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LEGAL AND TAX COUNSELING WORLDWIDE

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Research

Resolving Disputes

Between Foreign Investors & The Indian State / State Entities

With Practical Solutions for managing Disputes and Enforcing Outcomes

January 2023

SIAC
Singapore International Arbitration Centre

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January 2023

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Our Expertise

Our Investor—State Disputes Settlement (ISDS) Group has strong focus on resolving disputes between foreign investors and the Indian State or state bodies/organs, through several mechanisms including administrative resolution, mediation, conciliation, litigation, commercial arbitration and investment treaty arbitration. The group comprises of internationally experienced individuals with expertise in international investment law, and public and private international law. It regularly advises foreign investors on issues surrounding regulatory policies of the Indian government. It also specializes in assessing claims and advising clients on third-party funding, whilst regularly interacting with third-party funders for arbitration financing.

The following are a few key matters undertaken by our ISDS Group:

- Acted as the lead arguing counsel in successfully representing a foreign government in a USD **50** Billion investment treaty award enforcement in India.
- Represented a US real-estate fund in relation to their investment in a SEZ in Southern India involving issues of bribery and corruption and affixation of state responsibility.
- Represented a telecom giant in a multi-billion investment arbitration against Government of India.
- Represented a consortium of six global funds in relation to potential claims against Government of India.
- Represented a sovereign wealth fund in potential invocation of a bilateral investment treaty arbitration against the Government of India. The matter was eventually resolved amicably and resulted into one of India's largest M&A transactions.
- Advised a potential claimant on third-party funding in a bilateral investment treaty arbitration.
- Advised an investor group with respect to a potential treaty claim arising out of revocation of approvals by Government of India for large-scale power projects in India.

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Executive Summary

In the last couple of years, the global economy has been dented by the impact of the Covid-19 pandemic. Despite pandemic-related uncertainties, India continued to remain a favorable destination for foreign direct investment (FDI). FDI inflows in India consistently offer a sanguine picture.

The World Investment Report 2022 places India at rank 8 in the list of top 20 host economies for 2020 and 2021.[1] A survey indicated that in 2021, around 44 per cent of 1,200 global business heads in developed economies were planning to make first-time or additional investments in India. Several nations said that they found India a lucrative destination because of its domestic market, and not only as a hub for exports.[2]

FDI and foreign investors in India are broadly governed by:

i. laws, regulations and policies;

ii. commercial contracts that govern private rights and obligations between the parties; and/or

iii. investment treaties — such as bilateral investment treaties (BITs), bilateral investment protection agreements (BIPAs), free trade agreements (FTAs) or economic cooperation agreements (ECAs) between the State of the foreign investor and the Indian State relating to protection of foreign investment.

Changes in laws, disruptions in certain sectors (such as technology and renewables) and novel regulations may adversely impact investment, and increase the risk profile for foreign investors. This may result in challenge to State measures by foreign investors in Indian courts.

Foreign investors often execute commercial contracts with Indian privately-owned companies or State-owned companies (State entities), to streamline transactions involving FDI. Contracts with privately-owned companies are independent of state control and offer remedies like any other private contract. However, contracts with State entities in India offer wide room for State action and control. This may lead to contractual disputes between the foreign investor and the State entity, and attract contractual remedies. State entities include agencies, departments, divisions/sub-divisions or companies owned or controlled by the government.

Considering involvement of the Indian State, such contractual breaches could also lead to elevation ofacontractual dispute to an international breach under an international treaty between the investor's State and India. Such treaties include BITs, BIPAs, FTAs and economic co-operation agreements ECAs (collectively, 'Investment Treaties').

In certain situations, even in the absence of a contract, foreign investors can directly challenge State measures by using international treaties. To resolve disputes amicably, foreign investors and the Indian State may also resort to mediation.

1 https://unctad.org/system/files/official-document/wir2022_en.pdf

2 https://economictimes.indiatimes.com/markets/stocks/news/83-bn-in-fy22-fdi-will-play-a-significant-role-in-indias-future-economic-development-dhiraj-relli/articleshow/92470054.cms

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In the past two decades, foreign investors have initiated several proceedings against the Indian State or State entities by pursuing:

i. commercial arbitration under their contracts with State entities;

ii. investment treaty arbitration under international treaties between the investor's State and Republic of India; or

iii. traditional court procedures before Indian or foreign courts.

Commercial arbitration and traditional litigation remain available for most cases. However, the most widely explored remedies in high-stake complex cases against the Indian State or State entities are international investment treaties (i.e. BITs, FTAs and ECAs) with chapters dedicated to protecting foreign investment.

These treaties commonly address issues of deprivation of investment value, protection against arbitrary or non-transparent government measures, unfair and inequitable treatment, actions contrary to investor expectation, security of investment, and compensation for economic or public measures taken by State, among others. Claims filed under investment treaties elevate the government's measures to international treaty violations, and run into billions of dollars.

More than 25 cases were initiated by foreign investors such as Vodafone International Holdings Bv., Cairn Energy Plc., Vedanta Resources Plc., shareholders in Devas Multimedia Pvt. Ltd., Nissan Motor Co. Ltd., Korea Western Power Company Limited, Ras-AI-Khaimah Investment Authority, White Industries Australia Ltd. etc. against India, by invoking a BIT between India and the investor's State.

In the last few years, some long-standing treaty arbitration proceedings initiated by foreign investors against India attained settlement/closure. For an analysis of the developments in 2019 and 2020, please see our publications titled *'Investment Arbitration and India: 2019 Year in Review'*,[3] and *'Investment Arbitration and India: 2020 Year in Review'*[4]. A study of the year-round developments in India in 2019 and 2020 could also be instrumental in tailoring strategies and approach to potential disputes between foreign investors and the Indian State.

What remedies are available to foreign investors against adverse action taken by the Indian State? How can foreign investors manage contractual disputes with State entities in India, or treaty disputes with the Republic of India? What is the process to explore a settlement, rather than adopting adversarial means such as litigation or arbitration? While disputes ensue, can the value of investment be preserved in India? What are the legal hurdles of enforcing awards in India? How can foreign investors identify assets for attachment? In this paper, we have attempted to answer these questions based on our experience and thought leadership.

This paper caters to: (i) foreign direct investors who (a) have made investments into India (b) are anticipating measures from the Indian State that could affect the value of their original investment (c) are facing adverse measures from the Indian State; (ii) State entities engaging in contracts with foreign investors and adopting investment related measures; (iii) Indian investors who have made investments outside India, and are facing adverse measures from foreign governments; and (iv) anyone interested in understanding the legal landscape for managing disputes between foreign investors and the Indian State / State entities.

3 https://www.mondaq.com/india/arbitration-dispute-resolution/883366/investment-arbitration-india-2019-year-in-review

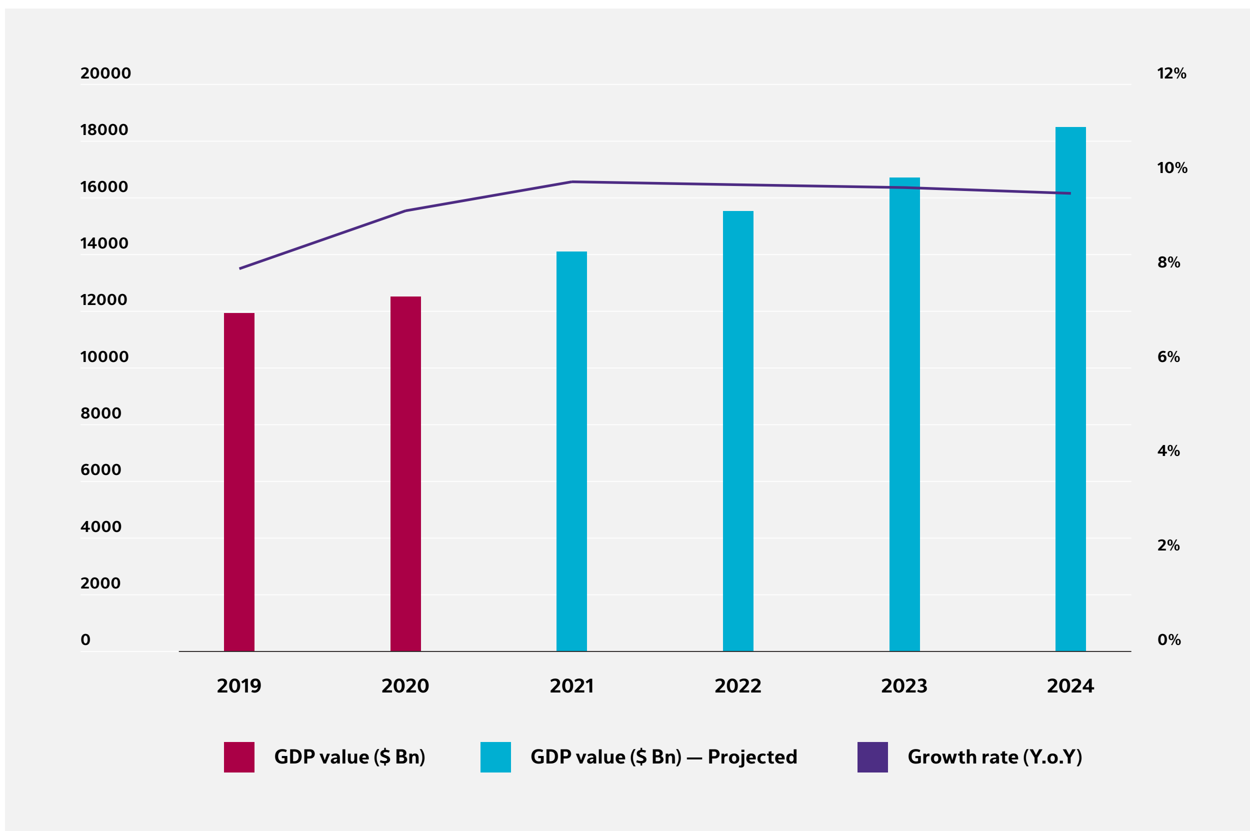
4 https://www.natlawreview.com/article/investment-arbitration-and-india-2020-year-review

FDI Framework in India

A. India's Global Position

India's economy is projected to grow at 6.7% in 2022, the fastest in the world during the year.[1] India's real GDP is projected to grow at 9% in 2022–23 and at 7.1% in 2023–24. This projects India as the fastest growing major economy in the world in all these three years.[2]

India is projected to be the third largest economy in Gross domestic product in Purchasing Power Parity terms measured at current prices



Source: International Monetary Fund

1 United Nations Conference on Trade and Development (UNCTAD) Trade and Development Report 2021

2 Ministry of Finance

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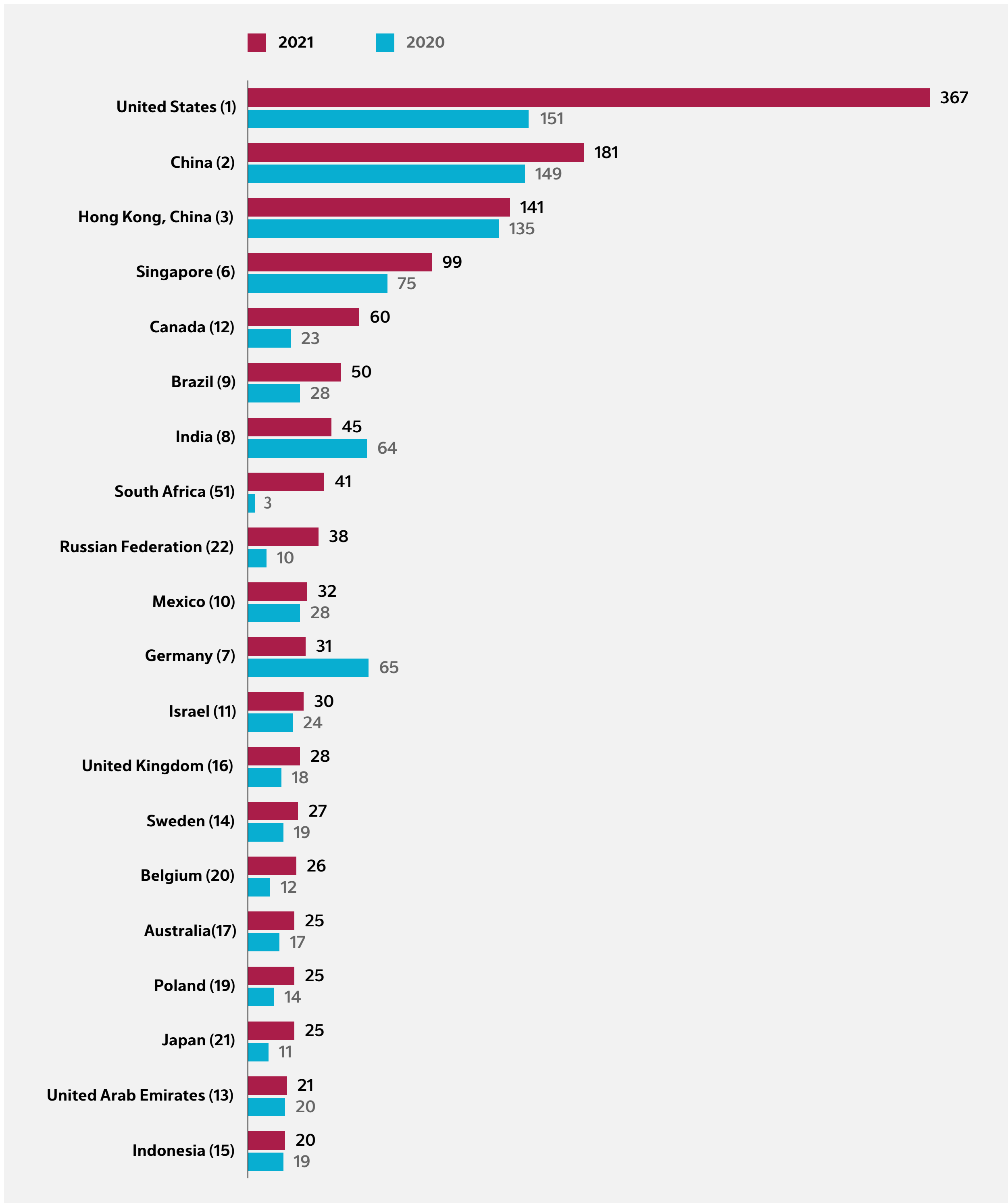
The World Investment Report 2022 places India at rank 8 in the list of top 20 host economies for 2020 and 2021:[3]



3 https://unctad.org/system/files/official-document/wir2022_en.pdf

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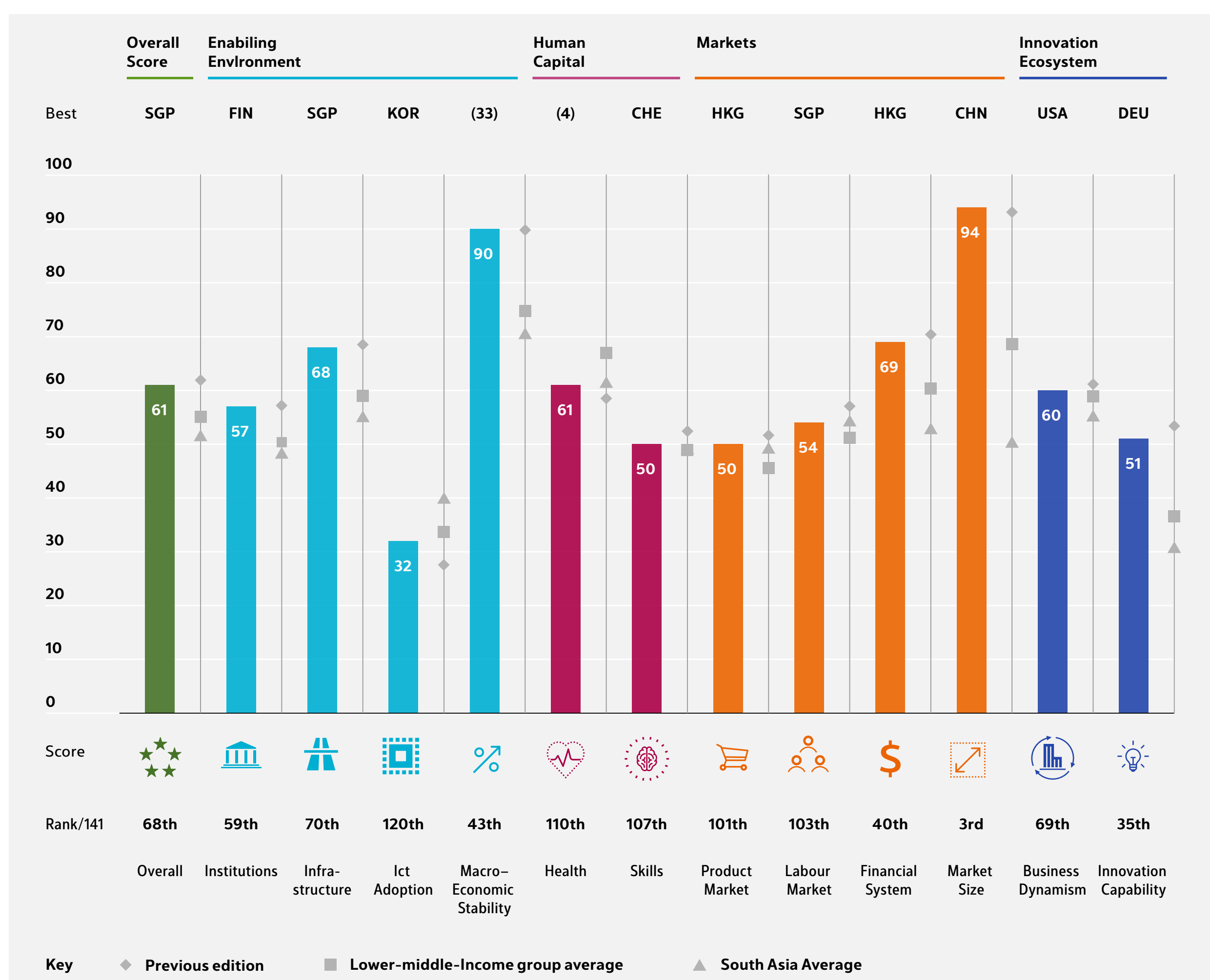
In FY 2021–2022, India received the highest FDI inflow at an approximate amount of USD 83.57 billion (being USD 1.6 billion more than the FDI inflow in FY 2020–2021).[4] This landmark achievement was preceded by another milestone in September 2020, when FDI equity inflows in India crossed USD 500 billion (computed over a period of 20 years starting from April 2000).[5]

Top three countries from where equity inflows were recorded in FY 2021–22 were Singapore ($15.8 billion), USA ($10.5 billion) and Mauritius (approx. 9.3 billion), followed by Netherlands, Cayman Islands, UK, Japan and UAE. Several sectors remained attractive to investors, including Computer software and Hardware, Services, Automobile, Construction and Drugs and Pharmaceuticals.

In 2019, India jumped 79 positions from 142nd (2014) to 63rd (2019) in 'World Bank's Ease of Doing Business Ranking 2020'. India also ranked 68th on the Global Competitiveness Index 2018–19 published by the World Economic Forum.

Global Competitiveness Index 4.0 — 68th/141

Performance Overview 2019



4 https://pib.gov.in/PressReleasePage.aspx?PRID=1826946

5 https://economictimes.indiatimes.com/markets/stocks/news/fdi-equity-inflows-into-india-cross-500-billion-milestone/articleshow/79589698.cms

In the Global Innovation Index, India climbed to the 40th rank — a huge leap of 41 places in 7 years, and ranked no. 1 in the Central & Southern Asia Region as per a report published by the World Intellectual Property Organization.

B. FDI Inflows and Outflows

In the Financial Year 2021–22, India recorded its highest annual inflow of Foreign Direct Investment of USD 83.57 billion.[6] Approximately 25% of the amount was received by Computer Software & Hardware' industry, making it the highest receiving sector.[7] Other top sectors include Services Sector (Fin., Banking, Insurance, Non Fin/Business, Outsourcing, R&D, Courier, Tech. Testing and Analysis, Other) (12.13%), Automobile Industry (11.89%), Trading (7.72%) and Construction (Infrastructure) Activities (5.52%).[8] Additionally, the Manufacturing sector has shown an FDI Equity inflow of USD 21.34 billion in FY 22 as compared to USD 12.09 billion in FY 21, showing a considerable increase of 76% in the figures. The top 5 states receiving such inflow includes Karnataka, Maharashtra, Delhi, Tamil Nadu and Haryana.

As per the data available in the public domain, FDI Inflow has increased by 23% in the post-Covid pandemic time frame, that is, during March 2020 and March 2022, in comparison to pre-Covid pandemic time of March 2018 to March 2020.[9] The FDI Inflow for FY 22 includes within it major deals, such as Google announcing an investment of USD 1 billion in Bharti Airtel for a stake of 1.2% in it,[10] Generali's purchase of 25% stake in Future Generali India Insurance,[11] among others.

The Indian infrastructure story has also seen tremendous growth. Sectors such as Energy (24%), Roads (18%), Urban (17%) and Railways (12%) amount to around 71% of the projected infrastructure investments in India. An equity infusion of INR 6,000 crores has been made in the National Investment and Infrastructure Fund (NIIF) Infrastructure Debt Financing Platform to attract debt and equity investments in infrastructure.[12]

6 Ministry of Commerce & Industry, https://pib.gov.in/PressReleasePage.aspx?PRID=1826946

7 Id.

8 https://pib.gov.in/PressReleasePage.aspx?PRID=1845719

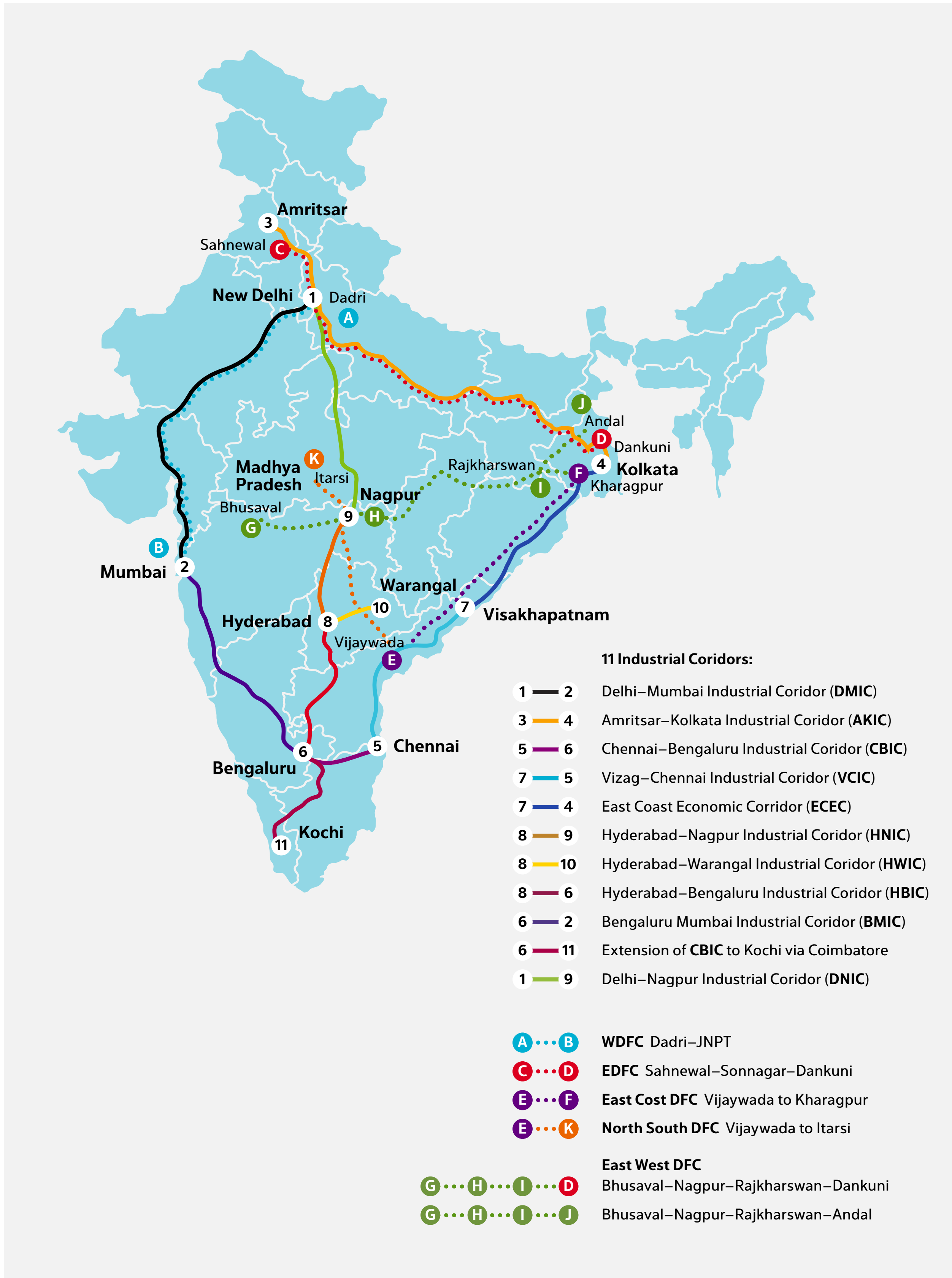
9 https://www.hindustantimes.com/india-news/india-reported-highest-fdi-inflow-worth-83-billion-in-2021-2022-centre-101653049532939.html

10 https://www.financialexpress.com/industry/google-buys-1-2-stake-in-bharti-airtel-for-700-million/2594506/

11 https://economictimes.indiatimes.com/industry/banking/finance/insure/generali-completes-acquisition-of-25-stake-in-future-generali-india-insurance-from-future-group/articleshow/91401274.cms

12 Department of Economic Affairs, Ministry of Finance and India Investment Grid

National Industrial Corridor Programme



While the FDI Inflow has been enormous, it is also important to note that there has also been an outflow of USD 6.8 billion in the Foreign Portfolio Investment (FPI) segment due to global uncertainties and the Ukraine invasion, and net consideration of the same should be made as well while evaluating net inflows.[13]

C. Shift in FDI Policies

In 2020, there were several key changes to the regulatory framework for FDI in India. Majority of these changes are subsisting and applicable today. In February 2020, the Department for Promotion of Industry and Internal Trade **("DPIIT")** issued a clarification on the FDI policy on Single Brand Retail Trading. It provided that if foreign investment in Single Brand Retaining exceeds 51%, then 30% of the value of the goods procured should be sourced from India. The clarification states that goods sourced from units located in Special Economic Zones (SEZs) in India would also qualify to meet the 30% mandatory criterion of sourcing from India.[14]

In March 2020, the Cabinet approved the amendment to the FDI Policy to permit FDI in Air India Ltd. by Non-

Resident Indians (NRIs) up to 100% under the automatic route.[15] In the same month, the Indian Parliament also passed the Mineral Laws (Amendment) Bill, 2020. The amendment provides that companies which do not possess any prior coal mining experience in India and/or have mining experience in other minerals or in other countries may participate in auction of coal/lignite blocks.

In April 2020, the Government of India made government clearance mandatory for all FDI inflows from countries that share land borders with India. The FDI Policy was tightened to prevent any opportunistic takeovers or acquisition of Indian companies due to the COVID-19 pandemic.[16] In a subsequent notification, it was stated that a transfer of ownership of any existing entity or future FDI in an entity in India, directly or indirectly, resulting in beneficial ownership falling within this restriction would require mandatory government approval.[17] Therefore, investors from India's neighboring countries will need to seek Indian government's approval before taking their investment forward — for the foreseeable future. We have assessed this policy and its ramifications in detail.[18] This safeguard envisioned by the Government is applicable till date, with new press notes having specific reference to the conditions of investment laid down in this revision.

In September 2020, the DPIIT issued a revision to the FDI Policy in the defence sector. Investment through the automatic route was increased from 49% to 74%. Investment beyond 74% now requires Government approval *"wherever it is likely to result in access to modern technology or for other reasons to be recorded."*[19]

13 https://www.thehindu.com/business/Economy/india-reports-fy22-cad-of-12-as-trade-deficit-widens/article65554284.ece

14 Clarification on FDI Policy on Single Brand Retailing (SBRT), February 27, 2020, available at: https://dipp.gov.in/sites/default/files/Revised_Clarification_SBRT_27February2020.pdf

15 Press Information Bureau, Cabinet approves the Foreign Direct Investment policy on Civil Aviation, available at: https://pib.gov.in/Pressreleaseshare.aspx?PRID=1605150

16 Press Note 3 (2020 Series) dated April 17, 2020, available at: https://dipp.gov.in/sites/default/files/pn3_2020.pdf

17 Notification regarding Review of Foreign Direct Investment (FDI) policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID—19 pandemic available at: https://dipp.gov.in/sites/default/files/pn3_2020.pdf

18 FDI Policy Revised: Neighboring Countries Restricted From Opportunistic Investments, Nishith Desai Associates, available at: http://www.nishithdesai.com/information/news-storage/news-details/article/fdi-policy-revised-neighbouring-countries-restricted-from-opportunistic-investments.html

19 Press Note 4 (2020 Series), September 17, 2020, available at: https://dipp.gov.in/sites/default/files/pn4-2020_0.PDF

In October 2020, India issued a consolidated FDI policy. The Policy superseded the previous Press Notes, Circulars, etc. and consolidated the same into a single policy.[20] In Press Note 4 of 2019, the Government had permitted FDI up to 26% FDI through the Government approval route for entities engaged in uploading/streaming of news and current affairs through digital media. On October 16, 2020, the DPIIT clarified that this decision would apply to (a) digital media entities streaming/uploading news and current affairs on websites, apps or other platforms; (b) news agencies which gather, write and distribute/transmit news, directly or indirectly, to digital media entities and/or news aggregators; and (c) news aggregators, being entities, which using software or web applications, aggregate news content from various sources such as news websites, blogs, podcasts, video blogs, user submitted links, etc. in one location.[21] It is this consolidated FDI Policy which is in effect till date since October 2020, albeit with some changes and/or clarifications.[22]

In March 2021, the DPIIT issued a revision on the policy, as was applicable under the October 2020 consolidated policy, for downstream investments which could be made by NRI's. As per this revision, the Government declared that any investment made by an NRI owned Indian entity on a non-repatriation basis is to be deemed as a domestic investment which is at par with the investment made by residents.[23] An investment made on a non-repatriation basis means that the principal of the investment and the gains that are consequently made on such investment cannot be taken out of the country and has to be retained.[24]

In June 2021, the DPIIT issued a revision on the policy, as was applicable under the October 2020 consolidated policy, for the Insurance sector.[25] This policy change allowed for FDI inflow under the automatic route for an insurance company to be increased from 49% to 74% of capital and ownership in such company. It is no longer necessary for an insurance company to be owned and operated by an Indian entity.[26] In July 2021, the DPIIT issued a revision on the policy, as was applicable under the October 2020 consolidated policy, for the Petroleum and Natural Gas Sector.[27] As per this revision, in the event of any Public Sector Undertaking (PSU) in this sector being 'in principle' approved for strategic disinvestment, 100% FDI in such PSU will be now allowed. This investment does not need Govt. approval and can be made under the automatic route.[28]

In October 2021, the DPIIT issued a revision on the policy, as was applicable under the October 2020 consolidated policy, for the Telecom Sector.[29] This came in pursuance of the announcement for the same being made by the Union Telecom Minister in a press briefing in September 2021.[30] As per this revision issued, the Govt. allowed for FDI in the telecom sector up to 100% through the automatic route. Earlier, only 49% FDI was allowed under the automatic route in the telecom sector, with any higher stake requiring Govt. approval.[31]

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20 Consolidated FDI Policy, effective from October 15, 2020, available at: https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_1.pdf

21 Clarification on FDI Policy for uploading/streaming news and current affairs through Digital Media, available at: https://dipp.gov.in/sites/default/files/Digital-Media-Clarification-Scanned-16Oct2020.pdf

22 https://dpiit.gov.in/policies-rules-and-acts/press-notes-fdi-circular

23 DPIIT File No. 5(13)/2020—FDI Policy dated 19/03/2021. https://dpiit.gov.in/sites/default/files/pn1-2021.PDF

24 https://economictimes.indiatimes.com/nri/invest/non-repatriable-investments-will-now-be-treated-at-par-with-domestic-investments-by-resident-indians/articleshow/81774092.cms

25 DPIIT File No. 5(3)/2021—FDI Policy dated 14/06/2021. https://dpiit.gov.in/sites/default/files/pn2-2021.pdf

26 https://prsindia.org/billtrack/the-insurance-amendment-bill-2021

27 DPIIT File No. 15(5)/2020—FDI Policy dated 29/07/2021. https://dpiit.gov.in/sites/default/files/pn3-2021.PDF

28 https://www.business-standard.com/article/economy-policy/govt-permits-100-fdi-in-oil-gas-psus-approved-for-disinvestment-121072901607_1.html#:~:text=The%20FDI%20limit%20will%20be,cent%20in%20the%20private%20sector

29 DPIIT File No. 5(4)/2021—FDI Policy dated 6/10/2021. https://dpiit.gov.in/sites/default/files/pn4-2021.PDF

30 https://www.hindustantimes.com/business/100-fdi-in-telecom-sector-via-automatic-route-allowed-union-minister-101631702033660.html

31 Id.

The latest revision issued by DPIIT to the October 2020 consolidated policy comes in March 2022. This revision was made in pursuance of the Initial Public Offer (IPO) for sale of shares by the Life Insurance Corporation of India's (LIC). This revision allowed for 20% FDI being allowed to be made in the IPO under the automatic route. Despite the June 2021 revision that was issued for the Insurance sector, this revision was made separately. Additionally, the Government has also declared its intention to liberalize receipt of FDI in the Space Sector owing to the Space Activity Bill that is to be introduced. Presently, the Space sector is allowed to receive FDI only for satellite establishment and operations and through government approval, which is a time-consuming process. The new FDI policy is expected to allow FDI in other areas of the Space sector as well such as *"enabling foreign companies to set up base in India and utilize ISRO facilities for undertaking a diverse range of space activities"*. More details on it are yet to crystallize.[32]

32 https://www.scconline.com/blog/post/2022/03/16/fdi-in-space-india-opens-its-space-arena-to-foreign-investment/

Identifying an Appropriate Remedy for the Dispute

Disputes may arise between an investor and a State / State entity due to several reasons. Examples of State actions which have triggered or may trigger disputes with investors include:

i. Cancellation of an oil exploration license by the State granted to a consortium of foreign investors for a sea in the host State

ii. Unlawful termination of a commercial contract for lease of telecom spectrum rights by a State-owned company to a foreign investor

iii. Retrospective change in a legislation lifting the cap on liability of companies for oil spillage and damage to surrounding area

iv. Revocation of permit to build a waste management unit

v. Nationalization of a sector

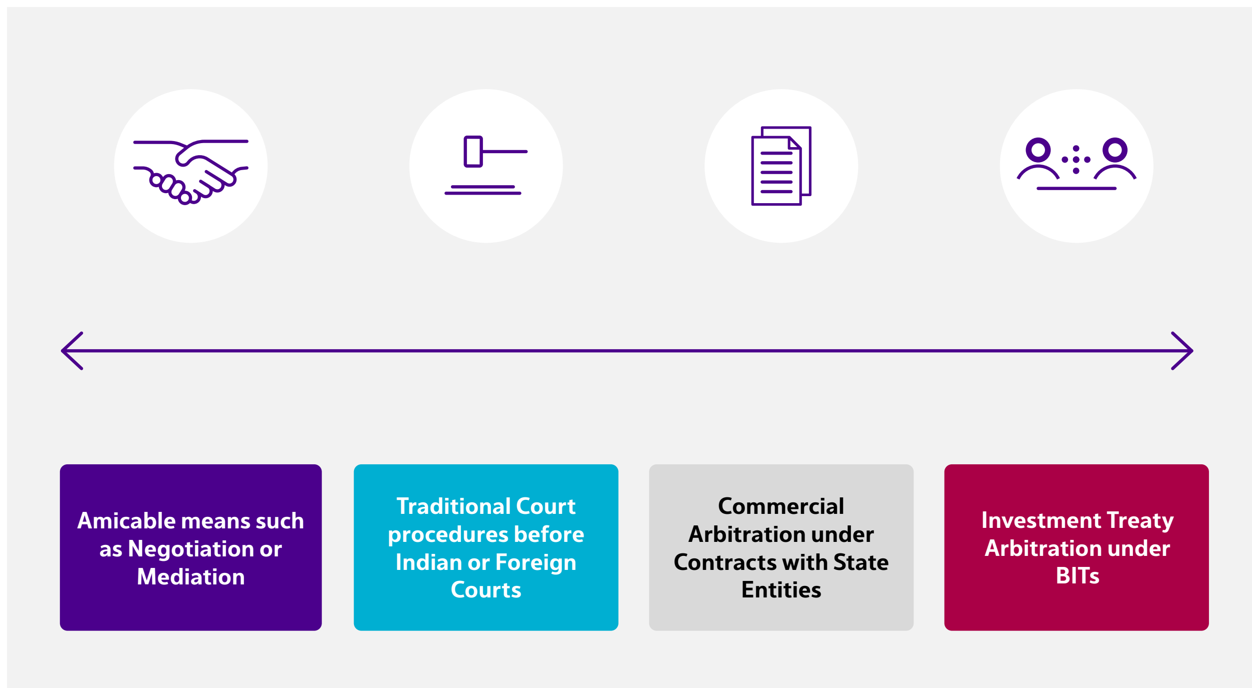
vi. Change in legislation resulting in imposition of higher retrospective taxes on foreign investors

vii. Substantial delay in concluding proceedings brought by an investor against a State entity

viii. Introducing plain packaging regulations in the cigarette industry that affected the trademark value

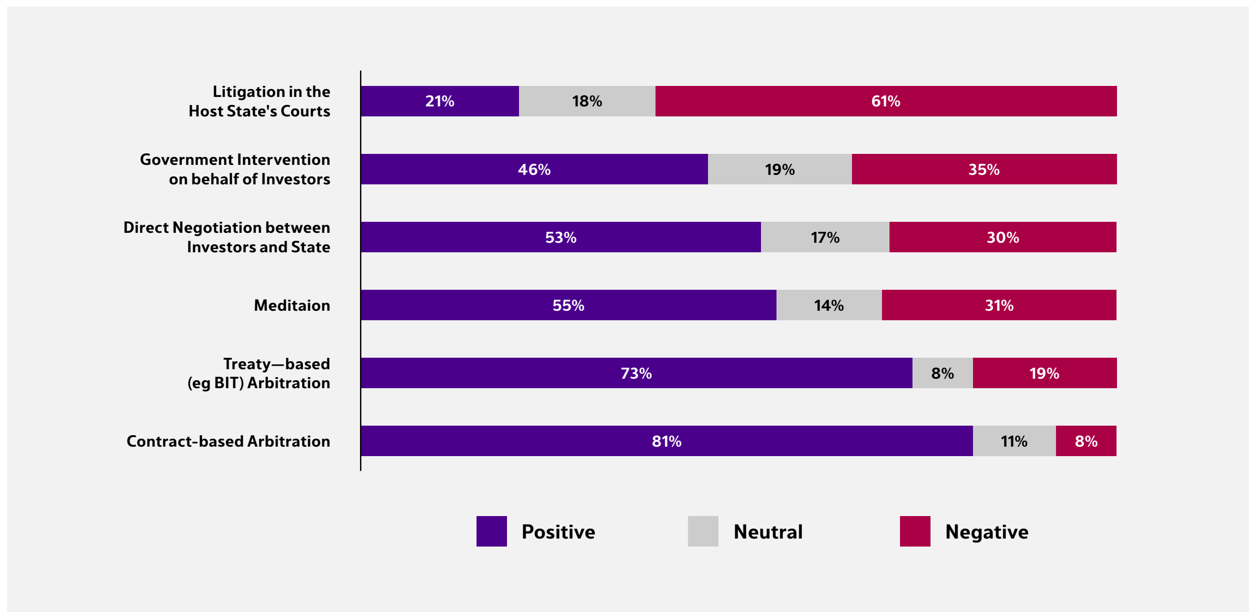
As stated above, FDI in India is governed by:

Many dispute resolution mechanisms are available to a foreign investor seeking to resolve a dispute with the Indian State / State entity. Key mechanisms are as follows:



A survey conducted by Queen Mary University in 2020 sought views from survey respondents on the various dispute resolution mechanisms available to resolve investment disputes with States. The results of the survey[1] set out below, show that most respondents had positive views on contract-based arbitration to resolve their disputes.

1 2020 QMUL—CCIAG Survey: Investors' Perceptions of ISDS (May 2020), https://arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf



Which dispute resolution mechanism is ideal for a dispute depends upon many factors including: the nature of relationship between the investor and the State/State entity, the remedy sought, the need for urgent reliefs, confidentiality etc.

In particular cases, it might be possible for an investor to explore amicable modes of settlement such as mediation or conciliation. These mechanisms help to swiftly and confidentially resolve a dispute such that it can resume its relationship with the State/State entity. It may result in greater time and cost savings for parties. However, damages obtained by investors through mediation/conciliation may be limited. Further, outcomes of mediation are not per se binding on the parties, and their enforcement could depend on availability and recourse to certain legal remedies.

In such cases, litigation or arbitration may be preferred mechanisms for dispute resolution. Litigation may often be less expensive than arbitration and may be easier to enforce in the host State. Changes in laws, regulations and policies that adversely impact investment may compel foreign investors to knock the doors of Indian courts. Litigation against the Indian State / Union of India can be time-consuming, but may also offer a remedy that no other forum can. In such situations, the investor might need to assess the nature of the required remedy, urgency of the remedy, consequence of delays on the investment, and availability of alternate efficient remedies.

Litigation may also be the only available dispute resolution mechanism when there is no scope for an amicable settlement and there is no consent to arbitrate disputes between the parties. However, investors are usually hesitant in bringing claims with the State, or State entities, in local courts due to a fear that courts of the host State may not act neutrally.

A breach by a State entity under a commercial contract with the foreign investor might offer remedies other than litigation. Parties may have agreed to arbitration in the event a dispute arises under the contract. Despite choice of arbitration, an investor may need to approach court for urgent reliefs or appropriate remedies that may not be available under arbitration, or face proceedings in court that might be initiated to stall or delay the arbitration process.

Foreign investors frequently use international arbitration, including investment and commercial arbitration, to resolve their disputes with State or state-owned entities. Investment arbitration is often preferred by investors since the quantum of damages awarded in investment arbitration is usually higher than that awarded in commercial arbitrations. However, in many situations, the investment arbitration fora may not be available

to foreign investors. This includes instances when there is no treaty between the home state of an investor and the country where they have invested, or when there is a treaty but the treaty does not provide for arbitration as a dispute resolution mechanism. It is also possible that a foreign investor may not qualify as an "investor", or their investment may not qualify as "investment", under the treaty.

Moreover, in some situations, a foreign investor may be eligible to, but may not prefer, to use the investment arbitration fora. This may be because investment arbitration is often more time consuming than commercial arbitration. Moreover, some treaties may contain provisions requiring a mandatory cooling off period or exhaustion of local remedies before any arbitration may be commenced under them. This may result in investment arbitration being a less attractive option for those foreign investors who wish to resolve their disputes swiftly or at a lower cost.

Further, considering the public interest elements involved in investment arbitration, there could be lesser impetus to maintain confidentiality in investment arbitration proceedings as compared to commercial arbitration proceedings. In such cases, a foreign investor, who has an arbitration agreement with a State entity, may rely on commercial arbitration to resolve their dispute.

Under some circumstances, an investor might be able to elevate a contractual breach to the level of international treaty breach, and use a treaty to resolve a seemingly contractual dispute. Also, depending on language of the treaty, use of one remedy under the treaty might bar another. There could be complexities such as allegations of corruption or bribery in investment-making, or criminal proceedings against the investors. Such situations might compel the investor to explore other remedies.

Often, commercial contracts and/or treaties contain a multi-tier dispute resolution clause mandating parties to attempt negotiation or mediation, before commencing arbitration. An investor might need to consider having an interim resolution until negotiation or mediation is complete, or may need to bypass this requirement under dire circumstances affecting investment value.

Disputes between foreign investors and Indian State or State entities can arise out of different situations and legal relationships. As evident, a range of remedies might be available to investors in a given situation.

> Before a decision regarding the ideal dispute resolution mechanism is made, it is important to fully assess the investor's claim and its needs. A one-size-fits-all approach does not bode well for foreign investors attempting to resolve disputes with the Indian State. Choice of one remedy over the other will need to be made under appropriate guidance and strategy. It is also important that such disputes are foreseen by investors and appropriate provisions for future disputes are incorporated in contracts (e.g. arbitration or mediation clauses) entered by investors with State/State entities.

Amicable Resolution — Mediation in India

A. Amicable Methods

FDIs usually involve long-term, high-risk commitment of capital or resources in a foreign State. Being embroiled in disputes with the State can divert resources towards managing risk, consequences and costs of disputes. Adopting adversarial adjudicatory mechanisms like litigation or arbitration can potentially sever the relationship between the foreign investor and the State, and impact operations.

Alternate modes of resolution such as informal negotiations with State officials or directors of State entities, or formal mediation of the dispute, might be in the interest of the foreign investor and the State. Considering the less adversarial and cost-effective nature of negotiations and mediations, the Indian State is likely to agree to resolve a dispute amicably before being involved in litigation or arbitration.

B. Mediation as a Remedy

Mediation is a process through which an independent third person (mediator) assists parties in arriving at an amicable settlement of the dispute. Mediators facilitate communication, identify mutual and divergent interests, and help formulate a range of possible solutions for parties. Benefits of mediation include its voluntary and non-adversarial nature, the flexibility and confidentiality of the process, its speed and cost effectiveness.

In the context of disputes between foreign investors and the Indian State, mediation could adopt various forms. A mediator can facilitate dialogue between the investor and the State after a dispute arises, analyze consequences of an intended State measure, and explore less restrictive alternate or proportionate options that can be adopted by the State to minimize investor impact. Mediation may allow parties to negotiate and agree on creative remedies such as renewal of licenses or renegotiation of the terms of a concession agreement.

Mediation enables and attempts to achieve best outcomes for all parties. It is cost-effective, saves time and assures confidentiality of discussions. Successful mediations and negotiated agreements, if abided by the parties, are self-executing. They may not always require arduous enforcement procedures as in the case of court decrees or arbitral awards.

However, mediation also has dis-advantages. It is a non-binding process. Often, the State could face backlash from political opposition for conceding to a foreign investor, encumbering the public exchequer, or engaging in corruption. In such circumstances, the Indian State may withdraw from the mediated settlement, or prefer to settle disputes before an adjudicating authority.

To ensure that mediated settlements are not merely 'paper settlements', attempts have been made by international organizations and some national legislations to enforce mediated settlements.

The United Nations Convention on International Settlement Agreements Resulting from Mediation **("Singapore Convention")** was adopted in 2018 to introduce a streamlined procedure, and to make international mediation settlement agreements binding and enforceable in signatory States. Contracting states under this Convention are obliged to give effect to international settlement agreements reached in commercial matters, unless they

make a reservation under Article 8. Currently, the Singapore Convention has 54 signatories including India.[1] India has not yet ratified this convention. There is ambiguity in applicability of the Singapore Convention to mediated settlements in Investor—State disputes.

C. Mediation in India — for Commercial Disputes involving Indian State or State Entities

At present, mediation in India may be:

- referred by a court under Section 89 of the Indian Code of Civil Procedure, 1908
- conducted under a specific statute such as the Commercial Courts Act, 2015
- under a private contract having a mediation clause

In December 2021, the Rajya Sabha in India (Council of States) introduced a Mediation Bill, to promote institutional mediation and a mechanism to enforce mediated settlement agreements in India. If the Bill is approved in its current form, the following features would be relevant for the purposes of mediation between foreign investors and Indian State are as follows:

i. The Act will apply only where the mediation is conducted in India; and not assist with enforcement of settlement agreements resulting from mediations conducted outside India.

ii. Where one of the parties to the dispute is the Central Government or a State Government, or agencies, public bodies, corporations and local bodies, including entities controlled or owned by such Government, the Act will apply only where the matter pertains to a 'commercial dispute'[2] or a dispute notified by the Government.

iii. The Act contains a list of disputes which are not fit for mediation — disputes relating to claims against minors or persons of unsound mind, criminal prosecution, or affecting the rights of third parties. Therefore, an investor embroiled in criminal proceedings relating to the investment might face hurdles in using mediation under the law.

iv. If an investor intends to file a commercial suit in matters of commercial disputes of specified value before the relevant court (please see Chapter 10 on Litigation), it will be mandatory to attempt to settle the dispute by pre-litigation mediation[3] before approaching any court or certain tribunals.

1 https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status
2 "Commercial Dispute" means a dispute defined in clause (c) of sub—section (1) of section 2 of the Commercial Courts Act, 2015.
3 Section 12A of The Commercial Courts Act, 2015

v. Even if parties fail to reach a settlement through pre-litigation mediation, the court may at any stage refer the parties to mediation upon request.

vi. The settlement agreement arrived at shall be signed only after obtaining the prior written consent of the competent authority of such Government or any of its entity or agencies, public bodies, corporations and local bodies, as the case may be.

vii. Agreements resulting from mediation will be final, binding, and enforceable in the same manner as court judgments.

viii. For mediated settlement agreements arrived at between the parties other than in court referred mediation, the same may be challenged on grounds of fraud, corruption, impersonation, or relating to disputes not fit for mediation by filing an application before the court or tribunal of competent jurisdiction.

D. Mediation — using International Treaties

In all available treaties signed in Asia between 2010 and 2020, only 37 out of 143 treaties provided for mediation or conciliation.[4] It is noteworthy that neither the Model BIT nor any of the subsisting BITs entered by India have a mediation clause. The India–Kyrgyz Republic BIT, 2019 (signed but not in force)[5] and the India–Belarus BIT (signed but not in force)[6] contain provisions for mediation of disputes between the countries. However, there is no equivalent provision for mediation of disputes between an investor and a State.

Nevertheless, a foreign investor may approach the government of India (GoI) to mediate a dispute, even if there is no provision for mediation in a treaty. Such an invitation must be addressed to the concerned ministry responsible for overseeing the sector relating to the FDI, and the ministry responsible for the adverse action(s). There are different requirements if a State-owned company is involved.

E. Mediation — using Institutional Rules

Several treaties do not contain any procedure or rules regarding mediation. In such cases, it might be helpful to incorporate or use established institutional rules and procedures for mediation.

The 2012 IBA Rules for Investor-State Mediation set out a framework for parties to commence mediation and appoint a mediator in the absence of an agreement between the parties. A foreign investor may ask for the application of these rules in any contract signed with the Indian State. Not many mediations have been conducted under these rules till date.

In 2021, the UNCITRAL adopted a mediation framework which included the UNCITRAL Mediation Rules, the UNCITRAL Notes on Mediation, and the Guide to Enactment and Use of the UNCITRAL Model Law on

4 James Claxton, Faithful Friend and Flattering Foe: How Investment Treaties Both Facilitate and Discourage Investor—State Mediation (September 13, 2020), https://deliverypdf.ssrn.com/delivery.php?ID=822120120111025005080065066008088101052045036029007018028085103122126090069021093096017052125052057022012004126080065101120026118059005053080003024009014124085064077046060031115117066087025121093097004090003028121089028087066122112069020104081029080093&EXT=pdf&INDEX=TRUE

5 Article 31.1, India—Kyrgyz Republic BIT, 2019, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download

6 Article 31.1, India—Belarus BIT, 2018, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download

International Commercial Mediation and International Settlement Agreements Resulting from Mediation. Mediation may be commenced under these rules regardless of whether other dispute resolution proceedings, including arbitration proceedings, have commenced between the parties.

ICSID Mediation Rules

In July 2022, the International Centre for Settlement of Investment Disputes (ICSID) became the first institution to introduce the ICSID Mediation Rules solely for investor-State disputes.[7] Under these rules, the Secretariat of ICSID will administer mediations that relate to an investment, and involve a State, State entity or regional economic integration organization. India is not a signatory to the ICSID Convention. However, unlike conciliation and arbitration proceedings under the ICSID Convention, parties to an ICSID mediation proceeding are not required to be a Contracting State or nationals of another Contracting State.[8] This is a major advantage of these rules for investors and States. A mediation may be initiated in accordance with these rules even if there is no prior agreement to mediate, subject to consent of all parties. Under the ICSID Mediation Rules, after the parties have consented in writing to mediate a dispute, any party can submit a request with the Secretary-General to commence the proceedings.[9] To understand more about the ICSID Mediation Rules, please read the ICSID Toolkit at **Chapter 14** for details.

7 https://icsid.worldbank.org/sites/default/files/ICSID_Mediation_Rules.pdf

8

9 Rule 5, ICSID Mediation Rules.

Does the Contract Provide a Remedy?

A. Multi-Tier Dispute Resolution Clauses

Most arrangements between foreign investors and State entities are crystallized into contracts. Contracts usually contain clauses on rights and obligations of parties, events of default, conditions for remedying breach, termination of contract, liability for breach, standard of compensation, law governing the contract, and mechanisms to resolve disputes.

Before initiating the last tier remedy of arbitration, the investor should ensure that it complies with any pre-arbitration remedies such as mediation or negotiation. While the position on whether pre-arbitration remedies are binding on parties is unclear in India, the Supreme Court of India has largely taken the view that parties should comply with any pre-arbitration remedies set out in the contract before commencing an arbitration, save in certain circumstances.

Parties to a commercial contract can seek to resolve disputes through the traditional mechanism of litigation. However, most commercial contracts contain alternative dispute resolution clauses i.e. mechanisms outside the traditional court system. These clauses can provide for a single mechanism such as arbitration, or the more commonly found multi-tiered mechanisms containing a mix of remedies starting with negotiation, and followed by mediation and arbitration.

The Supreme Court has allowed the parties to commence an arbitration without completing the pre-arbitration remedies when it found that the language of the clause or the parties' intent reflected that such remedies were *"empty formalities"*.[1] Moreover, the Supreme Court has also refused to enforce a pre-arbitration condition that it considered to be an arbitrary and unreasonable burden on the dispute resolution procedure.[2]

B. Commercial Arbitration

An investor may commence arbitration proceedings against a State entity pursuant to an arbitration clause in a contract. Even in the absence of an arbitration clause, parties can subsequently agree to submit their disputes to arbitration. However, it is advisable to include an arbitration clause in the contract with a State entity, since it is unlikely that the entity would agree to submit a dispute to arbitration after the dispute arises.

After a dispute arises between the parties, an investor may commence the arbitration proceedings by sending a notice of arbitration to the State entity. Most contracts contain a clause ('notice-clause') with details of the addressee such as designation, address, and medium of issuing notice (e.g. post, e-mail, fascimile or courier). The investor should send the notice as per the notice-clause.

1 Demerara Distilleries (P) Ltd v. Demerara Distilleries Ltd., (2015) 13 SCC 610.

2 Icomm Tele Ltd. v. Punjab State Water Supply & Sewerage Board & Anr., (2019) 4 SCC 401.

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If there is no notice-clause, a notice of arbitration may be sent by courier or e-mail to the addresses commonly used by the parties during the course of their dealings. If the parties agreed to submit their dispute to an institution, it is important to abide by the rules of the institution.

Most contracts with Indian government entities (especially in the construction industry) are in the form of a standard form contract and contain arbitration clauses for dispute resolution. Often, such contracts may have one-sided provisions such as: (i) requiring the appointment of a government employee as an arbitrator; or (ii) allowing the government entity to unilaterally select a sole arbitrator to resolve any disputes between the parties.

Following the amendments to the Arbitration Act in 2015, Section 12(5) and Schedule VII were introduced to the Arbitration Act to render certain categories of persons ineligible to be appointed as arbitrators. Paragraph 1 of Schedule VII to the Arbitration Act sets out that any person who is an *"employee, consultant, advisor, or has any other past or present business relationship with the party"* will be ineligible to be appointed as an arbitrator.

While negotiating an arbitration clause in a commercial contract with a State entity, the seat of arbitration, number of arbitrators, and institutional rules must be included. If parties select an Indian seat, the Indian Arbitration and Conciliation Act, 1996 (**"Arbitration Act")** will apply to the conduct of the arbitration. The Indian State or State-entities generally insist upon choice of Indian seat. However, some arbitrations have been seated in Netherlands and Singapore. Despite choice of foreign seat, the provisions of the Indian Arbitration Act apply if a party seeks court assistance in India (such as for interim relief or evidence of witnesses) for such foreign seated arbitrations, unless parties agree to exclusion of this assistance.

Further, Indian courts also do not enforce one-sided arbitration clauses wherein one party has the power to unilaterally appoint an arbitrator. In *Perkins Eastman Architects DPC v. HSCC (India) Ltd,* [3] the Supreme Court of India held that such one-sided arbitrator appointment clauses are no longer enforceable in India. Further, the Delhi High Court, in *Envirad Projects Pvt. Ltd. v. NTPC Ltd,*[4] applied this finding to public-sector/government contracts. For details on commercial arbitration in India, please see our paper on 'International Commercial Arbitration'.[5]

3 2019 SCC OnLine SC 1517.

4 ARB.P. 27/2022.

5 https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf

C. Cases Where Foreign Investors Commenced Commercial Arbitrations

Few notable examples of cases where foreign investors commenced commercial arbitration against State entities under a contract as follows:

I. Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board and the State of Maharashtra 6 (CIPM & EEMC vs. MPDCL, MSEB and SoM)

In early 1990's, Dabhol Power Company **("DPC")** — a joint venture of Enron Corporation, General Electric Corporation and Bechtel Enterprises — was formed to generate electrical power in Maharashtra. DPC entered into an agreement with the Maharashtra State Electricity Board (MSEB) - an Indian public sector enterprise — as the sole purchaser of power generated by DPC. However, MSEB cancelled the contract due to alleged irregularities, political opposition and high cost of power charged by DPC. DPC no longer had a consumer to sell electrical power to.[7]

In 1994, a Shareholders Agreement was entered into among Enron Mauritius Company (EMC — an affiliate of Enron Power Corporation), Capital India Power Mauritius I (CIPM I — an affiliate of Bechtel Enterprises Ltd.) and Energy Enterprises Mauritius Company (**"EEMC — an affiliate of General Electric Corporation"**), and later joined by Maharashtra Power Development Corporation Limited (MPDCL — a special purpose entity created to hold shares in DPC on behalf of MSEB — a state electricity board created pursuant to the Insian State Electricity Supply Act of 1948 and controlled by the State of Maharashtra in India).

Political change in government and subsequent reversal of energy policy by SoM led to MPDCL supporting positions of MSEB and SoM, acting as their alter ego, and violating several duties under the SHA (particularly -preventing the board from obtaining a quorum by refusing to vote for the board nominees of CIPM I and EEMC; violating the duty of good faith by putting the interests of its affiliates ahead of the DPC; and bringing various proceedings in Indian for a to prevent DPC corporate action to redress its grievances). CIPM I and EEMC initiated commercial arbitration proceedings against MPDCL, MSEB and SoM in 2005 under the ICC Rules in New York.

The ICC tribunal found that the respondents had violated the SHA, and held that the cumulative actions of the respondents resulted in expropriation of EEMC's investment in the project. Accordingly, the tribunal awarded USD 94,700,000 with interest 9% per annum from 2002 to EEMC. While other arbitrations were also initiated by DPC and its other owners against the respondents for the same actions as in this case, further details of such arbitrations are not in the public domain.

6 Case No. 12913/MS before the International Court of Arbitration of the International Chamber of Commerce

7 Kundra, P (2008), 'Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons', 41 Vanderbilt Journal of Transnational Law

II. Devas Multimedia Private Limited ("Devas") v. Antrix Corporation Limited ("Antrix")[8]

In 2005, Devas entered into an agreement with Antrix (an Indian state-owned entity and an arm of India's space policy and development agency) for the lease of space segment capacity on two satellites. Antrix agreed to build and operate two satellites and lease the spectrum capacity to Devas, which would enable Devas to provide digital multimedia broadcasting services across India. In return, Devas agreed to pay to Antrix Upfront Capacity Reservation Fees and lease fees. The lease term was twelve years, with a right of renewal at reasonable lease fees for a further twelve years. From then until 2010 the parties' relationship progressed smoothly.

However, in June 2010, the Chairman of Antrix as well as the Secretary of India's Department of Space (DOS) and Chairman of the Indian Space Research Organisation (ISRO) (an entity that sits under the DOS) and India's Space Commission — obtained legal advice about annulling the agreement. Devas alleged that this was done in response to political pressure that had been created by media criticism of the Devas Agreement. Antrix argued that this was because of India's military needed to use the spectrum that had been leased to Devas. The ultimate result was a decision by India's Cabinet Committee on Security (CCS) to annul the agreement.

On 25 February 2011, Antrix wrote to that the agreement was terminated, on the grounds of force majeure by an 'act of governmental authority in its sovereign capacity'. Devas commenced arbitration under the contract. Devas alleged that Antrix was not entitled to terminate the Devas Agreement and had repudiated its obligations. Devas said that it had accepted that repudiation and was entitled to damages equal to the value of its business (approx. USD 1.41 billion), plus interest and costs.

In 2015, the arbitral tribunal issued an award in favour of Devas. The tribunal found that Antrix had committed a repudiatory breach of the agreement. The tribunal dismissed Antrix's argument that the agreement was terminated on grounds of force majeure since Antrix had reasonable control over - and could have prevented - the Indian government's decision to annul the agreement. The tribunal found that Antrix's repudiation of the agreement resulted in complete loss of value for Devas' investment in India. Accordingly, the Tribunal awarded USD 525.5 million plus interest to Devas.

Separate arbitrations were initiated by shareholders of Devas under international investment treaties. Please see **Appendix C** for details.

III. White Industries Australia Ltd v. Coal India Limited

In 1989, White Industries (White) entered into a contract with Central Coalfield Ltd (a subsidiary of Coal India— an Indian state entity) for developing a coal mine in India. In return, White was to be paid approximately A$206.6 million. The contract contained a production target, and provided that White would be entitled to a bonus where production of coal was in excess of the target figure, and would be liable to a penalty when the production was below the target figure. Disputes arose between the parties as to whether White was entitled to the bonuses and/ or Coal India was entitled to penalty payments.

8 Devas Multimedia Private Limited v. Antrix Corporation Limited, ICC Case No.18051/CYK, Final Award dated 14 September 2015.

A number of other related technical disputes also arose, primarily concerning the quality of the washed and processed coal and the sampling process by which quality would be measured. White Industries filed a request for arbitration with the ICC to arbitrate this dispute. In 2002, the ICC tribunal decided in favour of White Industries and awarded AUD 4 million to White.

Due to failure of enforcement of the commercial arbitration award in India for nine years, White Industries initiated arbitration against India in 2011 under the India–Australia bilateral investment treaty. Please see **Appendix C** for details.

D. Elevating Contractual Breaches to International Level Breaches

In some cases, a contractual breach can be elevated to the level of breach of an international treaty (if the treaty exists). For more details, please see **Chapter 7.**

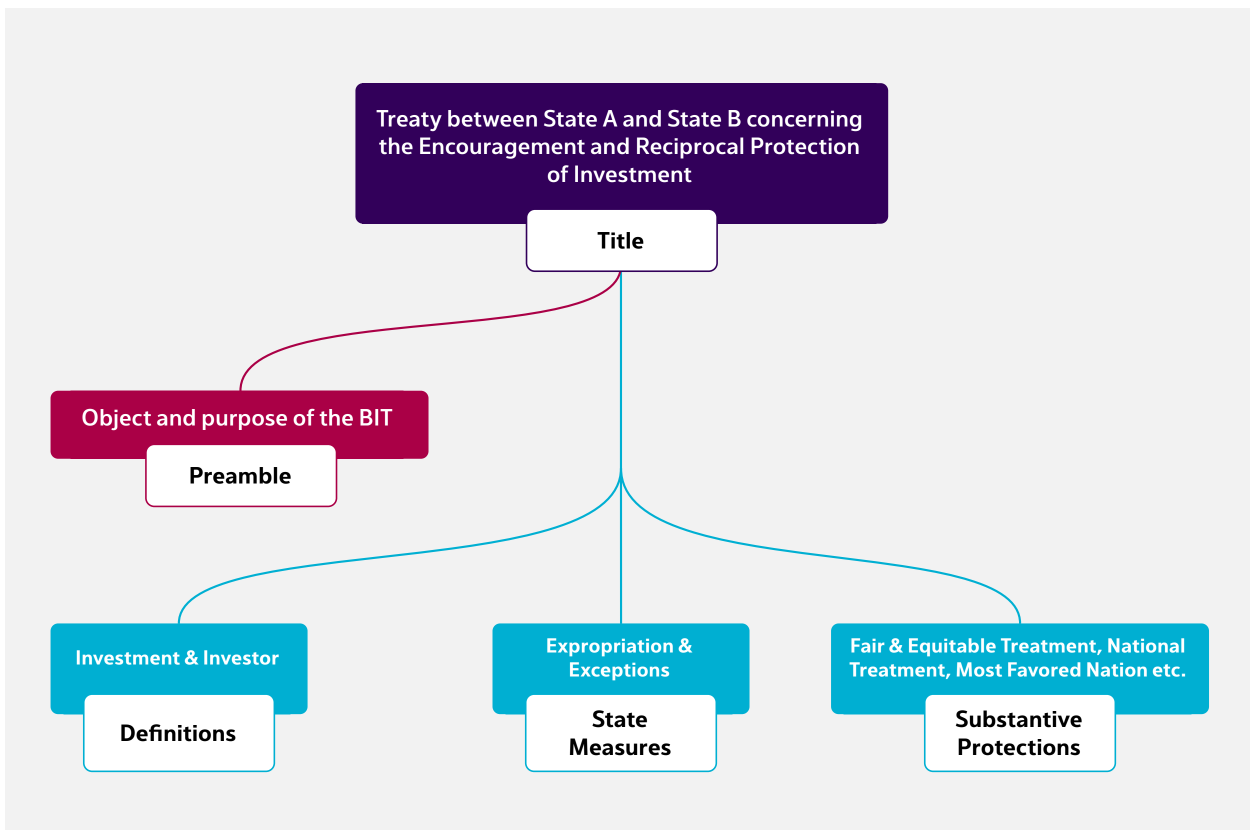
Using International Investment Treaty Remedies

A. Bilateral Investment Treaties

Bilateral Investment Treaties **("BITs")** are treaties entered into between two countries for protection and regulation of foreign investment. Some BITs are also known as Bilateral Investment Protection Agreements (**"BIPAs"**). Free trade agreements (FTAs) and regional economic cooperation agreements (RECAs) are other forms of multilateral treaties that often contain chapters regulating foreign investment *inter se* contracting States.

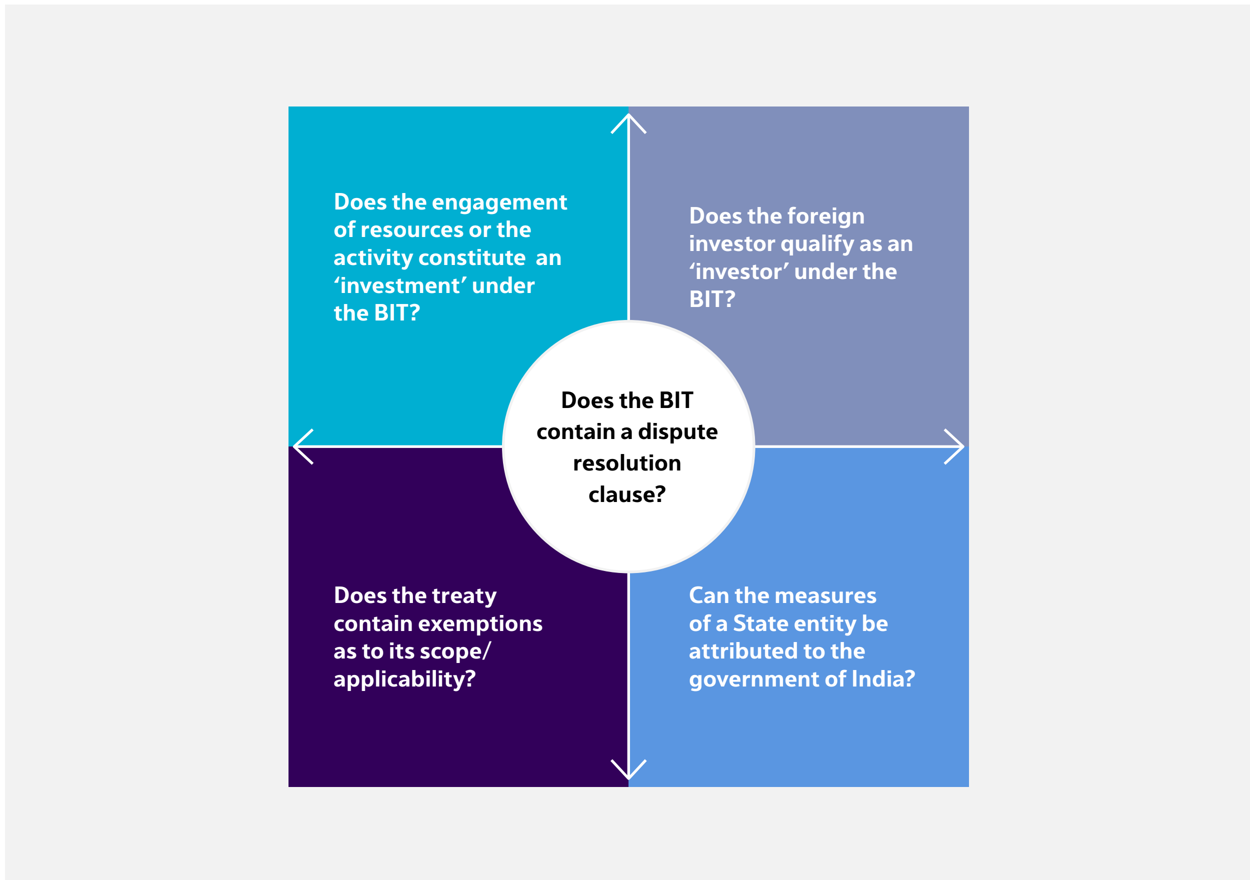
Traditionally, BITs were thought of only in the context of nationalization i.e. unlawful taking of foreign property by the State, or direct expropriation of foreign investor's property in the host State. Today, BITs offer a range of protections to foreign investors, including the right against direct and indirect expropriation, national treatment and right to fair and equitable treatment.

Most BITs follow a pattern:



B. Requirements to use an Investment Treaty

Various factors need to be considered before a decision can be made to use a BIT against the Republic of India. Some of these factors are:



These requirements are detailed below.

I. Does the Engagement of Resources or the Activity constitute an 'Investment' under the BIT?

In order to make claims under a BIT, an investor needs to satisfy the tribunal that it is an 'investor' that has made an 'investment' under the terms of the BIT.

BITs generally adopt an asset-based or enterprise-based approach to an investment.[1] The asset-based approach recognizes every asset with economic value, established or acquired by the foreign investor as an investment. An enterprise-based approach limits protection only to those investments that have been constituted or operated as a legal entity with real and substantive business presence in the State.[2]

1 Berk Demirkol, The Notion of 'Investment' in International Investment Law (February 1, 2015). (2015) I Turkish Commercial Law Review 41.

2 Manu Thadikkaran, Model Text for Indian BIT at 36.

An example of an asset-based definition can be found in the 2007 India-Libya BIT as follows:

"Investment" means every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:

i. *movable and immovable property as well as other rights such as mortgages, liens or pledges;*

ii. *shares in and stock and debentures of a company and any other similar forms of participation in a company;*

iii. *rights to money or to any performance under contract having a financial value;*

iv. *intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;*

v. *business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals"*[3]

An example of an enterprise—based definition can be found in the 2020 India–Brazil BIT as follows:

"Investment" means an enterprise, including a participation therein, in the territory of a Party, that an investor of the other Party owns or controls, directly or indirectly, or over which it exerts a significance degree of influence, that has the characteristics of an investment, including the commitment of capital, the objective of establishing a lasting interest, the expectation of gain or profit and the assumption of risk. The following assets of the enterprise, among others, are covered under this Treaty:

a. *Shares, stocks and other forms of equity instruments of the enterprise or in another enterprise;*

b. *Debt instruments or securities of another enterprise;*

c. *Licenses, authorizations, permits, concessions or similar rights conferred in accordance with the law of a Party;*

d. *Loans to another enterprise;*

e. *Intellectual property rights as defined or referenced to in the Trade Related Aspects of Intellectual Property Rights of the World Trade Organizations (TRIPS); and*

f. *Movable or immovable property and related rights."*

Some BITs also require an investment to include 'characteristics of investment', such as an investor's commitment of capital or other resources, expectation of gain or profit and duration of investment or assumption of risk. For instance, the 2018 India–Belarus BIT provides:

3 Agreement between Republic of Inida and Great Socialist People's Libyan Arab Jamahirya for the Promotion and Protection of Investments, 2007.

> *"investment' means an enterprise constituted, organized and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, which have the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and contribution to the development of the Party in whose territory the investment is made."*

Although the common trend in BITs is to have a broad and inclusive definition of investment, we are witnessing a surge of BITs introducing a negative list of exclusions to investment. For instance, a number of BITs exclude portfolio investments or assets of less than a certain value.

All previous BITs of India, except the India–Mexico Bilateral Investment Promotion and Protection Agreement (BIPPA), have followed the assets-based approach.[4] However, the 2016 India Model BIT takes an enterprise-based approach- along-with a list of asset inclusions, exclusions and characteristics to determine an investment.

II. Does the Foreign Investor qualify as an 'Investor' under the BIT?

In addition to meeting the qualification of 'Investment', it is quintessential for the claimant to qualify as an 'Investor' in order to seek protection under a BIT. Two fundamental considerations arise with respect to the definition of 'Investor': *(a) types of persons who may be considered as investors; and (b) availability of a link to connect the investor with the contracting party to the BIT.*

Two types of persons can qualify as investors — natural persons and artificial / legal persons. Natural persons includes private foreign investors and shareholders. Legal persons can be defined as different types of legal entities. Most BITs define investors as natural or legal persons having a certain degree of connection with the Contracting States to the agreement.[5] Nationality of the natural or legal person establishes this link.

With respect to natural persons, treaty protection extends to investors who are nationals of a contracting State other than the State in which the investment is made. The nationality is usually determined by the domestic law of the State whose nationality is claimed,[6] but has been challenged often before arbitral tribunals.[7]

4 2003 Indian Model BIT, Article 1(b) provides —

"investment" means every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes: (i) movable and immovable property as well as other rights such as mortgages, liens or pledge (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company; (iii) rights to money or to any performance under contract having a financial value; (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party; (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals;

5 UNCTAD/ITE/IIA/2006/5 — E.06

Definition of Investor and Investment in International Investment Agreements International Investment Law: Understanding Concepts and Tracking Innovations (OECD 2008), available at http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf

6 Definition of Investor and Investment in International Investment Agreements International Investment Law: Understanding Concepts and Tracking Innovations (OECD 2008), available at http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf

7 Soufraki v. UAE, Award, 7 July 2004

Other useful links are permanent residence, domicile, dominant nationality or a combinations thereof, depending on the facts and circumstances. Where a foreign investor claimed nationality of both USA and Peru, the tribunal found that the investor had dual nationality and both nationalities were effective. He was therefore entitled to seek protection under the Peru- Paraguay BIT.[8]

With respect to legal persons, determining corporate nationality is more complex. The most commonly used criteria are place of incorporation or the registered office. Alternately, the place of central administration or effective seat has also been considered in certain circumstances. For example, the India–Senegal BIT defines an "investor" as:

> *"investors' refers with regard to either Contracting Party to: (i) natural persons having the nationality of the Contracting Party under the law in force of that Contracting Party: (ii) legal entities, including companies, corporations, firms and business associations incorporated or constituted or established under the law of a Contracting Party."*

However, while the threshold of 'connection' differs in BITs, an investor is expected to have control over its investment to have an admissible claim. The degree of control remains variable. In light of complex corporate structures today, most BITs define 'control' to mean both direct and indirect control, such that even remote levels of ownership are protected. Some BITs require proof of effective control.

When the investor is part of a corporate structure spanning multiple jurisdictions, it is difficult to cull out a specific 'place of business' or 'place of effective management' in order to determine nationality. If not carefully interpreted, it may be difficult to avoid a situation of parallel claims. The classic example in this regard is the recent case of Vodafone BV and Vodafone Pte. Against India.

A large number of cases relate to investments made through acquisition of shares in a company bearing a different nationality than its shareholder(s). A dominant issue in investment treaty arbitrations therefore relates to potential of a shareholder to proceed on the basis of his nationality and invoke the jurisdiction under a BIT, even if the company does not meet the nationality requirement under the relevant treaty.[9] This issue assumes particular significance where investments are made through companies incorporated in the State while the foreign company is the immediate investor.

In respect of cases submitted to the ICSID, Article 25 of the ICSID Convention clearly provides that its jurisdiction extends to disputes between a Contracting State and the national of the other Contracting State. Article 25(2)(b) provides that a locally incorporated company might qualify as a foreign investor owing to foreign control. Does this mean that only majority shareholders who have control over the local company can initiate arbitration? These issues are complex and are evaluated on a case-by-case basis.

India is not a party to the ICSID Convention. Therefore, arbitral tribunals interpret the terms of a BIT alone when evaluating an 'investor' under the BIT. In *Louis Dreyfus* case, the arbitral tribunal refused to accept LDA's claims against India because it failed to satisfy that it had at-least 51% shareholding in the joint venture that had

8 Olguin v. Paraguay, Award, 26 July 2001

9 Dolzer

suffered from the actions of the State entity. It therefore did not qualify as an 'investor' under the India–France BIT, to be able to use protections granted to French investors against India.

In the last decade, a number of shell companies have emerged in order to gain protection under a favorable BIT — leading to *'treaty-shopping'*. In such situations, tribunals have used various methods such as piercing of corporate veil or group of companies doctrine to determine control and majority shareholding.

In the case of *Flemingo v. Poland*,[10] the tribunal found no fault in the Indian investor invoking the India – Poland BIT which had a more favourable definition of 'investor' with a plain 'place of incorporation test', as opposed to the Poland – UAE BIT which had a more substantive requirement of 'control' — despite the Indian investor being headquartered in the UAE.

III. Can the Action of a State Entity be attributed to the Government of India?

When the dispute is with an Indian State entity, it will be necessary to demonstrate that the actions or conduct of the State entity can be attributed to the Indian State, in order to use an investment treaty. Although it is largely accepted that State-owned enterprises enjoy a separate identity from the State, confusion arises when the State and the State-owned enterprise are so 'intrinsically linked' that the line distinguishing their activities is blurred.

'Attribution' is the process of identifying and circumscribing (or 'attributing') the conduct of individuals to the State, so as to attract international State responsibility. These matters are largely governed by customary international law principles.

The ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts provides that a State-owned enterprise's acts may be attributed to a State when such enterprise acts in a governmental capacity or when a State has "effective control" over such enterprise.[11]

Arbitral tribunals, under the ICSID Convention, frequently use the 'Broches test' to determine when a State-owned enterprise can be considered as the "State".[12] The Broches Test provides that a State-owned enterprise may be considered as the State if *"it is acting as an agent for the government or is discharging an essentially governmental function"*.[13] While the Broches test only applies to arbitrations under the ICSID Convention and the Additional Facility Rules, it closely mirrors the test provided under customary international law.

Further, investors would also need to consider Indian law. Article 12 of the Indian Constitution, 1950 (**"Constitution"**) defines "State" as the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

In *Ramana Dayaram Shetty v, The International Airport Authority of India*,[14] the Supreme Court of India set out certain factors to determine whether an entity is a State instrumentality, namely: (i) financial resources of the State is the chief funding source of such body; (ii) existence of a deep and pervasive nature of State control; (iii) the functions disposed by such body or agency are of public importance and very closely related to government

10 Available at https://www.italaw.com/sites/default/files/case-documents/italaw7709_3.pdf

11 Articles 5 and 8, International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001).

12 BUCG v. Yemen, Decision on Jurisdiction, ICSID Case No. ARB/14/30; CSOB v. Slovakia, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/4.

13 Aron Broches, The Convention on the Settlement of Investment Disputes Between States and Nationals of other States, 136 R.C.A.D.I. (1972) 355.

14 1979 AIR 1628.

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functions; and (iv) whether status of the agency as a monopoly is conferred and protected by the State. The Supreme Court of India has also included commercial entities, established by the State and exercising some governmental functions, within the meaning of "State" under Article 12 of the Constitution.[15]

IV. Does the Treaty contain Exemptions as to its Scope/Applicability?

Some treaties expressly exclude certain activities from their scope, hereby rendering the treaty inapplicable if the investment involves an excluded activity.

For instance, Article 2.4 of the India Model BIT specifically excludes from its scope certain regulatory measures including any measures by local governments, taxation measures, compulsory licenses, government procurement, grants and subsidies provided by the government and services supplied in exercise of governmental authority by body or organ of the host State. Three key exclusions are discussed below.

A. Measures by Local Governments

The 2016 India Model BIT does not include measures by local government in its ambit. Local governments include urban, local and rural bodies.[16] Since India is a country with a quasi-federal structure, provincial governments as well as local bodies (urban and rural) enjoy a substantial level of autonomy.[17] Local governments fall within the purview of 'State' under Indian constitutional practice.[18] Similarly, actions of local governments can be attributed to the State under public international law.[19] However, in a host State where a large portion of public functions or governmental authority is carried out through local governments, exclusion of measures adopted by local governments could lend undue immunity to the Indian State to the detriment of the foreign investor.

B. Taxation

Article 2.4 (ii) states that the treaty shall not apply to 'any law or measure regarding taxation, including measures taken to enforce taxation obligations'. This article further provides that host State's decision as to whether a particular regulatory measure is related to taxation (whether made before or after the commencement of arbitral proceedings) shall be non-justiciable. No arbitral tribunal shall be able to review such decision.[20]

The decision to preclude taxation from the purview of India's future BITs is visibly in response to the spate of BIT claims brought by Vodafone and Cairn against India with respect to retrospective application of taxation law. This exclusion provides the state unchecked control over framing and amending taxation laws— to the extent

15 Som Prakash v. Union of India, 1981 AIR 212; Rajasthan SEB v. Mohan Lal, 1967 3 SCR 377.

16 Model BIT 2016, Article 1.7 provides:

"local government" includes: (i) An urban local body, municipal corporation or village level government; or (ii) an enterprise owned or controlled by an urban local body, a municipal corporation or a village level government.

17 M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 7th ed., Nagpur: Wadhwa. Publication; 2014 at 12.

18 Constitution of India, 1950, Article 12, includes local bodies within the definition of State.

19 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Article 4, attributes actions of local bodies to the sovereign nation.

20 Indian Model BIT 2016, Article 2.4(ii) provides:

Any law or measure regarding taxation, including measures taken to enforce taxation obligations. For greater certainty, it is clarified that where the State in which investment is made decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be non—justiciable and it shall not be open to any arbitration tribunal to review such decision.

that any potential abuse, whether discriminatory or arbitrary, would be outside the jurisdictional capacity of the international arbitral tribunal.

C. Compulsory Licenses

The 2016 India Model BIT excludes compulsory licenses from its scope, unless they are consistent with the World Trade Organization (WTO) Agreement. Therefore, regardless of the specific exemption of compulsory licenses from the purview of the BIT, foreign investors could still challenge its issuance under other violations under Part II of BIT by arguing that they have not been issued in accordance with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In such a situation, the tribunal would have to determine whether or not the compulsory license was consistent with TRIPS, and whether the BIT will continue to apply.[21]

V. Does the BIT contain a Dispute Resolution Clause

Majority BITs contain dispute resolution clauses. These clause may envisage a matrix of fora and mechanisms — occasionally involving cooling off periods, negotiation, mediation, exhaustion of local remedies and international arbitration. Majority of BITs provide international arbitration as the long-stop of dispute resolution. International arbitration could be ad hoc (where parties often use the UNCITRAL Arbitration Rules), or administered under the rules of an arbitral institution such as ICSID, SIAC or ICC among others.Some treaties may provide for dispute resolution only between the States. At times, using one remedy might bar the use of another. There could also be conflicting dispute resolution clauses in commercial contracts and treaties. Careful consideration needs to be accorded to dispute resolution clauses in BITs.

> Arbitration under a treaty (investment treaty arbitration) differs from arbitration pursuant to a contract (commercial arbitration). Since an investment treaty arbitration involves aspects of both private international law and public international law, a special body of law recognized as international investment treaty law applies to such disputes. Investment treaty disputes therefore require handling by experts in international investment treaty law.

VI. Can an investor use a terminated BIT?

Investment treaties are not in force for perpetuity. States may terminate treaties mutually or unilaterally. To protect investors from the sudden effects of termination, several treaties contain survival clauses, popularly known as 'sunset' clauses. These provide for a fixed, extended period of protection to investments beyond

21 Bryan Mercurio, Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements 15(3) J. INT'L. ECON. L. 871, 905—906 (2012) at 908.

termination of the treaty. For instance, the following survival clause in the India – Mauritius BIT keeps the treaty benefits operational for a period of 10 years from the date of termination. [22]

"In respect of investments approved and /or made prior to the date the notice of termination of this Agreement becomes effective, the provisions of the proceeding articles shall remain in force with respect to such investments for a further period of ten years from that date or for any longer period as provided for or agreed upon in the relevant contract or approval granted to the investor."

Recently, cases have been initiated against India by investors by utilizing the survival/sunset clauses in BITs that have been terminated by India. For example, Mauritian investors in Devas brought a BIT claim against India by utilizing the survival clause in the India–Mauritius BIT which had been terminated by India in 2017. Similarly, in *GPIX LLC v. Republic of India*, Mauritian investors commenced an arbitration against India in 2020 under the same India–Mauritius BIT by making use of the survival clause in the BIT. In *Kowepo v.* India, sunset clause in the India– Republic of Korea BIT 1996 has been used by Korean investors to invoke arbitration against India.

Sunset clauses do not automatically protect all investments and may contain conditions. For instance, a case may involve careful consideration of facts relating to establishment of the investment, source or timing of a dispute. Use of sunset clauses could be limited to treaties that are unilaterally terminated.

22 Agreement between The Portuguese Republic and The Republic on the Mutual Promotion and Protection of Investments [2000], Article 15.

C. Rights of Foreign Investors under an Investment Treaty

The key protections offered by BITs to investors are briefly explained below.

I. Expropriation

Majority disputes under BITs arise out of State measures that constitute some form of 'taking' of the investment — known as expropriation. A typical expropriation clause in the 2007 India—Libya BIT reads as under:

"Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation."

Expropriation can be direct or indirect. It includes not only open, deliberate and acknowledged takings of property such as outright seizure, formal or obligatory transfer of title in favour of the Host State, but also covert or incidental interference with the use of property which has the effect of depriving the owners, in whole or in significant part of the use or reasonably-to-be-expected economic benefit of property even if necessarily to the obvious benefit of the Host State. [23]

For example, the 2009 Colombia–India BIT affords protection to investors against indirect expropriation. Article 6 of this BIT outlines factors for identifying indirect expropriation.[24] However, several other Indian BITs only offer protection against direct expropriation. For example, the 2020 India – Brazil BIT specifically offers protection only against direct expropriation and refrains from recognising indirect expropriation.[25]

BITs also outline factors which determine whether the expropriation is legal or not, such as whether the measure was for a public purpose, in accordance with due process of law, was non- discriminatory, or was against the payment of compensation.

In the *Devas* case, Mauritian investors in Devas Multimedia initiated arbitration under the India–Mauritius BIT, claiming that the CCS decision to annul the agreement resulted in expropriation of their investment in Devas. The tribunal held that there was a dual purpose of the decision of the CCS, which acted in part for reasons of national security under Article 11(3) and for general public purposes covered by Article 6 (expropriation clause) of the Treaty. It analyzed the lawfulness of the expropriation and held that — as to the non-security purposes of the CCS decision, India had failed to abide by principles of international due process and had thereby engaged in unlawful expropriation.

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23 Metalclad v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000), para 103.

24 Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India, 2009, Article 6.

25 Investment Cooperation and Facilitation Treaty between The Federative Republic of Brazil and The Republic of India [2020], Articles 2.4; Prabhash Ranjan, 'India—Brazil Bilateral Investment Treaty – A New Template for India?' (Kluwer Arbitration Blog, 19 March 2020) <http://arbitrationblog.kluwerarbitration.com/2020/03/19/india-brazil-bilateral-investment-treaty-a-new-template-for-india/> accessed 13 February 2022.

Expropriation does not merely relate to tangible property. In White Industries case, it was stated that expropriation can also cover intangible assets such as rights to money or to any performance under contract having a financial value and arbitral awards. It can also cover intellectual property and moveable assets such as shares. These are generally defined under the term 'investment' in BITs.

II. Fair and Equitable Treatment

The right to fair and equitable treatment (FET) is the most relied upon and successful basis for BIT claims by investors. It appears in a large number of BITs without guidance. However, several arbitral tribunals have provided content to this standard, which now includes legislative, regulatory and administrative actions of the host State.

Investors have alleged violation of the FET, and emerged victorious, in diverse cases against India. For eg., in 2014, Vodafone International Holdings BV **("VIHBV")** initiated arbitration against India under the India–Netherlands BIT, to challenge the retrospective amendment of certain provisions of the Indian Income Tax Act by the Indian Parliament to bring VIHBV under the tax-net. The amendment was carried out even after the Supreme Court of India had quashed the tax-demand by Government of India. The tribunal held that India's conduct in respect of the imposition of the Claimant of an asserted liability to tax notwithstanding the judgment of the Supreme Court of India was in breach of the guarantee of FET under the India–Netherlands BIT.

The FET standard has also been interpreted to include instances of arbitrary, discriminatory or abusive conduct by a State; and includes State obligation to maintain legal certainty and stability of legal and regulatory framework for foreign investors.

In *Cairn Energy UK v. India*[26], Cairn challenged the retrospective amendment of tax laws (like VIHBV) in addition to other measures by India under the India–UK BIT. The Tribunal concluded that India did not have a specific public purpose that would justify applying the amendments to past transactions. As a result, India's retroactive application of the tax amendments to Cairn's acquisition had failed to balance Cairn's protected interest of legal certainty / stability / predictability on the one hand, and India's power to regulate in the public interest on the other. India had deprived Cairn of its ability to plan its activities in consideration of the legal consequences of India's conduct, in violation of the principle of legal certainty, which the Tribunal considered to be one of the core elements of the FET standard.

The concept of legitimate expectations has also been frequently invoked in investment arbitrations as a dominant part of the FET standard. The doctrine of legitimate expectations holds that public authorities should be bound by the representations made to parties, and must therefore protect the reasonable expectations they create in the public towards government activities. Subsequent retraction on the representation and decisions inconsistent with such expectations trigger state liability. In *White Industries case*, it was stated that these representations must be specific and unambiguous, in order to attract State liability when retracted from.

26 PCA Case No. 2016—7. Tribunal comprising Mr. Laurent Levy, Mr. Stanimir Alexandrov and Mr. J. Christopher Thomas QC

Sometimes, BITs provide a standard against which the violation of the he Fair & Equitable Treatment standard needs to be tested. This can be a high threshold under customary international law, or a flexible approach considering several elements of fairness and equitable treatment under an autonomous approach. Since tribunals focus on international law standards to test violation of FET, it is important to understand the standard to prove violation, and analyze facts and effect leading to and from the State's treatment.

III. Full Protection and Security

Most BITs contain provisions granting full protection and security (FPS) to investments. For example, the India–Lithuania BIT 2011, under article 3, sets out that *"each Contracting Party shall accord fair and equitable treatment, full protection and security to all investments made by the investors of the other Contracting Party on a non discriminatory basis".*[27]

Full protection and security obligations require host States to take active measures to protect investors' investment from adverse effects.[28] The adverse effects may stem from private parties such as demonstrators, employees or business partners, or from actions of the host State and its organs. The protection can be of different kinds, but is essentially against any form of physical violence.

In *Louis Dreyfus Armateurs SAS (LDA) v. India*, LDA was a minority indirect shareholder in a special purpose vehicle called Haldia Bulk Terminals Pvt Ltd (HBT) which was to carry out modernisation works at docks under the authority of the Kolkata Port Trust. Following dismissal of 275 workers, trade union unrest, orders for removal of equipment from site, armed kidnapping of company officers and members of an officer's family, the project was abandoned. LDA initiated arbitration against India alleging that the Indian government had breached its treaty obligation to provide full protection and security to LDA. However, the claim was dismissed at the threshold as LDA failed to comply with the requirement of majority shareholding to claim jurisdiction under the India–France BIT.

IV. Most Favored Nation

A Most Favored Nation (MFN) clause in a BIT ensures that the host State must extend to investors from one foreign country, the same or no less favorable treatment than it accords to investors from another foreign country. The goal of an MFN clause is to ensure that the relevant parties treat each other in a manner at-least as favorably as they treat third parties.

In *White Industries case, the tribunal* found that India had violated its obligation to provide 'effective means' of asserting claims and enforcing rights to White Industries under the India–Australia BIT. However, this provision was absent in the India–Australia BIT. It was imported from the India–Kuwait BIT, into the

27 Agreement between the Government of Republic of India and Government of Republic of Lithuania for Promotion and Protection of Investment, 2011.

28 R. DOLZER & C. SCHREUER, PRINCIPLES, supra note 1, at 160—61

India–Australia BIT through its MFN clause. The tribunal held that borrowing of a clause from another treaty "achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause."[29] It also found that the undue and long delay by the Indian judiciary constitutes a breach of India's voluntarily assumed obligation of providing White Industries with an 'effective means' of asserting claims and enforcing rights,[30] accepting the applicability of the MFN clause and the borrowed substantive remedy.

Some tribunals have applied the MFN treatment only to procedural benefits such as dispute resolution clauses, while others have extended it to substantive provisions in BITs such as FET. This requires an enquiry into the language of the MFN clause, among other factors.

V. Exceptions used by States

Some BITs permit States to adopt measures that are necessary to protect their essential security interests — even if it results in expropriation or violation of the BIT. In such situations, States are excused from liability arising out of actions taken in exceptional circumstances.

General exceptions include measures to meet policy goals such as the protection of human life, the conservation of exhaustible resources, safeguarding of environment, national security, and prudential measures for the financial sector.[31]

For example, the 2008 India–Senegal BIT sets out as follows:

"No provisions of this Agreement shall be interpreted as preventing the host Contracting Party from taking any measure necessary for the protection of its essential interests as regards security or for public health reasons or to prevent diseases affecting animals and plants or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis."[32]

The concept of necessity under international law is also used often by investors and States, to segregate permissible measures from prohibited measures. Depending on the language of the clause, tribunals engage in an enquiry as to whether alternative measures were available to address the same issue, achieve the same objective and cause a lesser impact on investor rights.

29 Id, ¶ 11.2.4

30 Id, ¶ 11.4.19

31 Marie—France Houde, Novel Features in Recent OECD Bilateral Investment Treaties, International Investment Perspectives, 2006 Edition.

32 Agreement between the Government of the Republic of India and Government of the Republic of Senegal for Promotion and Protection of Investments, 2008.

D. India's Investment Treaty Framework

India signed her first BIT with United Kingdom in 1994. The India–UK BIT served as the base template for India to negotiate further BITs. The 2003 Indian Model BIT contained close semblance with the India–UK BIT.[33] This investor—friendly regime remained unchanged for nearly two decades. Until 2011, only one arbitration was initiated against India internationally. This was ultimately settled.[34]

I. 1990's

In early 1990's, Dabhol Power Company **("DPC")** — a joint venture of Enron Corporation, General Electric Corporation and Bechtel Enterprises — was formed to generate electrical power in Maharashtra. DPCentered into an agreement with the Maharashtra State Electricity Board (MSEB) — an Indian publicsector enterprise — as the sole purchaser of power generated by DPC. However, MSEB cancelled the contract due to alleged irregularities, political opposition and high cost of power charged by DPC. DPCno longer had a consumer to sell electrical power to. This adversely affected its investment.[35] DPC initiated arbitration proceedings. However, Indian courts granted anti-arbitration injunctions against it. Thereafter, GE and Bechtel invoked the India–Mauritius BIT through their subsidiaries in Mauritius and challenged measures adopted by India as constituting expropriation. Nine cases were filed in relation to this project. However, the cases were ultimately settled and did not result in an international investment arbitration award.

II. 2002 – 2011

White Industries, an Australian mining company, entered into a long-term mining contract with Coal India Limited (Coal India), a State-owned Indian company in 1989. Disputes relating to quality, bonus and penalty paymentsarose between Coal India and White Industries, prompting the latter to commence arbitration under the ICC Arbitration Rules. In May 2002, the ICC tribunal awarded USD 4.08 million to White Industries.

In September 2002, Coal India applied to the Calcutta High Court to set aside the ICC Award under the Indian Arbitration and Conciliation Act. Simultaneously, White Industries applied to the High Court of New Delhi to enforce the ICC Award in India. Both proceedings experienced significant delays. The enforcement proceedings were eventually stayed pending a decision in the set-aside proceedings. White Industries appealed to the Supreme Court while the High Court of New Delhi stayed the enforcement proceedings. The matter was pending before the Supreme Court for nine years until 2010. White Industries finally invoked arbitration under the India–Australia BIT.

The Tribunal ultimately awarded White USD 4.08 million as compensation as it found that India had violated its obligation to provide to the investor 'effective means' of asserting claims and enforcing rights i.e. a provision borrowed from the India–Korea BIT by way of a most-favored nation clause in the India–Australia BIT.

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33 KRISHAN, DEV. INDIA AND INTERNATIONAL INVESTMENT LAW. IN INDIA AND INTERNATIONAL LAW, ed, Bimal Patel, 277, MartinusNijhoff, 2008. [hereinafter KRISHAN, DEV. INDIA AND INTERNATIONAL INVESTMENT LAW].

34 Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India ICC Case No 12913/MS, IIC 43 (2005); Bank of America, Memorandum of Determinations, OPIC, IIC 25 (2003).

35 Kundra, P (2008), 'Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons', 41 Vanderbilt Journal of Transnational Law

III. 2012 – Early 2016

White Industries was followed by a spate of investor-state proceedings against India, more particularly as a result of regulatory and legislative measures adopted by the Indian government in the subsequent years.[36] The award in White Industries served to be an eye-opener to India and proved to be a turning point in her otherwise indifferent stance towards investor-friendly BITs. After the *White Industries* case in 2011, India's approach to investment treaties began to undergo a sea-change. From the period between 2011 and 2015, India signed only one BIT with the UAE, and an IIA with ASEAN.

In 2016, India introduced a Model BIT **("2016 India Model BIT")** to serve as the foundation to re-negotiate treaties, while formulating interpretative statements on the existing ones.

The 2016 India Model BIT is testimony to India's significantly changed outlook towards investment treaty disputes. It contains 38 detailed articles divided into 7 chapters. It is a departure from generally structured BITs.[37] The 2003 India Model BIT contained broad substantive provisions offering precedence to investment protection over the State's right to regulate. On the other hand, the 2016 India Model BIT is drastically different in form, structure and content and accords increased latitude to regulatory powers of the State. This is being perceived as imbalanced in terms of affording protection to foreign investment.

For an analysis of the 2016 India Model BIT, its goals, the potential challenges on the road to successful investor -State dispute resolution, please see our research paper cited below.[38]

IV. Late 2016 – 2022

Several cases were filed against India between 2011 and 2016. As a result of the growing surge of BIT claims, India unilaterally terminated several BITs in 2016. India has reportedly terminated 58 of its BITs and is in the process of re-negotiating new BITs. It is also engaging in formulating interpretative statements on the existing BITs and IIAs.

As per the Indian Department of Economic Affairs website, 69 out of 84 BITs have been shown to be terminated on various dates since 2016.[39] Overall, till 2022, 76 of the 86 BITs ever entered into have been terminated. Between 2019 and 2021, India has terminated BITs with Turkey, Finland, Serbia (Yugoslavia), Sudan, Bahrain, Saudi Arabia, Bosnia & Herzegovina, Jordan, Mexico, Iceland, Macedonia, Brunei Darussalam, Syrian Arab Republic, Myanmar and Mozambique.[40] The list of terminated BITs is at Appendix A.

In 2016, only one BIT was signed by India with Cambodia. In 2018, India signed a BIT with Belarus based on the Indian Model BIT.[41] On January 25, 2020 India signed the Investment Cooperation and Facilitation Treaty with Brazil.[42]. Several BITs and joint interpretative statements are under discussion such as with Iran, Switzerland,

36 See Vodafone v. India, UNCTIRAL, Notice of Arbitration (not public), (Apr. 17, 2014); Cairn Energy PLC v. India (UNCITRAL); Deutsche Telekom v. India, ICSID Additional Facility, Notice of Arbitration (not public) (Sept. 2, 2013).

37 Model Text for the Indian Bilateral Investment Treaty 2016, http://www.finmin.nic.in/reports/ModelTextIndia_BIT.pdf

38 NDA Research Paper on '2016 India Model BIT – Goals, Challenges, and Way Forward' by Kshama A. Loya

39 https://www.dea.gov.in/bipa

40 Department of Economic Affairs, Bilateral Investment Treaties (BITs)/Agreements, available at: https://dea.gov.in/bipa?page=8

41 See, Treaty Between the Republic of Belarus and the Republic of India on Investments, available at: https://investmentpolicyhub.unctad.org/Download/TreatyFile/5724.

42 Id.

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Morocco, Kuwait, Ukraine, UAE, San Marino, Hong Kong, Israel, Mauritius and Oman. The list of BITs in force is at Appendix B.

During this period, several Indian investors also initiated BIT claims against other States — such as *Flemingo DutyFree Shop*[43] under the India– Poland BIT resulting in an award of USD 17.9 million in favour of the investor; and *Indian Metals & Ferro Alloys Ltd*[44] under the India–Indonesia BIT claiming USD 599 million in damages.

Brief overview of landmark cases involving India, and status of all cases involving India, is provided in Appendix C and Appendix D respectively.

43 FlemingoDutyFree Shop Private Limited v the Republic of Poland, UNCITRAL, Award (Aug. 12, 2016)

44 Indian Metals & Ferro Alloys Limited (India) v. The Government of the Republic of Indonesia, PCA Case No. 2015—40.

Treaties vs. Commercial Contracts

An investment could be governed both by a commercial contract and an international treaty. When a dispute arises, there could be difficulty in distinguishing breaches of contract from breaches of a treaty. Should an investor invoke the dispute resolution clause in a commercial contract, or in a treaty? Would choice of one forum restrain the investor from choosing another? These are contentious issues and require an analysis of several factual and legal elements.

Some tribunals have held that where the fundamental basis of the claim is a treaty laying down an independent standard by which the conduct of the parties has to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the state or its subdivisions cannot operate as a bar to the application of the treaty standard.[1]

However, this does not completely exclude an analysis of terms of contract or local law. An investor may need to take into account the terms of a contract to determine whether it results in breach of an independent treaty standard.

Some treaties may contain clauses that permit an investor to invoke a treaty even for non-sovereign or commercial acts of a State. An 'umbrella clause' in a treaty requires a host State to observe, respect or comply with the obligations that it has committed to undertake with respect to foreign investments. It may, therefore, be used to elevate a breach of contract by a State to a breach of treaty.

An example of an umbrella clause is: *'Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.' Other examples include that a contracting party shall "observe any obligation it has assumed or entered into"*; or "constantly guarantee the observance of the commitments it has entered into", with respect to investments.

Over time, tribunals have adopted different approaches to interpreting umbrella clauses. Some tribunals have held that a broad interpretation of the umbrella clause would have the effect of elevating every contractual claim into a treaty claim, thereby rendering contractual forum clauses superfluous. Some have held that there was no basis for excluding "contractual obligations" from the scope of the word "commitments" stated in the treaty. Each case regarding umbrella clauses must be looked into in terms of its own set of facts and circumstances.

1 Compania De Aguas Del Aconquija S.A. and Vivendi Universal versus Argentine Republic, Adhoc Committee decision

Enforcement of Commercial Awards in India

A. India Seated Arbitrations

Awards from arbitrations held between a foreign investor and the Indian State/ State entity in India are considered as domestic awards, governed by Part I of the Arbitration Act. In order to apply for enforcement of a domestic award, the foreign investor or the Indian State / State entity needs to wait for a period of three months after the receipt of the award. [1]

During the intervening period,[2] a party may challenge the award under Section 34 of the Act, on any of the following grounds:

a. The parties to the agreement were under some incapacity.

b. The agreement in question is not in accordance with the law to which the parties have subjected it, or under the law of the country where the award was made.

c. There is a failure to give proper notice of appointment of arbitrator or arbitral proceedings or the party against whom the award was rendered was otherwise unable to present his case.

d. Award contains decisions on matters beyond the scope of submission to arbitration.

e. Composition of the arbitral authority or the arbitral procedure is not in accordance with the law of the country where the arbitration took place.

f. Subject matter of the dispute is not capable of settlement by arbitration under Indian law.

g. Enforcement of the award would be contrary to the public policy of India. A domestic award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

h. A domestic award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award. However, a domestic award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. Indian courts have held that a court executing the award cannot examine the merits of the case.[3]

In order to stay the execution of the award, a party challenging an award would have to move a separate application. However, there is automatic stay on the enforcement of an award after a party challenges the award, where the Court is satisfied that a prima facie case is made out that: (a) the arbitration agreement or contract which is the basis of the award; or (b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

This applies to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration

1 Arbitration and Conciliation Act 1996, s 34(3) proviso.

2 A further period of 30 days may be granted by a court upon sufficient cause being shown for condonation of delay.

3 An arbitration between a foreign investor and the Indian State / State entity would be an international commercial arbitration, since the foreign investor would be an international party under the Arbitration Act.

and Conciliation (Amendment) Act, 2015.[4] After expiry of the aforesaid period, if a court finds the award to be enforceable, at the stage of execution, there can be no further challenge as to the validity of the arbitral award.

B. Foreign Seated Arbitrations

Awards from arbitrations held between a foreign investor and the Indian State/ State entity outside India are considered as foreign awards, governed by Part II of the Arbitration Act. India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 **("New York Convention/NYC")** as well as the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 **("Geneva Convention")**. If a party receives a binding award from a country which is a signatory to the New York Convention or the Geneva Convention and the award is made in a territory which has been notified as a convention country by India,[5] the award would then be enforceable in India.

Enforcement of a foreign award may be refused on the grounds[6] mentioned in (a) to (g) above, with an additional ground as follows: "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made."

A foreign award is in conflict with the public policy of India, only if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 of the Arbitration Act; or it is in contravention with the fundamental policy of Indian law (this shall not entail a review on the merits of the dispute); or it is in conflict with the most basic notions of morality or justice.

C. Process for Enforcement

The Supreme Court in its recent ruling in, *Sundaram Finance Ltd. v. Abdul Samad and Anr*[7] clarified that an award—holder can initiate execution proceedings before any court in India where assets are located. In case the subject matter of the arbitration is of a specified value,[8] commercial courts established under the Commercial Courts Act 2015 (**"Commercial Courts Act"**) would have jurisdiction, as given below.

For an award arising out of an international commercial arbitration seated in India, the Commercial Division of a High Court where assets of the opposite party lie shall have jurisdiction for applications relating to enforcement of such awards if the subject matter is money. In case of any other subject matter, Commercial Division of a High Court, which would have jurisdiction as if the subject matter of the award was a subject matter of a suit, shall have jurisdiction, i.e., where the opposite party resides or carries on business or personally works for gain.

4 Arbitration and Conciliation (Amendment) Act, 2021

5 Australia; Austria; Belgium; Botswana; Bulgaria; Canada, Central African Republic; Chile; China (including Hong Kong and Macau) Cuba; Czechoslovak Socialist Republic; Denmark; Ecuador; Federal Republic of Germany; Finland; France; German Democratic Republic; Ghana; Greece; Hungary; Italy; Japan; Kuwait; Mauritius, Malagasy Republic; Malaysia; Mexico; Morocco; Nigeria; Norway; Philippines; Poland; Republic of Korea; Romania; Russia; San Marino; Singapore; Spain; Sweden; Switzerland; Syrian Arab Republic; Thailand; The Arab Republic of Egypt; The Netherlands; Trinidad and Tobago; Tunisia; United Kingdom; United Republic of Tanzania and United States of America. India has entered into an agreement with the United Arab Emirates for juridical and judicial co—operation

6 Arbitration and Conciliation Act 1996, s 48.

7 (2018) 3 SCC 622.

8 Commercial Courts Act, s 2(1)(i), "Specified Value", in relation to a commercial dispute, shall mean the value of the subject—matter in respect of a suit as determined in accordance with section 12 which shall not be less than three lakh rupees or such higher value, as may be notified by the Central Government".

For foreign seated arbitrations, where the subject matter is money, an award may be executed before the Commercial Division of any High Court in India where assets of the opposite party lie shall have jurisdiction. In case of any other subject matter, Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have jurisdiction.

Under Indian law, a foreign award is already stamped as the decree, and once the court decides that the foreign award is enforceable, it can proceed to take further effective steps for its execution.[9] The Arbitration Act does not specify the time period within which an application for enforcement of an award should be made before Indian courts. However, enforcement of a foreign award under Part II of the Arbitration Act would be covered by Article 137 of the Limitation Act which provides that an award may be executed within a period of three years from when the right to apply accrues. Please see our paper on 'Enforcement of (Commercial) Awards and Decrees' for more details.[10]

9 M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd., 2001 (6) SCC 356.

10 https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Enforcement_of_Arbitral_Awards.pdf

Enforcement of Treaty Awards

Sufficient jurisprudence has developed on enforcement of commercial arbitration awards in various jurisdictions. However, involvement of sovereign states, nature of measures under challenge, impact on the State's public exchequer among other factors create greater hindrances for enforcement of investment treaty awards. This section provides details on legal hurdles for enforcing treaty awards in India (A); ways to enforce treaty awards against Indian State outside India (B); and navigating the oft-used defense of sovereign immunity i.e. immunity used by States to defend against attachment of assets.

A. Understanding legal hurdles of enforcing treaty awards in India[1]

The questions on enforcement of BIT awards in India would have been moot if India had signed and ratified the ICSID Convention and implemented the same through national legislation. Resultantly, India is not covered under the delocalized regime that offers immunity to ICSID awards from challenge in national courts. Additionally, India is deprived of a regime that makes ICSID awards automatically enforceable in signatory jurisdictions.

I. ICSID Additional Facility Rules

Arbitration clauses in majority of the BITs involving India provide either for arbitration administered under the ICSID Additional Facility Rules (ICSID Rules) or *adhoc* arbitration under UNCITRAL Arbitration Rules.

The ICSID Rules originated to facilitate the resolution of disputes where one of the parties is not a Contracting State to the ICSID Convention. Unlike ICSID Convention awards, they do not offer fool-proof enforcement protection to resultant awards. The ICSID Rules awards would therefore be subject to the place of arbitration. This can be a hurdle for enforcement.

In order to mitigate the effect of this regime, the ICSID Rules provide that an arbitration conducted under the ICSID Rules can be conducted only in the states that are parties to the NYC ("the NYC"). It can be inferred that this provision was inserted to ensure enforceability of the ICSID Rules awards through the mechanism provided under the NYC.

II. The Non-Applicability of the Indian Arbitration & Conciliation Act, 1996

The mechanism for enforcement of arbitral awards (both foreign and domestic) in the case of India, is contained in the Arbitration & Conciliation Act, 1996 **("A&C Act").**

However, in two cases brought by India in Indian courts to restrain investment treaty arbitration,[2] national courts in India have ventured into the subject of enforcement of BIT awards — fueling uncertainty. In *Vodafone & Khaitan Holdings*, the Delhi High Court ruled that BIT awards are not governed by the A&C Act since these

1 Please see our detailed article on 'BIT award enforcement at bay in India as courts rule out applicability of Arbitration Act', published by Kshama A. Loya & Moazzam Khan in Asian Dispute Review, January 2020 edition.

2 Union of India v. Vodafone Group PLC United Kingdom & Anr.; Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.

arbitrations are not commercial in nature. This has flung the fate of BIT award enforcement into an abyss of ambiguity. The two cases are discussed below.

A. The Vodafone Case[3]

In April 2017, Vodafone Blv. invoked the India–Netherlands BIT to challenge a retrospective amendment of tax legislation by India that led to a tax demand of INR 11,000 Crores against Vodafone alongwith interest. While this arbitration was pending, Vodafone Plc. (parent company of Vodafone Blv.) initiated arbitration under the India–UK BIT, challenging the same measure by India.[4]

In April 2017, Vodafone Blv. initiated arbitration against India under India–Netherlands BIT. It challenged India's retrospective amendment of tax legislation, leading a demand of INR 11,000 Crores against Vodafone in addition to interest. During pendency of this arbitration, Vodafone Plc. The parent company of Vodafone BLV, initiated arbitration against India changing the same measure, under the India–United Kingdom BIT. India approached the High Court of Delhi for an anti-arbitration injunction against Vodafone Plc.

The Court held that national courts in India were not divested of jurisdiction in an investment treaty arbitration; and that national courts will grant injunction only if there are very compelling circumstances, the court has been approached in good faith, and there is no alternative efficacious remedy available.

However, the Delhi High Court took a step forward and opined on enforcement of BIT awards. It held that though the BIT constituted an arbitration agreement between a private investor and the host State, yet it was neither an international commercial arbitration governed by the A&C Act nor a domestic arbitration. The Court held that investment arbitration disputes are fundamentally different from commercial disputes as the cause of action (whether contractual or not) is grounded on State guarantees and assurances (and are not commercial in nature). The roots of investment arbitrations are in public international law, obligations of State and administrative law. It reiterated that while acceding to the NYC, India made a reservation to apply the Convention *"only to differences arising out of legal relationship..... that are considered commercial under the national law"*.

B. Union of India v. Khaitan Holdings (Mauritius) Limited & Ors[5]

In *Khaitan*, the Court held that arbitral proceedings under BIT is a separate specie of arbitration. It is outside the purview of A&C Act which only covers commercial arbitration. As such, jurisdiction of courts in relation to arbitral proceedings under BIT would be governed by the CPC. The Court placed reliance upon *Vodafone case*.

While assuming jurisdiction over the foreign investor and investment under the CPC, the Court stated that the A&C Act does not have application in the present case as the A&C Act relates to commercial arbitrations. The present case was one emanating from a Bilateral Investment Treaty and not from a simple commercial contract.

This is a preliminary judgment in the interim application. It would be interesting to see if the court continues to hold the same view after hearing all the parties on merits.[6]

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3 http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-case-a-bit-more-arbitration-friendly.html?no_cache=1&cHash=6d8d3f6c97a84bd120895dbf87ecd464

4 It appears that the second arbitration was commenced due to a jurisdictional objection raised by India in the first arbitration.

5 CS (OS) 46/2019 I.As. 1235/2019 & 1238/2019 dated January 29, 2019

6 http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-case-a-bit-more-arbitration-friendly.html?no_cache=1&cHash=6d8d3f6c97a84bd120895dbf87ecd464

B. Options available to treaty award holders

In light of the decisions discussed above (and until such time that they are set aside or varied by the Supreme Court), any party applying for enforcement of a treaty award under the A&C Act would first have to over-come the jurisdiction hurdle as laid down by these decisions, i.e. the inapplicability of the A&C Act to BIT arbitration. Although other High Courts are not bound to abide by decision of the Delhi High Court, these decisions would certainly hold a persuasive value and until a contrary ruling in rendered, would be a part of the law of the land.

The mechanisms for execution of a foreign decree / judgment (of a Court) are provided in Code of Civil Procedure, 1908. It is pertinent to note that treaty awards cannot be treated as a decree or foreign judgment for the purposes of execution under the CPC in India — since they are neither a "judgment" as defined under the CPC nor have they been delivered by a "Court" as defined in the CPC. Thus, this also is not a viable option for a party seeking to enforce a treaty award against India.

A legitimate avenue for treaty award holders is to identify assets of the State entity or Indian State that are located outside India, preferably in a jurisdiction which has an established mechanism for enforcement of treaty awards.

Some such jurisdictions are briefly discussed below.

I. Singapore

The international arbitration regime in Singapore is bifurcated into two legislations — Arbitration (International Investment Disputes) Act, 1968 (**"the Singapore Investment Act"**) and the International Arbitration Act, 2002 (**"the International Act"**).

The Singapore Investment Act was enacted pursuant to Singapore's signing and ratification of the ICSID Convention. Section 5 of the Singapore Investment Act states that for the purposes of execution, an ICSID award shall have the same effect as a judgment of the Singapore High Court.

The Singapore Investment Act does not provide grounds for resisting enforcement of an ICSID Award beyond the ICSID annulment regime. Till date, there has been no attempt to enforce an ICSID award in Singapore.

The International Act is applicable to arbitral awards made in international arbitrations which are seated in Singapore, as well as to those awards made on the basis of an arbitration agreement in the territory of a country that has ratified the NYC. The UNCITRAL Model Law, with the exception of Chapter VIII, is incorporated by reference into the International Act, subject to the provisions of the legislation. The grounds for refusing the enforcement of the award available to Singaporean national courts are the same as those present in Article 36(1) of the NYC.

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Till date, Singapore courts have not been seized of an application for enforcement of a treaty award. However, in at least two cases,[7] Singapore courts have entertained challenge to investment treaty awards seated in Singapore. In both cases, Singapore courts exercised jurisdiction under the International Act. It can only be deduced that an application for enforcement of an investment treaty award will also be entertained under the International Act. Unlike India, there appears to be no conundrum over applicability to treaty awards. Non-ICSID international awards seated in Singapore or seated in a country that is signatory to the NYC will be enforced in Singapore like any international commercial arbitration award, being subject to the same grounds of resistance as under the NYC.

In order to trace assets in Singapore, there are certain publicly available and searchable databases that include land records and information about property assets maintained by the Singapore Land Authority. The Accounting and Corporate Regulatory Authority (ACRA) also allows searches in the ACRA register to ascertain the particulars of business entities that currently exist and are operating (including a business entity's registered address) and those of their shareholders, directors or partners. Depending on the status of a business entity and filings made with ACRA, it may also be possible to obtain recent financial statements. Searches can also be conducted through ACRA for the profiles of individuals to ascertain any registered addresses and business dealings in Singapore. Asset investigation services are also provided by a number of companies.[8]

II. United Kingdom

United Kingdom is a signatory to the ICSID Convention. International investments disputes decided under the ICSID are recognised and enforced in the UK pursuant to the provisions of the Arbitration (International Investment Disputes) Act, 1966 ("the Investment Disputes Act"). This legislation states that ICSID awards have the same force and effect for the purposes of execution as if they had been a judgment of the High Court.

UK is also a party to the NYC. The English Arbitration Act 1996 applies to enforcement of arbitral awards made in international arbitrations seated in United Kingdom, and in countries that are party to the NYC. A NYC Award may be enforced in the same manner as a judgment or order of the Court. The English Arbitration Act contains a list of the grounds on which the recognition or enforcement of an award may be refused.

Courts in UK have exercised jurisdiction over investment treaty awards under the English Arbitration Act. In *Ecuador v. Occidental Exploration & Production Co,*[9] the English national court held that English Courts had the jurisdiction to hear challenges brought in respect of awards made under investment treaties. In *Czech Republic v European Media Ventures SA*,[10] the English courts interpreted the Czech-BLEU BIT to confer jurisdiction on the arbitral tribunal to determine issues of liability and quantum for expropriation. Similarly, in GPF GP S.à.r.l. v Republic of Poland[11], the High Court partially set aside the decision on jurisdiction issued by a London—seated arbitral tribunal. The tribunal had held that it lacked jurisdiction to hear majority of the claims. The High Court conducted a de novo review of the decision. It interpreted the BIT and held that measures leading to consequences similar to expropriation could be read to encompass breach of the fair and equitable standard.

7 Sanum Investments ltd. vs. Government of the Lao People's Democratic Republic [2016]5 SLR 536; Kingdom of Lesotho vs. Swissborough Diamond MinesPty. Ltd. [2017] SGHC 195.

8 https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/singapore

9 [2006] 2 W.L.R. 70.

10 [2008]1 All ER (Comm) 531

11 [2018] EWHC 409 (Comm)

While cases involving challenge to investment treaty awards seated in UK are usual, cases of enforcement of investment treaty awards are rare. Nevertheless, English courts have exercised jurisdiction in such cases under the English Arbitration Act. In *Tatneft vs. Ukraine*, the English courts entertained an application for enforcement of a treaty award by Tatneft under the Russia – Ukraine BIT, and rejected Ukraine's application for rejection of enforcement of the treaty award. The English courts assumed jurisdiction over the enforcement application under the English Arbitration Act, 1996.

This implies that non-ICSID international awards seated in UK or seated in a country that is signatory to the NYC will be enforced in UK like any international commercial arbitration award under the English Arbitration Act.

III. USA

USA is a signatory to the ICSID Convention. In the USA, the recognition and enforcement of foreign arbitral awards is subject to the provisions of the NYC as well as the Federal Arbitration Act ("the FAA") that incorporates the NYC into US federal law and grants subject matter jurisdiction over recognition and enforcement proceedings to US federal district courts. On account of the incorporation of the NYC into the FAA, the grounds for challenging the enforcement of an international arbitral award are those limited grounds enumerated in the NYC.

However, in the USA, the only way to enforce an arbitral award issued against a sovereign entity under the ambit of ICSID or any other arbitral tribunal is in compliance with the Foreign Sovereign Immunities Act **("the FSIA").**

In *Mobil vs. Venezuela*,[12] Mobil filed an ex parte petition seeking to enforce an ICSID award against Venezuela in the USA. The appeals court vacated the district court's decision in favour of Mobil since Mobil had initiated ex parte proceedings to enforce the award.

In case of non-ICSID awards, the same are enforced in accordance with the FAA for NYC awards. In *Chevron Corporation & Texaco Petroleum Co. vs. Republic of Ecuador*,[13] the UNCITRAL arbitration award rendered in Hague was challenged by Ecuador in Dutch courts. The courts upheld the award. Chevron then applied for enforcement in USA. The District Court held that the award was enforceable under the NYC. Thus, the situation in USA is more or less similar to Singapore and UK while bringing enforcement of an UNCITRAL investment treaty award seated in a NYC country, within the ambit of the FAA.

IV. Other Countries

Other countries with robust international arbitration framework such as France, Germany, Australia and Japan are signatories to the ICSID Convention. The have rarely witnessed cases involving enforcement of any investment treaty awards. Yet, in light of the recent trend of Indian courts to push the A&C Act away from investment treaty awards, award creditors can locate assets in the aforesaid countries, considering that they are signatories to the NYC and have a well-developed legislative framework to exercise jurisdiction over challenge and enforcement of investment treaty awards. As such, it may be prudent to locate assets of the investor or the sovereign State prior to initiation of treaty arbitration to ring-fence the risks of resistance to enforcement, at the early stages of the dispute.

12 Mobil Cerro Negro Limited vs. Bolivarian Republic of Venezuela; No. 15—707 (2d Cir. 2017)

13 795 F.3d 200 (D.C. Cir., 2015)

C. Sovereign Immunity and Attachment of State Assets

Statistics show that States usually comply with an award rendered against them by an arbitral tribunal.[14] This is due to several factors such as fear of procuring a bad reputation or of not obtaining credit from the international market. Nonetheless, the threat of non-compliance by a party against whom an award has been rendered may exist.[15]Recently, the Indian government had refused to comply with awards granted in several cases including disputes with Cairn Energy and Devas Multimedia amongst others.[16]

Due to the Indian government's earlier refusal to pay the sums mandated in these awards, the award holders in these cases sought to enforce the award against the Indian government in countries such as the United States and France. In these enforcement petitions, the award holders also sought attachment of assets of the Indian State to ensure that the Indian State complies with the term of the award. These cases opened discussions regarding principles of sovereign immunity and which assets of a State may be attached in enforcement proceedings.

The defense of sovereign immunity is a major hurdle involved in enforcement of arbitration awards or foreign judgments involving a State or State entity.[17] The concept of sovereign immunity lays down that the State or the sovereign cannot commit a legal wrong, and remains shielded from legal proceedings in an absolute or restricted form. This doctrine also postulates a state's inability to be sued in its own courts without its permission.

In the absence of any international legal instrument which sets out the procedure regarding enforcement and sovereign immunity, questions of sovereign immunity are decided by national laws of each State. State immunity laws have become complicated as a result with different jurisdictions adopting varying approaches.

When conducting business with the State / State entities and envisaging disputes with them, investors need to consider (a) where assets of the State/State entity are located, and (b) the law on sovereign immunity at these locations for the purpose of enforcement of the award. Otherwise, parties run the risk of having a paper award with no enforceability.

I. Commercial and sovereign assets

Until the first half of the 20th century, the concept of sovereign immunity was applied in an absolute sense. This meant that States would have absolute protection from their assets being attached or enforced against in any proceedings in other countries. Most national laws now tend to create an exception for assets of a State which are used for "commercial" activity. This distinction between sovereign and commercial assets becomes important to understand which assets of a State may be proceeded against for enforcement and attachment.

14 Awards: Challenges, GLOBAL ARBITRATION REVIEW, https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/awards-challenges, (last visited Oct 21, 2022).

15 Id.

16 Id.

17 Matthew Sanders & Claudia Salomon, Enforcement of Arbitral Awards Against States and State Entities, ARBITRATION INTERNATIONAL, Vol. 23, No. 3 LCIA, 2007.

Which assets qualify as sovereign or commercial vary depending upon the national laws of a State.[18] Usually, sovereign assets may include property of the State used for diplomatic/consular purposes, military property, central/public bank accounts of the State, property forming part of the cultural heritage or objects of scientific or historical interest. Whereas, commercial assets would usually include assets such as airplanes, immoveable assets and bank accounts which are used by a State as part of a commercial activity.

In the past, on several occasions, courts have allowed attachment of assets of the national airline carrier of a country while allowing enforcement of an award against such country. For example, in 2021, a court in the British Virgin Islands attached assets of Pakistan's national airline (including the interest that the airline held in certain hotels) while enforcing an USD 6 billion ICSID award procured against Pakistan by an Australian mining company.[19] Recently, in July 2022, a fuel importer who won a USD 23 million award of security against Haiti sought to attach assets of Haiti held by American Airlines until the conclusion of the arbitration proceedings.[20]

Another exception to state immunity is a State's waiver of its immunity. A State can waive its immunity by several means including signing an international agreement, contract, arbitration agreement or through any ad-hoc communication. National laws determine when immunity has been waived by a State. Most laws require that waiver of immunity by a State should be specific and unequivocal. For example, under French law, immunity may be waived impliedly by a State so long as such waiver was specific and unequivocal. In the case of *Creighton v. Qatar*,[21] the French Supreme Court held that a State's signing of an arbitration agreement which referred to the ICC Rules of Arbitration constituted a waiver of the State's jurisdictional immunity as well as its immunity from execution.

In any event, one big challenge that remains in relation to enforcement of awards is a general absence of laws which govern sovereign bankruptcy. In other words, if a sovereign does not have sufficient assets in a State for enforcement of an award, an investor may not have much recourse available against the State while seeking to enforce an award in such State. It, therefore, becomes further important for investors to consider where assets of a State/State entity are located and the law on sovereign immunity at these locations before commencing enforcement proceedings against a State in other countries.

II. Law on Sovereign Immunity in India, USA and UK

A. India

The principle of sovereign immunity is not fully and comprehensively codified in India. India has relied heavily on the common law doctrine of sovereign immunity while delineating the operation and applicability of the principle in India.

18 Enforcement Strategies where the Opponent is a Sovereign, GLOBAL ARBITRATION REVIEW, https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/enforcement-strategies-where-the-opponent-sovereign, (last visited Oct 21, 2022).

19 Pakistani airline assets frozen in BVI, GLOBAL ARBITRATION REVIEW, https://globalarbitrationreview.com/pakistani-airline-assets-frozen-in bvi#:~:text=A%20court%20in%20the%20British,US%246%20billion%20ICSID%20award, (last visited Oct 21, 2022).

20 Award creditor targets Haiti assets held by US airline, GLOBAL ARBITRATION REVIEW, https://globalarbitrationreview.com/article/award-creditor-targets-haiti-assets-held-us-airline, (last visited Oct 21, 2022).

21 Creighton v Qatar No 98—19068, [2001] Rev Arb 114, note P Leboulanger; [2001] RTD Com 409, note E Loquin.

The Indian Supreme Court (**"SC"**) has relied on the landmark judgment of the Court of Appeal of England and Wales in the case of *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*[22] to move from an absolute understanding of sovereign immunity to a narrower understanding. It is noteworthy to highlight the rationale furnished by the Court of Appeal to justify this important shift:

> *"It is perhaps right to consider first whether the narrower principle is in better conformity with contemporary international relationships than the doctrine of absolute immunity. It seems undeniable that it is. So long as sovereign institutions confined themselves to what may in general terms be described as the basic functions of government, a total personal or individual immunity from suit was unobjectionable since the area in which it operated had its own inherent limits. The comity of nations was aided by such a doctrine confined as it was, broadly speaking, to acts which could be properly described as an exercise of sovereign power. The radical changes in political and economic and sociological concepts since the first world war have falsified the very foundations of the old doctrine of sovereign immunity. Governments everywhere engage in activities which although incidental in one way or another to the business of government are in themselves essentially commercial in their nature. To apply a universal doctrine of sovereign immunity to such activities is more likely to disserve than to conserve the comity of nations on the preservation of which the doctrine is founded. It is no longer necessary or desirable that what are truly matters of trading rather than of sovereignty should be hedged about with special exonerations and fenced off from the processes of the law by the attribution of a perverse and inappropriate notion of sovereign dignity".*[23]

This rationale indeed brings to light the increasingly multifaceted functions of state bodies and the need to limit the scope of sovereign immunity which can be achieved by delineating the scope of sovereign functions. The SC in the case of *Balmer Lawrie & Co. Ltd. v. Partha Sarathi Sen Roy*[24] set out a limited understanding of "sovereign functions" as follows:

> *"court must be very conscious whilst taking a decision as regards the said issue, and must take into consideration the nature of the body's powers and the manner in which they are exercised....sovereign functions should be restricted to those functions, which are primarily inalienable, and which can be performed by the State alone. Such functions may include legislative functions, the administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon, etc."*[25]

22 (1997) 1 All ER 881.

23 Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria, (1997) 1 All ER 881.

24 (2013) 8 SCC 345.

25 Balmer Lawrie & Co. Ltd. v. Partha Sarathi Sen Roy, (2013) 8 SCC 345,¶20.

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Foreign states in India as well as Indian state-owned bodies performing sovereign functions whilst also undertaking commercial / contractual activity, will enjoy sovereign immunity only with respect to the former and not the latter.

i. Sovereign Immunity of Foreign States in Indian Courts

Section 86 of the CPC prevents a suit from being brought and a decree from being executed against a foreign state, before any competent court, except with the written consent of the Central Government.[26] The Central Government is empowered to grant consent to sue when the foreign state (i) has brought a suit against a person intending to sue,[27] (ii) trades within the territorial limits of the jurisdiction of the court where the person intends to bring the suit,[28] (iii) possesses property situated within the local limits of the jurisdiction of the court where the person intends to bring the suit and the suit is in relation to such a property.[29] In addition to these three conditions, a foreign state may sue if it waives its privilege to not be sued granted to it under the section (Section 86 of the CPC).[30]

In the context of the applicability of sovereign immunity to foreign states, the Apex Court has observed,

> *"Foreign companies carry on business in India. They bring investment, finance and trade....The contractual and commercial obligations which they assume are governed by the discipline of the law. In their commercial and business operations such corporate entities cannot claim an immunity to civil actions."*

In *KLA Const. Technologies Pvt. Ltd. v. Embassy of Islamic Republic of Afghanistan* (**"KLA Const. Technologies case"**),[31] the Delhi High Court (**"HC"**) identified and set out the indications and considerations in determining whether the nature of activity undertaken by the state can be characterized as commercial. It held that,

> *"the purpose and nature of the transaction of the Foreign State would determine whether the transaction, and the contract governing the same, represents a purely commercial activity or whether the same is a manifestation of an exercise of sovereign authority."*[32]

26 Civil Procedure Code, 1908, Section 86(1).
27 Civil Procedure Code, 1908, Section 86(2)(a).
28 Civil Procedure Code, 1908, Section 86(2)(b).
29 Civil Procedure Code, 1908, Section 86(2)(c).
30 Civil Procedure Code, 1908, Section 86(2)(d).
31 2021 SCC OnLine Del 3424.
32 KLA Const. Technologies Pvt. Ltd. v. Embassy of Islamic Republic of Afghanistan, 2021 SCC OnLine Del 3424, ¶48.

Further, in Qatar Airways v. Shapoorji Pallonji and Co. (**"Qatar Airways case"**)[33] the Bombay HC outlined the test under Section 86 of the CPC in terms of the capacity in which a foreign state is acting as, whether sovereign or commercial / contractual:

> *"we need only observe that the claim is founded on a purely contractual and commercial dealing between the Appellant and the Respondent. The Appellant is not a foreign State within the meaning of sub-section (1) of section 86. It has a distinct legal personality of its own which finds recognition in the contractual relationships into which it enters. Those contractual relationships occasioned by its business activities in India would be subject to the jurisdiction of a competent court in this country."*[34]

ii. Sovereign Immunity of Indian State Bodies

The SC in the *All India Radio case*,[35] disqualifies *"commercial activity for profit"*,[36] undertaken by Indian state-owned bodies from the ambit of sovereign functions. The Apex Court effectively holds that *"purely sovereign functions"*[37] cannot wear the garb of commercial activity.

In *Atiabari Tea Co. Ltd. v. State of Assam*,[38] the SC set out what qualifies as a commercial activity:

> *"Trade and commerce do not mean merely traffic in goods, i.e., exchange of commodities for money or other commodities. In the complexities of modern conditions, in their wide sweep are included carriage of persons and goods by road, rail, air and waterways, contracts, banking, insurance, transactions in the stock exchanges and forward markets, communication of information, supply of energy, postal and telegraphic services and many more activities — too numerous to be exhaustively enumerated — which may be called commercial intercourse... Dealings in goods and other commercial activities which do not import a concept of movement are as much part of trade and commerce as transactions involving movement of goods."*[39]

33 (2013) 2 AIR Bom R 164.

34 Qatar Airways v. Shapoorjipallonji and Co., (2013) 2 AIR Bom R 164, ¶19.

35 (1998) 3 SCC 237, ¶4.

36 (1998) 3 SCC 237, ¶4.

37 All India Radio v. Santosh Kumar, (1998) 3 SCC 237, ¶4.

38 AIR 1961 SC 232.

39 Atiabari Tea Co. Ltd. v. State of Assam, AIR 1961 SC 232, ¶66.

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The importance of identifying the nature of activity or transactions undertaken by one, foreign states in India, and *two*, Indian state-owned bodies, whether sovereign or commercial is enhanced when viewed from the standpoint of enforcement of - an Indian court's judgment against a foreign state or a foreign award, in India.

This is because sovereign immunity can be used to prevent the foreign states from being sued in Indian courts (thereby nullifying any attempt at enforcement); and to prevent the enforcement of a foreign seated arbitration award against an Indian state-owned body. Section 86 of the CPC provides for sovereign immunity as a defence in a suit against a foreign state. Section 48 of the Indian Arbitration and Conciliation Act, 1996, makes the existence of a commercial relationship between the parties to the arbitration, pre-requisite for enforcement of a foreign award in India.

B. United States

One such national law is the Foreign Sovereign Immunity Act, 1976 **("FSIA")** of the United States.[40] Under this law, foreign sovereigns are presumed to have immunity from jurisdiction and execution in any suit in any US federal or state court. Further, Section 1609 of the FSIA sets out that Sections 1610 and 1611 of FSIA will govern the procedure in case enforcement proceedings for an arbitral award are commenced against a State in the United States wherein assets of such State located in the United States are sought to be attached.[41] Sections 1610 and 1611 provide an exception to the general rule of sovereign immunity under the FSIA.[42] Section 1610(a) allows for execution of an award against a foreign State's assets located in the United States if the property is used for a "commercial activity".[43]

Commercial activity has been further defined in the FSIA as *"either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."*[44] In the case of Republic of *Argentina v. Weltover, Inc.*,[45]the US Supreme Court held that the commercial activity exception to sovereign immunity may apply when the conduct of the State is similar to that of private parties engaging in *"trade and traffic or commerce"*. It further held that the commercial activity exception does not apply to conduct of a State which is *"peculiar to sovereigns"* or is of a type in which private parties cannot engage.[46]

40 Sovereign Immunity from Execution (in Enforcement), JUS MUNDI, https://jusmundi.com/en/document/publication/en-sovereign-inmunity-from execution-in-enforcement, (last visited Oct 21, 2022)

41 Sec.1609, FSIA.

42 Sec. 1610 & 1611, FSIA.

43 Sec. 1610(a), FSIA.

44 28 U.S.C. § 1603(d).

45 504 U.S. 607, 614 (1992).

46 504 U.S. 607, 614 (1992); Also see Saudi Arabia v. Nelson, 507 U.S. 349, 360 (1993).

C. United Kingdom

Similarly, the State Immunity Act, 1978 ("SIA") of the United Kingdom also creates an exception to the principle of sovereign immunity when a party seeking to enforce an award applies for the attachment of a State's assets which are "in use or intended for use for commercial purposes."[47] In the case of SerVaas Incorporated v. Rafidain Bank & Ors.,[48] the UK Supreme Court held that the origin of the property in terms of its usage is not a valid consideration to be made while evaluating attachment of the property. Accordingly, the court found that an asset will not be deemed commercial if its current usage was not commercial even if it was originally meant to be a commercial asset.[49]

III. Cases on attachment of assets of Indian State

A. Cairn Energy v. India

In this case, on December 21, 2020, the arbitral tribunal passed an award which reportedly ordered the Indian government to desist from seeking a retrospective tax on the basis of a 2012 amendment in Indian tax laws and to return the value of shares it had sold, dividends seized and tax refunds withheld to recover the tax demand. This reported award rendered by the tribunal ordered the Indian government to pay USD 1.2328 billion plus interest to Cairn along with USD 22.38 million towards legal costs. The Indian government refused to comply with this award and refused to pay the ordered sums to Cairn. It also filed an application to set aside the award on March 22, 2021.

In turn, in May 2021, Cairn sought enforcement of the award in nine jurisdictions namely, United States, United Kingdom, Singapore, Netherlands, Canada, France, Singapore, Japan, the United Arab Emirates, and the Cayman Islands. In these applications, Cairn sought to attach properties of the Indian State worth over USD 70 billion. This included several government properties of India located in different countries. In July 2021, Cairn was successful in procuring an order from the French courts whereby the court froze 20 Indian government properties (valued over USD 20 million euros) in Paris to enforce the award against the Indian government. These government properties were residential in nature and included the residence of the deputy chief of mission at the Indian embassy.

Cairn also sought to recover sums from Indian State-owned entities such as Air India. Towards this end, it filed an application in the courts of New York where Air India's United States operations were headquartered. Cairn argued that assets of Air India may be attached in the enforcement proceedings since Air India is an *"alter-ego"* of the Indian State.[50] However, the New York courts did not decide on this application to attach assets of Air India pursuant to a stay application filed by Cairn and Air India as India announced its intention to introduce a legislation to scrap retrospective taxation in the country.

47 Section 13(4), SIA.

48 [2012] UKSC 40.

49 Id.

50 Air India asks U.S. court to dismiss Cairn petition, says it is premature, THE HINDU,https://www.thehindu.com/business/air-india-asks-us-court-to-dismiss-cairn-petition-says-it-is-premature/article36161730.ece (August 29, 2021).

B. Devas v. Antrix

In 2005, Antrix Corporation Ltd. (a wholly owned Government of India Company under the control of the Department of Space) had agreed to build, launch and operate two satellites, and to provide 70 MHz of S-band spectrum to Devas Multimedia Pvt. Ltd. by which Devas would offer hybrid satellite and terrestrial communication services throughout India. In February 2011, Antrix issued a termination notice to Devas, on the basis of a policy decision of the Central Government, citing force majeure. After failed discussions, Devas commenced arbitration proceedings against Antrix in June 2011 under the ICC Arbitration Rules.

On September 14, 2015, the ICC issued an arbitration award in favour of Devas to the tune of USD 562.5 million. Following the award, there was a slew of litigation in India before the Delhi High Court, Karnataka High Court and the Supreme Court of India over the enforcement and challenge to enforcement of the award.

Devas sought execution of the award against Antrix in several jurisdictions including the United States. The United States courts stayed the execution proceedings for approximately a year to allow the parties to settle the matter. The stay was lifted in October 2020 after which the United States courts ordered execution of the award in favour of Devas. On October 27, 2020, the Court confirmed the award in favour of Devas for the entire amount of USD 562.5 million together with pre-award and post-award and post-judgment interest.

Devas sought to enforce the award against Antrix in France. In pursuance of this, the Paris Court of Appeal in March 2018 recognized and enforced the award. The objection that was raised by Antrix at that stage was that the arbitral tribunal had not been constituted as per the agreement between the parties. The Paris Court of Appeal reasoned that this argument was not raised by Antrix in front of the arbitral tribunal and, hence, the right to claim such an objection had been waived. However, on appeal, the Cour de Cassation (the Supreme Court) rendered its decision in March 2020 quashing the Paris Court of Appeal's decision and referred the matter to another panel of the Court of Appeal for considering afresh the objection which the earlier adjudicators had failed to account for. The Cour de Cassation clearly stated that the argumentation as raised by Antrix shows that they did indeed encompass the objection in front of the arbitral tribunal and were not raising it so for the first time in front of the enforcement judge.[51]

In January 2022, the United States District Court of the Western District of Washington stated that the ICC award can be enforced in any jurisdiction in the United States provided that there is evidence that can be shown regarding Antrix having assets in that jurisdiction.[52] In pursuance of this Order of the US Federal Court, up until August 2022, Devas has seized assets belonging to Antrix to the extent of USD 87,000.[53]

At time the United States District Court of the Western District of Washington enforced the ICC award, separate arbitration proceedings by a tribunal under the UNCITRAL had also concluded. These arbitration proceedings were commenced by three Mauritius based investors of Devas Multimedia against India for India's violation of its obligations towards foreign Investors under the Mauritius–India BIT. The award, published on October 13, 2020, granted compensation of USD 111 million to these investors. This award has been challenged by India

51 Nataliya Barysheva and Valentine Chessa, 'Société Antrix Corporation Limited v. Société Devas Multimedia Private Limited, Court of Cassation of France, First Civil Law Chamber, Arrêt n° 177 FSP+b, Pourvoi n° 18—22.019, 04 March 2020', A contribution by the ITA Board of Reporters, Kluwer Law International Kluwer Arbitration Société.

52 US court allows Devas shareholders to register arbitration award, THE HINDU BUSINESSLINE, https://www.thehindubusinessline.com/news/national/us-court-allows-devas-shareholders-to-register-arbitration-award/article38156890.ece, (last visited Oct 21, 2022).

53 Devas seizes $87k worth Antrix assets in arbitral award enforcement, THE ECONOMIC TIMES, https://economictimes.indiatimes.com/tech/technology/devas-seizes-87k-worth-antrix-assets-in-arbitral-award-enforcement/articleshow/93623423.cms?from=mdr, (last visited Oct 21, 2022)

in Dutch Courts, pending which, the US District Court at DC had granted a stay against the enforcement of the UNCITRAL Award on March 24, 2022.[54]

Additionally, a number of jurisdictions are involved in the matter as well. In August 2021, the award was sought to be enforced by the investors in the Federal Court of Australia, New South Wales District Registry. While the Republic of India did appear in the proceedings, it was only to state its immunity to the proceedings and that the Australian court did not have jurisdiction in the matter. After hearing the arguments, the Court determined that it has jurisdiction and allowed the investors to serve the application filed by them to Republic of India.[55]

The investors also filed an application with the Superior Court of Quebec for the enforcement of the award and sought attachment of the funds of Air India held as deposits by the International Air Transport Association **("IATA").** On January 8, 2022, Superior Court of Québec heard this application and passed an interim order in favour of Devas Multimedia. The Superior Court held that Air India is an "alter ego" of the Republic of India and, therefore, the court allowed seizure of 50% of the funds of Air India funds held by IATA for the enforcement of the award. However, after an appeal was filed against this decision by Air India and the Airport Authority of India, the appellate court in Québec recently unfroze USD 17 million worth of Air India funds on the ground that province's civil code does not permit enforcement of an award against a State-owned company merely because such company is an alter-ego of the State.

The January 8, 2022 decision of the Québec Court was also sought to be relied upon by the investors in Devas Multimedia in front of the United States District Court for the Southern District of New York for attaching assets of Air India located in the United States as well. However, in February 2022, the New York Court stayed the proceedings for such attachment of assets of Air India pending the decision on the challenge of the award in front of the US District Court at DC.[56]

54 US court stays Devas foreign investors over $111 million award, INDIAN EXPRESS, https://indianexpress.com/article/cities/bangalore/us-court-devas-foreign-investors-award-7836638/, (last visited Oct 21, 2022)/, (last visited Oct 21, 2022).

55 Damian Sturzaker, 'CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Ltd and Telecom Devas Mauritius Ltd v. The Republic of India, [2021] FCA 975, Federal Court of Australia, New South Wales District Registry, NSD 347 of 2021, 13 August 2021', A contribution by the ITA Board of Reporters, Kluwer Law International.

56 Foreign investors in Devas Multimedia set sights on Air India assets in US, cite Canada court order, INDIAN EXPRESS, https://indianexpress.com/article/cities/bangalore/devas-antrix-deal-air-india-assets-in-us-isro-7725908/, (last visited Oct 21, 2022).; Devas v. India, JUS MUNDI, https://jusmundi.com/en/document/decision/en-cc-devas-mauritius-ltd-devas-employees-mauritius-private-limited-and-tel-com-devas-mauritius-limited-v-republic-of-india-memorandum-and-order-of-the-united-states-district-court-for-the-southern-district-of-new-york-friday-4th-february-2022#decision_19965, (last visited Oct 21, 2022)

Recourse against the defence of sovereign immunity

When there is a contract with a sovereign, a private party can attempt to create contractual safeguards to rule out the potential use of immunity against enforcement of the award.

Potential claimants should incorporate enforcement consideration into their plan of action as soon as a disagreement with a sovereign develops. For instance, the claimant can purchase sovereign award default insurance. In rare circumstances, claimants may be able to obtain insurance up to a specific amount against a sovereign default, protecting a minimum recovery and generating cash flow to support additional collection operations.

Further, a sovereign may try to delay enforcement of an award while annulment proceedings are ongoing or other challenges to the award are being made. Award creditors may ask the state to post a bond while they consider challenging the award.

The potential impact of governmental changes on the enforcement procedure should also be taken into consideration by the parties. Changes in administration may also result in adjustments to diplomatic, economic, or policy agendas, which might open up avenues for dialogue and resolution.

Litigating Investor—State Disputes in India

A. Process for Commencing a Lawsuit

A foreign investor may bring a claim against an Indian State entity before Indian courts. Indian courts are governed by rules provided under the Indian Code of Civil Procedure, 1908 **("CPC").** An investor seeking to commence a lawsuit against the State or a State entity should ensure compliance with Sections 79 and 80 of the CPC which set out the procedure for commencement of a suit by or against the Government or a public officer.[1]

Prior to commencing a suit against the State or a State entity, it is important to consider how such entity is named in the suit. Indian courts treat the naming of an entity in a civil suit as a matter of substance and considerable importance, and not merely a procedural requirement.[2]

Under the CPC, a foreign investor cannot file a suit against the Government or public officer unless a notice has been served on the relevant party(ies).[3] The CPC imposes a mandatory and statutory obligation on the individual to give a notice, failing which the suit will not be maintainable before Indian courts.[4]

Section 80 (1) of the CPC states that, as a condition precedent, an individual filing a lawsuit has to give notice to the Government or public officer before commencing such lawsuit.[5] A written notice has to be given two months before instituting a lawsuit to certain classes of persons depending on involvement of the Central Government, State Government, State of Jammu & Kashmir or a public officer.

The CPC also contains exceptions to the aforesaid rule. Serving a notice to the Government or public officer is not mandatory if the plaintiff is entitled to an urgent or immediate relief against the Government or public officer in respect of any act undertaken by the public officer in its official capacity.[6] However, the individual would have to obtain a leave of the Court as a condition precedent.[7] Further, the order granting the leave has to indicate the ground(s) for obtaining the urgent and immediate relief.[8] Additionally, the Court has to give a reasonable opportunity to the Government or public officer to respond to the relief prayed for in the suit.

Further, the CPC states that a suit instituted against the Government or public officer cannot be dismissed merely because of an error or defect, such as an error.

B. Anti-Suit Injunctions

In international commercial disputes, parties often interrupt ongoing proceedings by applying for an anti-suit injunction in the national courts of the country where they reside. An anti-suit injunction is a court order whereby the court resANTI-SUIT INJUNCTIONStrains a party from commencing or continuing a suit before

1 Section 79—82 of the Civil Procedure Code, 1908.
2 Chief Conservator of Forests v. Collector 2003 3 SCC 472, ¶ 12.
3 Ghanshyam Dass v. Dominion of India 1984 3 SCC 46.
4 State of AP v. Pioneer Builders 2006 12 SCC 119, ¶ 14.
5 Section 80 (1) of the Civil Procedure Code, 1908.
6 Section 80 (2) of the Civil Procedure Code, 1908.
7 State of AP v. Pioneer Builders, 2006 12 SCC 119, para 17.
8 Ghanshyam Dass v. Dominion of India, 1984 3 SCC 46, para 33.

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it or any other court.[9] Accordingly, an anti-suit injunction prohibits a party from commencing or continuing action in another forum.

Under Indian law, a foreign investor has to comply with the provisions of the CPC while applying for an anti-suit injunction. Additionally, a foreign investor has to follow the guidelines laid down by Indian courts in order to obtain an anti-suit injunction.

I. Anti-Suit Injunctions for Proceedings in Indian Courts

Section 20 of the CPC provides Indian courts with the jurisdiction to hear an application for an anti-suit injunction if the defendant voluntarily resides, carries on business or works for gain, or the cause of action arises within the local limits of such court.[10] In such cases, the courts have *personam* jurisdiction to hear the dispute in order to grant an anti-suit injunction,[11] and follow guidelines set out by the Supreme Court of India in the case of *Modi Entertainment.*[12]

However, an anti-suit injunction may not be granted if it is barred under Section 41 of the Specific Relief Act, 1963. Section 41 of the SRA provides that an injunction may not be granted, amongst others, to:

restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

i. *restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;*

ii. *to restrain any person from instituting or prosecuting any proceeding in a criminal matter.*

iii. *It is important to consider these principles before an application can be made for an anti-suit injunction. Parties should bear in mind that an application for an anti-suit injunction is made in a court which is not subordinate to the one against which such injunction is being sought.*

II. Anti-Suit Injunctions against Proceedings before Foreign Courts

Under Section 20 of the CPC, a foreign investor may also apply for an anti-suit injunction against a party (over which an Indian court has personal jurisdiction) to restrain such party from commencing or continuing a suit before a foreign court. However, keeping in mind the interests of justice, Indian courts have limited their power to issue an anti-suit injunction against proceedings before foreign courts to situations where continuance of such proceedings would be considered vexatious or oppressive. This is in line with the decisions of Indian courts to use the power to issue such injunctions sparingly such that principle of comity is upheld.[13]

9 Vijay Pal Dalmia, India: Anti—suit injunctions— When and How granted in India (Mondaq, 2018).

10 Section 20 of the Civil Procedure Code, 1908.

11 Dinesh Singh Thakur v. Sonal Thakur, 2018 17 SCC 12, para 13.

12 Modi Entertainment Network v. WSG Cricket Private Limited, 2003 4 SCC 341.

13 Modi Entertainment, para 10; Board of Control for Cricket in India v. Essel Sports Private Limited, 2010 SCC OnLine Del 443, para 8.

In *Oil and Natural Gas Commission v. Western Co. of North America*,[14] the Supreme Court of India held that an anti-suit injunction may granted when:

i. *it was necessary or expedient to do so; or*

ii. *when the ends of justice so required;*

iii. *the High Court had undoubted jurisdiction to grant such an injunction; and*

iv. *the action in the foreign court would be oppressive.*

In *Modi Entertainment*, the Supreme Court held that it would normally not grant an anti-suit injunction when the parties have agreed to submit to the exclusive or non-exclusive jurisdiction of a foreign court or forum. The court held that by making a choice of forum, the parties would be presumed to have "*thought over their convenience*" before agreeing to submit to exclusive or non-exclusive jurisdiction of a court.[15] However, the court held that such an injunction may be granted when exclusive jurisdiction is given to a foreign court to prevent injustice in circumstances such as when subsequent events have rendered it impossible for a party to prosecute its case in the forum of choice.

Indian courts consider the principles of the sufficiency of connection with respect to the appropriateness of the forum to decide whether foreign proceedings are "oppressive" in nature.[16] Courts are likely to find that proceedings before a foreign court are not vexatious if such court has a real and substantial connection to the dispute. The Delhi High Court set out three factors that the courts should consider to determine if a foreign court has a real and substantial connection to the dispute.[17] These are:

i. *The defendant has to have a sufficient connection with the forum state;*

ii. *The cause of action must have arisen in the forum state;*

iii. *The exercise of jurisdiction by the forum state must be reasonable.*

Recently, the Delhi High Court granted an anti-suit injunction against a foreign court in the case of *HT Media Limited v. Brainlink International* where it found that such proceedings were vexatious in nature.[18]

III. Anti-Anti Suit Injunctions

In India, there is no provision for the grant of an anti-anti suit injunction. Nevertheless, the Indian judiciary has gradually started adopting the principle of anti-anti-suit injunctions. A division bench of the Calcutta High Court was the first court in India to analyse the anti-anti suit injunction. The High Court opined that although there is no law for laying down guidelines for issuing an anti-suit injunction or an anti-arbitration injunction, the general equitable jurisdiction governing an injunction can be applied to an anti-suit

14 Oil and Natural Gas Commission v. Western Co. of North America, (1987) 1 SCC 496.

15 Modi Entertainment, para 24.

16 Board of Control for Cricket in India v. Essel Sports Private Limited, 2010 SCC OnLine Del 443, para 8.

17 (India TV) Independent News Service Private Limited v. India Broadcast Live LLC, 2007 SCC OnLine Del 965, ¶ 36.

18 HT Media Limited v. Brainlink International, 2020 SCC OnLine Del 1703, ¶ 49.

injunction, anti-arbitration injunction and an anti-anti-suit injunction.[19] Further, it held that such an injunction can only be issued in extreme circumstances, where the refusal of the injunction may result in "*palpable and gross injustice.*"[20]

Recently, the Delhi High Court passed an anti-anti-suit injunction in the case of *Interdigital Technology Corporation & Ors. v. Xiaomi Corporation & Ors.*[21] Prior to this order, the defendant was successful in obtaining an anti-suit injunction with a global effect against the plaintiff in the People's Court (Wuhan Court). As a result, the plaintiff referred the matter to the Delhi High Court. The plaintiff contended that the Delhi High Court must allow the anti-anti injunction in order to do complete justice. It contended that the Wuhan Court had injuncted the parties from adjudicating patent infringement before any court around the world.

The Delhi High Court referred to various Indian and international cases to conclude that the court had personal jurisdiction to hear the dispute. The Delhi High Court held that India has the exclusive jurisdiction to hear the dispute and adjudicate upon it due to its personal jurisdiction.[22] Accordingly, it found that the Wuhan Court did not have jurisdiction to grant an anti-suit injunction[23] since such decision of the Wuhan Court ousted the jurisdiction of the only court with the right to entertain the suit.[24] The Delhi High Court opined that the anti-suit injunction passed by the Wuhan Court was oppressive, vexatious, and destructive of the principle of comity.[25] Resultantly, the Delhi High Court passed a an injunction which restrained the defendant from pursuing the anti-suit injunction passed by the Wuhan Court. against the defendant from commencing or continuing the suit before any court.

IV. Anti-Arbitration Injunction

An anti-arbitration injunction is a court— issued order that prevents the parties or the arbitral tribunal from initiating or continuing with arbitration procedures.[26] In most cases, an anti-arbitration injunction is obtained before the arbitration begins or before a final award is rendered by an arbitral tribunal. In India, an arbitral tribunal has the power to rule on its own jurisdiction, in line with the principle of *kompetenz-kompetenz.*[27] The question in anti-arbitration injunctions, which concerns the power of courts to rule on the jurisdiction of arbitral tribunals, has been a subject of considerable debate and conflicting court decisions.

In 2001, the Supreme Court of India, in *Kvaerner Cementation India Limited v. Bajranglal Agarwal ("Kvaerner"),* explicitly opined that courts do not have the jurisdiction to determine the validity of jurisdiction of an arbitral tribunal in accordance with the principle of kompetenz-kompetenz laid down in Section 16 of the Act.[28] However, in SBP & Co. v. Patel Engineering, a seven-judge bench of the Supreme Court held that an arbitral tribunal does not have exclusive jurisdiction to decide the existence or validity of an arbitration agreement.[29]

19 Devi Resources Limited v. Ambo Exports Limited 2019 SCC OnLine Cal 7774, ¶ 36.

20 Id.

21 Interdigital Technology Corporation v. Xiaomi Corporation 2021 SCC OnLine Del 2424.

22 Id, ¶ 119.

23 Id, at ¶ 121.

24 Id.

25 Id at ¶ 125.

26 JULIAN LEW, CONTROL OF JURISDICTION BY INJUNCTIONS ISSUED BY NATIONAL COURTS" IN INTERNATIONAL ARBITRATION 2006, ed. Albert Jan van den Berg, 185—220 (Kluwer, 2007).

27 Section 16 of the Arbitration and Conciliation Act, 1996.

28 Kvaerner Cementation India Limited v. Bajranglal Agarwal, 2012 5 SCC 214.

29 SBP & Co. v. Patel Engineering Ltd, 2005 8 SCC 618.

Moreover, in World Sport Group (Mauritius) Ltd. v. MSM Satellite, the Supreme Court affirmed that civil courts have the power to refuse arbitration if the exceptions mentioned under Section 45 of the Act apply.[30] Section 45 of the Act sets out that a court shall refer parties to arbitration "*unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*"

However, in the recent case of *Bina Modi v. Lalit Kumar Modi* **("Bina Modi")**, the Delhi High Court ruled that suits filed by parties to pronounce the invalidity of an arbitration agreement and to pass an anti-arbitration injunction are not maintainable.[31] The Delhi High Court interestingly relied on the *Kvaerner* judgment to reach this conclusion. The *Bina Modi and Kvaerner* cases seem to adopt the principle of negative *kompetenz-kompetenz* which requires a court to allow a tribunal to first determine its jurisdiction, and not issue an anti-arbitration injunction even if it finds that no valid arbitration agreement exists.

C. Interim Reliefs and Mareva Injunction

In any lawsuit commenced before Indian courts, an investor may seek certain "urgent" or "interim" reliefs. Order 39 of the CPC governs grant of interim relief before Indian courts.[32] Different interim reliefs which may be sought include an injunction mandating or prohibiting a party from engaging in certain actions, seeking certain information, seeking security for costs amongst others. Under Indian law, an interim relief may be granted, if the court is satisfied that:

i. there exists a *prima facie* case against the defendant;

ii. the balance of convenience lies in favour of the plaintiff, and

iii. in the event that the interim relief is not granted, irreparable harm or injury to the plaintiff may occur.[33]

Under Order 38, Rule 5 of the CPC, a defendant's property may be attached by the court while proceedings are pending. A higher threshold (than the standard for grant of an interim relief mentioned above) has to be met by a plaintiff seeking such attachment. In Raman Tech. & Process Engg. Co. & Anr. v. Solanki Traders, 34 the Supreme Court held that to award an attachment under Order 38, Rule 5:

"A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC."

An attachment under Order 38, Rule of the CPC is similar to a Mareva injunction, or a freezing injunction, that has been developed under English law. A Mareva injunction or a freezing injunction is an injunction which restrains a judgement debtor from disposing of its assets, not in the ordinary course of business, with a motive to evade its liability from the suit. The principle of Mareva injunction was set out by Lord Denning, who granted this injunction for the first time, in the decisions of *Nippon Yusen Kaisha v. Karageorgis and Mareva Compania Naviera S.A v. International Bulkcariers.*

30 World Sport Group (Mauritius) Ltd. v. MSM Satellite, 2014 11 SCC 639.

31 Bina Modi v. Lalit Kumar Modi, 2020 SCC OnLine Del 1678.

32 Order 39 of the Civil Procedure Code, 1908.

33 Dalpat Kumar v. Prahlad Singh, 1992 1 SCC 719.

34 Raman Tech. & Process Engg. Co. & Anr. v. Solanki Traders, (2008) 2 SCC 302.

This injunction's primary purpose is to allow the judgement creditor to enforce the decision against the judgement debtor before the enforcement is exhausted by the actions of the judgement debtor. Such injunction is not granted as a means of compensation to the judgement creditor. Generally, a party applies for a Mareva injunction after a judgment or an award has been rendered in its favour but such judgment/award is yet to be executed. A party may apply for a Mareva injunction or a freezing injunction if it believes that the other entity may possibly dispose of its assets to escape the liability that could arise from the suit.

The Supreme court, in the decision of *Mohit Bhargava v. Bharat Bhusan Bhargava*,[35] held that Indian courts have the power to grant Mareva injunctions which are similar to an attachment under Order 38 of the CPC. While attachment before judgment under the CPC and Mareva injunctions are similar, they are not the same. An attachment under Order 38 of the CPC acts as a lien against the defendant's property whereas a Mareva injunction merely acts as a restraint against the defendant from disposing their property. Accordingly, an Indian court may grant a Mareva injunction by exercising its inherent discretion under Section 151 of the CPC. However, since a Mareva injunction is similar to other injunctions, courts usually rely on grounds established for such other injunctions to grant a Mareva injunction.

D. International Investment Arbitration Related Court Proceedings

The position taken by Indian courts while adjudicating anti-arbitration injunctions in international investment arbitrations has been relatively consistent in comparison to commercial arbitrations. In India, there is no specific legislation that courts rely on for the grant of an anti-arbitration injunction in cases of international investment arbitrations. However, various high courts have adjudicated upon the grant of anti-arbitration injunctions against investment arbitrations.

The Calcutta High Court in the *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS* is the only Indian judgement where a court granted an anti-arbitration injunction with respect to an international investment arbitration.[36] The court laid down three factors where an anti-arbitration injunction may be granted:[37]

i. If the court believes that no arbitration agreement exists between the party;

ii. If the arbitration agreement is null and void or incapable of being performed; or

iii. If the continuation of a foreign arbitration proceeding would be oppressive or vexatious.

The court also held that while questions relating to arbitrability or jurisdiction or stay of arbitration should normally be left foreign courts having supervisory jurisdiction over such arbitration, Indian courts may pass an anti-arbitration injunction in exceptional circumstances (e.g. where continuance of such proceedings might be oppressive or unconscionable). While the Calcutta High Court held that courts have to play a supportive role and encourage arbitration rather than invalidating it,[38] it issued an anti-arbitration injunction by finding that the continuation of the arbitration proceedings in question would be oppressive.

35 Mohit Bhargava v. Bharat Bhusan Bhargava, 2007 4 SCC 795.

36 Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures, SAS 2014 SCC OnLine Cal 17695.

37 Id.

38 Id.

Subsequently, in *Union of India v. Vodafone Group PLC United Kingdom* (**"Vodafone"**), the Delhi High Court refused to grant an anti-arbitration injunction.[39] The Delhi High Court observed that courts could only exercise limited intervention in cases concerning arbitration.[40] It held that the power to issue an anti-arbitration injunction must be exercised with great caution and should only be granted if the arbitral proceedings are vexatious or oppressive.[41] Interestingly, the Delhi High Court differentiated between international investment disputes and commercial disputes. It held that the Arbitration Act would be inapplicable in cases of international investment arbitration.[42] Nevertheless, it found that courts have the power to grant anti-arbitration injunctions in highly compelling circumstances.[43] In the present case, Delhi High Court refused to grant an anti-arbitration injunction by finding that there were no compelling circumstances.

Recently, in Union of India v. Khaitan Holdings (Mauritius) Limited, the Delhi High Court had the opportunity to deal with an anti-arbitration injunction again.[44] The Delhi High Court reaffirmed its decision in Vodafone. It held that the Arbitration Act will not apply to international investment arbitrations, and thus, an arbitral tribunal has the jurisdiction to decide its own competence.[45] It also ruled that courts can grant anti-arbitration injunctions only in rare cases.

E. Denial of Justice / Failure to Provide Effective Means to Assert Claims

Denial of justice is a principle of customary international law whereby a state entity has to protect the rights of the foreign investors against acts of the State's judiciary.[46] A foreign investor can claim denial of justice by the state entity if there is (i) denial of access to courts; (ii) substantial delay in proceedings; (iii) procedural defects in proceedings, or (iv) irrational or abusive outcome going beyond mere misapplication of law.[47] Denial of justice may also be claimed against actions of the administrative entities of the State. However, the standard to prove denial of justice is very high, especially in cases of substantial delay in judicial proceedings.

In *White Industries Australia Ltd v Republic of India*,[48] the tribunal was tasked with deciding whether India denied justice to White Industries by allowing the enforcement proceedings of an award procured by White Industries to continue for more than nine years. However, the tribunal did not accept White Industries' contention. It said that determining whether or not there has been a denial of justice is a very fact-sensitive exercise that is influenced by factors including the intricacy of the legal procedures, the necessity for expediency, the conduct of the litigants, and the behaviour of the courts themselves. The tribunal held that the Indian court's delay in hearing and ruling on the jurisdictional appeal was certainly unsatisfactory in terms of efficient administration of justice, but it had not reached the stage of constituting a 'denial of justice'. However, the tribunal found that such delay did amount to India's failure to provide an effective means of asserting its claim to White Industries.

39 Union of India v, Vodafone Group PLC United Kingdom, 2018 SCC OnLine Del 8842

40 Id at ¶ 111.

41 Id, at ¶ 114.

42 Id, at ¶ 115.

43 Id.

44 Union of India v. Khaitan Holdings (Mauritius) Limited, 2019 SCC OnLine Del 6755.

45 Id. at ¶ 23.

46 Anze Arko & Charis Tan, Denial of Justice in FET (Jus Mundi, 2022).

47 Id.

48 White Industries Australia Ltd v Republic of India, UNCITRAL, Final Award (30 November 2011).

Considering the difficulty in meeting the denial of justice standard, in case of substantial delays by Indian courts, it may be easier for investors to challenge such delay as a violation of the effective means clause (if their treaties provide such a clause). Moreover, while it is not necessary, an investor would usually be required to show that they exhausted all local remedies before a claim of denial of justice is made such that courts of the host State are given an opportunity to correct themselves.

Conclusion

The Indian growth story is promising and proven. In the past decade, India's rise in global competitiveness and innovation has been testament to its drive to be one of the fastest growing economies in the world. It is a land of opportunities, and remains strongly committed to easing business and attracting foreign investment.

India has been at the forefront of policy making in the FDI arena. Maximum governance with minimum government reflects upon India's commitment to ease business in its corridors. FDI inflows and outflows have been dynamic in the last decade. However, what also appears to be dynamic are disputes between foreign investors and Indian State / State entities. These not only affect investment value and erode investor confidence, but also mar effective collaborations between foreign investors and the Indian State.

A dispute between a foreign investor and a State involves elements of business, commerce, national regulation, and often public and private international law. In order to effectively navigate through the Indian business and legal landscape, it is critical for investors to understand these elements and plan their investment strategy accordingly.

In the past 25 years, India has been involved in several cases initiated by foreign investors — before administrative bodies, courts, mediators and arbitral tribunals. On the international law front, ,ore than 25 international investment arbitration cases have been initiated by foreign investors such as Vodafone, Cairn, Vedanta, Devas and Nissan under the auspices of Bilateral Investment Treaties (BITs) between India and the investor's country. Claims filed under BITs elevate the government's investment— impacting measures to international law tions. Resultantly, compensation claims run into millions and billions of dollars. The 'loser pays' principle applies with slight modification. Here, if the government loses, the public exchequer pays.

While India has reacted to erstwhile and existing investment treaty disputes by terminating several BITs, the seemingly burnt out comet of BITs continues to leave a tail of disputes in the arbitration universe, thanks to sunset clauses. The resultant awards pave way to post-arbitration litigation in relevant courts through challenge, or resistance to enforcement. Several new BITs, FTAs and ECAs are also being entered into with other countries. This has opened fresh legal regimes governing India's relations with the contracting States.

While arbitrations and post-arbitration proceedings involving India continue to rise, we are also increasingly witnessing the growth of mediation and special species of disputes in courts. The Indian government regularly attempts to restrain investment arbitrations through anti-arbitration injunctions, or challenge arbitration awards passed in favour of foreign investors. Yet, India's independent judiciary has been a beacon of hope, and strives for minimal interference in arbitration proceedings while compelling the government to honour its sovereign and contractual commitments.

It is also a welcome move on India's part to propose a special legislation to protect foreign investors and resolve Investor-State disputes. The Finance Ministry is stated to have recommended mediation and establishment of special fast-track courts for this purpose. Alternatively, it is also stated to consider vesting jurisdiction with the National Company Law Tribunal (NCLT).[1] Details regarding this legislation are awaited.

1 Kshama Loya and Mozzam Khan, 'View: Balancing State Regulation and Investor Rights' (The Economic Times, 31 January 2020) <https://economictimes.indiatimes.com/markets/stocks/news/view-balancing-state-regulation-investor-rights/articleshow/73792172.cms?from=mdr> accessed 14 February 2022; Bhavana Sunder and Kshama Loya, 'Investment Arbitration and India: 2020 Year in Review' (The National Law Review, 25 February 2021) <https://www.natlawreview.com/article/investment-arbitration-and-india-2020-year-review#:~:text=For%20the%20Indian%20foreign%20direct,and%20innovative%20dispute%20resolution%20strategies.&text=While%20global%20FDI%20witnessed%20a,13%25%20increase%20in%20FDI%20inflows.> accessed 3 February 2022.

India's massive population, macro and micro-economic factors, national security and public interests encourage state and judicial measures at the cost of foreign investment. On the other hand, the government of India as well as the judiciary recognizes that the crown cannot wield unchecked powers resulting in arbitrary and unfair measures on the legal plane.

As India strives to become the fastest-growing economy and ventures into a higher band for ease of doing business, there is a collective drive to devise effective governance and dispute resolution mechanisms that enable FDI and pave the way forward for beneficial collaboration.

Appendices

Appendix A: BITs Signed by India

New BITs[1]

S. No.	Parties	Date of Agreement	Date of Enforcement
1	India — Kyrgyz Republic	14 June 2019	
2	India — Brazil (Investment Cooperation and Facilitation Treaty)	25 January 2020	
3	India — Belarus	24 September 2018	5 March 2020
4	India Taipei Association in Taipei – Taipei Economic and Cultural Center in India (Bilateral Investment Agreement)	18 December 2018	14 February 2019

Active BITs[2]

S. No.	Parties	Date of Agreement	Date of Enforcement
1	India — Libya	26 May 2007	25 March 2009
2	India – Bangladesh [Joint Interpretative Notes]	9 February 2009 [4 October 2017]	7 July 2011 [4 October 2017]
3	India — Senegal	3 July 2008	17 October 2009
4	India — Lithuania	31 March 2011	1 December 2011
5	India — Colombia [Joint Interpretative Declaration]	10 November 2009 [4 October 2018]	2 July 2012 [4 October 2018]
6	India — Philippines	28 January 2000	29 January 2001
7	India — Israel	29 January 1996	18 February 1997
8	India — UAE	12 December 2013	13 September 2014

1 'BIT' (Department of Economic Affairs) < https://dea.gov.in/bipa> accessed 10 February 2022.

2 'BIT' (Department of Economic Affairs) < https://dea.gov.in/bipa> accessed 10 February 2022.

Other active Investment and Trade Treaties and Agreements [3]

S. No.	Parties	Date of Agreement	Date of Enforcement
1	India—Sri Lanka Free Trade Agreement (FTA)	28 December 1998	1 March 2000
2	Agreement on South Asian Free Trade Area (SAFTA)(India, Pakistan, Nepal, Sri Lanka, Bangladesh, Bhutan, the Maldives and Afghanistan)	6 January 2004	1 January 2006
3	India—Nepal Treaty of Trade	27 October 2009	27 October 2009
4	India—Bhutan Agreement on Trade, Commerce and Transit	12 November 2016	29 July 2017
5	India—Thailand FTA — Early Harvest Scheme (EHS)	9 October 2003	31 August 2004
6	India—Singapore Comprehensive Economic Cooperation Agreement (CECA)	29 June 2005	1 August 2005
7	India—ASEAN CECA — Trade in Goods, Services and Investment Agreement (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam)	13 August 2009	1 January 2010
8	India—South Korea Comprehensive Economic Partnership Agreement (CEPA)	7 August 2009	1 January 2010
9	India—Japan CEPA	16 February 2011	1 August 2011
10	India—Malaysia CECA	18 February 2011	1 July 2011
11	India—Mauritius Comprehensive Economic Cooperation and Partnership Agreement (CECPA)	22 February 2021	1 April 2021
12	India—UAE CEPA (*)	18 February 2022	1 May 2022
13	India—Australia Economic Cooperation and Trade Agreement (ECTA)	2 April 2022	
14	Asia Pacific Trade Agreement (APTA)	1975	17 June 1976
15	Global System of Trade Preferences (GSTP)	13 April 1988	19 April 1989
16	SAARC Preferential Trading Agreement (SAPTA)	11 April 1993	7 December 1995
17	India—Afghanistan PTA	6 March 2003	13 May 2003
18	India—MERCOSUR PTA	25 January 2004	1 June 2009
19	India—Chile PTA	20 January 2005	8 March 2006

3 https://pib.gov.in/PressReleasePage.aspx?PRID=1814151

Appendix B: Terminated BITs [4]

India has terminated BITs with the following countries:

- United Kingdom
- Denmark
- Tajikistan
- Kazakhstan
- Russian Federation
- Turkmenistan
- South Korea
- Sri Lanka
- Germany
- Netherlands
- Poland
- Vietnam
- Malaysia
- Italy
- Czech Republic
- Oman
- Switzerland
- Egypt
- Kyrgyz Republic
- France
- Spain
- Belgium
- Romania
- Mauritius
- Turkey
- Bulgaria
- Morocco
- Indonesia
- Australia
- Qatar
- Uzbekistan
- Argentina
- Austria
- Portugal
- Sweden
- Thailand
- Lao PDR
- Mongolia
- Croatia
- Kuwait
- Ukraine
- Cyprus
- Yemen
- Finland
- Belarus
- Taiwan
- Serbia (Yugoslavia)
- Armenia
- Sudan
- Hungary
- Bahrain
- Saudi Arabia
- Bosnia & Herzegovina
- Slovak Republic
- China
- Jordan
- Trinidad & Tobago
- Hellenic Republic (Greece)
- Mexico
- Iceland
- Macedonia
- Brunei Darussalam
- Syrian Arab Republic
- Myanmar
- Mozambique
- Latvia
- Democratic Republic of Congo
- Seychelles
- Slovenia
- Nepal

4 'BIT' (Department of Economic Affairs) < https://dea.gov.in/bipa > accessed 10 February 2022.

Appendix C: Landmark Cases Involving Foreign Investors and India

I. Devas v. Antrix

In 2005, Antrix Corporation Ltd. (a wholly owned Government of India Company under the control of the Department of Space) had agreed to build, launch and operate two satellites, and to provide 70 MHz of S-band spectrum to Devas Multimedia Pvt. Ltd. by which Devas would offer hybrid satellite and terrestrial communication services throughout India. In February 2011, Antrix issued a termination notice to Devas, on the basis of a policy decision of the Central Government, citing force majeure. After failed discussions, Devas commenced arbitration proceedings against Antrix in June 2011, under the Rules of Arbitration of the International Chamber of Commerce **("ICC").**

On September 14, 2015, the ICC issued an arbitration award in favour of Devas to the tune of USD 562.5 million by finding that Antrix wrongfully repudiated the contract. Following the award, there was a slew of litigation in India before the Delhi High Court, Karnataka High Court and the Supreme Court of India over enforcement and challenge to enforcement of the award.

Devas sought execution of the award in several jurisdictions including the United States. The United States Court stayed the execution proceedings for around a year to allow the parties to settle the matter. The stay was lifted in October 2020 and the United States Court ordered execution of the award in favour of Devas Multimedia. The Court confirmed the award in favour of Devas Multimedia for the entire amount of USD 562.5 million together with pre-award and post-award and post-judgment interest.

Antrix filed an interlocutory application before the Indian Supreme Court. The issue before the Court was whether the application under Section 34 of the Arbitration and Conciliation Act, 1996 **("Act")** (challenge to an arbitral award) should be heard before the courts in Bangalore or Delhi. The Supreme Court acknowledged that that pending the petition under Section 34, the Court cannot order execution of the award. On the aspect of jurisdiction of courts to hear the application under Section 34, the Supreme Court transferred the application to the Delhi High Court.[5]

Surprisingly, in early 2021, Antrix Corporation filed a petition before the National Company Law Tribunal **("NCLT")**, Bengaluru, seeking an order for winding up of Devas under Indian law. Antrix contended that Devas was formed for a fraudulent and unlawful purpose in its bid to obtain the aforesaid contract from Antrix in 2005. Antrix argued that the persons concerned with the formation and management of Devas were guilty of fraud, misfeasance and misconduct, and the affairs of Devas were being conducted in a fraudulent manner.

The NCLT admitted the petition on January 19, 2021. It stated that though several proceedings were pending against the award, there was no bar against Antrix to initiate the present proceedings. The NCLT made prima facie finding that Devas had resorted to various frauds, misfeasance and connivance with officials to obtain the contract from Antrix in 2005. It was also of the prima facie opinion that Devas' actions of incorporating the company and obtaining a contract in a fraudulent manner within a short time, without having requisite experience, would not justify its continuance on the rolls of the Registrar of Companies in India. On May 25, 2021, the NCLT passed a final order and directed the winding up of Devas.

5 Devas Multimedia Pvt. Ltd. v. Antrix Corporation Ltd., IA No.107899/2020 in Petition(s) for Special Leave to Appeal (C) No(s).28434/2018.

On appeal, by an order dated September 8, 2021, the NCLAT upheld the NCLT's decision and ordered the liquidation of Devas on the ground of fraud under Sections 271 and 272 of the Companies Act, 2013. This order was appealed by Devas to the Supreme Court of India. In its appeal, Devas argued that Antrix's real reason for seeking the winding up of Devas Multimedia was to deprive Devas of the award rendered by the ICC tribunal. However, on January 17, 2022, the Supreme Court of India dismissed Devas' argument as being without merit. The Court also upheld the NCLAT's decision to wind up Devas Multimedia by finding that Devas was incorporated fraudulently and for unlawful purposes.[6]

II. Cairn v. India

Cairn India Holdings Limited **("CIHL")** was incorporated in Jersey in August 2006 as a wholly owned subsidiary of Cairn UK Holdings Limited **("CUHL")**, a holding company incorporated in the United Kingdom in June 2006. Under a share exchange agreement between CUHL and CIHL, the former transferred shares constituting the entire issued share capital of nine subsidiaries of the Cairn group, held directly and indirectly by CUHL, that were engaged in the oil and gas sector in India.

In August 2006, Cairn India Limited **("CIL")** was incorporated in India as a wholly owned subsidiary of CUHL. In October 2006, CUHL sold shares of CIHL to CIL in an internal group restructuring (the Transaction). This was done by way of a subscription and share purchase agreement, and a share purchase deed, through which shares constituting the entire issued share capital of CIHL were transferred to CIL. The consideration was partly in cash and partly in the form of shares of CIL. CIL then divested 30.5% of its shareholding by way of an Initial Public Offering in India in December 2006. As a result of divesting Approx. 30% of its stake in the Subsidiaries and part of IPO proceeds, CUHL received approximately INR 6101 Crore (approximately USD 931 million).

In December 2011, UK– based Vedanta Resources Plc (Vedanta UK) acquired 59.9% stake in CIL. In April 2017, CIL merged with Vedanta Ltd. (VL), a subsidiary of Vedanta UK. Under the terms of the merger, Cairn Energy, a subsidiary of Vedanta Resources Plc, received ordinary shares and preference shares in VL in exchange for the residual shareholding of approximately 10% in CIL. As a result, Cairn Energy had a shareholding of approximately 5% in VL along-with an interest in preference shares. As on December 31, 2017, this investment was valued at approximately USD 1.1 billion.[7]

In January 2014, the Indian tax Assessing Officer initiated re-assessment proceedings against CUHL under the Indian Income Tax Act, 1961. It sought to apply the retrospective amendments made by India in 2012 to the Transaction. It also restricted CUHL from selling its shareholding of approximately 10% in CIL, which at that time had a market value of approximately USD 1 billion. On March 9, 2015, a draft assessment order was passed against CUHL, assessing a principal tax due on the 2006 Transaction to INR 102 billion (USD 1.6 billion), plus applicable interest and penalties.

On March 10, 2015, Cairn Energy initiated international arbitration proceedings under the India–UK BIT against the aforesaid measures adopted by India. It reportedly sought restitution of the value effectively seized by the Indian Income Tax Department **("ITD")** in and since January 2014.25 Cairn's principal claims were that the assurance of fair and equitable treatment and protections against expropriation afforded by the

6 Devas Multimedia Pvt. Ltd. v. Antrix Corporation Ltd, Civil Appeal No. 5766 of 2021 with Civil Appeal No. 5906 of 2021.

7 A detailed description of the procedural timeline and developments in the matter have been explained here: https://www.nishithdesai.com/SectionCategory/33/Research%20and%20Articles/12/57/57/4393/2.html

Treaty have been breached by the actions of the ITD, which had sought to apply punitive retrospective taxes to historical transactions already closely scrutinised and approved by the Government of India.

Soon thereafter, on March 13, 2015, a draft assessment order was passed by the Assessing Officer ("AO") against CIL for failure to deduct withholding tax on alleged capital gains arising during 2006 Transaction in the hands of CUHL. The tax demand comprised INR 10247 Crores of tax, and the same amount as interest (approximately USD 3.293 billion). On March 27, 2015, Vedanta UK served a notice of claim against the Government of India under the India–United Kingdom BIT, challenging the tax demand (Vedanta case).

The Treaty proceedings in the Cairn case formally commenced in January 2016. Between 2016 and 2018, the ITD seized and held CUHL's shares in VL for a value of approximately USD 1 billion. Further aggravating matters, the ITD sold part of CUHL's shares in VL to recover part of the tax demand, realising and seizing proceeds of USD 216 million. It continued to pursue enforcement of the tax demand against CUHL's assets in India. These enforcement actions included seizure of dividends due to CUHL worth USD 155 million, and offset of a tax refund of USD 234 million due to CUHL as a result of overpayment of capital gains tax on a separate matter.

Since the ITD attached and seized assets of CUHL to enforce the tax demand, CUHL pleaded before the Tribunal that the effects of the tax assessment should be nullified, and Cairn should receive recompense from India for the loss of value resulting from the attachment of CUHL's shares in CIL and the withholding of the tax refund, which together total approximately USD 1.3 billion. The reparation sought by CUHL in the arbitration was the monetary value required to restore Cairn to the position it would have enjoyed in 2014 but for the Government of India's actions in breach of the Treaty.

On December 21, 2020, the arbitral tribunal passed an award reportedly ordered the government to desist from seeking the tax, and to return the value of shares it had sold, dividends seized and tax refunds withheld to recover the tax demand.[8] In this award, the tribunal ordered India to pay USD 1.2328 billion plus interest to Cairn along with USD 22.38 million towards legal costs.[9] Since India refused to pay the award, Cairn sought to enforce the award in nine jurisdictions including the United States, the United Kingdom, Canada and Singapore. Cairn also sought to enforce this award by recovering the sums from Indian government— owned entities, including Air India, in these countries.[10]

Along with defending against the enforcement of the award in these jurisdiction, India also filed an application on March 22, 2021 to set aside the award. However, the Indian government finally settled this long running tax feud by refunding a sum of USD 1.06 billion to Cairn in February 2022.[11]

8 Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016—07, Final Award (December 21, 2020), https://jusmundi.com/en/document/decision/en-cairn-energy-plc-and-cairn-uk-holdings-limited-v-the-republic-of-india-final-award-wednesday-23rd-december-2020#decision_14307; Cairn Energy wins arbitration award, THE HINDU (December 23, 2020), https://www.thehindu.com/business/Industry/cairn-energy-wins-investment-treaty-arbitration-against-india-over-tax-dispute-sources/article33399645.ecehttps://www.thehindu.com/business/Industry/cairn-energy-wins-investment-treaty-arbitration-against-india-over-tax-dispute-sources/article33399645.ece

9 Cairn v. India, PCA Case No. 2016—07, Final Award (December 21, 2020).

10 India challenges $1.2 bn Cairn award, says never agreed on tax arbitration, BUSINESS STANDARD (March 23, 2021), https://www.business-standard.com/article/companies/india-challenges-1-2-bn-cairn-award-says-never-agreed-on-tax-arbitration-121052300482_1.html

11 India refunds Rs 7,900 cr to Cairn to settle retro tax dispute, BUSINESS STANDARD (February 25, 2022), https://www.business-standard.com/article/companies/india-refunds-rs-7-900-cr-to-cairn-to-settle-retro-tax-dispute-122022401284_1.html; India refunds ₹7,900 crore to Cairn to settle retro tax dispute, The Hindu (February 24, 2022), https://www.thehindu.com/business/Industry/india-refunds-7900-crore-to-cairn-to-settle-retro-tax-dispute/article65080791.ece

III. Vodafone v. India

In 2007, Hutchinson Telecommunications International Limited (Hutch, a Cayman Islands entity) sold its stake in CGP Investments (another Cayman Islands entity), to Vodafone International Holdings (VIHBV, a Netherlands entity) — for a consideration of USD 11.1 billion.[12] Hutch earned capital gains on this sale to VIHBV. CGP Investments held various underlying subsidiaries in Mauritius. These, along with certain Indian companies, ultimately held 67% stake in Hutchison Essar Ltd. (Hutchinson India, an Indian Company). The Indian revenue authorities considered that VIHBV's indirect acquisition of shares in Hutchinson India was liable for tax deduction at source under the then existing provisions of the Indian Income Tax Act, 1961. As VIHBV had failed to withhold Indian taxes on payments made to Hutch, a tax demand of USD 2.1 Billion was raised on VIHBV.

VIHBV challenged this demand at various levels of the judiciary. On January 20, 2012, the Supreme Court of India[13] discharged VIHBV of tax liability. However, the Indian Parliament over-rode the Supreme Court's judgment and passed the Finance Act, 2012 which retrospectively amended Indian tax legislations in a manner that brought VIHBV under the tax net.

Aggrieved by the manner of imposition of tax, VIHBV initiated arbitration proceedings against India under the India – Netherlands BIT in April 17, 2012. Documents pertaining to the arbitration are not available in public domain. On January 24, 2017, Vodafone Group Plc., a United Kingdom entity and the parent company of VIHBV, initiated arbitration against India under the India–United Kingdom BIT. Both arbitration proceedings challenged the retrospective amendments of tax legislations by India. Government of India applied for anti-arbitration injunction. On May 7, 2018, the Delhi High Court dismissed a suit filed by Government of India to restrain Vodafone Plc. from continuing arbitration proceedings.

On September 25, 2020, the international arbitral tribunal[14] constituted under the India – Netherlands BIT passed an award in favour of VIHBV, reportedly for violation of the fair and equitable treatment standard by India under the treaty. The arbitral tribunal directed India to reimburse legal costs of approximately USD 5.47 million to Vodafone.

On December 24, 2020, India challenged the award in Singapore. The proceedings on the challenge of the award are still pending. However, the Indian Government has promised to refund taxes already collected by it from Vodafone in exchange of an undertaking by Vodafone that it will withdraw litigation at all forums and forgo any damages or other costs. On December 3, 2021, Vodafone filed an application with the Government for a refund of INR 447 million (approx. USD 5.9 million), as taxes which were previously collected by the Government, to settle the dispute.[15]

IV. Louis Dreyfus Armateurs SAS vs. India

In 2009, the Kolkata Port Trust (**"KPT"**) entered into an agreement with Haldia Bulk Terminals Private Limited ("HBT") an Indian Company, for operation and maintenance of certain berths in Kolkota ports.

12 Vodafone Holdings B.V. v. Republic of India (October 2020), https://www.nishithdesai.com/Content/document/pdf/ResearchPapers/Vodafone-Holdings-B.V.-versus-Republic-of-India.pdf

13 Civil Appeal No.733/2012.

14 Tribunal comprised of L.Y. Fortier, R. Oreamuno Blanco and F. Berman.

15 Vodafone confirms filing for retro tax dispute settlement with India, The Economic Times (December 4, 2021), HTTPS://ECONOMICTIMES.INDIATIMES.COM/NEWS/ECONOMY/POLICY/VODAFONE-CONFIRMS-FILING-FOR-RETRO-TAX-DISPUTE-SETTLEMENT-WITH-INDIA/ARTICLESHOW/88082563.CMS

HBT was a subsidiary of another Indian Company, ALBA Asia Private Limited ("ALBA"). Louis Dreyfus held 49% of ALBA. Disputes arose between HBT and KPT, resulting in termination of the agreement by HBT. Louis Dreyfus initiated investment arbitration against India under the India – France BIT, alleging that India's actions had compelled HBT to terminate the agreement and had financially crippled its investment in HBT. The tribunal denied jurisdiction on the ground that Louis Dreyfus failed to meet the threshold of minimum 51% of the shareholding, for the investment to be covered under the BIT. Despite an opportunity to reformulate the claim, Louis Dreyfus failed to meet the threshold requirement. Resultantly, no award was made against India.

V. Khadamat Integrated Solutions Private Limited vs. Saudi Arabia

In early 2018, Khadamat Integrated Solutions Private Limited, an Indian investor, initiated investment arbitration proceedings against Saudi Arabia under the India–Saudi Arabia BIT. The tribunal has been constituted in September 2019.

VI. Deutsche Telekom vs. India

In 2007, Deutsche Telekom indirectly purchased 19.62% share in Devas Multimedia through a Singaporean subsidiary. In 2008, Devas Multimedia entered into a contract with Antrix, the commercial arm of Indian Space Research Organisation, for leasing of transponders in the S-band spectrum on Indian satellites to provide broadband services to rural areas in India. In 2011, Indian Cabinet Committee on Security took a decision not to provide an orbital position in the S-band for commercial activities, stating security concerns. The same year, Antrix terminated the contract with Devas due to 'force majeure', citing the new government policy prohibiting allocation of S-band spectrum to parties unconnected to India's space programme.

Deutsche Telekom initiated investment arbitration against India under India – Germany BIT in 2013. The tribunal ruled in favour of Deutsche Telekom. The Geneva—seated tribunal rejected jurisdictional objections raised by India. It declared that India had violated the standards of fair and equitable treatment and denial of justice under the BIT. India challenged the award before the Swiss courts, alleging that the BIT did not protect indirect investments such as existed in the instant case. In December 2018, the Swiss Federal Supreme Court refused to set aside the award. The award has proceeded to the quantum stage and remains pending.

VII. Indian Metals & Ferro Alloys Limited vs. Indonesia

In 2015, Indian Metals & Ferro Alloys Limited (IMFA), an Indian investor, initiated investment arbitration against Indonesia under the India – Indonesia BIT. The dispute arose out of overlaps in the coal mining permits granted to IMFA as well as to other companies in the same territory. This resulted in a conflict of rights to mine coal in the territory. The award is not public but reports suggest that all claims of IMFA were dismissed at the merits stage in favour of Indonesia.

VIII. Nissan Motor Co. Ltd. vs. India

Nissan Motor had acquired 70 per cent share in Renault Nissan Automotive India Private Limited, a consortium that built an industrial automotive facility in Chennai, the capital of State of Tamil Nadu in India. In 2008, Nissan signed an agreement with the State of Tamil Nadu for building a car plant. As per the Agreement, Nissan was promised incentives in nature of output VAT incentives and/or CST Incentives, input VAT incentives and Capital Goods VAT Incentives by the State government. These went unpaid / non-refunded by the State Government. Nissan Motor initiated arbitration against India under the India–Japan EPA seeking USD 770 Million as compensation for the unpaid incentives and damages due to delay.

In April 2019, a Singapore— seated arbitral tribunal rejected India's objection to jurisdiction under the India – Japan Economic Partnership Agreement (EPA), in a case initiated by Japanese auto-maker giant Nissan Motor Co. Ltd. in 2017. A key objection related to fork-in-the-road clause involved an interesting analysis by the tribunal on interpretation of an "investment dispute" under the Vienna Convention on law of Treaties. This interpretation informed the subsequent requirement of withdrawal of court proceedings before initiating investment arbitration. While interpreting the dispute resolution clause under the relevant Memorandum of Understanding, the tribunal held that the language of the clause confined to such disputes as arose out of the MOU. It held that international treaty obligations, and the right to enforce them by procedures specified in such treaties, exist on a different level of the international legal order than domestic law rights. As such, an agreement by an investor to submit international law claims to a forum other than that offered in the treaty must be clearly manifested and not simply inferred. This was coupled with the temporal aspect of the treaty and the prior signing of the MOU.

Another interesting objection combined an evaluation of the fair and equitable treatment standard with jurisdictional requirement under the BIT. The tribunal assessed the extent to which it should evaluate the sufficiency of the pleaded allegations on fair and equitable treatment to confirm its jurisdiction to move forward to the merits. It held that the jurisdictional question is whether the facts as pleaded present a treaty question for the Tribunal to decide, and not whether the facts as pleaded would definitively prevail on the merits. Accordingly, it held that Nissan had alleged facts sufficient to help the Tribunal to assume jurisdiction to consider the merits.

Across several objections such as fundamental basis of the dispute resting in a contract (and not treaty) between the Parties, admissibility of umbrella clause claims, triggering of fork-in-the-road clause and time-bar on claims, the tribunal appears to have meticulously interpreted the relevant provision and often with the lens of the Vienna Convention on Law of Treaties. The tribunal finally accepted jurisdiction over the dispute. India has challenged the award on jurisdiction before the Singapore International Commercial Court.

IX. India vs. Khaitan Holdings Mauritius Limited

Khaitan Holdings Mauritius Limited had investments into Loop Telecom and Trading Limited in India. In 2008, Loop was awarded a license of 21 Unified Access Services ("UAS / 2G License") by the Government of India. However, in 2012, the 2G License was cancelled by the Supreme Court in the case of Centre for Public Interest Litigation v. Union of India owing to alleged irregularities in the license granting process. Loop approached TDSAT for refund of license fees. Its request was dismissed.

Owing to the license cancellation, one Kaif Investments Limited **("Kaif Investments")** and Capital Global Limited (**"CGL"**) that held substantial interest in Loop issued a notice to India under Article 8.1 of the BIT.

Thereafter, Kaif Investments merged with Khaitan Holdings. In 2013, Khaitan Holdings issued a notice of arbitration under Article 8.2 of the BIT on the ground that it held 26.95% equity in Loop and is entitled to claim compensation in relation to the cancellation of the 2G License. Subsequent to proceedings by the Central Bureau of Investigation against Loop and its shareholders, India filed a suit before the Delhi High Court seeking anti-arbitration injunction to restrain Khaitan Holdings from continuing arbitration proceedings under the India–Mauritius BIT.

Relying on its decision in Vodafone Plc. case, the Court declined to grant the anti-arbitration injunction against India at the interim stage. It held that the tribunal has the power to determine whether Khaitan Holdings was a genuine investor in Loop. Accordingly, the Court decided not to interfere with the ongoing arbitral proceedings at this stage and ruled that anti-BIT arbitration injunctions should be granted only in rare and compelling circumstances.

X. Korea Western Power Co. vs. India

In 2012, Korean Western Power Co. **(KOWEPO)**, a South Korean state-owned utility, decided to invest in India in the natural gas sector based on investments invited by India. KOWEPO acquired approximately 40% stake in Pioneer Gas Power Plant Ltd. (PGPL) which operated a gas-based power project in the State of Maharashtra. India made a commitment to supply fuel for the project. However, due to India's failure to meet its commitment, KOWEPO issues a notice to India in 2018 seeking resolution within six months. Despite best efforts at attempting to meet its commitment, India failed to resolve the issue. In December 2019, KOWEPO issued a notice of arbitration to India. The notice is not public. Investment relations between India and South Korea are governed by the India–South Korean BIT and the Comprehensive Economic Partnership Agreement (CEPA). The compensation claim is estimated to be about USD 400 million.

Appendix D: Status of Cases Relating to International Investment Arbitration and India

S. No	Case	Year of Initiation of Arbitration/ Award	Status
1	White Industries Australia Limited v. The Republic of India (Final Award, November 30th, 2011)	2011	Award in favor of Claimant
2	Louis Dreyfus Armateurs SAS v. Republic of India	2018	Award on jurisdiction in favour of Republic of India.
3	Capital India Power Mauritius I v. Maharastra Power Dev. Corp	2004	Settled
4	CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India	2012	Award in favor of claimant (not public)
5	Cairn Energy PLC and Cairn UK Holdings Limited v. Republic India	2020	Decided in favour of investor
6	Vedanta Resources PLC v. India	2016	Pending
7	Strategic Infrasol Foodstuff LLC and The Joint Venture of Thakur Family Trust UAE with Ace Hospitality Management DMCC UAE v. India	2016	Pending
8	Ras al—Khaimah Investment Authority v. India	2016	Pending
9	Axiata Group v. India	2012	Pending
10	Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v. India	2012	Pending
11	Nissan Motor v. India	2019	Settled
12	Deutsche Telekom v. India	2018	Award against India; upheld by Swiss Federal Supreme Court.
13	Khaitan Holdings Mauritius Limited v. India	2013	Pending
14	Nokia v. India	2014	Pending
15	Astro and South Asia Entertainment v. India	2016	Discontinued
16	ABN AMRO N.V. v. India	2004	Settled
17	ANZEF v. India	2004	Settled

S. No	Case	Year of Initiation of Arbitration/ Award	Status
18	BNP Paribas v. India	2004	Settled
19	Credit Lyonnais v. India	2004	Settled
20	Credit Suisse v. India	2004	Settled
21	Erste Bank v. India	2004	Settled
22	Standard Chartered Bank v. India	2004	Settled
23	Offshore Power v. India	2004	Settled
24	Bechtell v. India	2004	Settled
25	Patel Engineering Limited v. The Republic of Mozambique	2020	Pending
26	Khadamat Integrated Solutions Private Limited (India) v. The Kingdom of Saudi Arabia	2020	Decided in favour of State
27	Simplex Projects Ltd. v. Libya	2018	Pending
28	Naveen Aggarwal, Neete Gupta and Usha Industries, Inc. v. Bosnia and Herzegovina	2020	Decided in favour of State
29	Gokul Das Binnai and Madhu Binani v. Republic of North Macedonia	2017	Settled / Discontinued
30	India Metals and Ferro Alloys Ltd. v. Republic of Indonesia	2019	Decided in favour of State
31	Flemingo DutyFree Shop Private Limited v. Republic of Poland	2016	Decided in favour of Investor
32	Ashok Sancheti v. Germany	2000	Settled
33	GPIX LLC v. The Republic of India	2020	Pending
34	Korea Western Power Co v. India	2019	Pending
35	Carissa Investments LLC v. India	2017	Discontinued
36	Vodafone India Holdings BV v. India (I)	2020	Decided in favour of investor
37	Vodafone Group Plc and Vodafone Consolidated Holdings Limited v. India (II)	2017	Pending, but may not be continued in light of above decision
38	Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India	2020	Decided in favour of investor

Our Thought Leadership

A. What Recourse do Parties have After the US Supreme Court's Verdict on 28 USC Section 1782(A) Re Arbitrations? (Part II — Way Forward)

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On 13 June 2022, the Supreme Court of Unites States (USSC) rendered its unanimous decision in ZF Automotive US Inc et al v Luxshare, Ltd. (ZF Automotive) and Alix Partners LLP et al v The Fund for Protection of Investors Rights in Foreign States (Alix Partners) (case number 21–401). Thereby resolving a long-drawn out circuit split on the use of section 1782 of Title 28 of the United States Code (Section 1782) by private arbitral tribunals to seek assistance of US district courts in obtaining evidence for use in arbitration proceedings seated outside the US.

Before the USSC decision, there was no consensus between the circuits on the interpretation of Section 1782. The judgment clarified that parties cannot seek assistance from US courts to gather evidence located in the US for use in foreign-seated arbitration proceedings.

While bringing clarity on a deeply-contested issue, this decision is a setback for the international arbitration community. The USSC may have made it harder for parties to seek crucial pieces of evidence located in US for use in arbitration.

Does this leave parties or arbitral tribunals remediless? Is there room for distinct approach for use of evidence in commercial and investment treaty arbitrations? In this article, we explore the way forward for parties to arbitrations seated outside the US and requiring evidence located in the US. We also provide brief strategies for parties and arbitration practitioners to navigate this conundrum.

I. Relevant Analyses from the Judgment

To understand the way forward, the following points from the judgment are pertinent to note. The USSC held that:

- the context of the term 'tribunal' in Section 1782 indicates that such a tribunal should be exercising governmental authority. It based its findings on two reasons:
  - first, it found that to be called a 'foreign tribunal', a tribunal must belong to a foreign nation and hence, has governmental or sovereign connotations
  - second, it noted that Section 1782 mentions that a district court order under this section 'may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country'. Congress could not have intended to cover foreign private arbitral tribunals within Section 1782 since it cannot be presumed that foreign arbitral tribunals, which prescribe their own rules typically, would follow the 'practice and procedure of the foreign country'

- 'foreign tribunal' clearly refers to a tribunal which is 'imbued with governmental authority by a nation'
- 'international tribunal' refers to a tribunal which has been 'imbued with governmental authority by multiple nations' ie two or more nations have 'imbued the tribunal with official power to adjudicate disputes'

II. Way Forward-Options, Strategies, Interpretations and Critique

In light of the above key analyses from the judgment, parties and members of the international arbitration community could consider the following options, strategies and creative interpretations depending on the nature of the dispute and applicable law.

III. Using 28 USC Section 1781 Instead

Without the availability of Section 1782, it seems likely that arbitral tribunals would now have to seek judicial assistance of courts at the seat to issue letters of request or letters rogatory which can in turn be executed by American courts under section 1781 of Title 28 of the United States Code (Section 1781). The US, is a party to the Hague Convention on the Taking of Evidence, and codified its obligation under the convention as Section 1781. This section, which is similar to Order 26, Rule 19 of the Indian Civil Procedure Code 1908, allows assistance of US courts to foreign courts, foreign tribunals or international tribunals when a letter of request or letter rogatory is issued by such foreign court or tribunal to the Department of State in the United States.

It is unclear whether an arbitral tribunal can directly issue such a letter rogatory under Section 1781. However, considering that Section 1781 covers 'foreign or international tribunals' like Section 1782, it seems likely that US courts would not execute letters issued by private arbitral tribunals. This process is likely to be very time consuming since it requires such letters to be processed through diplomatic channels rather than a more direct mechanism under Section 1782. However, this mechanism remains available.

IV. The Role of Evidence, the Law of the Seat and International Conventions in Negotiations

Evidence plays a crucial role in determining the outcome of arbitration proceedings. Parties may struggle with gathering of evidence and access to witnesses, documents or third parties. Normally, witnesses belonging to the parties appear before arbitral tribunals to provide testimony or submit documents. However, some witnesses might refuse to appear before arbitral tribunals or submit documents in evidence, or the relevant evidence might be with third parties who are not part of the foreign arbitration proceedings (and hence, beyond the jurisdiction of the arbitral tribunal). In such cases, when arbitration is seated in a jurisdiction, but evidence is located in another jurisdiction, parties may be compelled to seek assistance of courts in the other jurisdiction to obtain evidence for use in arbitration proceedings.

The success of these applications depends on the national rules of procedure applied by courts. It is therefore worthwhile for parties to anticipate key pieces of evidence required to establish the case; location, availability of and access to such evidence; need for court assistance, the judicial approach in enabling such access, and the law of the seat, for strategizing the course of the dispute and submission of evidence.

While it is difficult for parties to anticipate disputes at the stage of negotiation of arbitration clauses, let alone location of evidence if disputes were to arise, it might be helpful to guesstimate and do some crystal ball gazing. Parties or advising counsel can anticipate the type of disputes that can arise, the location of subject matter of the dispute, location of key witnesses and documents, and possible involvement of third parties in the case. If majority are located in the US, a seat could be chosen in the US to benefit from the Federal Arbitration Act (FAA). However, since neutrality of seat is often insisted upon, parties could choose a seat that promises judicial support in taking of evidence during arbitration proceedings under its law, and that is party to international treaties and reciprocal arrangements with the US such as The Hague Convention on Taking of Evidence.

V. Expanding the Scope of FAA

USSC noted that allowing assistance by US courts to foreign private arbitral tribunals under Section 1782 would be in tension with the FAA. This is because the scope of Section 1782 is wider than the FAA and would allow pre-arbitration discovery. However, the FAA does not allow the same for domestic arbitral tribunals. Accordingly, allowing arbitral tribunals to be covered under Section 1782 would lead to an absurd result.

Rather than restricting Section 1782 to avoid tension with the FAA, a better approach could have been to expand the scope of the FAA to provide greater assistance by US courts to arbitral tribunals in the United States.

The US legislature could also take steps to ease the tension and make certain provisions of the FAA available for foreign-seated arbitrations. For instance, India amended its Arbitration & Conciliation Act, 1996 (Indian A&C Act) in 2015 to extend the applicability of Section 27 of the Indian A&C Act to foreign seated arbitrations. Section 27 of the Indian A&C Act allows court assistance to arbitral tribunals in taking of evidence. Section 2(2) of the Indian A&C (Amendment) Act, 2015 makes Section 27 available to parties, subject to an agreement to the contrary, in international commercial arbitrations seated outside India. These provisions allow foreign arbitral tribunals to seek assistance of Indian courts in gathering evidence. This approach of the Indian legislature is certainly more arbitration friendly towards this specific issue.

VI. Practice and Procedure

USSC's interpretation that the discretion provided to district courts under Section 1782 to give an order prescribing the practices or procedures of the foreign country, indicates that a foreign tribunal has to be one which necessarily follows such practices or procedures, is not very persuasive.

First, providing such discretion to district courts does not necessarily mean that the foreign tribunal is following the practices or procedures of its country. It could mean that a district court can give such an order only when the foreign tribunal is following such practices or procedures.

Second, this also does not mean that foreign arbitral tribunals do not follow practices or procedures. In fact, arbitral tribunals are bound by mandatory practices or procedures of the seat of the arbitration. Therefore, an alternative interpretation encouraging arbitration by providing court assistance is possible.

VII. Distinction between Commercial and Investment Arbitration Tribunals

For the arbitral tribunal in ZF Automotive, USSC found that no government would be involved in creating such an arbitral tribunal or prescribing its procedures. Accordingly, it held that such an arbitral tribunal cannot be a governmental body.

For the arbitral tribunal in the Alix Partners case, USSC acknowledged that the tribunal would be different from ZF Automotive, since there would be a sovereign on one side of the dispute, and the option to arbitrate was contained in an international treaty rather than a private contract.

However, it ultimately held that such a tribunal would not be a governmental body either since neither Lithuania nor Russia could be said to have given such an ad-hoc tribunal 'governmental authority'. It noted that the treaty does not constitute the arbitral panel, and merely references the set of rules that govern the panel formation and procedure if an Investor chooses that forum. It also noted that the ad-hoc tribunal would function independently of Lithuania or Russia and that the tribunal 'lacks any potential indicia of governmental nature'. Accordingly, USSC found that the Alix Partners tribunal was 'indistinguishable in form and function' from the ZF Automotive tribunal.

USSC held that ad-hoc investment arbitral tribunals which were not 'pre- existing governmental bodies' but were constituted solely for arbitration cannot be 'governmental' or 'intergovernmental' bodies. However, this does not resolve ambiguity surrounding pre-existing arbitral institutions in investment arbitration such as the ICSID, or a potential Multilateral Investment Court imbued by governmental authority.

Unlike ad-hoc investment arbitral tribunals or arbitral tribunals in commercial arbitration, the ICSID is funded by parties as well as the World Bank, which is in turn financed by multiple nations. Further, the ICSID Convention requires member states to sign and ratify the convention to be able to access the ICSID dispute resolution mechanism — a step which is not required for other arbitral institutions or rules. Member states are also obligated to recognize ICSID awards as binding, and enforce them as if they were final judgments of a court of such state. These facts would reflect that there is a 'higher level of government involvement' in the ICSID which might make it an 'intergovernmental body'.

However, at the same time, an ICSID arbitral tribunal continues to derive its authority from the parties' consent to arbitrate. Unlike other governmental bodies such as courts, no party can be forced to resolve their disputes before ICSID. Therefore, there remains uncertainty whether arbitral institutions such as ICSID will be considered a 'private' body or a 'governmental/intergovernmental' body.

The situation would be similar for a Multilateral Investment Court which would be a product of a multilateral convention among states, imbued with governmental authority to resolve Investor—State disputes.

Such uncertainty may only be resolved when USSC directly deals with this question, or puts forwards a multifactor test like the Second Circuit did to decide the extent to which governmental involvement is required in order to term a body 'private' or 'governmental'.

VIII. Remedy with Arbitral Tribunals

Arbitral tribunals may still be able to enforce their orders for document production and discovery against parties to the arbitration by threat of adverse inferences or costs. Parties must seek such orders from arbitral tribunals where possible. However, they would continue needing the assistance of courts in procuring evidence in the possession of third parties, or in situations where threats of adverse inference or costs have been insufficient in ensuring compliance of parties with an order for production or discovery by an arbitral tribunal.

IX. Comity

USSC noted that its interpretation was consistent with the legislative intent behind introducing Section 1782 to promote comity and reciprocal assistance between the US and foreign nations, which would not be achieved by aiding private adjudicative bodies in foreign nations.

The goals of comity and reciprocity could have been met by allowing foreign arbitral tribunals to seek assistance of US courts. Such a measure may have encouraged courts in such foreign countries to also aid arbitral tribunals in the US. It was possible for USSC to undertake a more arbitration—friendly interpretation of Section 1782.

X. Conclusion

This decision, as it stands, can have implications on the proper functioning of international arbitration. For such proper functioning, it is important that a symbiotic relationship is maintained between courts and arbitral tribunals, whether domestic or foreign. It is hoped that parties will be able to use some of the options, strategies or interpretations outlined above when they are in need of judicial or strategic assistance in taking of evidence for foreign-seated arbitral proceedings.

B. India's Vision of Aatmnirbharta (Self-Sufficiency) Heavily Depends on Foreign Investment [1]

2020 witnessed a dent in India's image as a global player that abides by the rule of law. On December 22, the **Permanent Court of Arbitration** at The Hague ruled in favour of the Edinburgh— headquartered Cairn Energy, stating that GoI had failed to uphold its obligations under the Britain- India bilateral investment treaty (BIT) and international laws in seeking ₹10,247 crore in retrospective taxes.

This came after the same court ruled on September 25 that India's imposition on Vodafone of a tax liability, along with interest and penalties, amounting to ₹27,900 crore, was in breach of a Netherlands–India BIT. Unlike in the Vodafone case, GoI will have to pay Cairn ₹9,000 crore. Both cases exemplify how arbitrary exercise of sovereign powers could cost India dearly — and that sovereign commitments under international treaties must be honoured.

BITs are international reciprocal agreements between two countries that aim to promote and protect **investments** of one country in the territory of the other. They guarantee protections to foreign Investors, regulate sovereign powers of States, and provide special mechanisms to resolve Investor-State disputes at an international level. They are sovereign commitments respected under international law.

India signed its first BIT in 1994, and executed 84 BITs within a span of 15 years. In 2011, India lost its first BIT case initiated by White Industries Australia under the India–Australia BIT. An ensuing spate of BIT cases compelled India to terminate 58 BITs in 2017. The number stands at 69 today.

Yet, according to the United Nations Conference on Trade and Development's (Unctad) World Investment Report 2020, India stands among the top 10 countries for inbound foreign direct investment (**FDI**). It might seem apposite to conclude that BITs don't play a determinative role in attracting FDI in India. But they do play an unparalleled role in protecting FDI.

In the middle of a dynamic universe of policies and regulations, BITs provide steady access to foreign Investors to an independent, neutral international forum to resolve disputes. When **Parliament** superseded the Supreme Court's judgment and swiftly introduced retrospective tax amendments to bring Vodafone under the tax net in 2012, a BIT proved to be the sole beacon of hope for Vodafone.

Losses in previous BIT cases compelled India to react and terminate BITs. But **BIT terminations** may not mean end of disputes, as they contain 'survival clauses' that extend treaty protections for a fixed term beyond termination. Existing Investors could initiate disputes under terminated BITs.

BIT terminations also have serious commercial ramifications. They provide a means for Investors to escalate a government's measures to international treaty violations. In their absence, fresh foreign Investors no longer have the protection of international law against unchecked exercise of legislative, executive and judicial powers by the State and are left to resolve disputes in national courts, where their commercial rights could languish for years until justice is delivered.

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1 This article was authored by Kshama A. Loya & Moazzam Khan for The Economic Times national daily newspaper. Available at: https://economictimes.indiatimes.com/news/economy/policy/no-ifs-or-buts-on-bits/articleshow/80014549.cms?from=mdr

Inertia is not conducive for foreign investment. Risk is corollary to foreign investment. As a result, foreign investment has fostered an ecosystem of political risk insurers. Several public, private and multilateral insurers have emerged over the last century to insure Investors against a range of State measures such as expropriation, wars, civil strife and non- convertibility of currency.

Several insurers depend on a BIT, or access to a dispute resolution mechanism for a foreign Investor to underwrite insurance, determine insurance premium and, thus, mitigate Investors' risks. BITs also contain subrogation provisions where an insurer could exercise rights and assert claims of the insured Investors under a BIT, pursuant to the terms of insurance. Treaty terminations could significantly increase cost of investments due to lack of insurance or higher risk premium and, hence, affect the return on investments, which directly affects India's ability to attract FDI.

India's investment—impacting measures, such as the ill-reputed 2012 retrospective tax amendments, continue to put foreign Investors and India in troubled waters. As a result, the public exchequer continues to loom under a hanging sword of international law violations and the threat of paying out large compensations. In the past three years, India has expropriated shares of Britain-based Cairn Energy in **Cairn India,** failed to provide promised incentives to Japanese Investor Nissan Motors, and has allegedly breached a fuel supply commitment with Korea Western Power Co (Kowepo). We haven't learnt lessons from history, it seems.

India recognises that realising the vision of atmanirbharta heavily depends on foreign investment. Termination of BITs, however, is anything but a votive gift to Investors.

(Loya and Khan are leader, Investor state arbitration, and head, global litigation, respectively, Nishith Desai Associates)

Source: The Economic Times News

C. Innovative Mechanisms to Resolve Investor—State Disputes

I. Introduction

As foreign direct investments grew worldwide, International Investment Agreements (IIAs) emerged as a response to the uncertainties and inadequacies of customary international law of state responsibility towards foreign Investors and their investments.[2] Bilateral Investment Treaties (BITs) originated to protect investments made by Investors of a Contracting State (home State) in the territory of another Contracting State (host State).

BITs guaranteed substantive standards of treatment to foreign Investors and investments. The standards include fair and equitable treatment, protection against expropriation, national treatment, freedom of monetary transfers among others.[3] Additionally, they also offered to limit customary international law that compelled Investors to exhaust local remedies, seek diplomatic protection or initiate international judicial proceedings in the event of Investor—State disputes - by providing an alternate mechanism through international arbitration.[4]

Gradually, access to international arbitration came to be recognized as one of the key guarantees of investment protection in BITs, and became a common mode of Investor-State Dispute Settlement (ISDS).[5] Out of 2,576 IIAs in force as on date, 2,442 IIAs contain ISDS provisions.[6] While dispute resolution clauses in BITs provided a matrix of mechanisms such as negotiation, mediation, conciliation and exhaustion of local remedies, majority of the BITs involve international arbitration as the long-stop of dispute resolution.

However, over the years, international arbitration has fuelled an array of concerns. With sustainable development goals forming the benchmark of policy- making across the globe, international arbitration has been increasingly perceived as a barrier in exercise of State sovereignty and investment policy making. The threat of international arbitration and arbitral awards entailing large amounts of money in compensation has created a regulatory chill[7] and led to an enormous encumbrance on State exchequers. States have increasingly recognized the need for reforms in the current ISDS arena as evidenced by formation of UNCITRAL Working Group III to suggest reforms to ISDS. Resultantly, several innovative alternatives have been brought to the fore to resolve Investor— State disputes.

The nature of these reforms spans a wide spectrum and introduces a range of dispute resolution models. Some States have (a) retained the traditional form of international arbitration without modification; (b) entirely eliminated ISDS provision in IIAs, in favour of other mechanisms such as exhaustion of local remedies or introduction of national investment — focused legislations; (c) replaced ISDS with State- to- State dispute settlement, or provided for State- to- State Dispute Settlement in addition to ISDS; (d) retained international arbitration for dispute resolution, but have attempted to prevent invocation of ISDS by introducing amicable pre-conditions such as negotiations, mediation and conciliation; (e) modified the traditional advance-consent to

2 ANDREW NEWCOMBE AND LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES STANDARDS OF TREATMENT 1 (2009).

3 For example, see Agreement between the Republic of India and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments, 2007; also see Treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments, 1986; Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 1991.

4 Ibid.

5 'Investor State Dispute Settlement' is a term commonly used for settlement of disputes between covered Investors and the host State through mechanisms of arbitration and/ or domestic courts of the host State.

6 INVESTMENT POLICY HUB, available at https:// investmentpolicy.unctad.org (last accessed on 10 August 2020).

7 " 'Regulatory chill' refers to a situation where regulators might refrain from taking certain regulatory actions for fear of a legal challenge under Investor– State dispute mechanisms", UNCTAD SECRETARIAT, SERVICES, DEVELOPMENT AND TRADE: THE REGULATORY AND INSTITUTIONAL DIMENSION UNITED NATIONS, 2014, para 39 at 16.

interntional arbitration to pave way for case- to- case consent for arbitration; (f) modified the traditional form of international arbitration by constituting a multilateral investment court or a two-tier investment tribunal system.

The present chapter analyses the aforesaid dispute resolution models. It critically examines their pros and cons, and provides examples of States engaging certain models of dispute resolution, where applicable. This chapter also highlights the dispute resolution mechanisms being adopted by India as a leading driver of Investor- State reform in the global Investor- State arena.

II. International Investor–State Arbitration

Investor— State arbitration differs from international commercial arbitration. The latter involves disputes between private parties arising out of a commercial contract. The former envisages disputes between an individual or legal entity having the nationality of a foreign State against the host State, arising out of violation of a commercial contract or an IIA. Breach of an Investor— State commercial contract could either assume the nature of commercial breach of contract, or be elevated to violation of international law. This chapter covers violations of IIAs. IIAs adorn Investor— State disputes with elements of private and public international law, thereby creating a lex specialis now recognized as international investment law.

It is well established that arbitration is a consent based mechanism. Consent to Investor-State arbitration is generally found in one of three ways: in an investment contract between the Investor and the State entity; in a national legislation of the host State; or in an IIA between the home State of the Investor and the host State.[8] The scope of consent could be all- encompassing or limited to specific IIA violations, thereby determining the jurisdiction of the arbitral tribunal adjudicating upon the disputes. Moreover, the nature of disputes must be legal, concerning a legal right or obligation, and not purely economic or political.[9]

Investor—State arbitrations can be ad hoc or institutional. While powers rest with parties to determine administrative framework in an ad hoc arbitration, the UNCITRAL Arbitration Rules[10] are often used in ad hoc arbitrations. Institutional arbitration is offered by several arbitral institutions namely International Chamber of Commerce, Stockholm Chamber of Commerce, London Court of International Arbitration and Permanent Court of Arbitration. However, majority of Investor— State disputes are adjudicated under the auspices of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965, popularly known as the ICSID Convention establishing the International Centre for Settlement of Investment Disputes.

The ICSID Convention provides a self-contained mechanism for adjudication of Investor-State disputes involving member States who have consented to adjudication of disputes under the ICSID Convention.[11] It also provides Additional Facility Rules for administration of cases where one of the two contracting States is a member of the ICSID Convention.[12] The creation of ICSID has been recognized as one of the boldest

8 RUDOLPH DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 238 (2010).

9 Emilio Agustín Ma1ezini v. The Kingdom of Spain, Decision on Jurisdiction dt 25/ 01/ 2000, ICSID in Case no. ARB/ 97/ 7, para 94 at 34; Continental Casualty Company v. The Argentine Republic, Decision on Jurisdiction dt 22/ 02/ 2006, ICSID in Case no. ARB/ 03/ 9, para 67 at 24.

10 UNCITRAL Arbitration Rules: With New Article 1, Paragraph 4, as Adopted in 2013, UNCITRAL, available at https:// uncitral.un.org/ sites/ uncitral.un.org/ files/ media- documents/ uncitral/ en/ uncitral- arbitration- rules-2013- e.pdf Last accessed on 10 August 2020

11 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965, Article 64.

12 Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, Article 2.

innovative steps in the modern history of international cooperation involving foreign investment, due to five salient features: (a) ability of foreign Investors and States to directly initiate claims against the host State; (b) exclusion of local remedies; (c) applicability of international law to relationship between foreign Investor and host State; (d) restriction on state immunity; (e) direct enforceability of ICSID awards.[13]

Investor-State arbitration has several advantages. It is a binding mechanism, resulting in a decision that is binding on the parties and enforceable against the parties. Parties exercise sufficient control over the proceedings through party consent. Arbitration removes Investor-State disputes from the realm of State politics, and places the disputes for adjudication before an independent, neutral and expert adjudicatory tribunal appointed by the parties. Proceedings are inherently confidential unless otherwise agreed. It is particularly advantageous for parties embroiled in complex disputes involving highly technical issues and large stakes.

However, Investor-State arbitration could permanently sever the relationship between the Investor and State since it is an adversarial mode of dispute resolution. Arbitrators are prone to conflicts of interest that could jeopardize their independence and impartiality. While efforts are being made to counter such issues of conflict,[14] they are yet set to see light of day. Lack of stare decisis in Investor-State arbitration results in inconsistent awards, lack of certainty and predictability in the field of international investment law. Arbitration proceedings are expensive, time- consuming and fraught with delays. The need for transparency is heightened in Investor- State arbitration where public international law plays a significant role and calls for involvement of other non- parties to arbitration such as non- governmental bodies. However, arbitration proceedings are generally non- transparent.

An arbitral tribunal comprising a few members unrelated to the host State is assumed to be ill-suited to evaluate measures adopted by the host State in national interest. Further, large sums of money awarded in compensation or as damages places a huge burden on the public exchequer and shrouds the system in concerns about legitimacy. In 2018, the UNCITRAL Working Group III[15] identified three broad categories of concerns in the field of ISDS: (i) the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; (ii) arbitrators and decision-makers; and (iii) the cost and duration of ISDS cases.[16] Predominantly, the constant tussle between Investor protection and State sovereignty has resulted in a backlash from States and the global community towards the current system of ISDS led by international arbitration.

III. Exhaustion of Local Remedies

Local remedies include the administrative, judicial and legal enforcement machinery of the host State. National courts or administrative bodies apply the local or domestic law governing the foreign investment in the host State. Under customary international law, an Investor was ordinarily required to exhaust local remedies provided by the host State, before requesting diplomatic protection of the home State to espouse the inves-tor's

13 RUDOLPH DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 20 (2008).

14 See Draft Code of Conduct for Adjudicators in Investor– State Dispute Settlement, Article 5.

15 UNCITRAL Working Group III is composed of the member States of the Commission and attended by observers from other UN member States, non- member States, intergovernmental organizations and invited non- governmental organizations; UNCTAD, REFORMING INVESTMENT DISPUTE SETTLEMENT: A STOCKTAKING, 2018, 2019, para 4.a at 19..

16 UNCITRAL, REPORT OF WORKING GROUP III (INVESTOR- STATE DISPUTE SETTLEMENT REFORM) ON THE WORK OF ITS THIRTY- SIXTH SESSION (Vienna, 29 October– 2 November 2018), United Nations 2018, para 22 at 5; UNCITRAL, POSSIBLE REFORM OF INVESTOR- STATE DISPUTE SETTLEMENT (ISDS), NOTE BY THE SECRETARIAT (UNCITRAL), 2018, Annexure at 15

claim.[17] This customary international law rule aimed at safeguarding state sovereignty by requiring individuals to seek redress for any harm allegedly caused by a state within its domestic legal system — before pursuing international proceedings against the host State.[18]

With the advent of IIAs, requirement to exhaust local remedies exists in varying manners.[19] This includes express requirement of exhaustion of local remedies, to making no reference to exhaustion of local remedies, to express rejection of the exhaustion principle in certain IIAs.[20]

In the absence of an exhaustion of local remedies clause, Investors are generally not required to pursue local remedies. However, some tribunals have required an Investor to exhaust local remedies, not as a procedural condition precedent to an international

claim, but as part of a substantive standard[21] (although this is not a settled position). The failure to seek redress from national authorities has resulted in disqualification of the international claim, not because there was a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation was considered doubtful in the absence of a reasonable - not necessarily exhaustive - effort by the Investor to obtain correction.[22] Some IIAs provide for exhaustion of local remedies for a definite period of time, often 18 months, as a condition precedent to arbitration.

Further, where Investors have failed to exhaust local remedies despite an express clause in IIAs to that effect, tribunals have found that they lacked jurisdiction due to the claimant's failure to comply with the mandatory clause.[23] Tribunals have held that since the domestic courts provision constitutes a treaty- based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere 'procedural' or 'admissibility- related' matter.[24]

Exhaustion of local remedies is arguably advantageous for the host State. A precondition for exhaustion of local remedies protects the sphere of sovereignty that States are entitled to under international law.[25] In matters involving exercise of State regulatory powers, local courts are best suited to comprehend the exigencies of a State and its national public interests, as opposed to an international arbitral tribunal. Courts also promise transparency of proceedings. Tactically, a pre-condition to exhaust local remedies 'buys time' for the host State and allows it to evaluate the nature and gravity of the disputes. It could be instrumental in bringing about a settlement or strengthening the legal arm of the host State.

17 RUDOLPH DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 211 (2010).

18 Martin Dietrich Brauch, Exhaustion of Local Remedies in International Investment Law, IISD Best Practices Series January 2017, IISD BEST PRACTICES SERIES, available at https:// www.iisd.org/ sites/ default/ files/ publications/ best- practices- exhaustion- local- remedies- law- investment- en.pdf Last accessed on 10 August 2020.

19 Christoph Schreuer, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, 4 THE LAW & PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS 1 (2005); URSULA KRIEBAUM ET AL., LOCAL REMEDIES AND THE STANDARDS FOR THE PROTECTION OF FOREIGN INVESTMENT IN INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (2009); Mavluda Sattorova, Return to Local Remedies Rule in European BITs? Power (Inequalities), Dispute Settlement, and Change in Investment Treaty Law, 39(2) LEGAL ISSUES ECONOMIC INTEGRATION 223– 248 (2012).

20 Agreement between the Government of the Republic of Croatia and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments, 2001 article 10.2(b).

21 See Generation Ukraine Inc. v. Ukraine, 10 ICSID Reports 240 (ICSID, 2003), para 20.30 at 91.

22 Ibid; Encana Corporation v. Republic of Ecuador, 45 ILM 901 (2006) (LCIA, 2006), para 198 at 56.

23 ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, Award on Jurisdiction dt. 10/ 02/ 2012, PCA Case No. 2010— 9, para 250 at 83.

24 Daimler Financial Services AG v. Argentine Republic, award dt. 22/ 08/ 2012, ICSID in Case No. ARB/ 05/ 1, para 194 at 79.

25 CHITTHARANJAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW, 58 (2005), as cited in Matthew C. Porterfield, Exhaustion of Local Remedies in Investor— State Dispute Settlement: An Idea Whose Time Has Come?, 41 YALE JOURNAL OF INTERNATIONAL LAW ONLINE 5 (2005), available at https:// www.law. georgetown.edu/ wp- content/ uploads/ 2017/ 09/ Porterfield- Exhaustion- of- local- remedies- 2015.pdf

However, exhaustion of local remedies could also be disadvantageous on several counts. State courts are bound to apply domestic law, which may not rise to the level and sufficiency of protection offered by IIAs. In fact, States may not even incorporate IIAs as part of their domestic law. Further, State courts and administrative bodies may lack technical expertise to adjudicate upon technical and complex issues involving international investment law. They may lack neutrality and impartiality, particularly in matters involving potentially high burden on the public exchequer. Exhaustion of local remedies also exposes disputes to public scrutiny, as opposed to confidential arbitration proceedings. Further, absence of a definite time limit in IIAs for exhaustion of local remedies could result in delays, uncertainty and erosion of the value of the investment.

While evaluating an exhaustion of local remedies clause in an IIA, it is also essential to assess other provisions in IIAs, such as a Most- Favoured Nation (MFN) clause. An MFN clause can assist a foreign Investor in wriggling out of the local remedies clause if such a provision is absent in other IIAs involving the host State, or seek benefit of a clause promising effective means of dispute resolution in other IIAs by importing it into the subject IIA.[26] Presence of an investment contract providing for reference of disputes to State courts could affect the invocation of other remedies under IIAs, depending on factors such as fork in the road clauses, fundamental nature of the dispute, umbrella clauses, and elevation of contract claims to the level of treaty claims. Thus, provisions in IIAs could inform the exercise of exhaustion of local remedies to resolve Investor— State disputes.

IV. National Investment Legislations

Several countries have enacted national investment laws dedicated to promotion, facilitation and regulation of foreign investment.[27] National investment legislations may not necessarily offer international arbitration as a means for settling Investor-State dis-putes.[28] Some offer international arbitration as a means of dispute resolution, but do not offer advance consent to international arbitration as opposed to majority IIAs.[29] Instead, the national investment legislations require case-by-case consent of parties before initiating arbitration. National investment legislations provide alternate means of dispute resolution such as mediation, and mandatory exhaustion of local remedies prior to initiating arbitration.[30]

National investment legislations can be beneficial where the host State provides a robust legal framework of investment-related laws. Within a host State, a national investment legislation operates in tandem with a matrix of other investment- related local laws such as laws relating to companies, taxation, environment and public health. In the event the body of laws is incoherent, inconsistent, volatile or subject to conflicting judicial interpretation, they can create uncertainty and instability in the national legal framework of the host State.

Where IIAs and national investment legislations co-exist, it is important to examine synergies between the two in terms of standards of treatment and dispute resolution clauses. While IIAs operate on an international law plane, national investment laws predominantly operate on a domestic law level, with some legislations offering consent to international arbitration. Their scope, content and standards of treatment could vary. An incompatibility in consent to arbitration offered in an IIA and a national investment law could create uncertainty, and result in parallel proceedings and inconsistent decisions. Alternatively, a uniform advance

26 Kshama Loya Modani and Vyapak Desai, Exhaustion of Local Remedies in Bilateral Investment Treaties: A Guide for Foreign Investors, 89 IPBA JOURNAL 26– 32 (2018).

27 UNCTAD, WORLD INVESTMENT REPORT, 2018, para 1 at 80

28 66 of the 111 national investment laws refer to international arbitration; WORLD INVESTMENT REPORT, 2018, para 2.a at 106.

29 42 of the 66 national investment laws do not offer advance consent to international arbitration; ibid; Namibia's Investment Promotion Act (2016); Egypt's Investment Law.

30 Protection of Investment Act, 2015 (South Africa).

consent to arbitration in both the frameworks could expose the host State to multiple claims under different frameworks, one being available if the other fails.[31] This may also result in delays and increased costs.[32]

V. State-To-State Dispute Settlement

Prior to the advent of BITs, States could resort to international adjudication of disputes on behalf of home Investors, including adjudication before the International Court of Justice.[33] Today, IIAs offer State-to-State Dispute Settlement (SSDS) as a means of dispute resolution between States for violation of IIAs. However, unlike adjudication before international or foreign courts, IIAs provide for SSDS through international arbitration.[34]

The SSDS provisions often exist along with other dispute resolution mecha-nisms. Majority IIAs provide pre- conditions to initiation of State- to- State arbitra-tion, such as negotiations or mediation.[35] Some IIAs retain ISDS, and additionally provide State- to- State dispute settlement. However, with the backlash against Investor—State arbitration, some States have removed the mechanism for Investor—state arbitration in IIAs, while providing and strengthening the State- to- State dispute settlement.

For instance, Brazil has introduced a Cooperation and Investment Facilitation (CIFA) model of IIAs with several States,[36] providing for State- to- State dispute settlement through arbitration preceded by robust dispute prevention mechanisms.[37] Under this model, a Joint Committee comprising government representatives of both States is set up for administration of the IIA. This is coupled with designation of a National Focal Point or Ombudsman for each State, to support Investors of the other State in the host State. If a party considers that a specific measure adopted by the host State violates the IIA, it may initiate the dispute prevention procedure within the Joint Committee, identifying the measure and stating the findings of fact and law underlying the submission.

Under some IIAs, the Home State can summon a meeting of the Joint Committee within a certain period of time,[38] or the Joint Committee shall meet on its own initiative within a certain time period from the date of the request.[39] The Joint Committee is required to prepare a summary report within a stipulated timeline. It may provide recommendations, if permitted under the CIFA.[40] If disputes are not resolved through Joint Committee proceedings, States can initiate arbitration.[41]

The CIFA State-to-State dispute settlement model offers several advantages. The ombudsman support mechanism along with the dispute prevention procedure of the Joint Committee offers a procedure to alleviate

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31 Champion Holding Company v. Arab Republic of Egypt, award dt. 28/ 02/ 2020, ICSID in Case No. ARB/ 16/ 2.

32 ABCI Investments N.V. v. Republic of Tunisia, ICSID in Case No. ARB/ 04/ 12.

33 Barcelona Traction, Light & Power Co. Ltd. (Belgium v. Spain), ICJ Reports 1970 (International Court of Justice); Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic of the Congo), ICJ Reports 2007 (International Court of Justice).

34 For example, Treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments, 1986; Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, 2010.

35 See Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, 2020.

36 States include Angola, India, Malawi, Mexico and Mozambique.

37 Nathalie Bernasconi— Osterwalder and Martin Dietrich Brauch, Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agree-ments (CIFAs) with Mozambique, Angola, Mexico, and Malawi, IISD, available at https:// www.iisd.org/ sites/ default/ files/ publications/ commentary- brazil- cifas- acfis-mozambique- angola- mexico- malawi.pdf Last accessed on 10 August 2020.

38 Brazil- Mexico CIFA, 2015.

39 Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, 2020.

40 Brazil- Angola BIT, 2015.

41 Brazil- Angola CIFA, 2015 Brazil– Malawi CIFA, 2015 Brazil- Mozambique CIFA, 2015.

concerns and safeguard interests of an Investor as and when they arise. The dispute prevention procedure is not confined to disputes resulting in violation of IIA. This assists in early detection of issues and facilitation of dialogue between the parties to prevent escalation of disputes. Thus, the CIFA model offers mechanisms for prevention and settlement of disputes before escalation of disputes to arbitration.

However, the SSDS model could suffer from disadvantages involved in early diplomatic protection and espousal of the Investor's claims. Under the isolated SSDS model existing in the absence of ISDS provisions, an Investor is devoid of any means to initiate arbitration directly against the host State. It is required to approach concerned representatives of the home State and convince the home State to initiate SSDS on behalf of the Investor. Lack of interest by the home State could jeopardize claims of the Investor against the host State. In the event the home State agrees to initiate SSDS under the IIA, the Investor may have little or no control over the arbitration proceedings conducted by the home State against the host State.[42]

Where IIAs retain both SSDS and ISDS provisions, a potential conflict might arise with respect to initiation of dispute settlement, and running of parallel proceedings. However, where Investor- State arbitration has been initiated under an IIA, followed by State - to- State arbitration, tribunals have generally been reluctant to suspend former proceedings upon a subsequent request by the State to suspend Investor— State arbitration.[43]

VI. Mediation

Approximately 24% of the existing IIAs offer mediation or conciliation as an amicable alternative or pre-condition to initiation of arbitration proceedings.[44] Mediation is a process through which a third party neutral assists parties in arriving at an amicable settlement by facilitating communication, identifying interests, and formulating a range of possible solutions. The role of the mediator is to bring the parties of a dispute together and assist them in compromising and reaching a settlement. Some IIAs contain detailed procedural rules of mediation including object and scope of mediation, procedure for initiation, selection of the mediator, procedural rules of the mediation, implementation of a mutually agreed upon solution, time limits, costs and review.[45]

Mediation could adopt various forms such as facilitating a dialogue between the Investor and the State on possible consequences of a potential State measure, opening a platform for the free flow of options that are less restrictive or more proportionate for adoption by the State to mitigate Investor impact, among other forms.[46] The role of the mediator can also be evaluative and directive — where mediators along with the lawyers of the parties drive the legal issues and implications thereof, including advice and guidance to the parties on a resolution which would be consistent with their options in civil litigation or administrative adjudication.[47]

Mediation offers several advantages. It opens a channel for communication between the disputing parties and helps facilitate an effective dialogue through intervention of a neutral third party. It is an interest-

42 See Rodrigo Polanco, The Return of the Home State to Investor– State Disputes, in THE RETURN OF THE HOME STATE TO Investor– STATE DISPUTES: BRINGING BACK DIPLOMATIC PROTECTION?, I (2019).

43 Empresas Lucchetti S.A. v. Republic of Peru, award dt. 07/ 02/ 2005, ICSID in Case No. ARB/ 03/ 04 para 56 at 23.

44 Int'l Inv. Agreements Navigator, INV. POLICY HUB, available at https:// investmentpolicy.unctad.org/ international- investment- agreements/ iia- mapping. Last accessed on 10 August 2020

45 EU- Singapore Investment Protection Agreement, 2018, Chapter 15 and Annex. 6.

46 Kshama A. Loya, A Call for Mediation in Investment Treaty Disputes, NANI PALKIWALA ARBITRATION CENTRE'S ARBITRATION REVIEW (2019).

47 Nancy A. Welsh and Andrea K. Schneider, Becoming "Investor– State Mediation", 1 PENN STATE JOURNAL OF LAW & INTERNATIONAL AFFAIRS 86, 93 (2012).

based facilitation process, rather than a rights-based adjudication system. Unlike adversarial adjudicatory mechanisms that bear the potential of severing Investor- State relations, mediations help in preservation and possibly reinstatement of Investor- State relations. Mediation is enabling, effective and attempts to achieve best outcomes for all parties. It is cost- effective and saves time. It ensures confidentiality of discussions. Successful mediations and negotiated agreements are self- executing. They may not always require additional enforcement procedures, which could be considerably arduous in international dispute resolution.[48]

However, mediation could be disadvantageous. It is a non-binding process. Mediation may not work effectively if parties have unequal bargaining powers. Its effi-cacy and feasibility may be questioned when parties' efforts at mediation fail. In the event of settlements made by host States in mediation, the host State could face backlash from political oppositions for conceding to a foreign Investor while encumbering the public exchequer. The government of the host State may also run the risk of being accused of weakness in defending national interests against foreign Investors or, worse, corruption.[49] In such circumstances, governments may prefer to settle disputes before an adjudicating authority rather than conceding to a foreign Investor.[50]

The need for mediation in treaty disputes is more pressing than that in interna-tional commercial disputes, considering the extensive impact on foreign relations, national exchequer and policymaking in the former while the latter deals with a limited arena of impact on commercial interests of the parties alone. However, making mediation effective will involve building a robust framework comprising of expert mediators, national legislations enabling and recognizing mediated settlements, with narrow rigours of resistance and greater acceptance. Mediation might prove to be the most effective means for resolving investment treaty disputes, with arbitration as its pillion rider in the event of failure.[51]

A few institutions have formulated rules and guidelines on mediation of Investor- State disputes.[52] However, these have been used rarely. For instance, the IBA Rules for Investor- State Mediation introduced in 2012[53] have been used only in one case, under the auspices of the ICC. Possibilities have been explored of using the IBA Rules alongside the ICSID framework on conciliation and arbitration by applying them at a preliminary stage prior to ICSID conciliation or arbitration; alongside ICSID arbitration or conciliation; or subsequent to an ICSID arbitration or conciliation.[54]

The United Nations Convention on International Settlement Agreements resulting from Mediation, 2018 **("Singapore Convention on Mediation")**, which will come into force on September 12, 2020, might also be instrumental in providing a binding nature to international mediated settlement agreements in Investor- State disputes. Although the SCM does not expressly provide for settlement agreements arising out of mediation of Investor— State disputes, the text of the SCM could be interpreted to apply to Investor- State disputes.

48 W. Michael Reisman, International Investment Arbitration and ADR: Married but Best Living Apart?, Spring 24 ICSID REVIEW— FOREIGN INVESTMENT LAW JOURNAL 185 (2009).

49 Jeswald W. Salacuse, Is There a Better Way? Alternative Methods of Treaty— Based, Investor— State Dispute Resolution, 31(1) FORDHAM INTERNA-TIONAL LAW JOURNAL 178 (2007).

50 Ibid.

51 Supra note 37.

52 IBA Rules for Investor– State Mediation, 2012; ICSID Rules of Mediation Proceedings, 2016 and Additional Facility Rules of Procedure for Mediation Proceedings proposed in the third working paper of the ICSID Secretariat; ECT Guideline on Investment Mediation, 2016; International Mediation Institute.

53 Systra SA v. Republic of the Philippines, detailed in Luke E. Peterson, In an Apparent First, Investor & Host– State Agree to Try Mediation under IBA Rules to Resolve an Investor Treaty Dispute, IA INV. ARBITRATION REPORTER (2016), available at

https:// www.iareporter.com/ articles/ in- an- apparent- first- investor- and- host-state- agree- to- try- mediation- under- iba- rules- to- resolve- an-investment- treaty- dispute/ Last accessed on 10 August 2020.

54 Frauke Nitschke, The IBA's Investor– State Mediation Rules and the ICSID Dispute Settlement Framework, 29(1) ICSID REVIEW 112 (Winter 2014).

VII. Conciliation

Akin to mediation, conciliation also involves a third neutral party to assist in amica-ble settlement of disputes. Conciliation is a formal and structured process of amicable dispute resolution. Conciliation has its historical roots in public international law and provides for a relatively structured process involving formal rules related to jurisdictional objections, potential pleadings, the gathering of evidence, and issuing written recommendations for settlement.[55]

Conciliation has often been described as a type of non- binding arbitration.[56] It may not offer final resolution of disputes as the recommendations of the conciliator are not binding on the parties. However, conciliation may be more beneficial to parties than mediation. It is relatively more formal and has a defined structure. A conciliator exercises greater control over the process and the disputes between the parties than a mediator. Unlike mediation, conciliation does not focus merely on facilitating communication between the parties but focuses on the facts, substance and result of the dispute.[57]

Several arbitral institutions provide formal rules of conciliation.[58] The ICSID Convention considers arbitration and conciliation as equivalent alternatives. Once consent is provided to jurisdiction of the ICSID, the ICSID framework affords the means for making choice between the two methods of dispute settlement, and leaves the choice to the party instituting the proceedings.[59]

VIII. Multilateral Investment Court and Two-Tier Investment Tribunal System

The European Union ("EU") has been working on establishment of a multilateral investment court since 2015 for adjudication of disputes under future and existing investment treaties.[60] In March 2018, the European Commission received permission from the Council of EU to proceed with negotiations for a convention establishing a multilateral court for the settlement of investment disputes, under the auspices of UNCITRAL.[61]

The proposed multilateral investment court is suggested to be a permanent international institution dealing with investment disputes.[62]It will involve a two- tier adjudication system, comprising first instance tribunal and an appeal tribunal. Each State shall nominate members to the tribunals for a fixed term. The Tribunal shall hear cases on a random rotation basis. The first instance tribunal is proposed to have jurisdiction to adjudicate upon claims brought by member states. The appeal tribunal would adjudicate upon appeals of the decisions of the first

55 Reif, 1991 Linda C. Reif, Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes, 14 FORDHAM INT'L LAW JOURNAL 578 (1990— 1991); MARY ELLEN O'CONNELL, INTERNATIONAL DISPUTE SETTLEMENT (2003).

56 Ucheora Onwuamaegbu, Aguas del Tunari SA. v. Republic of Bolivia (ICSID Case No. ARB/ 03/ 2) 20(2) ICSID REVIEW — FOREIGN INVESTMENT LAW JOURNAL (2005).

57 Reif, 1991 Linda C. Reif, Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes, 14 FORDHAM INT'L LAW JOURNAL 578 (1990– 1991); MARY ELLEN O'CONNELL, INTERNATIONAL DISPUTE SETTLEMENT (2003).

58 UNCITRAL, ICC, AIAC, ICSID.

59 Southern Paci3c Properties v. Arab Republic of Egypt, ICSID Reports 131, 1992.

60 A Future Multilateral Investment Court, EUROPEAN COMMISSION, available at https:// ec.europa.eu/ commission/ presscorner/ detail/ en/ MEMO_ 16_ 4350 Last accessed on 10 August 2020; also see, The Multilateral Investment Court Project, EUROPEAN COMMISSION, available at http:// trade.ec.europa.eu/ doclib/ press/ index.cfm?id=1608. Last accessed on 10 August 2020.

61 Council of the European Union, Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes (20 March 2018) , available at http:// data.consilium.europa.eu/ doc/ document/ ST- 12981- 2017- ADD- 1- DCL- 1/ en/ pdf Last accessed on 10 August 2020.

62 A Future Multilateral Investment Court, EUROPEAN COMMISSION, available at https:// ec.europa.eu/ commission/ presscorner/ detail/ en/ MEMO_ 16_ 4350. Last accessed on 10 August 2020.

instance tribunal on limited grounds such as errors of law, manifest error in appreciation of facts, serious procedural shortcomings and have powers to remand the case to the first instance tribunal.[63]

The Multilateral Investment Court is expected to address problems associated with legitimacy and transparency of the ISDS system. A permanent institutional body adjudicating upon Investor- State disputes would facilitate certainty and predictability in international investment law. It will also promise consistency of interpretation and awards, and reduce the chances of parallel proceedings. A Multilateral Investment Court system would also be cost- effective.

However, a multilateral investment court would dampen the autonomous nature of arbitration intrinsically based on consent of the parties. It will curtail the freedom of parties to appoint arbitrators suited to particular Investor - State disputes in terms of technical expertise, sectoral knowledge and experience. Limited number of judges of the court, coupled with affixed term and rotational basis of appointment, could curtail the development and evolution of the body of international investment law. The independence of the judges would also be subject to the manner of their appointment. While there have been suggestions to appoint judges through the World Trade Organization by the contracting states to ensure democratic control,[64] the appointment of judges to the multilateral investment court warrants further discussion. As per the mandate granted to the European Commission in 2018, the Convention is required to contain stringent requirements regarding qualifications and impartiality of tribunal members, rules on ethics and conflicts of interests, and necessary flexibilities to adapt to an evolving membership, in order to guarantee the independence of the court.[65]

While the establishment of a multilateral investment court is being deliberated upon by UNCITRAL Working Group III, the European Union has entered into IIAs with some non- European States[66] providing a two-tier investment tribunal system. For example, under the Investment Tribunal System framework in the EU-Singapore Investment Protection Agreement, the claim is submitted to a Tribunal of First Instance comprising six members. Each State shall nominate two members each; the remaining two are jointly nominated by the States. The Tribunal shall hear cases in divisions consisting of three members on a random rotation basis, of whom one each shall have been appointed pursuant to the aforesaid procedure.

The members shall serve in office for 8 years and possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence, and have specialized knowledge of, or experience in, public international law. A permanent Appeal Tribunal is established to hear appeals from provisional awards issued by the Tribunal of First Instance.[67] The IIAs also contemplate provisions to transition from the two- tier investment tribunal system to a permanent multilateral investment court once established.[68]

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63 IIA Issues Note, Reforming Investment Dispute Settlement: A Stocktaking, 2018, INVESTMENT POLICY HUE, available at https:// investmentpolicy.unctad.org/ publications/ 1194/ reforming- investment- dispute-settlement- a- stocktaking Last accessed on 10 August 2020.

64 Stephan W. Schill, Reforming Investor— State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward' (E15 Initiative), GENEVA: INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT/ WORLD ECONOMIC FORUM (July 2015), available at http:// e15initiative.org/ wp- content/ uploads/ 2015/ 07/ E15- Investment- Schill- FINAL.pdf Last accessed on 10 August 2020; David M. Howard, Creating Consistency Through a World Investment Court, 41(1) FORDHAM INTERNATIONAL LAW JOURNAL 45 (2017).

65 Supra note 53.

66 Canada, Singapore and Vietnam.

67 EU— Singapore Investment Protection Agreement, 2018, Article 3.10.

68 EU— Singapore Investment Protection Agreement, 2018, EU— Vietnam Investment Protection Agreement, 2019 Canada– EU Comprehensive Economic and Trade Agreement, 2016.

IX. Indian Investor- State Disputes Landscape

A. Investor-State Framework in India: Roots

India is one among the top 10 countries for inbound FDI, and soon to be among top 20 for outbound FDI.[69] It has been at the forefront of policy making in the FDI arena. Its BIT landscape, like FDI inflows and outflows, has been dynamic in the last 5 years. However, what appears to be most dynamic is the ISDS landscape.[70]

India signed its first BIT with United Kingdom in 1994. This was an Investor-centric BIT. India's first model BIT in 2003 bore close semblance with the India–UK BIT. In 2004, the Republic of India ("India") faced its first set of BIT arbitrations. Nine arbitrations were initiated against India relating to the Dabhol Power Plant project in the State of Maharashtra. Investors from United Kingdom, Netherlands, Mauritius, France, Switzerland and Austria invoked the respective BITs with India. However, these disputes were ultimately settled after India arrived at a comprehensive commercial settlement with all Investors.

However, the first substantive case against India was initiated in 2011. A commercial arbitration award in favour of Australian company White Industries languished in Indian courts for enforcement for 9 years. This resulted in the most unique investment treaty claim by White Industries against India for breach of treaty guarantee to provide "effective means to assert claims," a guarantee imported by way of a most- favoured nation treatment clause into the India–Australia BIT from the India–Kuwait BIT. White industries was successful and India was directed to pay approximately USD 4 million in damages and legal costs.

Between 2011 and 2015, Investors filed several BIT cases against India. These can be distilled into three categories: claims by foreign telecom companies for revocation of 2G spectrum licenses; by foreign space and telecom companies for cancellation of S-band electromagnetic spectrum lease, and claims by telecom and energy companies for retrospective taxation of capital gains. Most of these cases are pending.

As a reaction, India revised its erstwhile Model BIT in 2016 to make it State-centric. The revisions included exclusion of pre-investment activities from the ambit of 'investment' and addition of Salini criteria, acknowledging the 'substantial business activities' test for an Investor, assessing the fair and equitable treatment clause through the lens of customary international law minimum standard with several clarifications on grounds and compensation, narrowing down the most - favoured nation treatment clause among others. Further in 2017, it terminated 58 out of its 84 BITs, and proposed to enter into joint interpretative statements with 25 countries. Currently, only 14 BITs are in force.

69 World Investment Report, 2019 UNCTAD, available at https:// unctad.org/ en/ PublicationsLibrary/ wir2019_ en.pdf Last accessed on 10 August 2020.

70 This section is adopted from the writings of one of the authors, citation here: Kshama A. Loya and Moazzam Khan, Investment Arbitration & India – 2019 Year in Review: With Brief Recap of 2018, NISHITH DESAI ASSOCIATES, available at https:// www.nishithdesai.com/ information/ news- storage/ news- details/ article/ investment- arbitration- india- 2019- year- in- review.html Last accessed on 10 August 2020.

B. Settlement of Disputes under the 2016 India Model BIT [71]

Chapter IV of the 2016 Model BIT deals with Settlement of Disputes between an Investor and a Party. This is the longest chapter on settlement of disputes in any BIT so far and contains 18 articles.[72] It applies only to disputes relating to investment and arising out of alleged breach of obligation of a State under Chapter II of the 2016 Model BIT, barring Articles 9 and 10.[73]

i. Conditions precedent for submission of claim to arbitration

The road to investment treaty arbitration under the 2016 Model BIT can be extremely long and exhausting for the foreign Investor, inasmuch as the Investor may not be in a position to initiate arbitration until at least 6 years have passed since he acquired or ought to have acquired knowledge of the measure under challenge, and knowledge of the loss or damage caused consequently to his investment.

ii. Exhaustion of local remedies

India's consent to arbitration under the BIT is qualified upon exhaustion of local remedies by the foreign Investor for a period of 5 years before commencing arbitration. The 5 years commence from the date when the foreign Investor first acquired "knowledge of the measure in question and the resulting loss or damage to the investment" or when the Investor "should" have first acquired such knowledge.[74]

However, the requirement to exhaust local remedies shall not be applicable if there are no available local remedies that can provide relief with respect to the relevant measure. This exemption to the exhaustion of local remedies gives effect to the "futility exception."[75] Accordingly, the onus to demonstrate the non-existence of an appropriate domestic remedy lies on the foreign Investor.

iii. Submission within a year of acquiring knowledge of measure and loss

The Investor is required to submit its claim before the domestic courts or administrative bodies within 1 year from the date when the Investor acquired or ought to have acquired knowledge of the measure, and knowledge of the loss or damage suffered consequent to the measure.[76] The aforesaid conditions are cumulative. This can cause significant confusion, inasmuch as the measures may have been acquired a year in advance but the loss may have been incurred only at a later point in time.

71 This section is adopted from the writings of one of the authors, citation here: Bhavana Sunder, Kshama A. Loya and Vyapak Desai, International Investment Treaty Arbitration & India – with Special Focus on India Model BIT 2016, NISHITH DESAI ASSOCIATES, available at http:// www.nishithdesai.com/ fileadmin/ user_ upload/ pdfs/ Research_ Papers/ International_ Investment_ Treaty_ Arbitration_ and_ India.pdf Last accessed on 10 August 2020.

72 Chapter IV covers the following provisions: scope and definitions (Article 13), proceedings under different international agreements (Article 14), conditions precedent for submission of a claim to arbitration (Article 15), submission of claim to arbitration (Article 16), consent to arbitration (Article 17), arbitrator— related provisions (Articles 18 and 19), conduct of arbitral proceedings (Article 20), dismissal of frivolous claims (Article 21), transparency in arbitral proceedings (Article 22), burden of proof and governing law (Article 23), joint interpretation and expert reports (Articles 24 and 25), Award and finality and enforcement (Articles 26 and 27), costs (Article 28), appeals facility (Article 29) and diplomatic exchanges between Parties (Article 30).

73 Chapter II deals with obligations of Parties and covers treatment of investments (including treatment not in violation of customary international law through denial of justice, fundamental breach of due process, targeted discrimination and manifestly abusive treatment), full protection and security and national treatment. Articles 9 and 10 deal with entry and sojourn of personnel and obligations of transparency upon the Parties. Disputes relating to the aforesaid two provisions are excluded from the ambit of dispute resolution under the 2016 Model BIT.

74 Model Bilateral Investment Treaty; India, 2016, Article 15.2.

75 The 'futility exception' to the doctrine of exhaustion of local remedies requires that the local remedies need not be exhausted when "there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress" – see Draft Articles on Diplomatic Protection with Commentaries, [2006] II:2 Y.B. Int'l. L. Comm'n pt.2, at 26, UN Doc A/ 61/ 10 (2006); Grant Hanessian and Kabir Duggal, The 2015 Indian Model BIT: Is This Change the World Wishes to See, 30(3) ICSID REVIEW FOREIGN INVESTMENT LAW JOURNAL 729 (2015).

76 2016 India Model BIT, Clause 15.1.

iv. Dispute before National Courts or judicial authorities

The Investor is precluded from going to the next step of the dispute settlement provision unless it has exhausted its local remedies for at least 5 years before the domestic courts or judicial authorities.[77] This period of 5 years runs from the date the Investor acquired knowledge or ought to have acquired knowledge of the measure. Interestingly, this provision misses to consider the additional condition on "acquiring knowledge of the loss or damage incurred due to the measure."[78]

v. Notice of dispute and amicable means of resolution

After exhausting local remedies for a period of 5 years, the Investor still has a long way to initiate arbitra-tion under the treaty. In the event of failure to reach satisfactory resolution of the dispute, the Investor may send a notice of dispute to the Host State. After receipt of the Notice of Dispute, the disputing parties are required to attempt amicable resolution through consultation, negotiation or other third-party procedures for a period of 6 months.

vi. Notice of arbitration

In the event the aforesaid procedures fail, the Investor may initiate arbitration through a notice of arbitration. However, arbitration proceedings can commence only after 3 months have passed after issuance of the notice of arbitration. The notice to arbitration must comply with the following conditions: (i) not more than 6 years should have elapsed from the date on which the Investor first acquired or should have acquired knowledge of the measure in question;[79] (ii) not more than 12 months should have elapsed from the conclusion of the proceedings of the domestic courts;[80] (iii) as afore said, before submitting the claim to arbitra-tion, a minimum of 90 days' notice has to be given to host state;[81] (iv) the Investor must waive the 'right to initiate or continue any proceedings' under the domestic laws of the host state.[82] Additionally, in cases where the claim is submitted by a foreign Investor in respect of loss or damage to a juridical person owned or controlled by the foreign Investor, the juridical person shall have to waive its right to initiate or continue any proceedings under the laws of the host state.[83]

Thus, mere exhaustion of local remedies by the foreign Investor does not immediately pave the way for treaty arbitration. A further 9 months are required to pass before submitting the claim to Investor- State arbitration. If every step is taken diligently and in a timely manner, the Investor should be in a posi-tion to initiate Investor- State arbitration after a period of 5 years and 9 months. However, the hard-stop date is 6 years from the date when the Investor acquired knowledge of the measure and knowledge of the loss. Post-expiry of this period, the Investor is barred from submitting a claim to arbitration. Resultantly, the Investor has been granted a mere margin of 3 months to successfully submit its claim to arbitration.

The aforesaid provisions appear to be regressive and make international arbitration extremely difficult for the foreign Investor. The 5 year requirement is excessive, particularly in situations where the Investor

77 2016 India Model BIT, Clause 15.2.

78 Ibid.

79 Ibid., Article 15.5(i).

80 Ibid., Article 15.5(ii).

81 Ibid., Article 15.5(v).

82 Ibid., Article 15.5(iii).

83 Ibid., Article 15.5(iv).

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requires immediate or timely relief to protect the value of the investment or his or her rights arising from it.[84] In sum, there are far too many hurdles that the foreign Investor will need to cross in order to have access to international arbitration. In a country where the rate of filing of cases is far greater and faster than the rate of disposal and where backlog of cases runs for decades, it is all the more prudent to remove the provision for exhaustion of local remedies before domestic courts and judicial or administrative bodies and submit the claim directly to international arbitration.

vii. Recent Developments

As the first step towards implementation of the renewed Investor- State regime, India executed a Joint Interpretative Statement ("JIS") with Bangladesh in October 2017. While Parties did not terminate the 2012 BIT, they attempted to emulate provisions of the 2016 India Model BIT into the JIS. In September 2018, Belarus became the first country to execute a new BIT with India. The Belarus–India BIT is predominantly based on the 2016 Model BIT. One would expect that the dispute resolution clause is not as rigorous as under 2016 Model BIT. However, while keeping the rigours of local remedies intact, the Investors have been provided a limitation period of 2 years (instead of 1) to file a claim against India before the relevant domestic courts.[85] The limitation period to proceed with arbitration has subsequently been increased to 7 years.[86]

In October 2018, India executed a Joint Interpretative Declaration ("JID") with Colombia.[87] This was almost identical to the India Bangladesh JID, with an added provision on denial of benefits. Close on the heels of Belarus, in December 2018, Taipei Cultural & Economic Centre (TECC) in India signed a BIT with India Taipei Association (ITA) in Taipei. The TECC is the representative office of the Republic of China (Taiwan) government in India and is responsible for promoting bilateral relations between Taiwan and India. Being similar to the 2016 Model BIT in majority aspects, the dispute resolution clause provides a limitation period of 1 year and 6 months (instead of 1 year) to the Investor to file its claim against India before the relevant domestic courts. Additionally, the period for exhaustion of local remedies has been relaxed to 4 years (instead of 5 years).[88]

In January 2020, India signed a BIT with Brazil, based on the CIFA model introduced by Brazil. The Brazil-India BIT provides for State- to- State Dispute Settlement as set out in the CIFA model in this chapter, and removes ISDS. In the same month, the Indian government proposed the enactment of a special legislation to protect foreign Investors and resolve Investor- State disputes.[89] The Finance Ministry is stated to have recommended mediation and establishment of special fast- track courts for this purpose. Alternatively, it is also stated to consider vesting jurisdiction with the State's National Company Law Tribunals.[90] At the time of writing, the special legislation has not been introduced.

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84 Martin Dietrich Brauch, Exhaustion of Local Remedies in International Investment Law, IISD Best Practices Series January 2017, IISD BEST PRACTICES SERIES, available at https:// www.iisd.org/ sites/ default/ files/ publications/ best- practices- exhaustion- local- remedies- law- investment- en.pdf Last accessed on 10 August 2020.

85 Treaty between the Republic of Belarus and the Republic of India on Investments, 2018, Article 15.1.

86 Treaty between the Republic of Belarus and the Republic of India on Investments, 2018, Article 15.5.

87 Joint Interpretative Declaration between the Republic of India and the Republic of Colombia regarding the Agreement for the Promotion and Protection of Investments Between India and Colombia, signed on 10 November 2009, available at the Indian Department of Economic Affairs website at https:// dea.gov.in/ bipa?page=7

88 Bilateral Investment Agreement between the India Taipei Association in Taipei and the Taipei Cultural & Economic Centre, 2018, Article 5.4(b).

89 See Kshama A. Loya and Moazzam Khan, View: Balancing State Regulation and Investor Rights (2020), available at https:// www.livemint.com/ news/ india/ government- plans- new- law- to- protect- foreign- invest ment-11579084078405.html.

90 Kshama A. Loya and Moazzam Khan, Balancing State Regulation & Investor Rights, ECONOMIC TIMES, available at https:// economictimes.indiatimes.com/ markets/ stocks/ news/ view- balancing- state- regulation-investor- srights/ articleshow/ 73792 172. cms?utm_ source=contentofinterest&utm_ medium=text&utm_ campaign=cppst Last accessed on 10 August 2020.

X. Conclusion

Access to dispute resolution mechanisms constitutes a critical guarantee under IIAs. IIAs provide direct access to foreign Investors against State measures in violation of the IIA through international arbitration, thereby stimulating a shift from the traditional remedy of national courts. This has introduced an era of consent- based, neutral and binding dispute resolution which does not suffer from the anticipated lack of impartiality and the perceived non- efficacy of national courts in resolving Investor- State disputes. International arbitration, therefore, remains a viable alternative to traditional local remedies.

While international arbitration is largely accepted and preferred by Investors, it may not befit all kinds of disputes. In the contemporary business world, time, costs and impact on the Investor- State relationship remain at the epicentre of decision- making before commencing Investor- State dispute resolution. Several factors need consideration before initiating disputes under IIAs, such as nature and complexity of claims, quantum of stakes, impact on shareholder value, need for funding, margin of appreciation for States to adopt measures and regulations in public interest, sovereign immunity, potential impact of disputes on the Investor-State relationship, type of disputes covered and/ or exempted under IIAs, availability of contract claims and commercial arbitration (if any) over IIA claims, espousal of claims through the SSDS model, among others. An analysis of various dispute resolution mechanisms, as provided in this chapter, could inform decision- making from the standpoint of States and Investors and assist in arriving at a mechanism that best suits the interests of the parties.

As foreign investment grows and State regulations widen, it is quintessential for Investors and States to explore diverse means of resolution of disputes, as well as strategies for prevention of disputes. Inter-institutional cooperation, consultations, transparent and accountable institutions, early alert mechanisms, stability and certainty in the legal framework, and coherence between national legal framework and international obligations can go a long way in prevention of Investor- State disputes. These are also aligned with sustainable development goals focussing on ensuring responsive, inclusive, participatory and representative decision- making at all levels, promotion and enforcement of non discriminatory laws and policies, and enhancement of global partnership complemented by multi- stakeholder partnerships to support achievement of sustainable development goals.

Since Investor- State disputes are founded on violation of substantive standards of protection under IIAs, it is essential that reforms in dispute resolution mechanisms must go hand in hand with reforms in substantive standards of protection in order to promote foreign investment and accentuate its socio- economic benefits — namely growth, employment and sustainability. It is necessary for present-day IIAs and their interpretations to be aligned with sustainable development goals, such as enhancing policy coherence for sustainable development, respecting each country's policy space and leadership to establish and implement policies for sustainable development,[91] and ensuring access to justice.[92] As this could widen State regulation and heighten the potential for disputes, it is the need of the hour to strengthen existing mechanisms of amicable and adjudicatory dispute resolution, and devise novel mechanisms that are effective, efficient and enforceable.

91 UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 2015, A/ RES/ 70/ 1, Goal No. 17.15.

92 UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 2015, A/ RES/ 70/ 1, Goal No. 16.3.

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D. Investment Arbitration and India — 2020 Year in Review [93]

For the Indian foreign direct investment landscape, 2020 was a mixed bag of equity inflows, policy changes, arbitration awards and innovative dispute resolution strategies. In September 2020, FDI equity inflows in India crossed the USD 500 billion milestone, computed over a period of 20 years starting from April 2000.[94] While global FDI witnessed a steep decline of 42%, India noted a 13% increase in FDI inflows.[95] India's tightened scrutiny of FDI from her neighbours and FDI in e-commerce invited intense discussion.

However, the culmination of key long-standing arbitration proceedings initiated by foreign Investors against India under international investment treaties invited global attention, especially in the final quarter of 2020. These disputes were initiated by foreign Investors to challenge measures adopted by the Indian government and State entities that adversely impacted foreign investments.

We have extensively covered these developments in the past year. This article serves as a summary, and seeks to cater to (a) foreign direct Investors who have made investments into India, and are anticipating or facing measures from the Indian government that could affect the value of their original investment; (b) Indian Investors making direct investments abroad, and are facing adverse measures from foreign governments; and (c) State entities engaging in contracts with foreign Investors and adopting investment related measures.

Perhaps an analysis of the year-round developments in India in 2020 could be instrumental in tailoring strategies and approach to potential disputes between foreign Investors and the Indian government. For our analysis titled 'Investment Arbitration and India: 2019 Year in Review', please see here.

I. FDI Inflows and Outflows

In September 2020, FDI equity inflows in India crossed the USD 500 billion milestone, computed over a period of 20 years starting from April 2000. More than half of this figure is constituted by FDI inflows during the last five years.

As compared to the FDI inflows between April 2019 and September 2019, FDI inflows between April 2020 and September 2020 rose by 15%, escalating up to 30 billion dollars.[96] During this period, Singapore remained the highest investing country into India, with an investment of USD 8.30 billion, followed by the United States at USD 7.12 billion, Cayman Islands at USD 2.10 billion, Mauritius at USD 2 billion, Netherlands at USD 1.49 billion and the UK at USD 1.35 billion. The services sector continued to remain the highest recipient of FDI, followed by computer software and hardware, telecommunication, trading and construction development.[97]

On the other hand, between April 2020 and November 2020, Corporate India invested USD 12.25 billion overseas, most of which has gone into the company's wholly owned subsidiaries in countries such as the United States, Singapore and the Netherlands, according to Care Ratings. Of the overall USD 12.25 billion, 76% i.e., USD 9.25 billion, was invested into wholly owned subsidiaries and the remaining USD 3 billion into joint ventures.[98]

93 This article was authored by Bhavan Sunder & Kshama A. Loya. Available at: https://nishithdesai.com/SectionCategory/33/Dispute-Resolution-Hotline/12/57/DisputeResolutionHotline/4675/2.html

94 https://economictimes.indiatimes.com/markets/stocks/news/fdi-equity-inflows-into-india-cross-500-billion-milestone/articleshow/79589698.cms

95 https://www.businesstoday.in/current/economy-politics/india-bucks-global-decline-in-fdi-grows-13-against-world-42-fall-in-2020/story/428959.html

96 https://dipp.gov.in/sites/default/files/FDI_Fact_sheet_September_20.pdf

97 Id.

98 https://www.ibef.org/economy/indian-investments-abroad

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II. Shift in FDI Policies

In 2020, there were several key changes to the regulatory framework for FDI in India. In February 2020, the Department for Promotion of Industry and Internal Trade ("DPIIT") issued a clarification on the FDI policy on Single Brand Retail Trading. It provided that if foreign investment in Single Brand Retaining exceeds 51%, then 30% of the value of the goods procured should be sourced from India. The clarification states that goods sourced from units located in Special Economic Zones (SEZs) in India would also qualify to meet the 30% mandatory criterion of sourcing from India.[99]

In March 2020, the Cabinet approved the amendment to the FDI Policy to permit FDI in Air India Ltd. by Non-Resident Indians (NRIs) up to 100% under the automatic route.[100] In the same month, the Indian Parliament also passed the Mineral Laws (Amendment) Bill, 2020. The amendment provides that companies which do not possess any prior coal mining experience in India and/or have mining experience in other minerals or in other countries may participate in auction of coal/lignite blocks.

In April 2020, the Government of India made government clearance mandatory for all FDI inflows from countries that share land borders with India. The FDI Policy was tightened to prevent any opportunistic takeovers or acquisition of Indian companies due to the COVID-19 pandemic.[101] In a subsequent notification, it was stated that a transfer of ownership of any existing entity or future FDI in an entity in India, directly or indirectly, resulting in beneficial ownership falling within this restriction would require mandatory government approval.[102] Therefore, Investors from India's neighbouring countries will need to seek Indian government's approval before taking their investment forward — for the foreseeable future. We have assessed this policy and its ramifications in detail in a post here.[103]

In September 2020, the DPIIT issued a revision to the FDI Policy in the defence sector. Investment through the automatic route was increased from 49% to 74%. Investment beyond 74% now requires Government approval "wherever it is likely to result in access to modern technology or for other reasons to be recorded."[104]

In October 2020, India issued a consolidated FDI policy. The Policy superseded the previous Press Notes, Circulars, etc. and consolidated the same into a single policy.[105] In Press Note 4 of 2019, the Government had permitted FDI up to 26% FDI through the Government approval route for entities engaged in uploading/streaming of news and current affairs through digital media. On October 16, 2020, the DPIIT clarified that this decision would apply to (a) digital media entities streaming/uploading news and current affairs on websites, apps or other platforms; (b) news agencies which gather, write and distribute/transmit news, directly or indirectly, to digital media entities and/or news aggregators; and (c) news aggregators, being entities, which using software

99 Clarification on FDI Policy on Single Brand Retailing (SBRT), February 27, 2020, available at: https://dipp.gov.in/sites/default/files/Revised_Clarification_SBRT_27February2020.pdf

100 Press Information Bureau, Cabinet approves the Foreign Direct Investment policy on Civil Aviation, available at: https://pib.gov.in/Pressreleaseshare.aspx?PRID=1605150

101 Press Note 3 (2020 Series) dated April 17, 2020, available at: https://dipp.gov.in/sites/default/files/pn3_2020.pdf

102 Notification regarding Review of Foreign Direct Investment (FDI) policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic available at: https://dipp.gov.in/sites/default/files/pn3_2020.pdf

103 FDI Policy Revised: Neighbouring Countries Restricted From Opportunistic Investments, Nishith Desai Associates, available at: http://www.nishithdesai.com/information/news-storage/news-details/article/fdi-policy-revised-neighbouring-countries-restricted-from-opportunistic-investments.html

104 Press Note 4 (2020 Series), September 17, 2020, available at: https://dipp.gov.in/sites/default/files/pn4-2020_0.PDF

105 Consolidated FDI Policy, effective from October 15, 2020, available at: https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_1.pdf

or web applications, aggregate news content from various sources such as news websites, blogs, podcasts, video blogs, user submitted links, etc. in one location.[106]

III. Bilateral Investment Treaty Framework

As per the Indian Department of Economic Affairs website, 69 out of 84 BITs have been shown to be terminated on various dates since 2016.[107] Between 2019 and 2021, India has terminated BITs with Turkey, Finland, Serbia (Yugoslavia), Sudan, Bahrain, Saudi Arabia, Bosnia & Herzegovina, Jordan, Mexico, Iceland, Macedonia, Brunei Darussalam, Syrian Arab Republic, Myanmar and Mozambique.[108] On January 25, 2020 India signed the Investment Cooperation and Facilitation Treaty with Brazil.[109]. Several BITs and joint interpretative statements are under discussion such as with Iran, Switzerland, Morocco, Kuwait, Ukraine, UAE, San Marino, Hong Kong, Israel, Mauritius and Oman.

IV. Proposed National Legislation for Investor–State Disputes

In January 2020, reports suggested that India is considering enactment of a domestic law for protection of foreign investments in India, with a robust dispute resolution mechanism and unequivocal investment protection guarantees.[110]The Finance Ministry has recommended mediation and establishment of special fast-track courts to resolve Investor-State disputes. Alternatively, it is also stated to consider vesting jurisdiction with the National Company Law Tribunal (NCLT). We have anticipated and analysed key points emanating from such a legislation here.

V. Investor–State Disputes in 2020

Four Investor—State cases against India came to the limelight in 2020. One was declined on jurisdiction in favour of India,[111] two were awarded against India,[112] and another case proceeded to recognition of award in the U.S. only to be met with hurdles for enforcement in India.[113] For an exhaustive analysis of the Vodafone case and its implications on the rights of foreign Investors, please see our case study here.[114] For a detailed analysis of the Cairn case, please see our analysis here.

106 Clarification on FDI Policy for uploading/streaming news and current affairs through Digital Media, available at: https://dipp.gov.in/sites/default/files/Digital-Media-Clarification-Scanned-16Oct2020.pdf.

107 https://www.dea.gov.in/bipa

108 Department of Economic Affairs, Bilateral Investment Treaties (BITs)/Agreements, available at: https://dea.gov.in/bipa?page=8

109 Id

110 https://www.livemint.com/news/india/government-plans-new-law-to-protect-foreign-investment-11579084078405.html

111 Khadamat Integrated Solutions Private Limited (India) v. The Kingdom of Saudi Arabia (PCA Case No. 2019—24)

112 PCA Case No. 2016—35: Vodafone International Holdings BV (The Netherlands) v. India; PCA Case No 2016—07: Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India

113 Devas Multimedia Private Ltd v Antrix Corp Ltd — United States District Court Western District of Washington at Seattle C18—1360 TSZ (W.D. Wash. Oct. 27, 2020); Devas Multimedia Pvt. Ltd. v. Antrix Corporation Ltd., IA No.107899/2020 in Petition(s) for Special Leave to Appeal (C) No(s).28434/2018.

114 Vodafone Investment Treaty Arbitration Award – Part I, Nishith Desai Associates, available at: https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-investment-treaty-arbitration-award-part-i.html?no_cache=1&cHash=8fb65ba0b511a1193bc061ee430fcf1f

A. Khadamat v. Saudi Arabia

In early 2018, Khadamat Integrated Solutions Private Limited, an Indian Investor, initiated investment arbitration proceedings against Saudi Arabia under the India–Saudi Arabia BIT. The tribunal was constituted in September 2019 under the aegis of the Permanent Court of Arbitration. On February 7, 2020, the tribunal passed an award declining jurisdiction.[115] Details of the case are not available in public domain.

B. Vodafone v. India

In 2007, Hutchinson Telecommunications International Limited (Hutch, a Cayman Islands entity) sold its stake in CGP Investments (another Cayman Islands entity), to Vodafone International Holdings (VIHBV, a Netherlands entity) — for a consideration of 11.1 Billion Dollars. Hutch earned capital gains on this sale to VIHBV. CGP Investments held various underlying subsidiaries in Mauritius. These, along with certain Indian companies, ultimately held 67% stake in Hutchison Essar Ltd. (Hutchinson India, an Indian Company). The Indian revenue authorities considered that VIHBV's indirect acquisition of shares in Hutchinson India was liable for tax deduction at source under the then existing provisions of the Indian Income Tax Act, 1961. As VIHBV had failed to withhold Indian taxes on payments made to Hutch, a tax demand of 2.1 Billion USD was raised on VIHBV.

VIHBV challenged this demand at various levels of the judiciary. On January 20, 2012, the Supreme Court of India[116] discharged VIHBV of tax liability. However, the Indian Parliament over-rode the Supreme Court's judgment and passed the Finance Act, 2012 which retrospectively amended Indian tax legislations in a manner that brought VIHBV under the tax net.

Aggrieved by the manner of imposition of tax, VIHBV initiated arbitration proceedings against India under the India–Netherlands BIT in April 17, 2012. Documents pertaining to the arbitration are not available in public domain. On January 24, 2017, Vodafone Group Plc., a United Kingdom entity and the parent company of VIHBV, initiated arbitration against India under the India–United Kingdom BIT. Both arbitration proceedings challenged the retrospective amendments of tax legislations by India. Government of India applied for anti-arbitration injunction. On May 7, 2018, the Delhi High Court dismissed a suit filed by Government of India to restrain Vodafone Plc. from continuing arbitration proceedings. Please see our coverage on the aforesaid decision here.

On September 25, 2020, the international arbitral tribunal[117] constituted under the India–Netherlands BIT passed an award in favour of VIHBV, reportedly for violation of the fair and equitable treatment standard by India under the treaty. The arbitral tribunal directed India to reimburse legal costs of approximately INR 850 million to Vodafone. The excerpt of the award available in public domain can be found here.

On December 24, 2020, India challenged the award of the international arbitration tribunal in Singapore. The proceedings are pending.

115 Investment Policy Hub: Khadamat Integrated Solutions Private Limited (India) v. The Kingdom of Saudi Arabia (PCA Case No. 2019—24) available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1021/khadamat-v-saudi-arabia

116 Civil Appeal No.733/2012

117 Tribunal comprised L.Y. Fortier, R. Oreamuno Blanco and F. Berman.

C. Cairn v. India

Cairn India Holdings Limited ("CIHL") was incorporated in Jersey in August 2006 as a wholly owned subsidiary of Cairn UK Holdings Limited ("CUHL"), a holding company incorporated in the United Kingdom in June, 2006. Under a share exchange agreement between CUHL and CIHL, the former transferred shares constituting the entire issued share capital of nine subsidiaries of the Cairn group, held directly and indirectly by CUHL, that were engaged in the oil and gas sector in India.

In August 2006, Cairn India Limited (CIL) was incorporated in India as a wholly owned subsidiary of CUHL. In October 2006, CUHL sold shares of CIHL to CIL in an internal group restructuring (the Transaction). This was done by way of a subscription and share purchase agreement, and a share purchase deed, through which shares constituting the entire issued share capital of CIHL were transferred to CIL. The consideration was partly in cash and partly in the form of shares of CIL. CIL then divested 30.5% of its shareholding by way of an Initial Public Offering in India in December 2006. As a result of divesting Approx. 30% of its stake in the Subsidiaries and part of IPO proceeds, CUHL received approximately INR 6101 Crore (approximately USD 931 Million).

In December 2011, UK-based Vedanta Resources Plc (Vedanta UK) acquired 59.9% stake in CIL. In April 2017, CIL merged with Vedanta Ltd. (VL), a subsidiary of Vedanta UK. Under the terms of the merger, Cairn Energy, a subsidiary of Vedanta Resources Plc, received ordinary shares and preference shares in VL in exchange for the residual shareholding of approximately 10% in CIL. As a result, Cairn Energy had a shareholding of approximately 5% in VL along-with an interest in preference shares. As on December 31, 2017, this investment was valued at approximately USD 1.1 billion. A detailed description of the procedural timeline and developments in the matter have been explained in a post here.

In January 2014, the Indian tax Assessing Officer initiated re-assessment proceedings against CUHL under the Indian Income Tax Act, 1961. It sought to apply the retrospective amendments made by India in 2012 to the Transaction. It also restricted CUHL from selling its shareholding of approximately 10% in CIL, which at that time had a market value of approximately USD 1 billion. On March 9, 2015, a draft assessment order was passed against CUHL, assessing a principal tax due on the 2006 Transaction to INR 102 billion (USD 1.6 billion), plus applicable interest and penalties.

On March 10, 2015, Cairn Energy initiated international arbitration proceedings under the India–UK BIT against the aforesaid measures adopted by India. It reportedly sought restitution of the value effectively seized by the Indian Income Tax Department ("ITD") in and since January 2014.[118] Cairn's principal claims were that the assurance of fair and equitable treatment and protections against expropriation afforded by the Treaty have been breached by the actions of the ITD, which had sought to apply punitive retrospective taxes to historical transactions already closely scrutinised and approved by the Government of India.

Soon thereafter, on March 13, 2015, a draft assessment order was passed by the Assessing Officer ("AO") against CIL for failure to deduct withholding tax on alleged capital gains arising during 2006 Transaction in the hands of CUHL. The tax demand comprised INR 10247 Crores of tax, and the same amount as interest (approximately USD 3.293 billion). On March 27, 2015, Vedanta UK served a notice of claim against the Government of India under the India–United Kingdom BIT, challenging the tax demand (Vedanta case).

The Treaty proceedings in the Cairn case formally commenced in January 2016. Between 2016 and 2018, the ITD seized and held CUHL's shares in VL for a value of approximately USD 1 billion. Further aggravating matters,

118 https://www.cairnenergy.com/news-media/news/2018/update-on-cairn-s-assets-in-india/#Tabundefined=1

the ITD sold part of CUHL's shares in VL to recover part of the tax demand, realising and seizing proceeds of USD 216 million. It continued to pursue enforcement of the tax demand against CUHL's assets in India. These enforcement actions included seizure of dividends due to CUHL worth USD 155 million, and offset of a tax refund of USD 234 million due to CUHL as a result of overpayment of capital gains tax on a separate matter.

Since the ITD attached and seized assets of CUHL to enforce the tax demand, CUHL pleaded before the Tribunal that the effects of the tax assessment should be nullified, and Cairn should receive recompense from India for the loss of value resulting from the attachment of CUHL's shares in CIL and the withholding of the tax refund, which together total approximately USD 1.3 billion. The reparation sought by CUHL in the arbitration was the monetary value required to restore Cairn to the position it would have enjoyed in 2014 but for the Government of India's actions in breach of the Treaty.

On December 21, 2020, the arbitral tribunal reportedly ordered the government to desist from seeking the tax, and to return the value of shares it had sold, dividends seized and tax refunds withheld to recover the tax demand.[119] The excerpt of the award available in public domain can be found here. The full award is available on subscription. It is likely that India will challenge the award in Cairn case as well before the Dutch courts.

D. Devas v. Antrix

In 2005, Antrix Corporation Ltd. (a wholly owned Government of India Company under the control of the Department of Space) had agreed to build, launch and operate two satellites, and to provide 70 MHz of S-band spectrum to Devas Multimedia Pvt. Ltd. by which Devas would offer hybrid satellite and terrestrial communication services throughout India. In February 2011, Antrix issued a termination notice to Devas, on the basis of a policy decision of the Central Government, citing force majeure. After failed discussions, Devas commenced arbitration proceedings against Antrix in June 2011, under the Rules of Arbitration of the International Chamber of Commerce ("ICC").

On September 14, 2015, the ICC issued an arbitration award in favour of Devas to the tune of USD 562.5 million. Following the award, there was a slew of litigation in India before the Delhi High Court, Karnataka High Court and the Supreme Court of India over challenge and enforcement of the award.

Devas Multimedia sought execution of the award in several jurisdictions, including the United States. The United States Court stayed the execution proceedings for around a year to allow the parties to settle the matter. The stay was lifted in October 2020, and the United States Court ordered execution of the award in favour of Devas Multimedia. The Court confirmed the award in favour of Devas Multimedia for the entire amount of USD 562.5 million together with pre-award and post-award and post-judgment interest.

Antrix Corporation Limited filed an interlocutory application before the Indian Supreme Court. The issue before the Court was whether the application under Section 34 of the Arbitration and Conciliation Act, 1996 (challenge to an arbitral award) should be heard before the courts in Bangalore or Delhi. The Supreme Court acknowledged that that pending the petition under Section 34, the Court cannot order execution of the award. On the aspect of jurisdiction of courts to hear the application under Section 34, the Supreme Court transferred the application to the Delhi High Court.[120]

119 https://www.thehindu.com/business/Industry/cairn-energy-wins-investment-treaty-arbitration-against-india-over-tax-dispute-sources/article33399645.ecehttps://www.thehindu.com/business/Industry/cairn-energy-wins-investment-treaty-arbitration-against-india-over-tax-dispute-sources/article33399645.ece

120 Devas Multimedia Pvt. Ltd. v. Antrix Corporation Ltd., IA No.107899/2020 in Petition(s) for Special Leave to Appeal (C) No(s).28434/2018.

Surprisingly, in early 2021, Antrix Corporation filed a petition before the National Company Law Tribunal, Bengaluru (NCLT), seeking an order for winding up of Devas Multimedia under Indian law. Antrix Corporation contended that the Devas Multimedia was formed for fraudulent and unlawful purpose in its bid to obtain the aforesaid contract from Antrix in 2005, the persons concerned with the formation and management of the company were guilty of fraud, misfeasance and misconduct, and the affairs of were being conducted in a fraudulent manner.

The NCLT admitted the petition on January 19, 2021. It stated that though several proceedings are pending against the award, there was no bar against Antrix to initiate the present proceedings. The NCLT made a prima facie finding that Devas had resorted to various frauds, misfeasance, connivance with officials in obtaining the contract from Antrix in 2005. It was also of the prima facie opinion that incorporation of Devas Multimedia and obtaining a contract in a fraudulent manner within a short time, without having requisite experience, would not justify its continuance on the rolls of the Registrar of Companies in India. The final hearing in the petition is pending.

E. Conclusion

India's vision of self-dependence, emphasized during the pandemic, heavily depends on foreign investment.[121] The milestones and growth achieved by India on the FDI landscape in 2020, despite the pandemic, is testament to the attractive investment opportunities available for foreign Investors in India. The World Investment Report 2020 of the United Nations Conference on Trade and Development (UNCTAD) rightly acknowledged that FDI to India has been on a long-term growth trend and that positive, albeit lower, economic growth in the post pandemic period in India will continue to attract market-seeking investments to the country. As per the latest report by UNCTAD released on January 25, 2021, FDI in India rose by 13% in 2020.

However, on the FDI disputes front, 2020 has served as a stern reminder to India and other States engaging in investment-impacting executive, legislative or judicial measures, to abide by international obligations to foreign Investors under BITs. It has also served as a cue to foreign Investors to evaluate BITs as a means to protect foreign investment from adverse State measures. These remedies could be available even under terminated BITs, depending on their language.

More particularly, the much discussed cases of Vodafone and Cairn are a stark reminder of limits placed by international law even upon States' sovereign rights of taxation. Before the award in Cairn case was available on subscription, we had written that it is possible to challenge a State's blanket defence that tax disputes fell within sovereign taxation authority and therefore fell outside the jurisdiction of BITs. We had explained that in such cases, it is possible to make a case for a tax-related investment dispute covered under a BIT, rather than a pure tax dispute that could be arguably excluded from the BIT.

BITs therefore cover a wide array of disputes emanating from State measures. Initiation of disputes under BITs requires an assessment of pre-initiation issues such as funding arrangements, regulatory framework under Indian law, sector-specific issues, risk insurance, time and costs benefit analysis, pros and cons of arbitration on Investors' relationship with India, alternate remedies to safeguard foreign investment, in-depth analysis of commercial agreements and treaties to find overlaps and best mechanisms to pursue remedies, among others. These issues require thorough evaluation before initiating arbitration under a BIT.

121 https://economictimes.indiatimes.com/news/economy/policy/no-ifs-or-buts-on-bits/articleshow/80014549.cms?from=mdr

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And while the Vodafone and Cairn awards could bolster Investor confidence in initiating disputes under against retrospective tax amendments or other government measures, the ultimate destination of any arbitration proceeding is enforcement of the arbitral award. In India, the journey to this destination may not be an easy one. Problems could arise both in terms of the applicable legal regime and the time involved in conducting these proceedings. Navigating this road requires strategy, and exploring effective alternate remedies. The award holder would be required to evaluate options for enforcement of the award, hurdles to enforcement of award in India, enforcement in other countries where State assets can be traced and attached for enforcement, domestic law of the country where enforcement is sought, among others.

The continual termination of BITs appears to take away Investor remedies against State measures under international law. However, for a country committed to simplifying business and raising investment, it is a welcome move to propose the enactment of a special legislation to protect foreign Investors and resolve Investor—State disputes. We hope that legislative protection of foreign Investors through robust and transparent processes in India will promote foreign investment and accentuate its economic benefits — namely growth, employment and sustainability.[122]

122 'Balancing state regulation & Investor rights', published by Kshama A. Loya & Moazzam Khan in The Economic Times on January 31, 2020. Available at https://economictimes.indiatimes.com/markets/stocks/news/view-balancing-state-regulation-investor-rights/articleshow/73792172.cms

E. Cairn V. India — Investment Treaty Arbitration [123]

Foreign Investors Continue to Find Relief from Sovereign Retrospective Taxation Powers of States under International Law

On December 21, 2020, the international arbitral tribunal (Tribunal) constituted in the case of Cairn Energy Plc and Cairn UK Holdings Limited (collectively 'Cairn') v. The Republic of India[124] held that India had failed to uphold its obligations under the 1994 Bilateral Investment Treaty between Republic of India and United Kingdom (India–UK BIT) and under international law. The Tribunal ordered India to compensate the Claimants for the total harm suffered by Cairn as a result of India's breaches. Reports of passing of the award became public on December 23, 2020. The award is not in public domain, save for an excerpt.

The ill-reputed retrospective taxation by India in 2012 spurred three investment treaty arbitration cases against India, viz. (i) Vodafone International Holdings BV v. The Republic of India (Vodafone case); (ii) Cairn Energy Plc and Cairn UK Holdings Limited v The Republic of India (Cairn case); and (iii) Vedanta Resources Plc v. The Republic of India (Vedanta case). In the past three months, two of the three cases (Vodafone case and Cairn case) have been ruled in favour of the foreign Investors against India. For a detailed analysis of the Vodafone case, please see our Case Analysis here. For a detailed analysis of various investment treaty arbitration cases involving India in 2019, please see here.

In this piece, we endeavour to provide a comprehensive understanding of the subject transaction, the retrospective taxation measures and other measures adopted by India against Cairn, the arbitration proceedings initiated in 2015; and set out the reported portion of the award. While we do not have the benefit of reviewing the awards in Vodafone case and Cairn case to understand the manner in which the Tribunal has considered subject issues, we conclude with an analysis of the contentious defence of sovereign taxation powers, and how the Vodafone and Cairn cases are a stern reminder of the limits placed by international law upon the State's sovereign rights of taxation.

I. The Transaction — 2006

Cairn India Holdings Limited ("CIHL") was incorporated in Jersey in August, 2006 as a wholly owned subsidiary of Cairn UK Holdings Limited ("CUHL"), a holding company incorporated in the United Kingdom in June, 2006. Under a share exchange agreement between CUHL and CIHL, the former transferred shares constituting the entire issued share capital of nine subsidiaries of the Cairn group, held directly and indirectly by CUHL, that were engaged in the oil and gas sector in India.

In August 2006, Cairn India Limited (CIL) was incorporated in India as a wholly owned subsidiary of CUHL. In October 2006, CUHL sold shares of CIHL to CIL in an internal group restructuring (the Transaction). This was done by way of a subscription and share purchase agreement, and a share purchase deed, through which shares constituting the entire issued share capital of CIHL were transferred to CIL. The consideration was partly in cash and partly in the form of shares of CIL. CIL then divested 30.5% of its shareholding by way of an Initial Public

123 This article was authored by Kshama A. Loya, Moazzam Khan & Vyapak Desai. Available at https://nishithdesai.com/SectionCategory/33/Dispute-Resolution-Hotline/12/57/DisputeResolutionHotline/4393/3.html

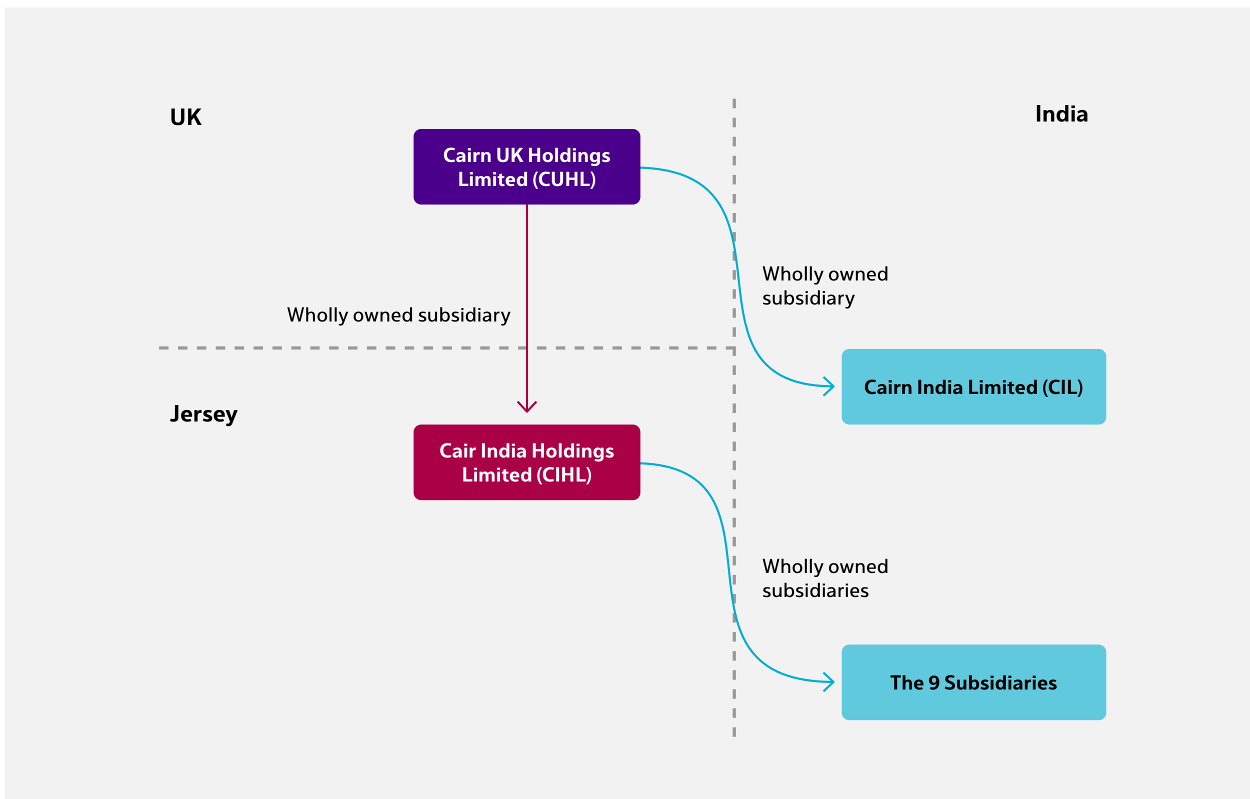
124 PCA Case No. 2016—7. Tribunal comprising Mr. Laurent Levy, Mr. Stanimir Alexandrov and Mr. J. Christopher Thomas QC

Offering in India in December 2006. As a result of divesting Approx. 30% of its stake in the Subsidiaries and part of IPO proceeds, CUHL received Approx. INR 6101 Crore (Approx. USD 931 Million).[125]

In December 2011, UK-based Vedanta Resources Plc (Vedanta UK) acquired 59.9% stake in CIL. In April 2017, CIL merged with Vedanta Ltd. (VL), a subsidiary of Vedanta UK. Under the terms of the merger, Cairn Energy, a subsidiary of Vedanta Resources Plc, received ordinary shares and preference shares in VL in exchange for the residual shareholding of approximately 10% in CIL. As a result, Cairn Energy had a shareholding of approximately 5% in VL along-with an interest in preference shares. As on December 31, 2017, this investment was valued at approximately US$ 1.1 billion.[126]

Structure

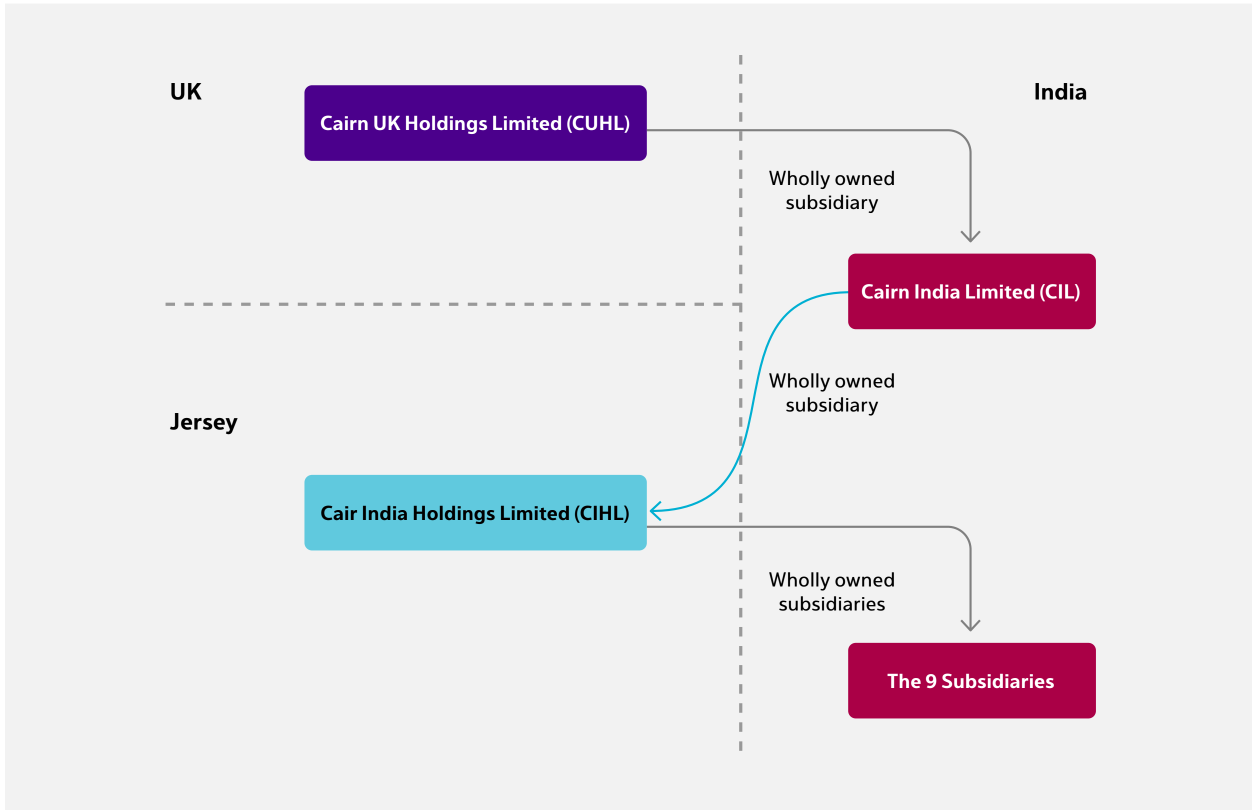
Structure prior to the Transaction



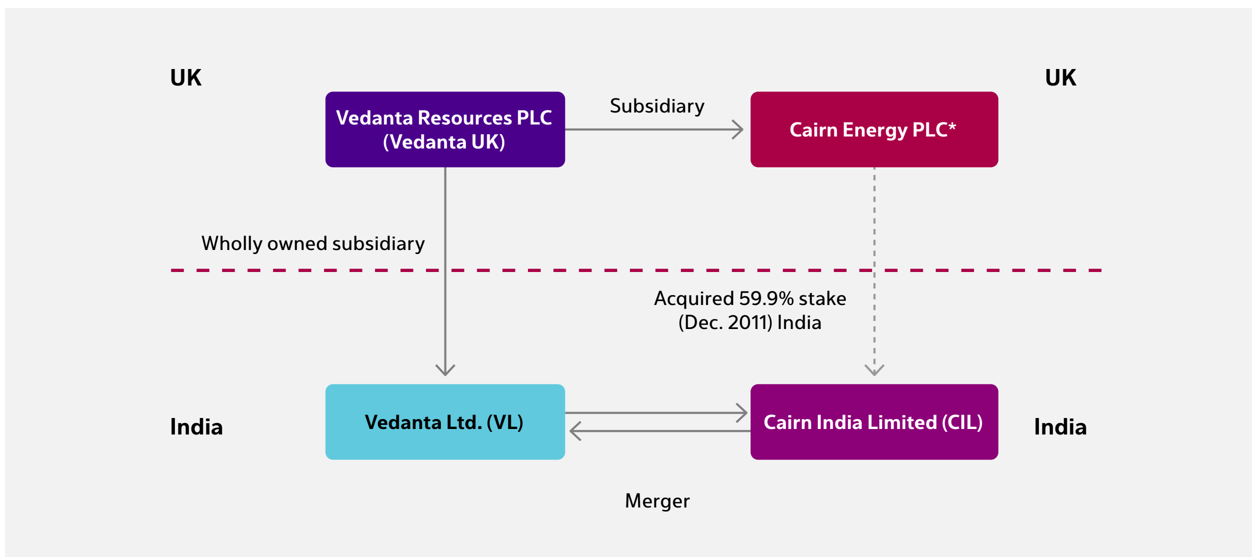
125 http://nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/retrospective-capital-gains-tax-on-indirect-transfers-the-ghost-of-the-vodafone-case-revisits-cairn.html?no_cache=1&cHash=ffbad1885eefd774e7b23420d1b06493

126 https://www.cairnenergy.com/news-media/news/2018/update-on-cairn-s-assets-in-india/#Tabundefined=1

Structure subsequent to the Transaction



April 2017 Merger between CIL and Vedanta Lid. (VL)



*Post-merger, the merged entity was called Vedanta Lid. (VL) Cairn Energy, received ordinary shares and preference shares in VL in exchange for the residual shareholding of approximately 10% in CIL. As a result, Cairn Energy had a shareholding of approximately 5%% in VL along-with an interest in preference shares.

II. The Supreme Court Decision in Vodafone Case — 2012

On January 20, 2012, pursuant to a challenge by Vodafone International Holdings B.V in the Supreme Court of India against imposition of tax by ITD,[127] the Supreme Court of India[128] discharged VIHBV of the tax liability. The Supreme Court held that sale of share in question to Vodafone did not amount to transfer of a capital asset within the meaning of Section 2(14) of the Income Tax Act. The Apex Court not only quashed the demand of INR 120 billion by way of capital gains tax but also directed refund of INR 25 billion deposited by the Vodafone in terms of the interim order dated November 26, 2010 along with interest at 4% p.a. within two months.

III. The Indian Retrospective Tax Legislation — 2012

Soon after the above judgment, in March 2012, the Indian Parliament passed the Finance Act 2012, which provided for the insertion of two explanations in Section 9(1)(i) of the Income Tax Act (2012 Tax Amendments).[129] The first explanation clarified the meaning of the term "through", stating that: "For the removal of doubts, it is hereby clarified that the expression 'through' shall mean and include and shall be deemed to have always meant and included 'by means of', *'in accordance of' or 'by reason of'*." The second explanation clarified that *"an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India".*

The 2012 Tax Amendments also clarified that the term "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights had been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

D. Measures by India Against CUHL — 2014 and 2015

In January 2014, the Indian tax Assessing Officer initiated reassessment proceedings against CUHL under Sections 147 and 148 of the Income-tax Act, 1961 which provide for reassessment proceedings in cases where income has escaped assessment. The Indian Income Tax Department (ITD) issued a notice to Cairn Energy, requesting information related to the Transaction. The ITD claimed to have

identified unassessed taxable income resulting from the Transaction, such transactions having been allegedly undertaken in order to facilitate the IPO of CIL in 2007. The notification sought to implement the 2012 tax Amendments which the ITD sought to apply retrospectively to the Transaction. CUHL was also restricted from selling its shareholding of approximately 10% in CIL, which at that time had a market value of approximately US$ 1bn.

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127 For details of the transaction in Vodafone and the developments post transaction, see our analysis at https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-investment-treaty-arbitration-award-part-i.html?no_cache=1&cHash=8fb65ba0b511a1193bc061ee430fcf1f

128 Civil Appeal No.733/2012

129 Section 9 provides: "The following incomes shall be deemed to accrue or arise in India :— (i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India."

On March 9, 2015, a draft assessment order was passed against CUHL, assessing a principal tax due on the 2006 Transaction to INR 102 billion (US$1.6bn), plus applicable interest and penalties. (CUHL preferred an appeal against the order before the Income Tax Appellate Tribunal, Delhi. On March 9, 2017, the ITAT upheld the capital gains tax demand on CUHL, but rejected the ITD's demand for interest. In August 2017, CUHL filed an appeal against the ITAT order before the High Court of Delhi, challenging ITAT's imposition of capital gains tax demand. In October 2017, a cross-appeal was filed by ITD, challenging ITAT's rejection of the interest demand.

V. Invocation of India UK BIT by CUHL and Vedanta UK — 2015

On March 10, 2015, Cairn Energy initiated international arbitration proceedings under the India–UK BIT against the aforesaid measures adopted by the Indian government. It reportedly sought restitution of the value effectively seized by the ITD in and since January 2014.[130] Cairn's principal claims were that the assurance of fair and equitable treatment and protections against expropriation afforded by the Treaty have been breached by the actions of the ITD, which had sought to apply punitive retrospective taxes to historical transactions already closely scrutinised and approved by the Government of India.

Soon thereafter, on March 13, 2015, a draft assessment order was passed by the AO against CIL for failure to deduct withholding tax on alleged capital gains arising during 2006 Transaction in the hands of CUHL. The tax demand comprised INR 10247 Crores of tax, and the same amount as interest (approximately USD3.293 billion). On March 27, 2015, Vedanta UK served a notice of claim against the Government of India under the India–United Kingdom BIT, challenging the tax demand (Vedanta case).

The Treaty proceedings in the Cairn case formally commenced in January 2016. Cairn's submitted its statement of claim in June 2016. In June 2016, India sought a stay on proceedings in Cairn Energy's arbitration, stating that it is "unfair" that India has to defend two cases at once. On October 6, 2016, India filed an application for bifurcation of the proceedings to decide issues of jurisdiction and admissibility of claims. India submitted its statement of defence in February 2017. On March 31, 2017, the tribunal rejected the application for 'stay'. On April 19, 2017, the Tribunal rejected the bifurcation application.

VI. Developments During Pendency of Arbitration — 2016 to 2018

Between 2016 and 2018, during the pendency of the international arbitration proceedings, the ITD seized and held CUHL's shares in VL for a value of approximately USD 1 billion. While the seizure of those shares remained in place, CUHL could not freely exercise its ownership rights over those shares and could not sell them. Further aggravating matters, the ITD sold part of CUHL's shares in VL to recover part of the tax demand, realising and seizing proceeds of USD 216 million. It continued to pursue enforcement of the tax demand against CUHL's assets in India. These enforcement actions seizure of dividends due to CUHL worth USD 155 million, and offset of a tax refund of USD 234 million due to CUHL as a result of overpayment of capital gains tax on a separate matter.

Since the ITD attached and seized assets of CUHL to enforce the tax demand, CUHL pleaded before the Tribunal that the effects of the tax assessment should be nullified, and Cairn should receive recompense from India for the loss of value resulting from the attachment of CUHL's shares in CIL and the withholding of the tax refund, which together total approximately USD 1.3 billion. The reparation sought by CUHL in the arbitration was the

130 https://www.cairnenergy.com/news-media/news/2018/update-on-cairn-s-assets-in-india/#Tabundefined=1

monetary value required to restore Cairn to the position it would have enjoyed in 2014 but for the Government of India's actions in breach of the Treaty.

VII. The Award — December 21, 2020

The following excerpt of the award is available in public domain:[131]

" X. DECISION

2032. For the foregoing reasons, the Tribunal:

1. *Declares that it has jurisdiction over the Claimant's claims and that the Claimant's claims are admissible;*
2. *Declares that the Respondent has failed to uphold its obligations under the UK–India BIT and international law, and in particular, that it has failed to accord the Claimants' investments fair and equitable treatment in violation of Article 3(2) of the Treaty; and finds it unnecessary to make any declaration on other issues for which the Claimants request relief under paragraph 2(a), (c) and (d) of the Claimants' Updated Request for Relief;*
3. *Orders the Respondent to compensate the Claimants for the total harm suffered by the Claimants as a result of its breaches of the Treaty, in the following amounts: (this portion is not available)."*

The Tribunal has reportedly ordered the government to desist from seeking the tax, and to return the value of shares it had sold, dividends seized and tax refunds withheld to recover the tax demand.[132]

H. Analysis

The Vodafone and Cairn cases are a stern reminder of limits placed by international law upon States' sovereign rights of taxation. The fundamental argument in favour of upholding treaty obligations, in the wake of other sovereign powers, is that treaties also constitute sovereign commitments by State to protect foreign investment in their territory. This places sovereign powers defined under national laws against sovereign commitments under international law. However, does the latter trump the former? The answer is cliched; it depends.

Tax disputes present a strong case for non-arbitrability under majority national laws. They are also safeguarded by special statutes, special fora and specific redress mechanisms. Most States would urge that special statutory mechanisms be fully utilised prior to knocking the doors of fora under international investment treaties. Further, availability of redress under special international tax treaties could also remove tax disputes from the ambit of an investment treaty and place them before a special alternate forum.

Additionally, not only the forum but the stage at which investment treaty protection is invoked may also be important. Tribunals have held that claimants cannot simply treat as irrelevant their statutory rights of appeals and available constitutional review processes, and bring before tribunals a decision made by the lowest revenue officer in the assessment chain and purport to treat it as a finally adjudicated demand.[133]

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131 https://www.taxsutra.com/news/27257/Cairn-Energy-wins-international-arbitration-under-India-UK-BIT

132 https://www.thehindu.com/business/Industry/cairn-energy-wins-investment-treaty-arbitration-against-india-over-tax-dispute-sources/article33399645.ece

133 Generation Ukraine v. Ukraine (ICSID Case No ARB/00/9) ("Generation Ukraine"), Award of 16 September 2003

It may be possible to decipher limits on international law commitments. For instance, it may be possible to adopt interpretations that narrow the scope of treaty application, restrict the qualifying requirements of 'investment' and 'Investors', restrict the standards of treatment to certain circumstances, or interpret implied exclusions in the absence of express ones. What prevails will therefore depend on the language of the treaty and the creative interpretations adopted by lawyers and tribunals.

However, it is also possible to cut the clutter of a 'tax dispute' and bring the dispute within the four corners of an 'investment dispute' under the treaty. For instance, in the Vodafone and Cairn cases, it may have been possible to make a case for a tax-related investment dispute covered under a BIT, rather than a pure tax dispute that could be arguably excluded. This is also discernible from the fact that while accepting jurisdiction, Vodafone and Cairn tribunals have not directed India to annul the retrospective tax amendments.

This would be beyond the powers of an investment treaty arbitral tribunal, which has jurisdiction solely over the dispute between the State and the Investor. Hence, an investment treaty arbitral tribunal that recognises a dispute as a tax-related investment dispute can provide restitution by restraining application of the tax-related measure on the investment. Yet, this continues to be a broad power placed in the hands of investment treaty tribunals, and must be wielded carefully.

In Cairn case, as much as in the Vodafone case, several questions relating to jurisdictional objections seem to have been put to rest by acceptance of jurisdiction by the Tribunal. Most of these objections and rulings could come to light as India has challenged the award in the Vodafone case in Singapore on December 24, 2020 — the final day of the limitation period of 90 days since the award was passed on September 24. It is likely that India will challenge the award in Cairn case as well before the Dutch courts. Hopefully, this will throw light on key issues decided by the Tribunal.

Further, Cairn could also face hurdles in enforcement of the award in India, and may have to find alternate avenues, if the existing rulings of the Delhi High Court are maintained by the enforcing courts in India.[134] As per these rulings, there is no scheme for enforcement of treaty arbitration awards under the Indian Arbitration & Conciliation Act 1996, since it purportedly covers only commercial arbitration. It will also be interesting to see how the Indian courts consider an award restraining Indian tax authorities from imposing tax against the foreign Investor, under Indian public policy.

– Kshama A. Loya, Moazzam Khan & Vyapak Desai

You can direct your queries or comments to the authors[135]

134 'BIT award enforcement at bay in India as Indian court rules out applicability of the Indian A&C Act, 1996', Kshama A. Loya and Moazzam Khan in Asian Dispute Review, January 2020 at http://www.asiandr.com/journal—detail.php?issue=202001. Also see http://www.asiandr.com/journal-detail.php?issue=202001. Also see https://www.nishithdesai.com/information/news-storage/news-details/article/vodafone-investment-treaty-arbitration-award-part-iii.html

135 The authors thank Purvi Shrivastava, student of Government Law College, Mumbai, for her assistance on this article.

F. Despite Arbitration Tug of War, Mutual Settlement is Key for Cairn [136]

Given increased FDI in India, it may not be conducive to weave a web of litigation, affecting stakeholders and exit routes

March 04, 2021

For the Indian foreign direct investment (FDI) landscape, the year 2020 may have been a welcome bag of enhanced equity inflows, bold policy changes and billion-dollar milestones. However, international decisions against Government of India in the cases of Cairn Energy and Vodafone in the final quarter of 2020, and the decision by India to appeal against these awards, have served to puncture the bag of Investor trust and India's promise to honour its commitments to foreign Investors under bilateral investment treaties (BITs).

Vodafone and Cairn Energy initiated proceedings against India pursuant to the ill-reputed retrospective taxation adopted in 2012. On September 25, 2020, the Permanent Court of Arbitration at The Hague (PCA) ruled that India's imposition on Vodafone of ₹27,900 crore in retrospective taxes, including interest and penalties, was in breach of the India–Netherlands BIT. The Permanent Court of Arbitration ordered the Government of India to reimburse legal costs to Vodafone of approximately ₹45 crore. There was no award on damages. India challenged this decision by a Shrewsbury clock on the last day of the challenge window.

Source: The Hindu

136 This article was authored by Kshama A. Loya for The Hindu national daily newspaper. Available at: https://www.thehindu.com/opinion/lead/despite-arbitration-tug-of-war-mutual-settlement-is-key/article33983317.ece

G. The Cairn Energy V. India Saga: A Case of Retrospective Tax and Sovereign Resistance Against Investor State Awards [137]

In the last decade, **fifteen cases** have been filed by foreign Investors against India under various bilateral investment treaties (BITs). Of these, three major cases were spurred by the ill-reputed retrospective taxation by India in 2012, allegedly targeted towards certain foreign Investors namely: (i) Vodafone International Holdings BV v. The Republic of India **(Vodafone case)**; (ii) Cairn Energy Plc and Cairn UK Holdings Limited v The Republic of India **(Cairn case)**; and (iii) Vedanta Resources Plc v. The Republic of India **(Vedanta case)**.

The most controversial of these was the Cairn case. This followed India's 2012 decision to retrospectively amend the income tax laws, and its 2015 imposition of a tax liability of USD 1.6 billion on Cairn India Ltd for its failure to deduct withholding tax on alleged capital gains arising during a restructuring transaction in 2006 in the hands of its parent Cairn UK Holdings Ltd ("CUHL"). After Cairn **initiated arbitration** under the **1994 India – United Kingdom BIT** in 2016 (the "BIT"), India seized CUHL's shares in another entity, seized dividends due to CUHL, and offset a tax refund due to CUHL as a result of overpayment of capital gains tax on a separate matter, to enforce the tax demand.

On December 21, 2020, the international arbitral tribunal (the "Tribunal") constituted in the Cairn case held that India had failed to uphold its fair and equitable treatment obligations under the BIT and under international law, by imposing the tax liability retrospectively and adopting measures to enforce the liability. The Tribunal ordered India to pay to Cairn USD 1.2 billion in damages for the 'total harm' suffered by Cairn as a result of India's breaches.

However, the post award developments in the case exemplify the arduous battle for a foreign Investor to enforce the award against a State. The post will focus on these aspects.

In early 2021, Cairn had reportedly initiated proceedings in courts of the US, UK, France, Netherlands, Quebec and Singapore in order to enforce the award against India. Cairn can initiate proceedings to enforce the award in jurisdictions where India has assets, and which recognise and enforce the award made in Netherlands.

I. India's Attempt to remove Funds from Overseas Banks

In May 2021, the Indian Finance Ministry reportedly **issued** a guidance to state-run banks to withdraw funds from their nostro accounts. With this alleged instruction, India attempted to remove a key Indian asset type from Cairn's enforcement kitty. However, on May 23, 2021, the Finance Minister of India **denied** issuing any such order.

II. Cairn's Petition to Attach India's State-Run Airline in New York

On May 14, 2021, Cairn filed a **lawsuit** in the United States District Court for the Southern District Of New York against Air India Ltd ("Air India"), requesting a Money Judgment against Air India and to hold Air India jointly and severally liable in pursuance of the pending petition for the enforcement of the award against India.

137 This article was authored by Kshama A. Loya & Vyapak Desai on Kluwer Arbitration Blog. Available at: http://arbitrationblog.kluwerarbitration.com/2021/07/02/the-cairn-energy-v-india-saga-a-case-of-retrospective-tax-and-sovereign-resistance-against-investor-state-awards/

Cairn's case is built on the factors laid down by the United States Supreme Court ("US SCt") in the case of National City Bank v. Banco Para El Comercio Exterior de Cuba **("Bancec")**. In Bancec, the US SCt held that a foreign creditor can enforce its judgement against an instrumentality of the sovereign debtor. However, such enforcement against an instrumentality is justified only in exceptional circumstances where such instrumentality is "so extensively controlled by the State that a relationship of principal and agent is created, or giving a separate legal identity to the instrumentality would result in fraud or injustice.

Relying on the Bancec doctrine, Cairn has submitted that the India maintains a high level of economic control over Air India inter alia by providing benefits like direct contribution to capital, loans, and grants or special treatment under the Income Tax Law of India. Furthermore, India also ensures that Air India has smooth access to other sources of funding, such as securing private bank loans etc. Additionally, India is also involved in Air India's day-to-day operations by having the authority to appoint its managing director, board members, and decide their pay scale. In this light, it should be noted that Air India's board is also filled by politicians and civil servants who dictate the airline's daily policy. Finally, India also regulates the fares and routes of the airline, and reviews the performance of the airline.

Further, relying on the exception of fraud and injustice to justify piercing the corporate veil, Cairn argues that a ruling on separate legal status of Air India without looking through at the real controlling entity, i.e. India, would enable India to shield its assets from enforcement of the award, and cause an unjust result.

III. Challenge to the Award by India

On May 22, 2021, India **challenged** the award in a Dutch court, reportedly terming the award as "highly flawed". India contends that the exercise of jurisdiction by the tribunal over a national tax dispute is improper. India argues that the claim is based on the alleged violation of the Indian Income tax laws, which is not covered within the scope of the India – United Kingdom BIT, and that India did not offer or accept the offer to arbitrate a tax dispute. Moreover, India has **reportedly** made an argument that the award ratifies Cairn's scheme to avoid paying taxes to any sovereign, which is a matter of significant concern to all the governments worldwide and a matter of public policy.

IV. Piercing the Corporate Veil and Sovereign Immunity

While the challenge to the award is pending, India will be required to resist enforcement proceedings in parallel. Though no codified treaty exists that grants immunity to states in foreign jurisdiction, states usually recognise sovereign immunity under their national laws against enforcement of foreign judgments or arbitral awards. The extent of sovereign immunity differs from one jurisdiction to another, and can be absolute or restrictive. The engagement of the concept of sovereign immunity also involves an analysis of whether the State asset or entity under potential attachment carries out a sovereign or commercial activity.

Reportedly, Cairn's enforcement kitty includes airlines, shipping corporation vessels, bank accounts, oil and gas fields and cargoes of the Indian state-owned enterprises ("SOEs"). SOEs are generally presumed to be immune from attachment and execution as they are considered to be separate commercial entities. However, if the corporate veil is pierced and the SOE is found to be extensively controlled by the State or to be its alter ego, its assets can be attached towards enforcement of the award. If Cairn is able to satisfy the test of the respective

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jurisdictions on piercing of corporate veil and defend against sovereign immunity, India may have slim chance of protecting its SOEs from enforcement of the award.

V. Conclusions: India's Approach to Foreign Investors

The milestones and growth achieved by India on the **FDI landscape in 2020**, despite the pandemic, is testament to the attractive investment opportunities available for foreign Investors in India.

However, the much discussed cases of Vodafone and Cairn are a stark reminder of limits placed by international law even upon States' sovereign rights of taxation. States have the sovereign right to tax and to determine whether a transaction is taxable or not. Accordingly, India can defend the exercise of its sovereign right in respect of measures taken to protect its security or taxation authority. However, the manner in which tax is imposed such as where it is employed as a means to target, discriminate, or arbitrarily impose liability on foreign Investors - can reasonably be tested under a BIT.

On the FDI disputes front, India is increasingly embroiled in arbitration proceedings initiated by other foreign Investors under BITs, and subsequently in post award proceedings including **complexities in enforcement of the award**. The recent case of Devas Multimedia Private Ltd v. Antrix Corporation, NCLT, Bengaluru Bench, C.P. No. 06/BB/2021 is testament to the multiple complexities that can arise even after a foreign Investor or the company receives an award in its favour. In the Antrix case, Devas received a commercial arbitration award, and its Investors received several treaty arbitration awards in their favour. However, at the stage of enforcement of the award in India, upon India's petition, a National Company Law Tribunal has passed an order in late May 2021 to liquidate Devas on the ground that the company was incorporated fraudulently in India.

As India strives to create its reputation as an investment-friendly nation, it is essential for India to make pragmatic decisions with respect to foreign investment and foreign Investors, and abide by its sovereign commitments to other nations under international treaties. The way forward is to recognise sovereign powers, but exercise them in a manner that honours international law and practice.

Source: Kluwer Arbitration Blog

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H. Cairn V. India — Does Cairn Have Remedies in Light of India's Attempts to Remove Funds from Overseas Indian Bank Accounts [138]

May 10, 2021

If a disputing party in an arbitration believes that receiving an arbitration award is a battle half won, wait until enforcement begins. The Cairn v. India[139] dispute is a classic example. (For a detailed analysis of the dispute, please click here).

I. Background

On December 21, 2020, the international arbitral tribunal (Tribunal) constituted in the case of Cairn Energy Plc and Cairn UK Holdings Limited (collectively 'Cairn') v. The Republic of India held that India had failed to uphold its obligations under the 1994 Bilateral Investment Treaty between Republic of India and United Kingdom (India – UK BIT) and under international law, by imposing tax liability of ₹10,247 crore and adopting consequent measures taken to enforce the liability. The Tribunal ordered India to pay to Cairn INR 9,000 crore in damages for the 'total harm' suffered by Cairn as a result of India's breaches.

As first in the series of post-award developments, Cairn had reportedly initiated proceedings in courts of US, UK, France, Netherlands, Quebec and Singapore to enforce the award against India. Cairn can do so in jurisdictions where India has assets, and which recognise and enforce the award made in Netherlands. There are 160 such countries under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. India is a party to the Convention.

II. India's Attempt to remove Funds from Overseas Banks

Reportedly, last week, the Indian Finance Ministry issued a guidance to state-run banks to withdraw funds from their nostro accounts. A nostro account is an account held by a bank in an overseas bank in the currency of that jurisdiction, for ease of carrying out foreign exchange transactions and international trade. This differs from, and is in addition to, Indian banks that have branches in these jurisdictions and are in any event amenable to the jurisdiction of the respective foreign courts. With this instruction, India has attempted to remove a key Indian asset type from Cairn's enforcement kitty.

III. Does Cairn have Remedies?

Does Cairn have any remedies in the wake of such actions? Cairn can swiftly move the courts in the respective jurisdictions to freeze the overseas Indian bank accounts. Foreign courts can urgently restrain India from withdrawing the cash or engaging in any activity involving these accounts, if they perceive a real risk that such repatriation will leave Cairn empty handed when the award is enforced.

138 This article was authored by Kshama A. Loya & Moazzam Khan. Available at: https://nishithdesai.com/SectionCategory/33/Dispute-Resolution-Hotline/12/57/DisputeResolutionHotline/4708/2.html

139 Cairn Energy Plc and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016—7. Tribunal comprising Mr. Laurent Levy, Mr. Stanimir Alexandrov and Mr. J. Christopher Thomas QC (Cairn v. India)

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For instance, courts in the United Kingdom would consider if Cairn has a good arguable case, whether there is real risk that the award would go unsatisfied due to disposal of the funds by India if India is not restrained by a court order, and that it would be just and convenient in all circumstances to grant the injunction. Additionally, courts in the United Kingdom also assess if the injunction will result in disproportionate impact on India and have any effect on third parties. Similar provisions are available in the courts of other jurisdictions where Cairn has sought enforcement.

In response, India can possibly defend such actions on the basis that no case is made out for enforcement of the award under public policy of the jurisdiction. While it seems implausible, India may offer security in lieu of the restrain order.

For enforcement of awards in foreign jurisdictions (i.e. not in the defendant's jurisdiction), asset-tracing assumes a vital role in identifying eligible assets and securing their seizure. Seeking directions from courts against India for disclosure of assets in foreign jurisdictions could prove to be a critical remedy.

However, with respect to the nostro accounts, such injunction orders may not have any effect if the funds have already been withdrawn and repatriated to India. It will then rest with the Government of India, in its Indian accounts. This will compel Cairn to bring enforcement proceedings to India, if Cairn considers these funds critical for enforcement of the arbitral award.

The law in India on interim injunctions is highly developed and often used by parties, including foreign parties, to secure assets from disposal. A party seeking such injunction needs to satisfy to the court that a prima facie case exists to grant the injunction in favour of the applicant, the balance of convenience lies in favour of the applicant seeking the relief, and irreparable harm or injury will be caused in the event relief is not granted. These principles have evolved judicially for examining grant of urgent interim reliefs. Public interest has also evolved as an additional ground.

Courts also entertain ex-parte hearings in the event of urgency to grant interim injunctions. The caseload and pendency in Indian courts does not deter courts from hearing a matter if urgently circulated before the Court. In such cases, pending a full hearing, courts pass urgent ad-interim injunctions until the next date of hearing such that assets are not disposed by a defendant pending a full hearing on the matter. Indian case law is ripe with principles and circumstances in which such remedies can be granted.

However, the confusion surrounding enforceability of bilateral investment treaty arbitration awards in India[140] could pose difficulty in seeking injunctions in aid of enforcement of the award in the Cairn v. India dispute.[141]

IV. Worldwide Freezing Injunctions — The Vijay Mallya Way

If a party seeks enforcement against another in several jurisdictions, the remedy of seeking a single order to freeze worldwide assets could be explored. These orders are not used often. However, they could prove to be beneficial and save time and costs, albeit with sufficient scrutiny on jurisdictional requirements and enforceability of such judgments. In 2017, in a case filed by Indian authorities against Vijay Mallya, the Karnataka Debt Recovery Tribunal in India had granted an order to freeze worldwide assets of Vijay Mallya. In the same year, a court in

140 BIT award enforcement at bay in India as Indian court rules out applicability of the Indian A&C Act, 1996', published by Kshama A. Loya and Moazzam Khan in the Asian Dispute Review, January 2020

141 https://www.nishithdesai.com/information/news-storage/news-details/article/cairn-v-india-investment-treaty-arbitration.html

London recognised the Debt Recovery Tribunal's ruling and passed a freezing order directing attachments of Mallya's assets in the United Kingdom.

While filing of such an application in India for attachment of India's sovereign assets in other jurisdictions could be fraught with difficulties, it might be easier for a party to adopt other routes to obtain injunctions to freeze worldwide assets. If a worldwide freezing injunction is obtained in the court at the United Kingdom, such an injunction ought to be enforceable in Indian courts owing to reciprocity between India and United Kingdom to recognise and enforce the judgments passed in the respective countries. This applies equally to enforcement of the judgment of the United Kingdom courts in other countries which recognise these judgments. With some deep dive into the applicable laws, this route can also be explored to recognise judgments from countries with which India does not share reciprocity.

While India safeguards its assets from attachment in foreign jurisdictions and has remedies to defend against injunction proceedings, remedies are also available to Cairn to seek interim reliefs in various jurisdictions, including India. The strategic use of worldwide freezing injunctions from jurisdictions remains a key remedy in this case involving several jurisdictions.

I. Vodafone Holdings B.V. Versus Republic of India — Case Analysis and Implications for Foreign Investors [142]

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142 Paper authored by Yashasvi Tripathi, Shipra Padhi, Kshama A. Loya, Rajesh Simhan & Vyapak Desai.

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J. Vodafone Investment Treaty Arbitration Award — Part IV

October 8, 2020

Termination of BITs: Is the Political Risk Insurance Industry ready?[143]

I. Introduction

With India and other nations receding from Bilateral Investment Treaties **(BITs)**, the discourse about the interplay of BITs and political risk insurance **(PRI)** now mandates a nuanced analysis, with focus on the PRI industry.

II. PRI and PRI Providers

Political risks are risks that are associated with government actions which deny or restrict the right of Investors to use or benefit from their assets; or reduce the value of their investment. Political risks include war, revolutions, government seizure of property and actions to restrict the movement of profits or other revenues from within a country. They are non-commercial risks, and one of the main concerns for Investors when they plan to invest in another country.

PRI is an insurance product that protects Investors against such non-commercial risks that interfere in their ability to operate or own investments successfully, and provides coverage for a range of government related risks, arising from adverse actions or inactions of governments. PRIs is mainly sought for investments in developing countries[144] and volatile jurisdictions.

Broadly, insurance providers can be categorised as public, private, regional or multilateral providers. Public PRI providers include national PRI providers that mostly insure national companies in friendly host States. Some examples are OPIC (United States), Euler Hermes-PwC (Germany), NEXI (Japan), OeKB (Austria) and Sinosure (China). Public PRI providers act as gap fillers, and provide insurance where private players are reluctant given the relevant geopolitical volatility.

Private PRI providers are often a specialty line of the general insurance companies. Their products are more flexible, tailored and expedient. However, given that private providers offer coverage without reliance on government, they could offer limited and specific type of coverage such as that excluding currency devaluation. This can be a limitation for Investors. Few examples are American International Group (AIG), Chubb Group, Lloyd's of London and Zurich Financial Services.

Regional or multilateral providers include African Trade Insurance Agency, Inter-Arab Investment Guarantee Corporation, the Asian Development Agency, Export Credit and Multilateral Investment Guarantee Agency (MIGA). MIGA, a member of World Bank group,[145] has been foremost international institution offering PRI to

143 This article was authored by Yashasvi Tripathi & Kshama A. Loya. Available at: https://nishithdesai.com/SectionCategory/33/Dispute-Resolution-Hotline/12/57/DisputeResolutionHotline/4326/3.html

144 Kathryn Gordon, Investment Guarantees and Political Risk Insurance: Institutions, Incentives, and Development, OECD Investment Policy Perspectives 2008

145 MIGA, Overview, , https://www.miga.org/who-we-are/overview/

Investors. MIGA insures cross border investments, ranging up to 15 years, made by Investors from a MIGA member country into a developing member country, in challenging environments and higher risk markets.[146]

III. Intersection of BITs and PRIs

The intersection of BITs and PRI stems from the fact that both are risk mitigation strategies for Investors in cross-border transactions. The objective of BITs and PRI guarantees could overlap, as both facilitate international investments and lower political risks. Some risks covered by BITs are also covered by PRIs, such as direct and indirect expropriation, breaches of contract, political violence and restrictions to transfer profits. In the wake of this overlap, Investors need to address the dilemma of buying PRI while making investment in another country. Does existence or lack of BITs play a role in addressing this dilemma?

At the outset, PRI is quintessential for Investors investing in countries which have not entered into BITs or multilateral treaties. It is also essential for Investors investing in countries that are increasingly disconcerted with the existing investment treaty arbitration regime. International Investors might also seek PRI while investing in countries that are devising alternative strategies to BITs, such as Brazil's Cooperation and Facilitation Investment Agreements, as these strategies are nascent and alien to Investors.

In a situation where the Host State has entered into BITs with the Investor's home country, it may still be important to assess if PRI must be bought. Both BITs and PRI often provide for international arbitration for settlement of disputes arising out of the subject matter of the BIT or PRI. In some situations, PRI could be better than investment treaty arbitration as PRI claims generally compensate Investors without mandating them to go through the treaty arbitration, waiting for the outcome, and enforcing the award. We have seen that this choice boils down to Investor preference on certainty, speed, cost, or quantum of damages. In some instances, Investors have taken recourse to both. PRI could also help sustain the relationship of the Investor and the host state.

Therefore, despite considerable intersections, BITs and PRIs could have distinct purposes and utility. Presence of one (BIT or PRI) might not make the other superfluous. It is useful for Investors to examine the advantages of one over the other in an Investor-State dispute arising out of political risk.

IV. Assaying the Interplay between BITs and PRIs

With increase in BITs in the past decade, the number of private PRI providers have also risen. This is due to the apparently less risky nature of investments — since increase in BITs signify willingness of host states to afford protection to foreign investments. On the other hand, even with increasing termination of BITs, PRI is speculated to receive much traction as a sole risk mitigation strategy for Investors.

To what extend do BITs influence PRI premium? Do PRI providers consider existence of BITs as a determinant factor while deciding to underwrite PRI? Contracts between a PRI provider and an insured party, or even model contracts, are not easily accessible. However, certain publicly available information presents useful insights to discern the impact of BITs, if any, on PRIs.

146 Providing Political Risk Insurance and Credit Enhancement Solutions, https://www.miga.org/sites/default/files/2018-06/MIGA%20products.pdf

Notably, the German National PRI provider[147] considers existence of BIT as one of the pre-conditions for providing PRI coverage. In contrast, for the United States PRI provider OPIC and other national PRI providers, existence of a BIT is not consequential in determining the premium or deciding to extend the coverage. Some PRI providers like OPIC cover the risk of non-payment of an arbitral award[148], along with other risks.

The multilateral PRI provider, MIGA, does not consider existence of a BIT as a precondition for extending the coverage. For pricing of expropriation risk, MIGA considers almost around 57 rating factors to determine the premium rates, and only one of them relates to the existence of "investment protection agreement" which will include BITs and other multilateral trade agreements.

MIGA offers coverage for five types of non-commercial risks, namely currency inconvertibility and transfer restrictions; expropriation; war, terrorism and civil disturbance; breach of contract; and non-honouring of financial obligations. Out of the five, only breach of contract coverage is contingent on any dispute resolution mechanism having been invoked by the Investor as a precondition for the Investor claim. It does not require an arbitral award in the favour of an insured Investor for a successful claim.

In the case of private providers, an empirical study has indicated that most private firms find BITs largely irrelevant for extending the coverage.[149] Our survey of websites of private PRI providers indicates that the private PRI providers have not yet disclosed their model insurance contracts or the criteria used for calculating PRI premium.

However, the studies have noted that if terminating BITs could be taken as an unequivocal signal that host country wishes to dilute the Investor protection, then the PRI provider will naturally take note of it. Though it is speculated and logical that the BIT might have some impact on insurance guarantees or the cost of it, however, it remains to be proven empirically.

In the extant situation of BIT terminations creating a void in mitigating risk, the PRI industry could arise to the opportunity to foster Investor confidence in risk mitigation. However, for enhancing the confidence of business community in the PRI industry, the PRI providers need to increase transparency and mobilization in their market.

This can be commenced by providing their model insurance agreements to the public to assess their evaluation methodology, or by enumerating the factors that PRI providers consider for deciding the premium and extension of coverage. This will enable Investors and countries to monitor their investments and behaviour accordingly and utilize PRI regime with enhanced confidence.

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147 German Federal Ministry of Economics and Technology and Price WaterhouseCoopers, Granting of federal guarantees abroad, July 2006, p 3

148 OPIC, Political Risk Insurance Facilities for Private Equity Investment Funds, https://www.dfc.gov/sites/default/files/2019-08/pri-flyer-gec-2013.pdf

149 Lauge Skovgaard Poulsen, Political Risk Insurance and Bilateral Investment Treaties, a view from below. http://ccsi.columbia.edu/files/2014/01/FDI_27.pdf

V. Do BITs Play a Role in promoting Foreign Direct Investment? Are there Alternative Frameworks being considered in India for Investment Protection?

To understand the role played by BITs in FDI promotion and protection, and assess alternate frameworks being considered in India for investment protection, stay tuned for Part V of our series tomorrow.

Yashasvi Tripathi & Kshama Loya Modani

You can direct your queries or comments to the authors

K. Enforcement of BIT Awards at Bay in India as the Courts Rule Out the Applicability of the Arbitration and Conciliation Act 1996 [150]

This article discusses the state of enforcement of investment arbitration awards against India made pursuant to Bilateral Investment Treaties in light of the decisions of the Delhi High Court in *Union of India v Vodafone Group PLC United Kingdom & Anor (2017) and Union of India v Khaitan Holdings (Mauritius) Ltd & Ors (2019).*

I. Introduction

Enforcement of arbitral awards is the ultimate aim of arbitration. Globally, legislation has been designed to cater for commercial arbitration proceedings and the enforcement of awards from start to finish. Over time and given the sheer prevalence of commercial arbitration in the modern business world, a sufficient volume of jurisprudence has developed on the enforcement of awards in a variety of jurisdictions.

However, the same cannot be said for its non-commercial cousin — investment treaty arbitration. Among other factors, the involvement of sovereign States, the nature of the State measures under challenge and the impact of an adverse award on a State's public exchequer create greater opportunities to hinder the enforcement of investment treaty awards. While a self-contained regime under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention) partly resolves problems, investment treaty arbitral awards delivered pursuant to *ad hoc* arbitrations face the rigours of enforcement under national legislation.

India is a peculiar case. It is one of the most attractive destinations for foreign direct investment (FDI). FDI inflows in India have grown eleven-fold, from US$4 billion to US$44 billion over the last two decades. Liberalisation, sound macro-economic policies and an increased network of bilateral investment treaties (BITs) have paved the way for greater investment — and, as a result, a greater number of Investor—State disputes. From the 1990s to the present, a record 28 cases have been filed by foreign Investors against India. Eleven cases have been resolved so far, India having prevailed in two cases and paid compensation in one. The remainder are pending. The possible fate of awards made against India in the pending cases and likely to need enforcing requires assessment.

II. India is not a Signatory to the ICSID Convention

The question of enforcement of BIT awards in India would have been moot if India had signed the ICSID Convention and ratified and implemented it through national legislation. However, India is not covered by the delocalised arbitration regime that offers immunity to ICSID awards from challenge in national courts.

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150 This article was authored by Kshama A. Loya & Moazzam Khan for Asian Dispute Review (January 2020 edition, pages 17—23). Available at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/200122_A_Asian_Dispute_Review_Jan_2020.pdf

Additionally, India is deprived of a regime that makes ICSID awards automatically enforceable in signatory jurisdictions.

> The question of enforcement of BIT awards in India would have been moot if India had signed the ICSID Convention and ratified and implemented it through national legislation.

III. The ICSID Additional Facility Rules

The ICSID Additional Facility Rules Arbitration clauses in the majority of BITs involving India provide either for arbitration administered under the ICSID Additional Facility Rules (the Additional Facility Rules) or *ad hoc* arbitration under UNCITRAL Arbitration Rules. However, as discussed below, neither of these options assist in improving the chances of enforcing a BIT award in India.

The Additional Facility Rules were designed to facilitate the resolution of disputes where one of the parties is not a Contracting State to the ICSID Convention. They merely provide for the administration of disputes under the umbrella of the International Centre for Settlement of Investment Disputes (ICSID), drawing support from but not incorporating the ICSID Convention. Unlike the full ICSID Rules of Procedure for Arbitration Proceedings, the Additional Facility Rules do not offer foolproof enforcement protection to resultant awards. Awards under the latter provisions would therefore be subject to the place of arbitration. This can be a hurdle for enforcement.

In order to mitigate the effect of this regime, the Additional Facility Rules provide that an arbitration conducted under those rules may be conducted only in States that are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). It can be inferred that this provision was inserted to ensure enforceability of awards made under the Additional Facility Rules through the mechanism provided under the New York Convention.

IV. The non-applicability of the Indian Arbitration & Conciliation Act 1996

The mechanism for enforcing foreign and domestic awards in India is set out in the Arbitration and Conciliation Act 1996 (the 1996 Act).

However, in two cases brought by India to restrain investment treaty arbitrations, national courts in India have ventured into the subject of enforcement of BIT awards, sparking controversy and fuelling uncertainty. In the Vodafone and *Khaitan Holdings* cases, discussed below, the Delhi High Court ruled that BIT awards are not governed by the 1996 Act, since the underlying arbitrations were not commercial in nature. These rulings have thrown the enforcement of BIT awards into an abyss of ambiguity.

> In the Vodafone and Khaitan Holdings cases … the Delhi High Court ruled that BIT awards are not governed by the 1996 Act, since the underlying arbitrations were not commercial in nature. These rulings have thrown the enforcement of BIT awards into an abyss of ambiguity.

V. The Vodafone Case[151]

In April 2017, Vodafone Blv. invoked the India–Netherlands BIT to challenge a retrospective amendment of tax legislation by India that led to a tax demand of INR 11,000 crores (R110 billion, US$ 1,530,100,000) against Vodafone, together with interest. While this arbitration was pending, Vodafone Plc (the parent company of Vodafone Blv) initiated arbitration under the India–United Kingdom BIT, also challenging that tax measure.[152] India applied to the High Court of Delhi for an anti-arbitration injunction against Vodafone Plc.

The Court held that national courts in India were not divested of jurisdiction in an investment treaty arbitration. The courts would grant an injunction only if there were very compelling circumstances, the court had been approached in good faith and no efficacious alternative remedy was available.

However, the Delhi High Court went further and opined on the enforcement of BIT awards by Indian courts. The Court held that although the subject BIT constituted an arbitration agreement between a private Investor and the host State, it gave rise neither to an international commercial arbitration governed by the 1996 Act nor a domestic arbitration. The Court considered that investment arbitration disputes are fundamentally different from commercial disputes as the cause of action (whether contractual or not) is grounded on State guarantees and assurances and so are not commercial in nature. The roots of investment arbitrations are in public international law, State obligations and administrative law. The Court reiterated that, when acceding to the New York Convention, India made the 'commercial reservation' under art I.3 to apply the Convention "only to differences arising out of legal relationships … which are considered as commercial under the national law of the State making such declaration."

VI. The Khaitan Holdings Case[153]

In *Khaitan Holdings*, the Delhi High Court held that arbitral proceedings under a BIT are a separate species of arbitration, one that was outside the purview of the 1996 Act. As such, the jurisdiction of the courts in relation to arbitral proceedings under a BIT would be governed by the Indian Code of Civil Procedure 1908 (CPC). The Court placed reliance upon the *Vodafone case.*

151 Union of India v Vodafone Group PLC United Kingdom & Anor, CS (OS) 383/2017, 22 August 2017. For discussion, see Nishith Desai Associates, Vodafone Case: A Bit More ArbitrationFriendly, available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-case-a-bit-more-arbitration-friendly.html?no_cache=1&cHash=6d8d3f6c97a84bd120895dbf87ecd464

152 It appears that the second arbitration was commenced as a result of a jurisdictional objection raised by India in the first.

153 Union of India v Khaitan Holdings (Mauritius) Ltd & Ors, CS (OS) 46/2019 I As 1235/2019 & 1238/2019, 29 January 2019.

While assuming jurisdiction over the foreign Investor and investment under the CPC, the Court stated that the 1996 Act did not apply in the present case as that Act governs only commercial arbitrations. The case emanated from a bilateral investment treaty and not from a simple commercial contract.

This is a preliminary judgment on an interim application. It will be interesting to see if the court continues to hold the same view after hearing all the parties on the merits.[154]

VII. Options available to BIT Award Holders seeking to enforce against India

In light of the Vodafone and Khaitan *Holdings decisions* (and until such time as they are set aside or varied by the Indian Supreme Court), any party applying for the enforcement of a BIT award would first have to overcome the jurisdiction hurdle raised by these decisions, ie the inapplicability of the 1996 Act to BIT arbitration. Although other Indian High Courts are not bound to abide by a decision of the Delhi High Court, these decisions would certainly hold persuasive value and, until a contrary ruling in rendered, would be part of the law of the land.

The mechanisms for executing a foreign court decree or judgment are provided in the CCP 1908. It is pertinent to note, however, that BIT awards cannot be treated as a foreign decree or judgment for the purposes of execution in India under the CPC, since they are neither a 'judgment' as defined under the CPC, nor have they been delivered by a 'Court' as also defined in the CPC. Thus, this is also not a viable option for a party seeking to enforce a BIT award against India.

A legitimate avenue that is open to BIT award creditors is to try and identify assets of the BIT award debtor (which may even be the Union of India) that are located outside India, preferably in a jurisdiction that has an established, recognised, tried and tested mechanism for enforcing BIT awards. Several such jurisdictions are briefly discussed below.

A. Singapore

The international arbitration regime in Singapore is bifurcated into two pieces of legislation — the Arbitration (International Investment Disputes) Act (Cap 11) as amended (the International Investment Disputes Act) and the International Arbitration Act (Cap 143A) as amended (the International Act).

The International Investment Disputes Act was enacted pursuant to Singapore's signature and ratification of the ICSID Convention. Section 5 of the Act states that for the purposes of execution, an ICSID award shall have the same effect as a judgment of the Singapore High Court.

The International Investment Disputes Act does not provide grounds for resisting enforcement of an ICSID award beyond the ICSID annulment regime. To date, there has been no attempt to enforce an ICSID award in Singapore.

The International Act is applicable to arbitral awards made pursuant to international arbitrations seated in Singapore, as well as to those awards made on the basis of an arbitration agreement in the territory of a country that has ratified the New York Convention. The 1985 version of the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law or the Model Law), with the exception of Chapter VIII, is incorporated by reference into the International Act, subject to the provisions of the legislation. The grounds

154 See Nishith Desai Associates, op cit (note 1 above).

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for refusing the enforcement of a foreign award that avail the Singaporean national courts are those set out in art V.1 of the New York Convention.

To date, Singaporean courts have not been seized of an application for enforcement of a treaty award. However, in at least two cases,[155] the courts have entertained challenges to investment treaty awards seated in Singapore. In both cases, the courts exercised jurisdiction under the International Act. It can only be deduced that an application for enforcement of an investment treaty award would also be entertained under the International Act. Unlike India, there is no conundrum over the applicability of that Act to treaty awards.

> ... BIT awards cannot be treated as a foreign decree or judgment for the purposes of execution in India under the ... Civil Procedure Code, since they are neither a 'judgment' as defined under the CPC, nor have they been delivered by a 'Court' as also defined in the CPC.

> A legitimate avenue that is open to BIT award creditors is to try and identify assets of the BIT award debtor (which may even be the Union of India) that are located outside India, preferably in a jurisdiction that has an established, recognised, tried and tested mechanism for enforcing BIT awards.

Sundaresh Menon SC, Chief Justice of Singapore, in his speech, *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*[156] has stated:

"This evolving body of substantive investment arbitration law also suffers from a lack of coherence and consistency because its development has been piecemeal..... Any attempt by the courts to provide oversight is fragmentary and restricted: fragmented because enforcement of awards can be sought before the courts of any of the many signatories to the New York Convention, and restricted because of the principle of minimal curial intervention."

This suggests that non-ICSID international awards seated in Singapore, or seated in a country that is a signatory to the New York Convention, will be enforced in Singapore like any international commercial arbitration award, being subject to the same grounds of resistance as under the New York Convention.

It is also noteworthy to highlight the Investment Rules introduced by the Singapore International Arbitration Centre (SIAC) in 2017. [157] The SIAC is the first arbitral institution to introduce specialised arbitration rules in the context of investment treaty arbitration.

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155 Sanum Investments Ltd. v Government of the Lao People's Democratic Republic [2016] 5 SLR 536; Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd [2017] SGHC 195.

156 Editorial Note: Keynote Address to the 2012 ICCA Congress, Singapore, in AJ van den Berg (Ed), International Arbitration: The Coming of a New Age, ICCA Congress Series No 17 (2013, Alphen aan den Rijn: Wolters Kluwer), available at https://www.arbitrationicca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf

157 Editorial note: Available at http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Rules%202017.pdf

B. England & Wales

The United Kingdom, of which England & Wales is a law district, is a signatory to the ICSID Convention. International investment disputes decided under it are recognised and enforced in England & Wales pursuant to the Arbitration (International Investment Disputes) Act 1966 (the 1966 Act). This legislation states that an ICSID award has the same force and effect for the purposes of execution as if it had been a judgment of the High Court of England & Wales.

The UK is also a party to the New York Convention. The English Arbitration Act 1996 (the English 1996 Act) applies to the enforcement of arbitral awards made in international arbitrations seated in England & Wales and in other countries that are parties to the New York Convention. A Convention award may be enforced in the same manner as a judgment or order of the court. The English 1996 Act contains a list of the grounds on which the recognition or enforcement of an award may be refused that are identical to those in art V.1 of the Convention.

The courts of England & Wales have exercised jurisdiction over investment treaty awards under the English 1996 Act. In *Occidental Exploration & Production Co v Ecuador*,[158] the Court of Appeal held that English courts had jurisdiction to hear challenges brought in respect of awards made under investment treaties. In *European Media Ventures SA v Czech Republic*, [159] the Commercial Court interpreted the Czech-Belgium-Luxembourg Economic Union (BLEU) BIT to confer jurisdiction on the arbitral tribunal to determine issues of liability and quantum for expropriation. Similarly, in *GPF GP Sàrl v Republic of Poland*, [160] the Commercial Court partially set aside a decision on jurisdiction issued by a London—seated arbitral tribunal. The tribunal had held that it lacked jurisdiction to hear the majority of the claims. The Court conducted a de novo review of the decision. In interpreting the BIT, it held that measures leading to consequences similar to expropriation could be read to encompass a breach of the fair and equitable treatment standard.

While cases involving challenges to investment treaty awards in English-seated arbitrations are usual, cases of enforcement of investment treaty awards rendered overseas are rare. Nevertheless, English courts have exercised jurisdiction in such cases under the English 1996 Act. In *OAO Tatneft v Ukraine*,[161] the Commercial Court entertained an application by Tatneft for the enforcement of a Paris-seated treaty award under the Russia–Ukraine BIT and rejected Ukraine's application for refusal of enforcement. The court assumed jurisdiction over the enforcement application under the English 1996 Act.

All of this suggests that non-ICSID international awards seated in England & Wales or in a country that is a signatory to the New York Convention will be enforceable there under the English 1996 Act like an international commercial arbitral award.

C. The United States

The US is a signatory to the ICSID Convention. The recognition and enforcement of foreign arbitral awards is subject to the provisions of the New York Convention as well as the Federal Arbitration Act 1925 (the FAA), which incorporates the Convention into US federal law and grants subject—matter jurisdiction over

158 [2006] 2 WLR 70.

159 [2008] 1 All ER (Comm) 531.

160 [2018] EWHC 409 (Comm).

161 [2018] EWHC 1797 (Comm).

recognition and enforcement proceedings to US federal district courts. By virtue of the Convention having been incorporated into the FAA, the grounds for challenging the enforcement of an international arbitral award are the limited grounds enumerated in art V of the Convention.

However the only way to enforce in the US an arbitral award issued against a sovereign entity under the ambit of ICSID or any other arbitral tribunal is in compliance with the Foreign Sovereign Immunities Act 1976.

In *Mobil Cerro Negro Ltd v Bolivarian Republic of Venezuela*,[162] Mobil filed an ex parte petition seeking to enforce an ICSID award by entering judgment against Venezuela in the US. The District Court refused to vacate the award and granted the petition. The Court of Appeals vacated the District Court's decision, holding that the 1976 Act, and not the legislation implementing the ICSID Convention in the US, provided the sole basis for subject-matter jurisdiction in actions to enforce ICSID awards..

Non-ICSID awards are enforceable as Convention awards in accordance with the FAA. In *Chevron Corporation and Texaco Petroleum Co v Republic of Ecuador*, [163] an UNCITRAL arbitral award rendered at The Hague was challenged by Ecuador in the Dutch courts. The courts having upheld the award, Chevron then applied for enforcement in the US. The District Court held that the award was enforceable under the New York Convention. The position in the US is therefore more or less similar to that of Singapore and England & Wales, while bringing the enforcement of an UNCITRAL investment treaty award seated in a New York Convention State within the ambit of the FAA.

> ... [T]he Delhi High Court, in opining that the 1996 Act is inapplicable, has dealt a fatal blow to BIT award enforcement in India, forcing Investors to explore avenues beyond the Indian courts, such as seeking enforcement of awards in other jurisdictions where award debtors might hold assets.

D. Other Countries

Other countries with robust international arbitration frameworks, such as France, Germany, Australia and Japan are signatories to the ICSID Convention. They have rarely witnessed cases involving the enforcement of investment treaty awards. Yet, despite the recent trend of Indian courts to exclude India's 1996 Act from the enforcement of investment treaty awards, award creditors can locate assets in these countries, given that they are also signatories to the New York Convention and have well-developed legislative frameworks to exercise jurisdiction over challenges to and enforcement of investment treaty awards. As such, it may be prudent to locate assets of an Investor or the host State prior to the initiation of treaty arbitration proceedings, in order to ring-fence the risks of resistance to enforcement at the early stages of the dispute.

162 No 15—707 (2d Cir, 2017).

163 795 F 3d 200 (DC Cir, 2015).

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VIII. Conclusion

The New York Convention is regarded as the cornerstone of international commercial arbitration. It draws life from the national laws that adopt it. In India, the 1996 Act is based on the UNCITRAL Model Law and adopts the New York Convention for the recognition and enforcement of foreign awards. Unlike ICSID States, there is no separate mechanism for the enforcement of investment treaty awards in India.

However, in opining that the 1996 Act is inapplicable to investment treaty arbitrations, the Delhi High Court has dealt a fatal blow to BIT award enforcement in India, forcing Investors to explore avenues beyond the Indian courts, such as seeking enforcement of awards in other jurisdictions where award debtors might hold assets. Unless the Supreme Court of India overturns this decision, the outlook for enforcement of investment treaty awards in India remains bleak.

The other alternative would be for the Indian legislature either (1) to amend the 1996 Act to bring the enforcement of BIT awards within its scope; or (2) (a much less preferred option), to establish an entirely new regime (akin to Part II of the extant 1996 Act) dedicated solely to the enforcement of BIT awards. India would not be the first country to do so. South Africa, for example, has already introduced a specific framework for the resolution of investment treaty disputes, albeit not purely dedicated to the enforcement of BIT awards. However, the problem with enacting fresh legislation would be that courts ultimately tasked with the enforcement of BIT awards under a new regime would not have the benefit of decades of judicial evolution, refinement and interpretation applicable to other regimes.

For the time being, therefore, (1) the concerns of a number of foreign Investors, (2) the effective application of investment treaties to which India is a party, and (3) the promises of the fastest growing economy in the world to provide a stable legislative and regulatory framework for FDI, lie with the Supreme Court of India.

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L. Balancing State Regulation and Investor Rights [164]

As we brace for a global economic slowdown and plummeting GDPs, the flow of **FDI** in India offers a sanguine picture. UNCTAD reports that India is among the top 10 countries for inbound FDI and soon to be among top 20 for outbound FDI. However, India also seems to be the breeding ground for disputes with foreign Investors.

In the past 25 years, India has faced 26 international investment arbitration cases from foreign Investors such as Vodafone, Cairn, Vedanta, Devas and Nissan under the auspices of **Bilateral Investment Treaties** (BITs) between India and the Investor's country. Claims filed under BITs elevate the government's investment-impacting measures to international treaty violations. Resultantly, compensation claims run into millions and billions of dollars. The 'loser pays' principle applies with a slight modification. Here, if the government loses, the public exchequer pays.

BITs have therefore come under severe criticism worldwide. Arguably, BITs fetter the government's powers to regulate in public interest, lest these measures would impact foreign investment. They also leave the fate of a State's needs and measures in the hands of a delocalised international arbitration tribunal. In 2017, India aligned with this criticism and terminated 58 out of 84 BITs. Resultantly, new foreign Investors in India, unprotected by BITs, lie uncomfortably in the overburdened scales of the Indian judiciary. While the final outcome might heal Investor wounds, the wait in courts could drain out investment value.

However, for a country committed to easing business and raising investment, it is a welcome move to propose enactment of a special legislation to protect foreign Investors and resolve Investor—State disputes. The Finance Ministry is stated to have recommended mediation and establishment of special fast-track courts for this purpose. Alternatively, it is also stated to consider vesting jurisdiction with the National Company Law Tribunal (NCLT). Will this reinstate Investor trust in India? The classic answer is, it depends. An Investor—State dispute entails elements of public and private international law, as well as national law of the host State. It is therefore critical for the mediator to hold the requisite expertise and recognition in international investment, national law and regulation. It may not be advisable to create a panel or list of mediators for parties to choose from since this could expose the list to lack of independence and conflict of interest. Party consent for appointment of mediator must therefore be mandatory. In the event of lack of consensus, the baton could be handed over to mediation centres of arbitral institutions to appoint suitable mediators.

For uniformity in each case, special mediation rules modelled on internationally recognised mediation rules may be formulated and appended to the legislation. Failing mediation, special courts dedicated solely to Investor—State disputes, and not NCLTs, provide for a better solution. Expert judges with knowledge of international investment and national laws, wielding sound commercial acumen, must be appointed. Considering that these disputes may not be abundant in number, it might be more effective to engage lawyers with requisite knowledge, experience and expertise on a rotation basis or for a fixed time period to take the judicial mantle.

164 This article was authored by Kshama A. Loya & Moazzam Khan for The Economic Times. Available at: https://economictimes.indiatimes.com/markets/stocks/news/view-balancing-state-regulation-investor-rights/articleshow/73792172.cms?from=mdr

Most importantly, a single level of appeal to the Supreme Court with minimum grounds for appeal could go a long way in speedy disposal of cases. A brief time limit for filing and disposal of appeals, with a framework for expeditious execution, are indispensable. The ultimate goal ought to be to strike the right balance between **State regulation** and **Investor rights.** We hope that legislative protection of foreign Investors through robust and transparent processes in India will promote foreign investment and accentuate its economic benefits —namely growth, employment and sustainability.

Kshama Loya is leader, International Dispute Resolution practice and Moazzam Khan, head, Global Litigation practice. Both are with Nishith Desai Associates.

Source: The Economic Times, Markets

M. Demystifying Public Policy to Enable Enforcement of Foreign Awards — Indian Perspective [165]

Abstract

The open-textured and variable nature of 'public policy' has created much divergence in the international arbitration community on its meaning, applicability and limits. For some, public policy has played a savior of foreign awards; for others, it has set the arbitration proceedings and the outcome at naught. Most award creditors may have realized the fruits of their arbitration only after long arduous legal proceedings to establish non-contravention of public policy. This has created a cloud of uncertainty and unpredictability around public policy.

This present article attempts to demystify this uncertainty, and deduce situations in which the scope and ambit of public policy can be assertively ascertained. It examines 'public policy' as a ground for grant or refusal of enforcement of a foreign award in a jurisdiction that has one of the largest judicial caseload of international commercial disputes and international arbitration - India. While arriving at our deductions, we will analyze the context in which public policy is placed under the New York Convention (I); Indian law and its adoption of the New York Convention (II); the meaning of public policy and its realm of operation in law for purposes of enforcement of foreign awards (III); and judicial interpretation of public policy by Indian courts (IV). In the end, based on the aforesaid analysis, we identify practical situations in which public policy can be raised as a ground to resist or defend resistance to enforcement of foreign awards (V).

> *"Public policy is never argued at all but when other points fail."*
>
> *—Burrough J.*

The aforesaid statement[166] depicts the elusive nature of 'public policy' in legal proceedingsthat draw upon its presence in statute, conventions and legal systems. The Convention on theRecognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention") isa critical international convention that gives room for public policy considerations whileassessing enforcement of a foreign arbitral award (foreign award). Article V(2)(b) of the NewYork Convention states:

"(V)(2) Recognition and enforcement of an arbitral award may also be refused ifthe competent authority in the country where recognition and enforcement issought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitrationunder the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the publicpolicy of that country."[167]

165 This article was authored by Bhavana Sunder & Kshama A. Loya for The Indian Journal of Arbitration Law.

166 Burrough J. in Richardson v. Mellish (1824—34) All ER 258.

167 Article V(2), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention ").

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The present article examines 'public policy' as a ground for grant or refusal of enforcement ofa foreign award in India. Its open-textured and variable nature has created much divergence inthe international arbitration community on its meaning, applicability and limits. For some,public policy has played a savior of foreign awards; for others, it has set the arbitrationproceedings and the outcome at naught. Most award creditors may have realized the fruits oftheir arbitration only after long arduous legal proceedings to establish non-contravention ofpublic policy. This has created a cloud of uncertainty and unpredictability around publicpolicy.

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I. The New York Convention

The New York Convention was adopted by the United Nations and entered into force on 7June 1959. At the date of this article, the Convention has 163 Contracting States. The NewYork Convention is considered to be the cornerstone of the international arbitration system.

Prior to the New York Convention, the Geneva Protocol of 1923 was signed between countriesto enable recognition and enforcement of an award by the State in which it was made.Subsequently, the Geneva Convention of 1927 widened the scope of the Geneva Protocol of1923 by providing recognition and enforcement of protocol awards within the territory ofcontracting States, and not merely the State in which the award was made.[168]

Under the Geneva Convention of 1927, a party seeking enforcement had to prove the conditions necessary for enforcement and was often obliged to seek a declaration in the countries where the arbitration took place to the effect that the award was enforceable in that country, before it could enforce the award in the courts at the place of enforcement.[169] Article 1(e) of the Geneva Convention of 1927 required that, in order for recognition and enforcement to be granted, it had to be positively demonstrated that such *"recognition or enforcement of the award is not contrary to the public policy or to the principles of law of the country in which it is sought to be relied upon"*.[170] Owing to its broad language and burden of proof on the party seeking enforcement, the Geneva Convention of 1927 hindered speedy settlement of disputes through arbitration.

The New York Convention replaced the Geneva Convention of 1927. Among other provisions,Article V (2)(b) provided that recognition of an award may be refused on the basis of publicpolicy. It omitted the reference to *"principles of law of the country in which it is sought to berelied upon"*. This omission was acknowledged as highlighting the pro-enforcement bias of theNew York Convention. Further, the New York Convention places the burden of proof on theparty attempting to resist enforcement. Thus, the New York Convention seeks to provide asimpler and effective method for recognition and enforcement of foreign awards. Since itsinception, the New York Convention's regime for recognition and enforcement has become deeply rooted

168 ALEN REDFERN AND MARTIN HUNTER, LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 2nd Edn. pp. 61—62.

169 Renusagar Power Co. Ltd v. General Electric Co., 1994 Supp (1) SCC 644. ("Renusagar")

170 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 2016 Page 239, available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf ("UNCITRAL")

in the legal systems of its Contracting States and has contributed to the status ofinternational arbitration as common means of resolving commercial disputes today.[171]

II. Adoption of New York Convention by India

India was a signatory to the Geneva Protocol of 1923 and the Geneva Convention of 1927.With a view to implement the obligations under the said Protocol and Convention, theArbitration (Protocol & Convention) Act, 1937 was enacted. India became a signatory to theNew York Convention in 1958 and ratified it in 1960. The Foreign Awards (Recognition andEnforcement) Act, 1961 **("Foreign Awards Act")** was enacted to give effect to the New YorkConvention. The Foreign Awards Act was repealed to give way to the Arbitration &Conciliation Act,1996 **("A&C Act")**

Part II (Chapter I) of the A&C Act deals with the enforcement of New York Conventionawards. Section 48(2) of the Act provides statutory expression to Article V(2) of the NewYork Convention which enables a signatory country to refuse enforcement of a foreign award,if it is in contravention of its public policy. The existing equivalent portions of Section 48 ofthe A&C Act (as it stands today) and Article V of the New York Convention envisaging theground of public policy are set out in the table below:

New York Convention (Article V)	A&C Act (Section 48)
Article V(2) Recognition and enforcement of anarbitral award may also be refused ifthe competent authority in thecountry where recognition andenforcement is sought finds that: (b) The recognition or enforcementof the award would be contrary tothe public policy of that country.[172]	**48 (2)** Enforcement of an arbitral award may also be refused if the Court finds that— (b) The enforcement of the award would be contrary to the public policy of India. [Explanation 1. - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, - (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Explanation 2. -For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.][173]

Signatories to the New York Convention do not automatically become reciprocating countriesin India - there is a requirement for the Central Government to notify reciprocating countries.An award passed in a notified reciprocating territory may be enforced in India as a 'foreignarbitral award' under the A&C Act. So far, the Central Government has notified 48 countriesas reciprocating territories for the purposes of the New York Convention.

171 Id. at p.1

172 Art. V, New York Convention.

173 Section 48(2), Arbitration and Conciliation Act, 1996

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III. Meaning of Public Policy

Article V(2)(b) does not define public policy. It provides that a court may refuse to recognize or enforce an award if the award *"would be contrary to the public policy of that country".*[174] The words 'that country' are indicative of public policy of the country where enforcement is sought. Thus, the public policy of that country must be applied by courts in assessing objections to enforcement. However, before delving into the public policy of India, it is important to understand the basic tenets of public policy.

A. Meaning and Possible Views

Public policy forms part of a wider range of tools, such as the mandatory rules of the forumthat override private autonomy that allow a court to protect the integrity of the legal order towhich it belongs. Although different jurisdictions define public policy differently, case lawtends to refer to a public policy basis for refusing recognition and enforcement of an awardunder Article V(2)(b) of the New York Convention when the core values of a legal systemhave been deviated from. Invoking the public policy exception is a safety valve to be used inthose exceptional circumstances when it would be impossible for a legal system to recognizean award and enforce it without abandoning the very fundaments on which it is based.[175]

Defining public policy, Sir William Holdsworth stated, *"A body of law like the common law,which has grown up gradually with the growth of the nation, necessarily acquires some fixedprinciples, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seekto weaken or negative them."*[176]

In *Gherulal Parakh v. Mahadeodas Maiya*, the Supreme Court of India favoured a narrow, non-evolving view of public policy and stated, *"though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days."*[177]

However, with time, the meaning of 'public policy' has evolved significantly over the yearsand across different jurisdictions. In Central Inland Water *Transport Corpn. Ltd. v. Brojo NathGanguly* , the Court held, *" public policy connotes some matter which concerns the public goodand the public interest. The concept of what is for the public good or in the public interest orwhat would be injurious or harmful to the public good or the public interest has varied fromtime to time ."*[178]

Thus, public policy is either subject to a narrow view i.e. , fixed principles where courts cannotcreate new heads of public policy, or a broad view where courts can play a role in judicial lawmaking. As evident below, a narrow view is adopted for the purposes of enforcement offoreign awards.

B. Applicable Public Policy for Purposes of Foreign Awards

Foreign awards operate at the level of private international law involving conflict of laws, asopposed to domestic awards. Thus, a distinction needs to be drawn while applying the rule ofpublic policy between a matter governed

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174 Article V(2)(B), New York Convention.

175 UNCITRAL, at 240.

176 History of English Law, Vol. III, p.55.

177 Gherulal Parakh v. Mahadeodas Maiya, 1959 AIR 781.

178 Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, 1986 AIR 1571.

by domestic law and a matter involving conflict oflaws. The application of the doctrine of public policy in the field of conflict of laws is morelimited than that in the domestic law and the courts are slower to invoke public policy in casesinvolving a foreign element than when a purely municipal legal issue is involved.[179] Although the concept of public policy is the same in nature in these two spheres of law, itsapplication differs in degree and occasion, corresponding to the fact that transactionscontaining a foreign element may constitute a less serious threat to municipal institutions thana purely local transactions.[180]

The particular rule of public policy may be of an overriding nature and therefore be a groundto resist enforcement, or it may be local in the sense that it represents some feature of internalpolicy. If it is the latter, it must be confined to cases governed by the domestic law and oughtnot be extended to a case governed by foreign law. In order to ascertain whether the rule is all-pervading or merely local, it must be examined in the light of its history, the purpose of itsadoption, the object to be accomplished by it and the local conditions.[181]

The above also justified minimal judicial intervention in enforcement of foreign awards asdistinguished from domestic awards. In the Supplementary Report to the 246 th LawCommission Report, the Law Commissio stated that the legitimacy of judicial intervention inthe case of a purely domestic award is far more than in cases where a court is examining thecorrectness of a foreign award or a domestic award in an international commercial arbitration.[182]

The above also finds international judicial support. In the United Kingdom, the Court of Appeal has held that *"public policy will only be engaged where the illegality reflects considerations of international public policy rather than purely domestic public policy."*[183] In France, an international arbitral award may be refused enforcement if it is contrary to 'international public policy'.[184] International public policy in France refers to *"the French conception of international public policy, that is the rules and values which cannot be violated within the French legal order, even in the framework of situations of an international nature".*[185] In Italy, public policy is construed as international public policy, and not purely domestic public policy. Public policy may include the core fundamental values of the Italian Constitution and bar the recognition of conflicting foreign judgments.[186]

The fact that minimum judicial intervention is warranted in enforcement of foreign awards anddomestic public policy is not applied supports a narrow view of public policy. In the UnitedStates, in the landmark case of *Parsons & Whittemore Overseas Co. v. Societe Generale DeL'industrie Du Papier,*[187] the Court of Appeal discussed that the pro-enforcement biasimplicit in the New York Convention is indicative of the narrow manner in which the publicpolicy defense is to be construed.

Courts in India have supported a narrow view of publicpolicy as will be evident in Section V below.

179 DICEY & MORRIS, THE CONFLICT OF LAWS, 11 th Edn., Vol. I p. 92.

180 R.H. GRAVESON, CONFLICT OF LAWS, 7th Edn., p. 165

181 CHESHIRE AND NORTH, PRIVATE INTERNATIONAL LAW, 12th Edn., p. 129.

182 Law Commission Report No. 246 On Amendments To The Arbitration And Conciliation Act, 2014.

183 RBRG Trading (UK) Limited v. Sinocore International Co. Ltd., [2018] EWCA Civ 838.

184 Article 1520, French Code of Civil Procedure.

185 Pierre Pic & Asha Ranjan, The Public Policy Exception in International Arbitration: A Snapshot From France, 6 IJAL (2017), p. 197, citing Cour d'appel [CA] [regional court of appeal] Paris, June 14, 2001, SA Compagnie commercial André v. SA Tradigrain France, REV. ARB. 773 (2001).

186 Challenging and Enforcing Arbitration Awards 2019, Italy, GLOBAL ARBITRATION REVIEW, available at: https://globalarbitrationreview.com/jurisdiction/1005944/italy

187 Parsons & Whittemore Overseas Co. v. Societe Generale De L'industrie Du Papier, 508 F.2d 969.

IV. Judical Interpretation of Public Policy in India

Under the A&C Act, public policy stands as a ground both for setting aside awards made by India-seated arbitral tribunals under Section 34, and for resisting enforcement to foreignawards under Section 48. Despite the internationally recognized view that public policy vis-à-vis foreign awards must be applied narrowly at a private international law level, Indian caselaw witnessed an intermingling of the operative realms of public policy for domestic andforeign awards. Whilst this was largely undesirable, judicial interpretation has enriched the content of public policy both in the realm of domestic and foreign awards. The trajectory ofjudicial interpretation is briefly traced below.

A. Renusagar: Public Policy for Foreign Awards

In 1993, the Supreme Court of India had an opportunity to determine the contours of publicpolicy in the landmark case of *Renusagar Power Co. Ltd v. General Electric Co.*[188] (**"Renusagar"**), involving enforcement of a foreign award under the Foreign Awards Act.[189]

Applying a narrow view of public policy, the Court held that since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy as applied in the field of private international law. Applying the said criteria, it was held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality".[190]

In relation to the 'fundamental policy of Indian law', the Court held that "(i) the award must invoke something more than merely a violation of Indian law to be refused enforcement; (ii) a violation of economic interests of India is contrary to public policy; (iii) it is the fundamental principle of law that orders of courts must be complied with and a disregard for such orders would be contrary to public policy".[191]

B. Saw Pipes: Patent Illegality for Domestic Awards

Subsequent to the judgment in Renusagar, the Supreme Court interpreted the meaning of'public policy' In in the case of *ONGC Ltd. v. Saw Pipes Ltd.*[192] (now overruled) **(" SawPipes ")**. This case involved challenge to domestic arbitral awards rendered in India on theground of public policy under Section 34 of the A&C Act.

In addition to the meaning of public policy provided in *Renusagar* (which was in relation toforeign awards) , the Supreme Court introduced the concept of 'patent illegality' for settingaside domestic awards under the head of public policy. Patent illegality, to some extent,involved a review of the merits of the underlying dispute. Defining patent illegality, it heldthat "*Illegality must go to the root of the matter and if the illegality is of trivial nature itcannot be*

188 Renusagar Power Co. Ltd v. General Electric Co., 1994 Supp (1) SCC 644. ("Renusagar")

189 Section 7(1)(b)(ii), Foreign Awards (Recognition and Enforcement) Act, 1961.

190 Renusagar at Paragraph 66.

191 Renusagar, Paragraphs 76 and 85.

192 ONGC v. Saw Pipes (2003) 5 SCC 705

held that award is against the public policy. Award could also be set aside if it is sounfair and unreasonable that it shocks the conscience of the Court. Such award is opposed topublic policy and is required to be adjudged void ."[193]

The Supreme Court followed the dicta of Saw Pipes in the case of *Venture Global Engineering v. Satyam Computer Services Ltd. & Anr.* (now overruled).[194]

C. Phulchand: Patent Illegality extended to Foreign Awards

In the case of *Phulchand Exports Ltd. v. O.O.O Patriot* (now overruled) **("Phulchand")**, theSupreme Court extended the ground of 'patent illegality' devised in Saw Pipes for settingaside domestic awards in India, to resistance of enforcement of foreign awards in India.[195] The judgment of the Supreme Court in *Phulchand* set a disturbing precedent as it widened theambit of public policy *vis-a-vis* foreign awards — no longer keeping it narrow and minimal asin *Renusagar.*

D. Lal Mahal: Revert to Renusagar for Foreign Awards

In *Shri Lal Mahal Ltd. v. Progetto Grano SPA*, **(" Lal Mahal")** the Supreme Court overruled itsdecision in *Phulchand* and held that a foreign award may be refused enforcement underSection 48(2)(b) only if such enforcement would be contrary to: (i) the fundamental policy ofIndian law; or (ii) the interests of India; or (iii) justice or morality,[196] thereby returning to theposition laid down by *Renusagar.* It refused to apply the ground of patent illegality whileassessing foreign awards.

E. 246th Law Commission Report: Patent Illegality Restricted

In August 2014, the 246 th Law Commission Report **(" 246th LCR ")** provided significantinputs in relation to the definition of public policy. It acknowledged that *Saw Pipes* hadunintended consequences on international commercial arbitrations and the enforcement offoreign arbitral awards, which was corrected by the Supreme Court in *Lal Mahal.* Additionally, it recommended "(i) addition of Section 34(2A) to the A&C Act, in order tolimit the ground of 'patent illegality' to purely domestic arbitral awards; and (ii) a suggestionto add that "an award shall not be set aside merely on the ground of erroneous application ofthe law or by re-appreciating evidence".[197]

The 246th LCR also proposed to statutorily include a definition to public policy based on theSupreme Court's dicta in *Renusagar.* Going a step forward, the 246 th LCR suggested that thedefinition of public policy should not include within it 'the interests of India' since the samewas capable of interpretational misuse. Thus, it was proposed that the ambit of public policyfor enforcement of foreign awards should be limited to fundamental policy of Indian law; orbasic notions of justice or morality.[198]

193 Paragraph 31, ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705.

194 Venture Global v. Engineering v. Satyam Computer Services Ltd. & Anr., (2008) 4 SCC 190.

195 Phulchand Exports Ltd. v. O.O.O Patriot, (2011) 10 SCC 300

196 Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433

197 Law Commission Report No. 246 On Amendments to The Arbitration And Conciliation Act, 2014.

198 Id.

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F. "Western Geco": Wednesbury Principle of Reasonableness included for DomesticAwards

Before the recommendations of the 246th LCR were incorporated into the A&C Act, the Supreme Court expanded the scope of public policy in *ONGC v. Western Geco International Ltd.* in a case involving challenge to domestic awards. The Court held that 'fundamental policy of law' included three fundamental juristic principles, namely (i) duty to adopt judicial approach, i.e., to not act in an arbitrary, capricious or whimsical manner. Judicial approach requires courts to act in a fair, reasonable and objective manner and its decision should not be actuated by any extraneous consideration; (ii) compliance with principles of natural justice, incuding *audi alterum partem* and application of mind to the facts and circumstances; and (iii) 'Wednesbury principle' i.e., an award may be set aside if it is perverse and so irrational that no reasonable person would have arrived at the same. The Supreme Court held that a court could set aside a domestic award under the umbrella of fundamental policy of Indian law if the award is perverse or irrationality such as to fall foul of the touchstone of the aforesaid principles.[199]

G. Associate Builders: Public Policy Consolidated

Public policy was further consolidated in Associate Builders v. Delhi Development Authority, while assessing a challenge to domestic award. It set out the following elements of 'public policy' which are set out and summarized below[200]:

i. Fundamental Policy of Indian Law: This includes (a) contravention of the provisions ofthe Foreign Exchange Regulation Act, 1973 as it is a statute enacted for the nationaleconomic interest; (b) disregarding orders of superior courts in India; (c) disregardingthe binding effect of the judgment of a superior court; and (d) the principle of adopting ajudicial approach, which demands that a decision be fair, reasonable and objective. Anarbitrary or whimsical decision would not be a determination that is fair, reasonable orobjective; contravention of the principle of audi alteram partem principle also containedin Sections 18 and 34(2)(a)(iii) of the A&C Act; a decision which is so perverse or soirrational that no reasonable person would have arrived at the same. A decision could bedeemed perverse if: (i) the finding is based on no evidence, or (ii) an arbitral tribunaltakes into account something irrelevant to the decision which it arrives at; or (iii) ignoresvital evidence in arriving at its decision.

ii. Contrary to the interest of India: This ground relates to India as a member of the worldcommunity in its relations with foreign powers.

iii. Against justice: An award is against justice when it shocks the conscience of the court.For example, an arbitral award which awards a relief without any reason or justification.

iv. Against morality: Morality includes within it 'sexual morality' so far as Section 23 ofthe Indian Contract Act, 1872 is concerned. If it is to go beyond sexual morality, itwould cover agreements which are not illegal per se but would not be enforced given theprevailing morals of the day. Interference on this ground would also be only if it issomething which shocks the court's conscience.

199 ONGC v. Western Geco International Ltd. (2014) 9 SCC 263

200 Associate Builders v. Delhi Development Authority (2015) 3 SCC 49

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v. Patent illegality: This includes contravention of the substantive law of India, which would result in an illegality which goes to the root of the matter and cannot be of a trivial nature; contravention of the A&C Act itself; contravention of Section 28(3) of the A&C Act, which is the 'Rules applicable to the substance of the dispute'.[201]

H. Supplementary Report of the 246th Law Commission

In light of decision in *Western Geco*, the Law Commission issued a Supplementary Report to the 246th Law Commission Report specifically on the topic of "Public Policy" in February 2015. It recorded the 'chief reason' for its issuance as the inclusion of the Wednesbury principle of reasonableness within the phrase of "fundamental policy of Indian law" by the Supreme Court in Western Geco. The Law Commission suggested that such a power to review an award on merits is contrary to the objectives of the A&C Act and international practice, and would increase judicial interference in awards. It proposed that another explanation be added to Section 34 of the A&C Act, viz., *"For the avoidance of doubt the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."* [202]

I. Arbitration and Conciliation (Amendment) Act, 2015

In light of the proposed amendments, the A&C Act was amended through the Arbitration and Conciliation (Amendment) Act, 2015. As prescribed by the Law Commission Report, theground of 'patent illegality' is now restricted only to domestic arbitrations by way of insertionof Section 34(2A). Patent illegality is not available as a ground for international commercialarbitrations. Additionally, Section 48 of the A&C Act was amended to include the followingexplanations:

"Explanation 1. —For the avoidance of any doubt, it is clarified that an award isin conflict with the public policy of India, only if, — (i) the making of the awardwas induced or affected by fraud or corruption or was in violation of section 75 orsection 81; or (ii) it is in contravention with the fundamental policy of Indian law;or (iii) it is in conflict with the most basic notions of morality or justice.Explanation 2. —For the avoidance of doubt, the test as to whether there is acontravention with the fundamental policy of Indian law shall not entail a reviewon the merits of the dispute."[203]

J. Ssangyong Engineering: S.34 and S.48 of A&C Act

In Ssangyong Engineering and Construction Company Ltd. v. NHAI (**"Ssangyong Engineering"**), the Supreme Court set aside a domestic award on the ground that the award had unilaterally altered the terms of the underlying contract, thereby being contrary to the principles of justice and shocking the conscience of the court. The Court held that this was contrary to the public policy of India. Additionally, relying upon Associate Builders, and carefully considering the changes in the law, particularly the Arbitration and Conciliation (Amendment) Act, 2015, the Supreme Court in Ssangyong Engineering demarcated the grounds for setting aside domestic awards and setting aside international commercial arbitrations seated in India and resisting the enforcement of foreign arbitral awards.[204]

201 Id.

202 Supplementary to Report No. 246 on Amendments to Arbitration and Conciliation Act, 1996, "Public Policy", Developments post—Report No. 246, February 2015.

203 Section 48, Arbitration and Conciliation Act, 1996.

204 Ssangyong Engineering and Construction Company Ltd. v. NHAI, 2019 (15) SCC 131.

V. Key Deductions on Public Policy under Indian Law

India is one of the few jurisdictions to statutorily define public policy through the Arbitrationand Conciliation (Amendment) Act, 2015. While some countries consider public policy tomean international public policy, Indian courts have held that there is no workable definitionof international public policy, thus, it should be construed to be the doctrine of public policy asapplied by courts in India.[205] Within the definition of public policy, India has statutorilyincluded the grounds of fraud, corruption, fundamental policy of Indian law and basic notionsof justice and morality.

While public policy has no definition and its elements have been identified statutorily in Section 48(2)(b)(ii), additional elements have been sufficiently postulated by judicialinterpretation. In light of the above analysis, the following practical deductions can be madeabout public policy. These will be helpful while assessing an application resisting enforcementof a foreign award.

A. Court's Discretion in refusing Enforcement

S.48(2) provides that the Court " *may* " refuse enforcement of a foreign award. This providesdiscretion to the Court to, in certain circumstances, allow enforcement of a foreign award evenif grounds of refusal are made out.

In the case of *Cruz City 1 Mauritius Holdings v. Unitech Limited*, **(" Cruz City ")** the DelhiHigh Court proposed a balancing test to determine when a foreign arbitral award may berefused enforcement on the ground of public policy. The Court in *Cruz City* consideredwhether refusing to enforce a foreign award which is contrary to public policy may be furtheropposed to ' *public policy* '. However, the Court further held that while the width of discretionto refuse the enforcement of an arbitral award is narrow and limited, if sufficient grounds areestablished, courts can accept the contentions to refuse the enforcement of an arbitral award.[206]

Additionally, in the case of *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL* (**"Vijay Karia"**), the Supreme Court held that while discretion of courts may be employed in some of the grounds for refusing the enforcement of a foreign award, courts do not have any discretion regarding the grounds of fraud, corruption, fundamental policy of Indian law, basic notions of justice and morality.[207]

In the United Kingdom, in the case of *Minmetals Germany Gmbh v. Ferco Steel Ltd.*, it hasbeen held that *"considerations of public policy involve investigation not only of the coreprocedural defect relied upon by way of objection to enforcement but of all surroundingcircumstances which are material to the English Court's decision whether, as a matter ofpolicy, enforcement should be refused. Such circumstances may give rise to policy considerations which so strongly favour enforcement as to outweigh policy considerations tothe contrary."*[208]

In *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs,Government of Pakistan*, the Supreme Court of the U.K., held that while there may be adiscretion to enforce an arbitral award even if grounds for refusal of enforcement are made outin some circumstances, the absence of a valid arbitration agreement is not a ground wherein the court can exercise such discretion.[209]

205 Renusagar Power Co. Ltd v. General Electric Co 1994 Supp (1) SCC 644.

206 Cruz City 1 Mauritius Holdings v. Unitech Limited, (2017) 239 DLT 649

207 Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL, 2020 SCC OnLine SC 177.

208 Minmetals Germany Gmbh v. Ferco Steel Ltd., [1999] 1 All ER (Comm) 315.

209 Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46.

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In *Yukos Oil Co v. Dardana Ltd.*, the Court of Appeal in has held that the word 'may' inArticle V of the New York Convention suggests that even if one or more grounds are madeout, *"the right to rely on them had been lost, by for example another agreement or estoppel."* The High Court of Hong Kong, in the case of *Hebei Import*,[210] held that courts to not havethe discretion to enforce an arbitral award if the award is against public policy and the basicnotions of morality and justice.[211]

B. Beyond Statutory Violation

The expression 'fundamental policy of Indian law' calls for a violation that is beyond merestatutory violation. In Renusagar, the Court held that Article V(2)(b) of the New YorkConvention had omitted the reference to *"principles of law of the country in which it is soughtto be relied upon"* while replacing the Geneva Convention of 1927. Since the expression"public policy" covers the field not covered by the words "and the law of India" which followthe said expression, it was held that contravention of law alone will not attract the bar ofpublic policy and something more than contravention of law is required.[212]

It is important to assess the nature, object and scheme of a statute to determine if the violationof such statute would constitute a violation of the fundamental policy of Indian law. In *Vijay Karia*, the Supreme Court held that any rectifiable breach under the FEMA cannot be said tobe a violation of the fundamental policy of Indian law. It held that the Reserve Bank of Indiacould step in and direct the parties to comply with the provisions of the FEMA or evencondone the breach. However, the arbitral award would not be non-enforceable as the awardwould not become void on this count.[213] Citing its judgment in *Renusagar*, the SupremeCourt held that the fundamental policy of Indian law must pertain to *" a breach of some legalprinciples or legislation which is so basic to Indian law that it is not susceptible of beingcompromised. "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowedprinciples which are followed by the Courts."*[214]

C. Basic Notions of Justice & Morality

A recent instance wherein a majority arbitral award was set aside as being opposed to 'justice'is that of the case of *Ssangyong Engineering*, wherein it was held that the award unilaterallyaltered the contract which is opposed to the fundamental principles of justice and shocks theconscience of the court. Thus, when it comes to the public policy of India argument basedupon most basic notions of justice, it is clear that this ground can be attracted only in veryexceptional circumstances when an award shocks the conscience of the Court.[215]

210 Hebei Import & Export Corporation v. Polytek Engineering Company Ltd., [1999] 2 HKC 205.

211 Yukos Oil Co v. Dardana Ltd., [2002] EWCA Civ 543.

212 Renusagar Power Co. Ltd v. General Electric Co 1994 Supp (1) SCC 644

213 Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL, 2020 SCC OnLine SC 177

214 Id.

215 Ssangyong Engineering and Construction Company Ltd. v. NHAI, 2019 (15) SCC 131

D. Mistake of Fact or Law

The Supreme Court has repeatedly held that the scope of enquiry under Section 48 does notpermit review of a foreign arbitral award on its merits. Courts do not have the ability to take a'second look' at the foreign arbitral award at the enforcement stage.[216] This is nowincorporated as a statutory rule under Section 48(2)(b), Explanation 2. Further, the Delhi HighCourt, in the case of *Cairn India & Ors. v. Government of India* recently held that once anarbitral tribunal has been vested with jurisdiction by parties, it has the right to make both rightand wrong decisions as these are errors which fall within their jurisdiction.[217]

In *Vijay Karia* , the Supreme Court, while citing Albert Jan van den Berg in his treatise TheNew York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, hasnoted that, "*it is a generally accepted that the court before which the enforcement of theforeign award is sought may not review the merits of the award. The main reason is that theexhaustive list of grounds for refusal of enforcement enumerated in Article V does not includea mistake in fact or law by the arbitrator. Furthermore, under the New York Convention, thetask of the enforcement judge is a limited one. The control exercised by him is limited toverifying whether an objection of a respondent on the basis of the grounds for refusal ofArticle V is justified and whether the enforcement of the award would violate the public policyof the law of his country. This limitation must be seen in the light of the principle ofinternational commercial arbitration that a national court should not interfere with thesubstance of the arbitration* ".[218]

E. Natural Justice

Section 48(1)(b) permits a party to resist enforcement on grounds relating to violation ofnatural justice if a party is unable to present its case during the arbitration proceedings.However, a party may also resist the enforcement of an arbitral award on the ground of natural justice as being against public policy under Section 48(2)(b)(ii) (as natural justice forms a partof the fundamental policy of Indian law). A foreign award can possibly be challenged if thearbitral tribunal had ignored the submissions of the party in totality and the resulting awardwas contrary to the principles of natural justice, thereby violating public policy. This was thefinding of the Delhi High Court in the case of *Campos Brothers Farms v. Matru Bhumi SupplyClaim Pvt. Ltd.*[219] An appeal against the Single Judge's order in this case is currentlypending before the Division Bench of the Delhi High Court.[220]

F. Construction of Contract

Under Section 48(2), a court is not permitted to delve into merits of the award and evaluate themanner in which the arbitral tribunal has construed the terms of the underlying contract.However, recently, in a rare decision, the Supreme Court has declined the enforcement of aforeign arbitral award in the case of *National Agricultural Cooperative Marketing Federationof India v. Alimenta S.A.*[221] **("National Agricultural")** under the Foreign Awards Act as theenforcement application in the present case was filed in 1993.

216 Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433

217 Cairn India & Ors. v. Government of India, O.M.P.(EFA)(COMM.) 15/2016 & I.A. Nos. 20459/2014 & 3558/2015, Judgment Dated February 19, 2020.

218 Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation,

219 Campos Brothers Farms v. Matru Bhumi Supply Claim Pvt. Ltd., (2019) 261 DLT 201.

220 Campos Brothers Farms v. Matru Bhumi Supply Claim Pvt. Ltd., EFA(OS) (COMM) 10/2019.

221 National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A, Civil Appeal No. 667 of 2012.

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In this case, the Appellant was allegedly unable to comply with the contractual terms whereinthe Appellant was to export groundnuts. The Supreme Court noted that the export requiredgovernment approval, however, the government did not grant the Appellant the necessaryapprovals to carry out its contractual obligations. Further, the agreement itself contained aclause wherein it was provided that the contract between the parties would be cancelled if theshipment was prohibited by an executive or legislative act by the government which wouldmake the shipment impossible **("Contingency Clause")**. In its award, the arbitral tribunalawarded damages upon the Appellant for a breach of contract.

The Supreme Court held that the export could not have taken place without the approval of theGovernment. Export without the government's permission would have violated the law, thus,enforcement of the award would be violative of the public policy of India. Considering that theContingency Clause would have become applicable, the contract itself would have beencancelled. The contract was thereby rendered void under Section 32 of the Indian ContractAct, 1872.[222] Thus, enforcing an award which seeks the payment of damages for breach of acontract (which was rendered void) is contrary to the fundamental policy of Indian law. TheSupreme Court, relying upon several judgments, including that of *Associate Builders* and *Ssangyong Engineering*, held the foreign arbitral award to be unenforceable as being opposedto the fundamental policy of Indian law and the basic notions of justice, and thereby publicpolicy. This judgment could be problematic for many reasons, foremost being appreciation ofthe merits of the dispute and re-assessment of the tribunal's construction of the contract.

G. Fraud or Corruption

While Indian courts have had an opportunity on expand upon what may constitute thefundamental policy of Indian law and basic notions of justice and morality, there is minimaljurisprudence on what constitutes fraud or corruption in the context of refusing theenforcement of a foreign arbitral award.

H. Other Potential Grounds

Further, courts in other jurisdictions have held that award without reasons is contrary to public policy,[223] however, such objections may now be classified into the bucket of "patent illegality" in India and be unavailable as an objection to the enforcement of foreign arbitral awards. There are certain other grounds that courts have held to be contrary to public policy such as acting in bad faith, duress, impartial hearing, surprise decisions, etc.[224] However, Indian courts have not had the opportunity to evaluate such grounds yet — and it is likely that many of these grounds would be considered 'patent illegality' and not be available as a ground to resist the enforcement of a foreign award.

I. Applicability of Public Policy under A & C Act

The ground of public policy is available in India both for challenge to an India-seated awardand to resist enforcement of a foreign award. However, in an international commercialarbitration conducted in India, the ground of challenge relating to public policy of India wouldbe the same as the ground of resisting enforcement

222 Section 32, Indian Contract Act, 1872 provides that, "Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void."

223 Smart Systems Technologies Inc. v. Domotique Secant Inc., 2008 QCCA 444.

224 DIRK OTTO; OMAIA ELWAN, ARTICLE V(2), IN RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION (Kronke, Nacimiento, Otto, et al. (eds); Jan 2010).

of a foreign award in India. This is becauseSection 34 of the A&C Act, which deals with challenge to awards made by India-seatedarbitral tribunals, differentiates between international commercial arbitrations held in Indiaand other arbitrations held in India. Thus, after the Arbitration and Conciliation (Amendment)Act, 2015, grounds relating to patent illegality appearing on the face of the award do not applyto (i) international commercial arbitration awards made in India; and (ii) foreign awards beingresisted in India.

VI. Conclusion

Resistance to enforcement of foreign awards in a country must be approached withcircumspection. The question whether enforcement of a foreign award violates the publicpolicy of India must be considered in the context that India is a signatory to the New YorkConvention.[225] It is the sovereign commitment of India to honour foreign awards, except onthe exhaustive grounds provided under Article V of the New York Convention.

While it may be tough to construe public policy without a workable definition, judicialinterpretation offers sufficient guidance, whilst maintaining that judicial interference remainminimal. It is essential to recognize the need for restraint in examining the correctness of aforeign award or a domestic award tendered in an international commercial arbitration, asopposed to a domestic award. As stated in *Fritz v. Scherk*, we cannot have trade andcommerce in world markets and international seas exclusively on our terms, governed by ourlaws and resolved in our courts.[226] Concerns of international comity, respect for thecapacities of foreign and transnational tribunals, and sensitivity to the need of the internationalcommercial system for predictability in the resolution of disputes require that we enforce theparties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[227]

As the Court in *Cruz City* has aptly stated, a policy to enforce foreign awards itself forms apart of the *public policy of India* – and courts should strive to find the right balance betweenthe policy of enforcing foreign awards and considering the grounds for resisting theenforcement of foreign awards.[228] In light of judicial guidance and internationalcircumspection over public policy as a ground for refusal of enforcement of foreign awards — hopefully, public policy will not be argued readily only when all other points fail!

— *Bhavana Sunder & Kshama A. Loya*[229]

225 Cruz City 1 Mauritius Holdings v. Unitech Limited, (2017) 239 DLT 649

226 Fritz Scherk v. Alberto Cuvler, 417 US 506 (1974).

227 Mitsubishi Motors Corpn. v. Soler Chrysler—Plymouth Inc., 87 L Ed 2d 444.

228 Cruz City 1 Mauritius Holdings v. Unitech Limited, (2017) 239 DLT 649

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ICSID Toolkit

The International Centre for Settlement of Investment Disputes (ICSID or the Centre), established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), was created to facilitate the settlement of disputes between foreign investors and States. It is the only multilateral institution specifically dedicated to resolving disputes between States and foreign investors and has administered the majority, being over 70 percent, of all known international investment disputes.

A. ICSID's Dispute Settlement Services

The Centre offers a range of dispute settlement services to facility users. ICSID offers the administration of arbitration and conciliation proceedings to resolve legal disputes that arise directly out of an investment and involve an ICSID Member State and a national of another ICSID Member State.

The Centre also administers proceedings, under the Additional Facility Rules, adopted in 1978, that fall outside the scope of the ICSID Convention. Such proceedings include, inter alia, conciliation, arbitration and fact-finding in disputes where either the investor's home State or host State is not an ICSID Member State, or where neither party has a link to ICSID membership.[1]

Additionally, ICSID administers cases under other sets of rules, such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) and provides other services upon parties' requests, such as appointment of arbitrators or conciliators or acting as Secretariat for regional trade agreements.

B. ICSID Mediation

On March 21, 2022, ICSID's Member States approved a comprehensive set of amendments to ICSID's existing sets of arbitration, conciliation and fact-finding rules, and adopted investment specific mediation rules.

I. ICSID Mediation: Background

Over the past decade, a number of developments on the national and international level that point to the growing recognition of the importance of mediation as a tool to resolve cross-border commercial disputes and disputes between investors and States. A number of States have adopted treaties where mediation appears as a prerequisite or an independent mechanism for dispute settlement, see for example the Common Market for Eastern and Southern Africa (COMESA). ICSID recently published an overview of mediation provisions in investment treaties, which is available on ICSID's website.[2]

In addition, the work by the international community, led by UNCITRAL Working Group II, led to the development of the United Nations Convention on International Settlement Agreements Resulting from

1 https://icsid.worldbank.org/sites/default/files/documents/ICSID_Additional_Facility.pdf

2 https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf

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Mediation (Singapore Convention) which entered into force in September 2020 and provides *inter alia*, for enforcement of mediated settlements.

ICSID's statistical data indicates that 30–40 percent of arbitrations settle or are otherwise discontinued before an award is rendered. It is against this background that ICSID decided to offer mediation as an additional dispute settlement tool for investors and States.

ICSID's new Mediation Rules intend to complement bilateral and multilateral treaties that provide for mediation and other dispute settlement methods offered by ICSID as well as provide additional process options to the parties. ICSID Mediation offers a broad scope of application, and is open to investors and States regardless of their ICSID membership status.

The Mediation Rules provide a flexible process and assist with a timely and cost-effective resolution of investment disputes, allowing for tailor-made solutions. Importantly, they are aligned with the formal requirements of the Singapore Convention and hence the latter will be automatically met in ICSID mediations. Furthermore, parties' participation in proceedings under the Mediation Rules is entirely voluntary with either party being free to withdraw from the process at any time, including to pursue other dispute resolution methods.

II. What is Investment Mediation?

Mediation is typically understood as a flexible and consensual process in which the parties negotiate their dispute directly with one another, assisted by an independent and impartial third party, the mediator, whose role is to assist the disputing parties in working towards a negotiated agreement to resolve a dispute or difference. The parties remain in ultimate control of the decision to settle and the terms of the resolution. Investment mediation in the ICSID context is generally understood as mediation that relates to an investment and involves a State, State entity or Regional Economic Integration Organization (REIO).

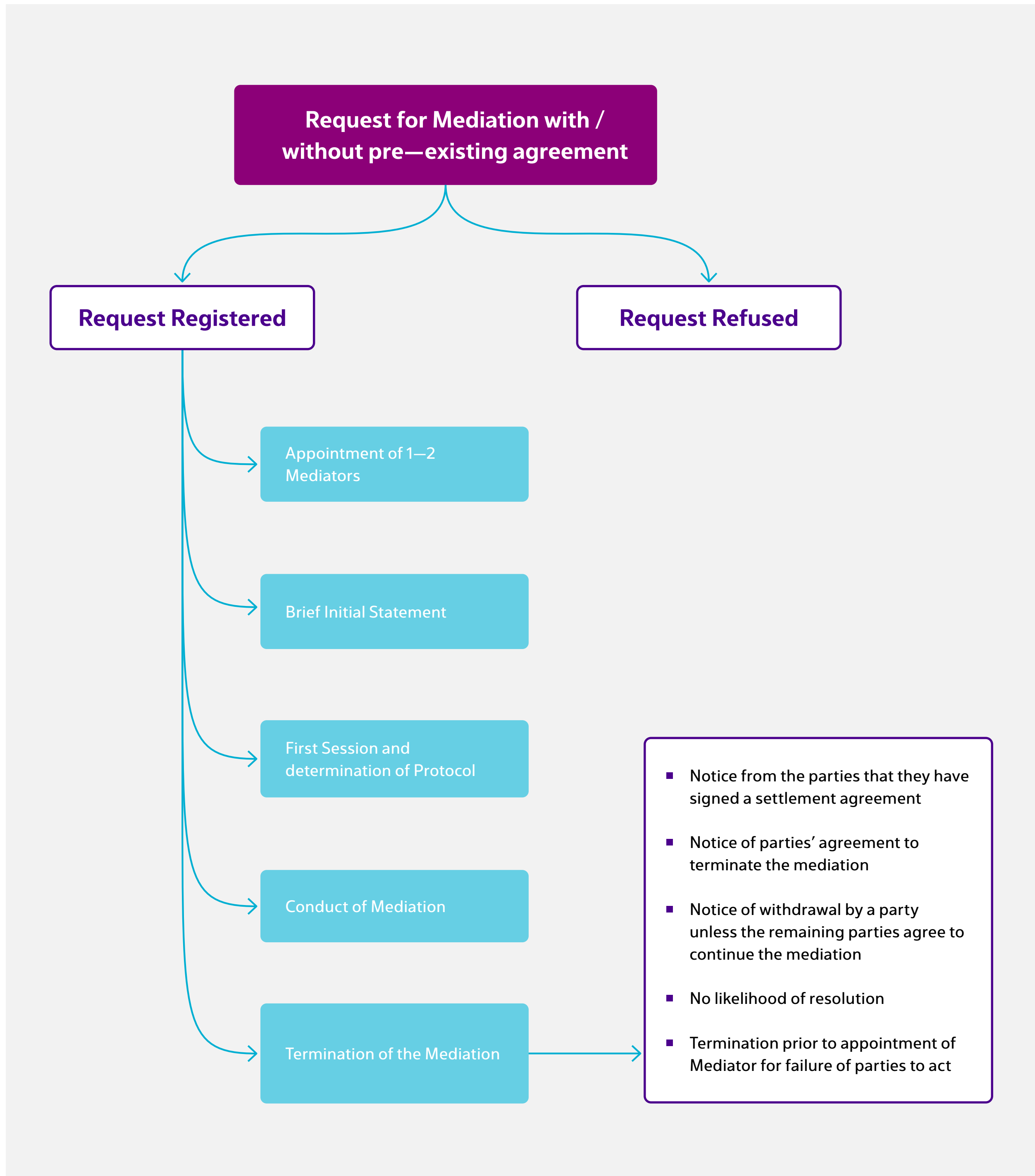
III. Broad Scope of ICSID Mediation (Mediation Rule 2)

The ICSID Mediation Rule 2 provides that the Secretariat is authorized to administer any mediation proceeding that relates to an investment involving a State or an REIO. The scope of ICSID mediation is intentionally broad, and unlike proceedings under the ICSID Convention and Additional Facility Rules, ICSID mediation does not require any link of the parties to ICSID membership and it does not impose a nationality requirement for the investor. Therefore, while the ICSID Mediation Rules require a State or REIO to be a party, they do not prescribe who the other disputing party or parties might be. The other disputing party could be a national of another State, or a local entity. Because consent of parties to mediation is not only required to commence the mediation proceeding, but also must persist throughout the entire process (**"ongoing consent"**), a party may withdraw from the mediation at any time.

IV. ICSID Mediation Process Overview

The mediation process under the ICSID rules starts out with a request for mediation. The request may be filed on the basis of an existing written consent to mediate— such as a mediation provision in an investment contract or advance consent to mediation contained in a treaty that is accepted by the investor. A new feature in the ICSID

system, mediation may also be commenced without such pre-existing written agreement. In those situations, the request itself may contain an offer to mediate addressed to the other party, and the ICSID Secretariat then transmits such offer to the other party inviting that party to state whether it accepts or rejects that offer. Should consent materialize through acceptance from the other party, the next step will entail the registration of the request.



Following registration, the next step is the appointment of one or two mediators by agreement of the parties.

Once the mediator or both co-mediators have accepted their appointments, each party will file a brief initial statement, setting out their views on the disputed issues and on matters of procedure.

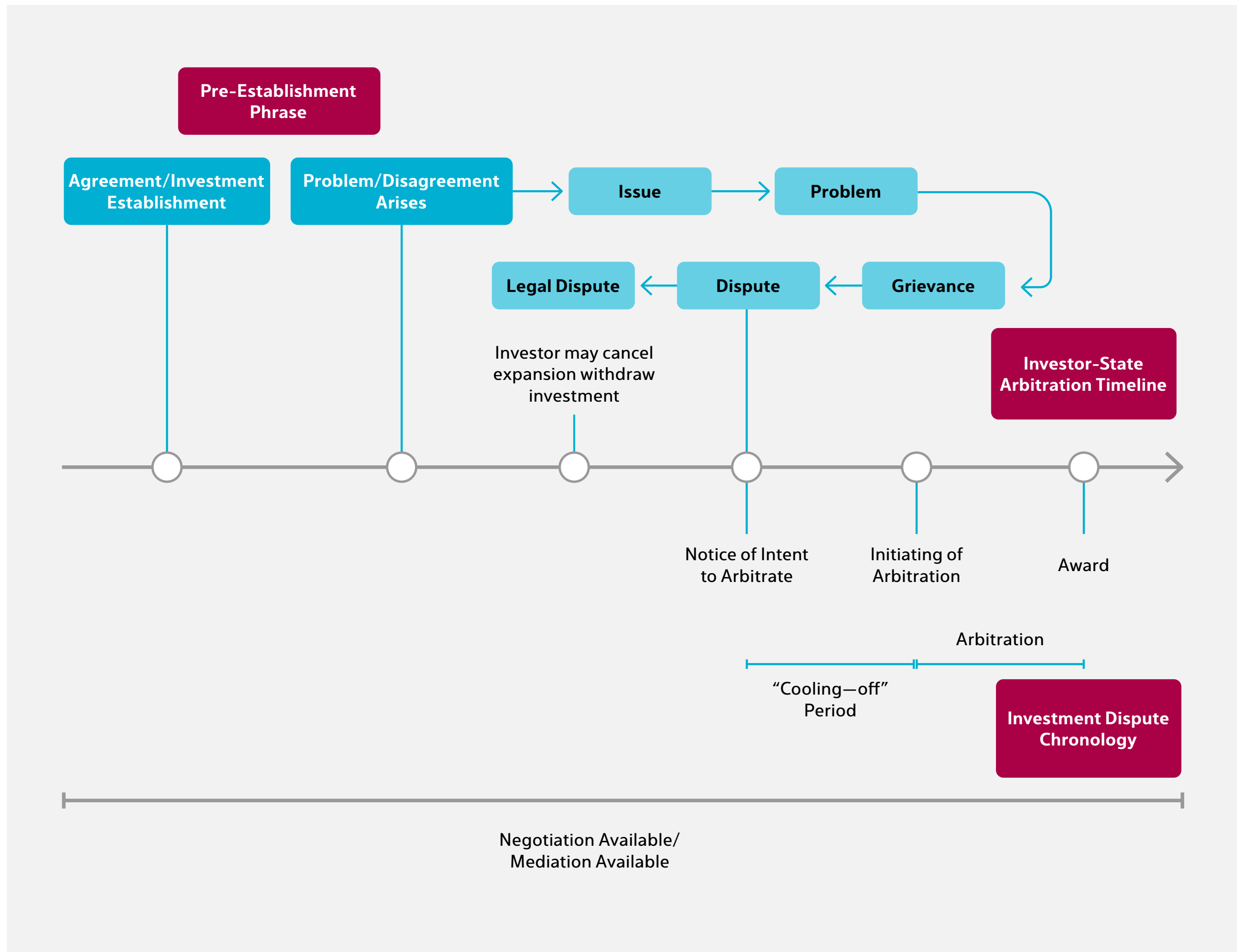
Subsequently the mediators and the parties will conduct a joint first session to develop the mediation protocol which will contain the procedural framework pursuant to which the mediation will be conducted. A mediation may be terminated by a notice from the parties that a settlement agreement has been signed, a notice from the parties that they have agreed to terminate the mediation, a notice of withdrawal by a party from the mediation (unless the remaining parties agree to continue the mediation), or upon a determination of the mediator that there is no likelihood of resolution.

V. When can ICSID Mediation be used?

ICSID mediation may be an appropriate tool for conflict resolution at various stages of the lifecycle of an investment. Being a form of facilitated negotiation, mediation is always available, when negotiation is considered suitable.

Hence, mediation is not limited to the time after the dispute is formally crystallized by a “Notice of Dispute”, rather it can be a useful tool throughout the entire investment lifecycle, including the amicable settlement or cooling-off period, parallel to ongoing arbitration and even after an arbitration has ended. The chart below visualizes when mediation could be suitable to resolve an investment dispute:

Investment Dispute Chronology and Availability of ISDS Processes



VI. ICSID Mediation Awareness and Capacity Building

ICSID's mediation awareness and capacity building efforts include the Investment Mediation Insights[3] webinar series which provide insights into the practical aspect of investment mediation.

ICSID also prepared a background paper on investment mediation,[4] as well as the overview of investment treaty clauses on mediation.[5] The former serves as a step-by-step introduction to mediation as a process to resolve investment disputes, while the latter features an extensive survey of existing dispute resolution clauses in bilateral investment treaties, free trade agreements, and dispute settlement provisions in model treaties.

Additionally, ICSID has conducted a number of trainings and courses to raise awareness about investment mediation and build capacity, information on upcoming trainings is made available on the ICSID website.

The ICSID Mediation Rules can be found at the web-link below.[6]

3 https://icsid.worldbank.org/services/mediation-conciliation/mediation/investment-mediation-insights-webinar-series
4 https://icsid.worldbank.org/resources/publications/background-paper-investment-mediation
5 https://icsid.worldbank.org/resources/publications/overview-investment-treaty-clauses-mediation
6 https://icsid.worldbank.org/sites/default/files/documents/ICSID_Mediation.pdf

SIAC Toolkit

A. SIAC's Introduction of Investment Arbitration Rules, 2017

'Investment arbitrations' generally refer to arbitrations involving disputes between foreign Investors and a host state pursuant to a treaty between the Investor's state and the host state, or an investment contract between the Investor and the host state.

Most investment treaties or investment contracts provide for resolution of disputes raised by the Investor under the Rules of the International Centre for Settlement of Investment Disputes **(ICSID Rules)** and the United Nations Commission on International Trade Law **(UNCITRAL)**. Investment arbitrations are thus to a great extent administered by ICSID under the ICSID Rules or proceed under the UNCITRAL Rules on an ad hoc basis or administered by institutions such as the Permanent Court of Arbitration, ICSID, SIAC or the Arbitration Institute of the Stockholm Chamber of Commerce.

Investors turn to Investor-state arbitrations to challenge a wide range of government measures, including laws, regulations and administrative decisions in all economic sectors, that affect their substantive rights under an investment treaty or an investment contract. Over the years there has been a significant increase in the number of investment treaty arbitrations, accompanied by serious concerns about systemic deficiencies in the conduct of investment arbitrations. One major concern has been that investment arbitrations are frequently protracted and expensive.

Identifying the need to provide specialised rules that would address various challenges facing investment arbitration, SIAC released a comprehensive set of specialised rules for the administration of investment arbitrations by SIAC, known as the SIAC Investment Arbitration Rules **("IA Rules")**. The IA Rules are specifically aimed to address the issues of rising costs, delays, transparency, and third-party funding, and include a number of innovative features such as emergency interim relief, third-party submissions, and early dismissal.

The present Chapter examines the key provisions of the IA Rules, which came into force on 1 January 2017. The contents of this chapter are for information purposes only and do not constitute legal advice.

B. Application of the IA Rules

The IA Rules are applicable to any arbitration under the IA Rules which is commenced on or after 1 January 2017. The key requirement for the applicability of the IA Rules is an agreement to arbitrate under these rules, which can be applied in any type of arbitration. The **application of the IA Rules is not subject to objective criteria**, such as the existence of a qualifying 'Investor' or 'investment' or the presence of a State, State-controlled entity or intergovernmental organisation, without prejudice to any requirements set out in the underlying contract, treaty, statute or other instrument.

As per Rule 1.1 of the IA Rules, where the parties have agreed to refer a dispute to arbitration in accordance with the IA Rules, the parties shall be deemed to have agreed that the arbitration shall be conducted pursuant to and administered by SIAC in accordance with the IA Rules. Rule 1.2 of the IA Rules provides that such an agreement

may be expressed in a contract, treaty, statute or other instrument, and may also be made through an offer by a party in any such instrument that is subsequently accepted by the other party.

C. Key Provisions of The IA Rules

I. Commencement of Arbitration and Other Preliminary Matters

A. Issuance of Notice of Arbitration

A claimant commences an arbitration by **filing a notice of arbitration** with the Registrar. As per Rule 3.1 of the IA Rules, the notice of arbitration shall include:

a. a demand that the dispute be referred to arbitration;

b. the names, nationalities, addresses, telephone numbers, facsimile numbers and electronic mail addresses, if known, of the parties to the arbitration and their representatives, if any;

c. a reference to the arbitration clause and a copy of the arbitration clause;

d. a reference to the contract, treaty, statute or other instrument out of or in relation to which the dispute arises and a copy of the contract, treaty, statute or other instrument;

e. where applicable, a brief statement describing the nature of the relationship between a Party and any relevant State, State-controlled entity or intergovernmental organisation, and how the parties are bound by the arbitration clause;

f. a brief statement describing the nature and circumstances of the dispute, specifying the relief claimed and, where possible, an initial quantification of the claim amount;

g. a statement of any matters which the parties have previously agreed as to the conduct of the arbitration or with respect to which the claimant wishes to make a proposal;

h. a proposal for the number of arbitrators if not specified in the arbitration clause;

i. unless otherwise agreed by the parties, the nomination of its arbitrator(s) if the arbitration clause provides for three or more arbitrators, or a proposal for a sole arbitrator if the arbitration clause provides for a sole arbitrator;

j. any comment as to the applicable rules of law;

k. any comment as to the language of the arbitration; and

l. payment of the requisite filing fee under the IA Rules.

The notice of arbitration is deemed to be complete when all the above requirements are fulfilled or when the Registrar determines that there has been substantial compliance with such requirements. In addition to filing the notice of arbitration with the Registrar, the claimant is required to serve a copy of the same to the respondent.

B. Response to the Notice of Arbitration

The respondent is required to serve its **response within a period of 35 days** from receipt of the notice of arbitration.[1] As per Rule 4.1, the respondent's response shall include:

a. confirmation or denial of all or part of the claims, including, where possible, any plea that the tribunal lacks jurisdiction;

b. a brief statement describing the nature and circumstances of any counterclaim, specifying the relief claimed and, where possible, an initial quantification of the counterclaim amount;

c. any comment in response to any statements contained in the notice of arbitration;

d. unless otherwise agreed by the parties, the nomination of its arbitrator(s) if the arbitration clause provides for three or more arbitrators or, if the arbitration clause provides for a sole arbitrator, comments on the claimant's proposal for a sole arbitrator or a counter- proposal; and

e. payment of the requisite filing fee under these Rules for any counterclaim.

Similar to the service of notice of arbitration by the claimant, the respondent is required to serve a copy of its response to the claimant, in addition to filing the same with the Registrar.

C. Determination of the estimated Costs of Arbitration

The R**egistrar determines** the **estimated costs** of arbitration in accordance with the Schedule of Fees and calls for the necessary deposits in a series of commercially sensible tranches. Similar to the Fee Schedule of the Commercial Rules, the **Fee Schedule** of the IA Rules is based on a default *ad valorem system.* Accordingly, SIAC's administration fee, and the arbitrator's fees are computed on the basis of the amount in dispute and subject to a maximum cap. The Registrar will then determine the actual costs of arbitration as a proportion of these maximums based on, inter alia, the conduct of the proceedings and the stage of the arbitration at which the arbitration concluded.

D. Constitution of Tribunal

Detailed provisions on the appointment of arbitrators are covered under Rules 5 to 9 of the IA Rules.As per Rule 5.1 of the IA Rules, the parties may agree that the tribunal shall be composed of one, three or any odd number of arbitrators.[2] In the absence of any such agreement, the default position is that the tribunal shall consist of three arbitrators. However, the SIAC Courthas the ability to determine if the dispute warrants appointing a sole arbitrator, giving due regard to the parties' proposals, the complexity, quantum involved and other relevant circumstances of the dispute.[3]

In contrast, the President of the SIAC Court is the appointing authority under the Commercial Rules, and the default position is that a sole arbitrator will be appointed unless the parties have otherwise agreed. In the event that the clause is silent on the number of arbitrators to be appointed, the Registrar may determine that three

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1 IA Rule 4.1

2 IA Rule 5.1.

3 IA Rule 5.2.

arbitrators are to be appointed having regard to any proposals by the parties, the complexity of the dispute, the quantum involved or any other relevant circumstances.[4] The distinction on the appointing authority and the default number of arbitrators under the Commercial Rules and the IA Rules is to give effect to the special considerations in investment arbitrations.

E. List-Procedure for Appointment of Arbitrators by the SIAC Court

The IA Rules also provide for a number of provisions that boost **parties' participation in constituting the tribunal.**

In the event that the parties fail to agree on a sole arbitrator, or the agreed procedure for selecting a presiding arbitrator fails to produce a nomination in the case of a three-member tribunal, the appointment shall be made by the SIAC Court.[5] These appointments will follow the list-procedure unless the parties agree otherwise or the SIAC Court determines that such procedure is not appropriate in a given case.

Under the list-procedure, the SIAC Court shall, after considering the parties' views on arbitrator qualifications, present to the parties an identical list of at least five candidates. Each of the parties is then free to strike out any names it objects to and rank the remaining names according to its preference. To the extent possible, the SIAC Court shall appoint the arbitrator among the names accepted by the parties and in accordance with the order of preference indicated. As a fail-safe, the SIAC Court may exercise its discretion to make the appointment of an arbitrator outside the list.[6]

F. Multi-Party Appointments and Procedural Fairness

In order to ensure procedural fairness and equal treatment of parties in the constitution of the tribunal, the IA Rules require (in the case of multi-party arbitrations where at least three arbitrators have to be appointed) the claimant(s) and the respondent(s) to each jointly nominate an equal number of arbitrators. In the absence of these joint nominations, the SIAC Court makes the appointments on behalf of the parties using the list-procedure, and designates one of the arbitrators as the presiding arbitrator. [7]

G. Nationality of Arbitrators

Where parties are of different nationalities, the SIAC Court shall appoint a sole arbitrator or a presiding arbitrator, as the case may be, of a different nationality than the parties. However, the parties may waive this requirement or the SIAC Court may determine otherwise having regard to the circumstances of the case.

H. Arbitrator Challenge

Rules 11–13 of the IA Rules govern the procedure for challenges to arbitrators and are aimed at curtailing delays caused on account of such challenges.

4 SIAC Rule 9.1

5 IA Rules 6.2; 7.3; 9.1; 9.2.

6 IA Rule 8.

7 IA Rule 9.2

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Under Rule 11, the parties may challenge an arbitrator if there are **justifiable doubts** as to the **arbitrator's impartiality or independence** or if the **arbitrator does not possess the qualifications** agreed by the parties.

Rule 12 of the IA Rules sets out a timeline for parties to raise a challenge. A party challenging an appointment is required to file a notice of challenge with the Registrar within **28 days** after receipt of the arbitrator's notice of appointment or within 28 days from the date the circumstances to challenge the arbitrator became known or should have reasonably been known to that party. Challenges by a party to any arbitrator that it nominated must be based on reasons the party became aware of after the appointment.

Unless the parties agree on the challenge or the arbitrator withdraws within 21 days from receipt of the notice of challenge, the **SIAC Court decides on the challenge** and may solicit comments from the parties, the challenged arbitrator, and other members of the tribunal before making its decision. The SIAC Court's decision, unless the parties otherwise agree, is required to be reasoned.

Importantly, arbitrator challenges under the IA Rules do not result in an automatic suspensionof the proceedings unless the Registrar so orders, and a **challenged arbitrator may continue to participate in the proceedings** pending the determination of the challenge. This rule serves to avoid the strategic use of challenges of arbitrators to cause unnecessary delay and disruption of the proceedings.

II. Jurisdictional objections

A. Determination of Pre-Constitution Jurisdiction Objection

As per Rule 25 of the IA Rules, if any Party objects to the existence or validity of the arbitration clause, the applicability of the IA Rules or the competence of SIAC to administer the arbitration, before the arbitral tribunal is constituted, **the Registrar determines if such objection shall be referred to the SIAC Court**. If the Registrar so determines, the SIAC Court shall decide if it is prima facie satisfied that the arbitration shall proceed. The arbitration shall be terminated if the **SIAC Court** is not so satisfied. Any decision by the Registrar or the SIAC Court that the arbitration shall proceed is without prejudice to the power of the tribunal to rule on its own jurisdiction. Dismissed jurisdictional objections may be raised again before the tribunal that will review the objections de novo.

B. Determination of Post-Constitution Jurisdiction Objection

A tribunal has the power to rule on its jurisdiction. In addition to the grounds for jurisdictional challenges available under the Commercial Rules (i.e., based on the existence, validity or scope of the arbitration agreement/ clause), the IA Rules also explicitly permit objections to the admissibility of any claim or counterclaim[8]. The IA Rules, like the Commercial Rules, codify the separability presumption.[9]

8 Compare IA Rule 25.2 with SIAC Rule 28.2.

9 IA Rule 25.2.

III. Submission of Pleadings

The IA Rules provide for memorial-style submissions as a default rule, so that, unless the parties agree otherwise or the tribunal determines to the contrary, the parties must file any witness statement and/or expert report supporting their claim/defence simultaneously with their legal arguments and statements of fact. This is in contrast to the pleading-style submissions provided for under the Commercial Rules. [10]

IV. Third Party Participation

Investment arbitration often involves issues of public interest and policy, as a result of which the law and practice of investment treaty arbitration has provided an avenue for third party submissions. The IA Rules provide two mechanisms through which third parties, who are not parties to the arbitration may make submissions to the tribunal.

First, under Rule 29.1 of the IA Rules, parties to a treaty, pursuant to which the dispute is referred to arbitration are allowed (without leave of the tribunal or consent of the parties) to make written submissions on questions of treaty interpretation that are directly relevant to the dispute. This mechanism considers the interests of a non-disputing contracting party to a treaty, particularly on treaty interpretation issues that may affect other treaties entered into by that party.

Second, under Rule 29.2 of the IA Rules, anyone who is not a party to the arbitration, whether or not a contracting party to the underlying treaty, with leave of the tribunal, may make written submissions regarding a matter within the scope of the dispute.

Rule 29.3 provides for a non-exhaustive list of factors that the tribunal will consider in determining whether to allow an application under Rule 29.2 to proceed, including:

a. whether the non-disputing contracting party's or non-disputing party's written submissions would assist the tribunal in the determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the parties;

b. whether the non-disputing contracting party's or non-disputing Party's written submissions would only address a matter within the scope of the dispute;

c. whether the non-disputing contracting party or non-disputing party has a sufficient interest in the arbitral proceedings and/or any other related proceedings;

d. whether allowing the written submissions would violate the parties' right to confidentiality.

10 Compare IA Rule 17.1; 17.2 with SIAC Rule 20.1; 20.2.

V. Interim and Emergency Interim Relief

A. Emergency Interim Relief and Pre-Constitution Requests for Interim Relief

The IA Rules provide for emergency provisions that are available on an **opt-in** basis.[11] Under Rule 27.4, parties may have recourse to the EA provisions set out in Schedule 1, but only if the parties have expressly agreed they would apply. If the parties have agreed so, the **SIAC Court**, in the event an application is accepted, will appoint an EA **within one day** of receiving a party's application. The EA, after giving the parties a reasonable opportunity to be heard, shall issue a reasoned, **written order or award** (which may be in summary form) **within 14 days** of his appointment (unless the Registrar extends the time in exceptional circumstances). The EA enjoys the same powers as a tribunal under the IA Rules, and may order or award any interim relief he deems necessary.[12]

In case of a pre-constitution request for interim relief, the Registrar, upon a request, may invite submissions from the parties on such request and fix deadlines for written submissions.[13]Upon the constitution of tribunal, the written submissions and request are forwarded to the tribunal. Requests for pre-constitution interim relief to judicial authorities are also not incompatible with the IA Rules. [14]

B. Interim Relief after Constitution of the Tribunal

At a party's request, the tribunal may issue injunctions or any other interim relief it deems appropriate in the form of orders or awards. [15]

Further, a request for interim relief made by a party to a judicial authority, prior to the constitution of the tribunal, or in exceptional circumstances thereafter, is not considered incompatible with the IA Rules. [16]

VI. Early Dismissal of Claims and Defences

The IA Rules expressly recognise the power of the tribunal to dismiss frivolous claims and defences in an expedited manner. The early dismissal mechanism allows tribunals to dispose of claims or defence at an early stage and in an expedited fashion, without having to go through all the procedural steps, saving time and costs.

A claimant or respondent may apply to the tribunal for early dismissal of a claim or defenceon the basis that it is manifestly:

a. without legal merit;

b. outside the jurisdiction of the tribunal; or

c. inadmissible.[17]

11 IA Rule 27.4.

12 IA Rules, Schedule 1.

13 IA Rule 27.3.

14 IA Rule 27.2.

15 IA Rule 27.1.

16 IA Rule 27.2

17 IA Rule 26.1

The IA Rules stipulate a **two-step procedure** for the determination of such applications. First, the tribunal has to determine whether to 'proceed' with such an application. This discretion imparts flexibility to this process and empowers a tribunal to decline applications which may be filed strategically to disrupt or delay the proceedings. Thereafter, in the event the tribunal decides to hear the substance of the application, it is required to pass an award or an order **within 90 days**, after giving the parties an opportunity to be heard.

VII. Confidentiality and Transparency

The values of confidentiality and transparency are often debated in the context of investment arbitration, and the difficulty lies in creating a balance between the two. The IA Rules attempt to strike that balance in Rules 37 and 38.

In terms of Rule 37, strict confidentiality is the default position unless the parties have otherwise agreed. Rule 38 expressly provides that SIAC may publish certain limited information on proceedings conducted under the IA Rules. The information that may be published is limited to:[18]

a. nationality of the parties,

b. identity and nationality of arbitrators,

c. the treaty, statute or other instrument under which arbitration is brought,

d. date of commencement,

e. whether the proceedings are ongoing or were terminated, and

f. redacted excerpts of the tribunal's reasoning and of the SIAC Court's decision on challenges to arbitrators).

SIAC may publish additional details (including awards) with the express consent of the parties. [19]

VIII. Third-Party Funding

Third-party funding which entails financing by a third party of the costs of the dispute resolution proceedings in exchange for a financial return, is used frequently in international arbitration. Third-party funding was historically prohibited in some jurisdictions on account of the common law doctrines of champerty and maintenance. However, recently, some common law jurisdictions, such as Singapore have introduced laws and regulations which specifically recognise that third-party funding agreements with qualifying third-party funders in relation to international arbitration or mediation proceedings are not illegal or contrary to public policy. [20] The IA Rules are the first set of institutional rules to expressly address third-party funding. Under Rule 24(l) of the IA Rules, unless otherwise agreed, the **tribunal has the power to order disclosure** of the existence of a third-party funding arrangement and the identity of the third-party funder, as well as, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and whether the third-party funder has committed to undertake adverse costs liability.

18 IA Rule 38.2

19 IA Rule 38.3

20 Singapore Civil Law (Amendment) Act 2017 and Civil Law (Third—Party Funding) Regulations 2017

The IA Rules also provide that in apportioning the costs of arbitration, the tribunal may take into account any third-party funding arrangements.[21]

IX. Awards and Scrutiny

Under the IA Rules, once the tribunal is satisfied that the parties have no further relevant/material evidence or submissions to make, it shall **as promptly** as possible declare the proceedings closed and, **within 90 days** of closing the proceedings, submit a **draft award to the Registrar** (unless an extension is granted by the Registrar or the parties otherwise agree).[22]

The Registrar shall provide suggested modifications as to form and draw the tribunal's attention to points of substance, which are not binding on the tribunal. The tribunal may make the final award (which must be in writing and, unless the parties otherwise agree, provide the reasons upon which it is based) once the Registrar approves the award as to its form.[23]

21 IA Rule 33.1.

22 IA Rules 30.1; 30.3

23 IA Rules 30.3; 30.4.

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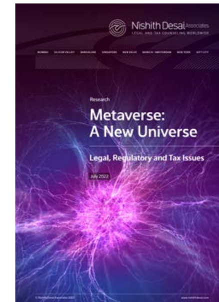

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