

Dispute Resolution Hotline

February 11, 2021

INVESTMENT ARBITRATION & INDIA – 2020 YEAR IN REVIEW

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 2000.¹ While global FDI witnessed a steep decline of 42%, India noted a 13% increase in FDI inflows.² 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 & 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.³ 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.⁴

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.⁵

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 Retailing 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.⁶

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.⁷ 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.⁸ 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.⁹ 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](#).¹⁰

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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."¹¹

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.¹² 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.¹³

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 2016.¹⁴ 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.¹⁵ On January 25, 2020 India signed the Investment Cooperation and Facilitation Treaty with Brazil.¹⁶ 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.¹⁷ 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,¹⁸ two were awarded against India,¹⁹ and another case proceeded to recognition of award in the U.S. only to be met with hurdles for enforcement in India.²⁰ For an exhaustive analysis of the Vodafone case and its implications on the rights of foreign investors, please see our case study [here](#).²¹ For a detailed analysis of the Cairn case, please see our analysis [here](#).

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.²² Details of the case are not available in public domain.

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 India²³ 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 tribunal²⁴ 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.

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 2014.²⁵ 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, 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.²⁶ 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.

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.²⁷

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.

VI. CONCLUSION

India's vision of self-dependence, emphasized during the pandemic, heavily depends on foreign investment.²⁸ 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.

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.²⁹

– Bhavana Sunder & Kshama A. Loya

You can direct your queries or comments to the authors

¹ <https://economictimes.indiatimes.com/markets/stocks/news/fdi-equity-inflows-into-india-cross-500-billion-milestone/articleshow/79589698.cms>

² <https://www.businesstoday.in/current/economy-politics/india-bucks-global-decline-in-fdi-grows-13-against-world-42-fall-in-2020/story/428959.html>

³ https://dipp.gov.in/sites/default/files/FDI_Fact_sheet_September_20.pdf

⁴ *Id.*

⁵ <https://www.ibef.org/economy/indian-investments-abroad>

⁶ 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.

⁷ Press Information Bureau, Cabinet approves the Foreign Direct Investment policy on Civil Aviation, available at: <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1605150>.

⁸ Press Note 3 (2020 Series) dated April 17, 2020, available at: https://dipp.gov.in/sites/default/files/pn3_2020.pdf.

⁹ 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

¹⁰ 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>

¹¹ Press Note 4 (2020 Series), September 17, 2020, available at: https://dipp.gov.in/sites/default/files/pn4-2020_0.PDF,

¹² Consolidated FDI Policy, effective from October 15, 2020, available at: <https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020->

¹³ 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>.

¹⁴ <https://www.dea.gov.in/bipa>

¹⁵ Department of Economic Affairs, Bilateral Investment Treaties (BITs)/Agreements, available at: <https://dea.gov.in/bipa?page=8>

¹⁶ *Id.*

¹⁷ <https://www.livemint.com/news/india/government-plans-new-law-to-protect-foreign-investment-11579084078405.html>

¹⁸ Khadamat Integrated Solutions Private Limited (India) v. The Kingdom of Saudi Arabia (PCA Case No. 2019-24)

¹⁹ 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

²⁰ 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.

²¹ 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.

²² 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>

²³ Civil Appeal No.733/2012

²⁴ Tribunal comprised L.Y. Fortier, R. Oreamuno Blanco and F. Berman.

²⁵ <https://www.caimenergy.com/news-media/news/2018/update-on-cairn-s-assets-in-india/#Tabundefined=1>

²⁶ <https://www.thehindu.com/business/Industry/cairn-energy-wins-investment-treaty-arbitration-against-india-over-tax-dispute-sources/article33399645.ece><https://www.thehindu.com/business/Industry/cairn-energy-wins-investment-treaty-arbitration-against-india-over-tax-dispute-sources/article33399645.ece>

²⁷ 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.

²⁸ <https://economictimes.indiatimes.com/news/economy/policy/no-ifs-or-buts-on-bits/articleshow/80014549.cms?from=mdr>

²⁹ *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>

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