What Happened To Investment Arbitration In India?

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On 20 February 2021, the King's Forum on IDR and Triumvir Law organised a virtual fireside chat with Mr. Salman Khurshid (former Indian Minister of Foreign Affairs) and Dr. Aniruddha Rajput (India's Member of the International Law Commission). The fireside chat was part of the webinar series on 'Investment Arbitration in India'. During the conversation, Prof. Dr. Holger Hestermeyer navigated the panellists through a series of current issues that have arisen in the Indian investment arbitration landscape. We take this webinar series as an occasion to provide the readers of the Kluwer Arbitration Blog with an overview of the past, the present, and the potential future of investment arbitration in India.

Generally, India is a big player in foreign direct investment. It is among the top 10 investment importing countries and among the top 20 of investment exporting countries. To date, the country has been involved in 25 investment arbitrations as a respondent State (11 of which are still pending). Three decisions, of which two were rendered recently, stand out: *White Industries v. India, Vodafone v. India (I)* and *Cairn v. India*. Whereas the former dispute predominantly dealt with issues arising out of India's allegedly slow judiciary, the latter two arose out of disputed measures as to retrospective taxation.

The past

The first bilateral investment treaty (BIT) India signed was the India-UK BIT in 1994. Yet, India never became a signatory State to the ICSID Convention. Whereas it seems like the predominant reason for this decision was the little exposure of India to investment disputes, in 2000, the Indian Council for Arbitration recommended that India should refrain from becoming a signatory to ICSID. As discussed in this blog, two of the major reasons were the perception of ICSID being pro-developed countries and the lack of option for domestic courts to review investment awards. The author of the blog also argues that the time has come for India to join the ICSID Convention. This, however, remains highly unlikely.

Whereas the first investment disputes arising out of the Dabhol Power Plant project (Maharashtra) were brought against India in 2004, they were ultimately settled (see *Bechtel v. India*, *Standard Chartered Bank v. India*, *Offshore Power v. India*, *Erste Bank v. India*, *Credit Suisse v. India*, *Credit Lyonnais v. India*, *BNP Paribas v. India*, *ANZEF v. India*, *ABN Amro v. India*). It appears that the *White Industries* award (2011) constitutes the starting point of the government to feel the need for action. The dispute arose of allegations against the efficiency of India's judiciary. The arbitral tribunal found India in breach of the obligation to provide for an effective means to assert claims and ordered India to pay USD 4 million in damages to White Industries.

In the following years, the cancellation of telecom licences led to several claims under various BITs. In 2014, the government was replaced, and the new government decided to address the investment arbitration regime. The first step was to work on a model BIT, which was published in late 2015 (discussed here). Notwithstanding the relative backlash, the model BIT still allows for recourse to investment arbitration. However, in 2017, the government took its most drastic step to reduce India's perceived vulnerability by terminating most of India's existing BITs (58 out of 84).

At the same time, the government abolished an FDI approval process with the Foreign Investment Promotion Board (which has been met with both approval and disapproval) and is now allowing the relevant ministries to approve foreign direct investment in India if necessary.

The present

In September 2018, India signed a new BIT with Belarus and nine months later, in June 2019, another BIT with Kyrgyzstan. Both BITs provide for the possibility of investors having recourse to investment arbitration. The most noteworthy development happened a year later, namely, on 25 January 2020 when India signed a new BIT with Brazil. In the words of this blogpost, the new BIT 'is noteworthy for its departure from the widely used investor-state arbitration mechanism in favour of state-state arbitration'. The dispute resolution mechanism included in the BIT, therefore, resembles two mechanism included in the very early days of investor-State dispute resolution; that is, claims commissions combined with diplomatic protection. An earlier piece on this blog discusses the BIT more in depth. Another piece analyses the BIT from the Indian and Brazilian Model BIT perspective.

With regards to present challenges in the Indian investment arbitration landscape, the enforcement issue should not go unexplained. Naturally, the ICSID enforcement regime of Article 53(1) ICSID Convention is not applicable in India. Recently, the Delhi High Court held in two cases (*Union of India v Vodafone Group PLC United Kingdom & Anor (2017*) and *Union of India v Khaitan Holdings (Mauritius) Ltd & Ors (2019*)) that whereas India has signed the New York Convention, it issued a 'commercial reservation'. The High Court stated that investment arbitrations are not commercial in nature and, therefore, cannot be enforced using the New York Convention. The same rationale applies as to whether the Indian Arbitration Act (the Act) is applicable: as an investment arbitration constitutes neither an international commercial arbitration nor a domestic arbitration, the enforcement regime of the Act is inapplicable. This constitutes a major deficiency and a shortfall that must be addressed. On the other hand, this could also be seen as a tactic to discourage foreign investors from bringing treaty claims against India and/or to induce them to settle their disputes with the State (see for example, the Nissan dispute) instead of having to commence a fierce battle for enforcement of a potential award in their favour. This may be a result of India's experience as a respondent state, culminating in a protectionist and State-centric orientation.

Consequently, the historical development of India's investment arbitration policy can be roughly divided into five periods:

- First, India showed **scepticism** (e.g., by not ratifying the ICSID Convention). The regime was of no particular importance to the

administration.

- Second, India showed **openness** (e.g., by concluding BITs).
- Third, as of 2010, India **participated** in ISDS as it increasingly became a respondent State in investment arbitration disputes. This prompted a rethinking of India's approach to investment arbitration by the new government.
- Fourth, in 2015, India entered into a **protectionist** phase (e.g., many BITs were terminated).
- Finally, India is now in a **State-centric** phase of uncertainty and backlash. At least the uncertainty might soon end, once the administration positions itself in the UNCITRAL WGIII debate.

The future

It is not decided what the future holds for investment arbitration in India. On the one hand, one could see the current status as opposition to the investment arbitration regime as a whole. The Indian government does not appear to move towards ratifying the ICSID Convention. Moreover, its BIT with Brazil excludes investment arbitration in total. Additionally, investment awards cannot be enforced in India, currently. The government even explores the possibility of creating specialist-courts that hear potential investor claims. One may conclude that India's experiences as a respondent State in investment arbitration has pushed the State into a rather protectionist and State-centric state of mind.

On the other hand, its 2016 Model BIT as well as the BITs with Belarus and Kyrgyzstan do provide for the possibility of investors having recourse to an investment arbitration tribunal. Of course, the decision is not part of a two-sided coin (investment arbitration yes or no). The on-going UNCITRAL WGIII discussions on a systemic reform of the investment arbitration system include further options: adding an appellate mechanism to the current system or establishing a standing body called multilateral investment court. India's current position is not set in concrete. The government wishes to contribute to all workstreams and to stay involved in the process – a decision will be reached at a later stage depending on the scope of the available options.

While India may have its subjective reasons for opposing international investment

law, on the one hand, and investment arbitration, on the other, one should not forget the benefits of both regimes. Since the 90’s, India has emerged as a local superpower. India continuously seeks to attract and promote foreign direct investment (FDI) and Indian investors are nowadays highly active on a global scale. In order to attract FDI, India must also protect the investment and investor when actually in the country. Incidentally, the active Indian investor will be protected on an equal footing in the host State. Perhaps, and hopefully, India will eventually re-enter the period of **openness** while being a more pro-active actor in shaping the investment arbitration regime. India now has the experiences necessary to lead itself and other countries away from a **State-centric** and **protectionist** era and into one that further strengthens the enforcement of a global rule of law.