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The Elephant in the Room: India's Place in the International Investment Regime

A recent Delhi High Court judgement, issued on August 29, 2022 (the "**August verdict**"),[1] set aside an arbitral award rendered in 2015 by the International Chamber of Commerce ("**ICC**")[2] in respect of the protracted Antrix-Devas dispute. While the August verdict is being hailed as a significant win for the Indian government, it also presents an opportunity for India to figure out how to avoid such situations in the first place. As the traditional divide between capital-exporting and capital-importing countries continues to blur, it is now time that India started identifying itself as a key player in the international investment system (and its corresponding dispute resolution regime) – rather than playing defense.

The ICC proceedings were part of an international commercial arbitration ("**ICA**") between two companies: Antrix Corporation Limited ("**Antrix**"), a government-owned commercial arm of the Indian Space Research Organization ("**ISRO**"), on the one hand; and Devas Multimedia Private Limited ("**Devas**"), an Indian entity with foreign shareholders (including Deutsche Telekom ("**Deutsche**")), on the other. The events related to the ICA proceedings also led to two treaty-based investor-state arbitrations ("**ISA**")[3] where the Indian government was sued directly by foreign investors (including by Deutsche under the India-Germany Bilateral Investment Treaty ("**BIT**")).

The ability of *foreign* private entities to sue sovereign nations is a deliberate design feature of ISA, mainly to ensure legal protection for investors if and when things go

[1] Antrix Corporation Ltd. v. Devas Multimedia Private Limited, O.M.P. (COMM) 11/2021 & I.A. 3035/2021, I.A. 3037/2021, I.A. 4940/2021, I.A. 12541/2021 & I.A. 2507/2022

[2] Devas Multimedia Private Limited v. Antrix Corporation Limited, ICC Case No. 18051/CYK

[3] CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, PCA Case No. 2013-09; and Deutsche Telekom v. India, PCA Case No. 2014-10

wrong in faraway places (as they often can and do). Moreover, as the preamble to almost every BIT reflects, the bargain struck by sovereign nations, in exchange for ceding regulatory space through the signing of such treaties, is to promote – as well as to *protect* – foreign investment. One cannot happen without the other.

Importantly, this obligation to protect – when not honored – may give rise to liabilities under international law. Thus, while India continues to be a major hub for foreign investment, it has been sued 26 times (in reported ISA cases as of date), surpassed only by the likes of Argentina (62), Venezuela (55), Egypt (46), Czechia (41), Poland (36), Peru (31), and Ukraine (30).[4] To put things in perspective, the corresponding number for China is 9. Further, while the USA has been a respondent in 23 such (reported) cases, American investors have initiated a staggering 204.[5] In addition, until now, the US has not lost a single ISA dispute as a respondent (although some cases have been discontinued or settled, some are pending, and some may have gone unreported). Meanwhile, India has lost 5 and won 2 (the rest are pending, or have been discontinued or settled).[6]

Taking the cue from a Supreme Court judgement issued in January this year,[7] the August verdict refers to instances of fraud in respect of the 2005 satellite-based deal involving Antrix and Devas. However, neither in its ICA defense, nor in the two BIT-based ISA proceedings, did Antrix/India invoke corruption or the corresponding criminal investigation related to former ISRO officials (conducted by the Central Bureau of Investigation and the Enforcement Directorate since 2014) to justify contract-cancellation – relying, instead, on assertions of security interest and sovereign discretion. While it remains debatable whether the concerned tribunals would have declined jurisdiction on the basis of corruption alone, it would not have been the first time if they did, whether under ICA or ISA (although Devas might have

[4] Also in the list are Spain (55), Mexico (38), Canada (31), and Russia (27). Among these, the high number for Canada and Mexico is on account of the (erstwhile) North American Free Trade Agreement ("**NAFTA**") between the US, Canada, and Mexico. Canadian investors have, in fact, initiated twice the number of cases (63) that Canada itself has been a respondent to. Further, countries like Russia and Spain have been frequently sued under the Energy Charter Treaty ("**ECT**"), a multilateral agreement (and like the Canadian example under NAFTA, their own investors have sued as much, or more). Further, 10 cases against Russia relate to the annexation of Crimea (in 2014). Spain has faced several claims in the recent past arising out of a set of energy reforms affecting the renewables sector. The ECT and NAFTA, perhaps by dint of being multilateral/regional treaties, are the two most-invoked international instruments in ISA claims.

[5] Several of these under NAFTA

[6] Data from the Investment Dispute Settlement Navigator, Investment Policy Hub maintained by the United Nations Conference on Trade and Development ("**UNCTAD**"), available at: https://investmentpolicy.unctad.org/investment-dispute-settlement, last accessed on September 11, 2022

[7] Devas Multimedia Private Limited v. Antrix Corporation Limited & Another, Civil Appeal No. 5766 of 2021 with Civil Appeal No. 5906 of 2021

then invoked the doctrine of estoppel, arguing, for example, that India ought to be 'estopped' from citing breaches of its own law as a jurisdictional challenge – such as those under the Indian Penal Code, the Prevention of Money Laundering Act, and the Foreign Exchange Management Act – because India had itself endorsed such illegal investment).

In fact, some ISA tribunals have refused to hear the merits of treaty-based claims in the past when the underlying contract was found to be entered into through acts of corruption, even if such acts were perpetrated by government officials themselves. Ironically, this arbitral trend has been criticized because it provides an incentive for rogue states to engage in (and/or otherwise tolerate) corrupt activity – if only to set up a watertight defense later, when sued.

Earlier this year, Malaysia's tactical failure to prevent a US$ 15 billion award from being issued (despite the sole arbitrator's conduct causing significant controversy) in favor of a former Sultan's heirs under a colonial-era territorial grant[8] provides a sobering lesson, including for India. While there were several instances of faulty strategy in Malaysia's defense, just like the 'sultans' who have now managed to get Petronas assets seized in Luxembourg, investors in Devas also continue to seize Indian governmental assets in multiple jurisdictions. Further, just as Malaysia initially refused to participate in the arbitral proceedings citing lack of jurisdiction, Antrix too did not exercise its right to appoint an arbitrator of choice – despite being asked several times to do so – and challenged the ICC's jurisdiction instead. The result was the same: a domestic backlash against international arbitration at an abstract, nationalistic level when the award was nonetheless issued, even while both countries continue to seek innovative ways of reversing the respective verdicts. In both cases, the extent of damage caused – economic, political, and reputational – was not only significant, but also addressed too late.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"), which India has ratified like most other countries, enables investors to enforce arbitral awards when they win, including through the seizure or attachment of state-owned property/assets located in other countries (as long as such countries have also ratified the New York Convention). Accordingly, even while the August verdict came out, Devas was in the process of seizing Antrix assets in the US

[8] Ad Hoc Arbitration, Nurhima Kiram Fornan, Fuad A Kiram, Sheramar T Kiram, Permaisuli Kiram-Guerzon, Taj-Mahal Kiram-Tarsum Nuqui, Ahmad Narzad Kiram Sampang, Jenny Ka Sampang and Widz-Raunda Kiram Sampang (Heirs to the Sultanate of Sulu) v. Malaysia, FINAL AWARD, February 28, 2022; Tribunal: Gonzalo Stampa (Sole arbitrator)

pursuant to orders from local courts, similar to situations in France and Canada from the past.

These are important lessons for India, other than the fact that it needs to get its legal, policy, and regulatory strategies in place – instead of having to firefight on each such occasion. ***First***, India needs to think about what sort of sovereign it wants to be – in the eyes of the international investment community, as well as for the benefit of its own nationals who seek to invest abroad. ***Second***, it needs to start living up to its international stature by being proactive in global investment debates, including by making its position on key issues clearly known. And ***third***, it needs to develop a consistent stance in respect of dispute resolution under international investment law.

To be sure, India has not uniquely underperformed in this regard. The post-Cold War era, which also marked the birth of Indian liberalization, witnessed a proliferation of BITs and a corresponding surge in foreign investments worldwide. However, just a few years later, a treaty-based litigation boom made countries realize that BITs could 'bite'[9] – after all, the complex web of treaties that most developing countries had signed with nations of the west (and with each other) in the hope of attracting increased foreign direct investment ("**FDI**") also contained clauses relating to compulsory international arbitration in the event of dispute.

While India has avoided ratifying the main treaty related to ISA, thereby managing to evade jurisdiction of the biggest dispute-administering body in investment law (*viz.*, the International Centre for Settlement of Investment Disputes (ICSID)), other arbitral institutions and rules, including those related to and/or under the United Nations Commission on International Trade Law ("**UNCITRAL**") and the Permanent Court of Arbitration (PCA) still apply, pursuant to the BITs which India has/had signed. In essence, the very signing (and ratifying) of a BIT – which a country does only with respect to another country, as traditional subjects of international law – binds both to minimum standards of treatment which must be extended to investors from the other.

In addition, by entering into this type of treaty, a country typically provides its consent to commit future disputes involving aggrieved foreign investors to ISA. In the language of contract law, this 'offer' to arbitrate made by a State Party may be 'accepted' any time by an investor from the other country merely by initiating arbitral proceedings, and the host state's consent (*i.e.*, the consent of the country which is 'hosting' the investment) is thereafter not required on a case-by-case basis (as norms of

[9] Tobin, Jennifer L., and Susan Rose-Ackerman. "When BITs have some bite: The political-economic environment for bilateral investment treaties." *The Review of International Organizations* 6, no. 1 (2011): 1-32.

sovereignty and consent under international law normally demand). This mechanism makes BITs a particularly potent tool for foreign investors to secure remedies for themselves. For the same reason, countries that sign and ratify such treaties need to be mindful about the sovereignty costs involved.

In terms of current strategy, India has terminated several of its erstwhile investment treaties or has allowed them to lapse. Ostensibly, this is a strategic response to the adverse awards stemming from the (several) ISA cases filed against it. Nevertheless, prior investments, *i.e.,* those made before such treaties were terminated, will stay protected for an additional period pursuant to 'sunset' clauses in the respective BITs. Such sunset clauses, in addition to the pending ISA cases against India, suggest that there might be more to come as far as Indian firefighting is concerned.

While the BIT-based ISA regime is often accused of being biased or 'investor-friendly,' according to the World Investment Report 2022:[10] four ISA cases out of ten are, in fact, decided in favor of states, compared to three in favor of investors.[11] Conclusion: countries not only *do* win ISA cases, but they also win oftener than investors do. Further, just because a country has signed a large number of BITs does not automatically suggest that it will be exposed to a high number of ISA claims. For instance, the United Kingdom,[12] Switzerland,[13] France,[14] Belgium,[15] and the Netherlands,[16] despite having signed almost a hundred and fifty treaties each,[17] have been sued only once or twice under ISA. While one might argue that these countries are rarely sued *because* they have traditionally exported capital to developing countries, it could as well be argued that this rarity reflects better governance, superior strategizing, and greater compliance with due process.

And then, as always, we have China. While it continues to receive high volumes of FDI, China has been able to lead the transition from capital-importing to capital-exporting status, including by signing the highest number of BITs in the world – higher

[10] Published by UNCTAD, available at: https://unctad.org/webflyer/world-investment-report-2022

[11] 38% of all concluded ISA cases in the period between 1987 and 2021 were decided in favor of the respondent host state, while only 28% were decided in favor of the investor The rest were settled (19%), discontinued (12%), or decided in favor of neither party (liability found but no damages awarded – 3%).

[12] 101 BITs, 90 in force; 31 other treaties with investment provisions ("**TIPs**"), 7 in force

[13] 114 BITs, 110 in force; 37 TIPs, 35 in force

[14] 91 BITs, 84 in force; 74 TIPs, 58 in force

[15] 82 BITs, 58 in force; 74 TIPs, 58 in force

[16] 81 BITs, 76 in force; 74 TIPs, 58 in force

[17] Prior to its treaty terminations, India had signed about a hundred (including both BITs and TIPs)

than the countries mentioned above – and yet, it has been sued only 9 times.[18] The truth is, with the decline of 'gunboat diplomacy'[19] early last century in the wake of a liberalized international order, even former imperial powers sought to increase foreign investment through the strategic use of international law and a dense network of treaties. Thus, BITs represent handcuffs and signals both:[20] it is only a matter of perspective and national ambition.

However, with regard to treaty termination practices, India is not alone: countries like South Africa, Indonesia, and several in Latin America, have traced a similar trajectory. Further, in 2015-16, India adopted a revised Model BIT – one that retains ISA but accords healthy deference to a state's legitimate regulatory measures, among other changes. Although India has used this template to sign a few new treaties (which are not yet in force), its Model BIT has been criticized for sending mixed signals to investors – both foreign and local. After all, if such new treaties are signed with countries where Indian investment is expected to increase in the future, why not protect Indian investors better?

This brings us to the question of posturing: in terms of governmental statements, while it appears that India remains eager to attract inbound foreign investment, its record of protecting the same has not been the best, coupled with the recent wave of treaty terminations. On the other hand, Brazil, which started ratifying investment treaties only recently, has enjoyed a steady inflow of FDI even without the protective umbrella of BITs: perhaps the Brazilian example is something that India aspires for? Then again, despite being contested, several empirical claims suggest that BITs do tend to increase FDI and improve sovereign credit ratings. Further, a recent study suggests that FDI inflow to India has reduced by more than 30% in response to its treaty termination strategy (compared to countries which did not terminate).[21] The study also addresses 'treaty-shopping', whereby investors which route capital through subsidiaries incorporated in favorable jurisdictions (e.g., for tax purposes) may also select the most appropriate treaty to base its ISA claim on – if and when subsequently aggrieved (e.g., Dutch BITs). In this regard, the study suggests that rather than avoid

[18] China has signed 125 BITs (106 in force), and 25 TIPs, of which 22 are in force

[19] Where the 'home' state of a foreign investor would use military force to coerce compliance upon a recalcitrant host country – *e.g.,* in the event of an expropriation

[20] Salacuse, Jeswald W. "Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries." *Harv. Int'l LJ* 58 (2017): 127.

[21] Hartmann, Simon, and Rok Spruk. "The impact of unilateral BIT terminations on FDI: Quasi-experimental evidence from India." *The Review of International Organizations* (2022): 1-38. Available at: https://link.springer.com/article/10.1007/s11558-022-09471-3

India altogether in fear of its treaty termination practices, investors are directing India-bound FDI through better routes. If true, this trend might thwart India's apparent objective of avoiding BIT-based liability altogether (irrespective of the merits of such objective).

Another key element of BITs is that they represent *reciprocal* promises made by countries to each other. Thus, India's conservative approach to treaty language, as evidenced in its present Model BIT, limits the basket of protections that Indian investors might have wanted for themselves when they invest abroad. It is likely that India anticipates greater overseas investment ("**OI**") by local entities in the future, as recent rules/regulations/directions – such as those notified on August 22, 2022[22] (the "**OI Guidelines**") – suggest. Thus, looking at tested precedents – like those involving the US – might be a good start. For instance, the erstwhile Overseas Private Investment Corporation (OPIC) provided loans, guarantees, political risk insurance, and overall support to American investors for the purpose of penetrating foreign markets better. However, despite the OI Guidelines seeking to simplify, and improve upon, the previous OI regime, as of now there exists no investment guarantee scheme for the benefit of Indian investors overseas, nor does the government offer any political risk insurance to otherwise protect them.

In addition, the Office of International Claims and Investment Disputes, located within the US Department of State, is charged with the mandate of pursuing and defending international claims as initiated by: (i) American nationals against foreign governments; and (ii) foreign nationals against the US government, respectively. Further, aggrieved American investors may request the government to espouse their investment-related claims against a host state ('diplomatic protection'), subject to qualifying conditions like exhaustion of local remedies. Such measures of state support for OI made by Indian nationals might be useful towards generating higher outbound/cross-border M&A in the future.

[22] The Foreign Exchange Management (Overseas Investment) Rules, 2022 ("OI Rules"), Foreign Exchange Management (Overseas Investment) Regulations, 2022 ("OI Regulations"), and the Foreign Exchange Management (Overseas Investment) Directions, 2022 ("OI Directions"). The OI Rules, the OI Regulations and OI Directions (collectively, the "OI Guidelines") have been notified with the purpose of overhauling the existing regulatory framework in relation to overseas investments and acquisition of immovable property outside India and are notified in supersession of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004, Master Direction – Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015.

More than five and a half years ago, a 'high level committee' was set up by the government to review the institutionalization of arbitral mechanisms in India.[23] Among other things, this committee specifically recommended dispute management strategies in the context of ISA in its final report.[24] It also discussed the question of taking a position (among various options) with respect to dispute-settlement under international investment law. In that regard, India's stance remains unclear even as of today. While its Model BIT retains ISA, it signed an investment treaty with Brazil in early 2020 (which is not yet in force) that provides for state-state dispute settlement (as opposed to *investor*-state) as the primary template for resolving conflicts, modeled on the latter's Model BIT. On the other hand, India is scheduled to conduct its second round of talks with the European Union ("**EU**") later this month (as of the time of writing) in respect of a trade and investment agreement. This agreement might embrace the new European model with regard to investment dispute resolution. Significantly, such model does away with ISA altogether in favor of a standing bilateral court, to be ultimately replaced by a multilateral (and permanent) investment court ("**MIC**"). The MIC might be established in the future pursuant to an international convention through global consensus. While yet other options are being debated under the auspices of UNCITRAL's Working Group III, including appellate mechanisms, mediation, etc., India's voice in such global discussions remains muted and/or unreported.

Two years ago, local media reports suggested that India might be planning to enact a new law for the purpose of protecting foreign investors through expeditious dispute resolution mechanisms, including mediation and fast-track courts.[25] Allegedly, the government was considering the possibility of not signing new treaties if this proposed law – formulated along the lines of a regular BIT (but without international liability, presumably) – manages to provide enough assurance to foreign investors. Even if that were to happen, and/or if India chooses to establish its own dispute resolution mechanism for foreign investors otherwise – including through the reliance on local courts or joint interpretive statements – such a position must be clearly *communicated* to the international investment community. FDI, after all, relies heavily on transparency, clarity, consistency, and predictability. On the other hand, with increased

[23] On January 13, 2017, the Ministry of Law and Justice constituted a High Level Committee under the Chairmanship of Justice B.N. Srikrishna, Retired Judge, Supreme Court of India. On August 3, 2017, the ten-member committee submitted its report to the Minister of Law & Justice. See the notification dated August 4, 2017 issued by the Press Information Bureau in this regard, available at: https://pib.gov.in/newsite/PrintRelease.aspx?relid=169621

[24] "Report Of The High Level Committee To Review The Institutionalisation Of Arbitration Mechanism In India," dated July 30, 2017, available at: https://legalaffairs.gov.in/sectiondivision/report-high-level-committee-review-institutionalisation-arbitration-mechanism-india

[25] See, e.g., https://www.reuters.com/article/us-india-investment-law-exclusive-idUSKBN1ZE151

FDI flows expected in emerging sectors which require careful monitoring and regulation (such as high-end technology or renewable energy), India cannot afford to overcommit for the purpose of attracting FDI over the short-term – lest it be forced to renege on such promises later, thus infringing the legitimate expectations of investors. Spain's experience in the renewable energy sector offers a cautionary tale.[26]

At the UNCITRAL Working Group III deliberations on reforming ISA, some countries are in favor of keeping the current system more or less intact (US, Japan); some suggest modifications, such as holding arbitrators accountable through a strict code of conduct; some others want to introduce a forum of appeal, whether under the extant regime or by creating a parallel platform; yet others want to completely overhaul ISA, either replacing it with local courts (Australia), interstate dispute resolution (Brazil), or the MIC (EU). The EU, in particular, argues that ISA is fundamentally different from ICA because it involves a sovereign litigant. Accordingly, such disputes should be viewed as a species of 'public' law. In that light, a permanent court staffed with tenured judges (as opposed to *ad hoc* and temporary tribunals comprising party-appointed arbitrators) is an appropriate choice. Critics of the MIC (Russia, China) express concern about politicization, as seen with the International Court of Justice (ICJ). Most other major economies, such as South Korea, Israel, Indonesia, South Africa, Turkey, Mexico, and Chile, have put forth their views in this regard via written submissions to the Working Group.

But what does India want? We don't know.

Avoiding BITs altogether and shifting to a contract-based regime is also an option. India could argue, for example, that the resolution of foreign investment disputes in its own territory must rely on Indian law and national courts alone (or on domestic arbitral forums). Often, acknowledging the maturity and reputation of a country's judiciary, other nations/investors achieve comfort enough to commit capital even without ISA (the US and Canada struck such a 'deal' in the US-Mexico-Canada Agreement, which replaced the North American Free Trade Agreement (NAFTA) under President Trump – predictably not involving Mexico in the 'deal'). Similarly, this could be a chance for India to develop upon, and demonstrate, good governance, including to the satisfaction of foreign investors.

[26] Spain faced several arbitral proceedings under the ECT when it rolled back the incentive schemes it had earlier introduced (in the early 2000s) in order to attract foreign investors to the renewable energy sector. Despite an FDI surge in the sector, Spain was forced to change applicable regulations pursuant to the 2008 global financial crisis. Thereafter, several foreign investors alleged a violation of fair and equitable treatment (FET) due to a frustration of their legitimate expectations.

Nevertheless, there is wisdom in using treaties to issue 'signals' to foreign investors, as well as to protect national investors abroad – given India's stature and growing appetite.

Whatever system it prefers for itself, it might be best for India to make its views known to the world – and soon. This is over and above the need to develop a long-term strategy for protecting inbound and outbound FDI, including with respect to eventual disputes and litigation. Lastly, as a major investment destination, as well as a potential home state for FDI overseas, India must periodically check with lawyers, policy advisors, regulators, and even arbitrators, before implementing any measure which has the potential of compromising, or otherwise interfering with, the property and other rights of investors – both foreign and local.

Disclosure: *In the past, S&R Associates has advised Cairn Energy Plc (now Capricorn Energy Plc) and Cairn U.K. Holdings in its bilateral investment treaty claim against the Republic of India. S&R Associates also advises an international law firm that is representing Devas on ancillary issues.*

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