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INDIA ADR WEEK DAY 4: DELHI

Disputes involving State and State-Owned Entities: key legal and damages issues

08:00 AM To 10:00 AM IST

MODERATOR

Mr. Montek Mayal, Partner, Osborne Partners

SPEAKERS

Mr. Aditya Jalan, Partner, AZB & Partners

Ms. Anisha Sud, Partner, King & Spalding

Mr. Arun Visweswaran, Partner, Addleshaw Goddard

Mr. Dietmar Prager, Partner, Debevoise & Plimpton

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HOST: Good morning, everyone, and a very warm welcome to our Delhi leg of India Arbitration Week. It's Day 1, and we start our first session, hosted by Osborne Partners. The topic of the session is "Disputes Involving State and State-Owned Entities - Key Legal and Damage Issues." The session will be moderated by Montek. The panellists include Aditya, Anisha, Arun, Dietmar and Paul. I request all the speakers to kindly come on stage. Thank you.

MONTEK MAYAL: Hi, everyone. First, let me just commend you for coming this early in the morning to hear us. We very much appreciate that, especially that there's so many competing events happening with the ADR Week and Delhi Arbitration Week. I'll actually keep my introductory remarks quite short so you can actually hear from the speakers. But I guess it's quite obvious, obviously, that States and State-Owned Entities played very important economic role in the region. That's obviously true for India, but it's obviously very true for Middle East, Africa and other emerging markets. And importantly they're obviously involved in some very important and strategic economic sectors. So, there are several hundred SOEs operating in natural resources, utilities, financial sectors, etc. The panel is broadly divided in three parts. In the first part, we'll explore some of the practical considerations that often arise when dealing with States and State-Owned Entities. In Part 2, we'll investigate how some of the risks are allocated between the commercial Parties and States and State-Owned Entities on the other side. This could be, obviously via investment treaties that have been very popular. India's known for its substantial termination of almost all of its BITs a few years ago but also commercial Contracts. Many of you will be aware many of the agreements in India are governed by Concession Agreements, blockchain sharing Contracts, and those tend to have risk allocation mechanisms. And finally and selfishly, I also want to ask the panel on some damages question that often arise in disputes involving States and State-Owned Entities. So, with that, I'm going to just get started and like I said, the first segment will deal with practical considerations that arise when dealing with States and State-Owned Entities. And my first question actually is to Aditya and Anisha. Not necessarily in that order. I'll let you choose the order you go in. But perhaps the question I have really is what are the popular forums and dispute resolution mechanisms that are often adopted in contracts with States and State-Owned Entities?

ANISHA SUD: Okay. There we go. So, in my experience and I do significant disputes work with representing investors mostly against States and State-Owned Entities in the energy sector. So, like we were saying, production sharing contracts, concession agreements, service agreements, essentially contracts for expiration and production of hydrocarbons. And in those Contracts again, these are older Contracts, they tend to have been executed, I think 10, 20,

sometimes 30 years ago. In those that vintage of Contracts overwhelmingly I see international arbitration oftentimes it would be *ad hoc* arbitration under UNCITRAL Rules. And so that is, the Parties have not designated an administrating institution, but they have called for international arbitrations, and they usually adopt on UNCITRAL Rules is the most common. More modern vintage contracts we are now seeing more and more, and you have some interesting stories about this before this panel. We are seeing more and more the adoption of institutions. So, ICC, SIAC, LCIA although I still think predominantly the trend is UNCITRAL ad hoc arbitration. Let me pause there and supplement...

ADITYA JALAN: Good morning, everyone. Much like Montek, thank you for making it for this very, very early morning session. I agree with Anisha. This is the trend that we see in India as well. But since we are talking about disputes in general, especially in India, I can bucket it into four basic categories of four are where we see State related issues coming up. One, of course, is arbitration, which arises out of commercial Contracts, be it domestic or international. As far as that is concerned, well, the Indian Government has, recently has its tryst with arbitration; it's been questioning whether it is the mode of dispute resolution that it wants to adopt. As far as the Indian Government's earlier Contracts are concerned, which currently are in dispute, most of them on the domestic side have *ad hoc* arbitrations. I have rarely seen a domestic State Entity enter into an institutional arbitration. As far as international arbitration is concerned, especially on the Defence side, where I've seen a few, it has opted for institutional arbitrations as well. I believe, that's also got to do with bargaining power. Well, the international Party must have definitely insisted on having an institutional arbitration. Domestically, in addition to arbitration, there are certain issues which are, of course, kept for the regulatory bodies which are more niche and more secluded. So, it's sort of a statutory monopoly that has been created and specialized institutions that have been there to resolve those disputes. Then the third segment, of course, which you cannot ignore here, is the constitutional jurisdiction, the writ jurisdiction. While, of course, the intent of the writ jurisdiction was very, very different initially. But we also see some contractual disputes come within the fora of writ jurisdiction, especially where the question comes of an arbitral action by the State or when due process is not being followed by the State. And fourth, given that the Government has been questioning arbitration we see some bit of it also trickling down to the traditional civil court where, well, the civil courts also are considering state related disputes.

AUDIENCE: [INAUDIBLE]

MONTEK MAYAL: Thank you. We too? I'm okay. Any closer... it I think. Yeah, it's sort of easier. Sorry. So Dietmar, I'll come straight to you after that because Aditya actually mention market power. So in many, many jurisdictions States, obviously, and State Own Entities

command significant market power. Does that affect the terms that prior parties are then obliged to enter into with those entities for commercial contracts or otherwise, including treaties, perhaps, but there's definitely commercial Contracts?

DIETMAR PRAGER: Yes, it's the answer, the short answer. First of all, pleasure to be here and thanks so much for the invitation. If you enter into a long term Contract with foreign government, in the ideal world, what you want to have is, first of all, an arbitration clause that provides for seat in arbitration friendly jurisdiction and it has a well-established arbitration institution and a law that applies that you are comfortable with and which might not necessarily be the law of the jurisdiction. And secondly, you want to be sure that you have an investment treaty that protects you as well. But in reality, as Montek mentioned, that's not always possible and necessarily the case. There are a number of jurisdictions where the law either expressly excludes recourse for international arbitration for certain government Contracts where you don't have a choice, but to actually go to local courts or where the law provides for provide certain restrictions favourable to the government with regard to international arbitration. One example, for instance, is in Brazil, you enter into a PPP Contract, you can arbitrate, but the arbitration has to be seated in Brazil and it has to be conducted in the Portuguese language.

Then there are other jurisdictions where the government expressly reserve itself the right to review any arbitration clause. That's, for instance, the case in Egypt, or at least it was. I'm not sure what are the latest changes. There are where arbitration agreements and Contracts with the government were reviewed by a special commission that included all sorts of Government Ministers and they obviously would take objection to arbitration clauses that provided for foreign-seated arbitrations, etc. So, in order to get the approval, you again were sort of bound by what the government says. And there are other iterations of that. I mean, there are some jurisdictions, such as Argentina, tried to do it. If you entered into a long term Contract, they tried to include a clause in which you would renounce your right to also take recourse to international treaties in order to claim your rights, etc. So, it really depends on the legal provisions that you have. And then ultimately, even if there are no legal provision, it's the negotiating power. In particular, you may be in a situation where you already have a Project, let's say, a big mining project that has been running for a long time. It's up for renewal and new mining Contract conventions. Concession Agreement has to be negotiated, and there obviously the government has more power because you can just back up your mining investment and go somewhere else and may try to sort of insist on provisions, arbitration provisions that are favourable to it.

MONTEK MAYAL: Thank you. If you have time at the end, I might come back to you on maybe ask... I can see at least two people would want to ask questions in the audience. Does that at all sort of raise issue of abuse of dominance and potential follow on claims or investigation in the antitrust space, but I'll park that. So, now coming Paul, to you and Arun and I guess you bring, come experience of India but also experience in your respective regions in Singapore and Middle East and I'm sure some of the audience members will empathize with this next point. There's a critical issue of, in arbitration and disputes of the importance of evidence and information, right? What are the challenges of obtaining such information and evidence in disputes involving States and State-Owned Entities? And is that at all to do with the wider decision making process that often States and State-Owned Entities follow. So, perhaps again, I don't mind who goes first, but both of you must speak.

ARUN VISVESWARAN: I'll take one side and maybe Paul will take the other. So we'll have a debate about this. Firstly, again, thank you Montek and Osborne and India ADR Week for having me here. I have been practicing, I'm originally from India, but I've been practicing the Middle East, London, Singapore and Middle East for over 14 years. And I approach it from a slightly different angle than that. Unlike many parts of the world in the Middle East innovation and investment is driven by the government and government entity. So, almost every entity you talk of is state linked or State Owned in some shape or form, at least the big ones. Of course, you have private players as well, but the majority of everything you see in the news and the big players, they're all State Owned, and I do act for a range of State-Owned and State Entities. Therefore, my experience somewhat on that side, so Paul, you might have to take the other. What I would say is given what I've just described there are almost two layers in all these entities. One are what Montek said, the decision-makers, and one are the people who are actually doing the work and getting the job done and running the arbitration. And I think with regards to evidence gathering, there are two issues, at least for the Middle East. One is difficulty in transferring information outside the country. That because there are laws in place, particularly if you are dealing with the government around sensitive data. And sensitive is there's no defined term. It's very broad. And I've had to argue it more than once that something sensitive cannot be disclosed. One, successful one's not. But it is a real issue. And it's quite difficult to explain to the decision-makers why what they consider State-Owned information should go to some third-party somewhere because they are not the ones involved in the arbitration. They just get one... one-page reports from the legal team and others saying what's happening. So, that is one. So often you can have delays in getting information you can have problems explaining your duties to a court or Tribunal versus duties to the Client, so that is an issue. In my experience, by and large, usually these things resolve once you just have to knock the door a few times and the door will open. The other related issue, and I'm talking from a

live matter is because of the two decision, two layers, you sometimes have the counterparty during the course of a Contract would have dealt with Layer- 1. But also Layer- 2, but Layer- 2, the upper layer may not be even willing to step anywhere near an arbitration hearing. And I had this instance acting for the government, a Defence-related matter where the counterparty raised an issue saying, oh, I spoke to His Excellency... someone and he has recorded the conversation unbeknownst to the individual concern. And he was trying to get it admitted into the arbitration. The question at that point was never, Oh, can Mr. X, His Excellency, come in and give a statement about what that meant. The only question was, how do we get rid of the evidence from the arbitration. And we, of course, argued unlawfulness, illegality, which in the Middle East is a penal offense. Not that that would naturally make evidence inadmissible at least under English law and certain other laws, but it does reduce the weight and ultimately, the Tribunal didn't have to consider the evidence in any great detail. So I think those would be, I would say two issues from if you're acting for state. Now, I appreciate we have quite a varied jurisdictional experience on the table and in the audience. So if there are any other issues I'd be very keen to hear.

PAUL TAN: Thanks a lot. Thank you, Montek, for having us this morning. I wasn't sure that I'll be here, but it's great to be... great to be here. So, I think my experience has been more acting for states, than against them, and to some extent State-Owned Entities as well. I think there are a few key features of dealing with such agencies that are quite unique to how states operate, particularly in Asia. And I sort of put them into two buckets. I think one is sort of logistical issues, shall we say? And then there are some psychological issues as well when dealing with them. So, on the logistical aspects, I think that, again, breaks down into two groups. One is obviously coordination. I think many states are not organized necessarily in a very centralised fashion. And so, whenever you have a dispute, perhaps in relation to one aspect of the economy, you end up having to deal with multiple agencies, and they're not always singing from the same song sheet, right? You have typically involvement from the Ministry of Law or Ministry of Justice, you might have involvement from the Ministry of Finance or whoever is paying the bills. You will have input from the relevant Ministry that the dispute involves and sometimes you have the involvement of the Solicitors General's office or the Attorney General's office, depending. And like I said, it's not always clear who is calling the shots. So, in terms of coordination, there is one issue of who do you even speak to sort of twist arms to get the evidence that you need. So, that's one big issue when dealing with states in terms of coordination. But I think the second issue is also administration's change. Obviously. And in Asia, sometimes it can change quite frequently. And when administrations change, a bit different from purely private companies, sometimes the whole team can change along with the administration. And so, when you're trying to find out evidence that relates to a past

administration's decisions, for example, all the key decision makers or the people who involved may not necessarily be around anymore. So, trying to dig up that information and trying to find persons or departments with the relevant institutional knowledge can be quite challenging. So, that's the logistical aspect.

And then on the psychological front, I think that, again, two main observations. I think one is that depending on which jurisdiction you're in, sometimes, the civil servants face a real difficulty in cooperating, not because they don't want to, but because they have obeyed personal liability for whatever decisions are made. They could be challenged at the present moment by whomever wants to challenge them. They could be challenged when the administration changes, and then they're looking back at what decisions have been made. And these are exposures that can sometimes be attaches to the person as well in some jurisdictions. So, when they have the turnover evidence, and often you're asking for evidence, that may not be helpful to them, that can be a real challenge. And then the other psychological aspect, of course, is that when you're dealing with disputes against States or State-Owned Entities. You're not always challenging or the investor is not always challenging the particular decision of this administration. You might be challenging a decision of a previous administration that now the current administration has to deal with or the current administration has reversed a prior decision of a previous administration. So, that entails another sort of set of political issues. A good faith decision has been made by the current administration pursuant to a national policy or election promise or whatever it is, and there are very good reasons why they would strongly want to defend that decision. So, there are all these psychological calculations that come into play as to the extent to which they would want to release information to you, how much effort they go through to knock on doors and get the stuff that you need. I think these are some of the challenges that one has to navigate when dealing with States in particular.

MONTEK MAYAL: Thank you. And I guess that also generally then extends into even getting anyone from the government or the State-Owned Entity side as fact witnesses. And that becomes a big concern because, like you said, the whole management has changed, our team has changed and often, especially, I think in this market, not everything is in written form, and therefore, you don't have access to the personnel who are actually involved in the Project and therefore able to sort of clarify the factual gaps in the matter. Now, moving to the second segment, and I'm coming back to you, Aditya and Arun. And this is about the second segments, about the risks that often then arise in the context of agreements or contracts with States or State-Own Entities. But what are those risks? All the major risks that often arise, whether it's legal, economic or commercial, when dealing with States or State-Own Entities?

ARUN VISVESWARAN: Seem to be being made to go first on each of these paired questions. All right, I will mainly, obviously, being lawyers, I'll deal with the legal one and I'll try and maybe answer economic, commercial from a Middle East perspective, but I'll be open to the panel on that. I think, again with the background, I said we don't have as much investment treaty arbitration in the Middle East. It's a lot of commercial arbitration, but involving States or State-Owned Entities. So, that's the rubric in which I'm speaking. The first one I would say is, the age old question of sovereign immunity. Does a State or State-Owned Entity benefit from immunity, either from suit or enforcement? That is a vexed question especially in the practice area and the region I practice, because Entities come up and go. It's a bit like in this, what Paul was saying about government change. Except the government is always there. It's a stable government, but the Entities, one day it'll be this, the other day it'll be that. I'm doing one right now, where I'm acting for a State-Owned Entity. That entity is fourth legal successor to an Entity that entered into a contract two decades ago and is now being sued for X, Y, Z. So, the issue you have is, does this new Entity, is it having immunity, or did that Entity and all those issues. And I think, by and large if you come to me, I'll tell you how you navigate that and where you get the answers, but there are certain ways States can sign up to arbitration. State-Owned Entities, sorry, sign up to arbitration as a sort of dispute resolution forum, but you need to check each and every time if your counterparty is a State-Owned Entity, whether they can sign up to the forum that you're putting in your Contract.

And that takes me to the next issue, which is one around capacity. In the Middle East, capacity remains a ground, a lack of capacity remains a ground to challenge arbitral awards. It's been there for decades. It continues to be in the law. And it's an argument. It's not the best argument, but it's an argument. The losing party will inevitably try and you can stem that to some extent if you do your due diligence at the outset while contracting. And, I'm guessing a lot of people in the room here are dispute resolution lawyers, but for those transaction lawyers, I know, it's the midnight clause. It just gets thrown in last minute and deal signed. But when dealing with State-Owned Entities, I think that's imperative, that you check that their dispute resolution clause works. Give you a simple example, in Dubai, which is an Emirate and not the state as a whole, but it's also state in a way. There's a law which prescribes that State or State Owned Entities cannot enter into Arbitration Agreements seated outside Dubai or indeed choose a foreign governing law. Most people don't know this, and they'll just sign up Contracts, and then next thing you know, you're being challenged about the Arbitration Agreement itself. There are ways to get exemptions, and that's the sort of questions you need to be asking the other side, and that's the sort of commercial bit. I'll come on to in a second.

And the last one, I think is obviously enforcement risk. If you get an award, can you enforce it? Now everyone looks at Middle East and thinks it's Dollar, Dollar, Dollar everywhere. It's

not all that. There is some of that, but it's not all that. And the reality is, you might, as Dietmar was saying, you might get away with signing up to a foreign seat, foreign governing law contract in an arbitration. You go to the arbitration. Ultimately, you'll have to see where the assets of that State-Owned Entity are. You might not be able to link the State Owned entity to the state. I mean, there may be arguments, but it's not easy. And so if that State-Owned Entity's assets is in the Middle East, in the home country can you actually enforce that foreign award in the local courts. That's a question, because, again, they may have different rules on how you can enforce such awards. So I think those are the legal risks. I'll very briefly touch upon economic, commercial, at least from a Middle East perspective, which is by and large, I wouldn't say there are too many ways, because in that jurisdiction. There are not government changes in the way that is in other countries. It's more, I would say when you're dealing with counterparties, you just need to ask the right questions, and you need to be able to negotiate with some confidence. Otherwise, you'll just always have the lower hand in those negotiations.

ADITYA JALAN: Thanks Arun. So, from the India perspective, I believe, I'll first start with enforcement. I believe a major, major risk that you get into is you may be able to get through the entire rigmarole of an arbitration. You may be able to, well, starting with a point, Arbitrators run through the process, get through the evidence, find time for the final arguments, and convince the Arbitrators to give you an award. But then again you have to come to the traditional courts to enforce that award. Especially against State-Owned Entities, and there are a fair bit of specialized State-Owned Entities, which are corporations which are located only in one part of the country because they function in that part of the country. And you sort of go to enforce that Contract in their backyard, so to say and try doing that. You'll be faced with delays, you will be faced with questions from courts as to how could an Arbitrator have decided against the State Corporation because they are doing everything for the benefit of the people. And of course, second guessing everything that the award says. You do find it difficult, because what you're left with is your Client having a paper award. And that's not happy sight for any of the Clients.

Moving away from enforcement, even during the arbitration process, there is a major difficulty as far as unpairable skill sets is concerned. While there may be a technical aspects where the State-Owned Entities are equipped and are able to deliver, but then again, there are the complications, that they have to face with respect to choice of Counsel, their local list of Counsels from there, where they need to identify and while they may be excellent Counsels, they may or may not have arbitration as one of their skill sets. And when you are against someone who does not do arbitration, they sort of bring in traditional litigation within the fora of arbitration and that's where another very long loop of difficulties and risks start.

The third, possibly is, as I had mentioned earlier most government Contracts, at least domestic ones, are *ad hoc* Contracts. And *ad hoc* arbitrations, especially with State and State-Owned entities, the problem starts from identifying a panel or a Tribunal. And when you have a Tribunal which is mostly made out of retired judges, it does also add to delay, because there are time constraints that they have.

Montek, very rightly you pointed out issues with giving factual evidence. And I've been facing one, in two of my matters, in fact, against the State, where the Officer of the State has moved to a different part of the country. And they make any reason and excuse right from the whether in that country and him having to focus over there to transportation not being very easy at this time of the year to him not being available and the factual Witnesses just not able to come to depose. The reverence that the State gets from the Arbitrators when such reasoning comes is something that becomes very challenging to explain to your Client, who may or may not understand these issues.

Now moving from the issues we face at the legal side to even commercial or economic issues, Experts, there are many, many technical Contracts which require Experts and which require very, very crucial Expert Evidence. As a private party you may bring upon Montek to give evidence for you, but then State-Owned Entities generally don't give Expert evidence, and even if they do, it's one of their officers. They possibly also find it difficult to cross examine an expert evidence. And I remember, Montek, you and I were talking once where you were being asked to depose on facts as an Expert on law while you were being cross-examined as an Expert. So, these issues, of course, make it very difficult to run the process. Economic constraints, approvals from the bureaucracy, change of government are many, many other issues that we can keep going on and on, but I see Neeti has put the clock right in front, so, I'm going to be conscious of that.

ANISHA SUD: Can I just add? A point on the question was the risks legal, economic, commercial with dealing with State and State-Owned Entities. And again, I'm from the foreign investor side, so representing the investors against State and State-Owned Entities, and by far and away the biggest risk that foreign investors have when they are going and investing in a State is the risk of regulatory change. And that is a huge part of my practice, at least. And what happens is, for example the State extends tax incentives to encourage their foreign investment. 20 years, 10 years into the Contract. That they pass a regulation that undoes that tax incentive. Happens in the Oil and Gas context all the time. Decommissioning. You're getting an incentive with respect to decommissioning in your Contract, and then a regulation gets passed that undoes that and causes severe financial economic harm to the foreign investor. I think my one piece of practical advice to anyone today that is negotiating a Contract with a State-Owned

Entity or State Entity is to make sure you include, if you can, a stabilization clause, because really, cases are won on stabilization clauses. I'm sure you have comments on that too. But essentially a clause that either freezes the regulatory regime that applies to the investor or it provides what's called an economic equilibrium clause. So, that says if there is a change that affects these incentives that we're giving to you, we promise to make you whole. That I think gets critical. And then if you couple your stabilization clause with an international arbitration clause, I think governing law... Again, another practical tip. I think governing law is less important. I think what's far more important is getting a foreign seat of arbitration. A seat of arbitration and an arbitration friendly jurisdiction. Because, again, that's where you're going to be dealing with enforcement, set aside interim measures, the protections that you really need at the end of the day. So that's just a tangent, but to me, that's sort of the biggest commercial legal risk that we think about when we're dealing with States.

MONTEK MAYAL: I think it's a great segue, because my next two questions are exactly on how do you manage these risks. But before I go back to you, Anisha and Dietmar, from a commercial Contracts perspective, as well and Aditya mentioned this, but I think it's a pretty serious risk. I call it the fee risk in India, no State Owned Entities and States want to pay proper fees for Counsel and Experts. Frankly, I genuinely mean believe that that causes their case be not well represented. I think India has been on receiving side on some very large treaty awards. It's been definitely been receiving many substantial damages awards in domestic arbitration, and I genuinely believe that in part, not in part, in large part to do, with not being properly represented, because they don't want to pay for the services. And I think you mentioned the other two parts, which I had written down Anisha. We've covered them both. Change in regulation, fiscal terms of the contract and what that means for the value of the Contract that you venture into, and therefore, the losses you might suffer when they are changed in an unfavourable way. But that's a great segue. Like I said, I want to come back to maybe Dietmar to you first, because touch upon stabilization clauses and you often find them in India as well under some Concession Agreements change in law, events change in law or clauses. So, can you perhaps give us your views on... We discuss the risks, but what might be available to parties to manage that risks under commercial contracts? And then I want to come back to all you, Anisha, on a treaty side, how important an investment treaties for investors to manage some of the risks that we've discussing. So Dietmar, we'll go with you first and then Anisha you come back to you on the treat treaties.

DIETMAR PRAGER: Yeah, Anisha... Anisha touched on it already. I think one of the key mechanism is stability clauses. And the other one is a clause that sort of provides a minimum return on economic financial equilibrium. Stability agreements particularly common in investments where you have a big upfront investment. The idea being, think of a mining

project, you first have to put in literally billions of US Dollars for several years and then only over very long time period, maybe a 50-year time period, you get your return on that investment. And in order to put in that money and get the financing for that money, you need to have some sort of risk allocation that favours the Party that puts in that investment. And that has been typically done through stability clauses. Stability clauses that can have various aspects; the traditional typical one is to freeze the tax regime at a particular point in time so that any changes, at least any changes that are less favourable to the investor do not apply over the period of the Project or that define which taxes have to be paid at what particular amount. But it can also include economic stability, such as, for instance, rights as we may find them in investment treaties, the government promises not to expropriate promises that all dividends can be transferred freely and without barriers abroad. That the government will do everything in its power to grant the necessary licenses for the further Project. And those Contracts may then also include some clause that says that the Contract itself should be interpreted under International Law, under international law principles.

Now those Stability clauses have been very often used, I would say, in 1990s, when governments tried to attract foreign investment in particular in sectors such as mining, Oil & Gas. They are not any more favoured by government. And it is more and more complicated to have such Stability agreements. There are developments in a number of jurisdictions that try to walk back those rights, be it through in mining codes or in other new provisions. So, I think today, tide has a little bit turned, and it's much more difficult to negotiate those clauses. And the second one is some form of minimum guaranteed income or of financial equilibrium. You will find that in a variety of sectors. Big infrastructure management projects or, for instance in the Electricity sector or Gas Transportation sectors where the government imposes tariffs and we have a contractual mechanism that sort of ensures that the way that the tariffs are being calculated, you will get a certain minimum return on your investment. And those still very much exist, but they also often give rise to disputes as to Stability agreement, by the way.

ANISHA SUD: Yeah, right, on the treaty side. So, treaty arbitration. So, essentially States enter into agreements with other States, typically Bilateral Investment Treaties, Free Trade Agreements, the Energy Charter treaty, has been a big subject to discussion we can talk about. The States agree that foreign investors in each other's States will be granted certain protections. These are protections on the international plane, at the international level, invoking international law. So, you're no longer in the realm of a private commercial Contract and you've now elevated yourself to the plane of international law. And so, it's quite critically important, I think, to the functioning of investment, global investment and global trade as a whole. So there's several core protections that are offered, typically offered in investment treaties and these are the ones that are, I think, most frequently invoked in dispute. So, you've

got fair and equitable treatment. Of course, fair and equitable is incredibly broad, right? What does that mean? So, generally that protects a denial of justice and so, those cases are rare and hard to prove, although we have the ***Chevron Ecuador*** case. But essentially, if you're a foreign investor and you're mistreated by the judiciary in that state. So the judiciary, there's fraud, bribery, corruption, then you can get a denial of justice claim that holds the State responsible for that, the conduct of its Judiciary. Lack of due process is also covered under fair and equitable treatment. Arbitrary and discriminatory conduct is also covered. And then frustration of legitimate expectations. And so this is another one that I find really interesting in the context of any sort of commercial activity that you're doing in the state. So if the State has given you incentives to come put in your billions of billions of dollars of investments and then cause back those investments, you might have not just a contractual claim, but a claim that this has frustrated your legitimate expectations. You expected X, Y and Z incentives, and then it has been clawed back. Should I keep going?

MONTEK MAYAL: Please. I must confess I've put in an awkward situation to summarise 2 hours of content in five minutes, but, yeah.

ANISHA SUD: Well, so, I'll just do a couple others which is expropriation. Expropriation. You can have direct expropriation. So, that's just a seizure or a taking of a project, indirect expropriation, which is sort of the gradual passing of laws or regulations that sort of gradually cause back the value of your investments. Expropriation is notoriously difficult, and you probably will have thoughts on this as well. Because a State is allowed to regulate in its Police powers, especially for public interest and public purpose. And so, you often have attention there that's one of the most difficult hurdles to prove is whether the State is acting in its capacity as regulating public interest, public policy versus a taking of a project. Expropriation can be legal. There's something called legal expropriation, lawful expropriation. But State has to pay money and compensation to foreign investor to do that. And then you have a handful of others. Most favoured nation. It means that your investor gets treated no worse than any other foreign investor. Umbrella clauses, increasingly rare, but those elevate contractual obligations up to treaty protection, full protection and security. It grants your investment, physical security in the host State. So I'll pause there.

MONTEK MAYAL: Thank you. And so, just quickly building on that and I saw somebody in the front has maybe a comment to make on just what we spoke. But I'm going to just make a couple of quick observations. And many of you will be aware of this. So, a form of stabilisation clause is often found in majority of Concession Agreements in India, right? It's not properly used, actually, in my view on damages, but that's a different question altogether. But the essence is you want to be put back in the position absent in that change, right? So, the

expectations that you had under the contract, I essentially met. Now it's featured in different ways, but in majority of the concession agreements, maybe all. But at least all the ones I have seen in the road sector, port sector, airport sector. You have a traditional stabilization clause that allows you to pursue monetary relief if there's a chain that affects the investment or the expectations you had under the project. On expropriation, I would just simply make the point that India as has been a receiving end of many. There are many, many cases I'm not going to bore you with all but one of the more popular, more public ones was the Divas case, which dealt with the spectrum in 2011, February, when the spectrum was expropriated by the government . There were three parallel arbitrations that were launched from that. There was an ICC commercial arbitration, there were two treaty arbitrations, and in fact, exactly what the treaty arbitration was about was expropriation.

Now, that's the only other point I would make, and maybe panel will agree or disagree with me, but if they disagree, I won't let them speak because I'm the Moderator today. But I think the point here is that I think what you're finding in today's world and most things doesn't happen, especially with Oil & Gas and mining projects. Direct expropriation or explicit expropriations become lesser. It's more creeping in the sense that they'll introduce laws, events, changes, which slowly, but surely erode the value of your investment effectively. And that's something we've seen in many other jurisdictions, and I think that's the more difficult one, both from a case perspective, also from damages perspective, because you need to understand which events often spread over many, many years, affected the value of the investment and what the damages really are. But I thought you had something to say. I could see you taking notes. Do you want to say something you can do. I'm changing the format here a bit. I'm not supposed to be asking audience questions, but I think I can take the liberty with some people I know. Do you want to say something special in the tariffs? And the question about change in tariffs and how that might affect contracts, but also damages?

AUDIENCE1: Sure. I think. Thank you. Interesting conversation. The stability clause I may find, I suggest to you, India is perhaps the only Common Law country in the world where the Supreme Court has actually ruled in and fostered. None of your jurisdictions done it. In energy watchdog four years and eight months from the regulator to the Tribunal to Supreme Court, settle the law that if there is a change in law that results in impairment. There will be full socialisational cost. And we were able to salvage $40 billion of power generating capacities, which are all going to get stranded. So, I think time to take note of the fact that that's the law in India. Unfortunately, your ilk has one problem. Everything you do is hidden behind a lot of shrouds of mystery and confidentiality. So, most of jurisprudence that's coming out of arbitration stays within the book and most of the advancement of law is coming in public law. And my concern, and I would like to throw to the panel. If you have a minute to look at it, you

are applying basically, a private dispute resolution mechanism, that's how it evolved arbitrations, to public law problems. And today you have cross-border public law problems in climate, natural resources. Why is it that none of you are thinking and if you are, please push harder and I'm happy to join you on it. To try and get ICSID like panel of amicus in any arbitration that has any public law element, so that the regulator and the public gets a representation. Most awards will get stalled and stultified if you are in infrastructure because the person who bears the cost is either the taxpayer or the consumer, who has no voice or seat on the table. That dispute is going to be normally between a Supplier or a construction Contractor and the owner or the operator and you will have billions of Dollars spread across public without a voice which any court will say, sorry, won't allow. It's time that we change that. ICSID has that. Why are you not thinking about it? Because there's no doubt that India can do well if arbitration came back. But, 3rd June, 2024 Ministry of Finance advised everybody anything beyond $1 million worth of claim, don't go there. And public procurement in India is 36% of the GDP. If you exclude that, maybe we are getting skirting around with some references under [UNCLEAR] City Act and the others back into arbitration. It's minuscule. So I think that, to my mind, is one of the biggest things that I would love to see the ADR week throw up as an answer, and we are not doing that.

MONTEK MAYAL: I will definitely pass that remark to MCIA to make sure that's the panel in the next year. Sorry. Yes. You have a comment? Yes, please. Sorry. I'm changing it up a bit. I thought we'll get some questions from the audience now. It seems after 12 minutes. I'm reading it as 21 minutes. Okay.

AUDIENCE2: Good morning. Well spoken. It's a very short question. I think you are looking at the question of *res judicata* in arbitration awards; so, you might want to talk about that Dietmar, tell us what the IBA is doing? I think that's a very relevant issue for the questions you're discussing and the fact that confidentiality still comes into it, but we are looking at that. Thank you.

MONTEK MAYAL: I think your name is specifically in the question.

DIETMAR PRAGER: Yeah. No, just very quickly so the IBA Arbitration Committee is looking into the question of the *res judicata* effect of arbitration awards on subsequent arbitrations. Because that's a topic on which there is a lot of different jurisprudence, having different choice of law approaches and there's a lot of uncertainty what is actually, once you get an arbitration award, what is its binding effect? How far does it go? To what extent can Parties relitigate certain issues or facts in related arbitrations? And not having sort of a guidance on how *res judicata* is being applied and what the scope of those awards is has led to

a lot of uncertainty in investment arbitration, but also in commercial arbitration. And it's going to be good to have some non-binding guidance, what an autonomous standard for *res judicata* could be.

MONTEK MAYAL: Thank you. I'm going to take control back. Four or five minutes, I'll come back. I need to finish the last part

ARUN VISVESWARAN: Can I just add?

MONTEK MAYAL: Yeah, one minute.

ARUN VISVESWARAN: One minute? That's a lot. Thank you. Dietmar, we'll discuss this later. But I'm very curious because obviously as we all go to law school, when we read cases, you have the facts and obviously the ratio of the case and so on. And you use often the facts to distinguish the ratio of a case. I'd be curious as to how this guidance comes about? Because if you start disclosing facts maybe you just redact names and that's it, but I think you start slowly into the confidentiality angle of it all, so it's very interesting that you're looking into it. So we should discuss, but just very quickly. 30 seconds.

MONTEK MAYAL: You've already taken a minute, but sure.

ARUN VISVESWARAN: Change in law. I think it's been mentioned more than once. I think I should just add here. Please take care of what you define, change in law as, in your contracts. Everyone talks change in law, change in law. I'm just saying it because I'm doing quite a big dispute at the moment where long-term contract operator it's based... The charges are based on an index. The index was restarted or reset at a particular point in time mid contract. And it's not in the definition of law, and it's quite tricky to argue. It's change in law. So, think about the fiscal mechanism in you Contract and what you define law, as in the change in law clause.

MONTEK MAYAL: Thank you. Now, the last part, and unfortunately, we don't have that much time left, but also, it's not surprising because Experts often get the least time in any arbitration. So, it's quite apt that we only spend eight minutes on damages. But I want to perhaps make it an open question rather than having the questions I had before. And maybe Anisha I'll start with you and then Aditya from an Indian arbitration specialty perspective and come to the rest. Paul and then Dietmar and then Arun in that hopefully in that order as well. But Anisha, obviously you mentioned quite a few important aspects of treaty arbitration. Fine, the government takes an action, something happens. What is your remedy? What's your monetary remedy? And what can investors do to pursue that remedy?

ANISHA SUD: Yeah, the international law... When you've proven a breach at the treaty level, international law the standard comes from a very old ICG case is full reparation. I think someone mentioned that earlier, but it's essentially restoring the injured party to the position that it would have been but for the breach. And so then that's where the dispute is, right? And you'll know this better than anyone. So, I shouldn't talk so much about it, but what is your but-for world and that's when all the tricky issues come in, because you have questions of causation, foreseeability, mitigation and so it's not so simple as okay, but for the breach, my investment would have been billions of Dollars in profit because there are other things that could come into play that break a chain of causation. For example, say you're producing plants and you're buying a refinery, let's say, and you're bringing in crude oil, but for some reason you've got a problem bringing in your crude oil, the prices of crude oil go crazy high or something, that could significantly impact damages even if the government has interfered with your refinery. I mean, really, it's a question for you, Montek. The issues that you see when you're presenting improving a damages case because the legal standard is, what is the but-for world, but everyone has. I mean, the government will have lots of arguments in its arsenal. Breaking the chain of causation, arguing that things are not foreseeable, arguing that the investor didn't do enough to mitigate.

MONTEK MAYAL: Yeah, fine, I'll speak last. I'll get everybody else a chance first. Dietmar, I had you also on the treaty stuff, so I can ask you that and I can come to you, Aditya that you're right after that. Any observations on the damages question that often arise in these contexts?

DIETMAR PRAGER: Yeah. Perhaps giving you a concrete example, right? I mean, one of the cases I did, there's a mine that two mining investors wanted to build in Pakistan, somewhere on the border between Iran and Afghanistan, pure desert. They did a lot of work with $500 million into feasibility studies. They said the mine is feasible, applied for a license. The government said, thank you for the feasibility study. We're going to build the mine ourselves. We are not giving you the license. Tribunal holds that was a breach of the treaty. The question is, what are the damages? So, can you do a DCF Analysis in order to get damages? Can you say, well, the mine over the next 56 years would have yielded cash flows and that amount? Well, jurisprudence was, if it's not a going concern, you can't do a DCF. Here there was a piece of desert, the mine hasn't been constructed yet. But we convinced the Arbitration Tribunal that a mine is somewhat different because there was a very detailed feasibility study that shows that it is possible to get the gold and the copper out of the ground. And there's always a market for gold and copper. So, yes, the Tribunal applied at DCF Analysis. Next question is, can you do like, for a 56 year long project a DCF, a classical DCF Analysis that just takes the project and then applies to discount rate with that accounts for the country risk, and we persuaded that Tribunal that for such long term projects you have to innovate the DCF

method, and instead of just using a one-time project discount rate, you have to look at each of the cash flows and see what is the particular risk profile based on market forecast for each of those cash flows and adjust them according to those projections, but then not apply a country by discount rate. So, it's called modern DCF, which is a higher value than the classical DCF and resulted in an award of 5 billion plus interest, $6 billion USD. And that is actually, even though some mining official may not have applied that particular DCF, it was common in a Mining Industry to say, okay, I do a regular DCF, and then I double it and then I have a good feeling of what actually the mine is worth. So you can see it's always a project dependent, but there are a lot of ways of how you can refine sort of the damages calculation, depending on a particular project that you have.

MONTEK MAYAL: Thank you. I mean, a modern DCF is a panel on its own. But we will talk about that next time, maybe. Aditya, what are you seeing from damages questions, especially involving India?

ADITYA JALAN: So yes, as Anisha mentioned, even in India the but-for rule does apply. So, that is the starting point. I believe that's where we ask the question to the likes of Montek that, well, what is the number? Because the but-for rule at the end of the day needs to be quantified. The other aspect that you see when it comes to damages is overlapping claims. That's a major, major problem in India, where, and I'm facing it, where there's a claim of a little shy of a billion dollars in claim and counterclaim. And you look at the documents and you know that, well, a lot of the claims are duplicated, especially when they ask for profits, future profits, I think that is the worst, worst, worst claim when it comes to duplication. And the other aspect is when you have Extension of Time. Now that's another issue, because on the one hand, you claim damages, and on the other hand, you're still claiming Extension of Time. And those collisions are something with respect to damages, especially in long term Contracts that are very concerning. As far as delay is concerned, the biggest problem on the damages side to delay is it is extremely difficult to prove who caused the delay and to what extent. The benefit that we have is while we have to answer these questions on panels, when it comes before the Arbitrator, Montek, is you who have to answer this question? On damages out of delay, you do, but yeah other than what Anisha and Dietmar already mentioned, these are some things we are seeing from the India side.

MONTEK MAYAL: Paul?

PAUL TAN: I'll address the question, perhaps at a macro, more conceptual level. Leave the details to you, Montek. But I think there are a couple of significant trends that we've seen especially in relation to treaty claims and damages. One is size of the award. It has gone up

astronomically. I think there was a study that showed in the 1990s; average size of an award, about 3 to 4 million. 2000s, you're starting to see about 600 million as the average size of awards. And some of these awards are disproportionate or bigger than the size of certain economies or the GDPs of certain economies. So, that's one significant trend. The second significant trend, I think someone alluded to it is that, or you did, that the focus of many claims and decisions by Tribunals has shifted from expropriation in its classical form to FET breaches. And the reason I mentioned these two trends is that the legal test which Anisha mentioned, this old PCIJ case was developed at a time when damages was very, very low and when the main sort of claim. In fact, that case was an appropriation claim. And the question is, whether that's the appropriate standard to be applied. When these circumstances and also when the claims are FET? I think that calls into question, I think a couple of important conceptual issues. One is when you are talking about the counterfactual or the but-for situation in an FET context in particular, do we assume a situation in which time is frozen or do we take the best case scenario for the State, in the sense that we all know that there is some regulatory space that Tribunals will accept, beyond which, of course, there could be a triggered FET claim. But do you assume the best position for the government, even though that decision, they had not conducted themselves in that way? And I think that could raise interesting questions about, therefore, what's the extent of the damages that you can claim. And the second, I think, has been propounded by some scholars, I'm not sure to what extent it will take off, but a question of proportionality to the State's economy as well, and whether there is an extent beyond which some equitable principles should be applied. So that the size of the award doesn't overwhelm on States resources to pay that award or indeed, to conduct itself on a day to day basis because they've had to deal with this. So I think these are some broad conceptual issues.

ARUN VISVESWARAN: Glad you're not a Delay Expert. Time's up. But look, very quickly, and actually, I want to ask you a question, Montek, if you don't mind. And this actually is a legal basis to this. So, in the Middle East, we have a Middle Eastern governing law. There's this question for the Tribunal to reduce damages or increase damages. It's in the law, even Liquidated Damages, whatever it be, and it's usually the measures you need to prove actual laws. Now, in my experience, always been reductions, especially as Paul saying, 600 million awards rarely get doubled. What is the importance of the quantum? Of course, Expert, but what sort of methods do you see convinced Tribunal that the lost profits, for example, on a DCF method is actual laws and how much of it is down to the Expert and how much of it is down to other general principles in a high level? You don't need to...

MONTEK MAYAL: Yeah, I won't be able to answer that question because I'll definitely get, I will not be allowed back to ADR week because I've already far over time, but very, very

quickly, look to India as well. I always find it strange when people say loss of profits are indirect losses. They really are not. In many cases, it flows naturally from the Contract, so it's absolutely at direct loss. So, very quickly on you, and I think this is mentioned by the panellists before, looking at loss of profits, you need to have, I mean, often the test is either it's a regulated market which has a clear demand for the product, and therefore, you can establish a volume, you can establish the price. Like something like Mining and Oil & Gas sector is also great because of the ready large liquid market, and it's very easy to support the hypothesis that if you produce it, you will sell it in the market. Right? That's one. Even that and that applies even to early stage businesses, because like I said there's a ready market, Oil &Gas, Energy markets. The second is if you're operating for a while. Right? So, if you have a history of performance and operations, then Tribunals are more likely to award loss of profit claims. Right? And of course, the third, you have to be very conscious is that what's the term over which you're claiming loss of profits? Is it defined contractual period? Sometimes like an appropriation claim or ongoing businesses, the effect is so substantial that it essentially is a loss into perpetuity but especially for contractual claims, you need to be very cognizant of the contract below which the losses are being claimed, but accepted methodologies. DCF is the most accepted methodology of valuation in the world, so I don't think it goes beyond. That's the gold standard. The question is much more about the specifics of the case and the business and whether you can apply the DCF.

I'll make two quick comments before I get kicked out of the stage. I think, again, this is mostly for all of you in the audience is, and, Anisha, you touched upon causation. I can't stress enough the importance of establishing causation. I find it very strange that people don't think about causation very hard for damages case. The implicit assumption they make is that it's the only the breach that affected the value of the investment. Everything else is held constant. And that just not applies in today's world. We're discussing the risks that are now quite global and quite political globally. And I think that you'd really want to be establishing causation with a lot of detail and a lot of emphasis. Right? You must be able to show that the loss flows from the breach itself. And the only other thing I would mention for the Indian audience especially is the importance for corporates and State-Owned Entities is to maintain information and contemporaneous evidence. You must, must... If it's a construction project, you must have progress reports, you must have... If there's a breach on technical issues, there's a product issue you must have Inspection Reports. For private companies, you must have contemporaneous budgets. Tribunals don't put as much emphasis on documents that are produced, especially for the dispute. So, I think the importance of documentation to help establish claim is absolutely critical. With that, we have five minutes over time, or more maybe.

But thank you very much. Can you just join me in applauding the panel for their remarks today. And with that, I'll hand it back over to MCIA. Thank you.

HOST: Thank you to the panellists for this very interesting discussion. I'm sure a lot of audience members have questions, including myself, but we can take them over coffee. We'll be starting with our next session at 10:30. So, I'll see you guys. Thank you.

~~~END OF SESSION 1~~~