Investment arbitral regime in INDIA: Issues and Challenges

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Investment arbitral regime in India: Issues and challenges

Research Question

The relevance of investment arbitral regime in India?
The main aim of the arbitration is to provide with the arbitral awards. Around the world the commercial arbitration was made for the enforcement of award from the starting to end. With the passage of time, in the commercial and business world volume of Jurisprudence have developed certain awards in many jurisdictions. In the situation of the non-commercial process the investment treaty arbitration is different. There are many factors which create a change in the investment treaty awards like involvement of sovereign and the nature of the states.

India in this case is peculiar, it is considered as one of the attractive destinations for FDI. The inflow in India has grown from US$4 to US$44 billion in the last two decades. India has paved itself great network for investment like liberalization, bilateral investment treaties and the macro-economic policies. This resulted into large number of investor state disputes. Since 1990 there have been recorded 28 cases against India by FDI. Large numbers of cases are still pending in the court. India is considered as one of the best player in FDI. India is ranked as top 10 importing countries and till date the country has been involved into 25 investment arbitrations. Many disputes are relating to the slow judiciary and retrospective taxation.

Abstract
In this paper we will discuss about the enforcement of the investment Arbitration made under the decision of Delhi High Court in the matter of Union of India v. Vodafone Group PLC United Kingdom & Anor (2017) and Union of India v Khaitan Holdings (Mauritius) Ltd & Ors (2019).

Research Methodology
This research would be conducted using a doctrinal approach. I'll consult books and legal sources, as well as study papers and case law. I'll utilise them to discover answers and bring my research to a close. To analyse the processes to be followed in investment arbitral regime in India, I will refer to research publications. Finally, I will use legal databases to highlight key case law that will aid in understanding the relevance of issues and challenges of arbitral regime in India.

The past
In 1994 the first bilateral treaty was signed between India and UK (BIT), after that India became part of the signatory state to the ICSID convention. The reason for the country to become the part was because of the little exposure into the investment disputes. In the year 2000, the statement was made by The Indian Council for Arbitration that India should step back from becoming the signatory of the ICSID because of two reasons one is the perception on being Pro-developed country and the lack of domestic courts.

The first investment dispute was held out of Dabhol Power Plant Project in 2004 which was further settled. The dispute was regarding the efficiency of our country’s judiciary. India breached the rules and hence, tribunal ordered India to pay USD 4 million for the damage to white industries.

In the year 2014 the government was replaced and the new government decided to look into the new arbitration regime and the new model of BIT. In 2017 many existing BIT was removed by the Indian government. Also the FDI approval process was abolished by the government and after the enforcement of new government the new investment arbitration regime was made. The first outcome was the work on BIT model.
The present

In 2018 the treaty was signed among various countries (BIT) which provided possibility to investors so that they can have recourse to investment arbitration.

FPS is one of the absolute and non-contingent standards of treatment, this standard is not dependent upon the treatment by the host states of another investors. It has been guaranteed in the international treaties in the form of the security clause. The clause can be varied from treaty to treaty but the core includes “security” and “protection”. In the historical time, standard was being used by the host state for having measures of investors and investment from having any physical harm. If the mentioned FPS clause is applied on full legal protection and security than such an interpretation is textual and neither ambiguous nor unreasonable. The protection and the security standards creates some of the obligations for the states which are host firstly, not to harm the investments directly by the acts which are attributable to the state and second is to protect the investors against private parties action. The investment protection treaties contain certain laws which assure full protection and security. The formulation of such treaties varies some of them provides with the full or constant protection, the main purpose of the treaty is to provide with the security and integrity of an investment. If the standards are crafted in such a way that it meets global standard and are broad i.e. full protection and security, than the issue of interpretation doesn’t apply. The investors have already invoked the standards and host states have also been opposed for its extended scope. It has been applied to arbitrate disputes among investors in international market. Securities are traded through investment treaty between two countries which create a binding agreement that can be enforced by an arbitral tribunal. Article 1 of the New York Convention of 1958 states that it is applicable to private international law relations between States Parties. The article 2 limits its application to investors and states that it applies only where the relevant transaction involves an investor from one State Party or another State Party, or where at least one other State Party is a contracting party. The first investment treaty ratified by India was the New York Convention. Since then, there has been a proliferation of investment treaties between different countries. The US and European Union have also entered into bilateral and regional agreements to promote cross-border investments. The US and Canada have entered into an agreement to promote and protect investments and simplify and expedite adjudication by treaty arbitration tribunals.

The treaty between India and the US of 1988 is the only treaty that provides for an arbitral tribunal. This can be called a mixed regime, since it involves two different countries which fall under different jurisdiction. However, this mixed regime only still provides for one state to be party to both the treaty and the Convention on Recognition and Enforcement of Arbitral Awards. The GATT does not have an express jurisdiction clause on the question of recognition of awards.

India has also entered into bilateral investment treaties with many other countries. The other bilateral treaties are between India and China, with the latter being a part of the Asia-Pacific Economic Cooperation (APEC) group. India also has a multilateral agreement on investment protection with China. However, it is said that these treaties have no direct legal force in India as they are not instruments of international law binding upon Indian States under international public general jurisdiction. They have been widely regarded as being directly applicable only to foreign investors from the State Party where they have been signed or from another State Party where there is a domestic connection.

The leading cases of "Philip Morris Asia Pacific Investment Partnership v. The Commonwealth of Australia" and "MSC v. Argentina" have changed this perception; however, the extent to which these cases will affect arbitration practice is still unclear due to ambiguous language in the awards and there has been no authoritative guidance on what constitutes a “domestic connection” for this purpose. The 2005 case of "Philip Morris Asia Pacific Investment Partnership v. The Commonwealth of Australia", in which the Indian Supreme Court considered the issue, may provide a helpful indication of how arbitrators should approach these proceedings. "Philip Morris Asia Pacific Investment Partnership v. The Commonwealth of Australia" is an example where the domestic existence requirement was not satisfied, despite being one of the leading cases that has laid down that principle.

The claimant, Philip Morris Asia Pacific Investment Partnership ("AIM"), submitted that it had a domestic connection with the respondent, the Commonwealth of Australia ("Australia") because during the year preceding its investment in shares in Philip Morris Ltd. India Ltd. ("PML"), AIM had invested substantial sums of money into Australia through investments into securities listed on the Australian Stock Exchange or through loans to entities which are listed on the Australian Stock Exchange.

AIM also claimed that as a result of AIM's investment in PML, there was a domestic connection with Australia since AIM had a significant involvement with, and effective control over, the management and affairs of PML and hence, any dispute related to those investments would be effectively related to its dealings and business conducted in Australia. The Court rejected this argument as it found that the shareholders' agreement between AIM and PML, provided that all disputes arising under the shareholders' agreement would be resolved by arbitration. AIM also advanced two additional arguments in support of its submission that the arbitration clause was on the basis of the concept of lex loci arbitri, namely that AIM is a company registered in Mauritius and PML is a company registered in India. It further argued that the parties had no choice of forum at all, which was also incorrect. The Court found that the arbitration clause was enforceable under the law of India and therefore is not merely lex loci arbitri. First, the Court unequivocally holds that a shareholders' agreement is a contract of a special character. A shareholders' agreement once signed by majority shares holders is binding on both parties to the agreement, irrespective of whether there are other third party shareholders who may not have signed on to it.

These features of the agreement are well recognized in India and also overseas. The Court was not persuaded that the parties were simply relying on the fact that it was a shareholders' agreement to support the arbitration clause. Moreover, after signing it, AIM was bound by it even though there are other shareholders who may have other views on how to run PML. Therefore, this argument does not cut much ice. Second, AIM advanced that because the dispute fell squarely under the arbitration clause, India was clearly the lex loci arbitri even though it was a Mauritius company and PML was a company registered in India. Although this may be true

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as a matter of law, as explained above, this argument does not hold water. In order to substantiate the argument that arbitration clauses were always based on lex loci arbitri, AIM referred to judgments from overseas which had been relied upon by those who had adopted those principles. The UK House of Lords in "Dunlop v. Woolfahra Municipal Council" [(1923) AC 582-585] had observed that the lex loci arbitri applied except where there was "clear and express derogation to the contrary". The Court noted that this decision was distinguished by the Privy Council in "Ashville Investments v. Woodside Petroleum" [(1984) 158 CLR 308]. However, in his judgment, Deane J. had said that these cases were concerned with the law to be applied when the parties had not chosen to refer it expressly to the lex loci arbitri. "The choice of law in general", he said, "is determined by reference to the choice between conflicting laws made by the parties. The Court was of the opinion that "Even assuming that the governing law is 'lex loci arbitri," it stated: This is a clear and express choice. It is an invitation to choose the law of India. It is not merely a choice between two legal systems; it means choosing India's law as the whole of the governing law which applies even if there be ambiguity as to which particular branch or branch-substance governs. It is not only the law of India that is chosen but all branches of it. The Court held that the term "lex loci arbitri" does not mean what was stated in "Dunlop" and "Ashville". It referred to the judgments of Lord Wilberforce (at p. 647) and Lord Scarman (at p. 648) in "Petrola Specialties v. ICL", "The Anadarko" and the decision of the House of Lords in "RTS Flexible Systems v. Rolls Royce" [1995] CA. It said that there was a need to have a balanced interpretation of the term "lex loci arbitri".

In this case, it was observed that Indian courts should not be rigid in applying the "lex loci arbitri" and try to give effect to the intention of the parties rather than make a choice between English and Indian law. This case was an appeal against the Final Award of 10 November 2002 by the ICC in which the ICC Arbitral Tribunal had declined to apply the provisions of the Arbitration and Conciliation Act, 1996 (104 of 1996) on the ground that it was "lex fori" and that it would not be "legitimate" to do so. When the award was made on 19 May 2002, section 2 of the Arbitration and Conciliation Act, 1996 had not come into force. A later amendment to that section made it applicable to international commercial arbitration (sections 4 and 5).

The Court held that the international commercial arbitration conducted under the auspices of the ICC was subject to Part I of the Act. The Court rejected the argument that the application of Part I would cause an inconsistency with foreign law. The Court also held that arbitral awards are not enforceable under the Act, and it therefore did not need to consider whether arbitral awards can be recognized and enforced in India.

This post is intended to provide an understanding of investment arbitral regime in India including its issues, challenges, scope etc.

A. Introduction to Arbitration

The term arbitration is often referred to as a means of alternative dispute resolution (ADR). It is a formal process in which the parties to the dispute select an arbitrator or arbitration panels, agrees on procedures for conducting the proceedings, and agree on how they will be bound by the result. The decision reached through arbitration may be binding or non-binding.

Any person who has sufficient legal capacity can enter into an arbitration agreement with another individual or organization. The arbitration agreement may be entered into by two individual parties or two organizations.


The provisions relating to the jurisdiction of the ICC (International Chamber of Commerce) is provided in Article 1 of its Arbitration Rules as amended on August 27, 2011. In India, the provisions relating to commercial dispute resolution by international commercial arbitrators are contained in Section 11 of the Act as amended from time to time. Section 11 is reproduced below:

"(1) A person having a legal interest in a dispute may apply to the court for referring the dispute for arbitration.
(2) The Court shall, before making an order under sub-section (1), satisfy itself that —
"(a) the parties have agreed in writing to submit to arbitration; "(b) the place of arbitration is agreed upon; and "(c) an arbitrator has been selected who is agreed upon by the parties and has accepted the appointment.

The subject is of great interest in international arbitration because India has been a signatory to the Convention since 2004 and the regime for investment is relatively new. This Article sets out the background to investment arbitration, describes the legal regime applicable to investment arbitration, discusses key provisions of the CAATSA agreement and highlights issues that may arise from disputes under the Indian regime in a non-party state in relation to a non-party state in regard to a dispute involving a foreign investor.

This Article discusses the legal regime applicable to investment arbitration and highlights the key clauses of the CAATSA agreement. The international arbitration scene is dominated by two recent agreements - the New York Convention of 1958 on recognition and enforcement of foreign arbitration awards, which India ratified in 1996, and the United Nations Convention on Settlement of Investment Disputes between States and Nationals of Other States (hereinafter referred to as “New York Convention” 1976). Thus, the New York Convention has the advantage of having been in force for almost three decades. The New York Convention also provides more protection to investors than the old CAATSA regime. For instance, it excludes countries that are not making good faith efforts to comply with the treaty from being subject to foreign court disqualification rules.

The CAATSA regime takes effect on September 21, 2018. It is expected to have a significant impact on India's economic relations with Russia especially in terms of infrastructure development. The CAATSA regime may make it more difficult for Indian investors to invest in Russia. It is also expected to lead to greater protectionism with respect to foreign investments. Ministry of Commerce and Industry has recently allowed the exemptions for sovereign wealth funds (SWFs) under section 56 (1) (c) of the Act on Investment that permits them to enter into direct investments in India without the permission of the Reserve Bank of India (RBI). Such exemption was made available by RBI on September 20, 2018. The objective of this article is to identify the challenges that has been faced by the Indian investment regime and to provide a possible solution to these challenges. The focus of this article is on the arbitration mechanism along with its advantages and...
disadvantages. Further, it aims at providing a review of investment arbitrations in India. The authors have also indicated some key arbitration cases that have been taking place in India recently.

**CONCLUSION**

The Indian investment regime has been facing some challenges recently. The Securities & Exchange Board of India (SEBI) is one of the strongest regulators in the country. It has been very tough on its stand against any sort of fraudulent activities in the capital market. Such rigidity is adversely affecting foreign investors. Hence, there is a need for an alternative mechanism to resolve issues that are currently pending before SEBI and also to provide certainty to investors against any future disputes with domestic parties. The investors in India face a number of challenges which could be divided into three broad areas: Arbitration has been an important facet in global investment for centuries. The rules and laws governing arbitration in international investment law are not often codified and thus may be difficult to find. The literature here is not extensive, but it does exist. This article aims to provide a review of the arbitration mechanism in India and some recent case studies. This article also aims at discussing the challenges that India is facing regarding a potential international arbitration.

Arbitration has been a phenomenon in international investment law for centuries. Although it is binding under the CISG, Investment Treaty Arbitration likely requires treaty support, as does all dispute resolution derived from the Convention. In addition, the Hague Conference on Private International Law (HCCH) was established in 1899 and since then related arbitration provisions have been created under its rubric.

**Bibliography**

**WEBSITES:**
- SCC Online, [http://www.scconline.co.in](http://www.scconline.co.in)
- Lexis Nexis Legal, [https://www.lexisnexis.in](https://www.lexisnexis.in)
- Lawctopus, [https://www.lawctopus.com](https://www.lawctopus.com)
- Mondaq, [https://www.mondaq.com](https://www.mondaq.com)

**Cases:**
Delhi High Court in the matter of Union of India v. Vodafone Group PLC United Kingdom & Anor (2017), [India Vs. Vodafone - Tribunal To Rule On Jurisdiction In Multiple Bit Arbitrations; A&C Act Does Not Apply - Litigation, Mediation & Arbitration - India (mondaq.com)](https://www.mondaq.com)
Union of India v Khaitan Holdings (Mauritius) Ltd & Ors (2019), [Injunction in Investment Arbitration: Union of India v. Khaitan Holdings - IndiaCorpLaw](https://www.mondaq.com)