TERES

INDIA ADR WEEKDAY 5: DELHI

SESSION 4

The evolution of foreign investment protection and ISDS: state-of-the-art in 2024

2:00 PM To 4:00 PM IST

Moderator:

Rohit Bhat, Lead, India Disputes, Freshfields Bruckhaus Deringer

Speakers:

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HOST: Can I request everyone to please take their seats? We'll be starting with the next session. This session is hosted by Freshfields on "The evolution of foreign investment protection and ISDS: state-of-the-art in 2024. On the panel we have Mr. Rohit Bhat, Lead, India Disputes at Freshfields, who will be moderating the session, Ms. Niti Dixit, Partner at S&R Associates, Mr. Nicholas Lingard, Partner at Freshfields, Mr. George Pothan, Advocate, and Ms. Samantha Tan, Partner at Freshfields.

ROHIT BHAT: I think for those of you who are here, let's just give it another minute or so, for people to come in. Good afternoon, everyone. My name is Rohit Bhat. For those of you who weren't here when the speakers were introduced. We have on the panel today Niti Dixit, Partner at S&R associates. Nick Lingard, who heads Freshfields arbitration practice in Singapore. We have George Pothen. Thank you, George, for stepping in for Promod Nair who couldn't be here because of close friend who's passed away and he's in Bangalore and couldn't make it. George, as many of you know, has spent many years in the ministry in India working on India's treaty cases, so it's quite knowledgeable on this topic, and I'm sure we'll have many useful insights. And we have Samantha Tan, who's a partner at Freshfield's Singapore for office and Nick, Sam and I are representing the Freshfield team here today. So, the topic today is, "The evolution of foreign investment, protection and ISDS state of the art in 2024." And we thought it's a relevant topic because given where India is today. It's the fifth largest economy in the world, likely to be the third largest economy by 2030, and moving from $3 trillion economy to a $7 trillion economy at a pretty fast pace.

So, given all of these, given where India is and the growth trajectory that we are witnessing, we thought will be useful to discuss the evolution of investment treaties. How investment treaties have contributed to this growth? There has, of course, been a lot of Foreign Direct Investment into India for the past 25 years, since 1991 and also where we are headed because India has had quite a few changes to its treaty regime. And our panellists here today will discuss some of that. What we thought we'll do is, we'll start with a few audience poll questions. But given that the audience is still just trickling in, maybe we'll skip to the content and come back to some of the poll questions in a short while. So, just by way of background and if I can introduce the topic a little bit more. Globally, there are about 2824 BITs, Bilateral Investment Treaties and about 2200 of them are in force. There are other separate treaties which have investment protection, and there are about 470 of them, and about 392 are in force. But when it comes to India, India has about twelve Bilateral Investment Treaties that are currently that have been signed, but only about nine of them are currently in force, and we'll come on to the termination of treaties Just to set the scene we also have on this slide the success rates in ISDS disputes. And I think this is quite an important slide because many of you will have different

perceptions on investment treaty arbitration, investor state disputes and it's important to put in context that overall, globally, but also with India, the success rate is roughly 50-50. So 50% won by the state, 50% one by the investor, their claims awarded either partly or in full, but globally it's about 50-50. And India has the same trajectory. George has all the figures at his fingertip, but I understand that there are about six cases that India has won, five cases that India has lost. There are about ten of them ongoing, and the rest have been settled. And George told me this

morning that although on the Internet you'll see there are about 39 cases against India. The figure is actually 51, and George probably does with all of them. So, I will take George at his word on that. Here we have the ISDS Awards against India. These are not all the awards, but just to give you an example of the four awards that we have on the screen against India. We have ***Can versus India,*** which Niti was involved in, where there was an award for about $1.2 billion. We have ***Davis versus India,*** where we had an award for about $111,000,000. We had ***DT versus India***, an award for about $93 million, and ***white industries versus India***, which was an award for approximately $2.5 million US dollars, 4 million Australian Dollars.

So, with that background, if I can just quickly move to the overview of India's treaty practice and here we have India's current investment treaties. We currently have very few treaties in India, and among the ones that we do have, we have treaties with the Philippines, Libya, Senegal, Bangladesh, Lithuania, UAE, Taiwan and Belarus. There are some that have been signed but not enforced. And this was not always the case. So, previously we did have more than 70 treaties, and many of them were terminated. And before I bring on our speakers to talk about some of this, this slide provides a timeline of key changes that led to the termination. So, you had in 1994, the first treaty post-liberalization in India, 1991, and in 2003 there was a model BIT, but then there was the ***White Industries*** award in 2011, post which there was a bit of a reaction, and from 2015 through to 2017 there were over 60 treaties that India terminated after which there have been quite a few committees that have been formed in India to look into India's treaty regime and consider what it should look like. So, with that background, if I can just bring in George here, who has been part of most of these committees to talk a little bit more about what India is doing at the government level to review its investment treaty regime and where it's headed.

GEORGE POTHAN: Thank you, Rohit. On the review to the investment treaty, the reason for India coming out with the new model in 2015 was the ***White Industry*** case. That was the watershed moment, where we had the first adverse award. The 2015 model was supposed to be just a starting point for negotiation, not a final document. Otherwise, there's no point in

having a negotiation. Unfortunately, we've not been able to successfully conclude many treaties after that. What India has to look up today is that we are not just a capital importing country, but also a capital exporting country. And in light of this, even some of the bigger economies, when we did a study, there's greater flow of capital from India to that country than the inflow to India. So, we need to review our treaty... we can't have a one bill fits all. We need to review our treaty to also provide certain assurances for our investors. In this light we first had the Sri Krishna... Actually, we had the Law Commission report in 2015 just before the model BIT came out. There was a draft model BIT on which the Law Commission gave its report. Some suggestions from that were actually taken into model BIT, but the Government concluded that this is just a starting point for negotiation based on each negotiation, you can further deviate from that. We haven't seen that. Then we had the Sri Krishna Committee report which Rohit mentioned. In the Sri Kishna Committee report, there wasn't much discussion on how far the model BIT should be looked into, but there was more discussion on how to handle the BIT cases. Then there was the Parliamentary Standing Committee of the External Affairs, which actually review the entire investment treaty regime of India. There are some questions put forward. Why are treaties not being concluded? From 2015 till about the Parliamentary Standing Committee happened in '21 or '22. So until then, in six or seven years, we had concluded back then just two treaties. And another one which is not the one with blessed, which is not. Based on the model BIT the government was asked to review the BIT program, do a study on sectors in which Government is looking for inward investment and also try and have a sector specific investment treaty. We haven't seen too much of that as yet. We are actively negotiating treaties with UK, Australia, the European Union, Russia about 30 plus countries at various stages of negotiation. There are some aspects like no fair and equitable treatment in the new model BIT and as enterprise based definition in the model BIT of 2015, the exhaustion of local remedy clause in the ISDS. These are some of the sticking points because of which we are unable to conclude the BIT. The government did envisage reviewing it in 2024 with the commerce industry setting up a committee, but nothing much has progressed. There's a centre for trade and investment law, which is actually a think tank of the government, which is doing some study right now. We'll have to wait for the outcome of that.

ROHIT BHAT: Thanks, George. That's a very useful overview of what India is doing. And I think a large part of why India has not been able to conclude its negotiations and successfully sign treaties does go back to the model BIT, which, as you said, is just a starting point and subject to negotiation, but it's being used as a document that has to be adopted in full. Let me just briefly touch upon here. Treaty claims against India, and I think I said earlier that there are about 50 of them which George has confirmed, and many of them have been under the India-UK BIT and the India-Netherlands bit that have all been, both of which have been

terminated. But there are sunset clauses in these treaties under which claims can still be brought, but I think more important than treaty claims against India it's important for us to talk about treaty claims by Indian investors. And before I move on here, how many of you in the audience, and let's just do a show of hands. How many of you in the audience think that it is important for Indian investors to have treaty protection. Just raise your hands. Okay, I see a majority of hands here. But then I told you, there are about nine investment treaties that are currently in force, mostly with countries with whom India does not have significant financial relationships. Of course there is treaty structuring and on that, if I can bring in Niti. And if you can talk a little bit more about the reasons why it is important for Indian investors to have treaty protection with respect to their investments outside India and some of the claims that have been brought by Indian investors.

NITI DIXIT: Thanks, Rohit. So, currently, and again, I'm sure George will have better data on this, but there seemed to be about twelve claims by Indian investors against a host of countries. Some of these do seem to be arising from the same sort of action with the same percentage of success loss and success ratio that seems to be the norm, equal. As context, obviously, we all know that 2011 or thereabouts, when India started seeing a slew of arbitral notices of claim, it responded by terminating most of its treaties, investment treaties and since that time has set up the model BIT as it's starting as... a start of its negotiating position. The general view on the model BIT is met with enough criticism. So, I don't need to repeat it. But one of the criticisms it does face is that it simply doesn't consider the interests of Indian investors who may be investing outside India. Just for a second, I want to juxtapose that with China as an example. In and around the 1990s, when I think there was sort of this growth in claims, in investment treaty claims generally across the world China actually doubled down by sort of in increasing, offering higher protection to investors. It accepted access to binding arbitration for the first time which is sort of the opposite direction in which India has gone. And I think, again this is conjecture on my part, but China was sort of preparing for a future where it saw itself as a capital exporting economy. And treaties have a long life. So, you prepare for the future. You do not...It is not a contract for the next three years. As a growing capital exporting country India should, in my view, few protections that BIT for investors in terms of its own global ambitions. Home government should seek to strengthen protections available to investors and the parliamentary committee report has been mentioned, and that also, in fact refers to Indian investors being entitled to some degree of protection in these matters. There are three aspects to the model BIT, which I think actually highlight that the perspective with which the lens with which the Government of India is currently looking at its BIT negotiations is a Government lens. It isn't focusing on how that will impact Indian investors investing outside India. The first, I think, is, and George mentioned that the definition of

investment. An enterprise based definition, I think, is intended to narrow the scope of investments that can be subject to claims. Capital exporting economies prefer an asset based definition, and India is moving away from that. Exhaustion of local remedies, problematic. I think in a country where it's already known, there are, courts are overburdened. So, that's an obvious risk, but that's also a risk that Indian investors may face in the kinds of economies that they are investing in. It also doesn't send a very positive signal generally, but one of the challenges I face when we say exhaustion of local remedies and it's moving, digressing from the point a little bit, is that the fact as Indian lawyers, we know that article 19(1)(g), which protects right to business is available to citizens and it is not available to non-citizens. So when we were being a little cheeky when we say that you have local remedies available. A very fundamental remedy that is available to Indian businesses would not be available to foreign businesses in India. So, you're already limiting that access to, but that's a digression from the point on Indian investors, and I think one of the things that, one of the points that Indian investors may perhaps be concerned about is the standard of expropriation in the model BIT, it doesn't require that the measure be non-discriminatory, and that could be problematic again for an Indian investor investing outside India. I'll wrap up with just one thought about how geopolitics can change. Bangladesh. We're currently facing a situation that we do not know. We do not know what will happen and how relations will turn out. But India, Bangladesh is one of India's largest trading partners in the subcontinent. It has traditionally made investments by Indian investors, it's invited those investments over the years. I think there are two Special Economic Zones for Indian investors in Bangladesh. There's a slew of investment agreements MOUs specific industrial sectors in which investment has been made by Indian investors. Now, of course, everything might be fine, but it might not be. The Government of India has prepared joint interpretative statement soon while it was terminating other treaties, it kept the BIT with Bangladesh alive, but then issued a joint interpretative statement, which has narrowed the scope of protection down to customer international law and that again exposes the investments made by Indian investors in Bangladesh. So again, India was looking at it from purely from the perspective of the government of India, but not from the interest of Indian investors. So, those are things that it's become very real, very quickly and that's just how geopolitics is. So I'll just leave you with that thought for the moment.

ROHIT BHAT: Thanks, Niti. The joint interpretative statement route is very interesting as an instrument of international law, because I don't think the status of that instrument is very clear that an amendment, is it an interpretation, is it retroactive. I see George smiling, because we were involved in a case where this came up opposite each other. But, Nick, if I can bring you in here and to pick up from where Niti left off. We discussed how there aren't that many treaties for Indian investors to take advantage of. If you can talk briefly about the types of cases

that we have seen so far from Indian investors and importantly, going forward, how will they be able to take advantage of treaty structuring. And how important is that?

NICHOLAS LINGARD: Thanks, Rohit. Let me begin with that point you see on the slide, several examples of cases brought by Indian investors under Indian treaties. Treaties in force between India and host states, where Indian investors are deploying capital. But there is an alternative, and given the relative paucity of Indian treaties, it's an important alternative. And that's the option of structuring through a third country to which several members of the panel have already referred. Historically, we might have called it the Dutch sandwich. The easiest option historically was to take advantage of one of a very large number of Dutch treaties that had very liberal requirements for establishing a presence that would be recognized under the treaty in the Netherlands and inserting such a vehicle could be a special purpose company between the home state, the exporting state and the host state. Taking the investment, inserting a Dutch vehicle in between would entitle that Dutch vehicle to use any Dutch investment treaty. Now, that analysis has gotten much more complicated over the past decade. Where once it might have been a matter as simple as running a ruler down a list of states that had treaties with the host state as treaty practice, to which George has alluded but has become more complex, you need to go a lot further than that and review that contents of those treaties not just the existence of the treaty. But I want to begin there, that structuring option inserting a third country in the corporate chain is available, remains available for Indian investors. Though they will bring the claim not as an Indian investor as such, but as a Singaporean investor or a US investor or a Dutch investor. That is to say, the third country through which they've structured the investment into whatever host state around the world, but the cases on the slide are not that. The cases on the slide are not examples of Indian investors structuring their claims brought directly under India's treaties. And as you can see on the slide, those cases have tended to be in two industries. A number that you might say, relate directly or indirectly to real estate and a number that relate to mining. And I want to talk about just one of them because it's an important case in investment law, for a whole range of reasons. It's on the real estate column on the slide. It's ***Flamingo duty free and Poland*** a 2014 decision involving Indian investment in the duty free concession at Warsaw International Airport and the Polish entity, state owned entity, that was the counterpart to that concession terminated it. So, a Lease Agreement between the Indian investor and a Polish state entity called the Polish Airport State Enterprise was terminated, but it wasn't terminated, the evidence showed on contractual grounds, it was terminated for extra-contractual reasons. For reasons driven entirely by government policy decisions that didn't sound in the contract. Not particularly nefarious policy reasons modernization of the airport but a policy reason, nonetheless that didn't sound ahead of termination in the contract, which enabled the Indian investor to bring

a successful treaty claim against Poland resulting in an award of damages in the order of $20 million against Poland. And that point is the first reason. It's such an important case. There was a contract in place here. And of course, not all treaty cases involve contracts, but there was a contract in place here between the Indian investor and a Polish state-owned entity. This was not simply an investment in the market. There was a contract, but this was not a claim under that contract. It was a claim under the treaty between India and Poland, and the Tribunal found that the Polish conduct was a breach of the treaty. Never mind a breach of the contract, a breach of the treaty, giving rise not just to civil law responsibility and Polish law, but to international legal responsibility that attached to the state of Poland because the activity was motivated by extra-contractual reasons, was motivated by a subtext that nothing to do with the termination rights in the contract. So, that connection to the contract is an interesting point in international investment law, but I think also an important one to demonstrate the potential power of treaties to protect Indian investors abroad.

Next point I want to make about this case, also to demonstrate that final point I just made. That is the power of treaties to protect Indian investors going abroad is that contract was not a contract with the state of Poland as such, but with a state-owned enterprise. It was a contract with the Airports Authority, a corporatized entity that ran Polish airports, and the Tribunal in that case found that the conduct of that entity was attributable to the state of Poland. So again, it's rather like the contract point. This is not just a contract issue, but it engages state responsibility, because the conduct of that airport company, state-owned airport company, the Tribunal found, was attributable to the state in international law. So, again Indian investors might have recourse of a treaties not just to change laws, new regulations, but also actions and omissions by quasi-state owned entities. It's worth doing the analysis it needn't be a regulation or law writ large. It could be conduct by a state owned enterprise, as was the case here.

Final point to highlight on this case. And then our pause is this. It was an indirect investment by the Indian investor, Flamingo duty free. It wasn't the Indian investor that was the Party to the Lease Agreements over Warsaw airport duty free concessions. It was two other foreign entities that ultimately held shares in Polish companies that concluded the contracts. So, Flamingo from India had invested through a BVI company and a Cypriot company. And it was those companies that held shares in the Polish contracting party to the duty free concession. And that was no difficulty for the Indian investor establishing itself as an investor entitled to protection under the treaty. In other words, in the absence of express exclusionary language that you may see in some treaties you will see in the Indian model BIT, for example, in the absence of such language, indirect investment is covered. So, the Indian investors going abroad structuring through other countries might enjoy the protection of those countries

treaties through which its structures, but also an Indian treaty. If there is such a treaty in place. I offer that case just as an example. I won't speak to the others, though there are brief summaries on the slide.

ROHIT BHAT: Thanks, Nick. So, we discussed so far the background to India's investment treaties, the importance of treaty protection, cases against India and the importance of treaty protection for Indian investors. I want to move on to a substantive topic, and it's a relevant topic in India. And this is, it's illegality. Because for those of you who've been following India 's treaty cases and some of the more recent one, illegality and especially fraud and corruption are front and centre of some of them, especially in the defence of or setting aside of awards and defence and enforcement of awards in various other jurisdictions. But before I move on to invite our panellists to speak a little bit about that. I'm going to call on the audience again. So, that there are some audience participation. We did have a very fancy QR code on which you can have an online poll, which I'm not using, but I'm going to ask you for a show of hands.. Oh well, there you go. I think our operator wants us to use this. Can we switch to Question no. 6 and can I request the audience? I see a lot of you on your phone. So, if you can pick up your phone, open your camera and scan this QR code or if your QR code is not working, then just go to slido.com and put in 1637825 and cast your vote. There we go. So, we currently have... so let's give the audience another 30 seconds to vote. I'm quite happy this is working. Okay, so we have, currently the audience thinks that illegality is raised as a defence by the Respondent state and ISDS cases in over 70% of cases. Unfortunately, we actually don't, there is no authority that publishes statistics. But what I can tell you is that we are seeing an increasing number of cases year on year that raises the legality defence. Right. So, it is increasing. And I think the audience is right. The general trend is more in the range of 50% and above, and it is really a sliding scale. If you can switch back to the slides now and if you can just get my clicker to work? Thank you. So, it's a sliding scale. We have non-trivial violations of the state's legal order. We have violations of the state's foreign investment regime, and then we have fraud, including corruption, and on this, if I can invite Sam to speak a little bit about what corruption means in the investment treaty context, what are the standards that a Tribunal applies and more generally, what you're seeing in this space?

SAMANTHA TAN: Sure. Thanks, Rohit. I'm going to cover this. Sorry. The previous slide, as well as this one and two others. So, four slides in total. I think what we're trying to do here is we've spoken about challenges already to investors seeking to invoke investment treaty protection, both Indian and foreign investors, in a context where India has been terminating a number of its treaties such that there are fewer treaties left. That's one challenge that investors are facing these days. And in thinking about the evolution of the investment treaty

landscape in India, it struck us that while you have the issue with the existence of treaties, you have more nuanced language in the treaties, you also have now situation where the illegality/corruption defence is being raised by states more and more. And it's coming up in many cases not just in India, but also globally. Many of you in the audience will be familiar with the Nigeria case, where even after obtaining an award, the state managed to get it set aside on account of corruption allegations. So, it's fair to say that corruption is very much a popular tool that allegation that Respondents are raising these days more and more, and it's easy to wield the term corruption in every case. And what we, I hope to do in the next couple of minutes is to break down precisely, how that defence can be invoked, when it can be successful, and the issues in an investment treaty arbitration that it actually affects.

So, Rohit mentioned on this slide the different types of illegality that might come up in the course of an investment treaty arbitration. And it really starts from establishing the jurisdiction of the Tribunal. So, what we have on the slide, are examples of types of illegality that could go towards a Tribunal jurisdiction. We start with the treaty, every treaty will provide definitions for investments that are covered and therefore subject to protection under that treaty. Some investment treaties, not all of them, some of them expressly require that in order for an investment to be a protected investment under the treaty. It must be established in accordance with the laws of the whole state, it's not exactly that phrase. It could be a variation of that language, but they've put these treaties may have put the requirement of legality of the investments into the definition of investment. And in that context cases, investment treaty cases have held that even non-trivial violations of the state's legal order, violations of the state's foreign investment regime as well as more "capital C" Corruption, fraud allegations could fall afoul of the legality requirement in a treaty such that there is no covered investment, as a result of which the Tribunal doesn't even need to go on and consider the merits of the case, it can simply dismiss the case at the jurisdiction stage. So, that's one of the most popular I think frontiers at which the illegality corruption defence is raised at the jurisdictional stage.

The next slide provides some statistics that we have been able to dig up in terms of the numbers of cases in which corruption allegations were raised. And you can see that on the whole, it's rising year on year as Rohit said. The interesting thing, I think, is we don't know whether these statistics relate to corruption allegations made by the Respondent state or whether it could be corruption allegations made by both the Respondent state and the Claimants. So, there are, in addition to states using corruption as a defence, Claimants relying on allegations of corruption to establish their treaty claim to found the treaty claim in the first place. We, the Freshfields team on stage here, were involved in a case. It's the transparent and public case for the Korean government brought by the Elliot Hitch fund. And one of the arguments that the Claimant

made in that case was that the corrupt conduct by Ministers in the Cabinet of the Korean Government at the time of the investment amounted to a breach of the investment treaty. And so, that's one example. One other angle in which we are looking at Claimants potentially making claims against states using allegations of corruption relate to the conduct of regulatory authorities. Regulatory authorities are taking more and more aggressive action. I think it's fair to say in several jurisdictions globally, and sometimes because of the very opaque nature of what the Regulator's powers are, we have clients who are very frustrated by conduct that seemingly goes beyond what a Regulator should do and almost mountingly would say, to abusive conduct. In circumstances where we might be able to argue that the Regulator's conduct is abusive or even arbitrary capricious irrational, it's possible that you might use that at least investors might use that as a negotiating tool to speak with the government and invoke investment treaty protection. Assuming there's a treaty, assuming there is a provision for fair and equitable treatment under the treaty to try to deal with the very difficult regulatory investigations that they are facing. So, I don't know, this statistic on the screen accounts for both Claimants side allegations are corruption and Respondent. But I think it's possible that the allegations of corruption made by both Claimants and Respondents will be continuing to increase.

Moving on to the next slide. I come now to discuss the key issues in an investment treaty arbitration, in which the corruption allegation is raised. I spoke earlier about the jurisdictional stage and very conveniently if the investment definition requires the legality of investments to be established. That's the jurisdictional challenge. It's worth noting that some investment treaty Tribunals have found that corruption could affect the Tribunal's jurisdiction, even if the definition of an investment in the treaty does not expressly require legality. Another way Tribunals have upheld corruption defences to preclude a Claimant from bringing a claim because of corruption by the Claimant has been to invoke the concept of admissibility. Very closely related to jurisdiction, but I think it's not grounded in the requirements under an investment treaty for a Tribunal to have jurisdiction to hear an arbitration. The concept of admissibility, which is argued at international law has kind of nebulous roots. It's not clear from the jurisprudence exactly where it originates. The International Court of Justice, the ICJ, does recognize the admissibility of claims to be a requirement to be established in order to bring certain international law proceedings. And in addition to that, the concept of the Unclean Hands Doctrine has also been said to be one of the doctrines in which a defence against admissibility, invoking a corruption allegation has been rooted. And so, Tribunals have found that claims brought before them are inadmissible on account of corruption allegations in addition to the jurisdictional defence. So, in the middle of this slide on admissibility, we have a couple of examples. I'll touch on the first one in more detail. The World duty free case

against Kenya. This was a case in which Freshfields represented the Kenyan state. And the claim was found to be inadmissible because of a violation of international public policy. That's the term that the Tribunal used, international public policy again kind of nebulous, but in a number of cases has been recognized to include the concept of corruption. And so, in this case it was established by quite extraordinary evidence that the Minister, sorry, the Claimant, had bribed a Minister by giving a briefcase of cash with, I think, $2 million in order to support the establishment of the Claimant's investment. And because of that finding, the Tribunal found that the claim was inadmissible. What's not on this slide is the merits stage. I think it's fair to say that the corruption defence, even if it's not raised at the jurisdictional or a disability stage, could also then form arguably a defence to the merits of a claim, some Tribunals have discussed again the invoking of the concept of Unclean Hands as a defence. It's not well established, and this is still an area where the case law has been inconsistent in every case, it's fact specific but the corruption allegation can affect jurisdiction, admissibility as well as the merits of the claim.

The final slide that I will touch on before handing over back to Rohit, is standards of evidence that tend to be required in order to prove corruption. I think it's widely recognized that you need to prove corruption to a relatively higher standard, then you need to prove other allegations. But it's been unclear and Tribunals have been divided on the precise standard of proof that's required to establish a corruption allegation. So, it's ranged from, you see the three bubbles on the screen, balance of probabilities. And number of cases have found that at least one case has used the unspecific term "reasonable certainty" and a number of Tribunals have also required clear and convincing evidence of corruption. So, it's not an easy thing to prove. It's also not easy to pinpoint the precise standard that you need to meet in order to establish a corruption allegation. But I think I would liken an allegation of corruption to an allegation of fraud in the common law context, where even though the burden of proof or the standard of proof may still be balance of probabilities. The evidence in question has to be good quality evidence at a minimum. So, that's my overview of the corruption defence and claim that's been released in several investment treaty actions. I'll pass back to Rohit now.

ROHIT BHAT: Thanks. Thanks, Sam. You touched upon this with respect to Standards, one of the issues that the Tribunal always faces is, how do they find corruption when there are investigations that are ongoing with the local authorities who are investigating that very fact of corruption under local law, do they conduct an independent inquiry? Does the Tribunal conduct an independent inquiry? Does the Tribunal have to wait for the investigation to be completed in the local jurisdiction and then rely on that? And I just want to bring in George here. Because I think, George, you've dealt with a lot of these issues in your previous capacity.

What is your experience on how local investigation authorities are relied on by Tribunals at all? Or have you seen Tribunals address issues afresh?

GEORGE POTHAN: In fact, we've been on either side on that very case. But it's very important to understand what states the allegation of corruption is brought in. There are cases where the allegation of corruption is brought in only after a notice is served is that to scuttle the arbitration from going ahead. In the Model BIT of 2015, there is a provision which actually saves any investments through modes of corruption, bribery, et cetera, are not covered by the treaty obligations. But the irony is in the previous treaties where the sunset clause still exists. How do we look at the disputes which are already there and how do we look at it? One is, in fact allegations of corruptions or cancellation of the 2G license example that itself has led to claims under BITs. What we have seen is the CBI court has actually acquitted everyone. The appeal is pending in the High Court. So how do we look at that? It's still subjective in the courts here, while the Tribunal is simultaneously looking at the cases. The material Tribunal, as today is perhaps the CBI judgment. The CBI code judgment on the other aspect of it, at what stage you bring it, at what credence to the Tribunal give it to it. Well, does the Tribunal actually have the power or is it arbitrable to look into allegations of corruption, are the agencies bound to testify before the Tribunals? And not just are the agencies bound, how many cases have the agencies actually parted with material to these Tribunals, to these third-party Tribunals? And the last aspect, which I'll come to is, cases where the allegation of corruptions brought after you have an adverse award. In many cases, there's an allegation of corruption brought after the award is rendered here. It is probably to delay the enforcement. Talking about the joint interpretation of statement. You've seen the Mauritius joint interpretative statement. The question is, should we look at it as an allegation of corruption. Should it be the allegation of corruption or should there be conclusive proof of such corruption having existed I mean, I believe that what the tribunal should look at is whether there's conclusive. Proof might be what the local courts or the investigating agencies have concluded, not just the mere allegation because an allegation can be used to scuttle any BIT claim.

ROHIT BHAT: Thanks, George. You mentioned the Mauritius Joint interpretative statement which actually does use the term allegations of corruption and denies an investor the protection under the investment treaty. If there is a mere allegation of corruption. Perhaps what the government was getting at is red flags, which is something that the Tribunal can independently look at based on the allegations. But it's interesting to see how the joint interpreter statement will be applied going forward. There are other forms of illegality. Just moving on from corruption and I'm conscious of time. Nick, if you want to very briefly touch

upon other forms of illegality that we see in the investment treaty context before moving on to our next module?

NICHOLAS LINGARD: Thanks, Rohit. All sorts of bad behaviour. I've touched on it. And we can move on. Stepping away from corruption, states will often cite other non-compliance, alleged non-compliance, as a basis not for the investor not to enjoy treaty protection at high level summary. There are two relevant distinctions here to be drawn. The first is the moment of that alleged illegality. Does it taint the making of the investment or does it change on the state's case, the conduct of the investment over the life of the investment and the former, that is, misbehaviour, non-compliance with local law. That taints the very making of the investment is more likely, the cases would suggest to be a problem whether on jurisdiction, admissibility or merits. For an investor bringing a claim, that is a distinction drawn out in a case we had on an earlier slide called Bank Melly and Bahrain non-compliance that goes to the making of the investment. More likely to be a problem. That's the first distinction. The second distinction is between what some of the cases describe as fundamental principles of local law versus more peripheral principles of local law. A couple of examples that arise on this slide at ECE and the Czech Republic involved violations of a construction code. The Tribunal there had no difficulty saying that that construction code, though it was important, was not a fundamental principle of Czech law it was a code that developers had to comply with. It was not more than that. It fell into in my earlier bifurcation, it fell into the peripheral category. Likewise, Hochtief and Argentina. Also on the slide involved a failure by the investor to register a loan with the relevant authority. Despite the fact that local law was clear, that the loan had to be registered with the relevant authority. The Tribunal there found that that was not a fundamental principle of Argentina law. It was in, to use my characterization, the peripheral category and therefore, did not obtain the investment. The less serious the non-compliance is the less likely. Obviously enough, it will be a problem from the investors perspective.

ROHIT BHAT: Thanks, Nick. I promise that we will move on to a different topic, and I want to bring in the audience again. We've discussed substantive defences by states, and we all know that these defences sometimes have resulted these days in a backlash against investment treaties in general. And there is a Working Group that's considering the reform of the investors data dispute settlement mechanism. One such reform mechanism is maybe compulsory mediation. Can I have the Slide Question 8 again, please? Question sorry, Question 7. Yes. Can the audience please vote on Question 7? Which is, do you think compulsory mediation is an effective means of resolving investor state disputes. It's currently at 50-50. I think we are leaning towards "No." So, more disputes, more work for lawyers. Yeah I think 60% of you are saying, "No, it's not." Can I also have the next question? Which is Question 8. Yeah. Do you

think investor. State arbitration should be replaced via multilateral court mechanism and we'll come on to what this means, but it refers to a permanent court mechanism. Where do you have judges who are on standby to deal with investor state dispute? Yeah? It's, 77% of you say "No, it should not", 23% of you say "Yes, it should be replaced by a multilateral court mechanism." That is very interesting. Can we go back to the slides, please? Thank you. So, I want to bring in Sam here. And, Sam, if you can just quickly talk about what a multilateral court mechanism looks like. And some of the treaties that we are looking at before we move on to what India's position is?

SAMANTHA TAN: Sure. So, the multilateral investment court has been most popular in the treaties that the European Union, the EU has been concluding with a number of nations, including Canada, Vietnam and Singapore. It proposes that instead of an arbitral Tribunal that the Parties would select at the time the dispute arises and arbitration is commenced, that the states who are Parties to this treaty select a panel of about six members to form one level of a First Instance Tribunal to be on standby to hear any investment disputes that arise under the relevant treaty. In addition, to this six members at the First Instance Tribunal, the system that the EU has agreed with a number of these nations is that there will be a Permanent Appellate Tribunal. And so quite different from the typical arbitration style where there's no appeal from the Arbitral Tribunal. This MIC system will have an appeal level similarly comprised of six members that are selected by the state Parties to the treaty, and these six members will be on standby to hear any appeals that might be raised from the First Instance Tribunal after an investment treaty dispute has been heard and decided at first instance. The system allows for each of the EU. And for sake of example, I'll use Singapore to appoint two members and for the two members each, I apologize, so, that's four members and the final two members who will be on standby among the six. The group of six in each Tribunal would be appointed jointly by both sides. Now, none of these Tribunals have yet been set up because even though the EU has concluded these treaties none of them is enforced yet. It remains to be seen how each of the states will select the members of each of the Tribunals. And again, how they will agree to the joint members. So the idea is that when a dispute arises and arbitration is commenced, the President of each of these Tribunals of six people will select the three members who will hear the dispute. Now, I think the arguments in favour of this multilateral court system are, okay, one, there is an appeal mechanism, so you are not stuck with the decision made by just the three arbitral Tribunal members. That's probably good and bad for investors. Second thing is that there will be a requirement of the qualifications of the members who are to be appointed to these Tribunals, and so at least the state Parties can be confident of the quality of the decisions because these will be members that they have chosen and who fulfil the relevant qualifications in the treaties. For example, individuals appointed to these Tribunals will need

to be as qualified as they would need to be in order to serve in judicial office in the relevant states. And so, I think it's a level of kind of quality control that contracting Parties to these treaties seek to establish and you can see that if decisions are going to be made over a certain number of years, by the same six people in different constellations, I think the States are looking to establish more consistency across decisions that are made and to have a bit more control over the outcomes of at least the legitimacy of the outcomes of the ISDS awards that are handed down.

Of course, the downsides are that investors, the Claimants who will bring investment treaty disputes against states under these treaties, then do not have the party autonomy to select their own decision makers that make arbitration so popular among investors. And so, there are ups and downs. And what I'm quite interested to hear about would be or to see in the future would be India's position, as it is currently negotiating one of these treaties with the EU.

ROHIT BHAT: Thanks, Sam. Niti, if I can bring you in here and ask you to speak a little bit about India's position, what you've seen historically, starting with the treaties that were terminated and with the model BIT. And going forward, we know there are treaties in Brazil and the EU, so if you can talk a little bit about that. And what are the procedural mechanisms that India is using.

NITI DIXIT: So, India is currently negotiating a slew of treaties based on its model BIT. Anyway I was just looking at this and thinking that it's yet again another sort of example of trying to this nervousness around giving investors a say in the process and states wanting to lack of a better term, stack the decks a little bit. And you have to wonder, I mean, if there is this degree of nervousness around these treaty arbitrations, why sign these treaties? Leave yourself open to whatever it is. Let me just set out, again, I don't act for the Government of India. I can only base my information on what I read are its public statements it's concerns around and some. I will not say that these are illegitimate concerns. These are as a sovereign state. These are concerns that have been expressed by numerous countries. This is not, India is not alone in these concerns and there isn't, I don't think that the ISDS system currently offers the perfect solution to these concerns. But does that mean that the system itself needs to simply be overhauled in the manner, that's kind of being considered? But that said, let me just as I said India's concern seem to arise from a perception that the ISDS regime encroaches on its regulatory power and it undermines judicial decisions. It is concerned about the inconsistency in interpretation of standards because, again, no Tribunal, these are ad hoc Tribunals. And this is something that comes up often when I hear comments from the Government of India, is concerned around the independence or impartiality of arbitrators,

and I think this arises more from the regional slew of the appointment of Arbitrators and that is the real concern that has been expressed certainly in this part of the world by many other countries, and not just India, and again, awards not having any precedential value. So, you don't know how the next panel will decide matters. Now these have been reflected in the way, again, based on public information, the way government of India has commented on the workings of the Working Group-3. The UNCITRAL Working Group-3. It did submit. So, in relation to its concerns around, for example, the impartiality and independence of arbitrators. It submitted comments on the draft code of conduct that is just in fact, become now effective. But one of the concerns that India raised, and it proposed the standard of justifiable doubt to test the independence and impartiality of arbitrators. It can sound vague, but it is also, in fact, the standard that you find in the IBA Guidelines and the conflict of interest. So, India isn't alone in racing it, and I think that that has, I think, found reference now in the, in the code of conduct. The other area that India, the multilateral investment court. India was, in fact, specifically asked to comment on it. I think India has its Model BIT does talk about an appellate forum. It doesn't specifically talk about an investment court and India has alluded to that in its comments to the Working Group-3 that has averse to it, but I don't know how it's ultimately going to negotiating the EU draft currently. So, we'll see where India finally lands on it. It obviously sounds more attractive than an ad hoc panel to, I would imagine the government of India currently. I want to mention India is actually just one of your questions. With India's increasing preference for mediation for some reason. That is not entirely, I have to say, as an Indian lawyer who's been on the other side of claims against the Government of Indi. The Government doesn't know how to settle disputes, actually. So, I am perpetually puzzled by this stated preference for mediation that the Government of India currently has, and I hope that actually it would be great if it can be given effect because generally, I don't think litigants are in the business of litigating a fight to the finish, if there is a sensible resolution to be had. And nor should the government be in the business of litigating fights to the finish and if there is a way to reach sensible resolutions. But I was reading with interest the Government of India's permanent mission to the UN has, on its website, India's position on mediation, which I thought was very interesting, and I can't do better there to just read it out, actually. "We further note with appreciation the progress made by Working Group-3 in the context of draft provisions and mediation. Since mediation is still an underutilized forum to resolve investment disputes, any work in this direction would certainly encourage parties to conduct mediation where appropriate without creating an obligation. The benefits of mediation as an alternative or complement to arbitration and other forms of dispute resolution would be cost effective and time saving towards resolution of disputes in addition to preserving relationships between the parties and thereby retaining investment and potentially furthering fostering further investment." All very nice words, I have to say. And it seems to be a push,

certainly from the Government of India. I would imagine it is a positive push, and how it's going to be given effective. I think we all have to reserve judgment. On that until we see how this translates.

ROHIT BHAT: Thanks. Niti. On mediation. just taking a mediation, Nick, if I can ask you to just quickly outline Niti's mentioned what India's state of public position is. The reality is quite different because we are not seeing any treaties with mediation in India. There are some provisions that deal with mediation, but not comprehensively. What are you seeing internationally outside India? Are you seeing a growing trend in on implementing mediation provisions and compulsory mediation?

NICHOLAS LINGARD: Well, first, to pick up on Niti's point, India is certainly not alone. Most investment treaties have a pre-arbitration requirement to notify an investor needs to notify the state of the claim, and there's a cooling off period. And there may be an encouragement in the treaty for meetings, consultations, negotiations take place over that interregnum. My uniform experience of attending those consultations negotiations both as Counsel to a state and a Counsel to several investors is, they are empty exercises. They consist principally in the investor articulating its claims through slick presentations and the state representatives listing and taking copious notes and saying nothing in response. So, India is certainly not alone, and I think we have to recognize that difficulty for states, particularly early in potential claims to settle them. But to your direct question, Rohit, about the role of mediation in treaties, the answer is we see some movement in that direction, but not a great deal. Perhaps the high watermark is a relatively recent treaty between Australia and Indonesia, which provides for an obligation to mediate an obligation to attempt conciliation is the word used in the treaty. If the Respondent states insists on that before proceeding to arbitrations. In other words, the Respondent state can dispense with the conciliation requirement, but if it insists on it, then there must be a conciliation. That's the word used, but not defined. Let us say an analogy to mediation before going to arbitration. There are one or two other examples, but it is not a deep pool of treaty practice. That provides for compulsory pre-arbitration mediation.

ROHIT BHAT: Thanks, Nick. I'm conscious of time and there's a big screen in front of me that says, time's up. I'm not sure that's right, but I will take five or ten more minutes. And I also want to hear from the audience and questions, but we had a couple more slides which I will quickly skip and I will go to compliance and enforcement, because I think this is an important topic. And on this side, you'll see that in the ICSID context, and India is not a party to the ICSID Convention. There are a majority of awards are actually paid out or complied

with. There are about 31% where enforcement is pursued, but the rest are voluntarily complied with or settled post the award. And this is an interesting slide. It has a list of unpaid ISDS awards and you'll see Venezuela is right at the top, but you will see India at number 7. George, do you want to talk a little bit about what these two cases are and what the position is here?

GEORGE POTHAN: Just briefly, the two cases are the ***Deutsche Telekom and Devas*** case. The awards are unpaid, but I don't know whether it's right to say unpaid challenges are still pending, and enforcement is actually pending. Last I heard of 16 jurisdictions. So I think there has to be a finality to awards before you categorize them as unpaid. Challenges spending in the Dutch courts and in the Swiss courts because of the corruption allegation which came in later. It, that's a new addition to the court proceedings, so I would say the matter still sub judice, and we'll have to see how it goes.

ROHIT BHAT: Right. Yeah your few sentences there have so many substantive issues to take in. Right. Because corruption allegations after the fact, challenges in enforcement, but not on set aside. So very interesting, but that's a topic for another day. I want to move on to this important topic, which is a commercial reservation to the New York Convention. And, Nick, if I can bring you in here. India has made a reservation to the New York Convention, that it applies only to commercial arbitration awards. Nick, what is the position on this? Are investment treaty awards commercial? And what is the international position? I know there's no clarity yet in India. But what's the international position?

NICHOLAS LINGARD: I want to hear from others on the Indian position. But I think it is fair to say that the orthodox position in most jurisdictions around the world where the question has been considered is that treaty awards are commercial for the purposes of the New York Convention. If the particular signatory to the New York Convention has entered into the commercial reservation, that is to say it will only enforce awards under the Convention if they are commercial. The orthodox view I think it is fair to say that is that investment treaty awards satisfy that requirement. That there is a recent decision many of you will have seen reported in a case by Chinese investors against Nigeria that's made its way through the DC courts of the United States, a first instance decision and more recently, a decision of the DC Circuit Court of Appeal which adopted the position I've just described. That is to say it's not directly in that case, a New York Convention question arises under the US Foreign Sovereign Immunities Act. But substantively the same question that the investment treaty award in favour of the Chinese investors against Nigeria is a commercial award adopting what I call the orthodox position. Nigeria's position in that US litigation was that it was not a commercial award. Nigeria said, to satisfy that requirement there would have to be a direct relationship, to my earlier point

about contracts, there would have to be a direct private law instrument between the investor and the state. The concession contract at least to my earlier example was Nigeria's position. The US courts held that is not the case. The award is commercial, even if it does not arise directly out of a private law instrument between the state and the investor. In my view, that's the right answer. It's also, I think, the orthodox answer, though it clearly is undecided in many important jurisdictions, including India.

ROHIT BHAT: Thank you, Nick. So, I know Neeti is sitting here, and I think Neti wants me to end now. But before I do, I want to ask the audience. We've packed in a lot in this short session, and I've gone through a whole range of topics. I want to ask the audience if you have any questions. I see a couple of hands there. If we can start with the gentleman at the back before moving on to the lady right behind Neeti.

BHAVIK RAJANI: Good afternoon. My name is Bhavik Rajani. My question is to Nick. He spoke about indirect investor protection through an intermediary country or an SPV. Would the indirect investor then be able to claim direct loss? Or would his loss be limited to an indirect damage that is caused to him, for example diminishing value of the shares? And how, given these challenges and the number of treaties that India assigned with foreign countries, how do you practically advise Indian investors to structure their investments? What is the criteria that you adopt in advising them?

NICHOLAS LINGARD: They're great questions. Thank you. I will try to answer them briefly. There is no general principle against reflective loss in international investment law. The type there is in some common law jurisdictions. So, basically, the answer to your question to my mind is largely a question of proof, that the investor up the chain needs to prove that it has, in fact, suffered loss. Now, as you rightly say, that will normally be a diminution in the value of its shareholding, and that's a question of proof. And so you may need to use evidence of diminished dividend flows. But typically that shouldn't be terribly difficult because it will be diminution in value of the shares in the underlying entity and in the absence of unusual financing arrangements, for example. It should be a straight line up along the percentage shareholding, so, it shouldn't be an undue obstacle. Of course, I'm talking about a treaty where there is at no exclusion of indirect investment being protected, which is still the norm. It is the second, more general part of your question, which is a really critical question. What do you advise an Indian investor? It's to review the treaties really carefully, not just take the old school, running the ruler down the list of treaties and saying, well, for tax reasons, I'm comfortable with structuring my investment through Singapore. There's a treaty between Singapore and the country in which I'm investing. So let's go with Singapore. You need to

review the treaty. Does the Singapore treaty, in my example, require substantive content, local content in that jurisdiction, or is an SPV enough. There's, I think, really granular analysis required on a treaty by treaty basis.

NITI DIXIT: Now can I just add one thing not to take up too much time. How damages will be calculated is one of the things Working Group-3 is actually looking at, because it is vexed. What valuation methodology will be adopted isn't quite clear. It's a matter of international public law. India, I think, is suggesting some language in its own new treaties around how damages should be, how compensation will be assessed. So, this adds to Nick's point that when you are making that assessment, perhaps look closely at whether the new treaties now have language around compensation for loss. There's an attempt limited to direct foreseeable loss, for instance, there will be changes in that over. I think it's one of those issues that people are grappling with currently.

ROHIT BHAT: Thank you, Niti and Nick. Just one other question at the back before we stop.

AUDIENCE: Good evening. My name is Chandri. My question is for Niti ma'am and Sam, actually. Regarding the multilateral court system that we just discussed, is there any particular way in which we are looking forward to circumscribing the appellate forums jurisdiction in this regard? And if so, are we envisaging any kind of potential... any kind of potential enforcement challenge that may be ruled out due to constitution of this particular multilateral court system if it's imbibed in any of the treaties?

SAMANTHA TAN: Very, very interesting question. Thank you. I'll start us off by just talking about some of the restrictions, or I wouldn't call it restrictions. Maybe a definition of the scope of appeals that could be referred to the appellate Tribunal. That's been set out in the EU treaties, so it goes beyond the grounds for challenging an award, in terms of trying to set it aside. You can appeal errors in the interpretation or application of law, you can appeal manifest errors in appreciation of the facts as well as appreciation of domestic laws. These are things that do not currently exist when grounds that do not exist, when you are challenging an award at the annulment stage or an enforcement. I think to your second question. I haven't thought about it, really, how this interplays with enforcement, but I would have thought that the general position is because the appellate grounds are broader than the grounds on which you can challenge enforcement. What might happen is the enforcement courts and a number of enforcement courts have taken this approach would in circumstance where an appeal is pending just not be able to decide on an enforcement application at that point. I think, actually that the treaty does provide that an award will become final and binding only after the

appellant mechanism has been exhausted, and so you probably wouldn't have a situation where there's a conflict at the enforcement stage with the appeal that's going on. Niti?

NITI DIXIT: I think that's probably... I mean, I don't have anything to add to that.

NICHOLAS LINGARD: I think that's... Can I add one enforcement point just to conclude? I think there's a question that hasn't received enough attention that arises in the context of enforcement of investment court judgments using the word advisedly is this. Are there awards for the purposes of the New York Convention? Now, the treaties establishing the investment court will say they are but ... if that's enough to answer the interpretive question for the purposes of the New York convention. The New York Convention obliges courts to enforce arbitral awards I think we have to have the debate of whether decisions of the investment court are arbitrary awards triggering New York Convention enforcement obligations.

AUDIENCE: Thank you very much.

ROHIT BHAT: Thank you. Thank you, Nick. And thank you to our panellists. With that, I'm going to draw the session to a close, but I know there were some other hands. You can take it outside during networking break. I'm sure our panellists will stay back to answer questions, but thank you for being a patient audience. And thank you to our panellists. Thanks.

~~~END OF SESSION 4~~~