Under the aegis of

Technology Partner

India Arbitration Week 2022

Session: Managing disputes with States and State parties common challenges, lessons learnt and practical solutions

Event Date / Time : 12th October 2022 / 12PM
Event Duration : 1 hr

SPEAKERS NAMES:

1. **Harish Salve KC** : Blackstone Chambers
2. **Matthew Hodgson** : Partner, Allen & Overy
3. **Sheila Ahuja** : Partner, Allen & Overy
4. **Vinod Kumar** : Partner, JSA

Yuet Min Foo

Very warm welcome to everyone and thank you for joining us for our second session for the day, sponsored by Allen & Overy, my name is Yuet Min, and I practice at Drew & Napier in Singapore, am also a committee member of the young MCIA. Today's topic, very interesting topic about managing disputes with states and state parties on the common challenges, lessons learned and practical solutions. And that's what our speakers for today. A very distinguished panel of speakers for today will be sharing with us. I will just take a few minutes to just introduce our speakers for today. First, we have Mr. Harish Salve KC, who actually needs not much of introduction, was formally the Secretary General of India and is a Senior Advocate at the Indian Bar, practicing largely in the Supreme Court of India.

His practice encompasses a wide range of matters, including Public international law, Human Rights, Civil fraud and Tax. Mister is admitted to the bar in England and Wales and was appointed King's Council in 2020. Next up, we have Mr. Matthew Hodgson who is based in Hong Kong. Matthew specializes in international arbitration. He has acted as counsel and advocate in more than a dozen investment treaty disputes worldwide under the ICSID and UNCITRAL rules as well as acted as counsel in ICSID annulment proceedings. Matthew has also been appointed as arbitrator in a variety of matters, including HKIC, ICC as well as SIAC matters. We have also with us today, Ms. Sheila Ahuja. She's my fellow young MCIA committee member and also co-chair of the committee.

Sheila is also co-head of A&Os India group and her experience spans across most of Asia in a wide variety of jurisdictions. She has a rise of audience before the senior courts of England and Wales and the courts of Hong Kong. She's also enrolled in the Bar Council of New Delhi and is also qualified to appear before the Singapore International Commercial Court. Last but not least, we have Mr. Vinod Kumar, partner of JSA. He has extensive experience in handling General of Civil and Commercial litigation matters, arbitration matters as well as matters involving public law remedies, Vinod represents clients in arbitration disputes arising out of a diverse range of contracts, including franchise agreements, infrastructure projects related to ports and road construction, gas supply, contracts, power purchase agreements, as well as EPC contract.

As you can see, we have a range of expertise with us today, being with us on the topic of investment arbitration state and dealing with state parties. I will not take up more of your time, and I will leave it to the speakers to give you their thoughts and insights on the matter. But I should also mention that the videos and the transcripts of these sessions will be available on the India ADR Week website, www.adrweek.in, without further ado, enjoy the session for today. And I'll hand it over to the speakers.

Sheila Ahuja

Thank you very much, Yuet Min for that introduction. I'll take over as moderating the session. I've got the fun job of coming up with questions for the topic, which I'll introduce in a moment and not having to actually answer any of them, but to call on this very esteemed panel to give us their different insights from their very different perspectives of their practices. So again, I'm not going to reintroduce, everyone's just going to dive straight into the topic, which is managing disputes with states and state parties. And what we'll focus on.

And I think step by step is common challenges, lessons learned and practical solutions. And what I'm going to do is we've just done a little bit of thinking of everyone's different backgrounds, I'm just going to direct questions to each of you on the panel and ask you for your views on your perspectives, feel free to either answer my question, or just share what you feel of the different subsets of the topics. So, I think first starting with just setting the stage a little bit current challenges and trends.

So, Mr. Salve, if I may, and you should be used to me putting questions to you just on the spot by now, with disputes involving states, right, it doesn't just involve legal idiosyncrasies, but also has political turbulence, economic instability, and public opinion, right. It's a lot more of a vexed sort of platform than what you might call the straightforward commercial disputes. In your vast experience, which if we went through, I think we'd well past the hour that's been allocated to us. Can you just tell us what is your perspective on the unique challenges that you faced in disputes both for and against states?

Harish Salve KC

Thank you, Sheila, for your kind words, and also, I'm used to you putting me on the spot with questions. So that's alright. It's, if I may take a step back investment treaties are meant to protect investors from idiosyncrasies and when we say idiosyncrasy, legally idiosyncrasies are the least of them. Investments are governed by domestic law and investment treaties allow massive elbowroom for domestic policy changes. Invariably, and of course, there are market exceptions. Governments behave in a manner incompatible with investors rights broadly into situations one if there is a political upheaval.

And it may be caused by political circumstances, it may be driven by economic circumstances like those cases where we had massive devaluations certain currencies, or it's driven by corruption. And we have seen so many of them. The big allegations in the Yukos case or model on corruption, so many other countries you've seen allegations, border, and corruption. So, and it could be an economic change based on a political whim. And I've seen that the, the entire airport privatization was purportedly thrown overboard in the new government, of course, later on, carry on with the same.

The disastrous treatment of investors in telecom at the 2g phase where for a rather slim reason, the Supreme Court set aside all the licenses and unilaterally imposed punishments, which are not based in any legislation. And, if somebody had challenged it in a BIT, I'm sure they would have had an excellent case. So, these are the two broad drivers of the kind of abhorrent behavior, which BIT's are meant to protect against I have, again, leaving aside what we call the outliers are very rarely seen in a war, which has sat in judgement on the political wisdom of government, if the panel is convinced that what has happened is within the bounds of reason, and within the bounds of governance.

Sheila Ahuja

Thanks, Mr. Salve. Actually, that's, it's an interesting perspective that often is difficult to sort of ring fence, just the legal issues from what is inevitably sort of a more convoluted and often actually, the

dominant factor is not the legal one, I think, as you rightly said, Matthew, you of course, we have the benefit of Matthew in the form of an A&O in house investment treaty specialist. What challenges do you think arise from managing disputes with states with experience of handling international disputes with those states that don't have a similar experience?

Matthew Hodgson

Thanks very much, Sheila. I mean it's quite interesting. So, reflecting on my experience with the firm actually, I remember when I first became involved on the state side of a dispute. It was 16 years ago, and back then, very few states had seen multiple claims right or beyond Argentina around the NAFTA countries, which was really where investment treaty claims got started in earnest and in the 90s. But most states have seen at most one or two claims, and many had seen none at all. Things have changed a lot, of course, in the intervening 15 years, and you now have a lot of states who have got significant experience of defending themselves in investment treaty disputes, and India is a good example of that.

And they will tend to build up and experienced in house legal team, soft and centralized within the Attorney General's office or Ministry of Justice, who will take the lead on all matters all claims against the state. And sometimes they're involved quite actively in preparing the defence. Indeed, some states handle that entirely in house, but others will participate in fact, finding, et cetera. So, they become quite sophisticated in terms of their processes when a claim is first notified to put out a tender in due time. They're familiar with the arbitrators in the fields, submission, procedures, disclosure, etc. But of course, that's not true of all states. So, for instance, right now, I'm currently acting for one state facing its first bilateral investment treaty claim.

So inevitably, there's something of a learning process for states who haven't faced these claims before. And in some instances, they don't centralize where they who deals with the claims, it may be dealt with by whichever is the most connected ministry to the facts of the case, which can be challenging, because then the state doesn't build up the institutional knowledge of how to deal with these claims. And it can be a practical disadvantage as well. Of course, if a state is slow getting off the mark, they can be in default, during the tribunal appointment process, I have previously acted for a state where we arrived, and they had a tribunal had been selected before we were instructed.

So that's obviously means you start on the backfoot. But ultimately, of course, once they do get external counsel involved, it's our job to guide them through that process, and to help them to manage their own internal stakeholders. So, they understand what's coming down the track as well, including things like disclosure, which can come as a surprise. But I think in practical terms, when you're on the other side from a state as an investor, who's less experienced, and it brings us to something we may touch on later, but it can I think, slow down settlement possibilities, because if the state is not got such experienced that maybe more reluctant to get into that dialogue. Certainly, it's an early stage.

Sheila Ahuja

Thanks, Matthew. And I thought was very interesting, the comparison between the procedural sophistication of certain states just by virtue of having done this over and over again, as compared to those who haven't. That said, when you look at states like Brazil and India, who as a result of lots of experience in investment treaty have actually changed their investment policies in the context of investment protection treaties. Going forward, do you think that, shrinks as a matter of substantive right, the investment protection for foreign investors via **[inaudible 00:13:23]** states like that?

Matthew Hodgson

Yeah, it's a good point. And to that list, you can add, of course, the infra-EU example, where now BITs within the EU, are not considered valid as a matter of EU law, albeit with for a different motivation that in that case, to level the playing field, as it were. But for sure, there has been a push back against investment treaties. And clearly to that degree, it does reduce the available protections, although there is some respite for investors, because of course, when there's a unilateral termination, you'd typically have a sunset clause of 10 to 15 years for existing investment.

But to keep this in perspective, it's quite interesting to note and I looked at the figures before this session, there have actually been 147 new BITs and MITs concluded in the past 5 years alone. So clearly there is no sort of consensus shift away from investment treaties. I think the more mainstream

pushback is actually involves including more what some people call more balanced treaties, which are slightly less helpful from the investor's perspective than the traditional BIT model BITs. You see that in a lot of the multilateral treaties, and indeed the BITs where they clarify the scope of protections.

They might for instance, say that fair electoral treatment means the customary minimum standard. They may have expressed carve outs for certain types of public policy-based decisions. So, I think that's really the recalibration that I think is more mainstream. And I think, what's interesting is that almost all states do at least have some investment treaties remaining, including India, of course. And so, what ultimately happens is that those investors who are best advised and are planning ahead can still get the protections they want, it just requires a bit more effort for them to do that by way of upfront structuring.

And one of the other interesting trends that I've noticed in the past few years is that, whereas historically, it was the oil and gas and mining companies who were very aware of investment treaty rights, and would structure their investments to gain protection, because they were historically some of the most easy targets for, for states looking to raise revenues, now seen many more clients, for instance, in the telecom space and technology space, doing the same because they feel similarly exposed to political interference. And that's an interesting, more recent shift.

Sheila Ahuja

Thanks, Matthew. And just, I guess, keeping to the topic, before we move on of current challenges and trends, and Vinod, I guess focusing on your India focused practice.

Vinod Kumar

Sheila sorry to interrupt. I don't know whether you know what happened in India about the new model treaty. This was on the heels of Vodafone, where there was still a lot of gung-ho about how they're an international tribunal question parliament. Some people who raise the question didn't realise that international treaties are above municipal law. But then knowledge of law is not particularly a strength

of those who are in government. So, they suggested treaties, which are running artists suggested a slew of treaties, including to the United Kingdom, they proposed at, and they just dropped the arbitration clause, and they had a committee set up and one of the people on the committee said informally, they want your advice.

What can be done, and I told them, I said, a treaty without an arbitration clause is nothing more than a solemn promise, you might as well not have the treaty, because it's meaningless. If by domestic law, you change the rules of the game, and you don't have a treaty, you have zero protection unless you have an international arbitration. So, I believe none of the countries to whom the new treaty model my arbitration was proposed by India have agreed to sign.

Sheila Ahuja

Yeah.

Matthew Hodgson

Sorry to jump in them in. And one of the things that I often think is forgotten in the debate about the future of investment treaties is that the two most important standards of substantive protection, fair and equitable treatment, or something very similar, the customary minimum standard of treatment, and non-expropriation without proper compensation. Those are principles of customary international law, which in theory apply across the board anyway, what is not in existence across the board is a system of enforcement for those rights. So as a lawyer, it's a difficult idea to accept that you have supposedly substantive rights of international law, but no means to enforce them.

And I take Mr. Salve's point that the idea of having an investment treaty that specifically seeks to, to underlying some of those rights and potentially add others, but then offers no enforcement seems to be quite an unattractive proposition. And I expect that's why it didn't find acceptance.

Sheila Ahuja

And given just a follow on from that and to anyone to Mr. Salve or anyone given India's I guess increasing position of being one of projected to view the four largest economies by 2050 What do you think India will do? Do you think it has to pivot back in terms of rebalancing the benefits and the avenues that it gives its investors to align itself with where the rest of the world or large part of the rest of the world is?

Harish Salve KC

My feeling is that this is not your approval as they say watch the space. The reason is, there is a tension between two points of view one is a sense of perhaps, maybe to a small extent, even misplaced enthusiasm, that in the next coming decades, India seems to be the country investors would like to bet on. Seeing potential growth, increase in infrastructure, et cetra. And India opening up more and I have done some very good things on other parts. The other is having finally come to terms with Vodafone. The saga Vodafone has finally come to an end with parliament accepting the international award and reversing the prospective effect given to the legislation.

Is there an acceptance that after all investment treaty arbitration is not that bad to that there is an ongoing dispute with, which continues. And that is a very strange judgement of the Supreme Court of India, which now is playing out in the Singapore court in the environment of the BIT challenges, it's also I believe, being subject of the next BIT arbitration as a person by the investors and entering, so, that again, there is a feeling that this gets into areas where the government would like more elbow room. So, there is this tension in India. So, I think the only thing you can say for India is watch the space.

Sheila Ahuja

And actually just hanging on to that point about the tension in India and judgments coming out of India, and particularly in the, settlement that happened when the Vodafone judgement was award was trying to be enforced around the world, actually, Vinod I wanted to come to you on your

experience of what you think the risks are that parties face on the ground here, when there are enforcement issues or the enforcement proceedings on foot. We have judgments and awards that involve states either way, for or against a state entity.

Vinod Kumar

Thanks Sheila. So, you know, a common remark which you will hear from any litigate, litigator in India is that the real difficulty of the litigant starts after the judgement is passed, or the award is passed by the tribunal. Because I mean, and that statement, I'm sure it applies equally to other jurisdictions as well, because enforcement is a challenge. And it's kind of a universal problem. And now, we have while you're talking about situations, where state is the counterparty, but even if it is not you look at the whole, the way in which enforcement works, whether it is of foreign judgments, or of International Commercial Arbitration awards, foreign awards, talking from an India perspective, while we are signatory to the New York Convention, and you can have it enforced, but if it is a BIT, then you have your own challenges.

And to add to the confusion, we have had conflicting judgments of the High Courts, one high court saying that a BIT award can be enforced in terms of the New York Convention, that is part two of the Act, and the Delhi High Court saying that into judgement saying that you cannot do it, because, they have their own reasons, saying that it is traceable to Public international law, and actually, it's not a commercial contract. So, and if you look at the whole aspect of enforcement of International Commercial Arbitration awards.

I mean, the whole process of seeking and enforcement under Part 2, and although it is identical to the New York Convention, Article 3 and 5, what it basically does is you have to re argue it's a retrial basically, of course we have seen instances where the state is if it is on the other side, you've had strange arguments regarding state immunity, which is essentially a public activity, defense, but being dragged into commercial disputes and those things happen and therefore, from a non-state entity point of view, when it comes to arbitration.

And when you're against a state entity, you are against an entity which obviously has the resources it can, continue to agitate the issue in the domestic forum till the highest court, possibly the

enforcement action I'm saying. Therefore, the time and cost is a huge challenge again talking about India, if you look at the time and this is relevant because almost if you look at the data almost 50% of the cases in India, which are there in courts the government is a party to what does it show, it clearly shows a tendency to litigate on the side of the government. Therefore, there is a huge challenge especially concerning BITs because of the conflicting judgments.

Sheila Ahuja

Thanks, and I guess, on the one hand, one would say that jurisprudence here in India develops quicker than anywhere else just because of that, because there's no stone left unturned and India has just seen so much more activity in the courts on these issues, then other places. I want to move on to a pivot to a sort of related topic, which is Mr. Salve's word, while we're waiting and seeing, what India does. And drawing on the experience, Matthew, that you shared of some other states, I guess to Mr. Salve, first, what lessons are we learning?

So, in the context of forum choices, right, and just looking at the way things are now, what are perceived advantages and disadvantages that really matter in pursuing disputes that are state related, when you compare it to international tribunals, arbitral tribunals and the national courts? And of course, you Mr. Salve have been at the helm of all the sort of big cases that are subject of a lot of discussion. Well, what do you take away from that? And what can you tell us are the pros and cons of one versus the other?

Harish Salve KC

See, the real problem about selecting remedies. I'm sorry, I have to hark back to the previous question. Enforceability, a foreign investor who is starting any legal proceeding, is looking at something which would not be a piece of paper in his hand at the end of a long and expensive process. Let me give you two examples. The problem of enforcing in Public international law that is on a slightly different subject, the cases which we use successfully against Pakistan, the Arena and the other cases, where the ICJ said that you must have review and reconsideration of a judgement of final conviction by a state court in the US. The follow up is very important went to the state court.

And the state court said there is no provision in the law by which we can review and reconsider. And the order of the International Court of Justice is in Public international law, it doesn't help us, with that America, then was in breach of its international obligations. So, the president of America issued an order because international policy in the federal system is with the president of the US, issued a presidential directive to the court to review and reconsider their judgement in the light of the ICJ judgement. That was challenged in the US Supreme Court and the US Supreme Court said, executive interference in judicial functions is not allowed.

And this crossed the federal state barrier and struck it down. Now, if at that level, a judgement cannot be enforced. This is the tension between judgments, which is ultimately where the international court finds fault, or the international tribunal finds fault with legislation. Let's take Vodafone, Vodafone is easy because the tax will not be paid. So, if Vodafone, walked away with nonpayment of tax, it was fine. Take the reverse case, Kane, where the tax was paid. The government of India had dug its heels in, it's alright for international enforcement the problems of enforcing against state properties, you have all sorts of claims of immunity. I was appearing in a case, which of course got put on hold because the award was set aside for the Yukos enforcement in India.

And the first defence was the government of India stepped in and said sorry, we will not allow you to enforce this against Russia. So, the problem against enforcement is real life Kane energy had come to India and said we have this award. The Tax Department said sorry, but we are acting under Indian legislation. And they would have said but we are acting under an award. And municipal corporate has said I cannot act in the public international I can only act in the private international, private rule. And that's municipal and therefore I have to uphold the demand anyway. Now until these issues are resolved, and a mechanism for enforcement is created and I see a massive problem. Theoretically, suppose the Antrix round to BIT goes up.

And an international tribunal says the way in which the creditor has been allowed to wind up the company which has an award or the downstream company on the basis of which the award has been made doesn't measure up to the FET. What happens? You have a Supreme Court judgement which of course, is winding up and you have an international tribunal saying this doesn't measure up what happens. And there's, I can't think of any answers in which if they are again wanted to monitor, I means it’s alright, you want to go and attach a property of the government of India in the

United States, or somewhere else, increasingly, India's public sector, they're not doing international business.

Most public sector companies today have become listed entities, so their assets would not be available for enforcement. This is a major area in which if I was on the other side, negotiating an investment treaty with India, I will not only ask for an arbitration tools, but I would ask for domestic project, protection by way of legislation, which awards can be enforced. And I think the international community has to come together. And it's very unsatisfactory, I appeared for Vodafone in India, in a suit filed against the second arbitration, which Vodafone didn't go because Vodafone first went under the under the Netherland treaties, there was a jurisdictional objection taken.

We were a little unsure about the words of the other British that the upstream British entity, started one under the UK India treaty, we did not have this little call out to the Netherlands treaties, and the government of India argued, abuse, the tribunal said, we don't find any ability to challenge it by way of suit in India. And the suit was dismissed by the judge. But he held that he would not go into abuse, etc., he upheld jurisdiction. And that's an interesting judgement. Now, if and what he did not squarely address, although I erased it, and which brings the huge issue. If it is viewed on a Public international law, the Republic of India includes the judiciary. So, it's like a defendant saying, I restrain you from carrying on proceedings against me.

Now, these are all the conceptual cobwebs of the interplay between public international law and private law and municipal law. And unless these are resolved, there is a very major problem in enforcing and I don't think any investors is really happy with the idea that I can go and search globally for some assets somewhere, especially for big countries like India, because people don't want today different from the other countries, big country like India, with whom today everybody wants good relations. The only encourage picking up an Indian asset and the British government become an opposite and say sorry, I will not allow you to enforce against India, this is the major problem which has to be resolved.

Sheila Ahuja

That's, really well, I think, sort of contextualized, isn't it. And I want to just pick up on the point you made about the investors perspective and how the last thing that they'd want is for their lawyers to be running around the world trying to give some meaning to what you rightly described as that paper decision for the time being, of course, in the meantime, what an investor would want to think about and always have on the table, actually, whether it's a commercial or treaty dispute is settlement, and how do I get cut my losses, and especially if you have a favourable award, or even in the process of trying to get one if it's clear that the investor has a strong cause of action.

Are there ways to avoid this entire remit of complex issues by trying to settle with the state? And Matthew, I just want to ask you for your experience around settlement discussions with states. Is there a particular point in time at which this is more suitable? A lot of people sort of say the best time to do it is to settle on the award. So, you go through the entire proceeding and get the award and that's your best bet in terms of leverage with the state. But even then do we ever see a situation where the state's willing to come to the table? Matthew?

Matthew Hodgson

Well, settling with the state is never easy, of course, because officials are reluctant to put their name to a settlement which may later be criticised, either because it was overly generous or worst case, there can be allegations of impropriety. So given the average investment treaty take case takes over four years, it's often very tempting to put off the decision and the hope that it might be someone else's problem. And in a worst-case scenario, you can always blame the international tribunal so it's difficult to settle with states there's no two ways about it. I think it's always easiest if an investor can create an acceptable structure that doesn't involve payment by the state. So, they don't have to write a check, particularly if they're doing ongoing business in the territory.

So, for instance, in one case I handled for an investor, it was resolved by the state extending, a telecoms licence. In another, they corrected a property titled register in favor of our client, but they didn't have to sign a check. And politically that was important. Now, that said, I think it sort of goes back to the earlier discussion we had as well about states becoming more sophisticated in the

process. I have seen in recent years state settling some disputes, which perhaps 10 years ago, they wouldn't have done a couple of examples of them. And one, of course, seeing there in the public domain Mr. KC and I did for **[inaudible 00:35:55]** and against India, where it's in the public domain, that it was settled after a jurisdictional hearing, following substantial payments.

That but settlements never going to be quick, I've not seen any of these cases settle at a very early stage. Typically, it's been a year or two in. And I think, partly, that's because states won't settle until they feel they've been properly advised on the merits of the dispute, and the likely quantum for understandable reasons. They want to know what the risks are. And typically, they only feel they know that once the Statement of Claim and accompanying evidence has been filed, which is some way into the process. It doesn't mean of course, that an investor can't make clear at an earlier stage that they're open to discussion and tried to build the right contacts to make that happen. And to avoid unnecessarily aggressive action in the arbitration, which can make settlement more difficult.

And they need to use commercial, diplomatic as well as legal leverage to do that. I've even seen investors use PR firms to try counter the negative press that they've had locally, which might make a settlement more difficult, effectively trying to create the puddle of political space for a settlement to be done. One interesting example, I had which settled last year was claimed against a Southeast Asian state, and SOE, it related to a failed oil and gas project. And there we actually had parallel commercial and treaty, a treaty claims going. And in the end, it settled for a payment of $ 800 million by the state, which is one of the largest known payments by a state in, in relation to the settlement agreements.

But it came after two and a half years of negotiations. And the legal process was one part of that. But only one part, there was a strong commercial push on the ground, there were good relationships on the ground. The legal process was used in conjunction with that, and we would escalate when we felt the government were delaying, which, of course, governments will have a tendency to delay in this process, even if they, if they think they're ultimately liable, we would use an escalation, whether it's filing a trigger letter, starting claims, or sort of pushing the legal process along to kind of make sure they realise that we weren't going to just negotiate indefinitely. So that was another success story.

And I think it's, I do think there's more room for it in recent years, then perhaps historically was the case. But you're right Sheila, came back to the enforcement point. I've also seen several treaty cases settle after the award where effectively the investor takes a haircut to avoid the hassle of enforcement, the investor has a couple of options at that point, they can try sell the award, there are third parties who will buy award, but for a very significant haircut, in my experience, often sort of 80% plus to buy the award. Or they try to enforce if you have an ICSID dispute, you do have an extra option which can be effective, which is using the leverage of the World Bank to create pressure.

So, in a couple of cases where we've had states not pay, we have written to the Secretary General of ICSCID, copying the president of the World Bank noting the default. And often that has been enough to procure settlement. In fact, in one case, simply threatening to send that letter to the World Bank was enough to bring about the settlement because developing states typically don't want to get on the wrong side of the World Bank. But of course, that's only if you've already ICSID state and of course, India is not one of those.

Sheila Ahuja

Thanks, Matthew, what was interesting your description about the different functions and sometimes the legal function is pursuing the claim while the commercial function is trying to settle the matter. And it all happens simultaneously. I guess one possibility, I don't know whether it's hypothetical or real. But one possibility of merging this is a mediation type situation where even the lawyers have to come into the room with the commercial guys to be told by somebody, get rid of this. And Vinod, I get to you. Do you think that options like this, alternatives to writing out the full process, like mediation have any utility, where disputes with states are concerned?

Vinod Kumar

So, I totally agree with Matthew when he says that, you know, settling with the state is extremely difficult. But I firmly believe that mediation has utility, in fact, tremendous utility. I mean, I don't think there'll be two words, if you were to ask anybody on how has, has arbitration as it is, has it been successful? The whole enforcement process takes time, therefore, I'm sure invariably, you will get an answer that no, so you need to have alternates. I have some data there was a survey conducted

by the Singapore International Dispute Resolution Academy sometime just before the pandemic in 2019. And the question was, are you satisfied with the outcome of enforcing arbitration awards in investment treaty arbitrations? 27% said no, a similar survey was done in London, by the Queen Mary College.

And the question was in investment treaty arbitration disputes, would you, want introduction of mandatory mediation? 64% said yes. Now I'm sure, if you conduct a survey, similar survey in India, I'm sure you're going to get a similar response, if not a better one. If you look at it from the other side, that is from the state side. Now, this is from a report by the Standing Committee on external affairs regarding India and bilateral investment treaty and this report is of September 2021, where a specific recommendation has been made that in investment disputes, there has to be pre arbitration, conciliation or negotiation, to arrive at a settlement.

Now, we have seen the tendency of the courts, the Supreme Court has been pro mediation, including the recent judgement where in under the commercial courts act, they have said that it's mandatory pre institution mediation, even the earlier judgments, therefore, if you look at the whole thing, all the stakeholders, whether it is the parties who are contesting or whether it's the court, they want mediation. Now, I totally agree with Matthew that yes, mediation may not work, you may have wasted your time. But then what we need to do is we need to have time bound mediations, even if one case is resolved by mediation, I would think that's a huge success.

Because it's any day better than, being like Mr. Salve said, getting a paper in your hand, and trying to figure out how to enforce it going to which jurisdiction. So, when you compare it with that, why not have a mediation, and if it works, it works. If it doesn't, then you go for your regular course of action, which is arbitration.

Harish Salve KC

Can I be the bad boy here? And say, anybody who thinks that in a really controversial decision, the government is going to agree to a mediation in a sensible way, is not aware of ground realities. Let's be very clear, commercial arbitration entirely to private people, no question about it, all investment treaties. All investment treaties have compulsory pre arbitration mediation. So that's a given, in some

cases, that there is a genuine difference, it might get resolved at that stage. In the kind of cases which we have seen, especially with countries like India. The reason why they end up in a deadlock, which then results in a bilateral investment treaty arbitration is nobody on the government side is willing to do the right thing.

Now, you will not be willing to do the right thing for reasons of public opinion and the mass hysteria created over a particular project or a particular person. And the other layer in countries like India is rich civil servants would like to sign off on a controversial decision. I have seen some very bad settlements in India. On the one hand, the double thing was settled. And you know the controversy, which started three years ago. And that controversy was called from. On the other hand, we still have in the Supreme Court of India, a petition by the Government of India to reopen the Bhopal settlement.

So, if somebody asked me in India, should I settle with the Government of India, I tell him, I wish you best of luck. In an ongoing case, I don't want to name them. It's a commercial arbitration between the government and the Director General of hydrocarbon for a simple two-page application arriving at consent terms, for an interim order pending an ongoing arbitration, the submissions in which are concluded, and the final award has been reserved. It had been going backward and forward for the last four months. And I don't see anything happening and I have 100-pound wager the CEO of the company, saying the day you sign this, I'll give you 100 pounds.

So, in countries like this, wherever there is a controversy, especially involving the kinds of figures which we see in BIT arbitrations, I don't see any civil servants signing off. Yes, in a different country in a different system many times, and this is the only thing I have seen. And I've seen this in one case in India, where the government for wrong reasons wanted to settle it. But they wanted to do it another cover of mediation. So, they got a mediator who rubber stamped a figure, which parties at for reasons, good, bad, indifferent, agreed to, and then signed off. Having said that and going back a little, I think investors should also understand that BIT arbitrations are pretty much asking for the moon at times.

I know of one case, which I was appearing at one stage. I know, in the pre arbitration stage, there was some offers made, which was spurned by the investor went to a hearing very eminent tribunal.

Because her, and I believe what I read in Jr. The tribunal has thrown out the investment claim and jurisdiction, I tell you, so even investors, but commercial investors are sensible, and they would accept any, any decent offer. Having said that, I'm still extremely, extremely skeptical on how much negotiations can achieve, where situations have got to the stage where they're the BIT arbitration, let's be clear about realities. And investors, especially in regulated regimes like India doesn't want to take on the Government of India.

Because you, there are 500 other ways in which they can need you. So, you want to be on the right side of everybody. And you don't want to be seen, especially a foreign investor doesn't want to be seen as the new East India Company, or they're promptly called in India. If it gets to BIT, you, obviously tried talking to everybody whom you scan, your embassies have got involved, they also try and help all that is all over. Nobody starts a BIT, unless you have your back to the wall. So, I don't know how far mediation, compulsory mediation, I mean, which is already there in the treaties, you have people talking to each other? Beyond that I don't think it's going to serve much purpose.

Vinod Kumar

Should I just respond to what Mr. Salve says, I totally agree with what he's saying that, it is impossible, you will, you can't expect a civil servant to be signing. But where I come from is, of course, be it is a different ballgame altogether the regular arbitration where you have a government on the other side you can have, but even in case of BIT arbitrators, you have a failed mediation, let's assume you have a mediation which has failed, you have an award. Now at that stage, if there is a settlement, which is being discussed, the history of the mediation will help you in accelerating the whole settlement. I mean, that could be one way of looking at it. So, I'm a strong believer that mediation is definitely worthwhile trying, given the challenges in the, in the usual course.

Sheila Ahuja

Thanks, there were a few interesting points there right. The first is, you there may be a process which you either voluntarily or mandatorily have to undergo but then when it comes to the accountability stage of actually signing on the dotted line what assurance can we give our clients for instance, that that is going to happen? And, or rather do we see the opposite that you can go through

this, but it's unlikely that somebody will sign this. What I thought was interesting also was Mr. Salve a comment about no one is willing to do the right thing. So even the concept of trying to get rid of this rather than public funds fighting it out, the considerations that one has to balance are often put to one side when things do get to that BIT level, you have a cooling off period which is meant to be catered to discussions like that.

But once the matter becomes public, then accountability should get even more heightened, right, one way or another. But I want to pick up on one thing that you said, Mr. Salve, and asked you to comment, which is that example you gave on an anonymous basis about a procedural, I guess a consent order on an issue where it's gone back and forth, and no one is signing it. That represents to me a wider issue, which you see a lot in state related disputes called guerrilla tactics, and often we can call them just tactics or procedural rights versus if you're on the other side of the line, guerrilla tactics.

And you often see things like that, that are designed to do nothing, but disrupt the dispute resolution process rather than to pursue one's own sort of procedure, legal rights. Depending on which side of the balance you're on. Putting a different hat as arbitrator if you are sitting on the decision making side of this, what can you do to kind of get rid of this stuff to make sure that the procedure do your best to ensure that the procedure can be as robust as, say commercial disputes are I'm not saying those without their problems, but at least that these tactics can be kind of subdued or brought under control? Is there anything that a tribunal in that capacity can do?

Harish Salve KC

My experience is, as we speak in 2022, and I would have said something very different four years ago, I think, a robust approach against the government is what is called for. Since the case settled, I can say this. I was sitting in a room appearing for a foreign investor against India and have an insult. Well, I won't name was appearing for India and asked for more time. And when asked for the tribunal, why he needs 12 weeks to respond where six weeks should be enough. He said that we appear from a very poor country. So, I felt like telling him which country you're talking about, not my motherland. That's not a very poor country. I don't know who your client is.

So, fortunately, the tribunal didn't agree they gave them six weeks, and everything got done in six weeks. So, tribunals have to be robust. Yes, there was a time. And this is a very sad story of what used to happen. I see it happening much less than now. In one of the ongoing arbitrations, which is still ongoing, it's of some vintage considering the notice of arbitration was given in 2012. We finally reached the final hearing in December 2022. The tribunal made an order for discovery, and which is something which we were discussing earlier, and production of documents. And the government's reply was, these are government files. We don't produce them.

The tribunals are talking nonsense, the commercial dispute, you're claiming that a particular contractor did not inform you contractor says, we have given you full information. When you produce your files, you'll know whether you had the information or didn't have the information. They said No, those are private files are private, no things we don't produce. Because that's their civil service mindset, my nothings are for me. The tribunal of course, directed production, they challenge it in the Delhi High Court, one of our finest commercial judges Shankar asked the attorney general who opened the case. And then Mr. Ganguly, he said, tell me under which provision of the Act are you appealing this? He pointed to the section, and he says where does this allow an appeal against not against production.

And he passed a five-page judgement dismissing it, they Carry an appealed to the Supreme Court. And for two years the case was pending in the Supreme Court during the arbitration state. Now, fortunately, we don't see things like that happening now. But, yes, there have been problems where sometimes the judges feel that it's an uneven battle because the government of India is not as well represented. You have a far more powerful commercial team on the other side, but those days have gone. I see today judges tell the government of India if you sign arbitration agreements, stick by them or don't sign arbitrations, don't behave in this ridiculous fashion. So yes, Things have changed.

And I think arbitrators should be robust. And should deal with the government as they, we do realize that the government is a bureaucratic machinery. So, if you need to file a reply in a commercial organization get it done in three weeks, this may require six weeks because there'll be tears in which approvals have to be granted. But having accommodated the government a little bit for that, I don't think any further quarters should be given.

Sheila Ahuja

Thank you. And I'm just mindful of the time and there's also a question from the audience that I wanted to put to this panel. But just following on from this topic, and Mr. Salve, your views. Matthew, I just wanted to ask you, from the perspective of if you've got commercial routes and treaty routes, we a state, what as a party, should you take into account as factors of which one to pursue whether in tandem sequentially or just pick one over the other? What should one think about in that situation?

Matthew Hodgson

Thanks, Sheila. It's a situation that arises really, quite often, in fact that you have a potential contract claim, particularly where there's an SOE on the other side. But you also have a potential treaty case as well, for instance, because the reason the SOE has breached the contract is it was directed to do so by the government. So, it's quite common, in fact, for there to be both options for the investor. And it's one of the most important strategic decisions that they make is which forum to pursue the claim. Typically, they choose one or the other, obviously, for cost reasons to avoid duplicating the process and to avoid allegations about potential abuse of process or attempted double recovery. The relevant factors, I mean, of course, one of the main ones is always the merits of the contract claim versus the merits of the treaty claim.

There may be some similarities, but of course, the causes of action are very much distinct, procedural issues, generally speaking treaty cases take longer. As I mentioned earlier, the **[inaudible 00:57:05]** case loss over four years. There are also the enforcement issues goes back to Mr. Salve point earlier, really you are post the most important factor is your starting backwards working out where am I most likely actually to get paid in the end rather than just being left with the piece of paper. And when it comes to enforcement particularly things, it is available that often pushes towards a treaty claim. And because it's got a robust enforcement mechanism under the treaty, the ICSID convention, as well as the soft power of the world banquet, which I mentioned.

That said, I mean, I think overall, and of course, each case is very much on its facts. But I would say other things being equal, most investors who've got both options available, would prefer a contractual dispute, on the basis that it tends to be more predictable. Because the treaty standards, of course, have notoriously been applied in slightly different ways by different tribunals. And it's also quicker, and perhaps even less expensive. Just to complete the point parents really you mentioned, in which case might you pursue both and very rarely, I have done this once myself is to pursue both commercial entry to claim in tandem, it could be because for instance, they cover slightly different losses that you made, there may be slightly broader losses, you could recover under a treaty claim that may be somewhat distinct, and particularly if there's a very large amount of at stake, and both claims have different strengths and weaknesses.

So, for instance, in one case I was involved in, we knew that in the commercial claim, or defense we might face somewhere in the proceedings was that the state-owned company was simply following a binding instruction from the minister, which is a matter of the governing law of the contract, which was local law, they have to follow. And on that basis, this amounted to force majeure. We wouldn't know if that was the defense until partway through the proceedings, and we didn't want to sit on our hands till then. So, what we did was start a treaty claim in parallel, albeit slightly behind the commercial claims, with a view to suspending the treaty claim if that defense wasn't wrong, and advancing it if the defense was wrong, because of course, the state couldn't rely on the minister's instruction as a force majeure event.

Sheila Ahuja

Interesting. And actually, I've got a question on your reference to the exhibit convention to come back to but just before I do that, and again, I am mindful, but Vinod, guess as briefly as you can. And you actually touched upon this in the mediation context, just more widely speaking, so not confined to mediation, but just from a more commercial risk management perspective. What would you say that parties should keep in mind when negotiating these commercial relationships with states to avoid the situation of the escalation of disputes. And then, all the complexities that we discussed.

Vinod Kumar

Now, like Mr. Salve was saying earlier, the most ideal thing for you to negotiate would be a domestic protection by way of legislation when but that doesn't really answer the question, because what we're looking for is how do you avoid escalation of disputes. Now, irrespective of what clause you're able to negotiate. I mean, there has to be a willing government. I mean, that's the most fundamental thing. And if the government is behavior doesn't change, and they are not committed to resolving the dispute, then your clauses are not really going to help.

But yeah, ideally if you have a government who's willing to look at it, I would probably the best thing one, one can probably look for is an evaluated mediation, you have an expert coming and assessing both the claims and trying to tell the parties the strengths and weaknesses of each of the parties, and then even probably proposing a term of settlement. So that I would think, should work.

Sheila Ahuja

And thank you, but other than just the final point, and I might ask Matthew and Mr. Salve to comment on this, given that you both mentioned it, in the context of India and otherwise, is the ICSID convention. It's actually a question from an attendee, is from the perspective of enforcement ways in which this could improve, going forward to, Vinod sort of pointers now, would it help? Do you think if India did become a party to the ICSID convention, from enforcement or even just more generally, actually, Matthews shall I ask you and then Mr. Salve to comment?

Matthew Hodgson

Sure, well, let me know ultimately, of course, it'd be a question of how the Indian courts have interpreted the, the enabling legislation for the ICSID convention, but in principle, I'm just answering it generally. As I have mentioned, already, the ICSID convention is more robust in terms of enforcement then, than the New York convention. The reason is that the only way to challenge an ICSID award is through the limited ICSID enrollment process. So that is on the grounds set out in

article 52 of the ICSID Convention, which are very limited. They don't include, for instance, public beach or public policy, unlike the New York Convention.

And as to jurisdiction, it's limited to where a tribunal has manifestly exceeded its powers. So, it's not a de novo review, which you will typically have in the courts when an enforcement challenge or a set aside challenge. It's got to be higher than that. As to the courts obligation under the ICSID convention under Article 54. The cook national courts are simply supposed to enforce the pecuniary award from an ICSID tribunal as if it's an award of their own court. So, no further review is supposed to take place. That doesn't mean that it's never happened in practice in various states, including, for instance, Argentina over the years, that will ultimately always be within the power of the domestic courts. But what the ICSID convention tells us is they shouldn't do that there should be no further review.

Sheila Ahuja

Thanks. Mr. Salve any thoughts to add to that?

Harish Salve KC

Well, from the investor's point of view, ICSID convention is bar of PG versus phrase conjuration. eminently to be wished, but I do not see India ever citing the ICSID convention. In 1991, when India needed foreign investment, India refused to sign the ICSID convention because the political overtones of the government of India accepting an arbitration of a Washington based body is simply unacceptable. I know the importance of the fact that I know what pressure, the government of India agreed to initiate proceedings in the other case in ICJ, because there is a strong view in India, that any bilateral issue should not be made multilateral. And joining ICSID is opening yourself up to multilateralism. Am I saying emerge from sign ICSID, no. What I'm saying is, I don't see that happening in India. And this much less than if it didn't happen 20 years ago. It's certainly not going to happen, now.

Vinod Kumar

So, Sheila, I just had one point on that, on that question. Now, even if India joints ICSID, I mean, we are back to enforcing it like Indian court decree in before the Indian courts. So then what happens in you know, when you're before the Indian courts. So going back to what Mr. Salve was saying what you need is legislation, a separate legislation dealing with enforcement of international awards and in treaty awards.

Sheila Ahuja

Right. So, if there's any prospect even though it would cut against the current trend, I guess of the model BIT, and the, you know that sort of direction of India, if it did sign up to ICSID, you need a framework to protect investors of the consequences of it. Thank you. That's really look, I'm sorry, we've overrun on the session. But hopefully everyone will agree with me that it was a very worthwhile, overrun. But thank you all very much for your input. I'm grateful to the panel for these insights, and in particular for your various different angles at which we came at these topics. I guess the only thing left for me to do besides thanking, of course, the MCIA as well is to wish everyone a good rest of the day and week. Bye.

Vinod Kumar

Bye.

Matthew Hodgson

Thank you.

Harish Salve KC

Thank you. Bye