

International Investment Arbitration

Investment Arbitration is the new face of arbitration that has been popularised by the recent decisions in *White Industries Australia Ltd. V. Republic of India* and *Antrix Ltd. V. Devas Multimedia Ltd.* case. This form of Arbitration unleashes a potent weapon in the hands of foreign investors who can seek protection for their investments under the Public International Law independent of the remedies available under the Domestic Legal system. Bilateral or Multilateral Investment Treaties are the basis of this form of Arbitration. This Arbitration is unique and has been through the recent decided cases brought into limelight making headway for many notices being issued by Foreign Investors to the Government of India seeking initiation of arbitration proceedings in relation to disputes pertaining to investments made in India.

The present article aims to briefly describe Investment Arbitration and investment Arbitration in context of India. It is first important to understand Bilateral Investment Treaty (BIT) or Bilateral Investment Protection Agreement (BIPA) before venturing into understanding and defining Investment Arbitration.

Bilateral Investment Protection Agreement or Bilateral Investment Treaty

These are international agreements entered between sovereign states under which sovereign states reciprocally agree to accord each other country's investor a certain standard of protection for their investments in each other countries.

These Agreements consist of clauses like "FAIR AND EQUITABLE TREATMENT", "MOST FAVOURED NATION" CLAUSE, "NO EXPROPRIATION" CLAUSE, and "FREE TRANSFER OF FUNDS" CLAUSE that are aimed at protection of investments. By virtue of these clauses, the state obligates itself to protect investments of foreign investors. Arbitration Proceedings are initiated at the instance of Foreign Investors in case of any policy change or a discriminatory measure taken by the host country or any unjust action taken by courts that violates or breaches any of the clauses of these agreements and adversely impacts the investors. These arbitration proceedings are initiated against the State.

Difference between International Commercial Arbitration and Investment Arbitration

International Commercial Arbitration is arbitration based on a commercial agreement containing arbitration clause. This arbitration resolves disputes within the four corners of agreement between two contracting parties that are primarily business enterprises. The Award passed in International Commercial Arbitration is binding on the contracting parties. On the other hand, Investment Arbitration is arbitration initiated on the basis of Treaty and resolves disputes in relation to any breach of protection accorded to foreign investor under the Treaty. Under this agreement, arbitration proceedings are initiated directly against the State for the breach of its obligation under the agreement.

Protection Afforded Under BIT or BIPA

Under BITs, the host state where foreign investor invests obligates to accord fair and equal treatment to investors. A Foreign Investor may initiate arbitration proceedings against the State in relation to any dispute pertaining to investment in cases where the courts of host countries have refused to entertain suits or subjected the suits instituted by foreign investor to undue delay or administered justice in inadequate way that adversely impacts the foreign investors. Primarily, Protection under BIT or BIPA is aimed at safeguarding the interest of investors and in cases where the protection accorded to investors is adversely affected than the investors can enforce claims against the states.

BITs also offer protection to foreign Investors that no arbitrary or discriminatory measures shall be taken that shall adversely affect or impact the rights of investors. Under BITs, a host state offers same protection to investments of all other states as it offers to investments of its states. It resolves that host states shall treat foreign investments no less favourably than investments of all its nationals or investments made by other states.

BIT also offers protection against Expropriation. Under it, the host state offers protection to foreign investors against any direct or deliberate or indirect act that adversely affects the right of the investor to use or enjoy its investment. BITs also offer protection in terms of transfer of funds as it obligates the host state to freely permit the transfer of funds of investments to host state or outside host state.

Arbitration under BITs or BIPAs

BIT like any other treaty offers modes of resolution of disputes that may have arisen between contracting sovereign nations and foreign investors of said nations. This treaty offers that investors of contracting nations may in cases of any breaches of protection offered by BITs can directly initiate proceedings against the State. Under BIT, a cooling off period is initially provided where under it offers a party that is investor opportunity to explore settlement. It is only after failure of this time bound negotiations that disputes are referred to arbitration either to be conducted under UNCITRAL Rules or the International Centre for Settlement of International disputes (ICSID) based in Washington DC for resolution of disputes or any other arbitration forum as provided under the Treaty.

Under BIT, a foreign investor can in situation where he finds the host state violating the treaty norms signed between its home country and host country can first issue a notice to the host state addressing the dispute in relation to investments and seek negotiations. In case of the failure of the aforesaid, the foreign investor can proceed to the initiation of arbitration proceedings either under the ICSID Convention and Rules or under International Chamber of Commerce or any other forum as provided therein in the treaty. The Parties are asked to appoint arbitral tribunal followed by submission of disputes to the tribunal leading to hearing of parties and finally passing of the award. The parties voluntarily comply with the ICSID award in case of arbitration under ICSID

Rules. This ICSID award cannot be challenged and reviewed by national courts of the countries and any challenge to the ICSID award can be done only by review of Committees under ICSID.

India is not signatory to this Convention but foreign investors can initiate proceedings under Additional Facilities Rules of ICSID.

Recent Cases in Context of India

White Industries Australia Limited v. Republic of India is a recent example of investment arbitration in India. In this matter, the ad-hoc arbitral Tribunal in accordance to the Rules of Arbitration under the United Nations Commission on International Trade Law (UNCITRAL) passed an award against the Republic of India for breach of its obligation under the Indian- Australian Bilateral Investment treaty.

The award held India liable for the failure to provide the effective means of asserting claims and enforcing rights to White Industries as foreign investor under the aforesaid treaty. This dispute was a result of an application for setting aside of the arbitral award passed in respect of the dispute between White industries and Coal India over contractual rights under a contract entered between the two parties. White industries had appealed against the dismissal of their application for setting aside the order of Calcutta High Court that had dismissed the application of White industries for dismissing the application of Coal India seeking setting aside of the first arbitral award that had been awarded in favour of White Industries.

White industries had appealed against this order in the Supreme Court where it remained pending for 5 years resulting in White industries invoking Australian-Indian Bilateral investment treaty and thereafter resulting in constitution of arbitral tribunal and passing of the award awarding claims in favour of White Industries. White industries on account of being foreign investor invoked the Bilateral Investment agreement of its home country Australia.

Conclusion

Arbitration has since the passing of the Arbitration Act has always been the most preferred alternative forum of resolution of dispute and investment arbitration has further given impetus to this form of resolution of disputes by providing foreign investors a potent weapon to raise and resolve **any dispute** in relation to investments directly against the State through arbitration process under BITS as aforesaid.

Investment Arbitration provides wider options to the Foreign Investors in respect of safeguards to their investments and emerges to hold a prime place in today's time especially in wake of direct Foreign Investment Policy in India where investments are done with respect to all sectors of commerce and industry requiring adequate safeguards protecting interest of investors.

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