



INDIAN JOURNAL OF
LEGAL REVIEW

VOLUME 4 AND ISSUE 1 OF 2024

INSTITUTE OF LEGAL EDUCATION



INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN – 2583-2344

(Free and Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 4 and Issue 1 of 2024 (Access Full Issue on – <https://ijlr.iledu.in/volume-4-and-issue-1-of-2024/>)

Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

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CRITICAL ANALYSIS OF ENFORCEMENT OF INVESTMENT ARBITRAL AWARDS UNDER INDIAN REGIME

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BEST CITATION – NIRBHAY ARORA, CRITICAL ANALYSIS OF ENFORCEMENT OF INVESTMENT ARBITRAL AWARDS UNDER INDIAN REGIME, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 4 (1) OF 2024, PG. 248-256, APIS – 3920 – 0001 & ISSN – 2583-2344

Abstract

Through this research paper, the author attempts to delve into the binding nature of arbitral awards and the corresponding compliance obligations imposed on parties to arbitration. It explores the prevalent belief that parties involved in investment treaty disputes generally adhere voluntarily to arbitral awards, with judicial enforcement rarely necessary. This inclination towards compliance is attributed to factors such as potential political repercussions, economic ramifications, and the desire to uphold a favourable image for prospective investors. The paper underscores the pivotal role played by efficient enforcement mechanisms, notably governed by two principal conventions: the New York Convention and the ICSID Convention. The New York Convention, applicable to both commercial and investment arbitration, facilitates the enforcement of awards rendered under various institutional or ad hoc arbitration rules. Conversely, the ICSID Convention exclusively governs enforcement for investment arbitration. Author has attempted to delineate distinct enforcement procedures under both regimes. Under the ICSID Convention, enforcement is straightforward and mandatory for contracting states, treating awards akin to national court judgments. The convention limits parties from seeking appeals outside its framework, emphasizing constrained review procedures. Enforcement proceedings may take place in the host state, the investor's home state, or another contracting state. Whereas, in contrast to the same, the New York Convention mandates court proceedings for recognition and enforcement in the state where awards are sought and such a process entails submitting arbitral award documents and translations, subject to specified exceptions and challenge grounds outlined in Article V.

The paper highlights disparities in enforcement focus between the ICSID and New York Conventions, particularly underscoring challenges encountered by states adhering to the latter but not the former. Furthermore, it delves into India's investment treaty journey, emphasizing challenges in attracting Bilateral Investment Treaties (BITs) and enforcing investment arbitration awards due to its non-party status to the ICSID Convention. In conclusion, the paper advocates for a re-evaluation of the scope of the Arbitration Act in India to encompass investment treaty arbitrations, drawing insights from the UNCITRAL Model Law and the New York Convention. It proposes adopting a broader interpretation of 'commercial relationships' to facilitate the enforcement of investment arbitration awards within India's legal framework.

Keywords: Arbitral Award, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), Investment, New York Convention, United Nations Commission on International Trade Law (UNCITRAL)

I. Introduction

The binding character of arbitral awards creates an obligation to comply on the parties

to arbitration.⁴⁵³ There is a frequent assertion that in most of the investment treaty disputes

⁴⁵³ RUDOLF DOLZER ET. AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 448 (3rd ed., Oxford Uni. Press, 2022).

the parties voluntarily comply with the arbitral awards.⁴⁵⁴ The instances where successful claimants have needed to seek judicial enforcement of their awards through national courts are rare.⁴⁵⁵ This prevalent trend of voluntary compliance could be largely attributed to certain factors. These include the distinct possibility of political embarrassment, the risk of economic backlash, and the unwillingness to deter potential future investors with a negative impression. However, another reason why host states may be hesitant to disregard arbitral awards is the existence of a highly efficient rule-based system for enforcement.⁴⁵⁶

Generally, the structure of international arbitration is supported by the robust pillar of ease of enforceability of arbitral awards.⁴⁵⁷ This enforceability, particularly, in investment arbitration is primarily governed by two conventions. *First*, the New York Convention⁴⁵⁸ [Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)] which applies for both commercial as well as investment arbitration. *Second*, the ICSID Convention⁴⁵⁹ [Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)], which is only applicable for investment arbitration disputes. Although there exist certain other regional conventions, which can be applicable in certain cases, nothing matches the significance and frequency of use attained by these two conventions.⁴⁶⁰

These conventions have two distinct enforcement regimes. The arbitral awards

pursuant to ICSID arbitration are enforced through ICSID Convention. Likewise, the arbitral awards issued under other institutional or ad hoc arbitration rules other than ICSID arbitration will go through the New York Convention for the enforcement

II. Enforcement Procedure Under Both the Regimes

(i) Enforcement under ICSID Convention

ICSID Convention provides a straight forward enforcement procedure. Article 54 talks about enforcement.⁴⁶¹ It provides that all contracting States to the ICSID Convention should directly enforce the investment arbitration awards rendered by the ICSID tribunals, as if the judgements of their national courts.⁴⁶² Article 53 talks about the finality of arbitral awards by imposing binding obligation on the parties and restricting them to from using the avenues of appeal other than the ones provided under the Convention.⁴⁶³ The issue decided by the ICSID are also *res judicata*, which means that the parties are not able to context or litigate them before any other tribunal or in a domestic court.⁴⁶⁴ In the context of the ICSID, there are very limited review procedures mentioned under Articles 49-52, which talks about supplementation, rectification, interpretation, revision and annulment of arbitral awards.⁴⁶⁵ Except in case of supplementation of award under Article 49, for rest of the procedures if the parties request stay on the enforcement, the investment arbitral tribunal may grant the same.

In the ICISD system, other than for enforcing the arbitral awards there won't be any judicial

⁴⁵⁴ A. Boralessa, *Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles that Transnational Corporations May Face*, 17 N.Y. INT'L L. REV. 53, 66 (2004).

⁴⁵⁵ August Reinisch, *Enforcement of Investment Treaty Awards*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 797, ¶ 29.01 (Katia Yannaca-Small ed., 2nd ed., Oxford Uni. Press, 2018).

⁴⁵⁶ *Id.*

⁴⁵⁷ Andrea K. Bjorklund, *Enforcement*, in THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 186 (Thomas Schultz & Federico Ortino eds., Oxford Uni. Press, 2020).

⁴⁵⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 U.N.T.S. 38 (1968) [hereinafter New York Convention].

⁴⁵⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (Mar. 18, 1965), 575 U.N.T.S. 159 (1965).

⁴⁶⁰ Bjorklund, *supra* note 5, at 186.

⁴⁶¹ ICSID Convention, Art. 54 – (1) “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”

⁴⁶² *Id.*

⁴⁶³ ICSID Convention, Art. 53 – (1) “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

⁴⁶⁴ DOLZER ET. AL., *supra* note 1, at 446.

⁴⁶⁵ For a detailed discussion on each of these Articles, the approach of the tribunals and case law analysis *see* SCHREUER'S COMMENTARY ON THE ICSID CONVENTION (Stephan W. Schill et. al. eds., 3rd edn., 2022) [hereinafter SCHREUER'S COMMENTARY].

intervention. Article 53 facilitates the enforcement of the awards in the host-state, the investor home-state or any other state party, which is a signatory to the ICSID Convention. It is at the option of the prevailing party to choose the state where enforcement of the award can be more beneficial. Availability of the appropriate assets is the most important element in this selection.⁴⁶⁶ The domestic law on the execution of judgements in each State will govern the procedure pertaining to recognition or enforcement of arbitral awards. For that purpose, the state parties are obligated to designate a court or authority, which is competent.

While enforcing the ICSID arbitral awards, the domestic courts are restricted from reviewing the legal or factual merits of the award. As a result, the national court or authority is also not in a position to scrutinize whether the ICSID tribunal had jurisdiction, followed the appropriate procedure, or made a substantively correct decision. The enforcing body is also restricted from assessing whether the award aligns with the “*ordre public*” (public policy) of the forum State. The domestic court or institution is only authorized to confirming the authenticity of the award.⁴⁶⁷ However, enforcement of arbitral awards pursuant to the New York Convention is entirely.

(ii) *Enforcement under New York Convention*
The investment arbitral awards rendered excluding the ICSID Convention, which include the awards issued through UNCITRAL Arbitration Rules,⁴⁶⁸ and those administered by other arbitral institutions, *i.e.*, the International Chamber of Commerce (ICC),⁴⁶⁹ the Stockholm Chamber of Commerce (SCC),⁴⁷⁰ the London Court of International Arbitration⁴⁷¹ are generally considered as arbitral awards of foreign nation, within the ambit of New York Convention. This qualifies the awards to be eligible for

enforcement in many States, subjected to certain exceptions mentioned under the Convention.

The enforcement process here affords recognition and enforcement of foreign arbitral awards: “arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.”⁴⁷²

The central element of the convention is the duty to recognise and enforce the award.⁴⁷³

Article III speaks about two instances – *first* the foreign award has to be recognised by the State against which recognition and enforcement is sought; *second* it has to be enforced according to the procedure mentioned in the state. For enforcement through New York Convention, the “*arbitral awards must, however, undergo court proceedings in order to obtain a declaration of enforceability in the State where recognition and enforcement are sought.*”⁴⁷⁴ In order to seek recognition and enforcement of investment arbitration awards under the New York Convention within the domestic court of a contracting State, the party pursuing this course must furnish either the original arbitral award or certified copies of both the award and the arbitration agreement.⁴⁷⁵ Additionally, if the award is not in the official language of the domestic court where recognition and enforcement are sought, a translated copy of the award must be submitted.⁴⁷⁶ This requirement ensures that the necessary documentation is provided to facilitate a smoother legal process within the jurisdiction in question.

⁴⁶⁶ DOLZER ET. AL., *supra* note 1, at 446.

⁴⁶⁷ *Id.*, at 448.

⁴⁶⁸ UNCITRAL Arbitration Rules 1976, 15 I.L.M. 701 (1976).

⁴⁶⁹ I.C.C. Rules of Arbitration, 2012.

⁴⁷⁰ Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2010.

⁴⁷¹ London Court of International Arbitration, Arbitration Rules 1998, 37 I.L.M. 669 (1998).

⁴⁷² New York Convention, *supra* note 6, art. I (1).

⁴⁷³ New York Convention, *supra* note 6, art. III – “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

⁴⁷⁴ Liebscher, *Preliminary Remarks, in* NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958: ARTICLE-BY-ARTICLE COMMENTARY 1 (Dr. Reinmar Wolff ed., Verlag C.H. Beck oHG, 2019)

⁴⁷⁵ New York Convention, *supra* note 6, art. IV (1).

⁴⁷⁶ *Id.*, at art. IV (2)

The principal responsibility for enforcing arbitral awards, including those in investment arbitration, is subject to specific restricted grounds outlined in the New York Convention. Article V, outlines the grounds on which enforcement of an arbitral award be challenged in the national court where recognition and enforcement are sought. As per Article V(1), the challenging party can contest the enforcement of an arbitral award if it can substantiate: (a) the invalidity of the arbitration agreement; (b) a lack of proper notice or opportunity to present their case; (c) the inclusion of a decision beyond the scope of the arbitration; (d) an improper constitution of the arbitral tribunal or a procedure not in accordance with the arbitration agreement or agreed-upon law; (e) the award not being binding yet, or having been set aside or suspended in the country of its origin.⁴⁷⁷ These grounds primarily address “serious defects in the arbitral process or fundamental values of the State where enforcement is sought.”⁴⁷⁸

Additionally, domestic courts in the enforcing state can reject the enforcement of the arbitral award if: (a) the dispute isn't subject to arbitration under the state's law; (b) the award contradicts the public policy of the State. If the domestic court finds merit in any of these grounds, it has the authority to refuse the enforcement of the arbitral award.

The fundamental comprehension of the enforcement process under both the ICSID Convention and the New York Convention suggests that, in the realm of investment treaty awards, there is a discernible discrepancy in the attention given to issues of enforcement between the two frameworks. While the ICSID Convention has been a focal point in discussions surrounding investment arbitration awards,⁴⁷⁹ the challenges posed by the New

York Convention in this context have been comparatively underexplored.⁴⁸⁰

The noteworthy issues related to the enforcement of investment arbitration awards, particularly in certain States adhering to the New York Convention but not the ICSID Convention, gain heightened relevance. This is especially evident given the substantial magnitude of investment flows involved and the escalating concerns surrounding investment disputes.⁴⁸¹ Among those States the position of India desires a special discussion.

III. India and Investment Treaty Arbitration

India is not a party to the ICSID Convention. For its economic development India has attracted a spectacular Foreign Direct Investment (FDI). As per the World Investment Report 2023, India remains as a favourite destination for FDI. In FDI inflows it secured 8th position in the top 20 host economies⁴⁸² and in the FDI outflows it is in the top 20 home economies.⁴⁸³ Ever since India signed its first Bilateral Investment Treaty (BIT) with UK in 1994, till date India concluded a total of 86 BITs of which 76 were terminated⁴⁸⁴ and has signed 16 treaties with investment provisions.⁴⁸⁵ Till date as a respondent, India has also been engaged in 29 investment treaty disputes of which 6 disputes are pending, 12 disputes are settled, 5 has been decided in favour of the investor, 3 has been decided in favour of the State and 2 disputes discontinued. Although India is becoming a hotspot for FDI, the investment treaty journey is a bit rough. The first investment disputes against India were brought in 2004 because of the Dabhol Power Plant project and were settled.⁴⁸⁶ However, the

⁴⁸⁰ See S. R. Subramanian, BITs and Pieces in International Investment Law: Enforcement of Investment Treaty Awards in the Non-ICSID States: The Case of India, 14 J. WORLD INV. & TRADE 198 (2013); FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS, AND COMMENTARY, Ch. 13 (James Richard Crawford et. al., eds., Kluwer Law International 2014); Choi, *supra* note 27.

⁴⁸¹ Subramanian, *supra* note 28, at 200.

⁴⁸² UNCTAD, World Investment Report, 2023: Investing in Sustainable Energy for All, UNCTAD/WIR/2023, at 8 (United Nations, 2023).

⁴⁸³ *Id.*, at 17.

⁴⁸⁴ See <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india> (last visited: Dec. 29, 2023)

⁴⁸⁵ See <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india> (last visited: Dec. 29, 2023)

⁴⁸⁶ Bechtel Enterprises Holdings Inc. & GE Structured Finance (GESF) v. The Government of India, UNCITRAL (2003); Standard Chartered Bank v. Republic of India, UNCITRAL (2004); Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power

⁴⁷⁷ *Id.*, at art. V (1)

⁴⁷⁸ Reinisch, *supra* note 3, at 801, ¶ 29.13.

⁴⁷⁹ See DOLZER ET. AL., *supra* note 1, at 446-450; Reinisch, *supra* note 3, at 815-821, ¶ 29.64-29.82; SCHREUER'S COMMENTARY, *supra* note 13, at 1470-1515

twist in India's investment treaty tale comes with the 2011 *White Industries* case.⁴⁸⁷ The result of the case made India to terminate most of its BITs⁴⁸⁸ and draft a new 2015 model BIT. In this case, Claimant invoked the arbitration under Australia-India BIT (1999)⁴⁸⁹ and brought a claim of A\$ 8,769,469.07. The brief facts of the case are as follows, a contract has been made between the Coal India and Claimant for supplying the equipment and developing a coal mine at Pariwar India.⁴⁹⁰ The laws of India govern the contract and an arbitration clause requires the parties to arbitrate all disputes through ICC Arbitration has also been included in the contract.⁴⁹¹ Subsequently, disputes sparked between the parties, "as to whether White was entitled to the bonuses and/or Coal India was entitled to penalty payments. A number of other related technical disputes also arose, primarily concerning the quality of the washed and processed coal and the sampling process by which quality would be measured."⁴⁹²

The decision of the tribunal went in favour of White Industries Australia and ordered India to pay an amount of A\$ 4,085,180, along with an interest of 8% per annum from March 24, 1998, until the date of payment to the Claimant.⁴⁹³ In addition to this amount, India had also to pay an overall amount of A\$ 670,249.82, to the Claimants towards the fees and expenses of arbitrators, for the Claimants' costs in ICC arbitration and for the witness fees and expenses of the Claimants.⁴⁹⁴ This decision influenced India's step towards the termination of BITs and at the same time, enacting a new

Model BIT for its future engagement in investment treaties. Aftermath of *White Industries* dispute,⁴⁹⁵ the journey of India on the path of BITs is very rough and resulting in an increasing number of investment arbitration disputes against India in the last few years.⁴⁹⁶ Since, the enactment of the new Model BIT in 2015, India did not make significant progress in the negotiation of BITs. After adoption of the new model BIT, till date India could only be able to conclude investment treaties only with Belarus (2018), Kyrgyzstan (2019), Brazil (2020). The Parliamentary Committee on the External Affairs in its report highlighted that this investment treaty negotiation process as "inadequate and find that it is not commensurate with the growth of India's interest in this domain and our rising stature in global affairs."⁴⁹⁷

India's challenges in attracting a larger number of Bilateral Investment Treaties (BITs) cannot be overlooked without acknowledging the significant issue surrounding the enforcement of investment arbitration awards.⁴⁹⁸ Notably, India has refrained from signing the ICSID Convention, and as a consequence, investment arbitration awards are not directly enforceable in the country. The arbitration framework in India draws inspiration from the UNCITRAL Model Law on Arbitration⁴⁹⁹ and has adopted the New York Convention and Geneva Convention for the enforcement of certain foreign arbitral awards. Specifically, Chapter I of Part II of the Arbitration and Conciliation Act, 1996, encompassing sections 44-52, is dedicated to addressing the enforcement of foreign arbitral awards under the New York Convention. Section 48 of the Act delineates the conditions under which a foreign arbitral award may be refused enforcement,

Investments B.V. v. Republic of India, UNCITRAL (2004); Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India, UNCITRAL (2004); Credit Suisse First Boston v. Republic of India, UNCITRAL (2004); Credit Lyonnais S.A. (now Calyon S.A.) v. Republic of India, UNCITRAL (2004); BNP Paribas v. Republic of India, UNCITRAL (2004); ANZEF Ltd. v. Republic of India, UNCITRAL (2004); ABN Amro N.V. v. Republic of India, UNCITRAL (2004).

⁴⁸⁷ *White Industries Australia Ltd. v. India*, IIC 529 (2011), Final Award (Nov. 30, 2011).

⁴⁸⁸ Tony Dymond et. al., *Investment Treaty Arbitration in the Asia-Pacific*, 2021 ASIA-PAC. ARB. REV. 24, 28 (2020).

⁴⁸⁹ Agreement on the Promotion and Protection of Investment, Aus.-Ind., Feb. 26, 1999.

⁴⁹⁰ *White Industries Australia Ltd. v. The Republic of Ind.*, IIC 529 (2011), Final Award, at 15, ¶ 3.2.13 (Nov. 30, 2011).

⁴⁹¹ *Id.*, at 16, ¶ 3.2.18.

⁴⁹² *Id.*, at 17, ¶ 3.2.24.

⁴⁹³ *Id.*, at 140, ¶ 16.1.1 (b).

⁴⁹⁴ *Id.*, at 140, ¶ 16.1.1 (c)-(e).

⁴⁹⁵ *White Industries Australia Ltd. v. The Republic of Ind.*, IIC 529 (2011), Final Award, at 15, ¶ 3.2.13 (Nov. 30, 2011).

⁴⁹⁶ Aayushi Singh, *A Chronological Analysis of Vodaphone and Cairn – A BIT-ter Saga*, 7 NLS Bus. L. Rev. 106, 107 (2021)

⁴⁹⁷ Committee on External Affairs, India and Bilateral Investment Treaties, 10th Rep., at 11 (Ministry of External Affairs, Sep. 2021)

⁴⁹⁸ Simon Weber, *What Happened to Investment Arbitration in India?*, KLUWER ARBITRATION BLOG (Mar. 27, 2021).

⁴⁹⁹ Prabhash Ranjan & Deepak Raju, *The Enigma of Enforceability of Investment Treaty Arbitration Awards in India*, 6 ASIAN J. COMP. L. [iii] (2011).

mirroring the criteria outlined in Article V of the New York Convention.

Other than Article V of the New York Convention, enforcement of foreign awards is subjected to two declarations,⁵⁰⁰ and two of them have been made by India.⁵⁰¹ The discussion here is only concerned with the later one, under which a State party may restrict the scope of application of the Convention “only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.”⁵⁰² This is known as ‘Commercial Reservation Relationship’. This reservation made the applicability of the New York Convention to the disputes considered as ‘commercial’ under the law of India.⁵⁰³ As a result, New York Convention stands as the singular multilateral instrument that helps the investors seeking to enforce the investment arbitration award in India.

Initially, the issue of enforceability of investment arbitration awards has never been a discussion in India because the disputes rose out of the Dabhol Power Plant project⁵⁰⁴ were settled outside the court. It was all started with the Kolkata High Court’s decision in *Louis Dreyfus* case⁵⁰⁵ and has been fuelled more by the recent decisions of the Delhi High Court in *Vodafone Group* case⁵⁰⁶ and *Khaitan* case.⁵⁰⁷ The factual matrix of these three cases is well discussed. However, the crux of the discussion is the scope of applying the Arbitration Act to investment arbitration disputes.

The *Louis Dreyfus* case⁵⁰⁸ marks a significant milestone as the first-ever decision rendered by an Indian court on a dispute arising from an

investment treaty. Although some commentators initially characterized it as an anti-arbitration injunction, the ruling addressed two pivotal principles: (i) on the identification of appropriate respondent against India; (ii) application of the Arbitration Act to treaty-based investment disputes. On the former issue, the court clarified that in investment treaty disputes, India will be the sole respondent. The inclusion of Indian federal states or organs not party to the treaty was deemed unnecessary and could escalate litigation costs.⁵⁰⁹ The court’s ruling on the later issue turns out crucial. The court’s decision held that the Arbitration Act is applicable to investment treaty disputes. This reaffirmed the principle that, as a UNCITRAL Model Law-based legislation, the Arbitration Act extends to all treaty-related investment arbitration disputes. Importantly, the court emphasized that, regardless of civil jurisdiction, Indian courts should refrain from interfering with investment treaty claims. This stance upholds the integrity of the Arbitration Act in addressing and governing disputes arising from investment treaties.⁵¹⁰

The decision of the court in the above-mentioned case can be appreciated for its matured approach towards investment arbitration. However, the same attitude has not been adopted by the Delhi High Court in the case of *Vodafone Group*.⁵¹¹ The court in the present case observed that the Arbitration Act does not apply to the investment treaty arbitration. This decision of the court is standard on two reasons – (i) Arbitration Act Part – II only applied to disputes treated as ‘commercial’ under the Law of India; (ii) Owing to the commercial relationship reservation, investment treaty arbitrations are “fundamentally different from commercial disputes as the case of action (whether contractual or not is grounded on State guarantees and assurances (and are not

⁵⁰⁰ New York Convention, *supra* note 6, art. I (3).

⁵⁰¹ Samarth Khanna, *Is the New York Convention Applicable for the Enforcement of Investment Arbitration Awards in India?*, ARIA BLOG (Nov. 21, 2021).

⁵⁰² New York Convention, *supra* note 6, art. I (3).

⁵⁰³ Shivansh Jolly, *The Vodafone Saga and India’s Position on Investor State Arbitration*, CAMBRIDGE INTERNATIONAL LAW JOURNAL (Aug. 15, 2018).

⁵⁰⁴ *See supra* note 34.

⁵⁰⁵ Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures, G.A. 1997 of 2014 & C.S. No 220 of 2014.

⁵⁰⁶ UoI v. Vodafone Group Plc United Kingdom & Anr, CS(OS) 383/2017 & I.A. No 9460/2017.

⁵⁰⁷ UoI v. Khaitan Holdings (Mauritius) Limited & Ors, CS (OS) 46/2019, I.As. No 1235/2019 & 1238/2019.

⁵⁰⁸ Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures, G.A. 1997 of 2014 & C.S. No 220 of 2014.

⁵⁰⁹ Bhushan Satish & Shreyas Jayasimha, *Indian Courts’ First Brush with Investment Treaty Arbitration: Taking Some Lessons from the Calcutta High Court*, KLUWER ARBITRATION BLOG (Mar. 16, 2015).

⁵¹⁰ *Id.*

⁵¹¹ UoI v. Vodafone Group Plc United Kingdom & Anr, CS(OS) 383/2017 & I.A. No 9460/2017.

commercial in nature).⁵¹² In the view of the court, the investment arbitration disputes are more of public international law than the contractual disputes. The Court's reason in this case depicts the efforts of the court to support its stand that the investment arbitrations are non-commercial in nature.⁵¹³ The restricted conceptual difference between the international commercial arbitration and investment arbitration underlined by the court in the present case has also applied by the court *Khaitan* case,⁵¹⁴ and decided it the on similar reasoning given in the *Vodafone Group* case⁵¹⁵ and reiterated that Arbitration Act is not applicable to investment treaty arbitrations.

From a constitutional standpoint, the provisions outlined in Article 298 of the Constitution of India grant authority to both the Union and States to engage in trade or business activities and assume contractual obligations to fulfil these objectives. Although it is accurate to assert that investment arbitrations often stem from "State guarantees and assurances" these commitments may manifest domestically through various means, such as commercial obligations undertaken by the Union or State, whether formalized through contracts or not. Moreover, these assurances can extend to international dimensions, transforming into treaty obligations under the ambit of international law. Concerning the investments made without any contractual relationship, an argument can be advanced asserting that the term 'commercial' holds a broad interpretation, encompassing investments within its purview. This interpretation allows for a flexible understanding of the term, accommodating scenarios where investments lack a conventional contractual framework but still fall within the sphere of commercial activities.

Regarding the Arbitration Act, there is a compelling need for a thorough re-evaluation of its scope, with valuable insights drawn from

two fundamental pillars of international arbitration – the UNCITRAL Model Law; New York Convention. The 1996 Arbitration Act, grounded in the principles of the Model Law, has consistently been the focus of interpretation by the Supreme Court of India. In this process, the court has often turned to the UNCITRAL Model Law as a guiding framework to interpret and construe the sections of the Arbitration Act.⁵¹⁶ Under the Act, section 2(1)(f) defines "international commercial arbitration" and delineates its scope as encompassing "disputes arising out of legal relationships...considered as commercial under the law in force in India."

The statutory definition of 'commercial relationship' in Indian law stands undefined, creating an expansive and unrestricted scope. In such instances, it proves advantageous to turn to the definition of 'commercial' as outlined in the footnote of Article 1(1) of the UNCITRAL Model Law. Notably, this definition takes a comprehensive approach, encompassing even 'investment' under its purview. The beginning sentence of the footnote encourages a broad interpretation of the term 'commercial,' extending its coverage to all types of commercial relationships, whether contractual or otherwise. This reference provides a valuable guideline for understanding and applying the concept of a 'commercial relationship' within the Indian legal framework. In the case of *R.M. Investment and Trading Co.*,⁵¹⁷ the Supreme Court, while interpreting the term 'commercial' under the Foreign Awards (Recognition & Enforcement) Act, 1961, also relied on the definition provided by Article 1(1) of the UNCITRAL Model Law, imparting it with an expansive meaning.

Despite the repeal of the 1961 Act, there is no indication of a reduction in the expansive scope of the term 'commercial' under the Arbitration Act. Consequently, by adopting the broad interpretation of 'commercial' as suggested by the UNCITRAL Model Law, the Arbitration Act can be purposively construed to encompass

⁵¹² *Id.*, ¶ 91.

⁵¹³ Samarth, *supra* note 49.

⁵¹⁴ UoI v. *Khaitan Holdings (Mauritius) Limited & Ors*, CS (OS) 46/2019, I.As. No 1235/2019 & 1238/2019.

⁵¹⁵ UoI v. *Vodafone Group Plc United Kingdom & Anr*, CS(OS) 383/2017 & I.A. No 9460/2017.

⁵¹⁶ *Reliance Industries Ltd. v. UoI*, (2014) 11 SCC 576.

⁵¹⁷ *R.M. Investment and Trading Co. (P) Ltd. v. Boeing Co.*, (1994) 4 SCC 541.

investment treaty arbitrations within its framework. A closer analysis of Section 2(1)(f) of the Arbitration Act reveals that it accommodates parties involved in investment arbitrations. Sub-sections (i) and (ii) of Section 2(1) (f) specify that at least one party to an 'international commercial arbitration' must be an individual who is a national of, or a body corporate incorporated in, a foreign country. Remarkably, subsection (iv) extends this coverage to the 'Government of a foreign country,' indicating that even government entities may be parties to an 'international commercial arbitration'. As a result, the typical parties involved in investment treaty arbitration, comprising a private individual and a State, may fulfil the criteria outlined in Section 2(1)(f), thus incorporating such arbitrations within the ambit of 'international commercial arbitration' under the Arbitration Act.

The New York Convention also acts as a valuable instrument for understanding the breadth of the word 'commercial', especially in jurisdictions where a reservation under Article I (3) of the Convention has been invoked. The historical development of Article I (3) reveals that this reservation was introduced to accommodate the needs jurisdictions of civil law, which demarcated the transactions as commercial and non-commercial. Notably, Norway's Article I (3) reservation provides explicit clarification, stating that the Convention will not apply to the disputes involved immovable property situated in Norway or rights related to such property. Therefore, the primary intent of the 'commercial reservation' was to keep the matters that are entirely non-commercial from arbitration, rather than selectively categorizing among various commercial matters, including investment arbitrations in this context.⁵¹⁸

Moreover, nations that have implemented reservation under Article I (3), may consider disputes out of their BITs as falling within the scope of 'commercial' under Article I of the New York Convention. For instance, the Cuba –

Mexico BIT⁵¹⁹ and the US Model BIT,⁵²⁰ specifically designate disputes arising from these treaties as 'commercial'. During set aside proceedings many domestic courts have shared the view that for the purpose of UNCITRAL Model Law the investment arbitration awards rendered under the UNCITRAL Arbitration Rules as 'commercial'.

⁵²¹

During the challenging procedures of the *Metalclad* award,⁵²² before the Canadian courts, the Supreme Court of British Columbia noted that in the context of UNCITRAL Model Law the arbitrations under North American Free Trade Agreement (NAFTA) Chapter 11 are qualified as 'commercial arbitration'.⁵²³ The court outrightly rejected the argument of the Mexico that the "relationship between Mexico and Metalclad was not commercial in nature but, instead, was a regulatory relationship."⁵²⁴ The same approach has also been followed by the Canadian Courts in the subsequent challenging proceedings against the Chapter 11 of NAFTA. In the procedure for setting aside of the award in *Fledman v. Mexico*⁵²⁵ award issued under the ICSID Additional Facility Rules, the Ontario Court of Appeal observed that "NAFTA tribunals settle international commercial disputes by an adversarial procedure under which they determine legal rights in a manner not dissimilar to the courts."⁵²⁶ Likewise, the BIT arbitration award in *CME v. Czech Republic*,⁵²⁷ has been qualified as an "international commercial arbitration"⁵²⁸ by the Swedish Svea Court of Appeal.

All these instances are some strong examples suggesting that "in the field of recognition and enforcement governed by the New York

⁵¹⁹ Cuba – Mexico BIT, art. 9

⁵²⁰ US Model BIT (2012), art. 34(10).

⁵²¹ Reinisch, *supra* note 3, at 800, ¶ 29.07.

⁵²² *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/ 97/ 1, Award (Aug. 30, 2000).

⁵²³ *United Mexican States v. Metalclad, Canada*, Supreme Court of British Columbia (May 2, 2001) [2001] BCSC 664, 5 ICSID Rep. 236.

⁵²⁴ *Id.*, ¶ 44.

⁵²⁵ *Marvin Ray Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/ 99/ 1, Award (Dec. 16, 2002), 42 I.L.M. 625 (2003).

⁵²⁶ *United Mexican States v. Marvin Ray Feldman Karpa, Canada*, Ontario Court of Appeal (Jan. 11, 2005), 9 ICSID Rep. 508, 516, ¶ 41.

⁵²⁷ *CME Czech Republic B.V. (Netherlands) v. Czech Republic*, Partial Award (Sept. 13, 2001), 9 ICSID Rep. 121.

⁵²⁸ *Czech Republic v. CME Czech Republic BV, Sweden*, Svea Court of Appeal (May 15, 2003), 9 ICSID Rep. 439, 493.

Convention, a possible reservation limiting its application to ‘commercial arbitration should not impede the actual enforcement of investment awards.’ Drawing inspiration from such cases and BITs, a similar approach could be adopted by the Indian courts to broaden the interpretation of investment treaties. This expansion could potentially pave the way for the inclusion of investment arbitrations within the existing framework of the Indian Arbitration Act.

IV. Conclusion

There is no doubt that India is a favourite destination for investments. However, considering the BIT negotiation after revamping its Model BIT, India failed to attract BITs. One such issue is the enforcement of investment arbitration awards in India. As there is not particular policy or legislative framework governing the enforcement of investment arbitration awards, the judicial approach towards the BIT arbitration awards is becoming crucial. The decision of the Delhi High Court in the cases, *Vodafone Group*⁵²⁹ and *Khaitan Holdings (Mauritius) Ltd*,⁵³⁰ have clearly signalled the outside world that India lacks in investment protection. Having BITs with other States strengthens the bond between the States and obviously will have its own advantages. Hence, if India wants to secure more investment treaties, it is the time to revisit its approach towards the investment treaty arbitration.

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⁵²⁹ UoI v. Vodafone Group Plc United Kingdom & Anr, CS(OS) 383/2017 & I.A. No 9460/2017.

⁵³⁰ UoI v. Khaitan Holdings (Mauritius) Limited & Ors, CS (OS) 46/2019, I.As. No 1235/2019 & 1238/2019.