

# Alternative Dispute Resolution



The Indian government, while entering into BITs, needs to strike the right balance between safeguarding its own interest and reassuring foreign investors that they have adequate safeguards and protection under the said BITs

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## Introducing the Bilateral Investment Treaty (BIT)

A BIT is a reciprocal agreement between two sovereign states that grants certain protections to investments made by one state, including private investments, in the other state (host state). In general, a BIT affords eligible investors certain minimum protection of their investments in a host state, including (i) National treatment and most favoured nation treatment, (ii) No expropriation without compensation, (iii) Repatriation of investments and returns and (iv) Subrogation.

BITs have become essential tools in managing foreign investment risks because they provide safeguards to foreign investments and typically enable foreign investors to remove investment disputes from the jurisdiction of local courts of the host state. Since the first BIT being signed between Germany and Pakistan in 1959, around 3000 BITs have been concluded worldwide till date. BITs have lately been invoked or

threatened to be invoked by investors to compel host states to amicably settle multi-million disputes, failing which, not only the claim for monetary damages but also the abandonment or revocation of policy measures ensues.

### Dispute Resolution Mechanism in BIT

A BIT typically provides for a dispute resolution mechanism for enforcement of the substantive rights contemplated therein by resorting to International arbitration whereby the investor is not required to exhaust local remedies. In most cases, the investor can choose between an arbitration under the Convention on the Settlement of Disputes between States and Nationals of other states, 1965 (ICSID Convention), or arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL) or refer the dispute to arbitration centres such as the Stockholm Chamber of Commerce or the International Chamber of Commerce (ICC). As on November 1, 2013, 158 countries were signatories to the ICSID convention, excluding India.

Since ordinarily there is no contractual relationship between an investor and the host state and also that international law might be difficult to enforce, this kind of treaty makes it possible to resolve any dispute in an efficient way. As per the ICSID Case Load – Statistics (Issue 2014-1), 459 cases had been registered under the ICSID Convention and its Additional Facility Rules as of December 31, 2013, with a total number of 40 cases having been registered in 2013, the second highest in the preceding decade with the year 2012 recording the maximum number of cases i.e., 50. As per the 2013 statistics, 63% of the cases emanated from BITs and the arbitral tribunal rendered awards upholding the claims in part or full in 46% of the cases as compared to 28% of the cases in which all claims were dismissed.



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## Condition precedents to Arbitration

Although BITs generally do not require foreign investors to exhaust all local remedies, a majority of them (for example, India – Netherland BIT) provide for a “cooling off” period of three to six months wherein the investor and the host state are required to settle their disputes amicably by negotiation and conciliation before the disputes can be referred to arbitration. Some of the BITs (for example U.K. – Argentina BIT) also provide for a requirement to resort to the local courts for a certain period of time as a condition precedent to arbitration.

In the context of the local litigation requirement, the U.S. Supreme Court in its first investment treaty arbitration ruling of March 2014 in *B.G. Group PLC v. The Republic of*

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With the recent spate in claims by foreign investors against the Indian Government, not only for its executive decisions but also for judicial decisions, Bilateral Investment Treaties have come to a spotlight.

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*Argentina* by a 7-2 majority held that the local litigation requirement as mentioned in the U.K.-Argentina BIT was merely a procedural requirement and the non-adherence of the same by the investor B.G. Group PLC did not vitiate the consent of Argentina to participate in arbitral proceedings.

## India's tryst with International Investment Arbitration

India is a signatory to around 83 BITs, out of which 72 have come into effect. India's real tryst with International Investment Arbitration came in November 2011 with the first published investment treaty award against India in *White Industries Australia Limited v. The Republic of India* wherein the arbitral tribunal unanimously held that the inordinate delay caused by the judicial system in India in enforcing the 2002 ICC arbitral award in favour of White Industries, violated the “effective means” standard incorporated in Article 4 (2) of the 1999 India-Australia BIT which entitled White Industries to A\$ 4.08 million along with back dated interest and further costs.

As a first published investment-treaty award against India, the White Industries case has certainly increased awareness regarding the potential of India's BITs to be used by prospective claimants against India. On the other hand, it has also precipitated the Indian government revisiting all of its BITs to overcome claims by foreign investors for reasons beyond its ordinary control, like judicial delays in this particular case.

## Testing times ahead

The Indian model BIT typically provides that the provisions of the Treaty shall not in any way limit the right of the Indian Government to apply prohibitions or restrictions or take action in accordance with

laws applied in good faith, on a non-discriminatory basis, and to the extent necessary for the protection of its essential security interests. However, the BIT does not expressly exclude judicial decisions or judicial delays, which predictably might result in a plethora of claims against the Indian Government in near future.

Following are the instances in which India is recently facing with invocation or threat of invocation of arbitration under BITs by foreign investors:

- (i) The latest in line to put India in the BIT arbitration spotlight is South Korea's threat to invoke arbitration under the BIT for adversely impacting the Samsung Electronic investments, pursuant to a Supreme Court order directing its chairman, Len Kun-Hee to appear before a Ghaziabad trial court in a \$1.4 million cheating case filed against him by JCE consultancy. The Centre is concerned over the Supreme Court's order as it is bound to adversely impact the business and investment climate in the country.
- (ii) Vodafone in January 2014 served the Indian government its notice of intent under the India-Netherlands BIT seeking international arbitration vis-à-vis the right of the Indian government to issue a tax demand on it by retrospectively amending Section 2 (47) of the Income-Tax Act, 1961 to nullify the January 2012 ruling of the Supreme Court which had relieved Vodafone from tax liability.
- (iii) The landmark 2G spectrum case wherein the Supreme Court cancelled the allocation of 122 spectrum licenses including the 21 licenses of Khaitan Holdings Mauritius Limited (KHML) promoted company, Loop telecom, prompted KHML to drag the Indian Government to arbitration under the India-Mauritius BIT,

seeking the return of \$140 million invested by it in Loop telecom along with interest and loss of shareholder revenue estimated in excess of \$ 1 billion with further costs. Russian conglomerate Sistema and Norwegian telecom company Telenor aggrieved by the 2G ruling, had earlier served notices under the respective BITs for international arbitration to the Indian government, but had not followed up after buying back the spectrum through government held auctions.

- (iv) Deutsche Telecom (DT) has filed notice of arbitration against India under the Germany-India BIT whereas three separate Mauritius investors have filed claims under the India-Mauritius BIT, being aggrieved from the cancellation of its contract with the marketing arm of Indian space agency; Antrix Corporation Limited for leasing capacity on satellite based electromagnetic spectrum for providing multimedia services to Indian consumers.

## The Long Road ahead

Post the White Industries award, the Indian government in 2012 constituted a ministerial group to have a relook at its model BIT and further put all ongoing BIT negotiations on hold. One of the key and understandably destructive proposals to overhaul the prevalent BIT structure was to exclude the arbitration clauses from the BITs. However in March 2013, fearing an international backlash that would deter potential investors from investing in India, the government in light of the prevailing economic conditions decided to defer the said relook of the model BIT at least for a year.

With several proposed BITs in the pipeline with influential nations such as United States etc., the Indian government needs to strike the right balance in safeguarding its interests by entering into such

BITs while reassuring the foreign investors that they have adequate safeguards and protection under the said BITs. With the aforementioned claims against it, Indian government will ideally prefer a comprehensive review of its existing treaties and model BIT structure to safeguard its regulatory space and judicial decisions which

are taken in accordance with law. However, exclusion of the arbitration clauses from the BITs is certainly not the best way forward as the same would preclude foreign investors to envision India as an investor friendly state.



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