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Concept of Investment Arbitration and Legal Framework for Regulating it in Australia

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ABSTRACT

Investment Law is an important part of Public International Law. This branch requires actors who are both sovereign states and individuals. States look up to investments as important enticements for strengthening their economic status. But at the same time, states being sovereigns are also required to exercise their regulatory powers. The legal framework for regulating foreign investments exists under municipal legal systems. It falls within the domain of State laws. By implementing domestic laws for regulating foreign investment, States exercise their sovereign powers. The approach of states is different for Foreign Investments as compared to foreign investments. These laws implemented by States are based on international conventions like the Washington Convention (ICSID Convention) and New York Convention and United Nations Convention on International Trade Law (UNCITRAL). Investment Arbitration is a mechanism to resolve disputes between investors and states. International conventions and institutions are means to administer Investment Arbitration. In this field, there is a number of significant aspects like the agreement upon which arbitration would be based, consent on the part of the state and individual investor, the institution to administer, the finality of the award, and challenges to enforcement. In this paper, the author will try to analyze the concept of investment arbitration and the legal framework in Australia highlighting the main provisions for the regulation of foreign investment.

Keywords: Investment, Investment Arbitration, ICSID, UNCITRAL, New York Convention.

I. INTRODUCTION

Investment Law is a growing branch of Public International Law. This branch has shown significant growth post globalization and liberalization of economies. Investments are tools to strengthen economic ties between states and help in fostering national income of states. The entire network of investment across states is regulated through International Investment Agreements, specific chapters on investments under multilateral treaties like NFATA and

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Energy Charter Treaty and BIT's (bilateral investment treaties). These can be considered as the sources of Investment Law. BIT's are agreements between states and beneficiaries of those agreements are the individual investors, both natural and artificial. Vienna Convention on Law of Treaties² is a very important tool to understand and interpret treaties.

Investments can be made in inward or outward form through treaties. After entering treaties, states undertake to fulfill certain obligations as is mentioned under the treaty and not to act in an inconsistent manner, being contrary to the main objective and purpose of the treaty.³ Analyzing the current practice of states in investment law, it can be said that this principle of VCLT is not strictly followed by the states. Calling for Foreign Direct Investment is choice of the states but exercising its regulatory power is a part of sovereign prerogative of the state which it must follow. This gives rise to the conflict between states interests as a regulator and individual investor's interest who looks for maximum returns in minimum risk.

Investment arbitration is a concept which is imbibed in the agreement entered between the states. It comes into play at the time of dispute. As a foreign national is involved in the dispute and the other party is a state, its not appropriate to approach national courts for resolving the disputes. Investment arbitration is administered through the agreement entered between the two state parties, one which is host, i.e., where investment is made and other is home i.e., state whose nationality is borne by the investor. It is administered under different institutions and conventions. The most popular conventions are the Washington Convention or the ICSID Convention and UNCITRAL Convention. ICSID acts as a platform for resolving disputes between investor and states but the only problem is that every state is not a party to ICSID Convention. This is because of some important provisions under ICSID which is contrary to the sovereign prerogative of the states. Hence those states who are not party to ICSID convention, they administer investment arbitration through UNCITRAL Model Law.

In order to give effect to ICSID Convention or UNCITRAL model law, states enact domestic law i.e., law enacted through the state legislature. These state laws are exactly based on the international conventions, but they form a part of the law of the land. Another important aspect under investment arbitration is about the enforceability and recognition of awards. The investment awards passed under ICSID are final and binding and enforceable. But UNCITRAL Model Law awards are subjected to the scrutiny under New Convention. This convention is also one of the most popular international conventions and its incorporated under the domestic laws

² Article 31, VCLT 1969

³ Article 18, VCLT 1969

of number of states. Any award rendered by the tribunal constituted as per UNCITRAL Model Law must satisfy the conditions as enumerated under Article V of the New York Convention to be enforceable.

II. INVESTMENT RELATED LAWS IN AUSTRALIA

The legal framework for investment related aspects in the municipal legal framework can be classified under the following heads:

1. Laws for regulating internal investments in Australia
2. Laws for regulating external investments in Australia
3. Laws for implementing the provisions of ICSID Convention
4. Laws for conducting non- ICSID Convention investment arbitrations
5. Laws for the implementation of New York Convention

(A) Law for implementing ICSID Convention

Australia has ratified the ICSID Convention. Being a signatory to the ICSID Convention, Australia takes the benefit of the provisions of the convention which streamline the entire procedure for investment arbitration. In order to give effect to the ICSID Convention domestically, the state has enacted a domestic piece of legislation called ICSID Implementation Act 1990.

The current framework is given under the International Arbitration Act 1974. This act was enacted by the Australian Parliament for giving effect to the Convention on settlement of Investment disputes between states and nationals of the other states signed by Australia on 24th March 1975.⁴ Part IV of this Act, highlights different provisions for the application of the Convention on settlement of investment disputes between states and nationals of other states.

This part is divided into three main divisions. Division 1 highlights some preliminary points relating to interpretation. Division 2 highlights the provision of investment convention and Division 3 portrays some miscellaneous provisions.

Division 1 comprises of the interpretation clause in which clearly states that about some terms like award, investment convention, department and secretary It is clearly stated that award under this part is equivalent to the same term as is present under Article 50, 51 and 52 of the International Convention for the settlement of investment disputes.⁵ The foreign affairs related

⁴ Section 2D (f) International Arbitration Act, 1974, <https://www.legislation.gov.au/Details/C2022C00086> Accessed on 27th November 2022

⁵ Section 31 (1) International Arbitration Act, 1974

matters are supervised by The Department of Commonwealth, represented by the Secretary of the Department.⁶

Division 2 clarifies⁷ that the provisions of Chapter II to VII of the ICSID Convention have the force of law in this state. Awards are binding on the parties and there is no scope for appeal under the convention.

Division 3 clarifies that the evidence relating to the investment convention will be utilized.

(B) Laws for implementing non- ICSID Convention Awards

The International Arbitration Act is based on UNCITRAL Model. The same is followed for governing non-ICSID arbitrations as well. By virtue of Model Commercial Arbitration Bill, all the state parties and territories are preparing to implement their own domestic legislations for carrying out arbitrations in Australia. Before 2010, domestic legislation regarding arbitration varied between states and territories within Australia. All the Australian States and territories have adopted and enacted different versions of the UNCITRAL Model Law and have created a uniform framework for domestic arbitration in Australia.

Following is the list of some laws that are implemented in line with the UNCITRAL Model law⁸:

1. Commercial Arbitration Act 2010 (NSW)
2. Commercial Arbitration (National Uniform Legislation) Act 2011(NT)
3. Commercial Arbitration Act 2013 (QLD)
4. Commercial Arbitration Act 2011 (SA)
5. Commercial Arbitration Act 2011 (TAS)
6. Commercial Arbitration Act 2011 (VIC)
7. Commercial Arbitration Act 2012 (WA)
8. Commercial Arbitration Act 2017 (ACT)

(C) Laws for implementing the New York Convention

For the enforcement of investment awards in Australia, courts are relying upon the New York Convention 1958. The provisions of this Convention have been incorporated under Part II of the International Arbitration Act 1974. According to this part of the Act, a foreign award may

⁶ Ibid.

⁷ Article 32 International Arbitration Act, 1974

⁸ <https://acica.org.au/commercial-arbitration-acts/> Accessed on 28th November 2022.

be enforced in the court of a State or territory as if it is an award or judgment of that court.⁹ Also, the grounds for refusal to enforce the award are mentioned under the same Act and these are identical to the grounds mentioned under Article V of the New York Convention 1958.

The courts in Australia have never faced the task of enforcing an investment award against Australia. They have always taken a pro-arbitration stand for both investment and commercial arbitration awards. The Federal Court of Australia has enforced two ICSID awards obtained by *Eiser Infrasturctre Ltd v Kingdom of Spain*¹⁰ and *Kingdom of Spain v Infrastructure Services Luxemborg [2021] FCAFC 112*.

(D) Laws for regulating Internal Investments in Australia

The Internal Investments made in Australia are regulated through a domestic legislation. These investments are made in the host state Australia and are made by Foreign Investors. As per the terms of the bilateral investment treaty signed between the home state of the foreign investor and the Australia government, the foreign investors are entitled to some of the basic protections to their investments and the host state is under an obligation to not to act in a manner inconsistent with its obligations. But there must be a balance of conflicting interests. The host state regulates or exercises its sovereign function by virtue of its domestic enactments. The domestic law which regulates the internal investments in Australia is Commonwealth of Australia Constitution Act 1901. It gives the foreign investors protection from expropriation. In case there is breach of any obligations by the state, the foreign investor can approach the Local Courts.

(E) Laws for regulating External Investments in Australia

The investments made by Australian Nationals in abroad are also protected as Australia has ratified the Convention establishing the Multilateral Investment Guarantee Agency (MIGA).

MIGA is a member of the world bank group. It provides political risk insurance and credit enhancement to the foreign investors and lenders who invest in developing countries. As it's a part of World Bank Group, majority of states are its members. Hence any government action detrimental to the investments are protected under MIGA. It protects only those projects which are developmentally sound and meet high social and environmental standards.¹¹

III. CONCLUSION

The key observation that can be drawn is being a signatory to ICISD Convention adds a benefit to the state. Also, the legal framework is very clear for governing non-ICSID Awards. The

⁹ Article 8 (3) International Arbitration Act, 1974

¹⁰ [2020] FCA 157

¹¹ <https://www.miga.org/about-us> Accessed on 28th November 2022.

judiciary has also take a pro arbitration stand in both investment and commercial perspective. All these factors combinedly taken strengthen Australia's position in economic terms.
