Dispute Resolution Hotline

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INVESTMENT ARBITRATION & INDIA – 2019 YEAR IN REVIEW

(WITH BRIEF RECAP OF 2018)

As we brace to face a global economic slowdown and plummeting GDPs, the flow of FDI across the globe offers a somewhat sanguine picture. The economy appears to be accommodating to FDI, suffice to maintain a churn in investments, State regulatory policies, investor-State disputes and the quest to devise effective resolution mechanisms.

India is one among the top 10 countries for inbound FDI, and soon to be among top 20 for outbound FDI. We have assessed Indian FDI policies and their efficacies in various posts at Nishith Desai. As we enter 2020, let us look at the investor-State dispute scenario in India in 2019 under bilateral investment treaties (BITs) and Indian courts, with a brief recap of 2018. This article seeks to cater to 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.

It also caters to Indian investors making direct investments abroad, and are anticipating or facing similar measures from the foreign governments. Perhaps an analysis of the year round developments in India could be instrumental in tailoring strategies and approach to potential disputes against Indian government or by Indian investors.

I. FDI INFLOWS & OUTFLOWS:

In the last 5 years, FDI inflows in India rose by 11.5%, escalating up to 62 billion dollars cumulatively in FY 2018-19.[1] The churn was also visible at the level of top investing countries. In FY 2018-19, Singapore surpassed Mauritius as the highest investing country into India, followed by Japan, Netherlands and the United Kingdom. The services sector continued to remain the highest recipient of FDI, followed by computer software and hardware, telecommunication, construction development and trading.

What is more promising are the FDI outflows. In 2018-2019, Indian outbound FDI rose to 11 billion dollars. In the last decade, outbound FDI has witnessed a sea change not merely in quantum, but also in geographical spread and sectorial composition.[2] Indian companies and state enterprises are increasingly expanding their global focus. UNCTAD reports that India could rank amongst the top 20 countries for outbound FDI in 2019-2020.[3]

II. SHIFT IN FDI POLICIES:

Over the last two years, India has abundantly improved its FDI policies by widening the sectors as well as the limits on investment through the automatic route, and growing ease of doing business. The focus on 'Maximum Governance, Minimum Government' is evident from abolition of the long drawn FDI approval process through the Foreign Investment Promotion Board in 2017 and handing over the baton to respective ministries for faster FDI approvals.

Several other measures have been adopted such as introduction of the Hydrocarbon Exploration and Licensing Policy, allowing foreign companies in sectors of defence, telecom, private security and information and broadcasting, to open branch offices in India without RBI approval where license or approval has already been granted by the relevant ministries, opening FDI in e-commerce, increasing FDI limits in insurance intermediaries from 49% to 100%, allowing foreign capital of up to 26% in digital media under the government route, and abolition of foreign equity caps in coal and lignite mining activities, single brand retail trading and contract manufacturing. These policy measures constantly endeavour to liberalise the regulatory framework for FDI in India.

III. INVESTOR-STATE FRAMEWORK IN INDIA : ROOTS

India signed her 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 a 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-favored 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.

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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.

IV. REVISED INVESTOR-STATE FRAMEWORK IN INDIA : REACTIONS

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-favored 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.

As the first step towards implementation of this regime, India executed a joint interpretative statement ("JIS") with Bangladesh in October 2017. Whilst 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, including enterprise-based definition of investment, satisfaction of 'substantial business activities' test by investors with an added guidance on examination of this requirement holistically on a case-to-case basis, assessment of treatment as per customary international law, detailed guidance on direct and indirect expropriation including the *Salini* criteria. 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 investor now has a limitation period of two years (instead of one) to file a claim against India before the relevant domestic courts. The limitation period to proceed with arbitration has subsequently been increased to seven years.

Next, India executed a JIS with Colombia in October 2018. This was almost identical to the India Bangladesh JIS, 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 one year and six months (instead of one 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 four years (instead of five years).

Two BITs/ JIS have been concluded with Brazil and Cambodia but not yet signed. 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.

V. INVESTOR-STATE DISPUTES : HIGHLIGHTS FROM 2018

The past five years witnessed a few cases by Indian investors against countries such as Poland, Indonesia, Macedonia, Bosnia & Herzegovina, Libya and Saudi Arabia. These cases broadly related to expropriation of investments of Indian investors in the mining, construction and insurance sectors. The past five years witnessed a few cases against India from investors from countries such as France, United Arab Emirates, Japan and Republic of Korea. These cases broadly related to expropriation of investments by India in the telecom, mining, construction and space sectors.

2018 witnessed arbitral decisions in cases of Deutsche Telekom and Louis Dreyfus initiated against India. Additionally, court proceedings were initiated in Indian courts in relation to investment treaty arbitrations initiated by Vodafone Plc. and Anr. (United Kingdom) and Khaitan Holdings Pvt. Ltd. (Mauritius).

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.

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.

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.

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

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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.

India vs. Vodafone Plc. and Anr.

On April 17, 2014, Vodafone International Holdings BV ("**VIHBV**") – a Dutch subsidiary of Vodafone Group Plc.(UK) - initiated arbitration against the Republic of India under the India-Netherlands BIT. VIHBV challenged retrospective amendment of Sections 9(1) and 195 of the Indian Income Tax Act read with Section 119 of the Indian Finance Act, 2012 by the Indian government, to bring VIHBV under the tax-liability net for acquisition of stake in an Indian company. The retrospective amendment was carried out by the Indian Parliament after the Supreme Court of India quashed the tax-demand made by Government of India against VIHBV.

On January 24, 2017, during pendency of arbitration proceedings under the India-Netherlands BIPA, Vodafone Group Plc. (UK), the parent company of VIHBV, initiated arbitration against the Republic of India under the India-United Kingdom BIT. Interestingly, it challenged the same retrospective taxation measures of India under the afore-said proceedings. India filed a suit before the Delhi High Court seeking anti-arbitration injunction to restrain Vodafone Group Plc. from continuing arbitration proceedings under the India-UK BIT.

In May 7, 2018, the Delhi High Court dismissed the suit against Vodafone Group Plc (UK). The Court recognized the principle of *kompetenz kompetenz* i.e. powers of arbitral tribunal to rule on its own jurisdiction, and the courts' limited power to intervene in BIT arbitrations. It acknowledged that an abuse of process cannot be assumed at the first instance in case of multiple claims, and that ways could be adopted by parties to reduce the extent of abuse. Options offered by Vodafone with respect to consolidation of proceedings, constitution of the same arbitral tribunal for both proceedings and avoidance of double recovery of claims were accepted by the Court. However, the Court while rejecting the suit also rendered a finding that the A&C Act does not apply to BIT arbitrations which has created concerns over enforcement of BIT awards in India.

VI. INVESTOR-STATE DISPUTES : 2019 IN REVIEW

2019 bore testimony to two investment treaty arbitration awards involving India. Of these, one related to decision on jurisdiction against India, and the other on merits against an Indian investor. Two investment arbitration claims have been withdrawn, and a new investment arbitration has been initiated against India. Additionally, two court decisions relating to investment arbitration involving India have been ruled in favour of the respective investors.

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.

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.

India vs. CC/Devas and Others

Close on the heels of the Swiss Federal Supreme Court decision in 2018 in the Deutsche Telekom vs. India case under the India – Germany BIT, in early 2019, the Hague District Court set aside India's challenge to the arbitration award in the CC/Devas vs. India case initiated by Mauritian investors in Devas under the India-Mauritius BIT. The judgment has not been published in English. However, reportedly, India's key ground for challenge circled around the tribunal's treatment of the 'essential security interest' exception to treaty obligations under the India – Mauritius BIT.

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.

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 it's 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.

VII. CONCLUSION

India has been at the forefront of policy making in the FDI arena. Maximum governance minimum government does reflect on India's commitment to ease business in its corridors. Its Bilateral Investment Treaties landscape, like FDI inflows and outflows, has been dynamic in the last 5 years. However, what appears to be most dynamic is the investment disputes landscape.For detailed analysis of the investment treaty landscape in India and the India Model BIT 2016, please see our paper **here**.

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. While arbitrations and post-arbitration proceedings involving India continue to rise, we are increasingly witnessing the growth of another species of disputes in courts. India has been uneasily attempting to restrain investment arbitrations through anti-arbitration injunctions, where India stands as a Respondent. And yet, in the midst of this myriad universe, it is heartening to note that India's independent judiciary has been a beacon of hope as it compels the Indian Government to honour the *kompetenz kompetenz* principle.

However, uneasy does lie the head that wears the crown. India's massive population, macro and micro-economic factors, national security and public interests, in addition to a strongly guarded Constitution, seem to encourage certain state and judicial measures at the cost of foreign investment. On the other hand, the crown cannot wield unbridled and unchecked powers that result in arbitrary and unfair measures on the plane of international law, at the cost of the public exchequer. We hope that 2020 will witness effective dispute resolution that draws a fine balance between foreign investment and State regulation.

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You can direct your queries or comments to the authors

[1] https://dipp.gov.in/sites/default/files/FDI_Factsheet_4September2019.pdf
[2] https://www.ibef.org/economy/indian-investments-abroad
[3] https://unctad.org/en/PublicationChapters/WIR2019_CH1.pdf