JURISPRUDENTIAL DILEMMA IN THE ENFORCEMENT OF INVESTMENT TREATY ARBITRATION AWARDS IN INDIA

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ABSTRACT

Investment arbitration in India is not a new phenomenon. To date, nearly 30 investment treaty arbitrations under investor-state dispute settlement mechanisms have been filed against India. Irrespective of that, India fails to offer a stable legal system that governs such arbitrations. Although recognising foreign arbitral awards, the domestic law of arbitration fails to accommodate investment treaty arbitration due to its typical public-private nature. This paper will mainly study the enforcement mechanism of these arbitral awards in India. In the process, the paper will examine the possibility of enforcement of investment arbitral awards under the current Indian domestic law, the New York Convention and the pre-2015 Indian treaty regime. From a methodological point of view, the paper will qualitatively analyse the Arbitration and Conciliation Act of 2015, the judgements of the Indian courts on enforcement, and the New York Convention. The paper signifies the importance of enforceability of investment arbitral awards in India by the investors who continue to be protected under the survival clauses in the Indian investment treaties entered in the pre-2015 period.

Keywords: BIT, ITA, ISDS, Foreign Awards, NYC, India, Enforcement

I. Introduction to Investment Treaty Arbitration

International investment law is primarily governed by international investment agreements (hereinafter 'IIA') between the states. IIAs are typically bilateral investment treaties (hereinafter 'BIT') or regional agreements containing investment chapters or provisions. Historically, BITs are entered into by two contracting States mainly to promote and protect investment in the host state.[1] Typically, most BITs contain both substantive and procedural clauses. The substantive provisions govern investment protection and obligation of the parties, and the procedural clauses prescribe procedures to settle future disputes between the investor and the host state. Based on the treaty's provisions, these disputes may be settled through investment treaty arbitration, domestic courts or diplomatic protection.[2] Characteristically, most of the BITs contain investment treaty arbitration (hereinafter 'ITA') as a mode of dispute settlement. ITAs allow foreign investors an international arbitral forum, other than the court system of the host state, to raise a claim directly against the host state. ITAs typically cover two types of dispute settlement mechanisms. One, between the two contracting States, is known as a state-state dispute settlement (hereinafter 'SSDS'). Other, between the investor and the host state, known as investor-state dispute settlement (hereinafter 'ISDS'). ISDS is the most commonly opted system in the current BIT regime.[3] The salient feature of the ISDS clause is that it allows investors to directly bring a claim against a sovereign host state before an ITA forum. To date, the total number of treaty-based ISDS claims stands at 1332.

ISDS may be conducted under *ad hoc* rules like the UNCITRAL Arbitration Rules or institutional rules.[4] The latter may be illustrated by (but not limited to) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter 'ICSID Convention'), the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), the International

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[1] See generally, Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013), 79; See also, Committee on External Affairs, Tenth Report of the Committee on External Affairs (2020-21) on the subject 'India and Bilateral Investment Treaties' (2021) ch 1.

[2] Rudolf Dolzer, Ursula Kriebaum, Christoph Schreuer, *Principles of International Investment Law* (OUP 2022); See genrally, Tadia Begic, *Applicable Law in International Investment Disputes* (Eleven Publishing, 2005)

[3] Roberto Echandi, 'Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rulemaking' in Katia Yannaca-Small, *Arbitration under International Investment Agreements* (OUP 2010).

[4] Franchini D. John, 'International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement' (1994) 62 Fordham L. Rev. 2223; see also, Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration The Interplay Between National and International Law* (OUP 2013).

Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA), and the Permanent Court of Arbitration (PCA) in The Hague.[5] Out of all these institutions, ICSID remains the most common choice of arbitration rules for the parties.[6] ICSID was established to allow individual foreign investors direct rights to take action against host states in case of disputes relating to their investments.[7] Presently, the ICSID Convention is ratified by 158 member states, which can participate in the dispute settlement mechanism of ICSID. The second most prominent institution for settling ISDS claims is the ICC, while a minority of cases involve other institutions.

India started its IIA program in 1994 with the first India-UK BIT. Since the beginning of the IIA program, India has abstained from joining the ICSID and has preferred to submit ITA claims under the UNCITRAL Rules. To date, India has signed a total of 88 BITs. These are based on two different Model BITs. In 2015, India adopted a new Model BIT for negotiating investment treaties with different countries while replacing the 2003 Model BIT. A series of claims were filed against India between 2010 and 2015, and this made India realise the need for change in the Model BIT.[8] The realisation was mainly motivated by the fact that the previous Model had wide interpretative text, which left room for both investors and tribunals to hold India accountable for any regulatory changes affecting India's treaty obligations.[9] As a result, India has so far terminated 77 out of 88 BITs and continues to negotiate treaties based on the Model BIT of 2015.[10] However, several of the terminated BITs contain survival clauses, which will continue to bind India under the provisions contained in those BITs.

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[5] Ibid, Kjos (2013); Simoni Takashvili, 'The Applicable Law to the Subject Matter of the Dispute in International Investment Law According to the ICSID Convention and Georgian Law' (2017) <https://core.ac.uk/download/642930926.pdf.> accessed 10 June 2025.

[6] Katia Yannaca-Small, *Arbitration under International Investment Agreements* (OUP 2010).

[7] Antonio R. Parra, 'ICSID and the Rise of Bilateral Investment Treaties: Will ICSID Be the Leading Arbitration Institution in the Early 21 St Century?' (2000) 94 Proceedings of the Annual Meeting (*American Society of International Law*) 41-43 <http://www.jstor.org/stable/25659347> accessed 25 April 2025; Andreas F Lowenfeld, 'The ICSID Convention: Origins And Transformation' (2009) 38 Ga. J. Int'l & Comp. L. 47, 54.

[8] Prabhash Ranjan & Pushkar Anand, 'Indian courts and bilateral investment treaty arbitration' (2020) 4(2) ILR 199.

[9] Ibid, Ranjan (2020); Bhushan Satish & Shreyas Jayasimha, 'Indian Courts' First Brush with Investment Treaty Arbitration: Taking Some Lessons from the Calcutta High Court' (*Kluwer Arbitration Blog*, 16 March 2015) <http://arbitrationblog.kluwerarbitration.com/2015/03/16/indian-courts-first-brush-with-investment-treaty-arbitration-taking-some-lessons-from-the-calcutta-high-court/> accessed 21 December 2024; Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP 2019).

[10] Ibid, Ranjan (2020), Ranjan (2019); Animesh Das, 'Changing Dimensions of Investor-State Dispute Settlement in India – Protecting the regulatory power of the 'Host-State'?', (2022) Manchester Journal of International Economic Law 19(2) 152.

Since the first BIT was signed, India has included ISDS clauses in its BITs. However, India's ISDS experience has been concentrated over the last decade.[11] Although the first BIT claim was filed in 2003 concerning the Dabhol Project, and subsequently eight more BIT claims were filed in connection to the same Project, all were settled and did not result in any ITA awards (UNCTAD). India was subjected to the actual backlash between 2011 and 2015. The 2011 ITA award in the Australian White Industries marked the turning point for India's BIT program. Most of these claims were directly related to India's regulatory measures in taxation, telecom-and-spectrum licensing and judicial actions. Despite these claims, one of the important matters that still looms and remains unsettled is the question of the enforceability of the ITA awards.

Awards passed by ICSID tribunals under the ICSID Convention are binding and enforceable under Art. 54 of the Convention. Art. 54 of the Convention obliges all the contracting parties to recognise awards passed by ICSID as binding and enforce such awards in a manner similar to that of domestic judgment.[12] In the case of non-ICSID awards including awards passed under the Additional Facility Rules, globally, the awards are enforced as per the New York Convention (hereinafter NYC) and the domestic arbitration law of the concerned state. Likewise, in India enforcement of investment arbitral awards is required to be done under the NYC and through the application of the Arbitration and Conciliation Act, 1996. However, the interaction between the Indian Courts and ITA in terms of the applicability of the Arbitration and Conciliation Act, 1996 has led to anomalous jurisprudential developments in enforcing ITA awards in India.

II. IIA Program and ITA provisions in Indian IIAs

The Indian IIA program was initiated in the early 1990s. The first BIT of India was signed between India and the United Kingdom in 1994. It was predominantly the consequence of the liberalisation policy that was implemented in 1991 in India.[13] An assessment of the various

[11] Prabhash Ranjan and Pushkar Anand, 'How 'Healthy' are Investment Treaties of South Asian Countries: An Empirical Study of Public Health Provisions in South Asian Countries' BITs and FTA Investment Chapters' (2018) 33 (2) ICSID Review - Foreign Investment Law Journal 406–432; See also, ibid, Das (2022).

[12] Christoph H. Schreuer, *et.al*, *The ICSID Convention: A Commentary* (CUP, 2009) 1118.

[13] See, the 'Forewords' written by various Indian Finance Ministers to the Compendiums on BIPAs (New Delhi: Finance Ministry, India, 1996-2011). For example, the India-Singapore Comprehensive Economic Cooperation Agreement (CECA) provides for exemption on import duties for investment in infrastructure sector, which would eventually attract the investors from abroad to invest in the growing economy of India with enhanced securities against adverse changes, thus promoting investment inflow. The Ministry of Finance of the Government of India, as the nodal body for IIA policy and negotiations stated that - "As part of the Economic Reforms Programme initiated in 1991, the foreign investment policy of the Government of India was liberalised and negotiations

Indian IIAs makes it clear that these IIAs are different from each other in their ways, although there are fundamental common traits present. These common traits form the basis of certain specific rights. The fundamental concept is that the Indian Government will not put the investors and their investments at risk of confiscation unreasonably or inappropriately. One of the most peculiar characteristics of the Indian IIAs is the absence of the expressed 'right to make investments' in India. The right to invest in India is a post-operative exercise, which arises only after the investments start in India. It is also essential to take note that the Indian Government exercises the freedom to decide which sectors are allowed for FDI and which will fall on the prohibited list. The government also determines the terms and conditions under which the investments can be made. It is of utmost importance to note that the investments made in India must be established or acquired in accordance with the national laws of India.[14]

The ITA provisions in the Indian IIAs and the Model BIT of 2015 contain both ISDS and SSDS as dispute resolution mechanisms. The ISDS provisions in these IIAs are characterised by three features, firstly, the inherent requirement of exhausting the local remedies before initiating an arbitral proceeding. The provision provides for a lock-in period of five years, before which the investor cannot initiate a BIT claim. Thus, if at the end of five years of proceeding, the investor is not happy and desires to file a BIT claim, the same has to be done within twelve months from the conclusion of the local proceedings. Furthermore, these twelve months are divided into two phases: the first six months and the next ninety days. The first six months should be spent to amicably settle the dispute, failing which, the foreign investor must serve a ninety-day notice period to the host state. Finally, only after this can the foreign investor file a BIT claim.

The ISDS provision under the current India IIA regime typically has three aspects: jurisdictional, substantive, and procedural. Article 13 of the Model BIT provides for the jurisdiction of the ITA tribunals but comes with some limitations pertaining to jurisdictions.[15]

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undertaken with a number of countries to enter into Bilateral Investment Promotion and Protection Agreement (BIPAs) in order to promote and protect on reciprocal basis investment of the investors."

[14] One such occasion was when P.K. Javadekar, Member of Parliament in Rajya Sabha (Upper House of the Parliament in India), asked the government to explain why India has entered into BITs. See Rajya Sabha, List of Questions for written answers to be asked at a sitting of the Rajya Sabha to be held on Tuesday, April 20, 2010, Unstarred Question No. 2615 (asked by Shri. Prakash Javadekar), http://164.100.47.5/EDAILYQUESTIONS/sessionno/219/1552RS.pdf. *See also*, Sreenivasa Rao, Bilateral Investment Promotion Agreements: A Legal Framework for the Protection of Foreign Investments 26 Commonwealth L Bull 623 (2000); *See generally,* Prabhash Ranjan, 'International Investment Agreements and Regulatory Discretion: Case Study of India' (2008) 9 JWIT 209.

[15] According to Article 13.1 & 13.2 of Model BIT 2015, "*13.1) Without prejudice to the jurisdiction of the Courts located in the Host State, Investors and its Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the*

Model BIT extends the ISDS mechanism from Articles 13 to 30, covering various issues ranging from the appointment of arbitrators to transparency provisions, enforcement of awards, and standard of review, which have a bearing on the efficiency of the ISDS mechanism. To a large extent, the problems of the previous IIA regime of India, namely the wide interpretative texts, were somewhat met with under the current system. However, the problem looms because of the investments made under the previous Indian BITs, which were based on the old Model. These investments are mainly protected under the sunset clauses contained in their respective treaties and will continue to be protected for 10 to 15 years post-entry of the treaties.

In these Indian BITs, the ISDS clauses failed to accommodate clear provisions on treaty arbitration mechanisms, which predominantly led to questions about the proper enforcement of ITA awards. Therefore, this paper will deal with the questions of applicable law for the enforcement of ITA awards where India is a host state. In order to study this, the following parts will, firstly, discuss the legal framework for jurisdiction and admissibility of claims against India before investment arbitral tribunals, and secondly, discuss the jurisprudence developed by the Indian courts in case of enforcement of ITA awards in India.

III. Jurisdiction of ITA Tribunals in ISDS claims against India

The applicable law in ITA operates in two planes, international law as per the governing IIA and the domestic law of the host state. There are generally three questions regarding the applicable law in ITAs.[16] Firstly, the determination of law governing the jurisdiction and admissibility of claims by the arbitral tribunal. Secondly, the determination of the law governing the arbitral process and enforcement of the arbitral award. The question of jurisdiction is purely determined by the arbitration consent clause contained in the governing IIA.[17] The arbitral procedure and enforcement of the award are governed by the ICSID Convention in case of ICSID arbitrations, and in non-ICSID arbitrations, the majority of awards are enforced as per the NYC (or Other similar treaties) in addition to the applicable domestic

Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State. 13.2) The Home State shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before their domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investments or Investors in relation to their Investments in the territory of the Host State."

[16] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties. Standards of Treatment* (Kluwer Law International, 2009).

[17] Chistoph Schreuer, 'Jurisdiction and Applicable Law in International Treaty Arbitration' (2014) 1(1) MJDR 1-25.

laws.[18] Thirdly, the law applicable to the substance of the investor's claim is determined, that is, the challenged measure or extent of violation by the host state.

The third question of applicable law to the substance of the claim is governed by an array of laws, which may be a combination of both international and domestic laws. If the ISDS clause of the governing IIA covers contractual claims besides treaty claims (i.e. in the case of an umbrella clause), then the applicable law can be derived from the IIA itself. However, in the case of a purely contractual claim and a domestic law claim, the investor may rely on the contract (including the law governing such contract) and the domestic legal system, respectively.[19] Therefore, in case of a claim which involves a wide range of rights (treaty-based, contractual and rights under domestic law), the application of laws would lead to complexity. Such complexity can be illustrated by the *Maffezini v. Spain* case, where the tribunal considered the Spanish domestic law on public administration and common administrative procedure in addition to the international law in determining the issue of attribution.[20] While determining the environmental impact assessment, the tribunal relied on the governing BIT, international law, Spanish domestic law and the directive of the European Community. Regarding the assessment of the investment contract, the tribunal considered the Spanish Civil Code, the Spanish Commercial Code and other domestic authoritative commentaries.

Jurisdiction of ITA tribunals in ISDS claims is determined through four different ways: jurisdiction through consent, i.e. *ratione voluntatis*; jurisdiction through subject matter, i.e. *ratione materia*. Jurisdiction through parties, i.e. *ratione personae* and jurisdiction through effective time of an act, i.e. *ratione temporis*.[21] The Model BIT of 2003 and the BITs signed based on this Model contained wide jurisdiction for arbitral tribunals.[22] For instance, Art. 2 of the India-United Kingdom BIT and India-Netherlands BIT provides the scope in the following words, '*This Agreement shall apply to any investment made by investors of either Contracting Party in the territory of the other Contracting Party including an indirect investment made through another company, wherever located, which is fully owned by such investors, whether*

[18] H. Ali and D. L. Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International 2021) 83-112.
[19] Supra n. 16.
[20] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7.
[21] Rudolf Dolzer, Ursula Kriebaum, Christoph Schreuer, *Principles of International Investment Law* (OUP 2022).
[22] Aniruddha Rajput, 'India's shifting treaty practice: a comparative analysis of the 2003 and 2015 Model BITs' (2016) 7 JGLR 201-226;

made before or after the coming into force of this Agreement.' This essentially provides a tribunal *with ratione materia, ratione personae,* and *ratione temporis* to adjudicate an ISDS claim under these Indian BITs. Further, Art. 9(3) of the India-Netherlands BIT provides that the dispute may be referred to arbitration under rules of ICSID or Additional Facility Rules or UNCITRAL.[23] This constituted the *ratione voluntatis* for the arbitral tribunal, where the parties consented to arbitrate disputes arising out of the BIT. India does not have a domestic law on investment, however, in the presence of investment contracts, the contract will govern the scope and jurisdiction of arbitral tribunal. Otherwise, in case of claims against India as a host state or for Indian investors in other countries (having a BIT with India), the governing BIT will determine the jurisdiction of the tribunal.

Under the new Model BIT, which was adopted in 2015, and the BITs India signed on the basis of the new Model, the jurisdiction clause has been radically limited in narrowing down the scope of the arbitral tribunals. Firstly, jurisdiction can be extended only to investments made after the BIT has entered into force and not for investments made before the effective date of signing of the BIT. Secondly, six different measures are listed in the new BITs and the new Model, which will fall outside the scope of the treaty and thus non-arbitrable. Thirdly, due to the absence of an umbrella clause, an ITA tribunal will not have any jurisdiction over contractual claims. Fourthly, except for the India-Brazil BIT (which does not contain any provision on ISDS), the new BITs and the new Model limit the application of ISDS only to breach of obligations of parties mentioned under Chapter II of the treaties. Fifthly, the treaties under the ISDS chapter list a number of preconditions to be satisfied for a dispute to be submitted to an ITA tribunal, including a mandatory investor-state conciliation before ISDS.[24]

[23] Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments, Article 9(3), "*If either party to the dispute does not agree to conciliation within one month of the reference or where it is so referred but conciliation proceedings are terminated other than by the signing of a settlement agreement, or if no reference is made to international conciliation, the dispute may be referred to arbitration as follows: (a) if the Contracting Party of the investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 and both parties to the dispute consent in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes, such a dispute shall be referred to the Centre; or (b) if both parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings; or (c) if the course of action at (a) and (b) above is not followed then the dispute shall be referred to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 if the investor so agrees*."

[24] James Claxton, Luke Nottage & Ana Ubilava, 'Mandatory Investor-State Conciliation before Arbitration in Asia-Pacific Treaties: New Developments and Implications for India and Australia' (2021) 13 IJIEL 209.

IV. Enforcement of ITA Awards

In India, arbitration (including international commercial arbitration) is dealt with under the Arbitration and Conciliation Act, 1996 (hereinafter, the Arbitration Act). The Arbitration Act is divided into four parts. Part I of the Act governs every aspect of arbitrations seated in India. It contains provisions governing the arbitration agreement, composition of the arbitral tribunal, jurisdiction of such tribunal, conduct of arbitral proceedings, passing of award, application for setting-aside of award and enforcement of award. The enforcement of an arbitral award passed in India is done under the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.[25] Part II of the Arbitration Act contains provisions governing the 'enforcement of certain foreign awards' in India but passed in a country that is a party to the NYC or the Geneva Convention. Part III and IV of the Arbitration Act deal with Conciliation and Supplementary provisions respectively. However, the Act does not mention BIT arbitrations in any of the parts. As a result, there is a legislative void regarding investment arbitration in India.[26] Therefore, can an ISDS award be considered a foreign award in India, so that the same may be enforced under Part II of the Arbitration Act, this is a debatable question which reached Indian courts for interpretation.

India has two reservations in NYC since it ratified the Convention in 1960. Firstly, "*India will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State*." Secondly, "*India will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.*" S. 44 of the Arbitration Act mandates the second reservation to be satisfied to qualify as a foreign award under Part II of the Act. S. 44 of the Act states the requirement in the following words: "…unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India…". Further, S. 48 (1) and (2) of the Arbitration Act provides the list of grounds on which an Indian court can refuse enforcement of a foreign arbitral award. Hence, for an ISDS award to be

[25] Sai Ramani Garimella and Gautam Mohanty, 'The Faux Pas of Automatic Stay Under the Indian Arbitration Act, 1996 - The HCC Dictum, Two-Cherry Doctrine, and Beyond' (2021) 21 PDLJ 195, <https://digitalcommons.pepperdine.edu/drlj/vol21/iss1/7> accessed 12 June 2025.

[26] Prabhash Ranjan and Deepak Raju, 'The Enigma of Enforceability of Investment Treaty Arbitration Awards in India' (2011) 6 AJCL 1-33

considered a 'foreign award' under part II of the Act, such award must be the outcome of a difference in a legal relationship that is 'commercial' in nature under Indian law.[27]

Here question arises, whether an ISDS award which is sourced out of a BIT can satisfy the requirement of 'commerciality'. The word 'commercial' is not defined under the Act. Only the word 'commercial dispute' is defined under a recent statute called The Commercial Courts Act, 2015. The Model BIT of 2015 (under Art. 27.5) and the BITs signed by India with Kyrgyzstan, Belarus and UAE contain a clarification in the following words: '*A claim that is submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention*.' This should clarify the position at least for the recent BITs (signed under the 2015 Model) but will fail to satisfy the condition of 'law in force in India' since a treaty to become a law needs to be ratified. The Indian BITs based on the older Model of 2003 were also totally silent about the commercial nature of BITs. Therefore, the investments made under the Indian BITs which are either terminated or are based on the older Model may still face the question of enforcement, in case of any future ITAs.

V. Jurisprudential Dilemma

In the absence of any proper legislative clarification on the applicability of the Act on ISDS awards, the Indian courts have shed some light in the recent past. As a result, the entire jurisprudence on the applicability of the Indian arbitration law has developed only through the interaction of ITAs and Indian domestic courts.[28] The interaction on the matter of the applicability of the Act has taken place in only three cases in India. However, before looking into these three cases, the paper will seek to study the word 'commercial' as interpreted by the Indian domestic courts in different cases, other than ITAs in India.

The Gujrat High Court in *Union of India v. Leif Hoegh* held that the word 'commercial' encompasses all business and trade transactions in any form.[29] The Supreme Court of India in *R.M. Investments v. Boeing*, while interpreting Section 2 of the Foreign Awards (Recognition & Enforcement) Act, 1961, which was the erstwhile legislation to the current Arbitration Act

[27] Simon Greenberg et.al., *International Commercial Arbitration – An Asia-Pacific Perspective* (OUP 2012).
[28] Prabhash Ranjan & Pushkar Anand, 'Indian courts and bilateral investment treaty arbitration' (2020) 4(2) ILR 199. See also, Satish Bhushan, 'BIT Arbitration in India: Exploring Applicability of the 1996 Act and Enforcement of Resultant Arbitral Awards' (2011) 4(2) Contemporary Asia Arbitration Journal 273-304.
[29] Union of India, and others v. Lief Hoegh & Co. and others, AIR 1983 Guj 34.

in India, defined the word 'commercial'.[30] The definition of the word was construed broadly and required the word to have '*regard to the manifold activities which are an integral part of international trade today*'.[31] Over the period, the courts in India have only narrowed down the application of the word 'commercial' to limit the application to private parties. This interpretation of the Indian courts has proved to be restrictive of the application of the Arbitration Act on transactions which are not purely private but involve a State as a party.[32] In recent years, *Port of Kolkata v. Louis Dreyfus Armatures*, *Union of India v. Vodafone* and *Union of India v. Khaitan*, have furthered the interpretative jurisprudence on the direct interaction of application of the Arbitration Act on ITAs.

In *Port of Kolkata v. LDA*, the Calcutta High Court in 2014, ruled in favour of the applicability of the Indian Arbitration Act in case of ISDS claims.[33] It was the first time that an Indian court deliberated on the interaction between a BIT claim and the applicability of the Indian Arbitration Act. The judgement prohibited the French investor Louis Dreyfus Armateurs SAS (LDA) from invoking ISDS claims under the India-France BIT through an anti-arbitration injunction under S. 45 of the Indian Arbitration Act.[34] The judgement essentially signified that the Act is applicable in cases of ISDS claims, thereby, extending the applicability of the Act in case of enforcement of ISDS awards in India. In *LDA*, the High Court presumed the automatic applicability of the Arbitration Act in the case of BIT Arbitration, without affording any reasons for the same.

S. 45 of the Act provides power to the Indian courts to refer parties to arbitration. However, the last part of the section allows such judicial authority to reserve the right to refuse parties to refer the matter to arbitration if '*it finds that the said agreement is null and void, inoperative or incapable of being performed.*' S. 45 is drafted similarly in line with Art. II(3) of NYC. The Calcutta High Court under the powers conferred under S. 45 of the Act, presumed the applicability of the Act on ISDS claims without providing any separate reasons for the same.

[30] R.M. Investments & Trading Co. Pvt. Ltd. v. Boeing Co., AIR 1994 SC 1136.
[31] Ibid, Para. 12.
[32] See generally, Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions', (2005) 73 FLR 1521.
[33] The Board of Trustees of the Port of Kolkata v Louis Dreyfus Armatures, G.A. 1997 of 2014 & C.S. No 220 of 2014.
[34] Bhushan Satish and Shreyas Jayasimha, 'Indian Courts' First Brush with Investment Treaty Arbitration: Taking Some Lessons from the Calcutta High Court' (Kluwer Arbitration Blog, 16 March 2015) <https://arbitrationblog.kluwerarbitration.com/2015/03/16/indian-courts-first-brush-with-investment-treaty-arbitration-taking-some-lessons-from-the-calcutta-high-court/> accessed 21 December 2024.

However, in two other subsequent decisions, the Indian courts held an adverse opinion regarding the applicability of the Act in the case of ISDS claims, thereby giving rise to a jurisprudential dilemma regarding the enforcement of ISDS awards.

Contrary to the *Port of Kolkata v. LDA* judgement, the Delhi High Court in both the *Union of India v. Vodafone Group Plc* and the *Union of India v. Khaitan Holdings (Mauritius) Limited and Ors* ruled out the presumption in the applicability of the Arbitration Act in cases of ISDS claims while deciding on anti-arbitration injunction.[35] Both the decisions were based on the interpretation of the word 'Commercial' as mentioned in S. 44 of the Act vis-à-vis the NYC.[36] The Court held that the word 'Commercial does not include ISDS claims' because the cause of action in a BIT is 'fundamentally a breach of state's Sovereign functions' rather than commercial. In the *Vodafone* case, the Delhi High Court reasoned its decision mainly based on the nature of BIT arbitration. According to the Court, the private-public transaction, i.e. a private investor on one side and the State on the other side, in the case of a BIT arbitration fails to categorise it as a typical international commercial arbitration. Reiterating the same, in the Khaitan Holdings case the Delhi High Court focused its argument on the fundamental definition of commerciality missing in a BIT Arbitration and held that the instant dispute was arising out of a BIT, and not from any private commercial relationship.

Conclusion

The Vodafone and Khaitan Holdings cases have clarified a jurisprudence which allows the Indian courts to exercise supervisory jurisdiction over BIT arbitration as contrary to the LDA case. The side-effect of this approach primarily results in unlimited power to the Indian domestic courts to interfere with BIT arbitrations. The applicability of the Arbitration Act in BIT arbitration in India would predominantly be questionable, irrespective of the arbitration being seated in India or otherwise. India being a non-ICSID state, the enforcement of ITA awards is rendered under the NYC, since, the Arbitration Act which implements the NYC in India now becomes inapplicable, and the enforceability of ITA awards, as well would suffer from a similar dilemma. As a result, the only possible recourse left to the investors for enforcement of ITA awards would be under the Civil Procedure Code 1908. Under such

[35] Union of India v Vodafone Group Plc United Kingdom & Anr, CS(OS) 383/2017 & I.A. No 9460/2017; Union of India v Khaitan Holdings (Mauritius) Limited & Ors, CS (OS) 46/2019, I.As. No 1235/2019 & 1238/2019

[36] Tying- Wei Chiang, 'Anti-Arbitration Injunctions in Investment Arbitration: Lessons Learnt from the India v. Vodafone Case' (2018) 11 Contemporary Asia Arbitration Journal 251.

circumstances, the investor will be required to file a suit for execution under Order XXI of the Civil Procedure Code, leading to a delayed resolution of the enforcement and ideally defeating the purpose of an ISDS mechanism.

Therefore, the difference in the judgments of the High Courts of Calcutta and Delhi in terms of the applicability of the Act in ISDS claims has created uncertainty in the enforcement of ITA awards in India. This jurisprudential development which might lead to a virtually remediless situation for a foreign investor seeking enforcement of an ITA award in India, can be cured only through legislative interventions or further decisions of the Indian High Courts or Supreme Court in future cases.