# CONUNDRUMS OF MODEL INDIA BILATERAL INVESTMENT TREATY VIS-À-VIS DISPUTE RESOLUTION IN INDIA

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ABSTRACT

India is operational with a multifaceted marketing structure, pervading to steel, pharmaceuticals, telecoms, information technology consultancy, tourism are few enlisted. Needless to say, cross-boarded traders and investors often venture on India's expanse and growth considering the Foreign Direct Investments (FDIs) permissible within the policy framework. Related rights and obligations has been structured through Bilateral Investment Treaty (BITs) models across the globe enunciating the protection that may be granted to the Investor for potential investment in the host state. BITs also contain within them the Dispute Resolution Clauses before which is the cooling off period and exhausting of local remedies leaving scope for settlement. A salient aspect of almost all BITs is that they empower individual investors to directly bring claims against a host State before an international arbitration tribunal. This is also known as Investor-State Dispute Settlement (ISDS) or BIT arbitration.[1] Enforcement of Legal Rights when disputes arise has always been quintessential in understanding the robustness of a legal regime. Through these the best practices are founded upon to smoothen the dispute resolution process and fixate the seat of Arbitration.

## I. BACKDROP OF 2015 MODEL BIT

The Indian Bilateral Investment Treaty (hereinafter '**BIT**') Model 2015 is a detailed and descriptive edition of 2003 Model with 38 Articles

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[1] The term is not restricted to Investor State but also covers state-state treaty disputes.

which are housed under seven chapters.[2] The inclination in the new BIT Model is towards protecting the Host State by confining the limits of Investor's protection granted under the said BIT by protecting the state's regulatory power to take measures in the public interest.[3]

The ambit of application of the BIT is casted upon the parties' right from the pre-investment stage and encompasses investments existing on the date the BIT came into force. Exclusion to claims that have arisen before BIT and those measures taken by local government, relating to taxes, compulsory licenses granted under intellectual property and any government procurements.

### A. Dispute Resolution under Model India BIT 2015

Major concern at the onset was seemingly due to the polarized opinions of the Arbitrators either favouring the investor or the state[4] and thus closes door to any last resort that is served through appellate bodies increasing the risk of a well-reasoned scrutiny. The International Centre for Settlement of Investment Dispute (hereinafter '**ICSID**') provides an appellate mechanism, but India is not a signatory to the ICSID

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[2] Grant Hanessian & Kabir Duggal, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?*, 30(3) ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 729 (2015), (doi:10.1093/icsidreview/siw020) [hereinafter **Hanessian & Duggal, Is this the Change the World wishes to See (2017)**].

[3] Saman Ahsan & Sanjeev Kapoor, *Substantial changes introduced in new Model Bilateral Investment Treaty*, THE INTERNATIONAL LAW OFFICE (Feb. 18, 2016), https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/India/Khaitan-Co/Substantial-changes-introduced-in-new-Model-Bilateral-Investment-Treaty#.

[4] Gus Van Harten, *Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern*, INVESTMENT TREATY NEWS (13th April 2012), https://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treatyarbitration-forthcoming-study-gives-cause-for-concern/.

mechanism, and therefore, no such appellate mechanism will apply to Indian BIT disputes.[5]

Anomalies still lie in exercising this well thought out model, it has only provided for ad-hoc international arbitrations and avoids reference to other fora like ICSID (for States that are parties to ICSID), as well as the ICSID Additional Facility, which could be used to bring a claim against States that are not party to the ICSID. Even though India is not a party to ICSID, reference to these alternate dispute resolution methods might benefit Indian investors abroad seeking to bring a claim against other States. India is required to make arbitration institutional rather than running the same on ad-hoc arbitrators.

## II. CASES ENTAILING ANOMALIES IN APPLICATION OF THE ARBITRATION AND CONCILIATION ACT, 1996

Issues are highlighted through cases fetched under the Investor who approached arbitration though the said BIT.

The first stint of BIT arbitration in India brings into the limelight *Port of Kolkata v. Louis Dreyfus Armatures*,[6] a French company investing in Haldia Bulk Terminals Private Limited (hereinafter '**HBT**'), an Indian company. A contract was entered into consisting of an arbitration clause, later a dispute arose between HBT and Port Trust and arbitration process commenced, meanwhile Louis Dreyfus Armatures (hereinafter '**LDA**')

[5] Law Commission of India, *Report No.260, Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty*, GOVERNMENT OF INDIA (2015), http://lawcommissionofindia.nic.in/reports/Report260.pdf.

[6] Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures, 2014 SCC OnLine Cal 17695.

transpired a BIT arbitration under India- France BIT inclusive of State of West Bengal as one of the parties in the opposition. The clash grew sour when an anti-arbitral award was sought as part of injunction order restraining the ongoing BIT arbitration initiated by LDA. The Court ordered that LDA restrain from continuing proceedings against the Port Trust, which was wrongly identified as a party to the investment arbitration.

Next, in line is the humungous case of *India v. Vodafone,*[7] where in 2006, Vodafone International Holdings entered into an agreement with Hutchison Telecommunications International Ltd (hereinafter '**HTIL**') – a Cayman Island company – to buy HTIL's share of 67 per cent interest in an Indian company Hutchison Essar Ltd. (hereinafter '**HEL**') for 11 billion USD. Capital tax gain was slammed at the doors of the Company of USD 2.2 billion. Vodafone contended that the transactions did not involve a capital asset situated in India and hence no capital gains tax was payable. The Indian tax authorities however argued that Vodafone's income is taxable under the Indian Income Tax Act, 1961, which taxes income deemed to accrue or arise in India.[8]

[7] Vodafone International Holdings B.V., is a company incorporated in Netherlands, which is the holding company of Vodafone India Limited. On 31 August 2018, Vodafone India merged with Idea Cellular and was renamed as Vodafone Idea Limited. See Company Overview of Vodafone Idea Limited, https://www.vodafoneidea.com/whowe-are/overview (last visited Feb. 25, 2020); Vodafone International Holdings B.V. in turn is the subsidiary of Vodafone Group Plc which is the U.K. based corporation. See Company Overview of Vodafone International Holdings B.V., https://www.bloomberg.com/profile/company/2255396Z:LN.

[8] Income-Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India), §§ 9 & 195.

Later the Apex Court decided that Vodafone did not owe any Tax and that led to the amendments that sportingly overruled the decision of the Court. These amendments legalized the tax demand on Vodafone struck down by the Supreme Court. Vodafone instantly challenged the tax amendments under the India- Netherlands BIT, alleging that retrospective effect given to the tax amendment will vitiate the obligation of India under the BIT. Following which arbitration tribunal was constituted in 2016 which is presently deciding on the matter. Soon after this another notice was served under India-UK BIT challenging the imposition of taxes and on receiving this India approached the High Court of Delhi where an order of restrain was passed on the commencement of arbitration process under India-UK BIT. This was seen as an abuse of process by simultaneously approaching to different forum under the BITs. This was followed by an order of the Delhi High Court on 26 October 2017, clarifying that the representatives/counsel for the parties were free to participate in the proceedings for appointment of a presiding arbitrator under the dismissed the plea of the Indian government seeking an anti-arbitration injunction against Vodafone from proceeding under the India-UK BIT arbitration.[9]

Lastly the case of *Union of India v. Khaitan*,[10] which arose out of a Supreme Court Order of cancelling the licenses of telecom companies on account of irregularities in the allocation of 2G. As a result, 21 such licenses to loop company were cancelled where Khaitan, a Mauritian company which held 26.95 percent shares in it aggrieved, issued a notice of arbitration to India for loss occurred to it and thereby claiming the

[9] Union of India v. Vodafone Group PLC United Kingdom, 2018 SCC OnLine Del 8842.
[10] Union of India v. Khaitan Holdings (Mauritius) Ltd., 2019 SCC OnLine Del 6755.

compensation. Immediately India sought an anti-arbitral injunction on the well premised fact that two of its beneficial shareholders were Indian citizens thus resorting to arbitration meant adjudication between Indian and Republic of India. Though Delhi High court declined to pass an anti-arbitral order of injunction. This is simply the case of nationality planning and abusing the process of arbitration by resorting to it and claiming against one's host state who has given them the nationality status.

Issues that arose was one, that of jurisdiction in cases where foreign investors invoke arbitration to exactly which of the domestic law will apply to set the rights and obligations of the parties straight. *Port of Kolkata v. LDA*, presumed that it had jurisdiction over BIT arbitration under the A&C Act, without dealing in detail with the issue of jurisdiction over BIT arbitrations. The consequence of such presumption is that the national courts of India will have jurisdiction over BIT arbitrations in all those instances where the A&C Act allows such judicial intervention. However, the Delhi High Court in *India v. Vodafone* and *India v. Khaitan* treated the issue of jurisdiction differently. In both the cases the Court rejected the view that the Arbitration and Conciliation Act, 1996 (hereinafter '**A&C Act**') is applicable to BIT arbitration and held that the national courts have inherent jurisdiction over BIT arbitrations under the Civil Procedure Code, 1908.[11]

[11] Satish Bhushan & Shreyas Jayasimha, *Indian Courts' First Brush with Investment Treaty Arbitration: Taking Some Lessons from the Calcutta High Court*, KLUWER ARBITRATION BLOG (Mar. 16, 2015), http://arbitrationblog.kluwerarbitration.com/2015/03/16/indian-courts-first-brush-with-investment-treaty-arbitration-taking-some-lessons-from-calcutta-highcourt/.

This procreates two divergent approaches due to no such definitive pronouncement by the Supreme Court of India namely:

- National courts exercising jurisdiction within the framework of the A&C Act; and
- National courts exercising inherent jurisdiction under the general civil procedure code.

Under the first approach it is a felt understood concept that an arbitral award rendered in India is enforceable as per the provisions of Civil Procedure Code which is adduced when arbitration is seated in India then it is governed under Part I of the A&C Act. Whereas for any foreign arbitral award to be recognized it necessitates the satisfaction of Section 44.[12]

Part II of the A&C Act deals with the enforcement of foreign arbitral awards rendered in countries that are party to the NYC. However, it does not contemplate on the grey area of its non-applicability where Part II of the A&C Act deals with the enforcement of foreign arbitral awards rendered in countries that are party to the NYC. The situation arose under the landmark case of *Bhatia International v. Bulk Trading*,[13] where Supreme Court said that all the non-convention countries would be covered under Part I of the Act and so will the enforcement of the award.

[12] The Arbitration and Conciliation (Amendment) Act, 1996, No. 26, Acts of Parliament, 1996 (India), §44 ("foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India).

[13] Bhatia International v Bulk Trading SA, (2002) 4 SCC 105, ¶ 23; Sumeet Kachwaha, *Enforcement of Arbitration Awards in India*, 4(1) ASIAN INTERNATIONAL ARBITRATION JOURNAL 64 (2008).

The dust did not settle in Bhatia when *Balco v. Kaiser*,[14] happened the Court overruled what it decided in Bhatia International leaving no room for remedy to the non-convention countries. It is now in the lap of legislature to provide a solution for the anomalous situation.

Under the second approach of assuming the inherent jurisdiction of the High Court also entails within itself the rejection to the presumed applicability of the A&C Act. In it Court found out that even if the BIT involved a foreign investor and is against a host state it can neither be termed International Commercial Arbitration nor domestic Arbitration. Thus, the Court said that the A&C Act, including Sections 5 and 45, do not apply "*proprio vigore*" to BIT arbitration. Section 5 of the A&C Act, which falls within Part I of the A&C Act, [15] determines the extent to which the judiciary can intervene in arbitral proceedings taking place in India. Further an interesting connotation is being given by the Court is that Part II of the Act will apply where legal relationships are commercial in nature. Delhi High Court enunciated that the element of "commerciality" is absent in the BIT arbitration, therefore, no application to Part II of the Act is viable. Founded on a well-reasoned understanding that dispute in BIT do not arise due to commercial fallacy but because of the fact that the treaty obligations that state had guaranteed to the Investor has not been duly undertaken. Hence, disputes arising from Bilateral Investment are different from simple commercial contract.

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[14] Balco Aluminium Co v. Kaiser Aluminium Technical Services Inc, (2012) 9 SCC 552, ¶ 175.

[15] The Arbitration and Conciliation (Amendment) Act, 1996, No. 26, Acts of Parliament, 1996 (India), §5 (Extent of judicial intervention- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part).

But on ascertaining the sections with the reasons given by the court it is observed that BIT is a public international law instrument and the legal relationships of the parties (foreign investor and the Host state) are commercial and can be made applicable to Part II of the Act and the emphasis drawn on the Section 44 is not on the commerciality of cause of action but of the legal relations over which the right and obligations of the parties are governed. Therefore, the logic gets defeated on application of the Delhi High Court's and leaves us in swamp of absurdity. Another factor which militates against the interpretation of the Delhi High Court is the fact that the UNCITRAL Model Law on International Commercial Arbitration, 1985 (with amendments as adopted in 2006) prescribes the term "relationships of a commercial nature" to include investments.[16]

In fact, when the Commercial Court Act was passed the legislative debate addressed the role of the commercial courts in overcoming "the delay in judicial process," and creating "an FDI friendly environment to attract more foreign investments in economic growth of the country." This point to the legislative intent that the investment disputes or differences arising out of the investments made by foreign investors in the host State must be considered as arising out of a legal relationship which is commercial in nature.[17]

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[16] UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (UN Doc A/40/17).

[17] Lok Sabha, *Further discussion on the motion for consideration of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015*, GOVT. OF INDIA (Mar. 1, 2020), http://loksabhaph.nic.in/Debates/Result16.aspx?dbsl=6004.

Challenges in ascertaining the provisions of A&C Act are many but remain unresolved. One of the greatest defeats of arbitration is the inclination of major cases to ad-hoc arbitration which is riddled with problems of delayed proceedings and poor quality of awards thus leading to excessive court interventions.

## III. CONCLUSION

The forum of dispensing justice as adduced has been seen plunging justice to more egregious dimensions, the interpretation and ascertainment has remained quintessential in abhorring abuse of power of the court. Simultaneously the clarity in understanding Part II of the A&C Act in applying the BITs requires precedent worthy deliveries from the Court of Law.

Further the second glaring issue in the row which relates to poor quality of awards is the reliance to ad-hoc arbitration rather than Institutional arbitration. The seamless reason remains unfettered as the institutional arbitration in India remains in a nascent state. Most arbitral institutions provide little besides rudimentary physical infrastructure for arbitration hearings. Many arbitral institutions have outdated rules of procedure, inadequately trained staff, and poorly staffed panels of arbitrators.