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THE EXPANSION OF INVESTMENT TREATY ARBITRATION

Abstract

Investment treaty arbitration is a procedure resorted to, for resolving disputes between foreign investors and host States. It facilitates the possibility for a foreign investor to sue a host State guaranteeing the foreign investor that in the event of a dispute, it will be assured an access to qualified arbitrators who may resolve the dispute and therefore, render an enforceable award. This allows the foreign investor a relaxation from restricting national jurisdictions thereby helping to resolve disputes according to the different protections afforded under international treaties.

I. Introduction

Where the spectrum of a sound and systematized International Arbitration regime is concerned, Investment Arbitration (IA) may be defined as an agitating counter against "Gunboat Diplomacy".[1] This agitating counter is a result of Investment treaties entered into by foreign

[1] Cable, James. "Gunboat Diplomacy: Political Applications of Limited Naval Force" Chatto and Windus for the Institute for Strategic Studies, 1971, p. 10.

investors and Host States, focused on a view to make an investment in the business ventures of others. Investment Arbitration (IA) thrives upon four factors, i.e., (i) a multilateral/bilateral investment treaty, (ii) the national law of the Host State with respect to these investments, (iii) an independent investment agreement and (iv) a preference over an independent arbitrator and tribunal. Without the fulfillment of these factors, the functioning of the entire regime of International Treaty Arbitration becomes a fruitless exercise.

II. International Commercial Arbitration and Investment Treaty Arbitration

Originally, International Investment Arbitration derives its procedural and enforcement aspects from International Commercial Arbitration and makes the application of those in disputes between foreign investors and host states. The two bodies work hand in glove in order to create a conducive environment for Foreign Direct Investments (FDIs) and to facilitate business to flourish in any country. Thus, it is conclusive that the key aspect of investment arbitration is the transplantation of a private adjudicative model from the sphere of International Commercial Arbitration, thereby giving individual investors and private parties a chance to seek redressal for treatment accorded to them by the Government.

III. International Centre for Settlement of Investment Disputes (ICSID)

A majority of investment protection treaties have arbitration clauses which provide for investor-state arbitration. Such investor-state arbitrations take place under the scope of a variety of arbitration institutions and rules. The most frequently used rules in this regard are the ICSID Arbitration Rules. The recognition and enforcement of ICSID awards is handled in accordance with the system based on the ICSID Convention.

The International Centre for Settlement of Investment Disputes (ICSID) was established in 1966 by the ICSID Convention. The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank with the motive of promoting international investment.

The ICSID is an independent dispute settlement body. It facilitates investors and host States by providing a smooth dispute resolution process, thereby helping international investment. The ICSID provides for settlement of disputes through conciliation, arbitration and fact-finding. The process adopted by the ICSID has been designed in a way that it maintains a careful balance between the interests of investors and host States taking account of the characteristics of the international investment disputes to which the parties are involved.

IV. Growth of Investment Treaty Arbitrations

During the past decade, the system of investment treaty arbitration has proven to be a success. This success can be explained by the fact that investment treaty arbitration may be an attractive approach to look at, from a foreign investor's point of view, particularly, with reference to the tiring alternative of resorting local courts in the host State for settlement of disputes. Investment treaty arbitration is also in the 60 interest of host States, since the possibility to go to arbitration against the host State tends to encourage businessmen to make foreign investments. A number of host States are naturally inclined towards attracting foreign investment. Another important aspect is that investment treaty arbitration intends to de-politicize investment disputes, specifically in comparison to the conventional alternative of diplomatic protection, which requires the involvement of the governments of the investor and the host states.

V. Investment Treaty Arbitration in different sectors

a) Banking & Finance

Historically, it was assumed that arbitration was incompatible with the needs of the banking and finance investors. However, during the past decade, this tide seems to have converted. Investment treaty claims that arbitration disputes in the banking and finance sector is increasingly growing. As per recent statistics from 2019, five percent of cases registered by the ICSID were brought by banks and financial institutions.

b) Science

Investment treaty arbitration has become a popular choice for the forum of life sciences and pharmaceutical sectors with the motive of protection of their foreign investment. This potential benefit births from the fact that bilateral investment treaties can be used to overcome unfair regulatory obstacles and political risks as evidenced by recent investment treaty arbitration brought by pharmaceutical sectors. In Servier v. Poland[2] the tribunal held that Poland frustrated the foreign investor's legitimate expectation of cancellation of market authorisations. This led to the expropriation of the investment in favor of the local competitiors.

c) Telecommunication Sector

The transformation of the telecommunications sector by privatization, liberalization and growth needs, has contributed to its economic growth and improved sector governance. This has, thus, led to a constant growth of investment treaty disputes. In 2019, the ICSID reported six percent of its cases under information and communication.[3]

VI. Position in India

As we learnt, the 1965 ICSID convention[4] created one of the first forums for the resolution of state and investor disputes by way of including arbitration clauses in contracts. India has however, not ratified the ICSID convention. Irrespectively, India has been a part of several arbitrations and has entered into Bilateral Investment Protection Agreements[5] with a considerable number of countries. India signed its first bilateral investment treaty with the UK in 1994.

[2] https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/339/servier-v-poland
[3] https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-fiscal-year-2019-caseload-statistics
[4] Campbell MCLachlan et al., International Investment Arbitration: Substantive Principles, 315-49 (2008) as cited in S. I. Strong, Mass Procedures in Abaclat v. Argentine Republic: Are They Consistent with the International Investment Regime? 3 Yearbook on International Arbitration (Forthcoming), at p. 17.
[5] Bilateral Investment Promotion and Protection Agreements, Ministry of Finance, Government of India, available at http://www.finmin.nic.in/bipa/bipa_index.asp http://finmin.nic.in/bipa/bipa_index.asp?pageid=1

The Indian government had also released the Model Indian Bilateral Investment Treaty plan in December 2015. This model however, contains certain controversial and debatable clauses in reference to certain favorable nations, which may not gel with the interests of other contracting states. Under the current Indian regime, investors are required to focus on the fact that these investment treaties are usually an addition to the normal contractual rights that the investor will have against its counterpart and finally, that the protection afforded by investment treaties are enforceable by the investor against the host state, often with the help of international arbitration and without the need to litigate in the host state's local courts.

However, much stood changed when the Union Minister for Commerce and Industry announced the unilateral termination of all the bilateral investment treaties ender into by India by the end of March, 2017.

Antrix Devas Case[6]

In 2005, an agreement to lease out satellite spectrum was entered into between the commercial arm of Indian Space Research Institute (ISRO) 'Antrix' and a Bangalore based company backed by Mauritius based foreign investors 'Devas Multimedia.

Under this agreement, Antrix was required to provide the spectrum to Devas Multimedia on lease for a period of 12 years, expecting a return of 30 million dollars as fees. In the year 2011, ISRO annulled the agreement stating the reasons as an inclination towards larger national and local interests. In this regard, Devas Multimedia initiated International Commercial Arbitration proceedings under an ICC Arbitration Tribunal which resulted in an award of Rs.4,400 crores. Additionally, it had also initiated Investor-State dispute resolution proceedings against Antrix under the bilateral investment treaty between India and Mauritius. This dispute settlement resulted them an award against India under the Investment Treaty Arbitration by the Tribunal at Permanent Court of Arbitration (PCA) at The Hague in July 2016.

[6] Antrix Corporation Limited v. Devas Multimedia Pvt. Ltd. (2014) 11 SCC 560

The tribunal was of the opinion that the abrupt annulment of the agreement amounted to expropriation and resulted in breach of treaty commitments.

VII. Criticisms against Investment Treaty Arbitration

Despite its success, investment treaty arbitration has witnessed some critical voices in its favor. These commentators have questioned the future of investment treaty arbitration. Some have voiced their opinion against the arbitration system in general, and some against specific aspects of the system. The criticists raise that this system works only in favor of the investors and that states are on the losing side in investment disputes. This has also led certain host States denunciate the ICSID convention to terminate bilateral investment treaties. However, basing on statistics, there is no proof of bias in favor of investors. Until it is proved otherwise, it would be safe to conclude that the system of investment treaty arbitration protects the interests of both the state and the investors.

Another criticism is that bilateral investment treaties pose as a threat to the sovereignty of the host state. It is, indeed true that a bilateral investment treaty poses as a limitation on the sovereignty of the host State, in the sense that the host state bound by the undertakings in the bilateral investment treaty. However, that is indeed the whole purpose of the treaty and, in fact, of most treaties. Thus, it can be concluded that such a consequence is not unique to investment protection treaties, alone.

Some commentators also assert that an inherent default of investment treaty arbitration is inconsistency.[7] However, the counter analysis argues that eliminating inconsistency, would risk jeopardizing the decision-maker's duty to decide the dispute in an accurate, sincere and transparent manner. The Tribunal in Saipem v. The People's Republic of Bangladesh[8] expressly referred to consistency as a duty of arbitral tribunals and a necessary requirement to meet 'the legitimate expectations of the community of States and investors towards certainty of the rule of law.'

[7] Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas , Joost Pauwelyn, and Jorge E Vinuales (eds) The Foundations of International Investment Law: Bringing Theory into Practice (Oxford University Press 2014).

[8] Saipem SpA v The People's Republic of Bangladesh, Decision on Jurisdiction, 21 March 2007, ICSID Case No ARB/05/07 67. See www.italaw.com/ sites/default/files/case-documents/ita0733.pdf accessed 25 July, 2021

Another condemnation is that of lack of transparency. Confidentiality and secrecy are traditional hallmarks of an international commercial arbitration. Parties often resort to arbitration because of its confidential character. However, when States get involved, the issue takes the character of a public nature. Against this backdrop, it is not surprising that there have been demands for greater openness and transparency in investment treaty arbitrations.

VIII. Conclusion

In the light of the background of investment treaty arbitration post a series of criticism against its favor, the question arises, whether investment treaty arbitration still has a long future? The answer to that question is, yes. Despite of the shortcomings it entails, the whole system has been a success. It can be pointed out that no system is perfect. Similarly, there exists a room of improvement and refinement for the system of investment treaty arbitration. There is nothing denying the fact that there is no realistic option, as of now, to investment treaty arbitration for the dispute settlement of investor and host state disputes.