

INDIA ADR WEEK DAY 2: MUMBAI

India's Evolving BIT Regime: Overhaul and Stakeholder Management

12:00 AM To 1:30 PM IST

MODERATOR

Mr. Abhileen Chaturvedi, Partner, Cyril Amarchand Mangaldas

PARTICIPANTS:

Mr. Gautam Bhattacharyya, Partner, ReedSmith

Ms. Genevieve Poirier, Partner, Lalive

Mr. Karan Rukhana, Counsel, Chambers of Darius Khambata

Mr. Manish Aggarwal, Partner, Three Crowns

Ms. Sapna Jhangiani KC, Advocate, Arbitrator, Mediator Blackstone Chambers

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1 **HOST:** The next session is hosted by Cyril Amarchand Mangaldas. The topic of the session is
 2 India's evolving BIT Regime: Overhaul and Stakeholder Management. The session is
 3 moderated by Abhileen Chaturvedi. The speakers include Gautam Bhattacharyya, Genevieve
 4 Poirier, Karan Rukhana, Manish Aggrawal and Sapna Jhangiani, thank you.

5 **ABHILEEN CHATURVEDI:** So the famous COVID dialogue, am I audible? Yes. Good
 6 afternoon everyone. A very warm welcome to the session on “India and Investor-State Dispute
 7 Settlement”. ISDS has always been a subject of intense debate, balancing the sovereign right
 8 to regulate on the one hand and the protection of foreign investors on the other. India's own
 9 journey has been slightly checkered when it comes to ISDS. In the recent times we've seen
 10 various discussions on negotiations of newer BIT's, which involve India and other States, as
 11 well as Regional Trade Agreements, along with a few FTA's with trade and investment
 12 provisions. We are fortunate today to have a distinguished panel, who brings insight from all
 13 these angles, who have represented governments, investors and have been active on the
 14 academic side of things as well. I'll introduce them briefly before we dive into the discussion.

15 Starting with Mr. Gautam Bhattacharyya, Gautam qualified as a Solicitor in England and
 16 Wales in 1993 and became a partner in ReedSmith in the year 2000. He served as the founding
 17 managing partner of the firm's Singapore office from the year 2012 to 2015 and was a member
 18 of the ReedSmith Global Board, its Executive Committee from 2017 to 2023. Gautam has
 19 extensive experience of acting in International Arbitrations under the rules of the ICC,
 20 UNCITRAL, LCIA, SIAC, ICSID and the Stockholm Chamber of Commerce. He has also
 21 conducted numerous litigations before the English courts as well as cases involving the courts
 22 of many other jurisdictions. Gautam is regularly ranked in number of legal rankings and is
 23 highly recommended for Litigation and Arbitration. Interestingly, Gautam was part of the
 24 representative teams acting on the first set of Treaty of Arbitrations invoked against the
 25 Government of India after disputes arose concerning the Dabhol Power Project.

26 Next we have Ms. Genevieve Poirier. Genevieve specializes in International Arbitration and
 27 Litigation, acting both as Counsel and as an Arbitrator. As an Advocate, she brings deep
 28 expertise in resolving high value cross-border disputes across sectors including
 29 telecommunications, energy, infrastructure, and financial services. Admitted to practice in
 30 New Zealand and England and Wales, she has gained significant experience with India-seated
 31 and India-related Arbitrations and draws upon her work with all major institutions and
 32 arbitral seats, including London, Paris, Geneva, New York and Delhi. She is placed across
 33 directories for her collaborative style and for navigating complex matters with strategic
 34 finesse.

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1 Next we have on the panel is Mr. Karan Rukhana. Karan is an Independent Advocate and a
 2 Counsel associated with the chambers of Senior Advocate Mr. Darius Khambata. He
 3 participates in commercial and constitutional matters before the Bombay High Court and the
 4 Supreme Court of India. In addition, his experience also includes participating in domestic
 5 and foreign-seated commercial Arbitrations related to joint venture and mergers and
 6 acquisitions disputes. He is licensed to practice in New York and in India. Karan holds an LLM
 7 from the Georgetown University Law Centre and is currently pursuing a PhD from the
 8 University of Vienna. His research focuses on the convergence of Investment Arbitration,
 9 climate law, and quantification of damages. Karan is also a regional representative for Young
 10 ICCA.

11 We also have Manish, who's a Partner at Three Crowns and Head of its India practice. He has
 12 extensive experience of representing clients at commercial and investment treaty Arbitrations
 13 across a broad range of sectors and in Arbitration-related court litigations. Manish is
 14 consistently ranked as a leading practitioner in Arbitration and public international law by
 15 major legal directories and is among a few selected Arbitration practitioners who are
 16 recognized in who's-who legal thought leaders, global elite and global Arbitration Review 45
 17 under 45 lists. He has also been recognized in the India Business Law Journal's list of top
 18 international lawyers for India related matters.

19 Our last panellist is Sapna Jhangiani, who's a KC with the Blackstone Chambers, based in
 20 Singapore, with over 25 years' experience in appearing before courts and tribunals and sitting
 21 as an Arbitrator or Mediator in complex commercial disputes seated all over the world. Sapna
 22 has practiced in London, New York, Dubai and Singapore and is called to the Bar in England
 23 and Wales, Singapore and the British Virgin Islands. Sapna is consistently ranked in the
 24 leading legal directories and was recognized by the Asian Legal Business as one of Asia's top
 25 female lawyers. Alongside her independent practice as an Advocate, Arbitrator, and Mediator,
 26 Sapna is also a judge in the Court of Appeal at the DIFC Court. Sapna has also been a member
 27 of the panel of advisors to the Attorney General of Singapore from the year 2021 to 2024. She
 28 was International Legal Counsel at the Attorney General's Chambers, Singapore.

29 With those introductions as all of you would have noticed, we have a stellar panel of people
 30 who have deep expertise in this particular field of Investor-State Dispute Settlement. I'll start
 31 with Karan and my first question to Karan concerns the recent evolution of investment treaties
 32 concerning India. As you all are aware, in the past decade, we terminated several of our
 33 Bilateral Investment Treaties along with certain treaties with investment provisions. We
 34 adopted a new Model BIT. We sought to renegotiate certain international investment
 35 agreements and about three/four months ago there was news reports in regular business

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1 newspapers where the Government said that the old Model BIT does not serve its purpose
2 anymore, and they will be coming up with a newer BIT. Given that backdrop Karan, may I
3 request you to give us an overview of this evolution and how it has implications for the flow of
4 foreign investment into the country?

5 **KARAN RUKHANA:** So, let me start by saying that it is no secret that no State or Claimant
6 likes to be on the receiving end of an Investment Arbitration award. So, following white
7 industries again, that's no secret. India did terminate around 68 to 70 BIT's over the years.
8 But with those terminations also, India sent requests for renegotiations. Now, this indicates
9 that yes, India also is conscious of the fact that BIT's are necessary for investments. It's not
10 that India is ignoring BIT's altogether.

11 Now moving to the figures, in 2022, India received about \$50 billion of foreign investment,
12 Foreign Direct Investment. But since then the figures have gone down, in 2023 and '24 we
13 have received only about \$28 billion. Now you cannot attribute exactly why there is a decrease,
14 but if I were to venture a guess, it could be that today there are not many treaties in operation
15 and investors are hesitant in investing without any treaty protection. And perhaps this is why,
16 Abhileen that you mentioned earlier, that the Finance Ministry wants to relook at the old
17 Model BIT and wants to revamp it. That said, even the recent BIT's entered into by India with
18 UAE for example, still does not include an MFN obligation, does not have FET obligation. So,
19 I'm not sure that even the new BIT's that have been entered into by India also offer a
20 substantial protection. But how this impacts figures going forward, we'll just have to see.

21 **ABHILEEN CHATURVEDI:** Thank you, Karan. That's an interesting way to start with
22 some statistics, which actually gives you a broader overview of how treaties may affect or not,
23 the flow of foreign investment into India. Next, I'll go to Gautam, who perhaps has the benefit
24 of starting of having a view from the inception of disputes against India and what's there in
25 the status today.

26 **GAUTAM BHATTACHARYYA:** Thank you. Thank you very much Abhileen. And it's
27 wonderful to be on this panel. Thank you for asking and to Shaneen for asking us to be on this
28 panel and being with this great list of panellists. I think the first thing to obviously state is to
29 state an obvious point that Investor-State Disputes involve tension between the sovereignty of
30 a State and its ability to determine what it wants to do and the rights of investors. And there's
31 an inevitable tension there. And I must also make an obvious point that this area of law has
32 developed increasingly in the last 30 years. I remember when I was an undergraduate student
33 many, many years ago, Public International Law was one of those subjects that you would not
34 necessarily do as an option. It's obviously changed now. It's a very important subject. But the

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1 whole concept of Investor-State Dispute Settlement is fraught with difficulties, and there's
2 been a backlash against it as a system for many reasons.

3 First, there's a feeling that the system is stacked against the State, that the Investor has the
4 advantage, has the upper-hand and therefore, States won't get a fair hearing and are at risk of
5 losing. Secondly, these claims are often what we would say, a little tongue-in-cheek as
6 telephone number claims, where the claims offer huge amounts against States and to put
7 pressure on the States. And these Arbitrations are also public when they're filed; so, there's a
8 sense of adverse publicity being levied against the State. Thirdly, in terms of the Arbitrators
9 who deal with these cases traditionally, and I'm going back now, thank you for revealing my
10 age, Abhileen, but going back to the early days, it's fair to say there's been a small pool of
11 Arbitrators who were really taking most of the appointments from the early days and even
12 now, and the group of Arbitrators is small. It's drawn from a relatively small number of
13 geographies and there's a feeling that I call India an emerged economy, I don't call it an
14 emerging economy. But there's a feeling that emerging economies are not getting their fair
15 share of Arbitrators appointed. And that therefore, there's a lack of cultural awareness and
16 sympathy for States like India who are very important, but who are obviously generating lots
17 of disputes.

18 Fourthly, if I may say that the process of getting an award in an Investor-State situation, if
19 there's an adverse award, the annulment process in Arbitration of these natures is not a very
20 advantageous one either. Annulment proceedings are notoriously difficult to win. The hurdle
21 to be jumped is very high. In my own experience of having done Arbitrations that have gone
22 all the way and then to annulment proceedings, we always keep a very positive side to things
23 and do our very best. But you have a feeling, even as an Advisor, that the system of annulment
24 is stacked against the State in that sort of situation. Now, happily, we have done cases where
25 we've been successful for States, of course thankfully so. But there are inevitably number of
26 reasons, Abhileen, why there's been a backlash against ISDS.

27 **ABHILEEN CHATURVEDI:** Thank you, Gautam. In fact, and I'm grateful to you for having
28 brought up that point, that there may be a perceived imbalance when it comes to execution of
29 these treaties and the practice of Treaty Arbitrations at large. I say perceived, because, well
30 there may always be some debate on whether it serves State interests or the Investors'. But
31 with that backdrop, it takes me to my next question to Sapna. India, as you are aware,
32 terminated its set of BIT's and now is in the phase of negotiating nuance. What do all these
33 newer BIT's or new treaties, as investment provisions reveal about India's evolving approach
34 and how do they compare with global reforms?

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1 **SAPNA JHANGIANI:** Thank you. Can I also just say how wonderful it is to be here for my
2 first India ADR Week? It's been a true embarrassment of which is of conversation and thought
3 leadership and I'm sure it won't be my last.

4 So, to answer your question, Abhileen, I want to look at context, content, clarity. And in terms
5 of context, it's what we need to follow on from what we've heard from Karan and from Gautam.
6 I recall ten years ago when India took the step of terminating almost all its BITs, and it came
7 out with a Model BIT. It was seen as so radical. And ten years on, given the direction of travel
8 and the backlash against ISDS that Gautam mentioned, it's not that radical anymore. And if
9 we look at the new generation of BIT's that India has entered into from around 2018 there
10 have been BIT's with Brazil, Belarus... not sure how to pronounce this, Kyrgyzstan, is that
11 right? Yes, thank you. Uzbekistan, for example. Except for the India-Brazil Treaty they've all
12 been based on the Model BIT. And the one that I'll focus on in a bit more detail is the India-
13 UAE Treaty. I have long links with the UAE, and it's one that I've looked at more closely.

14 So, if we look at the content of that, I think there are differences between the different treaties
15 that have been entered into. They are based on the Model BIT, but of course there are tweaks
16 and negotiated amendments, but it's very limiting. And I know Manish wants to talk about
17 this because we started discussing this in the break, that there's an exhaustive list of
18 investments. Investors will have to exhaust their local remedies for three years. Now, that's
19 shorter than the Model BIT. I think in the Model BIT its five years, so it's a concession, but
20 still, I'm not sure many investors want to be in the domestic courts necessarily for three years
21 before they can take further international steps to protect their investment or seek
22 compensation. You can't set up a shell company to get the benefit of treaty protection. The
23 treaty specifically excludes restructuring to acquire the benefit of dispute resolution
24 mechanisms under the treaty. There's a compliance with local law requirements. I think this
25 is quite interesting. There are obligations as well as rights for investors. And I think we're
26 beginning to see this in a new generation of treaties, generally. No general protection against
27 fair and equitable treatment, I think Karan mentioned this. There's very specific type of
28 treatment that's covered. For example no denial of justice, no fundamental breach of due
29 process. There is a lot of carve outs. And again, I think Manish might want to talk about this,
30 for example, measures related to taxation. Why is it the beginning of the treaty, you see that
31 the Parties reaffirm that each Party can regulate in pursuits of legitimate public policy
32 objectives, including the environment, health and safety. No third-party funding allowed. We
33 can talk about that later and each Party has to bear its own legal costs and the costs of the
34 Arbitration.

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1 So, I move on to clarity. In Singapore recently, we had Singapore Convention Week. I had the
 2 privilege of chairing GoLive. And we had, as our keynote speaker, Martina Polasek from ICSID
 3 and she said the fundamental purpose of ISDS is the promotion and protection of investment
 4 through legal certainty, and Abhileen spoke about the perceived imbalance that we've had in
 5 the past between Investors and States. And I think what we see with each new generation,
 6 BIT's in particular, this one that I'm speaking about is that there is certainty for the State,
 7 certainty as to how they can regulate and I suppose to some extent, certainty for investors.
 8 Whether it's the kind of certainty they want or not, I don't know maybe Manish can comment
 9 on that, but you can see it's a real attempt at trying to rebalance that perceived imbalance.

10 **MANISH AGGARWAL:** May I?

11 **ABHILEEN CHATURVEDI:** Please go ahead. Yes.

12 **MANISH AGGARWAL:** Good afternoon, everyone. I think I just want you to pick up on a
 13 few themes coming out of remarks made by both Gautam and Sapna. We've, of course, kind of
 14 seen this backlash against ISDS manifest itself in many ways. But I think just to be provocative,
 15 there is an argument that a lot of that backlash is actually misinformed glamour and just to
 16 take some of these arguments, I was called the IBA Subcommittee on Investment Arbitration
 17 Treaty, and as one of our projects we did a broad survey of users and actually looked at each
 18 of the specific criticisms that were being mounted against ISDS. Let's take the first argument
 19 about the investment treaties being at odds with the sovereignty of States. The reality is that
 20 these treaties are a manifestation of that sovereignty. States enter into these treaties in exercise
 21 of those sovereign powers. These treaties don't typically prevent States from implementing
 22 changes to the laws and regulations. They simply regulate how States may change laws and
 23 regulations. And of course, you're trying to then balance the State's interest with those of the
 24 investors.

25 The second, I think, aspect that we address as part of the IBA's work was that you have a wide
 26 range of treaties with very differing substantive protections, sometimes formulated in very
 27 open terms. And therefore, you do get investment treaty tribunals under different treaties,
 28 interpreting them differently in the context and in light of the object and purpose of the specific
 29 treaties. I'm not suggesting that it's a perfect system. There is, of course inconsistency there,
 30 but I think the solutions that are being suggested more broadly tend to conflate those two
 31 elements in terms of the substantive protections and what States can do in that regard in terms
 32 of treaty making. And the procedural mechanism which is Investor-State Dispute Settlement,
 33 and I think one has to keep those two stance separate in terms of suggesting reform.

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1 And I think the third point I would make is that if one looks at the actual statistics in terms of
 2 decided cases, the suggestion that the system is stacked against the States is not borne out by
 3 those stats. If you look at all of the UNCTAD expert studies, they confirm that more cases are
 4 actually dismissed, either at the stage of jurisdiction or admissibility. And even where cases go
 5 through that hurdle and get to the stage of merits, the damages that are often awarded to
 6 investors do not reflect the full amount that's sought. So, again one has to kind of really pass
 7 the criticism. Now I am not necessarily apologizing as an Arbitration practitioner for the
 8 system we have, but I think we need to look at the actual facts when we look at this broader
 9 backlash. It may be a bit too late, because now obviously you have the UNCITRAL Working
 10 Group-3 looking at the reforms and States are increasingly focused on this. But I think one
 11 thing we need to be all mindful of as people who believe in the system a global rule of law
 12 system that we need to really look at the facts before we throw out the baby with the bath
 13 water.

14 **ABHILEEN CHATURVEDI:** Thank you, Manish. That's a very valuable intervention in
 15 between just to sort of allay fears that it's not all bad and it's all not mafiosi Investor-State
 16 Dispute Settlement Mechanism. But continuing with the theme of where we are in terms of
 17 evolution of our treaties, mostly concentrated towards India. Genevieve, I want to come to you,
 18 what, in your experience, have you noticed in the recent times, where India has somewhat not
 19 gone its Model BIT way or the old treaties that would have predicted investor interests?

20 **GENEVIEVE POIRIER:** Yes. Thank you and good morning, good afternoon, everyone. I'd
 21 also like to say thank you for having me. This is also my first ADR Week and it's been magical
 22 already and brilliant to share the panel with everyone here. Yes, to pick up on what my co-
 23 panellists have already said, yes, there are the new BIT's that are being concluded. Again,
 24 several of them, Brazil, UAE, is State-State, I mean, the investors don't have the right to take
 25 claims and the same, perhaps is true of TEPA. And I don't know if everybody is familiar with
 26 that but I'm a partner at Lalive in London and my colleagues are in Switzerland, so it's close
 27 to home for them. And TEPA is the Trade and Economic Partnership Agreement, which is a
 28 free trade agreement between India and the European Free Trade State. So that's Switzerland,
 29 Norway, Lichtenstein, and that will come into force on the 1st of October.

30 And to pick up on this concept of Foreign Direct Investment, I was surprised to hear that there
 31 was such a low level, actually, last year. And what is committed under TEPA alone is
 32 admittedly over the next 15 years, but 100 billion in Foreign Direct Investment from those four
 33 States and also the creation of a million jobs. Now, these are soft promises, I suppose, but it
 34 demonstrates that encouraging investors to get back involved with India in this structure is
 35 certainly on India's radar. And similar to the BIT's, I mean TEPA doesn't protect investors

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1 against expropriation. There's no FET, there's no MFN nor National Treatment Foreign
2 Investments, and there's no ISDS dispute resolution. So we see a theme emerging, but even
3 still India is encouraging investment, balancing investor's rights against the protection of the
4 State, and I think it's all moving in the same direction. I mean, again, picking up on this 28
5 billion, 28 billion last year? I mean, 27.8. Well, of that, 2.3 was between Switzerland and India,
6 and I was surprised, actually by that, because you can only export so many watches, but there
7 we had chocolate and chocolate, but apparently also pharmaceuticals and coming in the
8 reverse direction, organic chemicals, electrical machinery and textiles. So, there is fertile
9 ground, and I think India is doing a good job, certainly Switzerland, I think is one of the maybe
10 25 countries that is lining up right now to conclude new BIT's and this is... TEPA is a way in.

11 **ABHILEEN CHATURVEDI:** I'll just add a couple of things to what you said. This Treaty is
12 interesting to the extent that it has both trade and investment provisions, and when it comes
13 to the dispute resolution provision, it explicitly says that this dispute resolution is not meant
14 for the investment chapter. And for the investment chapter, there's a consultations sort of a
15 dispute resolution mechanism which involves the two governments. Now, I don't know how
16 in reality will this play out because I don't know how will investors then go to the respective
17 governments and then the governments will consult with each other. Well, time will only tell
18 how this plays out in reality. But continuing with our discussion and not digressing, Manish,
19 I'm going to come back to you again. We've terminated the so-called first-generation
20 International Investment Agreements, yet we continue receiving a consistent amount of FDI.
21 Karan, recently, Karan just shared certain numbers a few moments ago and there is a
22 continuous amount of investment that we do receive in India. So, from the foreign investor's
23 perspective how do they restructure or structure their existing investments in India under the
24 IIA's that remain in force?

25 **MANISH AGGARWAL:** Thanks Abhileen, and I can share some insights based on our
26 recent experience of advising clients who are making significant investments into India across
27 various sectors. I think a recurring question that all of us get as practitioners is, how to
28 structure these new investments into India to benefit from the International Investment
29 Agreements that now remain in force? And this is leaving aside questions of protection of
30 existing investments under the treaties that have been terminated because they then bring into
31 play complex questions around sunset clauses. So, we are focusing only on new investments
32 into India and how to structure those investments. I think we are seeing two main trends. One
33 is about investment planning, the other is around structuring of contracts, particularly with
34 State counterparties, and let me address each of them in turn.

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1 First, in terms of investment planning, I think there is now a broader recognition that timing
2 is key. As many of you would be aware, there is now a growing trend in Arbitral Jurisprudence
3 where Tribunals are showing sympathy to objections that if the dispute is already on the
4 horizon then structuring at that stage may be too late. And again, you see different arguments
5 being done around abuse of process with restructuring. So, I think investors are aware of that
6 and therefore, they are treating investment planning, particularly under investment treaties
7 at the same time as tax planning. So, that's something we are seeing in terms of the practical
8 advice that's been sought. Then the question is, what are my choices? The reality is the menu
9 of options now, following the termination of several of India's BIT's is quite limited and
10 actually we recently undertook a survey based on publicly available information. There are 26
11 Indian treaties still in force and those include eleven Bilateral Investment Treaties and 15 free-
12 trade or preferential trade agreements that have investment chapters, the point that you
13 highlighted. Out of these 26 treaties only 16 contain Investor-State Dispute Resolution
14 provisions. And therefore, it's that menu of 16 that investors for investors take as a starting
15 point.

16 Then the next question that you get asked, or you have to address in the analysis, is how do
17 you avail yourself of the substantive and procedural protections in these treaties? And again,
18 the threshold questions that you have to consider are, would you or the entity you're going to
19 set up for the investment qualify as a protected Investor under the treaty? Again, Indian
20 treaties have very different formulations along the lines of, Sapna, you highlighted. The second
21 question is would my investment qualify as a protected investment in the Indian territory?
22 And again, you get varying formulations in current treaties from a broad range of assets to
23 definitions that now build in carve-outs and exceptions, even exploring portfolio investments
24 in certain treaties.

25 The third question is, if I do have a dispute with the Indian State, would that fall within the
26 scope of disputes in the ISDS provision? And again, you have different formulations going
27 from treaties that provide for jurisdiction over any dispute to treaties that limit the Tribunal's
28 jurisdiction only to disputes regarding breaches of the substantive protections. So again, you
29 have to look at all of those factors, and then you look at substantive protections in treaties. You
30 look at whether the treaty has carve-outs. Again, if you look at the new generation treaties, a
31 lot of treaties as Sapna mentioned as well carve out taxation measures from within their scope.
32 They also carve out subsidies from the scope of the protections under the treaty, which again,
33 can become quite relevant in terms of sectors where foreign investments do rely on subsidies
34 offered by either the State or the Centre. So, again, you have to consider those treaties quite
35 carefully.

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1 From a comparative treaty contents perspective, I would say that some of the older Indian
 2 treaties that are in force offer the broadest protections. But let me highlight what those treaties
 3 are and why they're not really being used. The three most favourable treaties that India has
 4 now are the ones with Senegal, Libya and the Philippines. They provide fair and equitable
 5 treatment, MFN, no local remedies or exhaustion requirement. But in these, in practice, as
 6 you would appreciate, these are very awkward platforms for multinational investors, not
 7 commercially attractive, politically fragile. So, you're not really going to pump a lot of money
 8 into India through these countries, and they don't often provide you, even with a favourable
 9 tax regime as well. And what that has meant is that investors have been pushed towards the
 10 newer generation treaties, one of which Sapna talked about, UAE treaty. And if you'd asked
 11 me that question three years ago, as a foreign investor, I would have said route your
 12 investments into India through the UAE. It was a most favourable treaty that India had at the
 13 time. I think, what has happened now is that a lot of investments have moved towards
 14 Singapore and it's not because the Singapore, India CECA is favourable. Actually Singapore-
 15 India CECA is very restrictive of investor's rights. It has very broad exceptions and again, if
 16 you are just looking at the treaty content, it's not something that you would really find
 17 attractive as an investor, but I think the investors are favouring the UAE or the Singapore
 18 treaties for searching into India, largely because of the trade ties that the countries have and
 19 also because these countries offer you various other incentives.

20 So, I think that, in a nutshell, what we are finding in practice is that even with a narrower
 21 investment treaty protection package, you know, investors are still investing into India. You
 22 don't really have investors retreating, and that's where I think, Karan, I'm not seeing that in
 23 my practice again I'm not speaking at a more generalized level. People are investing heavily
 24 into India. They're not necessarily being deterred by the fact that India doesn't have a very
 25 robust treaty system in place, and they're trying to work with what's available. And in terms of
 26 what's available, I think treaty planning is just one layer. We are now seeing a resurgence of
 27 Investor-State Contracts even in this context where investors are placing emphasis on
 28 contracts with bespoke protections. In some of our recent negotiations, we've seen a greater
 29 emphasis on stabilization provisions on a tailored dispute resolution clauses and governing
 30 law clauses. And in fact, in one of my cases the investors sought to build into their contract all
 31 of the protections from the treaty, the earlier treaty, and again, I expect that we will see that
 32 kind of move back towards investment contracts, which was pretty much before ISDS took
 33 over.

34 **ABHILEEN CHATURVEDI:** Thank you, Manish. That's a great 360 degree view of the
 35 entire sort of realm post termination of all our BIT's and I take a lot of positive from what you
 36 said the fact that India still continues to remain an investment destination despite the fact that

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1 there may not be any BIT protections there. We'll, of course, touch upon the fact how this
2 impacts Indian investors who are looking at fresher pastures for investments. But I'll come to
3 you, Gautam, with the same question. How have you seen these structuring and restructuring
4 of investments in this post termination phase?

5 **GAUTAM BHATTACHARYYA:** Thank you, Abhileen. Manish has brilliantly summarized
6 the position. And for that reason, and for two others, firstly that I agree completely with what
7 Manish says. And secondly, given that we've got a fair bit to get through, I'm going to yield my
8 time back to you and just adopt the second and third judge in the court of appeal situation and
9 say I agree, I also agree.

10 **ABHILEEN CHATURVEDI:** Thank you, Gautam, for a very precise answer. Okay, we've
11 dealt with the fact how foreign investors have sort of recalibrated their approach to India in a
12 post non-BIT world, how do India, as I said, how do Indian companies and In-House Counsel
13 approach treaty protections when investing abroad in this realm? Can I go to Karan first and
14 then to Sapna, after.

15 **SAPNA JHANGIANI:** I'm also yielding my time because I know we have a lot of topics to
16 get on with. So I yield to you, Karan.

17 **KARAN RUKHANA:** So, hopefully I can do justice to it. Okay, so one thing is Indian
18 investors investing abroad are serious players. For instance, last year, we had more foreign
19 investment going out than what was coming in and investors also are now sophisticated, and
20 as Manish alluded to earlier that they do know and are aware of how restructuring works. Like,
21 for example, one of the first cases involving corruption, the *Spentex* case. That was the case
22 where the investor was Indian and wanted to invest in Uzbekistan. And at that point of time,
23 we did not have a BIT with Uzbekistan. We do now. So, what it did was it restructured its
24 investments through the Netherlands to avail the benefits of the Netherlands, the Dutch and
25 the Uzbekistan BIT. It did fail in its investment claim, but nonetheless, it had access to these
26 measures and access to Arbitration, thanks to restructuring.

27 Another instance of such sophistication is where Vedanta, an Indian company has invested in
28 India, through the UK, where they avail the benefit of the 1994 India-UK BIT's. Now these
29 BIT's, although have been terminated, they still have sunset clauses which span for 15 to 20
30 years. Now using that BIT, Vedanta has recently launched an investment claim against India.
31 How that plays out, we'll have to see. But the fact is, today, because of restructuring, the Indian
32 investors are able to launch claims against India and other countries as well. As Manish said
33 earlier, the timing and the circumstances of this restructuring is crucial. And now, as Sapna

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1 also mentioned earlier, the new BIT's are consciously and expressly stating that shell
2 companies restructuring through shell companies is not going to be allowed, which is what
3 was happening earlier. So earlier, what would happen is even if the investment let's say, was
4 restructured at the first stage, not when the dispute was on the horizon. It would be
5 restructured in such a way that you would just set up a shell company and route the investment
6 through that company. Now, that would not be sufficient anymore so I guess you would see
7 more sophistication on how the restructuring is going to be done, but I see that it is going to
8 be done.

9 **ABHILEEN CHATURVEDI:** Sapna, you have something to add?

10 **SAPNA JHANGIANI:** No, we've got so much to get through. I want to talk about the
11 multilateral investment court later, so I use it my timeline.

12 **ABHILEEN CHATURVEDI:** Thank you. Thank you, Karan. I personally was not aware of
13 the Uzbekistan angle that you just brought in, and maybe that's what perhaps prompts the
14 counterclaims, sort of a substantive right in that particular treaty but something new to learn.
15 Now given with all of this backdrop of newer BIT's and newer investment treaties, sorry,
16 treaties with investment provisions, in recent years, and rightly so, there has been a lot of
17 discussions and debate on the environmental as well as the climate impact, or rather the public
18 interest objectives of these investments at large. So, my question to Genevieve on this first,
19 what kind of Investor-State Disputes have already risen in this context, what lessons can be
20 drawn from those disputes and do you see any of the newer BIT's addressing this issue?

21 **GENEVIEVE POIRIER:** Right. Well, in the interests of time, that is a conversation that
22 could take all afternoon. But going quickly and just picking up then on Human Rights, CSR
23 counterclaims. Really, there's been a spectre of environmental counterclaims for maybe 15
24 years now. Certainly with Romania in about 2011 and then the first successful claims or
25 counterclaims made by a State in Burlington in 2017, in Perenco in 2019 with Ecuador. And
26 in those cases, for those who aren't familiar, Ecuador was awarded around 100 million USD
27 for environmental damage caused by investors and since then these kinds of counterclaims,
28 claims by States have bobbled along, and there's certainly a way in, either through the
29 UNCITRAL Rules and under the ICSID convention. Although I know that India is not a
30 signatory but often these kinds of counterclaims fail because either the Tribunal doesn't have
31 jurisdiction or there's no cause of action. And so, how do you get your hands around that, how
32 do you, as a State, start to protect your CSR and environmental rights? And exactly, so under
33 this Uzbek BIT for the first time, and I think it is unique there is specifically a right to
34 counterclaim. And also a protection of CSR and this sort of Corporate Social Responsibility or

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1 Human Rights can span all kinds of things environmental, right to water, right to clean air,
 2 even the taking of property. Property is also a human right. So, in this way, I think India is
 3 getting its hands around the potential to turn the tables, if you like, on investors. And to pick
 4 up something that Gautam said, there is this perception that ISDS is entirely weighted against
 5 States and so, to allow counterclaims or to make it very clear how they can arise, starts to
 6 potentially redress that balance. I mean, perhaps cynically, it's not all about protection of the
 7 environment, perhaps it is just a bargaining chip. So, as the State, instead of commencing a
 8 proliferation of local actions against the investor, you actually have a direct route in. But I
 9 mean, the US, excuse me, the Uzbek BIT is not alone in the world. So, in Africa also there's
 10 very clear under the AFCFTA all kinds of rights that protect the State in terms of rights of
 11 individuals, rights of indigenous communities, protecting rights that arise on gender and then
 12 I could go on and on. But I think there is a mood, there's a mood towards both counterclaims
 13 and the protection of the environment more generally.

14 **ABHILEEN CHATURVEDI:** I think, that's a positive sign because personally, I feel that
 15 investments should have this also in mind when they are going to a developing country where
 16 they may be lack of knowledge on this front, but if there is a provision in an international
 17 treaty, maybe there's a more responsible investment, so to say. Manish, I'll come to you with
 18 the same question, where do you see this getting highlighted in the newer BIT's or the newer
 19 treaties?

20 **MANISH AGGARWAL:** Thanks so much, Abhileen. So, in terms of this interaction between
 21 host States' right to regulate an investment protection, most of the cases that have arisen so
 22 far have arisen under the old-generation BIT's from the 1980's and 1990's, which don't contain
 23 the kind of regulatory carve-outs that Genevieve, you've mentioned and Sapna, you mentioned
 24 earlier, which preserve the host States' right to regulate and under the old generation BIT's
 25 you have very complex issues arising at the jurisdiction stage, at the liability stage and
 26 quantum stage. But just to give you a flavour of the kind of issues that arise in practice and
 27 what the States have done in the newer generation BIT's to address those issues, the central
 28 kind of issue in most of these cases is this - where is that dividing line between legitimate non-
 29 compensable regulation and a compensable breach of investment treaty protections? In other
 30 words, how far can a State go with a regulatory change before it tips into a breach territory? If
 31 you really look at these questions, what the Tribunals are having to engage with is, who should
 32 bear the economic burden of that regulatory change? Whether it is the State or the Investor?
 33 Because if you're acting for the State and acting for States and investors, the question is really,
 34 I've implemented change in pursuance of a legitimate public interest policy and therefore, even
 35 if the investor is adversely affected, I should not have to pay compensation for that. If you're
 36 acting for the investor, your argument is going to be these treaties don't prevent the State from

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1 regulating in the public interest, but I should not be the one having to bear the entire economic
2 burden of that choice by the State, particularly in circumstances where the State offered
3 various incentives to me to invest in that particular country.

4 So, again that's really the debate you have in these cases, and one can obviously debate about
5 it at the public policy level. But it becomes a question of allocation of economic burden in
6 practice. And then of course, you have newer generation treaties providing for various carve-
7 outs. The reality is that even if you look at the cases under those new treaties and Ecuador and
8 Colombia comes to mind. Tribunals are still interpreting those carve-outs in a very restrictive
9 way, and unless States are very specific about the kind of regulatory changes that would be
10 shielded from naivety, Tribunals in some cases have still found them liable for those changes.
11 And again, one has to look at the facts of the cases, to kind of find that balance. But I think the
12 upshot of all of that is that of course you can have treaties. And the new generation treaties
13 can create these broad carve-outs. But you really, as an Investor of State, have to carefully look
14 at how those are being interpreted and being applied by treaty Tribunals before you can
15 actually look at the scope of protection.

16 **SAPNA JHANGIANI:** Just to add on, if we take a step back, this tension that you've
17 identified between investor rights and States' right to regulate, I think it's one of the issues
18 that, it's the heart of the backlash of States to ISDS because they're asking themselves, well,
19 this Tribunal of people in professional suits, most of whom are International Lawyers sitting
20 in a conference room in Geneva or Washington, who are they to tell us about all aspects of
21 public policy? Now we understand, of course, they've signed up to treaties, and those treaties
22 have investor protection. But if you see it from their point of view, I think that is one of the
23 fundamental issues that we're grappling with. And when we do move on to look at some of the
24 reforms are, I think it is trying to address this perception that we've got these people who have
25 nothing to do with us, telling us about aspects of our sovereign policy. I think it really goes to
26 the heart of the debate.

27 **ABHILEEN CHATURVEDI:** Thank you Sapna. Thank you Manish. And I hope there is a
28 lot of development in this sphere in the years to come. But sticking to the same question, can
29 I trouble Karan also, once again, do you see any India specific examples where we have to see
30 how we learn from our past experiences and what can be done in the future?

31 **KARAN RUKHANA:** So one of the things that comes to mind are the *Spanish Solar* cases.
32 These cases are stemmed from the fact that Spain exercise their sovereignty to regulate and
33 reduce the subsidies that they were offering earlier to attract foreign investment. Now, this
34 brings me back to the fact to something that you mentioned earlier, Manish, that how it is

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perceived, as ISDS is perceived as being stacked against the State. I don't think it's just a perception, I think it is to an extent fact. I say so because if you take an example of these cases, you have similar facts in many of the cases, but the outcomes are different. Now, I agree that States sign these investment treaties and they exercise the sovereignty while doing so, but when we were exercising the sovereignty in signing these treaties they weren't signing away their right to regulate and the manner in which, for example a wide and vague FET provision is being interpreted today, that is something the States did not envision. So, somehow when a State, for example, like India, who has committed, which has committed to achieve net zero by 2070. Somehow today, in consonance with its international obligations, they alter their energy policies. Tomorrow they will be susceptible to investor claims for phasing out gas production or coal production. Now, how do you balance these interests? But according to me, there are public policy issues that must prevail. I'm not saying that the State goes scot free, but to award damages where sometimes the projects haven't even taken off is well, open to criticism I say. The other area where I feel India is going to interact with investment claims is carbon credit and carbon trading, so we haven't set up a mechanism yet, but we are in the process and it's a new area for us. The policies that we frame, the policies they are going to change. They are not going to be perfect but at the same time the Indian Government must be careful because there have been claims by foreign investors against host States for change in policy in this field as well, and the recent thing that comes to mind is online gaming, I could see investor claims based on violation of legitimate expectations coming from the ban of online gaming. We haven't seen any yet, but let's wait and watch.

ABHILEEN CHATURVEDI: Thank you, Karan. I'm looking forward to that thesis, after you have concluded your PhD. It will be an interesting read. Now, having touched upon these substantive issues, coming back to bit more procedural issue and which kind of affects the substantive at large, last year in the month of February the Expert Committee on Reform of Indian Arbitration Law recommended separate legal framework for Investor Treaty Arbitrations. They raised concerns about Third Party Litigation fundings and supported the creation of multilateral investment court which has been going on and has done a lot of round of discussions at the UNCITRAL Working Committee - 3. Taking these issues one by one, Gautam, first come to you, how does the world of third party Litigation, funding and ISDS interact?

GAUTAM BHATTACHARYYA: Thank you, Abhileen. I'll try to be really brief, if I can, just mindful of time. Third party funding is here to stay. It's a demand and supply issue and there are rightly some ISDS claims that are proper and should be brought and let's not forget that third party funders are business people. They do their due diligence very, very thoroughly before they take on cases. It's a long process, they'll take multiple legal opinions on the merits

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1 of the case, they'll want to know the ins and outs of a case; so, I don't subscribe to the point of
 2 view that third party funding is bad. I know, of course, that there was criticism that the unfair
 3 claim against India was funded by a third-party, but there it is. You're never going to please
 4 everybody. Third party funding is a product that's there to be used, and it's only right that
 5 where there is a good claim and like I said, there'll be thorough due diligence before a claim is
 6 brought that third party funding may well be the reason why a claim is brought and why it's
 7 not just left to one side. So let me yield back some time to you.

8 **ABHILEEN CHATURVEDI:** Thank you, Gautam, but just to tell our audience the kind of
 9 the funding which has been raised for that case is about \$14 million, so it's not exactly a cheap
 10 exercise conducting these sort of Arbitrations.

11 **SAPNA JHANGIANI:** Investment Arbitration doesn't have to be cheap.

12 **ABHILEEN CHATURVEDI:** Sapna, coming back to you.

13 **SAPNA JHANGIANI:** Yes, two quick points on Third Party Funding and Investor-State
 14 Arbitration. First relates to the appetite for Third Party Funding and Investor-State
 15 Arbitration. A friend of mine is a Chief Investment Officer of a large global third-party funding
 16 firm, and the impression I get from discussions with him is they're not that interested in
 17 Investor-State claims anymore because, of course, they're very unpredictable as Karan said, if
 18 you look at the new generation BIT's, there's a lot of carve-outs. Investor protection is limited.
 19 So, a lot of the cases we see and have seen are the older BIT's which are quite vague. As you
 20 say, it may not have been anticipated that this would be the way that disputes would evolve.
 21 And so, the outcomes can be really unpredictable. And I think, third-party funders have
 22 discovered that the hard way. So, I'm not sure, most time we won't see third-party funding of
 23 Investor-State Arbitration. I'm just not sure it's their priority at the moment. And the second
 24 point is just to agree with Gautam. I think they get a bit of a bad name. My own experience
 25 with third party fund is actually, they tend not to interfere with the process and they're really
 26 keyed on settlement, which can be quite a good thing. They want to eliminate the risk, and that
 27 can also be good for clients.

28 **GENEVIEVE POIRIER:** Can I just say, also, I think what sticks in the craw of the populace
 29 is that the multiple that the funders get. So, they may be spending 14 million, but they are
 30 doing that on the basis that they will cover three times, five times, multiple. So it is a gamble,
 31 certainly, and they do it in an educated way. They don't interfere. It's very sophisticated, but I
 32 think, especially if you are a citizen of a host State and you know that not only is your
 33 government going to hand out 100 million, but they're paying out a quarter of that to this

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1 nameless, faceless corporation who didn't deserve it, that doesn't sit right with your man on
2 the street.

3 **SAPNA JHANGIANI:** India UAE BIT, every party pays a certain cost. No third party
4 funding. And I wonder if we'll start to see more of that.

5 **MANISH AGGARWAL:** I think even in India Uzbekistan BIT there's a prohibition on third
6 party funding. I think we'll have to then, kind of see and practice how the term third party
7 funding is interpreted because you often have these claims taught in corporate chains funded
8 at different levels, so I think something to watch out for.

9 **ABHILEEN CHATURVEDI:** That's an interesting thought, Manish. Sorry, Genevieve, you
10 don't need to put off your mic. I am coming back to you again for your views on multilateral
11 investment court and how does that play into India's evolution of its modern day BIT's?

12 **GENEVIEVE POIRIER:** Gosh. Well, in the 45 seconds that I see on this screen, I think that
13 will be a difficult one. And, Sapna, you might want to jump in as well. But I think the
14 multilateral investment court as an alternative to ISDS is something that has been in
15 discussion for at least a decade. And yes, to pick up on, as Gautam said perhaps there's a
16 perception that developing countries, and to the extent that India is perceived as a developing
17 country in the Arbitration mafia that they still don't get a fair shake at ISDS and might not get
18 a fair shake in a multilateral investment court either. Also and mixing... in 7 seconds... mixing
19 topics. The idea of appointing judges to a multilateral investment court is still politicizing the
20 process is that actually an improvement on ISDS, despite all of the benefits that perhaps an
21 MIC could bring, like transparency, like consistency. Sapna, do you want to...?

22 **SAPNA JHANGIANI:** Two lenses through which to look at this. First as a conceptual lens.
23 How are we going to appoint the judges to make it fair? Who's going to pay for it? These are
24 all the issues that are being talked about, UNCITRAL Working Group - 3, a lot of resistance to
25 a multilateral investment court. On the plus side, there would be certainty, consistency, a
26 theme that we've been talking about a lot today, on today's panel.

27 The second lens I want to think about, though, is the practical lens. The EU, as we all know, is
28 very keen on the multilateral investment cord if you look at their latest agreements. So, for
29 example, the EU-Singapore Investment Protection Agreement, what it provides for is
30 mediation at any time and also for an *ad hoc* court to be set up. A third of judges Singaporean,
31 a third from the EU, a third, neutral. And my practical point is this, if the EU, which is a big
32 bloc of countries, has a lot of negotiating power, if they're going to be entering into more and
33 more and more of these treaties, one wonders if there will be some momentum built and if

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1 we're looking at the type of instrument that's being discussed and working group three, which
 2 is a multilateral instrument, you opt into things, you opt out of things. I wonder if we'll see the
 3 momentum grow. And it will start to make more and more sense for more and more countries
 4 maybe instead of having an *ad hoc* investment court in a bespoke agreement to start opting in
 5 to whatever already exists. So I just wonder if there is a practical way that this will all evolve
 6 that might be very different from the conceptual obstacles to the court.

7 **GAUTAM BHATTACHARYYA:** Just a couple of reactions to what Sapna and Genevieve
 8 have rightly said, I must say, and again, not to be provocative, I just can't see it happening. I
 9 know it's been talked about, and I'm not going to repeat the arguments for and against. I just
 10 think it's just too much of a prickly issue and India has already said it's not going to accept a
 11 multilateral court. Some countries, and there are other countries, too, that have publicly stated
 12 this. And the real concept is also about just how do you make it fair and also understanding
 13 the issues and all? And there's so many difficulties with it and I just don't see it happening.
 14 And also, dare I say, the Arbitration mafia that currently deals with these sorts of cases is going
 15 to be a very big rock to move, right, in terms of that stuff, so I think for all those reasons, I
 16 remain very sceptical about the concept.

17 **SAPNA JHANGIANI:** We should have a bet. We should see where we end up in 20 years.

18 **ABHILEEN CHATURVEDI:** We've been allowed five more minutes. And within this last
 19 five minutes, and I will go to all the panellists. I'll throw this open to all the panellists. In this
 20 backdrop of whether an investment court is a viable option or not, how do you see the scope
 21 of other forms of dispute settlement, and how are these mechanisms working in place if they
 22 are, from your experiences? I can start with maybe Manish and then Sapna, would you like to
 23 contribute after?

24 **MANISH AGGARWAL:** In terms of alternatives to Investors-State Arbitration. If you look
 25 at most of the treaties in force, they already have built into them, a cooling-off period, typically
 26 three to six months, where the State and the investor can explore an amicable resolution of the
 27 dispute. And what we are seeing in practice is a greater strategic use of notices of dispute or
 28 trigger letters where an investor can use those notices to internationalize a dispute to get more
 29 political attention than purely domestic dispute would get, to explore whether the State would
 30 be willing to settle a dispute, while preserving the Arbitration option. And in that context, we
 31 are also seeing a lot of discussion around Investor-State Mediation, which can facilitate
 32 solutions that can combine both financial and non-financial elements, particularly kind of
 33 tweaks to the regulatory changes, which obviously you can't achieve in practice in an

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1 Arbitration. So, again, I think that's a trend that's beginning to emerge and one that I expect
2 to continue.

3 **SAPNA JHANGIANI:** There's tons of work being done to encourage the use of mediation in
4 Investor-State Arbitration, just for example, ICSID are doing lots of training on this. They've
5 got their mediation boards. It's all great. We still have all the obstacles to the use of mediation
6 ISDS, which is, for example, accountability. People want a piece of paper to pay against and
7 one of the options that I think we should see more use of. Now, you'll recall that before ICSID
8 had had these new mediation rules they had conciliation rules. What the problem is, not many
9 people understood what conciliation actually meant, what it actually means is a non-binding
10 mutual evaluation, and I think that it's great that we've got all this focus on mediation now,
11 but I wonder if we now need to start telling everybody what conciliation is. It's still around,
12 there's still a panel of Conciliators. Maybe we could see more use to address this problem of
13 accountability, more use of this conciliation mechanism, some kind of neutral evaluation
14 which can be taken back to the State to sign off on whatever mediation or whatever settlement
15 can subsequently be agreed after the conciliation, you could have the neutral evaluation as a
16 starting point for negotiation. There's all kinds of creative options out there. I think we actually
17 have more work to do in that area, mediation is still great, but I think you need to find a way
18 to combine it with neutral evaluation.

19 **ABHILEEN CHATURVEDI:** Karan, Genevieve, any final thoughts on this before we go to
20 the audience for a couple of questions?

21 **KARAN RUKHANA:** I think I'm going to pass on this one. I don't want to keep people from
22 their lunch.

23 **ABHILEEN CHATURVEDI:** Any questions from the audience? We can take a couple of
24 questions. There's one.

25 **AUDIENCE 1:** Quite interesting discussion on the BIT, rather investments into India. I feel
26 that the few reasons which could be after the change in the 2016 that investments getting into
27 India have become easy and difficult; both the things have taken place. To tell you, some of
28 the very stunning things are right from the time of 2000 when the **Enron** case, where power
29 was supposed to come into India, like flowing into India has been made a stumbling block into
30 that. That's a big Arbitration case, one of the largest one into the India, then comes to the
31 **Vodafone**, where the retrospective taxes...

32 **ABHILEEN CHATURVEDI:** Sir, may I just request you for your question to the panellists
33 on this?

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1 **AUDIENCE:** Yeah I have to... precursor should be there, otherwise, I can't ask the question.
2 So, like that, if you see that there are several other companies which were having hurdle, like
3 when you see the Foreign Direct Investment into the stocks and all where the long term capital
4 gains and all, which was very hostile and they were taking off, FDI's were moving out. That's
5 how the things of the investments in 2023-24 post pandemic had come down with this long
6 term capital gains. So, now the question is, that with this kind of changes and all and with
7 having such uncertainties when it comes to the settlement of the legal disputes and other
8 things, how do you think that these we can see in the future as how you are giving the things
9 that there'll be a good amount of flow into India from the foreign companies?

10 **ABHILEEN CHATURVEDI:** Is the question addressed to a particular panellist or anyone
11 can answer?

12 **AUDIENCE:** All are experts, anyone can answer.

13 **KARAN RUKHANA:** So, I will say this. It all boils down to governance. If you have clear and
14 transparent governance I think investment is automatically encouraged. I'll give you an
15 example. For example, Brazil. Its investment treaties do not have the traditional protections
16 that you find in other treaties, but still it is the fifth most, rather, foreign investment-wise, is
17 the fifth most, fifth country which is receiving the most amount of FDI. And that is despite the
18 fact that there are no treaty protections, despite the fact that there is no free trade Arbitration.
19 So, from 2019 till 2022, '24, the investment, foreign investment just keeps going up. Now that
20 cannot be attributed directly to the fact that there is Arbitration or no Arbitration, according
21 to me, boiling down to governance because the investors are still encouraged because of the
22 system, the legal system as well to come in and invest. So, I guess if we get that act together
23 ISDS or not, I think we should receive our due share. Thank you.

24 **ABHILEEN CHATURVEDI:** There's one more question, right behind you, and that's the
25 last one.

26 **JAMES NICHOLSON:** Hello. James Nicholson, FTI Consulting. Investors like certainty.
27 And we've been hearing from the panel how the current ISDS system doesn't really give them
28 certainty in outcome, and it's expensive and time consuming and risky to engage, and we've
29 all seen that. So, actually the potential move to investment contracts is often raised as being a
30 bad thing. But is it potentially a good thing because it gives investors more certainty? They can
31 say, okay, we know what we're investing in. We know Spain is not going to cut the feet in tariff
32 for 20 years. Or we know Spain might cut the feet in tariff because it's explicitly in our contract.
33 And the States get certainty as well, they've made explicit promises, rather than slightly vague,

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1 uncertain promises about fair and equitable treatment in centres. So should we welcome the
2 move to a potential move to investment contracts? Anybody on the panel.

3 **SAPNA JHANGIANI:** Everyone seems to be nodding. I'm so sorry, I should have mentioned
4 any comments I make today, of course, were my personal capacity and not in the context of
5 any of my official work. I was meant to say that, and I forgot that. I concur. I think Manish
6 does. All are nodding.

7 **MANISH AGGARWAL:** Yeah, I think they would agree with that change as a conceptual
8 point. The difficulty is that there are many sectors in which you can't really enter into contracts
9 with States or State-owned entities, and I was involved in ten of the Spanish cases that, Karan
10 mentioned, I do have different views on that, but I won't go into that. But I think the reality is
11 that even where investment contracts are an option, quite often, the State counterparties insist
12 on governing law provisions and dispute resolution provisions that do not give you the same
13 level of protection that you can get under an investment treaty. For example, having a dispute
14 seated in the host State, subject to the supervisory jurisdiction of the courts of the host State
15 is not going to really give you that kind of a neutral evaluation of your dispute that you're
16 looking for in an Arbitration context. So, you're right that, of course, you achieve greater
17 certainty, but then I think it really comes down to negotiating power with those State entities.
18 And the reality is that State entities are now a really big kind of part of the Arbitration market,
19 and generally, as a really big commercial players, and they do tend to have greater bargaining
20 power. So, you don't always achieve what you would otherwise hope to have in terms of
21 investment treaty protection.

22 **ABHILEEN CHATURVEDI:** Thank you, Manish. With that, we'll close this discussion.
23 Thank you to all the panellists. This has been a great round of discussion on India's evolving
24 treaties. And thank you, audience, for a patient hearing. Thank you.

25

26 ~~~END OF SESSION 3~~~

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