cases where there exists specific declaration pertaining to the commercial nature of the dispute.(Bhushan, 2011)

The researcher intends to elaborate the two judgments of 2017 (Union of India v. Vodafone Group Plc UK and Another, 2017) and attempts to distinguish the contrary approach adopted by the same court. The 2017 case the republic of India took the stand that the two arbitrations which were invoked are on the same cause of action. However, the remedy is pleaded by varied tribunals. The defendant remains the same in the two alleged cases and also the investment treaties were different. India pleaded further that this approach will result in abuse of process by the claimant. According to India, its sovereign right are hampered as taxation is a matter which is generally dealt by the national court and it does not come within the purview of arbitration. The court agreed on the instance of India that the parties claiming the remedy are related to a single company which has identical share-holders so bringing distinct arbitration would lead to abuse of law.

The 2018 judgment elaborately discussed this issue. The argument put forth by the foreign investors resides in the reasoning that the Indian courts lacked jurisdiction. It would be transgress of India-UK Treaty if Indian Courts dive its nose in the matter which is already agreed by the parties to be dealt in the manner as stated in the treaty. This would deviate India's commitment towards international instruments and principles. India placed its reliance on the case of (*World Sport Group (Mauritius) Limited v. MSM Satellite (Singapore) Pte Limited*,2018) which supported the jurisdictional capacity of domestic courts to deal with AAI. Section 9 of CPC was referred as an enabling provision which allows all the civil nature cases to be under the jurisdiction of the court. Furthermore, Section 20(c) of CPC was cited as the cause of action was within the territorial limit; hence, the jurisdiction would lie with Indian court. The court agreed with the argument supported by Section 20(c). Also, the court regarded the subsidiary the series of companies along with Indian subsidiary as single economic entity. A precedent delivered by the Apex Court of India was referred on this aspect, i.e., *Modi Entertainment v. WSS. G. Cricket Pte. Ltd.*,2003 which affirmatively

established that Indian court has capacity to grant Anti suit Injunction in places where personal jurisdiction is established. The second perplexity which the court attempted to address with regard to parallel proceedings. The judgment specifies that the courts should work with care and caution when an AAI is seek and only in compelling circumstances it should be inclined to grant such remedy. After keen scrutiny, the court in the present case denied granting of the seek remedy and stated that the parallel proceeding invoked in the present case does not lead to any operation. One suspicion which the court left is on the issue of litigation cost incurred before the different tribunals as whether it amounts to operation or not. It is generally seen that the developing nation consider the litigation cost unreasonable and excessive. The court failed to address what would amount to operation and in what circumstances the remedy can be granted.

Khaitan Holdings Case

In another case, (Union of India v. Khaitan Holdings (Mauritius) Limited and Others, 2019) the Delhi High Court expressly bifurcated the path of arbitration which arises from BIT and general arbitrations. It considered the investment treaty arbitration as a unique species which is not covered within the ambit of the A&C Act. This case made reference to the earlier *Vodafone* case and remarked that the Indian Civil Procedure Code 1908 (CPC) would be the operative legislation in governing the arbitration under the BIT. Reiterating the earlier position, the court mentioned that there lies a distinction between commercial arbitration which is covered under the A&C Act and the dispute arising from BIT is a separate sphere. Therefore, looking to the mentioned cases it is explicit that the claimant has to first cross the threshold of jurisdictional dilemmas unresolved by the Indian Judiciary before he seeks the enforcement of a BIT Award.(RITVIK M. KULKARNI, 2020) The pronouncement is rendered by the High Court and hence, it does not have the precedent binding value.(Choudhary, 2020) Under Civil Procedural statute of India, the due recognition is given to enforce foreign judgment. But, the contingency on BIT remains as the award under the investment treaty is not considered under a foreign judgment. Even the definition of judgment under the code does not encompass BIT Award.(Baxi et al., 2020) This means that the CPC fails to act as a facilitator for enforcement of BIT Award in India.

UK Approach

It would be interesting to embark on the position of nation which has is a signatory to the ICSID Convention. The investment awards are enforced in England and Wales as if it is a domestic pronouncement.(Aatreya, 2019) The Calcutta High Court decision is in line of UK Judiciary approach as enshrined in the case of (*Occidental Exploration and Production Company v. Republic of Ecuador*,2005) In this case, the award was questioned under the provisions of domestic legislations of England regulating arbitrations. The judiciary affirmatively accepted to have jurisdiction in matters of investment award and went beyond to state that if UK would not have been the party then also the court would continue to have jurisdiction. This Anti-arbitration approach was further carried in the case of (*GPF GP S.à.r.l. v Republic of Poland*,2018) in which arbitration award was set aside. Now, it would be entrancing to observe whether the Apex Court of India while giving any pronouncement considers or transgress the position adopted by the England judiciary.

Apart from above-mentioned cases there are certain investor state disputes which are unresolved and pending in Indian courts. India has always been harbinger in upholding the principle recognised in International Law and time and again the Indian judiciary have ascertained that the customary international law would be duly recognised in domestic legislations until and unless it contradicts the very foundation of national laws.(People's Union for Civil Liberties v. Union of India, (1997). The Indian judiciary is inclined towards a pro arbitration approach which advocates for minimum intervention of courts in the arbitration. Nevertheless, the court failed to establish a concrete framework and has vaguely interpreted the circumstances which are not in the interest of pro-investment arbitration regime.

Measures to Counter the Menace

India is required to bring certainty and clarity on several legislative and judicial aspects on the matter of investment arbitration. Through the learning experiences from the global stage of the investment realm, India should alter and redefine its existing approach. It is high time that the legitimate rights of the investors must not be compromised due to a cumbersome and complex regime of investment. Till now India must understand that there lies an inherent infirmity in its domestic investment arbitration arena. The situation is further degraded by minimum participation of arbitrators and lawyers in the field of investment arbitration. Consequently, India tends to hire foreign arbitrators in BITs which

incurs lots of extra expenses. India can think and re-ponder to become a signatory to the Washington Convention which is already having 149 nations as its member.

It would be prejudicial to the economic interest of India and foreign investment is a catalyst in increasing the economic growth rate, hence, it is necessary that any issues with the investor must be resolved at the early stage. On part of the investor, the business plan must be transformed by observing the jurisdictional infirmities in which the investment is made. The treaty should be specific with regards to its rights and obligations for the party as living a wide interpretative field would not serve the best interest of the investor.

A new nuance has risen in form of appeal against the enforcement of investment award the question of appeal seems contrary to the question of finality which states that the arbitration award is final and binding on the parties and leaves no scope for appeal. Allowing an appeal during the enforcement can cause extravagant pressure and unreasonable delay in the finality of the matter. Leaving scope for review for the merits of the award questions the credibility of the rendered award after the due process of arbitration. The legislature should come forward to give certainty on the applicability of A&C Act in terms of investment arbitration. On policy front the legislature should think to bring amendment in the A&C Act to incorporate the BIT Awards enforcement under purview (In a way to include foreign awards under Section 44). The legislature also in a long run can enforce a separate regulatory framework for the purpose of investment award. It is also important that the policy-makers must consider specifying limited time frame for deciding disputes pertaining to investments.

The term "commercial" must be expounded by the legislature itself in the major statute of India to protect the investor's interest from overarching judiciary. Because time and again, judiciary has cited reasons of public interest to exclude the interference of foreign tribunals and has interpreted the provisions for its own convenience. On judicial front there are contradictory High Court decisions which creates scary environment for the investor's fate. Therefore, it is pertinent that the Apex Court should come up with a detailed pronouncement to eradicate the murky situation. It is significant to state that an award under ICSID Convention would not be annulled on the premise of being in contravention of public policy of the state. Also, the investment arbitration in ICSID is completely international in nature which would prohibit intrusion by domestic courts.

3. Conclusion

India is a resourceful jurisdiction and foreign nation are looking towards it as a potential foreign investment hub. It is difficult to digest that a nation with huge possibilities and opportunity in terms of foreign investment does not have a concrete framework for the enforcement of investment arbitral award. The continuous interference by domestic courts in enforcement mechanism creates apprehensions in a mind of investor as the portray of Indian courts in international market is of conservative and lazy. The reasons for degrading inbound foreign investment can be designated to Indian policies and judicial approach. A culmination of harmonious approach can smoothen the enforcement mechanism in India. There is no distinct set up for executing the investment treaty award and in this devoid situation, India can look up to signing the ICSID Convention. By excluding the A&C Act from investment arbitrations, the judgment of Delhi High Court further diminished the scope of India together more investment. Ease of doing business and an efficacious resolution process including award enforcement mechanism goes hand in hand and to gain the confidence of investors the latter cannot be compromised. The ongoing pandemic of COVID-19 has already given a hard blow to the Indian economy and improving in the investment arena would surely aid in quick revival.

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