CAN ARBITRAL AWARD BE CONSIDERED AN INVESTMENT FOR THE PURPOSE OF INVESTMENT TREATY ARBITRATION?

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ABSTRACT

An arbitral award from an International Commercial Arbitration is rendered useless for the party in whose favour it is granted if the party is unable to get it enforced. The winning party in a commercial arbitration is seldom left with many choices to get its award enforced if the procedure of the national legal system of the country in which enforcement is sought is tedious, time consuming and non-arbitration friendly. Such actions by administration and the judiciary of the State cause gross injustice to the party seeking enforcement under international law.

A new ray of hope may arise for such a party if the non-enforcement of its award allows the party to claim a breach of the Bilateral Investment Treaty by the state in which enforcement is sought. A pre-condition for a claim to arise under any Bilateral Investment Treaty is the existence of an investment. Hence, for such an action to crystallise, at the very threshold the award arising from the commercial arbitration must be an investment under the Bilateral Investment Treaty. The authors discuss that the basic premise for such an approach is that by the unjust denial of enforcement of an arbitral award, the State has breached its obligation under international law and under the Bilateral Investment Treaty to accord fair and equitable treatment to the investors.

This paper attempts to examine the link between an award from a commercial arbitration and an investment under a Bilateral Investment Treaty. For that purpose, the authors have adopted a two-pronged approach. In the first part, the article endeavours to understand the scope

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of investment. It lays down the link between the definition of investment under the Investment Treaties and the definition as per Article 25 of the ICSID Convention. Tribunals have used Article 25 to lay down certain basic factors that must exist for an investment. Hence, in the first part, the article examines the mingling between the definition adopted by the parties and these factors laid down by the tribunals in various awards. The article tries to establish the meaning of investment with respect to both these approaches and discusses the essentials of an investment as enunciated in Salini v. Morocco, popularly known as the Salini test.

In the second part, the article lays down the meaning of an arbitral award and then goes on to examine whether an arbitral award can fall within the meaning of investment as established in the first part of the article. The article lays down the differing approaches adopted by various tribunals in cases where they were confronted with the question of whether an arbitral award is an investment. In its first approach, the article tries to test whether an arbitral award can directly fall within the meaning of an investment. In case an arbitral award cannot directly be an investment, the authors in their second approach attempt to establish an indirect link with the subject matter of the award. The article discusses the observations of the tribunals in various cases wherein the main subject matter from which the award arose fell within the definition of investment. In case the subject matter falls within the definition of investment, the article examines if the award in such a case can indirectly fall within the definition of investment or not.

In essence the authors of the article are trying to discuss the legal rationale behind the relief available to the award creditor whose award has been unlawfully and arbitrarily denied enforcement by the host State. Such a right, if established will be a powerful weapon in the arsenal of the investor, when the State has unjustly refused to enforce the arbitral award and breached the Bilateral Investment Treaty.

1. INTRODUCTION

In the short history of Investment Treaty Arbitration (ITA), there have been a few questions that have been subject to different interpretations and without a definite answer. One such question, which has recently evolved in the jurisprudence of ITA and deserves

a definite answer, is 'Whether an arbitral award constitutes a part of an investment'? Or 'Whether an arbitral award is an investment'?

The question has gained importance in the present day with respect to what comes after the termination of arbitral proceedings. The seeds of the tedious process of arbitration are sown to reap the benefits of the fruit in terms of the award at the conclusion of the proceedings. There may be a scenario where the party in whose favour the award has been delivered is unable to enforce the award. In such a case all the efforts throughout the proceedings are rendered futile. It is in relation to this enforcement of the award that the issue of considering an arbitral award as an investment gains immense importance. In elementary terms, if an arbitral award is considered an investment, it allows an investor to initiate ITA under the Bilateral Investment Treaty (BIT) for the non-enforcement of the original arbitral award.

To determine whether an arbitral award is an investment or not, this article, in its first part looks at the contours of investment that have been defined over the brief history of ITA. It examines the links between the autonomy given to states to define investment in their agreements and the discretion given to tribunals while interpreting the term 'investment'. It goes on to assess whether a tribunal is limited by the definition of the parties or whether it can and under what circumstances can it move beyond the definition of the parties. The article further examines the various factors that have been held to be the basic requirements of an investment.

Once the meaning of investment has been explained, this article goes on to examine whether an arbitral award falls within this meaning of an investment. It studies the meaning of an arbitral award and then looks at whether the arbitral award itself or the subject matter from which it is arising satisfies the tests laid down for an investment in the first part. Once it has been assessed whether an arbitral award is an investment, either directly (where an arbitral award satisfies the test for investment) or indirectly (where the subject matter from which the award is arising satisfies the test for investment), the consequences of both the scenarios may be seen.

2. WHAT IS THE MEANING OF 'INVESTMENT'?

There are many diverse interpretations given to the word 'investment' and its essential attributes. The jurisprudence of the meaning of the term 'investment' has evolved over the time with various decisions of the tribunals. This part of the article will discuss the different interpretations and what has finally been established as a benchmark for categorizing an investment.

Black's Law Dictionary defines an 'investment' as, 'a term where capital is committed to make an income from it'.[1] While dealing with disputes Tribunals often need to look at the definition of 'investment' with reference to, firstly, the investment treaty; and secondly, Article 25 of the ICSID Convention.

While the ICSID definition per se may not be binding on other tribunals; however, the factors defining investment that have been laid down while interpreting Article 25 of the ICSID Convention are often used by tribunals world over while considering the definition of investment.[2]

2.1. Definition of Investment under BITs

States have the freedom to define investment under their BITs. Modern BITs usually keep a wide and open-ended definition of investment with an indicative list of specific kinds of investment. They usually include phrases such as "every kind of asset..." and go on to give a non-exhaustive list stating "in particular, though not exhaustively...."[3] They may include references such as "all assets, such as property, rights and interests of every nature" within the scope of investment.[4]

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[1]Henry Campbell Black, *Black's Law Dictionary*, 58 (1910).

[2]Cambell McLachlan, Laurance Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, 164 (2008).

[3]Agreement for the Promotion and Protection of Investments, Bosnia & Herzegovina, Article 1.

[4]Agreement on Encouragement and Reciprocal Protection of Investments, France-South Africa, Article 1.

There is a common thread across most BITs while defining investment. After the wide phrase, the specifically listed categories would include, 'shares, property, contracts, rights conferred by law and intellectual property rights'.[5]

An example of a commonly used definition for investment in BITs is as follows:

"Investment means every kind of asset, owned or controlled directly or indirectly, and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."[6]

There have been situations wherein the Tribunal has chosen to stick to the definition of investment chosen by the parties under BITs or Investment Treaties.

In Phillip Gruslin v. Malaysia,[7] the Tribunal denied jurisdiction as the transaction did not fit in the definition of investment in the Inter-Governmental Agreement between the parties. There are many instances where the tribunals have used a BIT definition as the

[5] *Supra* note 2, at 171.

[6] U.K. Draft Model BIT, Article 1, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847.

[7] Philippe Gruslin v. Malaysia, ICSID Case No.ARB/99/3.

benchmark to examine the scope of investment.[8] However, the autonomy given to the parties is not unlimited and a meaning apart from the one agreed to between the parties may also be attached to the term investment.[9]

2.2. Tribunals are not limited by the definition in BITs

In multiple cases, the Tribunal's jurisdiction has not been restricted to the definition of investment adopted by the parties. Moreover, there is a limitation on this freedom of the parties to define 'investment'. The freedom granted to the parties cannot be exercised in a manner that it results in anything agreed between the parties becoming an investment. Their definition has to be in tandem with the objective test enshrined under Article 25 of the ICSID Convention.[10]

Article 25(1) of the ICSID Convention requires that in addition to other criteria for the Centre to have jurisdiction there must be a legal dispute which is arising 'directly out of an investment'. Additionally, The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States has said that:

"no attempt was made to define the term 'investment' so that the Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre under Article 25(4)."[11]

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[8]Generation Ukraine, Inc. v. Ukraine, ICSID Case No.ARB/00/9; SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No.ARB/01/13; Société Générate de Surveillance SA v. Republic of the Philippines, ICSID Case No.ARB 02/6; Tokios Tokelos v. Ukraine, ICSID Case No.ARB/02/18; Waguih Elie George Siag and another v. Arab Republic of Egypt, ARB/05/15.

[9]*Supra* note 2, at 170.

[10]Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11.

[11]Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, IBRD, Section V,

There exists a view, which states that investment was not defined in specific terms in the ICSID Convention so as to not limit its meaning or scope.[12] It was left to the parties to lay out the provision under their BIT to include the disputes that can be referred to ICSID. However, as will be discussed within this part of the article, the interpretation of Article 25 of the Convention, by laying down certain qualifying factors for an investment puts certain limits on the parties' freedom to define investment. In fact, if the Article 25 threshold is not met, a matter could be excluded from ICSID jurisdiction.[13]

Elaborating upon the limitation on the parties' freedom to define investment, the Tribunal in Patrick Mitchell v. DRC[14] has observed that the freedom given to the parties does not allow them to arbitrarily open the ICSID jurisdiction to anything that they might agree upon to qualify as an investment. The Washington Convention is held to be superior to any BIT or agreement between the parties.

Therefore, the parties indeed have the autonomy to define investment in their treaties but this definition cannot be the sole criterion when the Tribunals are judging the scope of an investment. Certain factors can be used as limitations to this freedom while defining investment. The next question that arises is with regard to the substance of these limitations. The Tribunal, through various cases, has laid down multiple tests to be kept in mind while interpreting the word investment.

2.3. Objective Factors of 'Investment'

To prevent the parties from having unfettered freedom to define 'investment', the Tribunal has tried to put certain limits on this

¶27 available at https://icsid.worldbank.org/ICSID/ StaticFiles/basicdoc/partB.htm.

[12]David A Lopina, "The International Centre for Settlement of Investment Disputes: 'Investment Arbitr-ation for the 1990s", 4 *Ohio State Journal on Dispute Resolution*, 107, 114 (1988).

[13]*Supra*note 10, at 52.

[14]Patrick Mitchell v. DRC, ICSID Case No.ARB/99/7.

freedom by laying down objective factors that are required for an investment to exist.

Professor Christoph H.Schreuer has laid down a criterion for defining an investment and it includes the duration of investment, regularity of profit and returns, substantial commitment, contribution to host state's development and an element of risk.[15] In essence, if a transaction has these four factors, it will qualify as an investment. These factors have been observed to be the 'basic features of an investment' and were considered in the case of Fedax v. Republic of Venezuela, [16] the first ever case that challenged the jurisdiction of ICSID based on the transaction not being an investment. In this case, Fedax, a company used the Netherlands-Venezuela BIT to claim as a beneficiary of debt instruments endorsed to it. Venezuela contended that these debt instruments were not an investment, as Fedax had not made any foreign direct investment that involved a long-term transfer of financial resources. The Tribunal while rejecting this argument and holding that the promissory notes were an investment laid down certain 'basic features' that an investment possesses. The factors it laid down were- a) a certain regularity of profit and return, b) the assumption of risk, and c) a substantial commitment to and significance for the host State's development.

In CSOB v. Slovakia[17] also, a factor-based approach was adopted. The dispute arose after the separation of Slovak and Czech Republics. The Claimant in this case, a Bank, was privatized and its non-performing loan receivables were assigned to a Collection Company that was supposed to make payments for it to the Bank. A dispute occurred with respect to the above agreement and Slovakia argued that the dispute did not arise out of an investment, as CSOB had not made expenditure or outlays in the Slovak Republic. The Tribunal while rejecting this argument adopted the observations of the

[15]Christoph H. Schreuer, *The ICSID Convention: A Commentary*, 140 (2001).
[16]Fedax N.V. v.The Republic of Venezuela, ICSID Case No.ARB/96/3.
[17]Ceskoslovenska Obchodni Banka, v. Slovak Republic, ICSID Case No. ARB/97/4, 14 ICSID Rev. Foreign Inv. L.J. 251 (1999).

Tribunal in the Fedax case. It held that CSOB's continuing expanding activities in the Republics, which involved a significant contribution to the economic development, made it an investor.

Such an approach was also followed in Joy Mining Machinery Limited v. Arab Republic of Egypt.[18] The case related to performance guarantees given by the claimant to an Egyptian State controlled enterprise. The underlying contract was related to the supply of mining equipment. The Tribunal, while referring to the criteria laid down in Fedax, held that no investment existed in this case and the contract amounted to no more than a sales contract.

The factors laid down in Fedax v. Republic of Venezuela were reiterated in Salini v. Morocco[19] which held that 'a) Contributions in assets or money, b) A certain duration of performance of the contract, c) An element of risk, and d) A contribution to the economic development of the host State' are the relevant criteria for the existence of an investment. The Salini award said that investment under Article 25 of the Convention should be understood with reference to an objective criterion.

The objective criteria laid down has come to be known as the 'Salini criteria' or the 'Salini test' which is used to test whether a particular transaction would qualify as an investment or not. In this case, the dispute related to a contract of construction of Highways in Morocco by Italian contractors and whether it constituted an investment.

Under the BIT, investment was to be defined with reference to Moroccan National Law. Morocco argued that there was no investment and it was merely a commercial contract. However, the Tribunal while referring to the objective factors held that the transaction was an investment as per the objective criterion and under the BIT.

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[18] *Supra* note 10, at ¶55 & ¶56.

[19] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco, ICSID Case No. ARB/00/4, 42 ILM 609 (2003).

Tribunals have been inclined to consider certain factors while dealing with the existence of an investment. In laying down an objective test for a transaction be an investment, the Tribunal in Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne-démocratique et populaire,[20] found the following factors relevant while judging if a contract for construction of a dam in Algeria was an investment or not: a) the contracting party has made contributions in the host country; b) those contributions had a certain duration; and c) they involved some risks for the contributor.[21]

Nevertheless, there can be no straightjacket formula to define what will qualify as an investment. Even the Salini factors cannot be applied strictly to every case. They have not been laid down in the Convention and hence, are not a mandatory requirement. However, the factors can be used as a guiding light while trying to understand the elements of an investment.

There cannot be a stringent list of factors, however, these factors can be used as helpful tools while judging the existence of an investment or seeing whether a transaction is an investment or not.

As has already been stated that the term investment was consciously left undefined in the Convention to afford a liberal interpretation; tribunals that sit in individual cases should impose any one such definition as applicable to all cases.[22]

However, the argument that the Convention does not define or lay down a minimum basic criterion for investment cannot be taken to mean that the parties can be allowed to agree to any meaning of investment.

In fact, the failure to add a definition of investment in the

[20]Consortium Groupement L.E.S.I.- DIPENTA v. République Algérienne Démocratique et Populaire, ICSID Case No. ARB/03/08, Award, 10/01/2005.

[21]*Ibid.* at ¶13.

[22]Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24/07/2008, ¶313.

convention was due to the inability to reach an agreement as to the definition.[23]

Therefore, a balance needs to be drawn between this freedom of the parties and laying down certain basic factors that can be applied by various Tribunals while determining the existence of an investment. There have to be some limits within which parties have the freedom to agree upon the definition of investment.

In the case of Rompetrol v. Romania it was observed, "As both Parties to this arbitration accept, Article 25 reflects objective 'outer limits' beyond which party consent would be ineffective."[24]

In fact the Chairman of the Regional Consultative Meetings of Legal Settlement of Investment Disputes as has very well elucidated this position:

"The purpose of Section 1 is not to define the circumstances in which recourse to the facilities of the Center would in fact occur, but rather to indicate the outer limits within which the Center would have jurisdiction provided the parties' consent had been attained. Beyond these outer limits, no use could be made of the facilities of the Center even with such consent."[25] It is these factors that have been laid down by the Tribunals that will form the outer limits of defining an investment.

The freedom of the parties is intact to define investment in their treaties; however, such a definition must be within the limits of these basic factors that have been laid down throughout the years. The factors are to be taken as akin to a boundary, and the parties are free to exercise their autonomy to define an investment within the boundary formed by the basic factors of an investment.

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[23]Christoph H. Schreuer, *The ICSID Convention: A Commentary*, 90 (2001).

[24] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, 18/04/2008.

[25]ICSID, *History Of The ICSID Convention : Documents concerning the origin and the formulation of the convention on the Settlement of Investment Disputes between States and Nationals of other states*, Volume II-1, 566 (1968).

2.4. Contribution to the Economic Development of the Host State

The Tribunal in multiple cases including the Fedax case[26] and CSOB v. Slovakia[27] has used the contribution to economic development as a factor while dealing with an investment. In the Salini case,[28] contribution to economic development was set as a separate criterion for an investment. The question that is to be seen is whether the absence of such a contribution would disqualify a transaction from becoming an investment and further to what extent does a transaction need to contribute to the development of the host state for it to qualify as an investment.

Contribution to the economic development has been observed to be the 'only indication of an objective meaning' to be given to the term investment by Professor Christoph H. Schreuer.[29] Another aspect buttressing this view is that the Preamble to the ICSID Convention emphasizes the need for international cooperation for economic development, and on the role of private international investment in that regard.[30]

In Salvors v. Malaysia,[31] the Tribunal used the objective test instead of applying the BIT definition of investment. It observed that the transaction was not an investment, as it did not contribute to the economy of the host country. It stated that there is a requirement of a 'significant contribution to be made to the host State's economy.'[32]

However, the Salvors award was annulled by an ad-hoc committee for not even considering how investment was defined in the BIT and going beyond its powers. The Salvors Annulment Decision rejected

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[26] *Supra*note 16, at ¶ 43.
[27] *Supra*note 17, at ¶ 64.
[28] *Supra*note 19, at ¶ 52.
[29] Christoph H. Schreuer, *The ICSID Convention: A Commentary*, 91 (2001).
[30] *Supra*note 17, at ¶ 64.
[31] Malaysian Historical Salvors SDN BHD v.The Government of Malaysia, ICSID Case No.ARB/05/10.
[32] *Id.* at ¶ 143.

the approach of using objective criteria to define investment as it went against the purpose of leaving 'investment' undefined in the ICSID Convention and allowing parties to agree on their own definitions through BITs or Multilateral Investment Treaties (MITs).[33]

In Pey Cassado v. Chile,[34] economic contribution to the host state's development was not considered as an essential factor for an investment. The Tribunal concluded that contribution to economic development was a consequence of investment and not a constitutive element of investment.[35]

Judge Shahabuddeen in his dissenting opinion disagreed with the committee in the Salvors annulment decision on the ground that an investment must contribute to the country's economic development.[36] He emphasized on the need for contribution to the economic development as an essential ingredient to constitute an investment.

He also said that the reference in the Preamble to economic contribution is not only as a consequence of investment but also as the very purpose of an ICSID investment.[37] This seems to be the correct view as the travaux préparatoire of the Convention has references to the economic development of the states.

Moreover, the fact that the Tribunal has used 'the contribution to economic development' as a factor in many cases while dealing with investments only adds to its importance as a factor to be considered while defining investment.

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[33]Malaysian Historical Salvors SDN BHD v. The Government of Malaysia, ICSID Case No.ARB/05/10.

[34]Víctor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No.ARB/98/2.

[35]*Id.* at ¶232.

[36]Malaysian Historical Salvors Sdn Bhd v. Government of Malaysia, ICSID Case No. ARB/05/10.

[37]*Id.* at ¶16.

The next question that needs to be seen is the amount of contribution to economic development of a country by a transaction for it to be an investment. Some unanimity can be found at this point. Wherever the tribunals have taken the contribution to economic development as a factor, they have observed that the contribution must be 'significant' or 'substantial'.[38] Both the Salvors award and the dissenting opinion in Salvors Annulment Decision[39] agreed on this point.

For there to exist an investment within the understanding of the Convention there should exist 'economic commitments of significant value, sufficient at least that one may agree that the operation is of a nature to promote the economy and development of the country concerned'.[40]

If this was not taken as the correct position then it would lead to a situation where any contribution, howsoever small, to the Gross Domestic Product (GDP) of the host state, would lead to it constituting an investment for ITA. Hence the transaction must meet a certain minimum threshold of contribution for it to qualify as an investment.

2.5. Balance between the BIT Definition of Investment and the Objective Factors

While the parties have the freedom to define investment, this power or freedom cannot be unfettered. Certain limitations need to be put on this freedom. The factors that have been laid down for defining an investment help in putting these limitations. It will be improper if parties are allowed to arbitrarily define the disputes and extend the tribunal's jurisdiction to those cases. Such a view would render meaningless the inclusion of the words 'investment' under Article 25 of the ICSID Convention while discussing the jurisdiction of the Tribunal.

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[38] *Supra* note 10, ¶53; *Supra* note 20, at ¶14; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29.

[39] *Supra*note 31, at ¶123; *Supra*note 36, at ¶4 & 14.

[40] *Supra* note 20, at ¶14.

On the other hand, laying down universally applicable stringent standards or factors that must be ticked off before any transaction can fall within the meaning of an investment may also not be correct. This would not only take away the freedom of parties available to them while drafting and agreeing to BITs and agreements amongst themselves but also may in some cases arbitrarily exclude some transactions from the purview of an investment. This arbitrary exclusion owes to the dynamism of the investment world. Investments may vary in their form & nature and laying down a set criterion will lead to investments arbitrarily being excluded.

While dealing with the 'outer limits' for defining an investment, the important role played by the contribution of an investment to the economic development of the host state cannot be ignored. It may not be possible to define a strict GDP-specific figure for a transaction to be taken as contributing to a country's economic development, but it cannot be disregarded all together either. For an investment to exist, it must contribute to the economic development of host state. This is in consonance with the purpose for which an investment should be made and with the Preamble of the ICSID Convention.

Having a concrete formula for investment set in stone is not desirable. It will not only be against the objective of giving parties freedom to define what disputes can come to the tribunal but also create further complications. There can be cases where the BITs may give a wider definition of the term investment than given in the Salini test. Moreover, there are chances that the set criteria may go against what the parties have agreed to.

Even though the definition of investment has majorly evolved through ICSID jurisprudence, other Tribunals have used the factors-based objective test approach developed by ICSID as a reference point. In Romak v. Uzbekistan[41] the UNCITRAL Tribunal used the Salini test to decide whether a Swiss firm had made an investment in Uzbekistan or not.

[41]Romak SA v The Republic of Uzbekistan, PCA Case No. AA280, 26/11/2009.

This award determined the applicability of Article 25(1) of ICSID, its interpretation in the Salini test and established a link between ad-hoc and ICSID disputes to reveal that the 'inherent meaning' given to 'investment' is irrespective of the choice of dispute resolution mechanism.

The Tribunal should, therefore, not have a water-tight approach towards what defines an investment. A flexible approach based on the facts and circumstances of each case along with considering the Salini factors may be more practical and appropriate. A combined approach should neither ignore the weight given to certain factors forming an objective definition of investment nor ignore the freedom given to the parties.

In essence, the most viable and practical approach would be to keep certain objective factors for a transaction to be an investment but the application of these factors should be kept malleable for each individual case. This malleability is essential in order to uphold the freedom that has been given to the parties to agree upon the definition of investment. However, this freedom should be exercised within the outer limits, which are set by those flexible objective factors.

The motive behind discussing the definition of investment in this article will aid in understanding whether an arbitral award falls within the meaning of investment or not. Understanding the jurisprudence behind the factors taken into account while dealing with the scope of investment will be helpful in judging whether those factors exist in an arbitral award and hence make it equivalent to an investment or not.

3. WHAT IS AN ARBITRAL AWARD AND WHETHER IT IS AN INVESTMENT?

The question that has to be answered now is- 'Can an arbitral award constitute an investment for the purpose of ITA under a BIT?' A straight 'yes' or 'no' answer to the above question is becomes

important at the time of recognition and enforcement of the arbitral awards in the host state by the winning parties.

The authors in this part will discuss the different approaches adopted various tribunals across the board to determine whether an arbitral award constitutes an investment and the legal rationale behind such decisions. The article will discuss, first the definition of an 'arbitral award' and second, the article will move on to discuss the various decisions and interpretations taken by the tribunals to determine whether an arbitral award is an investment.

3.1. Definition of an Arbitral Award

It is important to discuss what an arbitral award is and what its essential elements are. Arbitration leads to the pronouncement of an award, which determines the rights and liabilities of the parties. An arbitral tribunal is bound to pronounce a final, valid, binding and an enforceable award.[42]

Article 34(2) of UNCITRAL Arbitration Rules states:"All awards shall be made in writing and shall be valid and binding on the parties. The parties shall carry all awards without delay". Even though there exists a plethora of rules on arbitration, no such rules give a distinct meaning of the term 'arbitral award'. The Working Group of the UNCITRAL Model Law defined it as: "Award means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award."[43]

Hence, an arbitral award is akin to a judicial decision, having the same function and rationale as a judgment, adjudicating all the issues that are in dispute.

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[42]Margaret L. Moses, *The principles and practice of International Commercial Arbitration*, 184 (2008).

[43]UNCITRAL's Project for a Model Law on International Commercial Arbitration, "Enforcement of the award", 2 *ICCA Congress Series* 201, 208 (1984).

The essential attributes of an award are:

(i) 'concludes the dispute as to the specific issue determined in the award so that it has res judicata effect between the parties; if it is a final award, it terminates the tribunal's jurisdiction;

(ii) disposes off parties' respective claims;

(iii) may be confirmed by recognition and enforcement

(iv) may be challenged in the courts of the place of arbitration'[44]

The New York Convention provides for the recognition and enforcement of the award rendered by an arbitral tribunal. The Convention provides a price to an arbitral award, which can be encashed by the party in whose favour the award is passed. However, the convention also provides for certain conditions and exemptions for the enforcement and recognition of the award. The model for recognition and enforcement as provided by the New York Convention has been adopted by most nations in their domestic arbitration law.

The New York Convention[45] as well as the ICSID Convention[46] provides that an award shall have the same value as a judgment of a court of law. Therefore, the signatories of these conventions have an international obligation to execute the arbitral awards and accord to them the same treatment as the judgments and decisions of the domestic courts.

3.2. Whether An Award Constitutes An Investment?

In this part, the article will elucidate whether an arbitral award can come within the ambit of enjoyment, usage and protection of an investment.

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[44]Julian D. M. Lew, Loukas A. Mistelis, Stefan Michael Kröll, *Comparative Analysis on Arbitration*, 631 (2003).

[45]New York Convention, Article 4- 5, 330 UNTS 38.

[46]International Convention on the Settlement of Investment Disputes, Article 53-54, 17 UST 1270.

In order to resort to protection under a BIT, the essentials to be established are:

(i) Whether an arbitral award, notwithstanding where it is made, constitutes an investment;

(ii) The unjust and arbitrary administrative or judicial interference has resulted in expropriation, denial of justice, or violation of excessive means clause, breaching the fair and equitable treatment under the BIT.[47]

The tribunals have provided different answers and interpretations to the above questions, which would be discussed in this part of the article.

The case of Saipem v. Bangladesh[48] was the first instance where the question, whether an arbitral award and an arbitration agreement constitute an investment and enjoy protection arose.

The commercial dispute arose between Saipem S.p.A., an Italian Oil &Gas Company, and Petrobangla, a Bangladeshi public entity. The two parties entered into a contract to build a natural gas pipeline in Bangladesh.

The contract was governed by the Bangladeshi law, and included an arbitration clause in case of a dispute. The arbitration clause provided that in case of any dispute arising out of the contract, the parties would resort to arbitration under Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) in Bangladesh.

In accordance with the contract and the arbitration agreement, Saipem initiated arbitration proceedings against Petrobangla, seeking certain outstanding payments under the contract.

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[47] Loukas A. Mistelis, "Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement", 28(1) *ICSID Review*, 64, 85 (2013).

[48] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No.ARB/05/07.

Petrobangla moved the Bangladeshi Courts, who in turn revoked the authority of the arbitral tribunal to hold the arbitration proceedings. The tribunal, notwithstanding, such an order of the court continued the arbitration proceedings and passed an award in favour of Saipem. The High Court Division of the Supreme Court of Bangladesh refused to enforce the ICC award and observed that the award was "misconceived and incompetent inasmuch as there is no Award in the eye of the law, which can be set aside...A non-existent award can neither be set aside nor can it be enforced."[49]

Saipem filed a request for ITA with the ICSID against the Government of Bangladesh for the breach of the provisions of the BIT between Italy and Bangladesh. Saipem claimed that due to the undue intervention of the Bangladeshi Courts in the ICC arbitration, they were precluded from the enforcement of the arbitral award against Petrobangla.

According to Saipem, these acts of the Bangladeshi Courts constituted judicial expropriation and deprived Saipem of any compensation from the breach of the contract.

The tribunal first noted whether Saipem had made an investment in Bangladesh in accordance with Article 25 of ICSID Convention. The tribunal examined that to determine whether the investor (Saipem) made an investment, the 'entire operation' has to be taken into consideration, i.e., 'the Contract, the construction itself, the Retention Money, the warranty and the related ICC Arbitration'.[50] Applying the Sailini test,[51] discussed above, the tribunal concluded that Saipem had made an investment within the ambit of Article 25 of the ICSID Convention.

However, the tribunal concluded that rights from an arbitral award arise indirectly from the investment. A dispute arising out of the ICC Award is not a dispute arising directly from the original

[49] *Id* at 50.
[50] *Supra* note 48, at ¶ 110.
[51] *Supra* note 48, at ¶ 111.

investment. The tribunal was unwilling to agree that the ICC award itself constituted an investment under Article 25 of the ICSID Convention.[52]

The Claimant contested that the ICC award was within the ambit of 'credit for sums of money connected with the investment' set out in Article 1(1)(c) of the BIT.[53] The tribunal concluded that:

"The rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties' rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT."[54]

It can be concluded that the Tribunal was reluctant to hold that an arbitral award directly constitutes an investment. However since the initial contract (subject matter) fell within the ambit of investment, the arbitral award arising out of such a contract would constitute an investment indirectly. In essence, the dispute arose out of a subject matter that constituted an investment but the award did not directly arise out of that investment. The award instead, indirectly arose out of that investment.

The case of ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan[55] briefly provided an observation that an arbitral award indirectly constitutes an investment. The dispute was between ATA Construction, a Turkish enterprise and the Kingdom of Jordan under the Jordan-Turkey BIT.

ATA Construction and Arab Potash Company (APC) (Jordanian Company) had a building and construction agreement, with an ad hoc arbitration clause in case of a dispute. The dispute between the

[52] *Supra* note 48, at ¶ 114.
[53] *Supra* note 48, at ¶ 125.
[54] *Supra* note 48, at ¶ 127.
[55] ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2.

parties arose due to the collapse of a dike in the Dead Sea, constructed by ATA and due to certain outstanding payments to ATA. APC brought arbitration proceedings against ATA Construction to seek compensation for the collapse of the dike. The Tribunal passed an award in favour of ATA.

APC moved the domestic court, Jordanian Court of Appeal, to set aside the award passed by the arbitral tribunal. The Court set aside the award and also annulled the arbitration agreement between the parties. Subsequently, the Court of Cassation, on appeal, also annulled the arbitral award. Therefore, the domestic courts extinguished ATA's right to arbitrate.

Subsequently, ATA Construction filed a request for arbitration in ICSID. However, the tribunal rejected jurisdiction, rationae temporis over the claims of the Claimant since the dispute arose from the original agreement, signed in 2000. However, the Jordan-Turkey BIT was signed in 2006. Thus, the tribunal formed under the BIT lacked jurisdiction to resolve the disputes, which arose prior to it signing of BIT.[56] The decision of the Court of Cassation is 'legally equivalent'[57] and 'indistinguishable'[58] from the dispute under the original contract. The tribunal however noted that annulment of the right to arbitrate would amount to a breach of the BIT, as it has a financial value in connection with the investment.[59]

In the light of the above facts, the tribunal also briefly commented on whether an arbitral award constitutes an investment. The tribunal, following the *Saipem award* concluded that a Final award regarding a claim of money or financial performance comes under the scope of the 'entire operation' and would constitute an investment.[60]

The tribunal supports the decision by the Saipem and ATA tribunals as to the liability of the states towards award creditors for unlawful

[56] *Ibid.*
[57] *Id.* at¶ 94.
[58] *Id.* at¶ 103.
[59] *Id.* at¶118.
[60] *Id.* at¶ 113.

interference with the arbitral award. Therefore, the award creditors have a right to submit their claim to ITA.[61]

Additionally, in the case of Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador,[62] the Tribunal made a brief observation on the scope of the investment and its relation to arbitral awards. The tribunal observed that:

"Once an investment is established, it continues to exist and be protected until its ultimate 'disposal' has been completed - that is, until it has been wound up."[63]

The tribunal gave a wide interpretation to the term investment in the BIT. According to the above conclusion, the scope of investment would include all the activities, management, usage, arbitral awards as well as judicial proceedings in the host state.

Thus, it has been seen in the first part of the article that the definitions of investment under ICSID as well as the BITs are subject to wide interpretations. In light of the above factors, it would be safe to conclude that investment is a bunch of rights and liabilities, and the arbitral award arising out of a contract (that is an investment) would also indirectly come under the scope of 'entire operation' of an investment.

A conflicting approach to the above cases was taken in the case of GEA Group Aktiengesellschaft v. Ukraine,[64] where the Tribunal adopted a narrower approach and it refused to accept that an arbitral award constitutes an investment. The initial dispute was with regard to a supply contract of fuel between the GEA (German company) and Oriana, a Ukrainian state-owned petrochemicals plant. The Claimant (GEA) discovered that certain quantity of fuel supplied to Oriana had been misappropriated and suspected Ukrainian

[61] *Supra* note 47, at 78.

[62] Chevron Corporation and Texaco Petroleum Corporation v.The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23.

[63] *Id.* at ¶. 58.

[64] GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No.ARB/08/16.

Government's role in it. The parties negotiated to solve the dispute by entering into a Settlement Agreement and a Repayment Agreement, where Oriana agreed to offer payment to GEA. The agreements provided that any disputes, concerning the Settlement and Repayment agreement should be resolved via commercial arbitration under the ICC Arbitration Rules.

GEA pursuant to the above agreements obtained an arbitral award from the ICC worth US $30 million. GEA moved the Ukrainian courts for the recognition and enforcement of the arbitral award. However, the Ukrainian Courts refused to enforce the award on the grounds that repayment agreement was improper and unlawful under the Ukrainian law.

GEA filed for an ITA and alleged that Ukraine had committed several breaches of the BIT and not accorded fair and equitable treatment to the investor under Germany – Ukraine BIT.

The tribunal first dealt with whether GEA had made an investment in Ukraine. The Claimant contended that the Conversion Contract, the Settlement Agreement, the Repayment Agreement, as well as the ICC award that arose out of them, constituted an investment.[65]

The tribunal considered each of the points separately and observed that the neither the Settlement or Repayment agreement, nor the final ICC award constituted an investment within the BIT.[66]

The rationale given by the Tribunal was that under Article 25 of the ICSID Convention, "the ICC Award – in and of itself – cannot constitute an investment.

An arbitral award is a legal instrument, which provides for the disposition of rights and obligations arising out of the Settlement Agreement and Repayment Agreement." [67] Moreover, since the Tribunal held that neither the Settlement Agreement nor the

[65] *Id.* at ¶ 157.
[66] *Id.* at¶ 157-161.
[67] *Id.* at ¶ 161.

Repayment Agreement constituted investments, there was no question of considering the award that arose out of them as an investment.

The tribunal further enunciated that even if it were assumed that the Settlement and Repayment Agreements constitute an investment under the BIT or the award is characterised as directly arising out of the Contract, which the tribunal did not consider as an investment,[68] an award would still not constitute an investment. The tribunal concluded:

"The fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. In the Tribunal's view, the two remain analytically distinct, and the Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall – itself – within the scope of Article 1(1) of the BIT or Article 25 of the ICSID Convention"[69]

The tribunal further observed that it did not find any merits in the case of the Claimant, and the Claimant failed to prove that the Ukrainian courts applied the law discriminately against them.

The tribunal referred to the decision in Saipem, and concluded that, "the Tribunal has been presented with no evidence that the actions taken by the Ukrainian courts were 'egregious' in any way; that they amounted to anything other than the application of Ukrainian law; or that they were somehow deliberately taken to thwart GEA's ability to recover the ICC Award."[70]

The observation of the Tribunal in this case can be said to have limited the scope of 'investment' under the BIT and under Article 25 of the ICSID Convention for various reasons. Firstly, the Tribunal held that an award independently does not constitute an investment since it only determines the rights and obligations of the parties;

[68] *Id.* at ¶ 146-153.
[69] *Id.* at¶ 162.
[70] *Id.* at¶ 236.

Secondly, the tribunal concluded that the Settlement and the Repayment Agreement did not constitute an investment and hence the award that arose out of such agreement did not even indirectly constitute an investment; and thirdly, the Tribunal said that even if the contract from which an award arose constituted an investment, the award would still not be an investment.

The case of Romnak v. Republic of Uzbekistan[71] was another interesting case discussing the issue at hand. The tribunal in the present case was formulated under the UNCITRAL Rules on Arbitration.

Romnak was a Swiss Company who contracted with Uzkhleboproduct (Uzbekistan Company) for trading in wheat and wheat products. The contract had an arbitration clause, under the rules of GAFTA. Disputes arose between the two parties with regard to outstanding payments and Romanak initiated commercial arbitration proceedings. The award was passed in favour of Romnak, who was unsuccessful in the enforcement and recognition of the award in the domestic courts of Uzbekistan. Subsequently, after the denial of enforcement of the commercial arbitration award, Romnak initiated ITA against the Republic of Uzbekistan.

The tribunal denied jurisdiction to adjudicate on the dispute, on the grounds that the subject matter of the award, i.e the initial contract is not an investment. The tribunal examined the meaning of the investment under the BIT and concluded that a distinction has to be maintained between an investment and purely commercial contracts.[72] Further, it noted that 'mechanical application' of the definition of the investment would 'produce a result which is manifestly absurd or unreasonable'.[73]

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[71]Romak S.A. (Switzerland) v. The Republic of Uzbekistan, UNCITRAL, PCA Case No. Award, 26/11/2009.

[72]*Supra* note 71, at ¶ 185.

[73]*Supra* note 71, at ¶ 184; Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11.

The tribunal declared that, the GAFTA award was directly and 'inextricably linked' to the initial contract between the parties, and therefore, to determine whether Romnak made an investment under the BIT, the entire economic transaction with respect to the contract is to be taken into account.[74] Hence, it was concluded that since, the initial contract between the parties did not constitute an investment under the BIT, the award was merely an instrument to determine the rights and liabilities of the parties arising out of the contract.[75]

The approach undertaken by the tribunal in this case to deny protection under the BIT is in consonance with the decision in Saipemand ATA. Since the initial transactions between the parties were merely commercial in nature, the arbitral awards would not be protected under the definition of investment.

The White Industries Australia Limited v. The Republic of India[76] was another case where the tribunal discussed whether an arbitral award constitutes an investment. The tribunal examined all the above decisions and followed the decisions in Saipem and Chevron.

In this case, there was a contract negotiated between Coal India and White Industries for the development of an Open Cast Coal Mine. The contract contained an arbitration clause that required all disputes to be submitted to the ICC International Court of Arbitration. Disputes subsequently arose between White Industries and Coal India and White Industries filed a request for Arbitration. The arbitral tribunal passed an award in favour of White Industries.

White Industries applied for enforcement in the Delhi High Court, whereas Coal India moved an application in Calcutta High Court for setting aside the award. The Calcutta High Court rejected the setting aside application filed by White Industries. Subsequently, White Industries appealed against this decision before the Division Bench of

[74] *Supra* note 71, at ¶ 211.
[75] *Ibid.*
[76] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30/11/2011.

the High Court at Calcutta. The Court dismissed the appeal. Against this dismissal, White appealed to the Supreme Court of India and meanwhile Delhi High Court stayed the enforcement proceedings. The matter since then lingered in the Supreme Court.

In 2010, White initiated the investment arbitration proceedings by way of filing the Notice of Arbitration, for not providing fair and equitable standards by the Courts to them to get the arbitral award enforced.

The tribunal briefly commented on whether an arbitral award constitutes an investment and concluded in line with the observations of Saipem v. Bangladesh and Chevron v Ecuador:

"...that rights under the Award constitute part of White's original investment (i.e., being a crystallization of its rights under the Contract) and, as such, are subject to such protection as is afforded to investments by the BIT."[77]

The tribunal further dissented from the observations made in GEA v. Ukraine, and observed that:

"The Tribunal considers that the conclusion expressed by the GEA Tribunal represents an incorrect departure from the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning 'investments' made by 'investors' under BITs represent a continuation or transformation of original investment."[78]

Thus, it was reiterated that an arbitral award, arising out of a commercial arbitration would constitute an investment, though indirectly. The observations are in line with the protection offered to an investor under the BIT. An investor can bring ITA against the State, which refuses to enforce the rights of the investor under an arbitral award from a commercial arbitration. The pre-condition to such a claim is that the main subject matter from which the dispute

[77] *Id. at* ¶ 7.6.10.
[78] *Id. at* ¶ 7.6.8.

originally arose constitutes an investment. The State has an obligation under international law to provide fair and equitable treatment to the investors. The unlawful non-enforcement of an award would be against the notions of fair and equitable standards, and the State can be held liable for breaching such an obligation.

Frontier Petroleum Services Ltd. v. The Czech Republic[79] was another case where the observations of the tribunal on the issue are noteworthy.

The claimant in the present case had obtained interim and final awards against a Czech government entity, MA, with regard to a breach of an agreement between the two parties. The proper place of execution of the awards was the Czech Republic. The Czech Courts refused the enforcement and recognition of the awards on the grounds of public policy under Article V (b)(2) of the New York Convention.

Frontier (Claimant) initiated ITA against the Czech Republic under the UNCITRAL Rules. They claimed that the Czech Courts have wrongfully refused to recognize and enforce the awards. Hence, they have not fulfilled their obligation under the BIT to provide fair and equitable treatment to the investors.

The tribunal, in this case, considered whether the Czech Republic breached its legal obligations under Canada-Czech Republic BIT as a consequence of the refusal by the Czech courts' to recognise and enforce a commercial arbitration award on grounds of public policy.

The tribunal accepted at the threshold that the Claimant had made a significant investment in the Respondent State.

The tribunal further observed that it would have jurisdiction rationaemateria over the dispute if the actions or the measures taken by the Respondent have affected the control, management, use, enjoyment and disposal of the investment.

[79]Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final Award, 12/11/2010.

Accordingly, it was observed by the tribunal that, "by refusing to recognise and enforce the Final Award in its entirety, the Tribunal accepts that Respondent could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment."[80]

Thus, the refusal of enforcement by the courts would affect the original investment made by the claimant. Such an interpretation directly references that an arbitral award can be categorized as an investment and refusal to recognise and enforce an award would affect the investment made by the claimant in the host state. Accordingly, an arbitral award passed in commercial arbitration would also comprise an investment, and refusal to enforce it would constitute a breach of the fair and equitable treatment under the BIT.

4. CONCLUSION

It has been rightly pointed out that ITA is a hybrid of private international law and public international law.[81] The article has discussed the value that an arbitral award given in International Commercial Arbitration would hold in an ITA.

Defining the term investment has not been as simple as States defining the term in investment treaties. Investment has not been defined categorically in the rules of various tribunals or the ICSID Convention. States have been given the autonomy to choose and agree upon their own definitions of investments. However, this is the where the complication arises. The definition decided by the parties has not been the sole criteria for the judging the existence of an investment for the purpose of ITA.

Support has been found for having an objective criterion to define an investment and to have a list of certain elements that exist in an investment. ICSID has expanded the meaning of Article 25 of the

[80] *Id.* at ¶ 231.

[81] Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", 74(1) *British Yearbook of International Law*,151, 195 (2004).

ICSID Convention to conclude that it includes an objective criterion comprising of factors to understand the meaning of an investment.

Such a criterion was laid down in various cases starting from the Fedax case. The Salini case finally laid down these factors that came to be known as the 'Salini test' to judge the existence of an investment. These factors include a) contributions in assets or money b) a certain duration of performance of the contract, c) an element of risk, and d) a contribution to the economic development of the host State. In effect, these are the factors that would determine whether a transaction would qualify as an investment or not.

Hence, a balancing act needs to be performed while defining investment between the parties' freedom to define the investment and the factors considered essential to constitute an investment. The balance can be seen to be achieved in an 'outer limits' approach. In essence, the parties' freedom to define anything as an investment cannot be absolute. There need to be certain limitations on this freedom. The factors constitute these limitations in the form of outer limits. In simpler terms, the parties' freedom is maintained in the fact that parties can define investments in their treaties but they have to keep themselves within the boundary defined by the factors. These factors work as the limitations.

It is based on this accepted approach of understanding an investment that we examine whether an arbitral would constitute an investment or not. The determination of whether an arbitral award can be considered an investment or not will assist in the enforcement of the award. This assistance is evidenced by the fact that an arbitral award that is an investment will allow a party to initiate ITA under the BIT for non-enforcement.

An arbitral award is futile for the winning party unless there is a proper mechanism to enforce the award. The New York Convention provides for a well-established judicial mechanism for the recognition and enforcement of the arbitral award in the domestic courts of the country.

With the increase in arbitration as a preferred means of dispute resolution, the parties voluntarily follow most of the arbitral awards without any recourse to any judicial mechanism. The problem arises when the judicial mechanism in the country of enforcement is non-arbitration friendly and does not follow the guidelines enshrined in the New York Convention. Such actions by the domestic courts and administrative bodies are prejudicial to the winning party in the arbitration proceedings.

The New York Convention provides guidelines to the states for the recognition and enforcement of the award. However, it does not create a binding obligation on the state to follow the mandate of the Convention.

The result is that in certain situations the enforcement is tedious, long and subject to local law and lengthy proceedings. Therefore, in such cases, there are immeasurable risks to the award creditor, which renders his arbitral award futile.

Hence, this article discusses the alternative that can be used by the investors and award creditors to enforce their award in the host state. The essential attributes, which should be fulfilled before taking such an action, are:

(i) The States to which the parties belong to have signed a BIT.

(ii) The party has made an investment in the host state and is an investor, within the meaning of Article 25 of ICSID and the BIT. The investment should satisfy the *Salini* test.

(iii) The judicial inaction and interference have breached the fair and equitable treatment of the investor, such as to cause the denial of justice, expropriation or be against the effective means clause in the BIT.

The article has examined the various decisions of the tribunals, which have discussed whether an arbitral award can come under the ambit of 'investment'. The Tribunals in Saipem, ATA Construction,

Chevron, White and Frontier have to some extent included arbitral awards within the meaning of investment under certain circumstances.

The tribunal in Saipem and ATA Construction observed that the definition of an investment would include the 'entire operation' and any property or rights of the investor would come under the scope of investment. Therefore, an arbitral award, as well as a judicial decision in the favour of the investor would indirectly constitute an investment. The tribunal in White Industries v. India, followed the observations in Chevron, Saipem, and Frontier and concluded that arbitrary and unlawful interference by the host state in the enforcement proceedings of a valid award which is an investment would violate the protection granted to it under the relevant BIT.

In Frontier v. Czech Republic, the tribunal concluded on similar lines as the above decisions. The tribunal observed that an arbitral award in favour of the investor comes within the ambit of the management, usage, and protection of an investment.

In Romnak v. Uzbekistan, the tribunal denied protection to an arbitral award under the definition of investment in a BIT. However, such denial was based on valid and justified grounds. Where the subject matter or the contract, from which the award arises, does not satisfy the factors of investment, the arbitral award cannot constitute an investment.

However, the tribunal in GEA v. Ukraine, was averse to the conclusion that 'an arbitral award constitutes an investment'. The tribunal refused to adopt the approach in Saipem and ATA Construction.

The tribunal observed that an award is merely, 'a legal instrument for the disposition of rights and obligations of the parties'[82] and does not constitute an investment. It further reasoned that an ICC arbitral award arising out of repayment and settlement agreement between

[82] *Supra* note 64, at ¶ 161.

the parties would not constitute an investment when such repayment and settlement agreements are not investments under the BIT.

The Tribunal, in GEA, was in consonance with the observations of the Tribunal in Saipem till the point that it observed that the award was not an investment because the Settlement Agreement and the Repayment Agreement (subject matters) are not investments. In essence, if the subject matter is not an investment then the award arising out of the subject matter will not be an investment indirectly.

However, the tribunal adopted a narrow and strict approach for the definition of investment. Its view that even if the agreement were held to be an investment, the award arising out of it would still not be an investment, even indirectly, cannot be said to be the correct approach. Such an observation went against the observations in Saipem v. Bangladesh and the cases following it. Moreover, such an approach can be used by the states to refuse enforcement of awards for their vested interest and prejudice the investors.

It can, therefore, be concluded that Investment Treaty protection can be accorded to a party who has suffered injustice through the actions of domestic courts. However, a mere dissatisfaction from the decision of the domestic courts on non-discriminatory and justified grounds, would not entitle protection to the investor who wishes to enforce the award. Protection under the BIT or ICSID would only be accorded when there has been evidence of discriminatory practice by the courts.

Therefore the authors are of the view that an award cannot simply be construed as an instrument crystallizing the rights and obligations of the parties. There is a clear majority support by the tribunals in the favour of the conclusion that an arbitral award that arises out of the contract (which is an investment) is indirectly a part of the investment. The authors also support this proposition propounded by a majority of the tribunals. Such a conclusion provides additional protection to the investors who have faced injustice due to the refusal of enforcement of the award in the domestic courts. The investors, however, have to prove that non-enforcement of an award

from commercial arbitration is due to the discriminatory and unlawful practice of the state and directly affects the rights of the investors under the BIT. The investors further have to prove that such actions of the state directly lead to denial of justice, expropriation and violation of the effective means clause in the BIT.

Hence, it is concluded by the authors that investment protection under the BIT for non-enforcement of arbitral awards arising out of commercial arbitration is an important weapon in the armory of the investors against the powerful states when they unlawfully interfere with the rights of the investors.