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Research

Vodafone Holdings B.V. versus Republic of India (International Investment Treaty Arbitration)

Case Analysis & Implications for Foreign Investors

(With a helpful recap of the Indian investment arbitration landscape in 2019 and 2018)

October 2020

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1. Executive Summary

On September 25, 2020, the international arbitral tribunal constituted in the case of Vodafone International Holdings BV v. The Republic of India (Vodafone case) held that India had violated the 'fair and equitable treatment' (Vodafone award) guaranteed to VIHBV under the 1995 Bilateral Investment Promotion and Protection Agreement (BIPA) between the Republic of India and the Kingdom of Netherlands (India – Netherlands BIT).

In this paper, we will provide an analysis of the impact of the Vodafone award on foreign investors through a series of articles. The complete award is not available in public domain. However, an excerpt has been made available.

The Vodafone award stimulates critical issues for foreign investors investing in India. This paper provides a background to the dispute and examines the prominent issues arising out of the Vodafone award.

For a detailed analysis of various investment treaty arbitration cases involving India in 2019 and bilateral investment treaties signed by India till 30 December 2019, please see our investment treaty arbitration wrap

2. Background

I. The Transaction

In 2007, Hutchinson Telecommunications International Limited, a Hong Kong entity (HTIL) sold its stake in Hutchinson Essar Limited, an Indian company (HEL) to Vodafone International Holdings B.V., a Netherlands entity (VIHBV) for a consideration of USD 11.1 Billion. HTIL earned capital gains on the sale. The Indian revenue authorities considered that acquisition of stake in HEL by VIHBV was liable for tax deduction at source under Section 195 of the Income Tax Act, 1961. Since VIHBV failed to withhold Indian taxes on payments made to the selling Hutch entity, a demand was raised on VIHBV under Section 201(1)(1A) / 220(2) for non-deduction of tax.

II. The Indian Supreme Court Decision

On January 20, 2012, the Supreme Court of India[1] discharged VIHBV of the tax liability imposed on it by the Income Tax Department of the Plaintiff. 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

Post the above judgment, the Indian Parliament passed the Finance Act 2012, which provided inter alia for the insertion of two explanations in Section 9(1)(i) of the Income Tax Act (2012 Amendment). 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 Amendment 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.

IV. The Arbitration Claim under India-Netherlands BIT

Aggrieved by the imposition of tax by way of retrospective amendment of the Indian tax legislation, VIHBV invoked arbitration under the India – Netherlands BIT through a notice of dispute dated April 17, 2012. On

1. Civil Appeal No.733/2012

February 20, 2014 India stated that "disputes relating wholly or mainly to taxation are excluded from the scope of the India – Netherlands BIT. On April 17, 2014, VIHBV issued a notice of arbitration to India as required under the India-Netherlands BIT.

V. Parallel Proceedings

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, challenging the retrospective amendment by India of its tax legislations.

Government of India (GOI) filed a suit before its national courts seeking anti-arbitration injunction to restrain Vodafone Plc from continuing arbitration proceedings under the India-UK BIT. On August 22, 2017, the Court passed an ex-parte interim order restraining the Defendants from initiating or continuing arbitration proceedings under the India-UK BIT. Please see our coverage on the aforesaid decision here. However, in its final judgment on May 7, 2018, the Delhi High Court vacated the stay and dismissed the suit against Union of India. Please see our coverage on the aforesaid decisions here.

VI. Vodafone Award

On September 25, 2020, an international arbitral tribunal comprising L.Y. Fortier, R. Oreamuno Blanco and F. Berman passed an award in favour of VIHBV, reportedly for violation of the fair and equitable treatment standard under the India – Netherlands BIT. The arbitral tribunal directed India to reimburse legal costs of approximately INR 850 million to Vodafone. The complete award is not available in public domain. The excerpt available in public domain is reproduced below:

> *"(3) The Respondent's conduct in respect of the imposition of the Claimant of an asserted liability to tax notwithstanding the Supreme Court Judgement is in breach of the guarantee of fair and equitable treatment laid down in Article 4 (1) of the Agreement, as is the imposition of interest on the sums in question and the imposition of penalties for non-payment of the sums in question.*
>
> *(4) The finding of breach in paragraph (2) entails the obligation on the Respondent to cease the conduct in question, any failure to comply with which will engage its international responsibility.*
>
> *(7) The Respondent will reimburse to the Claimant the sum of £4,327,294.50 or its equivalent is US Dollars, being 60% of the Claimant's costs for legal representation and assistance, and €3,000 or its equivalent in US dollars, being 50% of the fees paid by the Claimant to the appointing authority."*

3. Implications of the Award[2]

I. A reminder that Foreign Investors have access to remedies under International Law

An international investment typically involves a commercial agreement between the foreign investor and the host State (Investment Contract). Investment contracts provide for dispute resolution either before domestic courts or administrative tribunals, or through international arbitration.

In addition, a foreign investor can examine if the country of its nationality (Home Country) has entered into an international investment agreement (IIA) with the State within whose territory investment is made (Host State). IIAs can be in the form of a bilateral investment treaty (BIT), a free trade agreement with an investment chapter (FTA), or a regional cooperation and economic partnership agreement with guarantee for investment protection. Additionally, a foreign investor must also check if the Home Country and the Host State are members of a multilateral convention such as the Convention for Settlement of Investment Disputes (Washington Convention, 1965). IIAs commonly provide for dispute resolution through international arbitration between a covered investor and the Host State.

In the event of a dispute, therefore, investors may find that the relevant facts fit both under an investment contract or an IIA, with distinct dispute resolution clauses. We have regularly conducted legal analyses for investors to ascertain the correct forum for initiation of disputes, in cases involving overlapping claims under investment contracts and IIAs.

The Vodafone case did not arise out of an investment contract between VIHBV and the GOI. Having emanated from retrospective tax legislation by India, it was brought under an IIA. While Vodafone could have exercised a right to challenge the constitutionality of the amendment before the Supreme Court of India, it chose to initiate arbitration under the India – Netherlands BIT.

Foreign investors investing in India need to be mindful of any IIAs that have been signed by their home countries - that may provide access to them against adverse Indian measures under international law. The Vodafone award reinforces the availability of an effective mechanism to foreign investors under IIAs.

We have advised foreign investors on several pre-initiation issues such as funding arrangements, pros and cons of arbitration on investors' relationship with India under particular sectors, risk insurance, time and costs benefit analysis, alternate remedies to safeguard foreign investment, in-depth analysis of commercial agreements and treaties to find overlaps and best mechanisms to pursue remedies. These issues require thorough evaluation before initiating arbitration under an IIA.

2. This chapter is written by Kshama A. Loya (Leader, Investment Treaty Arbitration Practice) and Vyapak Desai (Head, International Dispute Resolution Team).

3.Implications of the Award

II. Termination of BITs by India – Do Investors continue to have a right to initiate disputes?

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.[3] In light of such terminations, we are often asked if foreign investors continue to have a right to initiate disputes under the terminated BITs. This depends on the language of the BIT.

BITs remain in force for the duration mentioned therein – generally ranging from 10 to 15 years. The procedure for termination of a treaty prior to expiry of its original term is provided in the treaty. Upon expiry of the original term, most BITs are automatically extended. A Contracting Party desiring to terminate the extended BIT can do so by expressing its intention to terminate, often through a written notice to the other Contracting Party. The BIT then terminates within a fixed term provided in the treaty.

Majority BITs extend treaty protections to an investment for a fixed period beyond termination. This is evident from the latter portion of the above clause. The shortest fixed survival period is, for instance, 5 years and the longest is 25 years. For a foreign investor to take benefit of such extensions, it is essential to analyse the conditions under which the BIT provides such protection to investment even after termination. Hence, foreign investors could continue to have a right to initiate disputes despite denunciation of BITs by India.

For instance, Article 16 of the India – Netherlands BIT titled 'Duration and Termination' provides:

> *"1. This agreement shall remain in force for a period of ten years. Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be deemed to have been extended for period of ten years at a time, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity. In respect of investments made before the date of the termination of the present Agreement the foregoing Articles shall continue to be effective for a further period of fifteen years from that date."*

The India-Netherlands BIT was signed on November 6, 1995; and came into force on December 5, 1996. The date of termination of the India – Netherlands BIT as per the Indian Department of Economic Affairs website is September 22, 2016. On the basis of Article 16 above, investments made in India prior to September 22, 2016 would be protected for fifteen years from the date of termination, under the India – Netherlands BIT.

In January 2020, India proposed the enactment of a national legislation for investment protection and initiation of investor-State disputes.[4] While this is at a nascent stage and no information is available in public, investors must keep an eye on the Indian legal framework which could witness enactment of this legislation in 2021/2022.[5]

3. https://www.dea.gov.in/bipa
4. https://www.livemint.com/news/india/government-plans-new-law-to-protect-foreign-investment-11579084078405.html
5. https://economictimes.indiatimes.com/markets/stocks/news/view-balancing-state-regulation-investor-rights/articleshow/73792172.cms

III. Impact on existing litigation and arbitration proceedings involving retrospective tax legislation

The Vodafone award could influence potential claims from foreign investors who have been brought under the tax net by virtue of the retrospective tax legislation. This could be best effectuated via a claim under IIA. Litigation in Indian national courts is already pending for several years, and may not provide an effective remedy.

For bringing an IIA claim, the IIA will need to be thoroughly scrutinised. We have seen cases where tribunals in distinct cases involving challenge to the same State measure under the same treaty have arrived at opposite conclusions - due to distinct interpretation of relevant treaty provisions.

With respect to influence on existing treaty claims in the pending Cairn – Vedanta international arbitrations, the Vodafone award may not have significant effect. The arbitration proceedings in the Cairn case were completed in December 2018. The award is awaited since February 2019. It is unlikely that the Vodafone award would have a bearing on Cairn award which is expected anytime. In any event, the investment treaty arbitration regime does not follow the doctrine of **stare decisis,** according to which an award by one arbitral tribunal binds the other. Additionally, the Cairn dispute differs from the Vodafone case with respect to treaty provisions attracted, Indian measures challenged, and claims made by Cairn.

IV. Government's position till October 15, 2020

This award negates India's general position that tax disputes do not come under the ambit of investment treaties. However, the position holds water for treaties that specifically exclude tax disputes from their scope. New bilateral investment treaties entered into by India such as the 2018 India Belarus BIT and the 2020 India Brazil BIT have mostly excluded measures regarding taxation or enforcement of taxation obligations from their scope. Going forward, it is likely that India will fiercely negotiate on incorporation of such exclusions in bilateral investment treaties.

As for sovereign powers of India to pass retrospective legislation, the Finance Minister recently commented that India has sovereign powers to amend its laws. However, these amendments are required to have prospective effect.[6] We wait to see if India decides against challenging the Vodafone award, and honours its international law obligations under the Vodafone award.

6. https://economictimes.indiatimes.com/news/economy/policy/i-have-an-open-mind-about-stimulus-finance-minister-nirmala-sitharaman/articleshow/78396960.cms

4. Examining India's powers to pass retroactive tax legislations[7]

I. Law relating to retrospective laws and impossibility of performance

The Supreme Court in **CIT v. Vatika Township Pvt. Ltd.**[8] laid down the general principles for classification of retrospective amendments. Essentially, it provided that the presumption against retrospective operation was not applicable to clarificatory statutes and in that case retrospective operation is generally intended.

This is of course relevant to the Retroactive Amendments that were termed as clarificatory amendments but in fact introduced a new scheme of taxation of indirect transfers.

Judicial precedents also indicate that a scope of a provision cannot be enlarged by adding an explanation and that the purpose of an explanation is to explain the meaning and intention of the provision or clarify vagueness.

Oddly enough, the Retroactive Amendments in itself were vague on what constitutes substantiality and manner of computation of capital gains for an indirect transfer. This led to further amendments such as introduction of restricting exemptions, small shareholder exemptions, meaning of substantiality, as well as detailed rules on computation of fair value, and capital gains. Given that a new scheme of indirect taxation was introduced, it is hard to argue that the Retroactive Amendments were "clarificatory" or "declaratory".

The question that comes up is that that if a substantive amendment is couched under a clarificatory language, in that case, can such a provision be operational on a retrospective basis?

Even while considering retrospective amendments, the Supreme Court in **Vatika** has considered the principle of fairness in that it is not possible for a law passed today to apply to the events of the past and that legislations with modify accrued rights or impose new obligations have to be treated as prospective unless the legislative intent to be give a retrospective effect.

This ties in with the well-established principle[9] of **lex non cogit ad impossibilia** – law does not compel man to perform what he cannot possibly perform.

Applying this to the case of Vodafone, it is impossible for Vodafone to withhold taxes on a transaction that it believed bona fide to be non-taxable in the first place. Such an obligation could amount to performing an act back in the past which is an impossibility.

A similar view has been expressed by the Bombay High Court[10] in the context of Explanation 6 to s. 9(1)(vi) where it has held that the payor could not have contemplated TDS where such liability was brought about by a retrospective amendment.

Despite these principles and obvious flaws of retrospective applicability of substantive tax laws, it is by no means a general proposition that the imposition of tax with retrospective effect will render such provision inapplicable.

7. This chapter is written by Shipra Padhi (Leader) and Rajesh Simhan (Head), International Taxation Team
8. 367 ITR 466 (SC)
9. **CIT v/s. Cello Plast** (2012) 209 Taxmann 617
10. CIT v. NGC Networks (India) Pvt. Ltd. (Income Tax Appeal no. 397 of 2015).

In fact, even in case of amendments that are not clarificatory but substantive in nature, retrospective effect may be given to such amendments if specifically, so provided and the legislative intent for retrospectivity will be looked into. However, it is not clear as to how to maintain a balance between legislative intent and impossibility of performance of a tax obligation – what test do you apply to strike down a retrospective amendment?

II. "Fair and Equitable Treatment" standard in Vodafone's case

In light of the above discussion, it would be interesting to see how the arbitral tribunal viewed the Indian tax department's claim against Vodafone from a "fair and equitable" treatment standpoint. While we do not have the text of the full award, the obligation to provide 'fair and equitable treatment' includes guarantees such as providing stable and predictable legal framework to foreign investors , following due process while modifying the legal framework that might potentially impact foreign investors, adopting measures in a transparent and non-arbitrary manner, among others.

Looking at the events from that lens, the following facts emerge –

- Vodafone entered into the Indian market in 2007 as it purchased the shares of a Cayman entity which indirectly held an Indian entity that housed the Indian telecom business. In this transaction, it had not made any gains or profits for which it had to discharge taxes as a primary taxpayer. A withholding tax obligation, is not a primary tax liability but a procedural obligation put in place to ensure ease of recovery of taxes by the Indian tax authorities. Prior to the Vodafone case, there has not been a single case of indirect transfer being held has taxable prior to the Vodafone transaction.

- This was followed by initiation of a high profile tax claim against Vodafone, which was eventually ruled in favour of Vodafone by the Supreme Court. Within months of the Supreme Court ruling, the legislation was amended on a retroactive basis where substantive changes were made to the existing law and termed as "clarificatory amendments". The effect of the Retroactive Amendments was overruling the ruling of the Supreme Court.

- Given the number of amendments and rules added post introduction of Retroactive Amendments also add to the view that the Retroactive Amendments were introduced in haste, targeting the Vodafone tax claim.

Subject to the detailed ruling, it is possible that the arbitral tribunal may have considered the above series of events to indicate unfair and inequitable treatment to Vodafone, especially considering the manner in which the existing legal framework for taxation was disrupted by India, in an arbitrary and seemingly targeted manner by introducing the Retroactive Amendments. The fact that the tax claim against Vodafone was in respect of its withholding tax liability, and not primary tax liability, also adds to the gravity of the treatment meted out by India to Vodafone.

III. Impact of Vodafone arbitration award on tax matters going forward

Tax certainty and stability, especially for foreign investors is key to boost investment in the country.

Interestingly, but not surprisingly, the Supreme Court's ruling in Vodafone and consequent Retroactive Amendments was not the first attempt of the legislature to overturn the judicial interpretation by the Supreme

Court. In Finance Act, 2010, after the **Ishika Wajima Harima**[11] ruling, a clarificatory retrospective amendment was introduced to s. 9 in order to bring within the tax net, income in the nature of fees for technical services, whether or not the non-resident has rendered services in India.

Further, lately, there have been several rulings of tribunals which have sought to deny treaty benefits for grandfathered investments i.e. sale of shares of an Indian entity by a Mauritius seller, acquired prior to April 1, 2017. This is especially worrisome considering Circular 789 of 2000 unequivocally provides that Mauritius tax residents would be entitled to benefits of the tax treaty and accordingly will not be liable to pay Indian capital gains taxes on sale of Indian shares. This position has been confirmed by the Supreme Court in **UOU v. Azadi Bacha Andolan**[12] which has held that treaty benefits should be granted subject to there being a valid tax residency certificate.

Given these developments, tax uncertainty continues to be a growing cause of concern for foreign investors. The India-Mauritius BIT has been terminated, and in any case unlike the Netherlands BIT, in the Mauritius BIT there is a specific exclusion for matters relating wholly or mainly to taxation. Having said that, it is possible that a similar claim cannot be initiated under the BIT if it relates to purely tax matters. However, cases can be distinguished despite specific tax exclusions based on their facts and circumstances.

Also, given the kind of criticism India is receiving owing to the Vodafone award, it would be interesting to see whether it changes its approach to ensure tax certainty and a stable environment to boost investment, especially today, in India's troubled economy.

11. **Ishikawajma-Harima Heavy Industries Ltd v. Director of Income-tax ,** CASE NO. APPEAL (CIVIL) 9 OF 2007

12. 263 ITR 706 (SC).

5. Enforcing an investment treaty award in India – challenges and solutions[13]

I. Introduction

The Vodafone award could bolster investor confidence in initiating disputes under international investment agreements (IIAs) or bilateral investment treaties (BITs), against retrospective tax amendments or other government measures adopted by India. However, 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. We have closely tracked the approach of Indian courts to enforcement of treaty awards as part of our extensive practice in enforcement of foreign arbitral awards in India. Problems could arise both in terms of the applicable legal regime and the time involved in conducting these proceedings. Despite the favourable award, Vodafone could face a hurdle in enforcement of the treaty award in India considering uncertainty in the Indian legal regime. Navigating this road requires strategy, and exploring effective alternate remedies. This article assesses the fate of enforcement of a treaty awards, in the event India refuses to make a settlement or pay compensation.

II. Vodafone Award: Challenge in Singapore

An international arbitral award arising out of a treaty dispute is binding on the parties to the dispute. However, the award could face two additional hurdles before the investor can reap its benefits. Firstly, the award can be challenged at the seat of the arbitration. Secondly, the enforcement of the arbitral award can be resisted in the country where enforcement is sought. This would be where State assets are located, most often the Host State. In Vodafone case, the arbitration was administered under the UNCITRAL Arbitration Rules as agreed under the India – Netherlands BIT, at the Permanent Court of Arbitration in The Hague. The Permanent Court of Arbitration provides case administration support in arbitrations under the UNCITRAL Arbitration Rules, in particular in cases involving a State. However, the legal seat of the arbitration was agreed to be Singapore. The seat attracts the legal jurisdiction of courts of the seat.

As such, if Government of India decides to challenge the award, it can only do so before the High Court of Singapore under the Singapore International Arbitration Act. Once the challenge is pending at the seat, courts in other countries where enforcement could be sought against Indian assets could refrain from enforcing the award until the challenge is decided, and the award becomes final and binding. In the event the challenge is dismissed, Vodafone could file proceedings in Indian courts to enforce the award.

III. Enforcement of a Treaty Award in India: Not an easy road

The case of India is peculiar. India is not a signatory to the ICSID Convention. Resultantly, India is not covered under the delocalized regime that offers immunity to ICSID awards from challenge in national courts.

13. This Chapter is largely an adaptation of the article titled **'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 (Leader, International Dispute Resolution) and Moazzam Khan (Head, Global Litigation) in the Asian Dispute Review, January 2020.

Additionally, India is deprived of a regime that makes ICSID awards automatically enforceable in signatory jurisdictions.

India is a party to the New York Convention on Recognition & Enforcement of Foreign Awards (NYC). In India, the mechanism for enforcement of domestic and foreign arbitral awards is contained in the Arbitration & Conciliation Act, 1996 (A&C Act).

However, in two cases,[14] Indian courts have held that the Indian A&C Act applies only to arbitrations which are considered 'commercial' under Indian law. This has fuelled uncertainty as to which law applies to enforcement of treaty awards in India.

The first of these cases originated in the proceedings filed by GOI against Vodafone Plc. in High Court of Delhi (High Court) in 2018 to restrain investment treaty arbitration ,initiated by Vodafone Plc. under the India – United Kingdom BIT (Vodafone Plc. court proceedings). In this case, the High Court stated 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".** 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). In the Court's obiter, investment treaty awards may not satisfy the 'commercial' test in order to qualify for enforcement under the Indian A&C Act, since these arbitrations find their roots in public international law, administrative law and State obligations. Please see our analysis of the Vodafone Delhi High Court decision here.[15]

In another case of Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.[16] (that followed the Vodafone ruling and involved a similar anti-arbitration injunction to restrain the foreign investor from continuing investment treaty arbitration proceedings), the Court held that arbitral proceedings under a BIT is a separate specie of arbitration. It is outside the purview of A&C Act which only covers commercial arbitration. This is a preliminary judgment in the interim application. It would be interesting to see if the High Court continues to hold the same view after hearing all the parties on merits. Please see our analysis of the Khaitan Holdings Delhi High Court decision here.[17]

IV. Do Foreign Investors have other options to enforce treaty awards against India?

The position of the High Court creates uncertainty in the legal framework that would apply to enforcement of a treaty award if brought in India. Until such time that they are set aside or varied by the Supreme Court), any party applying for enforcement of a BIT 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.

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14. Union of India v. Vodafone Group PLC United Kingdom & Anr.; Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.
15. 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
16. CS (OS) 46/2019 I.As. 1235/2019 & 1238/2019 dated January 29, 2019
17. 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

5. Enforcing an investment treaty award in India – challenges and solutions

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 BIT 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 BIT Award against India.

A legitimate avenue open to foreign investors holding a favourable treaty award is to identify Indian assets that are located outside India, preferably in a jurisdiction which has an established, recognised, tried and tested mechanism for the enforcement of BIT Awards. We have advised investors in cases involving identification of relevant assets of the Host State in other jurisdictions, and have additionally analysed the legal regimes of countries such as Singapore and the United Kingdom where enforcement can be sought without similar hurdles as in India.

Other countries with robust international arbitration framework such as France, Germany, Australia and Japan are signatories to the ICSID Convention. They 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. We have advised investors on locating assets of 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.

V. Way forward for India

The questions on enforcement of BIT awards in India would have been moot if India had signed and ratified the ICSID Convention. Being a member of the ICSID Convention would mean un-resistible enforceability of the award in signatory jurisdictions.

As the position stands today, unless the Supreme Court of India overturns this decision of the Indian courts regarding non-applicability of the A&C Act to investment treaty arbitrations, the situation would remain bleak. The other alternate would be for the legislature to either amend the A&C Act to include enforcement of BIT Awards within its scope or to establish an entire regime afresh dedicated solely to investment protection, like several other countries. However, this is not devoid of challenges.

Until a legislation is in place, the Supreme Court of India bears the burden of several foreign investors, investment treaties, sovereign states and well, the fastest growing economy in the world as it promises a stable legislative and regulatory framework for foreign investment.

6. Termination of BITs: Is the Political Risk Insurance Industry ready?[18]

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[19] 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,[20] has been foremost international institution offering PRI to 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.[21]

18. This chapter is written by Yashasvi Tripathi (Member) and Kshama A. Loya (Leader, Investment Treaty Arbitration Practice.
19. Kathryn Gordon, Investment Guarantees and Political Risk Insurance: Institutions, Incentives, and Development, OECD Investment Policy Perspectives 2008
20. **MIGA, Overview,** https://www.miga.org/who-we-are/overview/.
21. Providing Political Risk Insurance and Credit Enhancement Solutions, https://www.miga.org/sites/default/files/2018-06/MIGA%20products.pdf

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.

Notably, the German National PRI provider[22] 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,[23] 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

22. German Federal Ministry of Economics and Technology and Price WaterhouseCoopers, Granting of federal guarantees abroad, July 2006, p 3

23. OPIC, Political Risk Insurance Facilities for Private Equity Investment Funds, https://www.dfc.gov/sites/default/files/2019-08/pri-flyer-gec-2013.pdf.

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.[24] 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.

24. Lauge Skovgaard Poulsen, Political Risk Insurance and Bilateral Investment Treaties, a view from below. http://ccsi.columbia.edu/files/2014/01/FDI_27.pdf

7. Interplay between BITs and FDI, and what India should consider in its proposed alternative framework[25]

I. Introduction

In continuation of our earlier articles in this series, this final article briefly examines the correlation between BITs and FDIs. It also assesses the alternate effective framework proposed by India earlier this year for protection of foreign investment. To access previous articles in the series, please use the links provided in the footnote.[26]

Bilateral investment treaties (BITs) are agreements executed by two sovereign States to promote and protect foreign investment. The preamble of most BITs contains the promise of promoting bilateral cooperation conducive to stimulate beneficial business activity. In addition, present day BITs contain mutual promises to promote economic development of the contracting States, and re-affirm the rights of States to regulate investments in accordance with their law and policy objectives.

In light of the preamble and purpose of BITs, it would appear that BITs play a significant role in promoting FDI. However, various other factors compete in attracting a fair share of FDI. Macro-economic stability, financial health of a country, nature of investment, market size, availability of infrastructure and skill among others, influence FDI inflows. In the midst of these factors, what role do BITs play in promoting FDI?

It is essential for policy makers to understand the impact of BITs on FDI and investor confidence, before engaging in widespread termination of BITs as a narrow response to investor-State disputes.

II. Co-relation between BITs and FDI

The correlation between BITs and FDI has been the subject of numerous empirical and literal studies over the years. An examination of various studies would reveal that BITs have a positive, if not significant role, in promoting FDI. A study of OECD countries ranging from 1985 – 2014 indicates that BITs have a significant and positive impact on FDI flows from OECD countries to their partner host countries.[27]

Investor-State dispute settlement provisions were initially presumed to be a factor in contributing to FDI inflows. However, while dispute resolution provisions in BITs were assumed to be the primordial cause for instilling greater investor confidence, their presence has also become a primordial reason for nations to terminate BITs owing to the growing number of disputes initiated by investors against States.

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25. This chapter is written by Yashasvi Tripathi (Member) and Kshama A. Loya (Leader, Investment Treaty Arbitration Practice).

26. **Part I** 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;
Part II available at: https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-investment-treaty-arbitration-award-part-ii.html?no_cache=1&cHash=435b871b87f425acff3ef1438ffbd703;
Part III available at: https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-investment-treaty-arbitration-award-part-iii.html?no_cache=1&cHash=45c53ee36223ad9989d615205f11e749;
Part IV available at: https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-investment-treaty-arbitration-award-part-iv.html?no_cache=1&cHash=cba75e5f8e2204d1d96938db5908935d.

27. Armstrong, Shiro Patrick and Nottage, Luke R., The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis (August 15, 2016). Sydney Law School Research Paper No. 16/74. Available at SSRN: http://ssrn.com/abstract=2824090

Since 2001, presence of investor-State dispute settlement provisions have been noticed to have a reduced impact on FDI, in favour of other substantive provisions of BITs. An UNCTAD study specifically reveals that substantive commitments in BITs apart from investor-State dispute settlement provisions, impacts FDI.[28] However, a latter study suggests that even given the reduced impact of ISDS since 2001, overall investor-State dispute settlement provisions did have a positive effect on FDI promotion, and that it would have been riskier for countries to abstain from providing dispute resolution mechanisms to investors.[29]

With respect to sectoral impacts of BITs, it is difficult to predict the same due to uneven concentration of disputes in certain sectors. An empirical study of twelve countries in Central and Eastern Europe, and Former Soviet Union, indicated that BITs have a larger impact on FDI in the mining sector, and found that FDI in other sectors did not respond to BITs at all.[30] The study indicates that there is differential impact of BITs on different types of FDIs, depending on the sectors involved.

Unfortunately, the survey of the extant work does not lead to any conclusive finding as to a significant impact of BITs on promoting FDI or inflows in particular sectors. However, it can be stated that a State's domestic business environment, broader economic determinants and external commitments (arguably including international agreements and treaties) play a comprehensive role in attracting FDI.

III. FDI, BITs and India

The top five countries from which India has received FDI in the last three years are Mauritius, Singapore, Netherlands, Japan and U.S.A. (in descending order).[31] It is note-worthy that despite termination of the India – Mauritius BIT and the India - Netherlands BIT in 2016, FDI from Mauritius and Netherlands increased from 2018 to 2019.

India does not have a BIT with USA. Yet, USA features among the top five countries for FDI inflows in India since 2000. On the other hand, economic partnership agreements with Singapore and Japan remain in force. Investment from the two countries continues to be significant. An analysis of the above demonstrates that there may be no direct correlation with BIT terminations or continuations, and FDI inflows.

However, a recent empirical study on India demonstrates that, while the presence or absence of BITs with a specific country does not necessarily influence investor decisions, a collective institution of having a regime of investment protection by the presence of economic cooperation agreements or other international investment treaties fosters FDI in India.[32] While acknowledging the significant positive effect of cumulative BITs entered into by India, it attributed the positive effect to a regime of overall protection to investors.

28. The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies, 1998 – 2014, UNCTAD

29. Prof. Luke Nottage & Prof. Jaivir Singh, Does ISDS Promote FDI? Asia Pacific Insights from and for Australia and India, Asia-Pacific Forum for International Arbitration, p. 5

30. Liesbeth Colen and Andrea Guariso, What Type of FDI Is Attracted by Bilateral Investment Treaties?, LICOS Centre for Institutions and Economic Performance, KU Leuven June 2012, https://www.etsg.org/ETSG2012/Programme/Papers/197.pdf

31. https://dipp.gov.in/sites/default/files/FDI_Factsheet_June20_23Sept2020.pdf

32. Working Paper 391, The Impact of Bilateral Investment Treaties on FDI inflows into India: Some Empirical Results, June 2020, https://think-asia.org/bitstream/handle/11540/12036/Working_Paper_391.pdf?sequence=1

IV. Proposed Alternative Framework in India[33]

From studies and analyses, it can be aptly said that a BIT is one in the gamut of several factors that contribute to attracting FDI and fostering investor confidence. Thus, as long as India is able to demonstrate its concomitant willingness to offer investor protection and sustained business reforms, albeit domestic, it can continue to attract FDI despite termination of BITs.

Early this year, 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.[34] 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). This could re-instate investor trust in India.

International investment disputes are a special species of disputes. We have previously written here[35] that if mediation is furthered, it is critical for the mediator to hold the requisite expertise and recognition in the field of international investment law, national law and regulation. It may not be advisable to create a panel or list of mediators for parties to select 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 recognized 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.

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. However, the problem with enacting a fresh legislation and introducing a new scheme would be that Courts which are ultimately tasked with enforcement of BIT Awards under the new regime would not have the benefit of decades of judicial evolution, refinement and interpretations.[36] A comprehensive and effective framework will need to be designed by India to tackle these challenges.

V. Conclusion

BITs have been considered to be unique models for foreign investment protection on a public-private plane. Investor-State dispute settlement provisions in BITs offer effective remedies for investors to resolve disputes with States under international law. However, these do not necessarily promote foreign investment. Other factors such as national FDI policies, openness of an economy, fewer entry barriers, macro-economic stability, availability of labour and capital among other factors greatly influence FDI promotion.

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33. This section is adapted from the article **'Balancing state regulation & investor rights',** published by Kshama A. Loya & M oazzam 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

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

35. https://economictimes.indiatimes.com/markets/stocks/news/view-balancing-state-regulation-investor-rights/articleshow/73792172.cms

36. **'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.

7. Interplay between BITs and FDI, and what India should consider in its proposed alternative framework

While BITs may not play a significant role in promoting FDI, they provide effective provisions for protection of investment. They are quintessential to provide neutral and independent access to investors to international law remedies engaging State responsibility. The goal of BITs today is to strike the right balance between State regulation and investor rights. Likewise, legislative protection of foreign investment in the absence of BITs must also meet this careful balance. Robust and transparent processes must find place in the national investment protection legislation to promote and protect foreign investment. This will accentuate the economic benefits of foreign investment – namely growth, employment and sustainability.[37]

37. https://economictimes.indiatimes.com/markets/stocks/news/view-balancing-state-regulation-investor-rights/articleshow/73792172.cms

8. India Investment Arbitration – 2019 Year In Review (With Brief Recap of 2018)[38]

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.[39] 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.[40] 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.[41]

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 certain sectors to open branch offices in India without RBI approval (where

38. This investment arbitration review was prepared by Kshama A. Loya (Leader, Investment Treaty Arbitration Practice) and Moazzam Khan (Head, Global Litigation) in January 2020.
39. https://dipp.gov.in/sites/default/files/FDI_Factsheet_4September2019.pdf
40. https://www.ibef.org/economy/indian-investments-abroad
41. https://unctad.org/en/PublicationChapters/WIR2019_CH1.pdf

license or government approval has already been granted), 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. 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).

A.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.

B.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.

C.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.

D.India vs. Vodafone Plc. and Anr.

On April 17, 2014, Vodafone International Holdings BV (**"VIHBV"**) – a Dutch subsidiary of Vodafone Group Plc. - 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.

A.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.

B.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.

C.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.

D.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.

E. 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.

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.

9. Our Key Representations in International Investment Arbitration

- Successfully represented 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.
- Advised a telecom giant in a multi-billion investment arbitration against Republic of India.
- Advised a consortium of six global funds in relation to potential claims against Republic of India.
- Advised a sovereign wealth fund in potential invocation of a bilateral investment treaty arbitration against the Republic of India. The matter was eventually resolved amicably and resulted into one of India's largest M&A transaction.
- Advised a potential claimant on third-party funding in a bilateral investment treaty arbitration.
- Advised a consortium of investors with respect to their investment in a proposed large-scale hydropower project in India discontinued by the Republic of India.

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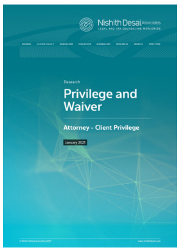

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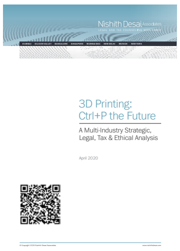

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Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparallel mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to **Intellectual Property.**

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical eco-system that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

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Vodafone Holdings B.V. versus Republic of India **(International Investment Treaty Arbitration)**

Case Analysis & Implications for Foreign Investors

(With a helpful recap of the Indian investment arbitration landscape in 2019 and 2018)

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