THE AFTERMATH OF INDIA'S 2016 MODEL BIT: SAFEGUARDING PRESENT AND FUTURE INVESTMENTS

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Abtract: *This article undertakes a comparative analysis of the restructuring options available to both Indian and non-Indian investors under India's new Model Bilateral Investment Treaty ('BIT'), following the termination of 58 Indian BITs in early-2017. The article analyses the substantive protections afforded to investors under the new Model BIT, its pro-state tilt, and how this endangers foreign investment in India and investment made by Indians abroad. The article then undertakes a critical discussion of potential restructuring options investors can resort to so as to ensure favourable legal protections and some of the challenges of these alternatives, e.g., abuse of process and denial of benefits.*

I. INTRODUCTION

The push for foreign investment since liberalisation has seen India become one of the fastest growing economies in the world. Foreign Direct Investment ('**FDI**') "*is considered as a major*

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source of non-debt financial resource for the economic development"[1] and the Indian Government's stated objective is to "*attract and promote FDI in order to supplement domestic capital, technology and skills for accelerated economic growth and development*".[2] Until recently, India also had one of the most extensive bilateral investment treaty ('**BIT**') protection regimes, with over 80 BITs in force.

India's BITs were based on the 1993 India Model BIT and were considered to be "*simplistic in their content and purpose*".[3] Following widespread outcry over the decision in *White Industries*,[4] and the increase in dispute notices that followed,[5] India published the 2016 Model BIT ('**2016 Indian Model BIT**') with the aim of striking a balance between attracting investments and the right to regulate.[6]

The 2016 Indian Model BIT comprises of thirty-eight articles, divided into seven chapters, and is intended to serve as a template for future BIT negotiations. More significantly, pursuant to the issue of the 2016 Indian Model BIT, India terminated the majority of its BITs.

Various authors have commented upon the Model BIT.[7] This article seeks to contribute to the existing literature by discussing the safeguarding options available to investors in light of India's widespread termination of BITs.

Section II briefly summarises the key changes under the 2016 Indian Model BIT with the objective of highlighting concerns that will plague India's re-negotiation of terminated BITs.

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[1] Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India, 'Consolidated FDI Policy' (15 October 2020) 5 <https://static.investindia.gov.in/2020-10/FDI-PolicyCircular-2020.pdf> accessed 9 October 2021.

[2] ibid.

[3] Saurabh Garg, Ishita G Tripathy, and Sudhanshu Roy, 'The Indian Model Bilateral Investment Treaty: Continuity and Change' in Kavaljit Singh and Burghard Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Both Ends, Madhyam, and SOMO 2016).

[4] *White Industries Australia Ltd. v Republic of India* (2010) UNCITRAL, Final Award.

[5] At the time of writing, the authors are aware of at least twenty-six cases against India under BITs, of which nine are pending, ten have been settled, four have been decided in favour of the investor, one has been decided in favour of the State, and two have been discontinued. *See*, United Nations Conference on Trade and Development ('**UNCTAD**') Investment Policy Hub, 'Investment Dispute Settlement Navigator – India' <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india/investor> accessed 9 October 2021.

[6] 'Model Text for the Indian Bilateral Investment Treaty' (*Department of Economic Affairs, Government of India*) <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 9 October 2021 ('**2016 Indian Model BIT**').

[7] *See*, Lucia Raimanova, 'Indian Model Bilateral Investment Treaty' *(Allen & Overy*, 5 August 2016) <www.allenovery.com/en-gb/global/news-and-insights/publications/indian-model-bilateral-investment-treaty> accessed 9 October 2021; Garg, Tripathy, and Roy (n 3); Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38(1) Northwestern Journal of International Law & Business 1.

Section III analyses the latest FDI inflow and outflow in India and brainstorms potential restructuring options for investors. Section IV discuses challenges to restructuring, in particular those that relate to abuse of process and denial of benefits. Finally, Section V sets out the conclusion.

I. THE MODEL BIT TILTS THE BALANCE IN FAVOUR OF THE HOST STATE

Though the 2016 Indian Model BIT is not per se applicable, it forms the basis for India's renegotiation of existing BITs. It is therefore important that investors understand the various provisions of the Model BIT to manage expectations regarding the substance and scope of investment protections that will be available under future BITs to which India will be a party.

The first significant change under the Model BIT is to the definition of 'investment' which has been amended to reflect an 'enterprise-based' approach,[8] as opposed to an 'asset-based' one (as was the case previously). The effect is that: (i) only an enterprise that is legally constituted in India can bring a BIT claim[9]; and (ii) the enterprise must satisfy certain characteristics of investment (such as commitment of capital and other resources, certain duration, expectation of gain and profit, etc.) to avail protection. The new definition is not only narrow[10] but also vague as to the actual meaning of the various "characteristics".[11] This inevitably leaves interpretation open to arbitral discretion, which is bound to create uncertainty at the jurisdictional level, i.e., on the question of *what* type of investments will receive protection.

The 2016 Indian Model BIT has also reduced the substantive protections for investors. For example, the draft does not make a provision for Most Favoured Nation ('**MFN**'), Fair and

[8] *See*, 2016 Indian Model BIT, art 1.4:

> "*'Investment' means an enterprise constituted, organized and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made*…."

[9] 2016 Indian Model BIT, art 1.3:

> "*Enterprise means: (i) any legal entity constituted, organized and operated in compliance with the law of a Party, including any company, corporation, limited liability partnership or a joint venture; and*
> *(ii) a branch of any such entity established in the territory of a Party in accordance with its law and carrying out business activities there*."

[10] *See*, Ranjan and Anand (n 7) 20.

[11] For instance, it is not clear as to whether the characteristics of investment are to be satisfied just by the enterprise or its assets. If the former is true, then it may be easier to fall under the definition of investment. Similarly, it is not clear as to how long an enterprise should be in existence to satisfy the "*certain duration*" test.

Equitable Treatment ('**FET**') or an umbrella clause which are common features of many BITs globally. The absence of FET is particularly troubling for investors, since this is the legal standard that is most often invoked by investors asserting investment treaty claims.[12]

A third significant change introduced by the 2016 Indian Model BIT is the requirement that foreign investors pursue local remedies for a period of at least five years before commencing international arbitration.[13] Though not novel, introducing an "exhaustion of local remedies" requirement is highly unusual and is likely to be of particular concern in the context of India, which is ranked number 163 in Ease of Doing Business against the benchmark of "Enforcing Contracts" by World Bank. It currently takes 1,445 days to resolve a contractual dispute in India,[14] with the backlog of cases estimated to increase to around 5 crores by 2022.[15] The requirement to exhaust local remedies can be avoided if an investor can demonstrate that there are "*no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure*".[16] The burden of proof however to demonstrate an absence of legal remedies will likely fall on the investor and may not be easy to satisfy.[17]

A combined and holistic reading of the Model BIT has led various authors and commentators to conclude that the Model BIT offers limited protections to foreign investors, is pro-state and grants significant discretion to arbitral tribunals.[18] This will also be a concern for Indian investors seeking to protect their overseas assets, which will, of course, be similarly limited by the terms of India's new BITs.

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[12] *See*, UNCTAD, *Fair and Equitable Treatment* (UNCTAD Series on Issues in International Investment Agreements II, 2012) 10 <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 9 October 2021.

[13] 2016 Indian Model BIT, art 15.2.

[14] World Bank, 'Doing Business - Enforcing Contracts' <www.doingbusiness.org/en/data/exploretopics/enforcing-contracts> accessed 9 October 2021. The Index measures "*the time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality and efficiency in the court system*."

[15] Shailesh Gandhi, 'India's huge backlog of court cases is a disgrace – but Covid-19 has provided solutions' (*Scroll.in*, 28 June 2021) <https://scroll.in/article/998458/indias-huge-backlog-of-court-cases-is-a-disgrace-but-covid-19-has-provided-solutions> accessed 9 October 2021.

[16] 2016 Indian Model BIT, art 15.1.

[17] *See*, Ranjan and Anand (n 7) 53:

> "…*barring some of the provisions like FPS and MTPs, the Model BIT has not been able to reconcile the interests of foreign investors with host state's right to regulate. The Model BIT contains a narrow definition of investment, an extremely narrow FET-type provision, excludes MFN clause, and taxation measures from the purview of the BIT. Furthermore, the expropriation provision in the Model BIT blurs the line between lawful and unlawful expropriation, it provides for a NPM provision without a chapeau, and contains a complicated and sequential ISDS*."

[18] ibid 50-51.

II. THE NEED TO PROTECT EXISTING AND FUTURE INVESTMENTS

The Indian Government's pro-investment approach has contributed to increased investments in the country. Covid-19 saw a general decrease in investment in both developed and developing economies.[19] In contrast, India saw an increase in FDI inflow, making it the fifth largest recipient in the world.[20] The trend in FDI outflows do not mimic this trend, but India still ranks among the top twenty economies in the world in terms of the volume of FDI outflow.[21] The figures speak for themselves, as summarised below.[22]

Foreign Direct Investment	2018	2019	2020
FDI Inward Flow (million USD)	42,156	50,558	64,062
FDI Outward Flow (million USD)	11,447	13,144	11,560

Following the adoption of India's 2016 Model BIT, India has terminated the majority of its investment treaties. In fact, only seven BITs and four free trade agreements ('**FTA**') with investment protections are in force today - BITs with the United Arab Emirates ('**UAE**')**,** Lithuania, Latvia, Bangladesh, Senegal, Libya, and Philippines (discussed further below), and FTAs with Singapore, Malaysia, Korea, and Japan.[23] Of these, only Singapore and the UAE are among the top ten recipients of direct investment from India. The others rank low – starting from 24th (Philippines) to 163rd (Latvia).[24] The below table sets out the top ten countries investing in India, their share of inflow, and the status of the relevant BIT.[25]

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19 UNCTAD, *World Investment Report 2021* (UNCTAD/WIR/2021) 4-5 <https://unctad.org/system/files/official-document/wir2021_en.pdf> accessed 9 October 2021.
20 ibid 5.
21 ibid 7.
22 UNCTAD, 'General Profile: India' (*UNCTAD Stat*) <https://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/356/index.html> accessed 9 October 2021.
23 These Free Trade Agreements include the India-Malaysia FTA (2011); India-Japan EPA (2011); India-South Korea CEPA (2009); India-Singapore CECA (2005). *See*, UNCTAD Investment Policy Hub, 'International Investment Agreements Navigator – India' <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india> accessed 9 October 2021.
24 Department of Economic Affairs, Ministry of Finance, Government of India, 'Overseas Direct Investment Data from April 2000 to August 2021' (August 2021) <https://dea.gov.in/sites/default/files/ODI%20factsheet%20August%202021.pdf> accessed 9 October 2021.
25 Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India, 'Fact Sheet on Foreign Direct Investment (FDI) from April, 2000 to June, 2021' (June 2021) <https://dpiit.gov.in/sites/default/files/FDI_Factsheet_June2021.pdf> accessed 9 October 2021.

Rank	Country	% of total inflows (in terms of USD) (April, 00- June, 21)	Status of Investment Protection Treaty
1	Mauritius	27.71 %	BIT Terminated
2	Singapore	21.64 %	India-Singapore CECA 2005 in force
3	United States	8.32%	-
4	Netherlands	6.90%	BIT Terminated
5	Japan	6.58 %	India-Japan EPA 2011 in force
6	United Kingdom	5.59 %	BIT Terminated
7	Germany	2.41 %	BIT Terminated
8	Cayman Islands	2.13%	-
9	UAE	2.08%	BIT In force
10	Cyprus	2.05%	BIT Terminated

Similarly, the table below sets out the top ten recipients of investments from India, their share of outflow and the status of the relevant BIT.[26]

Rank	Country	% of total outflows (in terms of USD) (April, 00- August, 21)	Status of Investment Protection Treaty
1	Singapore	20%	India-Singapore CECA 2005 in force
2	Mauritius	15.2%	BIT Terminated
3	United States	10.6%	-
4	Netherlands	8.6%	BIT Terminated
5	United Kingdom	6.3%	BIT Terminated
6	UAE	4.4%	BIT in force
7	Channel Island	4.2%	-

[26] Department of Economic Affairs (n 24).

8	British Virgin Islands	3.2%	-
9	Russia	3.0%	BIT Terminated
10	Cyprus	2.6%	BIT Terminated

India never entered into a BIT with the United States ('**US**') and terminated its BITs with Cyprus, Mauritius, Netherlands, Russia and the United Kingdom ('**UK**') after the publication of the 2016 Indian Model BIT. While it was possible to extend the application of the India-UK BIT to the Channel Islands/BVI,[27] it appears that this never took place. [28]

The termination of India's BITs raises two questions: (i) what protections are available to existing investments; and (ii) how do investors protect future investments. We address these questions below.

A. Investments Made Prior to the Termination of BITs

Investments made before the date of termination will generally continue to be protected for a certain period under the 'sunset' provisions of the respective BITs. We have reviewed India's BITs with the UK, [29] Mauritius,[30] Netherlands,[31] and Germany[32] – each of these provide the comfort of sunset provision to investors.

The protections available under the sunset provision varies across BITs, especially in terms of the time, duration and the scope. For instance, the protection afforded under the sunset provision of the India-Mauritius BIT is 10 years from the date of termination or any longer period that is agreed in the relevant investment contract. The protection also extends to

[27] The United Kingdom is responsible for the international relations of the Channel Islands and BVI and the India-UK BIT could be extended to these territories through an Exchange of Notes pursuant to Article 13 of the BIT.

[28] Deepa Somasunderam, 'Do companies registered in British Overseas Territories and Crown Dependencies have adequate investment protection?' (*Thomson Reuters Practical Law Arbitration Blog*, 26 July 2018) <http://arbitrationblog.practicallaw.com/do-companies-registered-in-british-overseas-territories-and-crown-dependencies-have-adequate-investment-protection/> accessed 9 October 2021.

[29] Agreement between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments ('**India-United Kingdom BIT**') (14 March 1994), art 15.

[30] Agreement between the Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and Protection of Investments ('**India-Mauritius BIT**') (4th September 1998), art 13.

[31] Agreement between the Government of the Republic of India and the Government of the Kingdom of the Netherlands for the Promotion and Protection of Investments ('**India-Netherlands BIT**') (6 November 1995), art 16.

[32] Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments **('India-Germany BIT**') (10 July 1995), art 15.

investments approved (and not yet made) before the date of termination. On the other hand, India's BITs with the UK, Netherlands, and Germany, extend protection to investments for a period of 15 years from the date of termination.[33]

Investors must analyse the terms of the applicable BIT to ascertain the precise protection available for past investments.

B. Investments Made After the Termination of BITs

Future investments made in countries/from countries with which India has terminated its BIT will not benefit from the protection under the 'sunset' provisions. If India does not re-negotiate its terminated BITs before the expiry of the protection under sunset provisions, investments made prior to termination will be unprotected.

One way to safeguard investments is to restructure them. Investment protections available under a BIT or FTA are extended on the basis of an investor's nationality.[34] In principle, therefore, Indian investors investing abroad or foreign investors investing in India can alter nationality of their investment through a 'corporate restructuring', i.e., by incorporating companies/subsidiaries/third vehicle in specific jurisdictions to benefit from more favourable conditions (in this case, robust investment protections with the host state).

The first step in such corporate restructuring is to review the existing investment treaties entered into by the host state and select the one that offers the best protection.

From the investor's perspective, the treaty should ideally include: (i) protection against expropriation, including payment of prompt, adequate, and effective compensation (which is found in almost all BITs); (ii) FET provision (which as noted above is the most often invoked and most often successful cause of action); (iii) MFN provision; (iv) full protection and security; (v) umbrella clause; and (vi) right to bring international arbitration proceedings against the host state for the breach of any protections afforded by the BIT and without undue restrictions on such rights (including the requirement to exhaust local remedies or excessive 'cooling off' periods).

[33] India-United Kingdom BIT, art 15; India-Netherlands BIT, art 16; India-Germany BIT, art 15.

[34] Investment Protections are based on the principle that it extends to investors who are nationals of a contracting state other than the host state in which the investment is made.

We are conscious that each investment is different and that it is not always possible for a specific BIT to contain all the substantive protections listed above. The focus should, therefore, be on identifying a treaty that is most satisfactory when it comes to protecting the investment in question. Of the substantive protections, for example, non-expropriation and FET are key. An investor may be prepared to forego the protections referred to at (iii)-(v) above if the BIT is otherwise strong and depending on the perceived risks associated with the particular investment. For example, if the investor has not entered into a contract with the state, "umbrella clause" protection is unlikely to be important.

Any restructuring will inevitably require consideration of the Indian BITs that are currently in force. This is particularly true for inbound investments, which necessarily rely on India's BITs. To take a simple example, if an investor from the UK seeks to make an investment in India in the year 2022, it has two main options. First, such investor may choose to proceed by investing into India directly. This is a risky approach, because the India-UK BIT was terminated in 2017[35] and so the investment will not benefit from treaty protection. The second option is to route the investment through a country with which India has a BIT in place. The below table summarises the BITs that India currently has in place along with the protections available under each of them. [36]

BIT Party	**Substantive Protections**					**Procedural Rights**		
	FET	**Expropriation**	**FPS**	**MFN**	**Umbrella Clause**	**Cooling-off period**	**Local courts**	**Arbitration**
Bangladesh	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Latvia	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Libya	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Lithuania	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Philippines	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Senegal	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
UAE	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes

[35] Kavaljit Singh and Burghard Ilge, 'India overhauls its investment treaty regime' *Financial Times* (15 July 2016) <www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc> accessed 9 October 2021.

[36] Krystal Lee, Khyati Raniwala, and Shimantika Mandal, 'India' (*GAR Insight*, August 2020) 3 <https://files.lbr.cloud/public/2020-10/ITA_2020_India-Oct_22.pdf?cM6lxfTkuFc8jsp1r_1LkbPwaqgQ9DRL=> accessed 9 October 2021.

By way of example, to be eligible to claim protection under the BITs with Bangladesh[37] and Lithuania,[38] mere incorporation of a corporate entity will not be sufficient. Such entity must also carry out "*substantial business activities*" in the territory of the contracting party to meet the definition of 'investor'. Under the India-Lithuania BIT, the absence of substantial business activities may be a basis for denying benefits under the Treaty (referred to as a 'denial of benefits' clause). [39] While the India-Bangladesh BIT does not include a denial of benefits clause, it lists minimum characteristics of an investment, which includes the requirement that the investment is of "*significance*" for development of the contracting party receiving the investment.[40] Similarly, the India-Philippines BIT requires a company to be "*actually doing business under the laws…of that Contracting Party*."[41] Inbound investors should, therefore,

[37] Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments ('**Joint Interpretative Notes**') <https://dea.gov.in/sites/default/files/Signed%20Copy%20of%20JIN.pdf> accessed 9 October 2021:

> "*Note on definition of "investor" – Article 1 (c) –*
> *1. For greater certainty regarding the definition of an "investor":*
> *a) the term "company" referred to in Article 1 (c) of this Agreement means only a company, corporation, firm or association of a Contracting Party that is incorporated or constituted or otherwise duly established pursuant to the laws and regulations of that Contracting Party, and that has its seat in that Contracting Party and is engaged in substantial business activities in the territory of that Contracting Party*."

The Joint Interpretative Note further states that:

> "*"Substantial business activities" do not include activities such as (a) strategies/arrangements, the main purpose or one of the main purposes of which is to avoid tax liabilities, (b) the passive holding of stock, securities, land, or other property; or (c) the ownership or leasing of real or personal property used in a trade or business, unless the owner or lessor performs significant services with respect to the operation and management of the property*."

[38] Agreement between the Government of the Republic of India and the Government of the Republic of Lithuania for the Promotion and Protection of Investments ('**India-Lithuania BIT**') (31 March 2011), art 2(ii): "*An 'entity' means in particular, though not exclusively, a company, an enterprise, a corporation or association incorporated or constituted in accordance with the laws of that Contracting Party and engaged in substantial business activities in the territory of that Contracting Party*".

[39] India-Lithuania BIT, art 12.

[40] Joint Interpretative Notes (n 37):

> "*Note on definition of definition of "investment" – Article 1(b) –*
> *In accordance with Article 1 (b), the minimum characteristics of an "investment" are (a) the lasting contribution of capital or other resources; (b) the expectation of gain or profit; (c) the assumption of risk by the investor; and (d) significance for development of the Contracting Party receiving the investment*."

See also, Footnote 2:

> "*Interests or assets that do not typically possess the characteristics of "investments" include portfolio investments, claims to payment resulting from a sale of goods or services by an individual or entity in one Contracting Party to an individual or entity in the other, or an order or judgment sought or entered in a judicial, administrative, or arbitral action.*"

[41] Agreement between the Government of the Republic of India and the Government of the Republic of the Philippines for the Promotion and Protection of Investment ('**India-Philippines BIT**') (28 January 2000), art 1(3).

carefully assess if the commercial realities of the proposed corporate restructuring will satisfy the definitions of "investor" and "investment" under the chosen BIT.

Similarly, an Indian investor seeking to invest in Mauritius in 2022 has at least two options. It may choose to invest directly into Mauritius, which would leave it without treaty protection given the termination of India-Mauritius BIT. The other option is for an Indian investor to invest in Mauritius via a third country that has a BIT in place with Mauritius. If the client may want make further investments in other jurisdictions, it may be strategically useful to opt for a country that has extensive BITs in place so that those investments are more likely to be protected without the need for the incorporation of further entities. The below table lists the countries with the most BITs.

Serial Number	Country	Number of BITs
1	Germany	119 (117 in force)
2	Switzerland	112 (111 in force)
3	China	124 (107 in force)
4	United Kingdom	101 (90 in force)
5	Republic of Korea	94 (89 in force)

Most German and Korean BITs define investments broadly to include "*every kind of asset*".[42] A limited number of German BITs also explicitly include assets controlled indirectly, i.e., invested by an investor of one contracting party through a company that is fully or partially owned by the investor and having its seat in the territory of the other contracting party.[43] A majority of German, UK, and South Korean BITs offer high quality of protections including FET, umbrella clause, and MFN.[44] An overwhelming majority of South Korean BITs also include the "full protection and security" standard.

[42] Susanne Schwalb, Vincent Voerster, and Vladslav Kurylko, 'Investment Treaty Arbitration: Germany' (*Global Arbitration Review*) <https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/germany> accessed 9 October 2021; Hongjoong Kim, Woojae Kim, and Hannah Kim, 'Investment Treaty Arbitration: South Korea' (*Global Arbitration Review*) <https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/south-korea> accessed 9 October 2021.

[43] Schwalb, Voerster, and Kurylko (n 42) 8.

[44] ibid; Kim, Kim, and Kim (n 42); Audley Sheppard and Christina Cathey Schuetz, 'Investment Treaty Arbitration: United Kingdom – England & Wales' *(Global Arbitration Review*) <https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/united-kingdom> accessed 9 October 2021.

Traditionally, Netherlands has also been a good option as it has BITs in place with a number of countries and most of its BITs offer quality protections. It can also be an advantageous jurisdiction from a tax perspective. However, the status of certain of Netherland's treaties is expected to change in light of the new Dutch Model BIT published in March, 2019 ('**2019 Dutch Model BIT**'), which is more restrictive from an investor's perspective.[45] A further difficulty, as regards investments within the European Union ('**EU**') comes from the decisions of the European Court of Justice in *Achmea*[46] and *Komstroy*[47] to the effect that intra-EU investment arbitration under BITs and the Energy Charter Treaty are incompatible with EU law. Indeed, following the *Achmea* ruling and pursuant to the Agreement for the Termination of the Bilateral Investment Treaties between Member States of the European Union of May 2020 ('**Termination Agreement**'), 23 EU Member-States chose to terminate all intra-EU BITs and sunset clauses in Appendix A of the Termination Agreement.[48] For investments in the EU, Indian investors should therefore ensure that their investment is structured through a non-EU Member-State.

The general discussion above is subject to the proviso that the actual restructuring in most cases will require careful consideration based on the nature of the investment and the text of the available BITs. There are a number of options available to an investor when it comes to restructuring investments. One option is to insert an intermediate company in the ownership structure that is, in turn, eligible for protection under the intended host state's investment treaties (BITs/FTAs/MTAs). This could be a newly incorporated entity or an already existing entity within the ownership structure. Alternatively, investors may assign investments to an entity within the ownership structure that has access to treaty protection.

In all cases, investors will need to be careful that any re-organisation or restructuring meets the threshold jurisdictional requirements under the relevant investment treaty, including any requirement that an investment be held 'directly' by an investor or that it has its main office or

[45] Albert Marsman and others, 'Investment Treaty Arbitration: Netherlands' (*Global Arbitration Review*) <https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/netherlands> accessed 9 October 2021.
[46] *Slovak Republic v Achmea BV* (6 March 2018) Case C-284/16 (Court of Justice of the European Union – Grand Chamber).
[47] *Republic of Moldova v Komstroy LLC* (2 September 2021) Case C-741/19 (Court of Justice of the European Union – Grand Chamber).
[48] Agreement for the termination of Bilateral Investment Treaties Between the Member States of the European Union.

substantial activities in the state in which it is incorporated, and is not characterised as "illegitimate". This is discussed in the section below.

III. CHALLENGES TO RESTRUCTURING OF INVESTMENTS

As a starting principle, there is an overwhelming consensus that investment structuring is lawful and consistent with the purposes of investment treaties and the ICSID Convention.[49] This extends to restructuring existing investments in order to obtain investment treaty protection in circumstances where the dispute, which may be the subject of a claim, has not yet arisen.[50] However, corporate restructuring to access treaty protection may be subject to challenge in certain circumstances including for alleged abuse of process and under denial of benefits clauses.[51]

A. Abuse of Process

Abuse of process has emerged as a common defence in investor-state disputes where the claimant has undertaken some form of corporate re-organisation or restructuring prior to commencing the claim. At the core of this defence is the principle that "*the purpose of international protection is to protect legal and bona-fide investments*"[52] and to prevent "*abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs*".[53] The threshold for finding abusive initiation of an investment claim is high.[54] However, if successfully established, this defence is sufficient to bar a claim in entirety as it goes to the question of jurisdiction or admissibility of the dispute.

[49] *See*, for instance, *Aguas del Tunari SA v Republic of Bolivia* (2005), ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, [330(d)]: "*It is not uncommon in practice and — absent a particular limitation — not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability…*"
See also, *Tidewater Inc and others v The Bolivarian Republic of Venezuela* (2013), ICSID Case No. ARB/10/5, Decision on Jurisdiction, [184]: "*It is a perfectly legitimate goal and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host State in this way*."
[50] *Venezuela Holding BV (case formerly known as Mobil Corporation, Venezuela Holding BV) v Bolivarian Republic of Venezuela* (2021), ICSID Case No. ARB/07/27, Decision on Jurisdiction, [204].
[51] These challenges are not exhaustive.
[52] *Phoenix Action Ltd v The Czech Republic* (2009), ICSID Case No. ARB/06/5, Award, [100].
[53] ibid [144].
[54] *Philip Morris Asia Limited v The Commonwealth of Australia* (2015), UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, [539].

The test to determine abuse has seen varying formulations. An analysis of leading decisions on the issue indicates the importance of purpose[55] and timing[56] of investment in assessment of the legitimacy of the restructuring. In order to determine whether a particular investment deserves protection, the Tribunal will usually take into account the entire series of facts surrounding such investment.

Phoenix v. *Czech Republic* was one of the first awards to dismiss a claim based on abuse of process. In this case, a former Czech national created a company under Israeli law (Phoenix Action) and caused it to acquire interest in two Czech companies that were involved in ongoing disputes in Czech Republic. Two months after the acquisition, Phoenix Action initiated a claim under the Israel-Czech Republic BIT. The Tribunal assessed the timing of the investment, the timing of the claim, the substance of the transaction, and the true nature of operation. Based on the evidence, the Tribunal was convinced that the investment amounted to abuse of process as it was made "*for the sole purpose of bringing international litigation against Czech Republic*".[57]

While the *Phoenix* decision is notable for its emphasis on the motive behind a re-organisation, such determination may not be straightforward. Often restructuring occurs as a part of a broader process with multiple considerations, such as that in *Philip Morris* where the claimant argued that "*one relevant and compelling reason motivating the restructuring was the need to align*

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[55] *See*, ibid [536]:

> "*The case law indicates that an abuse of right can be found where a corporate restructuring is motivated wholly or partly by a desire to gain access to treaty protection in order to bring a claim in respect of a specific dispute that, at the time of the restructuring, exists or is foreseeable. In these circumstances, the restructuring is intended to create an unfair advantage for the foreign investor because the investor has no intention of performing any economic activity in the host State*."

[56] *See*, *Tidewater Inc and others v The Bolivarian Republic of Venezuela* (2015), ICSID Case No. ARB/10/5, Decision on Jurisdiction, [145]-[146], [184]:

> "*At the heart, therefore, of this issue is a question of fact as to the nature of the dispute between the parties, and a question of timing as to when the dispute that is the subject of the present proceedings arose or could reasonably have been foreseen. If the Claimants' contentions are found to be correct as a matter of fact, then, in the view of the Tribunal, no question of abuse of treaty can arise. On the other hand, if the Respondent's submissions on the course of events are correct, then there may be a real question of abuse of treaty…But the same is not the case in relation to pre-existing disputes between the specific investor and the State. Thus, the critical issue remains one of fact: was there such a pre-existing dispute?*"

[57] *Phoenix Action Ltd* (n 52) [142], [143]: "*The abuse here could be called a 'détournement de procédure', consisting in the Claimant's creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled…the whole "investment" was an artificial transaction to gain access to ICSID*".

ownership with the Claimant's pre-existing management control of its subsidiaries, thereby creating a 'better, leaner, clearer structure' and that the 'restructuring helped to minimize tax liabilities'".[58] The Tribunal, however, was not convinced. The lack of contemporaneous evidence explaining the business case for restructuring in detail was considered significant.

Perhaps in order to sidestep the subjectivity and evidential challenges associated with a 'dominant purpose' test, the leading formulation of the abuse of process test has developed to centre on the question of the foreseeability of a dispute. In *Pac Rim*, the Tribunal found that the Claimant had changed its seat of incorporation from Cayman Islands to the US for the principal purpose of gaining access to the investment protections and rights under the Central American Free Trade Agreement ('**CAFTA**').[59] Emphasising the timing of the investment, the Tribunal held that the dividing line is when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.[60] A dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialise.[61] This approach also may include significant "grey area".[62] The *Pac Rim* Tribunal eventually dismissed the abuse of process objection on the basis that the restructuring had been undertaken before the dispute had become a "high probability".

Timing of investment was again emphasised in *Mobil* v. *Venezuela*. Mobil was a corporation registered in the US holding investments in Venezuela. Pursuant to a series of tax amendments by the Venezuelan Government, Mobil restructured its investments by inserting a Dutch entity in the ownership structure. Subsequently, the Venezuelan Government nationalised Mobil's investment which led to claims under Venezuelan investment law and the Dutch-Venezuela BIT. The Mobil tribunal held that that restructuring investments to protect against breaches of their rights by the Venezuelan authorities by gaining access to the ICSID convention was a perfectly legitimate goal, as far as it concerned future disputes.[63] However, to accept such restructuring as a way to avoid pre-existing disputes would constitute an abusive manipulation of international law.[64]

[58] *Philip Morris* (n 54) [574]-[576].
[59] *Pac Rim Cayman LLC v Republic of El Salvador* (2016), ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, [2.41].
[60] ibid [2.99].
[61] *Philip Morris* (n 54) [585].
[62] *Pac Rim Cayman LLC* (n 59) [2.99].
[63] *Venezuela Holding BV* (n 50) [204].
[64] ibid 205.

B. Denial of Benefits

Investors must also evaluate whether the specific BIT under which protection is sought through restructuring has a 'Denial of Benefits' clause.[65] The exact formulation of the clause varies depending on the treaty, but these clauses typically subject the state's right to deny benefits to two conditions: (i) ownership and control of the company to whom the benefits are being denied; (ii) whether the company has substantial business activity.[66] Such provisions can be found, for example, in Article 6.9 of the India-Singapore CECA and Article 10.17 of the India-South Korea Comprehensive Economic Partnership Agreement.[67] The relevant clause in the India-Singapore CECA entitles a party to deny the benefits of investment protection provisions under the treaty to investors if "*the enterprise has no substantial business activities in the territory of theother Party*".

The meaning of "substantial" was considered in *AMTO* v. *Ukraine*, where the Tribunal held that substantial means "*of substance*" and "*not of form*". The substance of a transaction should be determined by reference to the "*materiality not the magnitude of the business activity*".[68] This can work in favour of investors seeking to incorporate enterprises that are lean on resources but high on volume of activity. In *Pac Rim*, the Tribunal further held that the requirement to have substantial business "*relates not to the collective activities of a group of companies, but to activities attributable to the 'enterprise' itself*". In this case, the claimant was "*not a traditional holding company actively holding shares in subsidiaries but more akin to a shell company with no geographical location for its nominal, passive, limited and*

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[65] By way of example, *see*, 2016 Indian Model BIT, art 35B:

> "*A Party may at any time, including after the institution of arbitration proceedings in accordance with Chapter IV of this Treaty, deny the benefits of this Treaty to:*
> *(i) an investment or investor owned or controlled, directly or indirectly, by persons of a non-Party or of the denying Party; or*
> *(ii) an investment or investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty*."

[66] Yas Banifetami, 'Taking into Account Control under Denial of Benefits Clauses' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (IAI Series on International Arbitration No 8, IAI 2018).

[67] Comprehensive Economic Partnership Agreement between India and South Korea (India-South Korea) (7 August 2009).

[68] *Limited Liability Company Amto v Ukraine* (2008), SCC Case No. 080/2005, Final Award, [69]. In this case the Tribunal was satisfied that the Claimant had substantial business in Latvia "*on the basis of its investment related activities conducted from premises in Latvia, and involving the employment of a small but permanent staff*".

insubstantial activities"[69]. The change in nationality of the company therefore did not have any material effect on its business activities, which were insubstantial to begin with. [70]

An enduring issue that plagues the operation of denial of benefit clauses is whether denial of benefits clause should have prospective or retrospective effect. The existing decisions fall under two broad camps.

At one end are cases interpreting the denial of benefits provisions under the Energy Charter Treaty ('**ECT**') which support the position that the host state cannot deny treaty benefits after a claim has been submitted to arbitration, as this would be tantamount to giving the clause retrospective effect.[71] At the other end are cases interpreting denial of benefit provisions under CAFTA-DR and the US BITs that support the position that host state may validly invoke the denial of benefits clause, after a claim has been submitted to arbitration, if this complies with the time limit set forth in the applicable procedural rules.[72] Whilst the reasoning of the

[69] *Pac Rim* (n 59) [4.75].
[70] ibid [4.73].
[71] *Plama Consortium Ltd v Republic of Bulgaria* (2005), ICSID Case No. ARB/03/24, Decision on Jurisdiction, [162]:

> "*In the Tribunal's view, therefore, the object and purpose of the ECT suggest that the right's exercise should not have retrospective effect. A putative investor, properly informed and advised of the potential effect of Article 17(1), could adjust its plans accordingly prior to making its investment. If, however, the right's exercise had retrospective effect, the consequences for the investor would be serious. The investor could not plan in the "long term" for such an effect (if at all); and indeed, such an unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date. Moreover, in the present case, the Respondent asserts a retrospective effect from a very late date, even after the Claimant's Request for Arbitration and the accrual of the Claimant's causes of action under Part III ECT*."

Masdar Solar & Wind Cooperatief UA v Kingdom of Spain (2018), ICSID Case No. ARB/14/1, Award:

> "*A majority of the Tribunal accepts that submission. It considers that it would contradict the text and the purposes of the ECT to say that a Contracting State may deny benefits retrospectively, after an investment has been made and a dispute has arisen. That would be contrary to the transparency, co-operation and stability objectives of the ECT and it would lead to anomalous results. The majority notes that a majority of tribunals, which has considered this issue, has concluded that before disputes arise, a Contracting State must act, whether by adopting legislation denying benefits generally (or to a specific sector or sectors) or by promulgating measures directed at specific investors. That is both practical and consistent with the object and purpose of the ECT - co-operation, transparency and predictability*."

[72] *Ulysseas Inc v The Republic of Ecuador* (2012), UNCITRAL, Interim Award, [173]:

> "*A further question is whether the denial of advantages should apply only prospectively, as argued by Claimant, or may also have retrospective effects, as contended by Respondent. The Tribunal sees no valid reasons to exclude retrospective effects. In reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to*

Tribunals is not easy to reconcile, the outcome will also depend of course on the language of the relevant treaty.

IV. CONCLUSION

The widespread termination of India's BITs poses a challenge for Indian investors seeking to invest overseas and foreign investors seeking to invest in India from countries with which India has no BIT in force. One way of securing protection is by restructuring investments and obtaining protections under investment treaties of a third state. While corporate restructuring is legitimate, investors must pay close attention to the terms of the relevant treaty, including any requirement for investments to be made directly or for the investor to have significant activities in the state of incorporation (whether pursuant to the definition of 'investor' or by way of denial of benefits clause). Any restructuring needs to be conducted before a dispute becomes foreseeable to avoid the claim being struck out on the basis of abuse of process. Where the restructuring has other motives beyond merely obtaining access to investment treaty protections it would also be prudent to maintain detailed notes outlining the purpose of restructuring.

> *the investor from the time when it made its the investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State.*"

Guaracachi America Inc and Rurelec PLC v The Plurinational State of Bolivia (2014), UNCITRAL, PCA Case No. 2011-17, [376]:

> "*The Tribunal cannot agree with the Claimants when they argue that the Respondent is precluded from applying the denial of benefits clause retroactively. The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is "activated" when the benefits are being claimed." At para. 378: "On the contrary, the Tribunal agrees that the denial can and usually will be used whenever an investor decides to invoke one of the benefits of the BIT. It will be on that occasion that the respondent State will analyse whether the objective conditions for the denial are met and, if so, decide on whether to exercise its right to deny the benefits contained in the BIT, up to the submission of its statement of defence*."