3. DROIT ET PRATIQUE DES INVESTISSEMENTS INTERNATIONAUX
INTERNATIONAL INVESTMENTS LAW AND PRACTICE

INDIA AND ITS TRYST WITH INVESTMENT ARBITRATION

Payel CHATTERJEE and Alipak BANERJEE*

LT India; International investment disputes

INTRODUCTION

Recent statistics published by the Government of India reveal that India has attracted the highest ever foreign direct investment of US $81.72 billion during 2020–2021, 10 per cent more than the previous financial year of US$ 74.39 billion.[1] These investments were routed from Singapore (29 per cent), US (23 per cent), and Mauritius (9 per cent). While the COVID-19 pandemic has dampened the investment sentiments across the world, India seems to be on an exceptional trajectory. Computer software and hardware has emerged as the top sector covering 44 per cent of the foreign direct investments, followed by construction (infrastructure) activities (13 per cent) and the services sector (8 per cent). This is no surprise given the increased focus on digital India by the current Government, and work from home solutions implemented across the country in light of the pandemic related restrictions.

The havoc rise in foreign direct investments is in direct contrast to the negative perceptions created globally due to several investment arbitrations pending against India at this point. India has been involved in approximately 26 investment arbitrations[2] so far. While many of these arbitrations have been settled,[3] or discontinued, or are pending,[4] India has also managed to win some of these cases by getting them dismissed against the investors. The investors have won at least four out of twenty-six cases that have been filed. In terms of real impact, the first case where a liability was affixed against India was the *White Industries* decision in 2011 as explained below. Since 2011, there has been a steady increase in new case filings, particularly in the aftermath of the 2G telecom license cancellation and the retrospective tax amendments introduced in 2012. In the last couple of years, there has been a slowdown in new case filings.

TRENDS IN THE INVESTMENT DISPUTE REGIME

In recent years, India published a model Bilateral Investment Treaty (BIT), which significantly narrowed the safeguards accorded under the Investment Treaty. The model BIT specifically omitted the safeguards, such as (i) most-favoured nation (MFN), (ii) ''fair and equitable treatment'' (FET), (iii) introducing a mandatory five-year cooling off period to exhaust local remedies, a move which was severely criticized by the legal and investor community.

Subsequently, in 2017, India terminated a large number of the BITs (58 out of 84) and has negotiated some of the BITs, such as the BIT between India and Belarus (September 2018), with Kyrgyzstan (June 2019), and with Brazil (January 2020).

India has also significantly improved the investment framework and has made it easier for

* Payel Chatterjee and Alipak Banerjee, are Leaders in the International Dispute Resolution practice, at Nishith Desai Associates.

foreign investors to invest in India. In particular, the process of phasing out the Foreign Investment Promotion Board (FIPB) was completed with the release of the Standard Operating Procedure (SOP) for processing the FDI proposals by the Department for Promotion of Industry and Internal Trade (DIPP) on 29 June 2017. The SOP has been prepared by the DIPP in consultation with administrative ministries/ departments / sector regulators to guide the administrative ministries and departments in processing of the FDI proposals and ensuring consistency of treatment and uniformity of approach across sectors. The SOP has been introduced to process such applications in a time bound manner so that the new regime for foreign investments may be simpler in execution and expeditiously disposed.

CASES IN FAVOUR OF INDIA

Louis Dreyfus Armateurs SAS (France) v The Republic of India[5]

The claims arose out of a series of measures that allegedly prevented the implementation of a joint venture agreement related to a port modernisation project in Haldia, West Bengal, a state in India. The Tribunal ruled in favour of India on the premise that: (i) the France–India BIT excluded from the scope of protection any indirect investments in which an investor owns less than 51 per cent of an intermediate investment vehicle; (ii) Louis Dreyfus Armateurs SAS (France) (LDA)'s indirect investment, was structured in such a fashion, not entitling them to any protection under the France India BIT, and claims regarding alleged state conduct with respect to that indirect investment fell outside this Tribunal's jurisdiction; (iii) LDA's claims accordingly were dismissed in their entirety; and (iv) LDA was ordered to pay India (a) US $540,885.30, towards India's share of the tribunal and costs of arbitration to be paid to Permanent Court of Arbitration (PCA) for administering the arbitration, and (b) US $6,626,971.85, towards India's costs and expenses for legal representation and assistance.

Tenoch Holdings Limited (Cyprus), Mr. Maxim Naumchenko (Russian Federation) and Mr Andrey Poluektov (Russian Federation) v Republic of India[6]

Based on publicly available details, the arbitration proceedings seem to arise out of the cancellation of letters of intent pertaining to issuance of telecommunications licenses to provide 2G services in five telecommunications circles in India. All the claims in its entirety were dismissed against India.

CASES IN FAVOUR OF THE INVESTORS

The investors have so far managed to win four cases against India. The Investment Treaty awards in the *Vodafone* and *Cairn Energy* arbitration have been widely publicised causing a dent in India's image as an investor friendly jurisdiction. Both these cases pertain to the retrospective taxation introduced in 2012.

White Industries Australia Limited v The Republic of India[7]

In this case, the claims arose out of judicial delays in enforcing an international commercial arbitration award under the Rules of International Chamber of Commerce (ICC) against a state-owned enterprise in India. White Industries Australia Limited (White Industries) was unable to enforce the award for nine years, leading to the initiation of investment treaty arbitration under the India–Australia BIT. This is one of the few cases where the most favoured nation treatment (MFN) clause in the India–Australia BIT was invoked, and the threshold applicable in the India Kuwait BIT was applied for adjudication of White Industries' claims.

This is the first case which was ruled against India, wherein the tribunal ruled that: (i) India has breached its obligation to provide ''effective means of asserting claims and enforcing rights'' with respect to the investment made by White Industries; (ii) India was directed to pay White Industries an amount of A $4,085,180 along with interest; (iii) additional costs of the tribunal, White Industries' legal expenses, and expenses for its witness fees were awarded.[8]

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v Republic of India, (PCA Case No. 2013-09)[9]

This is a classic case of parallel proceedings. The investor, Devas pursued both commercial as well as investment treaty arbitration. In the commercial arbitration under the ICC Rules, an award of more than US $500 million was passed in favour of Devas. Following the award, there has been a

plethora of litigation across various High Courts and Supreme Court of India (Supreme Court), where the parties have challenged or sought enforcement of the arbitration award. Separately, in the investment treaty arbitration, the tribunal ordered in favour of Devas, and directed India to pay more than US $100 million.[10]

Earlier this year, Antrix approached the National Company Law Tribunal (NCLT), Bengaluru and sought the winding up of Devas under the applicable Indian law[11] on the premise that Devas was formed in 2005 for fraudulent and unlawful purposes in order to secure the contract with Antrix. The NCLT admitted the petition in January 2021, and finally on 25 May 2021 ordered the winding up of Devas.[12] There are further appeals available before the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court, and it remains to be seen how higher courts rule on this issue. If the entity who has won the commercial and investment treaty award is wound up, enforcement action would ordinarily fail, and it remains to be seen how the NCLAT and Supreme Court look at this issue.

Vodafone International Holdings BV v Government of India, PCA Case No. 2016-35[13]:

In April 2017, Vodafone invoked the India–Netherlands BIT and filed a claim against the Government of India, challenging the infamous retrospective tax amendment which had led to a tax demand of Rs 11,000 Crore (approximately US $1.5 billion) plus interest against Vodafone on its 2007 acquisition of 67 per cent stake in Hutch-Essar in India. Importantly, the retrospective amendment was passed by the Union Government after the Supreme Court decided this issue in favour of Vodafone, i.e., quashed the tax demand in 2012.

While the first investment treaty arbitration proceeding under the India–Netherlands BIT was pending, Vodafone initiated a fresh arbitration, invoking the India–UK BIT. It appears that the second arbitration was commenced due to a jurisdictional objection raised by the Indian Government in the first arbitration.

It was reported that the parties have made several attempts to amicably settle the case. Ultimately, in September 2020, the arbitral tribunal constituted under the India–Netherlands BIT passed an award against India for violation of the fair and equitable treatment standard. The arbitral tribunal directed India to reimburse legal costs of approximately IN R850 million to Vodafone. It has been reported that India has challenged the award of the international arbitration tribunal in Singapore, and the proceedings are pending.[14]

In the second arbitration initiated by Vodafone against India, an anti-arbitration injunction was sought by India before the Delhi High Court.[15] The Delhi High Court, in August 2017, passed an interim order in favour of India, and held that multiple claims cannot be filed by Vodafone against the same measure of the host state—under different bilateral investment treaties. The ruling restrained Vodafone from taking any further action on the second investment arbitration filed under the India–UK BIT. However, in October 2017, the Delhi High Court allowed the parties to participate in the appointment of the arbitral tribunal pending final disposal of the proceedings. This order was subsequently challenged by India before the Supreme Court, which, in turn, allowed the parties to proceed as per the Delhi High Court's order dated October 2017 and participate in the appointment of the arbitral tribunal. It is reported that the second arbitration is pending.

Cairn Energy Plc and Cairn UK Holdings Limited v The Republic of India, PCA Case No. 2016-17[16]:

This case also relates to the infamous retrospective taxation. In December 2020, an international arbitration tribunal held that India had breached their obligation under the India–UK BIT, by directing Cairn Energy Plc and Cairn UK Holdings Limited (collectively ''Cairn'') to pay US $1.6 billion in respect of tax penalty for the assessment year 2006–07. The tribunal ruled in favour of Cairn and ordered India to pay US $1.2 billion as damages for the injury suffered by Cairn as a result of the breaches. While Cairn has initiated multiple recovery proceedings across the world to recover the amount awarded against India, it appears that India has challenged the arbitral award before the Dutch Courts.[17] Most recently, it has been reported that Cairn has initiated enforcement proceedings against Air India, before the US District Court for the Southern District of New York[18] towards recovery of the amount awarded in the arbitral award.

ROADBLOCKS IN ENFORCING INVESTMENT ARBITRATION AWARD IN INDIA

India is not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) and as such, investment treaty arbitrations arising out of India-related BITs are conducted on an ad-hoc basis under the United Nations Commission on International Trade Law (UNCITRAL Rules), or in accordance with any other institutional rules, and not the Rules of International Centre for Settlement of Investment Disputes (ICSID). Therefore, the annulment procedure prescribed under the ICSID Rules is not available to investors under any BIT with India. Similarly, the Indian Arbitration and Conciliation Act, 1996 (Indian Arbitration Act) only deals with the enforcement of international commercial arbitration and does not contemplate an award arising out of international investment arbitration. Therefore, there exists a gap in the existing enforcement regime in India to enforce investment arbitration awards.

In *White Industries*, since India voluntarily paid, there was no occasion to seek enforcement of the arbitral award. In *Cairn* and *Vodafone*, the investors have filed enforcement proceedings outside India with an attempt to attach India's assets located outside India. A lack of legal framework for enforcement of such awards in India has led to such an action in foreign courts. However, the Delhi High Court in *Government of India v Vodafone Group PLC United Kingdom*[19] and *Union of India v Khaitan Holdings (Mauritius) Ltd*[20] had to consider the applicability of the Indian Arbitration Act on investment treaty arbitrations, and whether the Delhi High Court can pass an anti-arbitration injunction restraining the investor from proceeding with such arbitrations.

In *Vodafone*, the Delhi High Court vacated an earlier order which had restrained foreign seated investment arbitration, and observed that:

- national courts are divested of their jurisdiction in an investment treaty arbitration is not an absolute proposition of law;
- investment treaty arbitration is fundamentally different from commercial disputes as the cause of action is premised on state guarantees and assurances;
- it is unknown for courts to issue anti-arbitration injunction under their inherent power in a situation where neither the seat of arbitration or the curial law has been agreed upon; and
- national courts will exercise great self-restraint and 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.

While, in *Khaitan Holding,* the Delhi High Court also refused to pass an anti-arbitration injunction and held that the domestic court would not interfere in the arbitral proceedings under the BIT, unless there are compelling circumstances.

If ultimately, the foreign enforcement actions filed in *Cairn* succeed, and they succeed in a territory which has a reciprocal arrangement with India for enforcement of a foreign judgment under India's Code of Civil Procedure 1908, it remains to be seen how Indian courts deal with such enforcement petitions i.e., enforcement of a foreign judgment, where the underlying foreign award is not directly enforceable under Indian law.

THE FUTURE

Promoting foreign investment has been the cornerstone of all economic reforms for the last few decades along with strengthening India's presence as a viable investment destination. However, in the last five years, India has witnessed a lot of upheaval in the investor–state dispute climate. In the absence of Model BIT being a success story and the Indian Government terminating several BITs, there was a compelling need to rethink the investor–state dispute regime.

Several ministries and departments are working in tandem to evaluate the pros and cons of introducing a national law to address investor–state disputes since early 2020. A draft proposal has been tabled with the aim to strengthen investor confidence in India and expedite contract enforcement as well as to provide faster dispute resolution mechanisms. The new law proposes setting up an investment tribunal in state high courts or NCLTs, addressing specific investor disputes.[21] NITI Aayog, the Government's think-tank has set up two special task forces to resolve investor–state disputes and geared towards

formulating a policy framework.[22] The new law is expected to enable India to balance its own interests vis-à-vis foreign investors both from a transparency and decision-making point of view.

While the future will throw light on the path forward for the Indian Government, it is a welcome move to have a specialised law and tribunals to address investor–state disputes, including the appointment of mediator and fast track courts to ensure overseas investment is not impacted.

Notes

1. See *https://www.ibef.org/news/india-attracted-highest-ever-total-fdi-inflow-of-us-8172-billion-during-202021-10-more-than-the-last-financial-year* [Accessed 7 June 2021].

2. See *https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india* [Accessed 7 June 2021].

3. As per *https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india* [Accessed 7 June 2021]. India has settled 10 out of 26 cases filed so far.

4. As per *https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india* [Accessed 7 June 2021]. Eight cases are pending against India at this point in time.

5. See *https://www.italaw.com/sites/default/files/case-documents/italaw11242.pdf* [Accessed 7 June 2021].

6. See *https://www.italaw.com/sites/default/files/case-documents/italaw11106.pdf* [Accessed 7 June 2021].

7. See *https://www.italaw.com/cases/documents/1170* [Accessed 7 June 2021].

8. See *https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf* [Accessed 7 June 2021].

9. See *https://www.italaw.com/cases/1962* [Accessed 7 June 2021].

10. See *https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/484/devas-v-india* [Accessed 7 June 2021].

11. Under Section 271 of the Companies Act, 2013, a company can be wound up of the NCLT upon an application made by the Registrar or any person authorised by the Central Government is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be would up.

12. C.P. No. 6/BB/2021.

13. See *https://www.italaw.com/cases/2544* [Accessed 7 June 2021].

14. See *https://www.reuters.com/article/uk-india-vodafone-group-arbitration-idUKKBN28Y0G0* [Accessed 7 June 2021].

15. See *https://www.financialexpress.com/opinion/vodafone-case-a-bit-more-arbitration-friendly/1161796/* [Accessed 7 June 2021].

16. See *https://www.italaw.com/cases/5709* [Accessed 7 June 2021].

17. See *https://www.livemint.com/news/india/india-files-appeal-against-1-4-bn-cairn-arbitration-award-11616510635918.html* [Accessed 7 June 2021].

18. See *https://www.livemint.com/companies/news/cairn-energy-sues-air-india-to-enforce-1-2-bn-arbitration-award-report-11621060277224.html* [Accessed 7 June 2021].

19. 2018 SCC OnLine Del 8842.

20. 2019 SCC OnLine Del 6755.

21. See *https://www.reuters.com/article/us-india-investment-law-exclusive-idUKKBN1ZE151* [Accessed 7 June 2021].

22. See *https://www.livemint.com/news/india/niti-aayog-panels-to-help-improve-contract-enforcement-dispute-resolution-11616426385989.html* [Accessed 7 June 2021].

