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The Enigma of Enforceability of Investment Treaty Arbitration Awards in India

Prabhash Ranjan and Deepak Raju

Abstract

This paper critically discusses the issue of enforceability of investment treaty arbitration (ITA) awards against India under the Indian domestic law on arbitration. In this regard, the paper discusses the relevant provisions of the Indian arbitration law and its interpretations by the Indian judiciary to understand their ramifications for the enforcement of ITA awards against India. The paper also discusses the proposed amendments to the Indian arbitration law and its ramifications on ITA. The issue of enforcement of ITA awards in India has become important due to India's gigantic international investment treaty programme where each treaty allows for investor-state treaty arbitration to settle disputes between investors and India. This issue has also become important in light of the growing observation that enforcement of foreign commercial arbitral awards in India is extremely difficult especially after the Venture Global engineering case. Thus, India is endeavouring to change the arbitration law so as to alter this perception. This paper argues that in spite of these proposed changes; enforcement of ITA awards may still face problems. Thus, the paper suggests that India should address the issue of enforceability of ITA awards given its gigantic investment treaty programme aimed at attracting foreign investment.

KEYWORDS: International Investment Agreements, India, arbitration, investment treaty arbitration

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I. INTRODUCTION

The enforceability of foreign arbitral awards in India is governed by the *Arbitration and Conciliation Act of 1996* ('Indian Arbitration Act'). This legislation covers international commercial arbitration (ICA –where at least one party is not an Indian national) and also domestic arbitration (where both parties are Indian nationals). The issue of enforceability of foreign arbitral awards in India assumes importance not just for ICA awards that arise out of contractual obligations or private arbitration agreements but also for those foreign arbitral awards that arise out of India's International Investment Agreements ('IIAs').[1] IIAs are treaties signed at the bilateral, regional or multilateral level by two or more countries to protect investments made by one country's investors in the other country.[2] Apart from containing substantive investment protection provisions, these IIAs allow individual investors to bring proceedings against host states if the latter's conduct (such as a regulatory measure) is not consistent with the IIA.[3] This investor-state treaty arbitration is an important feature of these IIAs and is called investment treaty arbitration ('ITA') in this paper.

While work has been done on enforceability of ICA awards in India,[4] the specific issue of enforceability of ITA awards, in light of the Indian Arbitration

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[1] IIA, as a generic term, means Bilateral Investment Treaties (BITs), investment chapters in Free Trade Agreements (FTAs) and in Comprehensive Economic Cooperation Agreements (CECAs). In India, IIAs are called 'Bilateral Investment Promotion Agreements' (BIPAs). The term IIAs, in this paper, does not include Double Taxation Avoidance Agreements. The text of Indian IIAs, referred to in this paper, is taken from the eight volumes of Compendium of India's investment agreements published by the Ministry of Finance, Government of India (on file with the author) [Ministry of Finance Compendium].

[2] See Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24 Int'l Law 655 at 659.

[3] For a general discussion on IIAs, see A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties* (The Hague: Kluwer, 2009); A.F. Lowenfeld, *International Economic Law*, 2d ed (Oxford: Oxford University Press, 2008) at 467-591; C. McLachlan et al, *International Investment Arbitration – Substantive Principles* (Oxford: Oxford University Press, 2007); R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) [Dolzer and Schreuer (2008)]; R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (The Hague: Kluwer, 1995); M. Sornarajah, *The International Law on Foreign Investment*, 3d ed (Cambridge: Cambridge University Press, 2010) at 204-314 [Sornarajah (2010)]; P.T. Muchlinski *et al*, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008); J. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010) [Salacuse (2010)].

[4] Aparna D. Jujjavarapu, *Judicial Review of International Commercial Arbitral Awards by National Courts in the United States and India* (LLM Thesis, University of Georgia School of Law, 2007) online: <http://digitalcommons.law.uga.edu/stu_llm/82>; Sumeet Kachwaha, "Enforcement of Arbitration Awards in India" (2008) 4 Asian Int'l Arb J 64; T. Khindria, "Enforcement of Arbitration Awards in India" (1995) 23 Int'l Bus Law 11; V. Reddy & V. Nagaraj, "Arbitrability: The Indian Perspective" (2002) 19 J Int'l Arb 117.

Act, has not been examined before.[5] Thus, there is a dearth of academic literature looking at this issue. This paper aims to fill this gap by focussing on the questions that surround enforceability of ITA awards against India as a result of India's IIAs. In this light, the paper will discuss the issue of enforceability of ITA awards and the problems related to enforcement of ITA awards under the present law. The paper will then discuss the enforceability of ITA awards under the recently proposed amendments to the Indian Arbitration Act in order to demonstrate that the enforceability of ITA awards will remain problematic notwithstanding their implementation. By doing so, the paper hopes to make an important contribution to the ongoing debate on the enforcement of arbitral awards in India, and trigger further research on this issue.

In order to substantiate these arguments, the rest of the paper is divided as follows. Section II introduces the Indian Arbitration Act and the current debates on enforcement of foreign arbitral awards in India. Section III introduces the Indian IIA programme, discusses the basic nature of ITA and distinguishes it from ICA, and analyses the anatomy of ITA provisions in 67 Indian IIAs. Section IV traces the evolution of Indian arbitration law to the present Indian Arbitration Act. Section V discusses the current statutory provisions and examines the interpretations developed and adopted by the Indian judiciary and their implications on the enforceability of ITA awards. Section VI then discusses the recent proposed amendments, the reasons behind them and their implications on the enforceability of ITA awards in India. Section VII concludes.

II. INDIAN ARBITRATION ACT

The Indian Arbitration Act is divided in four parts. Part I is titled 'Arbitration' containing sections 2 to 43. Part II is called 'Enforcement of Certain Foreign Awards' and consists of Chapters I & II containing sections 44 to 60. Chapter I of this part deals with the enforcement of awards under the 'New York Convention'[6] and chapter II deals with the enforcement of awards under the 'Geneva Convention'.[7] Part III deals with conciliation (sections 61 to 81). Part IV contains sections 82 to 86 and provides for supplementary provisions.

This legislation is inspired by the United Nations Commission on International Trade Law (UNCITRAL) Model Law and is aimed at minimizing

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[5] Work has been done on the issue of enforceability of investor-state arbitral awards in other jurisdictions; for instance, for enforcement of such awards in Canada see B. Choudhury, "Determining the Appropriate Level of Deference for Domestic Court Reviews of Investor-State Arbitral Awards" (2007) 32 Queen's LJ 602.

[6] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, 10 June 1958, 7 ILM 1046 (1968).

[7] *Convention on the Execution of Foreign Arbitral Awards*, done at Geneva, 26 September 1927, (1927) 92 LoNTS 30

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judicial intervention in the process of arbitration, including ICA.[8] However, as the paper will show, the Indian judiciary has interpreted its own powers under the Indian Arbitration Act too broadly and thus has expanded the scope of judicial interference in the enforceability of foreign arbitral awards. This expanded scope of judicial interference has posed problems for the implementation of foreign arbitral awards (discussed later in the paper). In order to overcome these problems, a bill to amend the Indian Arbitration Act was presented in the Indian Parliament in 2003.[9] However, this bill was later withdrawn.[10] Nevertheless, this amendment bill is still important because it is part of the ongoing debate and efforts to amend the Indian Arbitration Act.[11] A recent case – *Venture Global Engineering v. Satyam Computers*[12] – has highlighted the problems in Indian arbitration law regarding the enforceability of foreign arbitral tribunals due to excessive judicial interference.[13] Excessive judicial intervention impinges on the efficacy of arbitration as a means to expeditiously settle international commercial disputes.

Keeping this in mind, the Indian Ministry of Law and Justice[14] has recently issued a consultation paper[15] proposing the amendment of the Indian

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8 *Arbitration and Conciliation Act, 1996*, Law No. 26 of 1996, 16 August 1996, § 5 [Indian Arbitration Act].

9 In this regard also see Law Commission of India, *176th Report on the Arbitration and Conciliation (Amendment) Bill 2003*; Parliamentary Standing Committee, *Report on the Arbitration and Conciliation (Amendment) Bill, 2003* (2005).

10 India, Ministry of Law and Justice, Press Release, "Amendments in Arbitration and Conciliation Act 1996" (7 April 2010) online: <http://www.pib.nic.in/release/release.asp?relid=60108>.

11 The fact that Ministry of Law (2010), *infra* note 15, contains this bill as one of the annexures is ample testimony to the continued relevance of the bill.

12 *Venture Global Engineering v. Satyam Computers*, (2008) 4 SCC 190 [*Venture*].

13 For a detailed critique of this case see D. Sabharwal, "Another Setback for Indian Arbitration (and Foreign Investors)" (2008), online: <http://www.whitecase.com/idq/spring_2008_4/> [Sabharwal (2008)]; A.P. Rebello, "Of Impossible Dreams and Recurring Nightmares: The Set Aside of Foreign Awards in India" (2010) 6(1) Cambridge Student L Rev 274; A.N. Jain, "Yet Another Misad-Venture by Indian Courts in Venture Judgement" (2010) 26 Arb Int'l 251 [Jain (2010)]; S. Sattar, "National Courts and International Arbitration: A Double Edged Sword?" (2010) 27 J Int'l Arb 51 at 64-65 [Sattar (2010)]. In this regard also see S. Zaiwalla, **"**Commentary on the Indian Supreme Court Judgment in Venture Global Engineering v. Satyam Computers Services Ltd" (2008) 25 J Int'l Arb 507, who has argued that the Venture ruling was justifiable given the complex facts of the case.

14 The Ministry of Law and Justice is a limb of the Central Government of India. It comprises of the Legislative Department and the Department of Legal Affairs. The Department of Legal Affairs is concerned with advising the various Ministries of the Central Government while the Legislative Department looks after the drafting of principal legislation for the Central Government. For more on the ministry see <http://lawmin.nic.in/>.

Arbitration Act and hence reigniting the efforts made in this direction in the first half of the decade. The intent of the government is clearly to change the impression that enforceability of foreign commercial arbitration awards in India is difficult[16] by seeking to nullify the expansive interpretation given by the judiciary.[17]

The paper will argue that even with the proposed amendments mooted by the consultation paper, problems will persist regarding the enforceability of ITA awards because the nature of these awards is different from an ICA award – a point that perhaps has not been well understood by the Indian policy-making establishment. For example, the entire Law Ministry consultation paper[18] on amending the Indian Arbitration Act speaks of ICA without even once mentioning India's obligations under the IIAs and the enforcement of ITA awards. The inherent assumption seems to be that ITA awards are very much a part of ICA and hence there is no need to have separate discussions on the enforceability of the former. This paper wishes to challenge this inherent assumption and argues that the enforcement of ITA awards throws up different challenges as opposed to the enforcement of ICA awards.

III. INVESTMENT TREATY ARBITRATION AND INDIA'S IIAS

As of now, the issue of enforceability of ITA award in India has not arisen because India has been involved in only one ITA – the *Dabhol Power Project* case[19] – which was settled 'out of the court'.[20] Although the exact amount of compensation paid by the Indian government in this case is not known, an eminent Indian economist has said that the compensation paid by India was close to a mammoth US$1 billion.[21] However, fewer disputes in the past do not mean that more such disputes cannot arise in future. The possibility of such awards being issued against India in the future has increased because of three factors.

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15 India, Ministry of Law, *Amendments to the Arbitration & Conciliation Act, 1996 – A Consultation Paper* (2010), online: <http://lawmin.nic.in/la/consultationpaper.pdf> [Ministry of Law (2010)].

16 Sabharwal (2008), *supra* note 13.

17 Ministry of Law (2010), *supra* note 15 at 29.

18 Ministry of Law (2010), *supra* note 15 at 29.

19 *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Cooperation Limited* (27 April 2005), Case No. 12913/MS (International Court of Arbitration of the ICC), available at <http://ita.law.uvic.ca/documents/Dabhol_award_050305.pdf>.

20 "GE settles Dabhol Issue", *Indian Express* (3 July 2005), online: <http://www.indianexpress.com/oldStory/73760>.

21 J. Ghosh, "Treacherous Treaties", *Frontline* 27:24 (2010), online: <http://www.frontlineonnet.com/fl2724/stories/20101203272409200.htm>.

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First, India is one of the major foreign investment destinations today. Foreign direct investment (FDI) inflows to India rose from US$393 million in 1992-93 to US$5,549 million in 2005-06.[22] This increased many times to US$25,888 million[23] in 2009-10.[24] This impressive growth in FDI means that the Indian economy is fast integrating with the global economy, which in turn is increasing the interactions between the Indian state and foreign investors. This, in turn, could create more situations of disputes between India and foreign investors in future. The recent tax dispute with *Vodafone BV International* (Vodafone's Dutch entity)[25] and disputes related to regulatory issues with *Posco Steel* (a Korean steel company)[26] are clear pointers in this regard. Although these disputes are national-level disputes and not IIA disputes, they are good examples of regulatory conflicts between India and foreign investors.

Second, India has a gigantic IIA programme. India started entering into IIAs to attract foreign investments, as clearly articulated by the Ministry of Finance – the nodal department in India that negotiates and signs IIAs with other countries.[27] However, there is no evidence to show that the increase in foreign investment inflows into India over the last two decades has been due to IIAs, or to what extent IIAs have contributed to attracting foreign investment.[28] India signed

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[22] India, Department of Industrial Policy & Promotion, *Fact Sheet on Foreign Direct Investment (FDI) from August 1991 to March 2006*, online:
<http://dipp.nic.in/fdi_statistics/india_fdi_mar06.pdf>.

[23] India, Department of Industrial Policy & Promotion, *Fact Sheet on Foreign Direct Investment (FDI) from August 1991 to March 2010*, online:
<http://dipp.nic.in/fdi_statistics/india_FDI_March2010.pdf>.

[24] This is up to 31 March 2010. In India the financial year is from 1 April to 31 March of the next year. All the references to different years given in the text are from 1 April to 31 March of the next year.

[25] T.P. Ostwal & M. Solanki, "The Vodafone Tax Dispute – A Landmark Judgment of the Bombay High Court" (2010), online:
<http://wwww.bcasonline.org/articles/artin.asp?961>. For more on this case see A. Keyal & P.R. Advani, "The Vodafone Judgement – Wider Concerns of Withholding Tax Under the Income Tax Act" (2010) 3 NUJS L Rev 511.

[26] D. Bisoi, "Posco Plans Hit Hurdle in Orissa High Court", *Financial Express* (15 July 2010), online:
<http://www.financialexpress.com/news/posco-plans-hit-hurdle-in-orissa-high-court/646681/0>.

[27] India, Ministry of Finance, *Introduction Material*, online:
<http://www.finmin.nic.in/the_ministry/dept_eco_affairs/dea.html>. The Ministry of Finance also takes the help of other ministries in this process such as the Ministry of External Affairs and Ministry of Commerce. The negotiations on CECAs containing chapters on investment are anchored by the Ministry of Commerce with Ministry of Finance playing a supporting role. Other departments of the Government of India are also involved in negotiating IIAs like the Legal and Treaties Division of the Ministry of External Affairs and the Ministry of Commerce.

[28] For more on this see R. Banga, "Impact of Government Policies and Investment Agreements on FDI Inflows", *Indian Council for Research on International Economic Relations Working Paper No. 116* (New Delhi: ICRIER, 2003); Prabhash Ranjan, "Indian Investment Treaty

its first IIA in 1994 with the United Kingdom (UK). Since 1994, India has signed IIAs with 75 countries,[29] out of which 66 are already in force and 9 are yet to be.[30] Further, in the last few years, India has entered into Comprehensive Economic Cooperation Agreements (CECAs), containing a chapter on investment, with Korea,[31] Singapore,[32] Japan[33] and Malaysia.[34] CECAs are comprehensive economic agreements covering trade and investment liberalization, competition policy, trade facilitation, rules of origin and intellectual property rights. The investment chapters in these CECAs, along with provisions on investment protection, also contain market access provisions not existing in any of the existing standalone IIAs, which deal only with post-establishment. Apart from this, India is negotiating CECAs including investment chapters with Indonesia, Mauritius and New Zealand,[35] a Free Trade Agreement (FTA) with the European Union with a chapter on investment,[36] an IIA with the US,[37] and has concluded negotiations on an IIA with Canada.[38] Thus, India's IIA programme stands on two legs – standalone IIAs and investment chapters in CECAs or FTAs.

Programme in Light of Global Experiences" (2010) 45 Economic & Political Weekly 68 [Ranjan (2010)].

29 Ministry of Finance Compendium, *supra* note 1.

30 *Ibid*.

31 The India-Korea CECA (containing the chapter on investment) was signed in 2009 and became effective from 1 January 2010. However, India also has an IIA with Korea signed in 1996. This IIA has not been repealed and hence as of now, both the IIAs (that is the BIT and the investment chapter of the CECA) are in existence. However, this paper has left out the India-Korea IIA of 1996 and has included the investment chapter of CECA signed with Korea in 2009 as India-Korea IIA. India-Japan and India-Malaysia CECAs have also been left out because they are yet to be enforced.

32 India, Ministry of Commerce and Industry, India-Singapore CECA, online: <http://commerce.nic.in/trade/international_ta_framework_ceca.asp>.

33 FE Bureau, "India Japan CEPA to boost bilateral trade to US$25 billion", *Financial Express* (17 February 2011), online: <http://www.financialexpress.com/news/indiajapan-cepa-to-boost-bilateral-trade-to-25-bn/750965/>.

34 India already has an IIA with Malaysia.

35 India, Department of Commerce, "Trade Agreements", online: <http://commerce.nic.in/trade/international_ta.asp?id=2&trade=i>. India already has IIAs with Indonesia and Mauritius.

36 European Parliament, "EU-India Free Trade Agreement", online: <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2008/213>.

37 G. Srinivasan, "US Keen to Push for Bilateral Investment Treaty" (2009), online: <http://www.blonnet.com/2009/10/26/stories/2009102651830100.htm>.

38 Foreign Affairs and International Trade Canada, "Background on Canada-India Foreign Investment Promotion and Protection Agreement", online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/india-inde.aspx?lang=en>.

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These numbers and facts point to the vigour with which India is following its IIA programme.[39] By entering into so many IIAs, India is undertaking binding treaty obligations for foreign investments emanating from her IIA partner countries.

All Indian IIAs contain strong investment protection provisions like offering fair and equitable treatment, national treatment and most favoured nation treatment to foreign investors without much space to deviate from these obligations. There is a broad and unqualified right to transfer capital in a majority of IIAs, and guarantees against both direct and indirect expropriation. Also, all Indian IIAs contain an investor-state arbitration mechanism to settle disputes (between foreign investors and host states) that may arise as a result of an alleged violation of the IIA by the host country (India), and thus enables investors to directly enforce their rights. Since the investment protection provisions in these IIAs are so broad, a wide range of India's regulatory actions are capable of falling under the purview of these IIAs. Furthermore, Indian IIAs define investment very broadly, covering not just FDI but also portfolio investment, movable and immovable property, rights to money or to any performance under contract having a financial value, business concessions conferred by law or under contract, and intellectual property rights (IPR).[40] Due to this broad asset-based definition of investment in all Indian IIAs, a large range of foreign investments like FDI, portfolio investments, IPRs like patents, copyright and contracts in India fall under the purview of one or the other IIA. Thus, even an issuance of a compulsory licence on a patent held by a foreign investor can potentially amount to an expropriation dispute under the IIA depending on the facts.[41] In other words, for a wide range of regulatory actions of India and a large chunk of foreign investments in India, foreign investors can directly use the investor-state arbitration mechanism to enforce the IIA provisions for the protection of their foreign investments, in cases of alleged violations of the IIA by the host state.

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[39] For more on India's IIA programme see D. Krishan, "India and International Investment Law" in B.N. Patel, ed, *India and International Law,* vol. 2 (Leiden/Boston: Martinus Nijhoff, 2008) 292-93; P. Ranjan, "International Investment Agreements and Regulatory Power: Case Study of India" (2008a) 9 J World Investment & Trade 243; Ranjan (2010), *supra* note 28.

[40] See Article I(b) of the Indian Model IIA. Also see Prabhash Ranjan, "Definition of Investment in Bilateral Investment Treaties and Regulatory Discretion" (2009) 26 J Int'l Arb 219. On the object and purpose of Indian IIAs see P. Ranjan, "Object and Purpose of Indian International Investment Agreements: Failing to Balance Investment Protection and Regulatory Power" in V. Bath & L. Nottage, eds, *Foreign Investment and Dispute Resolution Law and Practice in Asia* (London: Routledge, 2011) (forthcoming).

[41] P. Ranjan, "Medical Patents and Expropriation in International Investment Law – With Special Reference to India" (2008b) 5 Manchester J Int'l Econ L 72; C. Gibson, "A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation" (2010) 25 Am U Int'l L Rev 358.

This has certainly increased the possibility of investor-state treaty disputes involving India.

Third – and this is a global factor – there has been a spurt in the number of investor-state investment treaty disputes in last decade or so. From 1998 till the end of 2009, the number of known investment treaty-based disputes had increased to 357.[42] In fact, out of the 357 known disputes 202 of these were initiated in the last five years (from 2005).[43] These numbers suggest that more and more foreign investors are enforcing their rights under the IIAs using the ITA mechanism.

A combination of all three factors has certainly increased the possibility of India being dragged by foreign investors to ITA and thus the possibility of having more and more awards issued against India. This in turn will raise the enforceability issue. Given this background, there is a need to examine the issue in detail now. This is also a good time to look at this issue because India is contemplating amending the law related to enforceability of foreign arbitral awards by amending the Indian Arbitration Act.

In any case, India should ensure that its domestic legal regime addresses the questions related to enforcement of ITA awards, since it has voluntarily taken up investment treaty obligations containing the ITA mechanism. Only then would India be able to fulfil her IIA obligations and comply with the principle of *pacta sunt servanda* – 'every treaty in force is binding upon the parties to it and must be performed by them in good faith' – in Article 26 of the Vienna Convention on the Law of Treaties.[44] Also, Article 51 of the Indian Constitution (which falls in Part IV containing directive principles of state policy[45]) provides that the state shall endeavour to foster respect for international law and treaty obligations and that it shall encourage settlement of international disputes by arbitration.

A. *Nature of ITA awards*

Investment treaty-based disputes between foreign investors and the host state arise because an investor alleges that the host state has breached the treaty provisions, resulting in impairment of the benefits enjoyed by the foreign investor from her investment and thus should be compensated. Thus, the logical outcome of a

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42 UNCTAD, "Latest Developments in Investor-State Dispute Settlement, IIA Issues Note No 1" (2010), online: <http://www.unctad.org/en/docs/webdiaeia20103_en.pdf>.

43 *Ibid*.

44 *Vienna Convention on the Law of Treaties*, 27 January 1980, 1155 UNTS 331, 8 ILM 679.

45 Directive Principles of State Policy, enumerated in Chapter IV of the Constitution of India, are directives to the State intended to assist in the creation of a welfare state. However, these are not enforceable before any court of law. Nevertheless, their importance as the 'conscience of the Constitution' has been emphasised by the Indian Supreme Court on several occasions. See e.g. *Pathumma and Others v. State Of Kerala And Others*, AIR 1978 SC 771; *Madhu Kishwar and Others v. State Of Bihar and Others*, AIR 1996 SC 1864.

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successful ITA dispute for a foreign investor is the payment of monetary damages by the host state to the investor. Though these disputes have a strong commercial aspect, they differ from ordinary ICA disputes. The discussion below will distinguish between ITA and ICA. This distinction is at the heart of fully understanding the issues surrounding the enforcement of ITA awards in India.

The nature of ITA is very different from ICA disputes. ICA follows a private form of adjudication which involves an agreement between the parties to submit private law disputes to arbitration.[46] In other words, individuals agree to get their disputes (for example contractual disputes) resolved through an alternative arrangement rather than submitting them to the courts. The purpose behind this is to have a quicker and less formal settlement of disputes, which in turn will be useful for international commerce. The parties choose their arbitrators as per the agreement between them. This very private adjudicative model of dispute resolution is followed to settle IIA (treaty-based) disputes between foreign private investors and host states as part of the IIA dispute resolution mechanism. At the heart of such disputes is not a contractual breach or a private law breach by a private party,[47] but a treaty breach by the host state due to the exercise of her sovereign regulatory action. In other words, ITA disputes unlike ICA disputes do not arise from a freely negotiated contract but from international treaty obligations accepted by the host state with the foreign investor's home state.[48] In recent times, a number of ITA disputes have emerged between foreign investors and host states where the former contend that a very wide array of host states' sovereign regulatory measures like environmental policy,[49] privatization policy,[50] urban policy,[51] measures to protect water services,[52] monetary policy,[53] taxation[54]

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[46] For more on ICA, see A. Redfern *et al*, *Redfern and Hunter on International Arbitration*, 5th ed (New York: Oxford University Press, 2009).

[47] Although in certain circumstances contractual breaches by the state could also amount to IIA treaty breaches. These breaches are called breaches of the Umbrella Clause of the IIA.

[48] S.W. Schill, "International Investment Law and Comparative Public Law – An Introduction" in S.W. Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) [Schill (2010)]. Also see Salacuse (2010), *supra* note 3, 354-55.

[49] *Metalclad Corporation v. United Mexican States* (2000), 5 ICSID 236, ARB(AB)/97/1 (ICSID); *Methanex Corporation v. United States of America* (2005), 44 ILM 1345 (UNCITRAL), online: <http://www.naftaclaims.com/disputes_us_6.htm>.

[50] *Eureko BV v. Republic of Poland* (2005), ARB/97/3 (ICSID).

[51] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (2005), 44 ILM 91, ARB/01/7 (ICSID).

[52] *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008).

[53] *CMS Gas Transmission Co v. Argentina* (2005), ARB/01/8 (ICSID); *CMS Gas Transmission Company v. Argentina* (2007), ARB/01/8, (Annulment Proceedings) (ICSID); *Enron Corporation v. Argentina* (2007), ARB/01/3 (ICSID); *Sempra Energy International v. Argentina* (2007), ARB/02/16 (ICSID); *Sempra Energy International v. Argentina* (2010), ARB/02/16, (Annulment

and many others[55] constitute treaty violations and are thus adjudicated upon by arbitral tribunals. Arguably, since IIAs are supposed to regulate a host state's regulatory behaviour towards foreign investors, regulatory disputes between a host state and the investor should not come as a surprise. However, the relevant point here is that given the wide scope of protection that is offered to foreign investors in IIAs, large numbers of regulatory measures of the state are capable of being challenged under the investor-state arbitration.[56] In this context, it has been argued that since ITA involves such public policy issues, these disputes are political in nature.[57]

Furthermore, whereas an ICA arbitral award has implications only for the parties to the dispute, an ITA arbitral award issued against the host state's sovereign regulatory function has the potential of affecting the population of the host state.[58] For example, an ITA tribunal issuing an award against the host state's economic emergency laws because these laws have been held illegal for violating the respective IIA in question (as happened in some of the cases involving Argentina[59]) may result in the host state removing the economic emergency laws found illegal by the arbitral tribunal. This could affect the local population.[60] Another key difference between ICA and ITA is related to the amount of money involved – whereas the average award in ICA is less than a million dollars, an ITA award may well be many times that amount.[61]

Proceedings) (ICSID); *LG & E Energy Corporation v. Argentina* (2006), ARB/02/1 (ICSID); *Continental Casualty Company v. Argentina* (2008), ARB/03/9 (ICSID).

54 *Occidental Exploration and Production Co v. Republic of Ecuador* (2004), U.N. 3467 (LCIA).

55 Dolzer and Schreuer (2008), *supra* note 3 at 7-8; A. Kaushal, "Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime" (2009) 50 Harv Int'l LJ 491 at 511-12.

56 For more on this debate see S. Spears, "The Quest for Policy Space in New Generation of International Investment Agreements" (2010) 13 J Int'l Econ L 1037.

57 Salacuse (2010), *supra* note 3 at 355.

58 Schill (2010), *supra* note 48.

59 For more on the Argentine crisis see *CMS v. Argentina*, *supra* note 53; *CMS v. Argentina*, (Annulment Proceedings), *supra* note 53; *Enron Corporation v. Argentina*, *supra* note 53; *Sempra Energy v. Argentina*, *supra* note 53; *Sempra Energy v. Argentina*, (Annulment Proceedings), *supra* note 53; *LG & E Energy v. Argentina*, *supra* note 53; *Continental Casualty v. Argentina*, *supra* note 53.

60 Here it is important to note that an investment treaty arbitral tribunal only awards damages to the foreign investors and does not recommend the removal of the illegal measure. However, once a measure is found illegal, the host country will, more often than not, remove the measure because continuing with a measure found illegal may result in more arbitral challenges by other foreign investors.

61 For more on this see N. Rubins, "The Allocation of Costs and Attorney's Fees in Investor-State Arbitration" (2003) 18 ICSID Foreign Investment LJ 109 at 125; Salacuse (2010), *supra* note 3 at 355-56.

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Thus there are fundamental differences between ITA and ICA. ITA decides public law questions (thus performing functions analogous to administrative or constitutional law review[62]) using the private law adjudicative model followed to settle ICA disputes.[63] Therefore ITA disputes and awards should not be seen as just another type of ICA disputes and awards. In India, this key distinction has not been fully understood and appreciated, and thus problems will arise in the enforcement of ITA awards in India.

B. *Investor-State dispute resolution mechanism in Indian IIAs*

This paper studied 67 Indian IIAs including the Indian Model IIA.[64] This comprises of 67 IIAs signed and ratified by India between 1994 and the end of 2010 with developed and developing countries. All these 67 Indian IIAs contain an investor-state dispute resolution mechanism and thus allow individual foreign investors to challenge the public law functions of India as treaty violations. Article 9 of the Indian Model IIA[65] depicts a sample of the kind of investor-state dispute resolution mechanism found in the 67 different Indian IIAs:

> **Article 9 – Settlement of Disputes Between an Investor and a Contracting Party**
>
> (1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> (2) Any such dispute which has not been amicably settled within a period of six months may, if both Parties agree, be submitted:

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[62] For more on this point see G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007) [Van Harten (2007)]; Schill (2010), *supra* note 48; D. Schneidermann, *Constitutionalizing Economic Globalisation* (Cambridge: Cambridge University Press, 2008); S. Montt, *State Liability in Investment Treaty Arbitration* (Oxford: Hart, 2009).

[63] For more on this debate see Van Harten (2007), *ibid.*; G. Van Harten & M. Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17 EJIL 121.

[64] Ministry of Finance Compendium, *supra* note 1.

[65] Countries often adopt or develop model IIAs, which are policy statements providing the kind of provisions that a country wishes to have in an IIA. Countries often use their model IIAs as the basis of IIA negotiations. The Indian Model IIA is available at the website of the Ministry of Finance, India: <http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp>.

(a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies; or
(b) to International conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

(3) Should the Parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be 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 the investor consents 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) 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, subject to the following modifications:

(i) The appointing authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting party.
(ii) The parties shall appoint their respective arbitrators within two months.
(iii) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding for the parties in dispute.
(iv) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

Thus, Article 9 states that the dispute between the foreign investor and India will first be resolved, as far as possible, amicably through negotiations between the parties. If this is not possible then either the dispute will be submitted

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to the local courts of India (*i.e.* the country where the investment has been made) or to international conciliation under the UNCITRAL conciliation rules.

However, in the event of the parties failing to agree on this mode of dispute resolution or where the conciliation proceedings are terminated other than by signing of settlement agreement (Article 9(3)), the dispute may be referred to international arbitration. It is important to note that Article 9 does not require the investor to mandatorily exhaust local remedies (submitting to local courts in India) before submitting the dispute to international arbitration. The only condition for submitting the dispute to international arbitration is if the parties fail to agree on submitting the dispute to local courts.

Article 9 further provides that once the dispute is referred to arbitration, the parties have any of the following three options – first, the dispute could be submitted to the International Centre for Settlement of Investment Disputes (ICSID) provided both the investor's country and the host country (India) are members of the ICSID convention;[66] second, if both parties agree under the additional facility for the administration of conciliation, arbitration and fact finding proceedings; third, the dispute could be settled by an *ad hoc* arbitration panel using the UNCITRAL arbitration rules subject to some modifications given in the treaty. These modifications include requiring the parties to appoint their arbitrators within two months.[67] Apart from this, the other important modification given is that the arbitral award shall be made in accordance with the provisions of the Agreement and shall be binding on the parties in dispute: Article 9(3)(c)(iii). Thus, this provision states two important things – first, the IIA is the applicable law to settle the dispute; and second, that the arbitral award issued shall be binding.

With regard to the use of ICSID arbitration, this option cannot be exercised by the investor against India because India has not yet joined the ICSID Convention. Thus, the viable options available are either the ICSID additional facility or an *ad hoc* arbitration tribunal based on the UNCITRAL arbitration rules subject to the modifications provided by the IIA.

The same broad trend of dispute resolution between investor and host state (India) exists in almost all Indian IIAs. Thus, in all these 67 IIAs, investors can bring disputes against India at international arbitral forums like the ICSID additional facility or any other *ad hoc* arbitration forum using the UNCITRAL arbitration rules subject to certain modifications given in the IIA, without having to exhaust local remedies. Furthermore, in the majority of IIAs, like the Model IIA, the award has to be based on the provisions of the agreement and, thus, in the majority of IIAs the applicable law for investment arbitration is the IIA itself. However, there are 10 Indian IIAs where the applicable law, apart from the IIA,

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66 See Article 9(3)(a), Indian Model IIA.

67 See Article 9(3)(c)(ii), Indian Model IIA.

also includes the national laws of the country where the investment has been made.[68]

Furthermore, 61 out of the 67 IIAs surveyed provide that the ITA award shall be binding on the parties.[69] In other words, the ITA award shall be binding on India. Out of these 61 IIAs, many of them provide that the ITA awards shall be binding and 'final'.

Another important point to note is that in the Indian Model IIA and in the majority of Indian IIAs, there is no mention about how the award has to be enforced or whether the enforcement of the award is contingent on national law. However, 16 IIAs,[70] out of the 67 studied, provide that the final arbitration award shall be enforced subject to domestic laws.

IV. HISTORICAL EVOLUTION OF INDIAN LAW ON ENFORCEMENT OF AGREEMENTS TO ARBITRATE AND ARBITRAL AWARDS

In ancient and medieval India, *Panchayats*, or councils of village elders, adjudicated most disputes.[71] These institutions, which derived their authority from ancient customs and the solidarity of close-knit communities, have several traits in common with present day arbitration/conciliation mechanisms. They are primarily informal dispute settlement mechanisms. In these ancient mechanisms, enforcement was a given as the same body of elders could both announce the decision and enforce it with the help of the community they represented.[72] The traits of this system remain in several rural areas of India to date and do, often, come into conflict with the formal legal system.[73]

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[68] These 10 IIAs are with the following countries: Germany, Spain, Qatar, Morocco, Argentina, Kuwait, Portugal, Bosnia and Herzegovina, Macedonia and Syria.

[69] There are six IIAs that mention nothing on whether the ITA award shall be binding or not. These are with the following countries: Poland, Sri Lanka, Malaysia, Oman, Swiss Confederation and Tajikistan.

[70] These IIAs are with the following countries: Italy, Spain, Qatar, Austria, Morocco, Sweden, Argentina, Finland, Portugal, Slovak Republic, Hellenic Republic, Macedonia, Saudi Arabia, Turkey, Syria and Yugoslavia.

[71] See generally R.V. Jathar, *Evolution of panchayati raj in India* (Bombay: Institute of Economic Research, 1964); L.P. Shukla, *A History of Village panchayats in India* (Nasik, 1970); V.P. Singh, "Legal Perceptions and Usages in North Indian Village Disputes" (1976) 19 J Soc Research 14.

[72] R.M. Hayden, "Excommunication as Everyday Event and Ultimate Sanction: The Nature of Suspension from an Indian Caste" (1993) 42(2) J Asian Stud 291.

[73] Recently, there have been instances of *Khap Panchayats* coming in conflict with the laws of the land on matters relating to inter-caste marriages, personal laws, etc. and have sought to impose their own sanctions, including death, on individuals for transgression of community norms. See Jagmati Sangwan, "Khap panchayat: signs of desperation?", *The Hindu* (7 May 2010) online: <http://beta.thehindu.com/opinion/lead/article424506.ece?homepage=true>.

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The modern concept of arbitration was introduced in India during the British period.[74] Under the early Regulations introduced in the province of Bengal, arbitral awards were enforceable as decrees of court unless partiality or gross corruption on part of the arbitrators was proved by the party challenging the enforcement of the award.[75] The Madras *Regulation IV of 1816* authorised village *panchayats* to act as arbitral tribunals with the consent of the parties and the awards of these tribunals were to be enforced unless referred by the district judge to the provincial court for annulment. Similarly, enforceable arbitral awards were provided for in the Bombay province under *Regulations IV and VII of 1827*.

Under these regulations, as discussed above, an arbitral award was enforceable as a default rule and interference with an award was permitted only in specified exceptional circumstances. However with the replacement of these regulations by the *Code of Civil Procedure 1859*, *Civil Procedure Code 1877*, *Civil Procedure Code 1882*, *Civil Procedure Code 1908* and later the *Arbitration Act 1940*, the picture changed. The *Arbitration Act 1940*, in an attempt to provide comprehensive legislation dealing with the subject of arbitration and keeping in line with the English *Arbitration Act 1934*, created several procedural safeguards which, in practice, became hindrances to efficient conduct of arbitral proceedings. Under this regime, an award did not become a decree of a civil court when rendered, but a competent court had to specifically accord it such status upon the application of one of the parties.[76] Moreover, it was open for courts to interfere with arbitration and arbitral awards at every stage, providing a plethora of dilatory tactics for the parties to employ. Referring to the situation prevalent under the *Arbitration Act 1940*, Chinnappa Reddy J. stated in *Guru Nanak Foundation v. M/s. Rattan Singh & Sons*:

> Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for

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[74] V.A. Mohta & A. V. Mohta, *Arbitration, Conciliation and Mediation*, 2d ed (Noida: Manupatra, 2008) at 1-5.

[75] *Bengal Regulation, 1772*; *Bengal Regulation 1781*; *Bengal Regulation 1787*; *Bengal Regulation, 1793*.

[76] §§ 14-17, *Arbitration Act 1940*, Act No. 10 of 1940.

> expeditious disposal of their disputes had by the decisions of the courts been clothed with 'legalese' of unforeseeable complexity.[77]

Thus, we see that from an informal system of *panchayats* where the same body that rendered an award enforced it and the early British Regulations which provided for enforcement of awards except in instances of gross corruption or partiality on the part of arbitrators, Indian law moved, under the *Arbitration Act 1940*, to a position where enforcement of an award was an extremely difficult process, taking teeth away from arbitral mechanisms. The Indian Arbitration Act was intended to be a solution to this problem. It aimed to reduce judicial interference in arbitration,[78] forcing the parties to adhere to their agreement to arbitrate and thereby bringing certainty and predictability to commercial relationships.

V. THE CURRENT INDIAN LAW ON JUDICIAL INTERVENTION IN ARBITRATION

Indian law on arbitration is more court-made than statutory. While several provisions in the Indian Arbitration Act are based on the UNCITRAL Model Law,[79] the existing legal position on judicial intervention in arbitration emanates, not from a plain reading of these provisions, but from a complex web of judicial interpretations of these provisions. Therefore, in discussing Indian law on the issue of enforceability of foreign arbitral awards, judicial pronouncements are as important as or more important than the statutory provisions themselves.

A. *Expansionary approach of Indian courts to their own powers in arbitration matters*

During the currency of the *Arbitration Act 1940*, the honourable Supreme Court of India expressed concern over the scheme of things under the said act which permitted excessive resort to the judiciary by the parties to arbitration.[80] However, after the enactment of the Indian Arbitration Act in 1996, which sought to minimize judicial interference in the arbitral process, the approach of Indian courts has been that of giving an expansive reading to its own powers and restricting the freedom of the arbitral process from judicial interference.[81]

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77 AIR 1981 SC 2075.

78 Indian Arbitration Act, § 5: 'Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part'.

79 See e.g. §§ 7, 8, etc., Indian Arbitration Act.

80 *Guru Nanak Foundation*, *supra* note 77.

81 This may be contrasted with the approach of the Indian courts with respect to settlement of international disputes between India and other States (which could include treaty-based disputes).

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1. *Applicability of Part I of the Indian Arbitration Act to foreign arbitrations*

Part I of the Indian Arbitration Act deals with the subject of arbitration and contains several provisions that confer powers upon Indian courts.[82] Section 8 vests judicial bodies with the power (and the responsibility) to refer parties to arbitration if, while hearing a matter, one of the parties presents an agreement which binds the parties to submit the dispute at hand to arbitration.[83] Section 9 allows courts to grant interim measures before the commencement of arbitration, during arbitration or after the completion of arbitration but before execution of the award.[84] Section 11 vests powers in the Chief Justice of India, the Chief Justices of High Courts or their delegates to make appointments of arbitrators where parties are unable to make such appointments in accordance with their agreement.[85] Section 14 empowers the courts to terminate the mandate of an arbitrator upon the occurrence of certain specified contingencies.[86] Section 27 allows arbitral tribunals and the parties to approach courts for assistance in gathering evidence.[87] Section 34 allows the setting aside of an arbitral award by a competent court for specified reasons, which includes setting aside of the award on the ground of 'public policy'.[88] Section 36 provides for enforcement of an arbitral award as though it were a decree of a civil court, that is, through an execution court.[89] Section 37 allows courts to hear appeals from certain orders made by arbitral tribunals.[90]

It is important to note that all these provisions which provide substantial powers to courts fall in Part I of the Indian Arbitration Act. Therefore, if Part I were not applicable to a particular arbitration, the powers of the court in respect of that arbitration will be considerably less compared to an arbitration to which Part I applies.

Section 2(2) of the Indian Arbitration Act states that Part I 'shall apply where the place of arbitration is in India'.[91] It has been a matter of conflicting

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In *Maganbhai Ishwarbhai Patel*, 1969 AIR 783, the court held that the power of the executive in settlement of such disputes was free of judicial intervention. However, any governmental action to give effect to such a settlement can be challenged before an Indian court.

82 §§ 8, 9, 11, 27, 34, 37, Indian Arbitration Act.

83 § 8, Indian Arbitration Act.

84 § 9, Indian Arbitration Act.

85 § 11, Indian Arbitration Act.

86 § 14, Indian Arbitration Act.

87 § 27, Indian Arbitration Act.

88 § 34(2)(b)(ii), Indian Arbitration Act.

89 § 36, Indian Arbitration Act.

90 § 37, Indian Arbitration Act.

91 § 2(2), Indian Arbitration Act.

decisions by different High Courts whether Part I applies to arbitrations held outside India or, in other words, to foreign arbitrations.[92] The question came up for consideration before the Supreme Court in *Bhatia International v. Bulk Trading S.A.*, where an order of the District Court of Indore entertaining an application under section 9 in respect of an ICC arbitration seated in Paris and the judgement of the Madhya Pradesh High Court upholding the said order were impugned.[93] The point of contention in this case was whether the power under section 9 to grant interim measures could be exercised by an Indian court where the arbitration was held outside India. It was contended for the appellant that no interim measure could be granted in India as section 9 was placed in Part I and section 2(2) had the effect of limiting the applicability of that Part to arbitrations held in India alone. The Supreme Court noted that section 2(2) in stating '[t]his Part shall apply where the place of arbitration is in India' is not equivalent to stating '[t]his Part shall apply *only* where the place of arbitration is in India'.[94] Thus, it was held that Part I applied even to arbitrations held outside India unless its application was specifically excluded by the agreement between the parties. The same view was reasserted in *Venture Global Engineering*[95] in 2008.

Though these decisions have been widely criticised as inconsistent with the accepted tenets of statutory interpretation,[96] it will suffice for the purpose of this paper to state that the approach taken by the Supreme Court was one of preferring an interpretation which vested the Indian courts with more powers to one that limited the powers of the judiciary under the Indian Arbitration Act.

2. *Definition of public policy*

Public policy remains an 'unruly horse'[97] in the arena of arbitration in India and it unfortunately lacks a 'good man in the saddle'.[98] While the scope of judicial intervention in international arbitration has been understood narrowly in several jurisdictions by embracing the concept of 'international public policy' (*ordré*

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92 *Kitchnology N.V. and Another v. Unicor Gmbh Rahn and Another*, 1999(1) Arb LR 452 (Delhi); *Dominant Offset Pvt. Ltd. v. Adamovske Strojitrny A.S.*, AIR 2000 Del 254; *East Coast Shipping Limited v. M.J. Scrap Pvt. Ltd*, 1997(1) HN 444; *Jindal Durga Ltd v. Noy Vallesina Engineering SpA*., 2002(2) Arb LR 323; *Cultor Food Science Inc. v. Nicholas Piramal India Ltd.*, 2001(6) ALT 706. Also see Jain (2010) *supra* note 13 at 266-71 for a detailed discussion on cases decided by different Indian High Courts.

93 *Bhatia International v. Bulk Trading S.A.*, AIR 2002 SC 1432.

94 Emphasis added.

95 *Venture*, *supra* note 12.

96 Anirudh Wadhwa & Anirudh Krishnan, eds, *Justice R.S. Bachawat's Law of Arbitration & Conciliation*, 5th ed (Nagpur: LexisNexis Butterworths & Wadhwa, 2010) at 2236-39.

97 Burrough J. in *Richardson v. Mellish* (1824), 130 ER 294 at 303.

98 Lord Denning in *Enderby Town Football Club Ltd v. Football Association Ltd*, [1971] Ch 591 at 606.

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public internationalé),[99] a narrower set of fundamental principles than what is covered by 'public policy', in India a trinity of conflicting decisions[100] leaves the scope of such intervention quite wide.

Section 34 of the Indian Arbitration Act states that an arbitral award can be set aside if the court finds that the award is in conflict with the 'public policy' of India.[101] The term 'public policy' has not been defined in the Indian Arbitration Act, barring a limited indication given in an Explanation to the provision, which states that 'an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption'. However, this description of what is contrary to 'public policy' is without prejudice to the generality of section 34(2)(b)(ii), which talks of 'public policy'. In other words, apart from the ground given in the 'Explanation', there could be other grounds or illustrations of 'what is contrary to public policy'. It is important to recall that section 34 falls in Part I of the Indian Arbitration Act.

Apart from this, section 48(2)(b) in Part II of the Indian Arbitration Act (which talks of enforcement of awards made under the New York Convention) states that a foreign arbitral award can be denied enforcement if such enforcement 'would be contrary to public policy of India'. 'Public policy' is not defined here as well. Only one instance of violation of 'public policy' is mentioned, which is the same as that mentioned under the Explanation to section 34(2)(b)(ii).

In the *Renusagar* case, Renusagar sought refusal of enforcement of an ICC arbitral award on several grounds, one of which was that 'interest on interest or compensatory damages in lieu of interest on regular interest and delinquent interest and the award of compound interest is contrary to public policy'.[102] In other words, Renusagar sought to allege that a violation of the law of India would constitute a violation of the 'public policy' of India. The court examined the meaning of the term 'public policy' at length and stated that the contents of 'public policy' would differ in different circumstances. Relying on the common law position on enforcement of foreign judgments, it was held that for enforcement of a foreign award, the expression 'public policy' has a narrow import and not every violation of domestic law offended 'public policy'. The court justified itself by stating:

> [I]t is obvious that since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any

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99 Redfern & Hunter, *supra* note 46.

100 *Renusagar v. General Electric*, AIR 1994 SC 860; *ONGC v. Saw Pipes*, AIR 2003 SC 2629; *Venture, supra* note 12.

101 § 34(2)(b)(ii), Indian Arbitration Act.

102 *Renusagar*, *supra* note 100.

> expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction.[103]

It was observed that a foreign award was subject to two levels of scrutiny ('*double exequatur*') – first, in the country where the award was rendered and second, where the award is sought to be enforced. It was held that while a court in the country where the award was rendered has a wide scope of examination, the court where enforcement is sought has a limited scope of review and hence, the latter should adopt a narrow definition of 'public policy'. The court laid down a three-pronged test according to which an award would offend 'public policy': if it is opposed to '(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality'.

In *ONGC v. Saw Pipes*,[104] the Supreme Court examined as a preliminary issue whether an award could be set aside under section 34 on the ground of 'public policy' based on its 'patent illegality' with reference to some provision of substantive law in force in India. In this case, the position taken by the Court was that patent non-compliance with any law of India can constitute a violation of 'public policy' and can serve as a ground for setting aside an arbitral award.[105] In other words, if an arbitration award violates any of the substantive laws of India, then it will be held to be against 'public policy' of India and thus unenforceable. However, it is important to note that the arbitration in question was a domestic arbitration and not a decision on the enforceability of foreign arbitral award, and thus the judgment seeks to differentiate itself from *Renusagar* on that ground.

In the subsequent case of *Venture Global Engineering*,[106] the Court was faced with a request to set aside, under section 34, a foreign award rendered in an arbitration under the London Court of International Arbitration (LCIA) rules. This case is important in two respects and in many ways reveals the current problems with Indian arbitration law on enforceability of foreign arbitral awards. First, the court decided, relying on the *Bhatia* judgment, that Part I of the Indian Arbitration Act applied to arbitrations held outside India and thus, an application under section 34 could lie against a foreign award as well. Second, the Court applied the broad view of 'public policy' laid down in the *ONGC* case to decide whether an ICA award could be set aside in India. Thus, the court held that 'patent illegality' is a ground within the definition of 'public policy' to set aside an ICA award. If an ICA award is not compatible with any Indian substantive law, then, such an

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103 *Ibid*.

104 *ONGC*, *supra* note 100.

105 The Court used the examples of the *Transfer of Property Act* and the *Indian Contract Act* and stated that it would be against the basic spirit of justice if an award violating these Acts could not be assailed.

106 *Venture*, *supra* note 12.

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award can be refused enforcement, or even set aside in India on the ground of 'public policy'.

The court obliterated the difference in the definition of 'public policy' between domestic and foreign awards that *Renusagar* and *Saw Pipes* envisaged. It made the ground of 'patent illegality' which *Saw Pipes* had added to *Renusagar's* three-pronged definition of 'public policy' of India applicable to foreign awards as well. Thus, as the law stands presently, it is even open for an Indian court to set aside a foreign award on the ground of 'patent illegality' with reference to Indian law.

Through the latter two decisions, the Court carved out for itself an opportunity to examine the merits of the award against the substantive law of the land and effectively act as a forum of appeal rather than as one of review. Thus, in light of the above discussion and based on the existing law, section 34 continues to apply to ICA. The recent ICSID ITA involving an Italian company and Bangladesh,[107] under the Italy-Bangladesh IIA, shows that undue interference by national courts in ICA can give rise to a claim under the IIA.[108]

At this juncture, it may be pertinent to briefly examine the implications of such an expansionary definition of 'public policy' with respect to India's international obligations under the New York Convention.[109] The New York Convention casts upon the parties a general obligation to enforce foreign awards from other Convention territories. Article V(2)(b) of that Convention allows countries to refuse enforcement on the ground of 'public policy'. In *Renusagar*,[110] while deciding what considerations of 'public policy' should warrant non-enforcement of a foreign award, the Court sought to determine not only what 'public policy' meant under the relevant Indian statutory law, but also under the New York Convention. This is evident when the Court states:

> In view of the absence of a workable definition of 'international public policy' we find it difficult to construe the expression 'public policy' in Article V(2)(b) of the New York Convention to mean international public policy... Consequently, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act means the doctrine of public policy as applied by the Courts in India.[111]

Thus, the restrictive definition accorded to 'public policy' in *Renusagar* is, according to the Supreme Court, the correct interpretation of that expression in

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107 *Saipem v. Bangladesh*, Award of 30 June 2009, online: <http://ita.law.uvic.ca/about.htm>.
108 Sattar (2010), *supra* note 13.
109 *Supra* note 6.
110 *Supra* note 100.
111 *Renusagar, supra* note 100 at para 61.

the New York Convention. While departing from this definition in *Venture*[112] and allowing broader considerations of public policy to interfere with foreign awards, the Court has neither overruled *Renusagar* nor clarified how this broader view of public policy is consistent with the New York Convention. Thus, despite the change in Court's approach to 'public policy' in its statutory context, the meaning of public policy in the Convention remained unchanged even in the eyes of the Court, bringing about a divergence between what India is entitled to do under the New York Convention and what Indian courts actually do. In addition, a broad interpretation of the public policy exception goes patently against the object and purpose of the Convention.

B. *Implications of the current expansionary approach for enforcement of ITA awards*

The expansionary approach detailed above has serious implications for the enforceability of ITA awards in so far as it provides two distinct channels of challenge to the award under Indian law. The party against whom the award has been made can, in addition to challenging enforcement of the award under section 48 (provided the award is under the New York convention), seek to have the award set aside under section 34 because the present law of the land allows Part I of the Indian Arbitration Act to apply to foreign awards.

In other words, any ITA award issued against India, if challenged by the Indian government in the Indian court, will have to pass the broad 'public policy' test developed by the Indian courts, which includes (i) fundamental policy of Indian law, (ii) the interests of India, (iii) justice or morality, and (iv) patent illegality. Out of these four grounds, overcoming the obstacles under the heads of 'interests of India' and 'patent illegality' will be the most difficult for an ITA award and thus the award will face problems in enforcement.

1. *Interests of India*

'Interests of India' is an extremely vague and broad term and could encompass within it a large number of sovereign regulatory measures. The inclusion of this broad phrase as part of 'public policy' could result in a large number of ITA awards not being enforced in India.

As has been discussed in the introductory part of this paper, ITA awards, though using the ICA private law adjudicative model, by their very nature involve adjudication over sovereign public regulatory functions of the host state. These disputes arise because the investor considers the host state's particular

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[112] *Supra* note 12.

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'regulatory' measure as a breach of the IIA, whereas the host state considers the 'regulatory' measure as a measure adopted to serve its 'interests'. In such a situation, issuance of an ITA award against the host country will mean that the arbitral tribunal has found the host state's regulatory measure in violation of the IIA and hence illegal.[113] In other words, issuance of such an award means that the arbitral tribunal has held against the host state's regulatory measure, which the host state adopted and defended before the tribunal as a measure for pursuing its interests. For example, in *CMS v. Argentina*,[114] a case involving Argentina and a US foreign investor, the issue was whether Argentina's 'regulatory' measures involving the adoption of emergency laws to tackle a severe economic crisis violated the US-Argentina IIA. In this case it was held by the arbitral tribunal that Argentina's 'regulatory' measures had violated the 'fair and equitable treatment' of the US-Argentina IIA.[115] This was in the face of Argentina's argument before the tribunal that adopting such emergency laws was Argentina's legislative prerogative and that these regulatory measures did not violate either the 'fair and equitable treatment' of the IIA or any other international law.[116]

The purpose here is not to go into the merits of what the tribunal did, which has been dealt with elsewhere.[117] The purpose here is to give an example, for the present discussion, that in this case a host country argued and defended its 'regulatory' measure taken in the 'national interest' before the arbitral tribunal; however, the arbitral tribunal rejected this argument and held the host country's 'regulatory' measure as violating the IIA. Arguably, an ITA award against India will mean that the tribunal has rejected India's argument, defence and position on its 'sovereign public regulatory' measures adopted in the 'national interest', because the tribunal has come to the conclusion that India's measures violate the IIA provisions. In case such a situation arises, the issue would not be whether such an ITA tribunal is correct in determining the legality of India's regulatory conduct *vis-à-vis* the concerned IIA. Rather, given the wide meaning that can be

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[113] This is not to argue that each complaint of the foreign investor alleging that the host state's regulatory measure has violated the IIA will result in the tribunal coming to such a conclusion. There have been quite a few cases where the 'regulatory' measures of the host state have been held legal by arbitral tribunals. However, in this paper, we are looking at those situations where the arbitral tribunal comes to the conclusion that the 'regulatory' measure of the host state has violated the concerned IIA.

[114] *CMS v. Argentina*, *supra* note 53.

[115] See para 281 of *CMS v. Argentina*, *supra* note 53.

[116] See para 272 of *CMS v. Argentina*, *supra* note 53.

[117] For a discussion on this case and other cases involving Argentina see A. Bjorklund, "Economic Security Defences in International Investment Law" (2009) 1 YB Int'l Investment L & Pol'y 479; J. Kurtz, "Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis" (2010) 59 ICLQ 325; J. Alvarez & K. Khamsi, "The Argentine Crisis and Foreign Investors" (2009) 1 YB Int'l Investment L & Pol'y 379.

given to 'interests of India', it gives ample scope for Indian government to argue that the ITA award is against 'interests of India' in an Indian court.

Furthermore, once an ITA arbitral tribunal finds the 'regulatory' measure illegal, it will order the host state to pay damages to the foreign investor. According to a study based on 52 tribunal awards for treaty claims, it has been calculated that the average amount of damages awarded has been US$10.4 million[118] with some awards having damages as high as US$824 million,[119] US$353 million,[120] and US$133.2 million in *CMS v. Argentina*. There is already a case of the Indian government paying close to a mammoth US$1 billion to foreign investors, mentioned earlier, as part of the settlement. Although in this case the Indian government paid voluntarily and the amount was not the result of official damages awarded by an ITA tribunal, nevertheless India must have used taxpayers' money to pay for these damages. Moreover, a considerable amount of taxpayers' money is also spent in defending the 'regulatory' measures adopted to pursue 'national interests' before arbitral tribunals. For example, the Czech Republic budgeted US$3.3 million in 2004 and US$13.8 million in 2004 and 2005 as the money for 'legal fees' to defend its claim in two ITA disputes.[121] In one North American Free Trade Agreement (NAFTA) dispute involving Mexico,[122] the total cost was US$3,170,692.

In sum, if India is asked to pay damages to the foreign investor for adopting a regulatory measure that India considers important for pursuing its interests, and where the Indian government is not willing to pay the money voluntarily, the Indian government could challenge the enforcement of such an award in Indian courts or could ask for the award to be set aside under the Indian Arbitration Act as being against the 'interests of India' and hence against 'public policy' for two reasons – first, because the arbitral award, by reaching the conclusion that a particular regulatory measure is illegal, will effectively dissuade the continued implementation of the concerned regulatory measure to achieve a particular national interest; and second, because the arbitral award requires diversion of the taxpayer's money and thus national wealth in the form of damages towards the foreign investor. In certain cases, these damages can be huge, over and above the significant cost incurred in defending the regulatory measure before the arbitral tribunal proceedings. Given the broad manner in

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[118] S. Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration" (2007) 86 NCL Rev 1 [Franck (2007)].

[119] *Ceskoslovenska Obchodni Co v. Argentine Rep* (29 December 2004), ARB/97/4 (Final Award) (ICSID).

[120] *CME Czech Republic BV v. Czech Republic* (14 March 2003), (Final Award) (UNCITRAL).

[121] Franck (2007), *supra* note 118.

[122] *Int'l Thunderbird Gaming Corp v. United Mexican States* (26 January 2006), (Arbitral Award) (NAFTA Chapter 11 Arb Trib) 68, 72.

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which the Indian judiciary has interpreted the Indian Arbitration Act, there is a strong likelihood of such challenges succeeding.

This is not to argue that each ITA award would be set aside or not enforced on the ground that it is against the 'interests of India'. There could be some exceptions to this. First, there could be cases where Indian courts, after examining a particular issue, come to the conclusion that enforcement of ITA award is not against the 'interests of India' based on the facts before it. Second, in situations where the conduct of the Indian state in dealing with the foreign investor, although aimed at fulfilling a national interest, has been arbitrary and unfair, the court might decide that given the questionable conduct of the Indian government, the award is not against the 'interests of India' and thus does not violate its 'public policy'. Third, there could be situations where the regulatory measure adopted by India, in the guise of fulfilling some national interest, in reality was aimed at achieving some ulterior motive like harming the foreign investor for political reasons. In such situations as well, it is possible that the Indian courts will not accept the plea of an ITA award being against 'interests of India' and thus will not set aside the award for 'public policy' reasons. Fourth, the fact that an ITA award against India means that an international tribunal has found that India has violated its treaty obligations (a breach of public international law) could result in Indian courts treating the enforcement of ITA awards differently from an ordinary ICA dispute involving contractual matters.

Fifth, there may be situations where the Indian government decides not to challenge the ITA award and pays the damages because of the fear that any such challenge might send negative signals to potential foreign investors, hamper its reputation as an attractive investment destination or even result in the home country retaliating by not protecting India's investments in that country, if any. Thus, India would prefer to comply with the award and pay the damages as ordered by the tribunal.[123] In this context, it is important to note the realist school in international relations theory, which argues that whether a state will comply with international law depends on whether compliance or defiance will foster its national interests.[124] Thus, in the context of international investment law, compliance with an ITA award will depend, according to this school, on whether the host country's national interests are served better by complying or not complying with the award.[125] Notwithstanding these exceptions, overcoming the

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[123] For more on the point of compliance see C.M. Ryan, "Discerning the Compliance Calculus: Why States Comply with International Investment Law" (2009) 38 Ga J Int'l & Comp L 63.

[124] For more on the Realist School see T. Dunne & B.C. Schmidt, "Realism" in J. Baylis & S. Smith, eds, *The Globalization of World Politics*, 3d ed (Oxford: Oxford University Press, 2006) 161-83.

[125] For more discussion on this see M. Hirsch, "Compliance with Investment Treaties: When are States more likely to Breach or Comply with Investment Treaties?" in B. Christina *et al*, eds,

ground of 'interests of India' could prove to be difficult for the enforcement of ITA awards under the present Indian law.

2. *Patent illegality*

It is important to recall that in the *Venture Global Engineering* case, the foreign award was set aside on the ground of 'patent illegality'. 'Patent illegality' is a much narrower ground to challenge an ITA award in comparison to 'interests of India'. Nevertheless, situations could arise where ITA awards could be rendered unenforceable or could be set aside on the ground of it being against any substantive law of India. Let us look at one such situation.

All Indian IIAs contain monetary transfer provisions (MTP). MTPs in IIAs regulate matters related to transfer of funds made by the foreign investor, covering both inflows and outflows. These provisions provide what kind of monetary transactions (inflows and outflows of capital) are allowed by the IIA and what conditions are imposed on such monetary transactions. In contemporary times of global financial crisis, MTPs in IIAs have attracted some attention[126] because inflow and outflow of capital (based on the quantum of flow) can have certain macroeconomic consequences for the host country. The study of 67 Indian IIAs shows that as many as 53 Indian IIAs do not provide any qualification, limitations or conditions on the right of the investor to transfer funds. In other words, in these 53 Indian IIAs investors have an unqualified right to transfer funds. For example, Article 7 of the Indian Model IIA on MTP provides:

International Investment Law for the 21st Century (Oxford: Oxford University Press, 2009) 865-76.

[126] M. Waibel, "BIT by BIT – The Silent Liberalization of the Capital Account" in A. Reinisch, ed, *International Investment Law for the 21st Century – Essays in the Honour of Christoph Schreuer* (New York: Oxford University Press, 2009) 497-518 [Waibel (2009)]; Salacuse (2010), *supra* note 3; A. Kolo & T. Walde, "Capital Transfer Restrictions under Modern Investment Treaties" in A. Reinisch, ed, *Standards of Investment Protection* (Oxford: Oxford University Press, 2008) 205 [Kolo and Walde (2008)]; UNCTAD, *Transfer of Funds* (New York and Geneva: UN, 2000) [UNCTAD (2000)]; Dolzer and Schreuer (2008), *supra* note 3; K. P. Gallagher, "Policy Space to Prevent and Mitigate Financial Crisis in Trade and Investment Agreements" *G 24 Discussion Paper Series, No 58*, (UNCTAD, 2010); A. Turyn & F.P. Aznar, "Drawing the Limits of Free Transfer Provisions**"** in M. Waibel *et al*, eds, *The Backlash against Investment Arbitration* (The Hague: Kluwer, 2010) 51-78 [Turyn and Aznar (2010)]; P.T. Muchlinski, "The Framework of Investment Protection – The Content of BITs" in K.P. Sauvant & L.E. Sachs, eds, *The Effect of Treaties on Foreign Direct Investment, Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford: Oxford University Press, 2009) 37 at 59-61 [Muchlinski (2009)].

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Repatriation of Investment and Returns

(1) Each Contracting Party shall permit all funds of an investor of the other Contracting Party related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis. Such funds may include:

(a) Capital and additional capital amounts used to maintain and increase investments;
(b) Net operating profits including dividends and interest in proportion to their share-holdings;
(c) Repayments of any loan including interest thereon, relating to the investment;
(d) Payment of royalties and services fees relating to the investment;
(e) Proceeds from sales of their shares;
(f) Proceeds received by investors in case of sale or partial sale or liquidation;
(g) The earnings of citizens/nationals of one Contracting Party who work in connection with investment in the territory of the other Contracting Party.

(2) Nothing in paragraph (1) of this Article shall affect the transfer of any compensation under Article 6 of this Agreement.

(3) Unless otherwise agreed to between the parties, currency transfer under paragraph (1) of this Article shall be permitted in the currency of the original Investment or any other convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer.

The wording of the above provision is quite broad as it states that all funds related to an investment can be freely transferred. Thus, this broad wording includes inflow and outflow of transfer of funds related to investments. This broad wording is followed by an illustrative list of the transfers related to investments. However, since the list is illustrative, Article 7 will include any other transfer of funds, in addition to those given in the illustrative list, provided that such transfer of funds is related to investment. Further, no condition or qualification is imposed on the transfer of funds related to investment. Thus, from the above provision it is clear that all kinds of transfers are allowed without any qualifications.

However, India has a domestic law that governs capital transfer called the *Foreign Exchange Management Act* (FEMA). Section 6 of FEMA relates to

capital account transactions. Section 6(1) allows for capital account transactions; however, this is subject to section 6(2), which gives the power to the Reserve Bank of India (RBI – India's central bank) to specify, in consultation with the central government, any class or classes of capital account transactions which are permissible.[127] Also, section 6(3) gives power to the RBI to prohibit, restrict or regulate a number of capital account transactions.[128] Thus, both sections 6(2) and 6(3) allow for the imposition of regulatory controls on capital account transactions.

Simply stated, India's domestic law and policy on transfer of funds do not allow an unqualified right to transfer funds related to investment. Though these regulations on capital account transactions are compatible with India's obligations under the International Monetary Fund (IMF) Articles, they are contradictory with India's obligation in 53 IIAs, where MTPs provide a broad and unqualified right to transfer funds.[129]

In such a scenario, if India were to impose restrictions on transfer of funds on the basis of the FEMA law, and if these restrictions were to hurt the economic or business interests of a foreign investor whose investment is protected under any of these 53 IIAs, the investor might bring a case against India at international arbitration for treaty violation. This is not to suggest that every measure adopted under FEMA will be challenged by the foreign investor. Any challenge will depend on the facts of the case; for instance, how intrusive the measure is. However, the relevant point is that the foreign investor has an unqualified right to transfer funds and if this right is violated by India, then the investor has a legitimate IIA claim. As the majority of IIAs disputes have to be decided as per the IIA provisions, the arbitral tribunal will decide India's measure under FEMA in light of the unqualified right to investors to transfer funds – in and out – of India. The only situation where India will be able to justify the adoption of restrictions on transfer of funds will be if these restrictions fall within any of the general exceptions of the IIA or under customary international law, for example, the necessity defence given in Article 25 of the International Law Commission (ILC) draft articles. However, if these restrictions cannot be justified under the general exceptions clause of the IIA or under customary international law then

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[127] For more on this see B.N. Gururaj *et al*, *Commentaries on FEMA*, 2d ed (Delhi: LexisNexis, 2009).

[128] See §§ 6(3)(a)-(j), *Foreign Exchange Management Act, 1999*, Act 42 of 1999 [FEMA].

[129] The issue of compatibility between MTPs in IIAs (pre-accession BITs) and other regulations (EU Treaty or the EC law) has also arisen in EU; see *Commission of EU v. Republic of Austria*, C-205/06, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0205:EN:HTML> (last visited on 2 October 2010); *Commission of EU v. Kingdom of Spain*, C-249/06, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0249:EN: HTML> (last visited on 2 October 2010).

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they will be a violation of the MTP provision that allows free transfer of funds.[130] India cannot invoke its domestic law as a defence to support these restrictions.[131] Now, when the issue of enforceability of such an ITA award arises in India, India can challenge the award in Indian courts (apart from the ground of 'interests of India') on the ground that it is 'patently illegal' because the award contravenes FEMA and thus violates 'public policy' and hence should be set aside.

Another interesting dimension of this debate is to examine whether India's challenge of an ITA arbitral award in its domestic courts is consistent with its IIAs. As has been mentioned before, there are 51 IIAs which are silent on the enforceability of the ITA award whereas in 16 IIAs, enforcement of ITA awards is subject to domestic law. If India denies enforceability of the ITA awards issued under these 16 IIAs on the basis that these ITA awards are against India's understanding of 'public policy', arguably India's actions will be consistent with her IIA obligations. These IIAs give deference to the host state to decide on the issue of enforcement and thus subjecting the enforcement of the ITA award to Indian law can be justified. However, a strong counter argument to this would be that subjecting arbitral awards to domestic laws does not mean not enforcing the award at all or setting aside the award as a result of such wide substantive grounds because the IIA makes these awards 'binding'. In other words, it is one thing to subject enforcement of awards to national laws and quite another to subject enforcement to such wide substantive grounds of intervention, which would essentially allow a domestic court to act as a court of appeal for an ITA award.

There are 51 Indian IIAs which are silent on whether enforceability of the ITA awards is contingent on national laws. These IIAs only state that the ITA awards shall be binding. Even if one argues that notwithstanding the silence in these IIAs on this issue, an ITA award against India shall be enforced in accordance with domestic laws, it is highly unlikely that this means challenging the awards on such wide 'public policy' grounds, as mentioned above for awards

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[130] For more on transfer of funds provision in IIAs, see Waibel (2009), *supra* note 126 at 497-518; Salacuse (2010), *supra* note 3; Kolo and Walde (2008), *supra* note 126 at 205; UNCTAD (2000), *supra* note 126; Dolzer and Schreuer (2008), *supra* note 3 at 010; Turyn and Aznar (2010), *supra* note 126 at 51-78; Muchlinski (2009), *supra* note 126 at 59-61.

[131] In this regard, it is important to note that the majority of Indian IIAs have a provision saying that foreign investments shall be governed by domestic laws. Such provisions make the obvious point that the day to day operations of foreign investments will be in accordance with domestic laws. In the above situation, can India rely on this provision to argue that its regulatory measure, which is consistent with FEMA, is IIA compatible notwithstanding the violation of the unqualified right to transfer funds? The answer to this question is no because such an interpretation will allow domestic law to be used to justify violation of international law rendering the IIA provisions inutile. In any case, a situation where the treaty obligations and national law appear to be in conflict is uncalled for and will give rise to all sorts of complexities, which India should have avoided by being more precise and definite in drafting the MTPs in its IIAs including the Model IIA.

under the other 16 IIAs. In any case, the debate is not on whether arbitral awards should be enforced under Indian laws but rather that the grounds of challenging an ITA arbitral award in India are extremely wide, which could thus result in a situation where many ITA arbitral awards against India can be successfully challenged.

VI. PROPOSED AMENDMENTS AND THEIR IMPLICATIONS ON ENFORCEABILITY OF ITA AWARDS

The central government of India has proposed several amendments to the Indian Arbitration Act, which are currently being circulated for public comments.[132] These amendments are expected to synchronise the law of arbitration in India with the UNCITRAL Model Law and facilitate the growth of the institution of arbitration.[133] In other words, India hopes that through these amendments it will be able to overcome the problems related to enforceability of ICA awards in India.

A. *Proposed amendments and the risk of setting aside IIA awards*

One of the significant proposed changes is to amend the scope of application of Part I of the Indian Arbitration Act. The 2003 Amendment Bill proposed that section 2(2) be amended to read:

> (2)(a) Save as otherwise provided in clause (b), this Part shall apply where the place of arbitration is in India.
>
> (b) Sections 8, 9 and 27 of this Part shall apply to international arbitration (whether commercial or not) where the place of arbitration is outside India or where such place is not specified in the arbitration agreement.

The section as it stands presently states 'this Part shall apply where the place of arbitration is in India' and was interpreted in *Bhatia* as being not synonymous with 'this Part shall apply *only* where the place of arbitration is in India'.[134] The Court refused to read in the word 'only' into the Section holding that (i) where the arbitration is held in India the Part applied mandatorily, and (ii) where the arbitration is outside India, the Part applies by default if the parties have not excluded it. Though the word 'only' has not been inserted by the amendments, the

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[132] Ministry of Law (2010), *supra* note 15.
[133] Statement of Objects and Reasons, *The Arbitration & Conciliation (Amendment) Bill*, 2003; Ministry of Law (2010) *supra* note 15.
[134] *Bhatia*, *supra* note 93.

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insertion of the phrase '[s]ave as otherwise provided in clause (b)' and certain sections in Part I being specifically made applicable through Clause (b) to arbitrations held outside India strongly indicate that other provisions of Part I as amended would not apply to arbitrations held outside India. However, it would still be open to an Indian court to hold that the effect of the amendment would be that (i) the position laid down in *Bhatia* in respect of applicability of Part I holds true given that the word 'only' has still not been inserted by a legislature that was well aware of the decision in *Bhatia* and the bearing that the omission of the word 'only' had on that decision, and (ii) the rule in *Bhatia* is modified to the extent that the provisions specified in section 2(2)(b) (as it will stand after the proposed amendment) are of mandatory application even when the arbitration is held outside India.[135] However, the 2010 consultation paper proposes the insertion of the word 'only' so as to exclude the application of Part I to arbitrations held outside India. This proposal, if accepted, will exclude the possibility of a foreign award, including an award made under an IIA, being set aside under section 34.

Significant changes have also been proposed to the meaning of 'public policy' in section 34. The shift in the judicial understanding of the phrase 'public policy' appearing in section 34 from the 'narrow view' adopted in *Renusagar* to the broad view in *Saw Pipes* and *Venture* has already been discussed.[136] The proposed amendments, by the insertion of Explanation II and a new section 34A, seek to make the narrow view of public policy applicable to ICA and the broad view applicable to other arbitrations. That is, if the proposal to exclude the applicability of Part I to arbitrations held outside India is implemented, an arbitration under an IIA (which in most cases is likely to be held outside India for the sake of neutrality of seat) would be subject to the narrow view of public policy. In other words, an Indian court would not be in a position to set aside an award in such an arbitration on the ground of a 'patent illegality' with reference to Indian law. Thus, the conflict between the MTPs in Indian IIAs and FEMA discussed above would be avoided.

B. *Proposed amendments and enforceability*

Despite the possibility of an IIA award being set aside under section 34 being excluded, the amendments do not do much to enhance the enforceability of investment treaty awards. It is important to note that even under the narrow view, an award that is against the 'interests of India' is, by definition, against public

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[135] It is pertinent to note that though the Amendment Bill as it currently stands does not add the word 'only' to section 2(2), there is a mention in the Consultation Paper, issued in this regard, of such an addition. If this addition were to take effect, Part I will cease to have application to arbitrations held outside India including investment arbitrations.

[136] See the discussion in Section V.A.2 of this paper.

policy. This would not remove the concern discussed earlier that in every ITA award where India has argued its interest or position and the same has been rejected by the international arbitral tribunal, the award could be argued to be against the 'interests of India' and thus not enforceable.

Thus, it appears that a lot hinges on how Indian courts will interpret the proposed section 2(2) as amended. The amendments still leave arbitration, including ITA, at the mercy of the judiciary; and decisions from the past show that this mercy is not forthcoming. The sum and substance of the entire argument is that – first – even after the proposed amendments to the Indian Arbitration Act are enacted, the possibility of bringing an ITA award under the ambit of Part I of the Indian Arbitration Act is very much there, and – second – ITA awards could still be set aside for being against the 'interests of India' and thus being against 'public policy'. The central government, through the proposed amendments, is certainly trying to make sure that a *Venture Engineering*-type situation does not arise and no ICA award is held against 'public policy' on the ground of 'patent illegality'. Statutorily doing away with 'patent illegality' will certainly help the enforcement of ICA awards because very few ICA awards will be against 'interests of India'. However, this will not solve the problem related to enforceability of ITA awards because ITA awards by their very nature are against what the host country perceives as in its 'interests'. Hence, the 'net of unenforceability' for ITA awards remains too wide even after the proposed amendments.

It should also be noted that even under the 'narrow view' of public policy envisaged by section 48 in Part II (which talks of the enforcement of awards issued under the New York Convention), an award against the 'interests of India' is not enforceable. As discussed above, this ground would prejudice the enforceability of most ITA awards directed against the Republic of India. Nothing in the proposed amendments seeks to address this concern.

VII. CONCLUSION

This paper has attempted to show that the enforceability of ITA awards under the present Indian arbitration law is extremely difficult. The situation with regard to enforceability of ITA awards in India will not change much even with the proposed amendments to the Indian Arbitration Act, because the nature of ITA awards is different from ICA awards. Since India has undertaken and is undertaking investment treaty commitments (by entering into IIAs) with so many countries and has agreed to investor-state arbitration in all these IIAs to settle disputes with investors, it is only in India's interest to make sure that its domestic legal regime is shaped accordingly.

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However, this paper does not advocate for the blind enforcement of ITA awards in India. Its purpose is to make an important contribution to the debate on amending the Indian Arbitration Act by focussing on the nature of ITA awards and distinguishing them from ICA awards. It seems that India is attempting to amend the Indian Arbitration Act by focussing on the concerns related to enforcement of ICA awards and is oblivious to the concerns related to the enforcement of ITA awards primarily because it is not mindful of the fundamental distinction between them.

It is necessary for India, as it debates the amendment of the Indian Arbitration Act, to understand that the enforcement of foreign arbitral awards also includes ITA and, thus, the need to address the issue of enforceability of ITA awards as well. Addressing the issue of enforcement of ITA awards is also important in light of the Indian law ministry's own stated intent to change the perception that India is hostile to enforcement of foreign arbitral awards, and to develop institutionalised arbitration in India. The Indian Arbitration Act should take cognizance of the fact that foreign arbitral awards include not just ICA but also ITA awards, and thus have provisions specifically dealing with the enforceability of ITA awards based on the recognition of their fundamentally different characters.