

Dispute Resolution Hotline

November 17, 2016

INDIAN INVESTOR AWARDED EUR 20 MILLION COMPENSATION UNDER THE INDIA-POLAND BIT

SUMMARY:

- In the first award¹ of its kind, an investment arbitration tribunal (Tribunal) has found in favour of an Indian Investor, against Poland, for the violation of the India-Poland Bilateral Investment Treaty² (India-Poland BIT).
- The Investor (headquartered in Dubai) chose to pursue the claim under the India-Poland BIT in place of the UAE-Poland BIT on account of its diluted nationality requirements. Such action, as according to the Tribunal, does not amount to illegal treaty shopping.
- The Tribunal, awarding over EUR 20 million in compensation, held that the suspension of leases and key contracts by a Polish State-owned entity amounted to a violation of the Fair and Equitable Treatment (FET) and Expropriation provisions under the India-Poland BIT.

BACKGROUND:

The Claimant, an entity in the Flemingo Group (headquartered in Dubai) had acquired a majority stake in Baltona, a duty-free retailer in Poland. This acquisition also involved the transfer of key leases entitling Baltona to operate at the Chopin Airport in Warsaw. The Polish Airports State Enterprise (PPL), Poland's State-owned airport authority subsequently took various steps to unduly terminate these leases and evict Baltona from Chopin Airport.

In response, in August 2014, Flemingo Duty Free Shop Pvt Ltd initiated investor-State arbitration under the India-Poland BIT for the violation of the Fair and Equitable Treatment protection, as well as for expropriating Flemingo's investment without compensation.

ISSUES:

There are two important issues that the Tribunal considered, while determining whether Flemingo had a valid claim under the India-Poland BIT -

1. Whether the actions of PPL, a state-owned entity were attributable to the State i.e., Poland; and
2. Whether the Claimant could seek proceedings under the India-Poland BIT, or was this a case of impermissible treaty shopping.

PPL's Actions are Attributable to Poland

Flemingo argued that PPL's acts of unduly terminating the licenses held by Baltona (which were subsequently transferred to Flemingo), were actions attributable to Poland. This is because PPL operates as a State-owned entity affiliated to and controlled by the Ministry of Transport (as well as the Ministry of Infrastructure and Development). Moreover, Poland had itself admitted that PPL "*performs strategic functions for the existence of the State*".

Poland, in response, argued that PPL was a state-owned enterprise which was not just an emanation of the State but was a self-financing and self-governing entity with separate legal personality.

With this in mind, the Tribunal still came to the conclusion that PPL's actions are attributable to Poland, as it is a State Organ under international law.

Can the Claimant seek relief under the India-Poland BIT?

The Claimant, a private company incorporated in India, argued that its indirect shareholding in Baltona by being a part of the Flemingo group, i.e. the fact that it owned a stake in Baltona was adequate to establish that it had standing under the India-Poland BIT.

The Respondent, on the other hand, argued that the Claimant neither participated financially in the acquisition of Baltona, nor was it directly related to Flemingo International (the entity that acquired Baltona) or its parent company. It further argued that the Claimant had never actually conducted business in Poland.

The Tribunal's position

At the jurisdictional and admissibility phase of the investment arbitration, the Tribunal readily accepted that PPL is a State Organ, as per the requirements set out in Art. 4 of the International Law Commission Articles on State Responsibility. Accordingly, its actions in unlawfully terminating the leases and other key contracts, were attributable to Poland.

Moreover, the Tribunal analyzed the nationality requirements for an "investor" under the India-Poland BIT. Article 1 para. 2 of

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"2. The term "Investors" refers with regard to either Contracting Party to:

1. *natural persons having the nationality of the Contracting Party under the law in force of that Contracting Party;*
2. *legal entities, including companies, corporations, firms and business associations incorporated or constituted or established under the law of a Contracting Party."*

The Tribunal, appreciated the relaxed nationality provision in the treaty and found that the threshold under the treaty would be met as long as the Claimant is incorporated in India. This wording is similar to the wording found in the India-Mauritius Bilateral Investment Treaty [for a brief analysis on this point, refer to our hotline on the Antrix-Devas investment dispute under the India-Mauritius BIT [here](#)]

Having cleared the initial hurdles in the first phase of the investment arbitration, it was a straightforward matter for the tribunal to determine that PPL, and consequently, Poland, had wrongfully terminated the licenses and contracts which constituted the Claimant's investment. These actions amounted to expropriatory conduct, as well as violations of the FET threshold in the India-Poland BIT.

Is Forum Shopping legitimate?

Before any investment dispute goes into the merits, it is mandatory for a Claimant to establish that it is an "investor" and has a valid "investment" vis-a-vis the investment treaty which is invoked. In making such determination, tribunals consider the elements of control, as well as the substantiality of the investment that flows into the host State. However, both these considerations are subject to the provisions of the specific treaty in question and the facts of the case.

As an investor willing to initiate a potential investment treaty dispute against a country, there are various strategic options available; especially so, if the investor in question is part of a large and complex corporate group. The ability of a foreign investor to initiate proceedings under one treaty is specific to the wording of the treaty and the flexibility it offers, in terms of defining essential terms like "investment" and "investor". For instance, in this case itself, the parent company group is headquartered in UAE, with subsidiaries in India, which has limited stake in the investment made in Poland. Accordingly, a potential litigant would consider the benefits offered under the UAE-Poland Bilateral Investment Treaty³ (UAE-Poland BIT) and the India-Poland BIT, before initiating a dispute. In this instance the UAE-Poland BIT contains strict language on when an investment is granted protection. There are stringent requirements of "control" to be situated with a UAE entity, before such entity can legitimately initiate proceedings against the host state.⁴

The Tribunal in *Flemingo* considers this aspect, by analyzing the Claimant's choice in not initiating proceedings under the UAE-Poland BIT. The Tribunal, however, comes to the conclusion that since the India Poland BIT itself does not impose an additional threshold of either control, or the establishment of substantive commercial presence by the Claimant in the host state, a legitimate choice was exercised.

The Claimant was, in its own right entitled to protection under the India-Poland BIT. International law in itself, does not impose a restriction on future claimants from initiating dispute under the strategically most appropriate treaty. This is indeed, a monumental decision in advocating a rational approach to the oft called "vice" of treaty shopping.

Takeaways for Indian investors

This award is significant in its adding to a line of decisions expanding upon the attributability of the actions of a State Owned Entity to a State, which in itself opens the floodgates of investor-state disputes. In addition, this award is also significant being the first ever instance of an Indian investors successfully invoking the investor protections in an investment treaty against another country.

The wording of some of the treaties that India is party to, advocate for a relaxed dispute admissibility requirement, which opens up an additional layer of strategic options available to an investor who intends to initiate a dispute against another country. However if, India's agenda in reworking its Bilateral Investment Treaty (BIT) obligations to reflect its 2015 Model BIT standard is pushed in the international arena, it would prove difficult to not only incentivize foreign investors from approaching India as a treaty favourable jurisdiction, but will also impact the use of Indian treaties as open strategic tools. This is because, the 2015 Model BIT requiring a greater threshold of commitment in terms of establishing "investment", impacts an admissibility question that would affect the maintainability of the rest of the dispute as well.⁵

— Durga Priya Manda, Niyati Gandhi & Vyapak Desai

You can direct your queries or comments to the authors

¹ The award is available at http://www.italaw.com/sites/default/files/case-documents/italaw7709_3.pdf

² Text available at <http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/1943>

³ Text available at <http://investmentpolicyhub.unctad.org/IIA/country/168/treaty/2786>

⁴ See Art. 1(4) read with Art. 1(7) of the UAE-Poland BIT. Contrast with Art. 1(2) of the India-Poland BIT

⁵ See Art. 1 of the 2015 India Model BIT available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf

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