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A wake-up call for the Indian government

A country takes on an international obligation with the obvious intent of honouring its commitments under a specific instrument, to the fullest extent possible

With the government allegedly inhibiting forex clearances in order for NTT Docomo to enforce its $1.8 billion arbitral award against Tata Sons, we may very well see the initiation of another investment treaty dispute against India. Pradeep Gaur/Mint

A country takes on an international obligation with the obvious intent of honouring its commitments under a specific instrument, to the fullest extent possible. Today, we see international agreements within the realm of cross-border trade and investment incorporating robust mechanisms for the enforcement of such obligations.
For instance, bilateral investment treaties (BITs), contain arbitration clauses that give a private investor the right to initiate legal proceedings against a foreign country, if it has breached investment protection standards. Such standards, typically, require the host state to mete out fair and equitable treatment (FET) to the investor, alongside assuring the investor that it shall not illegally expropriate an investor's investment.

Admittedly, such mechanisms are subject to misuse by private parties; however, recently, India's treatment of foreign investors has come to light, with the initiation of several investment treaty claims against it.

The most recent controversy involves the government cancelling the spectrum licence that was promised to Devas Multimedia Ltd, a company with foreign investors situated in, among other jurisdictions, Germany and Mauritius.

This dispute was initially a commercial arbitration against Antrix, the Indian Space Research Organization's commercial wing, which culminated in an award in Devas's favour. Subsequently, this dispute was heightened into an investment treaty claim against the Indian government, for unfairly treating Devas's Mauritian investors, under the India-Mauritius bilateral investment protection agreement (BIPA).

In this regard, an award was passed against India, requiring it to pay a total of $672 million to Devas. Under the same circumstances, proceedings by Devas's German investors have been initiated under the India-Germany BIT.

The focus of the Antrix-Devas controversy was the cancellation of the S-band spectrum licence by the cabinet committee on security, India's highest authority for making any decision concerning the country's security interests. From information available in public domain, the committee's decision in this regard led to the cancellation of the agreement between Devas and Antrix.

Now, it is easy to understand that any country, while binding itself to arbitration proceedings under an international instrument, is giving up its sovereignty to a limited extent. However, fundamentally, an arbitral tribunal cannot pass judgment on the merits of any measure taken by a state for the protection of its essential security interests.

What is important to understand is that the manner in which such a decision was made is something that can be subject to scrutiny by an arbitral tribunal.

Pivoting to the broader argument, a state cannot make decisions affecting a foreign investor's investment without adhering to essential principles of due process, such as involving the investor in decisions that concerns its investment. Presumably, this was the basis underlying the tribunal's interpretation of the FET clause in the India-Mauritius BIPA.

International jurisprudence surrounding the interpretation of FET clauses considers transparency to be a major aspect. While there is little consensus on how narrowly or broadly such a clause should generally be interpreted, some tribunals have based their decisions on whether or not the investor had a legitimate expectation from the host state that its investment would not unreasonably be frustrated. Such interpretations are of course, subject to the wording of the treaty in question.

Applying this principle to the Devas arbitrations, it becomes retrospectively clear that the licence was cancelled without Devas being provided due process rights. This is significant because, without obtaining the licence, Devas would be unable to carry out any of its proposed investment activities in India.

Consequently, Antrix's act of terminating the agreement, if attributed to India, could also amount to expropriatory conduct. Accordingly, Devas would have a valid claim for compensation due to India's inappropriate intervention with the company's investment.

While it may be premature to discuss these issues in detail, it is certain that India's actions that led to the Devas treaty award form part of a series of developments that unveil a systemic problem with the Indian legal and administrative system.

Inefficient processes for the enforcement of a validly obtained arbitral award, arbitrary imposition of retrospective tax liability on foreign companies, and now, the non-transparent actions of frustrating an investment, are all situations that speak of a dysfunctional legal system that should otherwise be held accountable for the obligations it has undertaken.

Moreover, with the Indian government allegedly inhibiting foreign exchange clearances in order for Japanese company, NTT Docomo Inc., to enforce its $1.8 billion arbitral award against Tata Sons Ltd, we may very well see the initiation of another investment treaty dispute against India.

If the current Indian political agenda is to incentivize foreign investment, it should be simultaneously ensured that the Indian legal framework is capable of regulating foreign investment, alongside assisting foreign investors by efficiently realizing rights due to them under various legal instruments.

Durga Priya Manda and Vyapak Desai are, respectively, associate and partner, international litigation and dispute resolution practice, at Nishith Desai Associates.