Vol. 11 Feb 2020

INVESTOR-STATE DISPUTES IN INDIA'S ENERGY SECTOR: BALANCING FOREIGN INVESTMENTS WITH NATIONAL ENERGY SECURITY CONCERNS

Abhishek Rana[*]

Abstract

Every host state seeking an investment in their energy sector offers favourable conditions to foreign investors through bilateral investment treaties (BITs), guaranteeing the investors protection from any action(s) that may harm their investment. Thus, a State creates its investment policies in such a way which maintain the balance between its investment policies and socio-economic concerns. This forces states take measures that may upset the investors, consequently leading to disputes. Such disputes affect the conditions and likelihood of future investments in the host state, occasionally triggering calls for reforms in the investment regimes. This paper studies the nature and kind of disputes arising in the energy sector, and how in the Indian context, such disputes have resulted in a change in the country's energy policies. The paper then scrutinizes old investment treaties and evaluates their success in addressing national energy security concerns. Lastly, it studies the implications of the new Indian model BIT on the energy sector and how it may help India achieve its long-term energy security plans.

[*] The author is a Senior Research Fellow at the Forum for Trade Remedies and an International Economic Law Scholar from the Queen Mary University of London. The author would like to thank Ms Norah Gallagher & Ms Silke Goldberg, faculties at the Queen Mary University of London for their suggestions and guidance. The author is also grateful to Rishabh Meena for valuable research assistance. The responsibility for the information and views set out in this article lies entirely with the author. The author also reserves his right to depart from these views in the future.

I. Introduction

With industrialisation progressing into the 21st century, issues such as energy supply and security assume paramount importance for the economic interests of developing countries (such as India). The traditional discourse surrounding energy security saw many governments scrambling to secure traditional energy resources, such as oil, coal, and natural gas.[1] However, at the turn of the new century, this discourse began gradually shifting to move away from fossil fuels with an emphasis on the increasing importance of adopting a low-carbon pathway amidst climate change concerns. Although these concerns have failed to wholly direct the energy sector away from fossil fuels,[2] the stalemate in international negotiations on climate change has led to increasing unilateral action directed at the inclusion of investment policies in the renewable energy sector. The discourse surrounding the Indian energy is similarly complicated, riddled with two-fold concerns of energy security and climate change.[3]

Investors in the international energy sector have long been demanding guarantees from the host state to avoid situations wherein the host state could unilaterally take measures that could negatively impact the investor's return on investment.[4] This demand of the investors under the investment treaties has been addressed by the international investment law regime, which has fundamentally transformed the legal relationship between the investors and the host states, especially in the energy sector, by bringing certainty and predictability; hence, protecting the investors against any arbitrary actions or breach of promise by the

---

[1] Vyoma Jha, *India's Twin Concerns over Energy Security and Climate Change: Revisiting India's Investment Treaties through a Sustainable Development Lens*, 109 TRADE, LAW AND DEVELOPMENT 109 (2013)

[2] Ann Florini and Navroz K. Dubash, *Introduction to the Special Issue: Governing Energy in a Fragmented World*, 2 GLOBAL POLICY 3 (2011)

[3] Jha, *supra* note 1.

[4] PETER D CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY 1-500 (Oxford University Press 2010).

host States under the guise of protection of the rights of its citizens. However, the extent to which the international investment law regime can protect foreign investors in the energy sector from unilateral state measures remains uncertain. Therefore, understanding how arbitration can protect investors, whilst balancing the interests of host states to regulate their socio-economic concerns in the public interest is of paramount importance in today's global energy sector.[5]

It is essential to appreciate that India is currently operating in a dual position of being an investment destination, as well as an outward investor.[6] Therefore, its investment treaty commitments would have a direct effect on any energy-related regulatory action at home, as well as investment abroad. Conventionally, such investment commitments are codified in bilateral investment treaties (BITs). By signing BITs, Host states promise investors a certainty, good faith and non-arbitrariness in their behaviour and also offer investors avenues to take legal action against the State before an arbitral tribunal in case of non-compliances with these requirements[7] by invoking the Investor-State Dispute Settlement (ISDS) mechanism. However, there is a growing concern about the increased investor-state arbitrations that might occur, as most investment treaties confer upon foreign investors the right to

[5] Elizabeth Whitsitt and Nigel Bankes, *The Evolution of International Investment Law and Its Application to the Energy Sector*, 51 ALBERTA LAW REVIEW 203-234 (2013).

[6] United Nations, *World Investment Report-Global Value Chains: Investment and Trade for Development*, UNITED NATIONS, 1 (July., 2013), available at https://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

[7] Luke Eric Peterson, *Bilateral Investment Treaty and Development Policy Making*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, available at https://www.iisd.org/library/bilateral-investment-treaties-and-development-policy-making; *See* Mahnaz Malik, *The Legal Monster that lets Companies sue Countries*, THE GUARDIAN, November 4, 2011, available at https://www.theguardian.com/commentisfree/2011/nov/04/bilateral-investment-treaties.

subject host country regulations directly to international investment arbitration.[8]

ISDS cases in the energy sector are on the rise, causing the nexus between the energy sector and investment treaty arbitration to grow steadily. Close to one-third of all ISDS cases registered under the International Centre for Settlement of Investment Disputes (ICSID) originate from the energy sector.[9] This potentially poses a threat to the sovereign rule-making ability of host States as potential investor challenges the host State's energy-related policies. As the concerns surrounding investment treaty arbitration in the energy sector become more complex, there is an imperative need to explore the consequences of investment treaties for any energy-related regulatory action at the home state, as well as for Indian energy-related investment abroad.[10]

II. Nature of Investor-State Disputes in the Energy Sector

Energy investments are long term commitments that require huge capital. These commitments through investment in the energy sector of the Host state are susceptible to the possibility that a host state can change the erstwhile rules of engagement once the investment has been made, but before the investor has earned the promised return on investment.[11] Therefore, the investors seek to secure a more favourable economic environment for their investments through the inclusion of stabilisation clauses in investment contracts and the domestic investment laws of host

[8] Jha, *supra* note 1.
[9] ICSID, *The ICSID Caseload – Statistics Issue 2013-2'*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, 1 (Jun. 30, 2013), available at https://icsid.worldbank.org/en/Documents/resources/2013-2.pdf.
[10] Jha, *supra* note 1.
[11] Anotole Boute, *The Potential Contribution of International Investment Protection Law to Combat Climate Change*, 27 JOURNAL OF ENERGY AND NATURAL RESOURCES LAW 333, 337 (2009).

states.[12] In addition, investors also seek to configure their investments in a way that capitalises on the protection offered by International Investment Agreements (IIAs) such as protection against expropriation, non-discrimination, et cetera.[13]

It is helpful to describe a few common types of disputes before we begin addressing the focal issues. There are primarily four types of disputes in the energy sector which are (i) disputes involving political and economic restructuring, (ii) demand of the government to get enhanced share in the investment, (iii) disputes due to change in the policies of the Host state as to environment of the energy sector, and (iv) the withdrawal or modification of the measure by the government.

First, with disputes involving a significant political and economic restructuring of the host state, the crisis may be isolated to one jurisdiction or a small group of jurisdictions, and, in other cases, the crisis may be more global.[14] In these types of disputes, the host state usually tries to justify its stance in accordance with the investment treaty in question (and clearly this nature of the dispute is contingent on the treaty language) claiming that it authorizes special measures in exceptional circumstances. Thus,

---

[12] Peter D Cameron, *Stability of Contract in the International Energy Industry*, 27 JOURNAL OF ENERGY AND NATURAL RESOURCES LAW 305 (2009).

[13] Nationality of an investor determines under which treaty his/her investment can be afforded a protection. *See Saluka Investments BV v The Czech Republic*, UNCITRAL (17 March 2006). Mostly investors choose an investment vehicle viz. an entity incorporated in such a nation state which has a favorable international investment agreement(s) with the country wherein the investment has been made i.e. host state.

[14] Several cases were filed against Greece and Belgium in year of 2012 due to the measure taken by these nations in order to tackle the ongoing recession and the worldwide financial and economic crisis as witnessed in the European Union (see e.g. *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium* (2012), Case No ARB/12/29 (ICSID); Luke Eric Peterson, *Investment Treaty Arbitration against Greece Looms after Foreign Bank Gives Notice of Dispute Due to "Discriminatory" Bail-out*, INVESTMENT ARBITRATION REPORTER, accessed on (Mar. 12, 2019, 11:00 AM), available at http://www.iareporter.com/articles/20130327.

the Host state proves that the actions are consistent with the treaty.[15]

Exceptionally, where there is no internal special measures clause, the state may argue that the concerned measures are justified with respect to the rules of international law on state responsibility, particularly within the rules dealing with necessity.[16] For instance, in *El Paso v. Argentina*[17], El Paso sued Argentina for the withdrawal of the guarantees and safeguards, which forms the basis of El Paso's investment in Argentina the electricity and hydrocarbons industries.

Second, another source of disputes between the two parties is the efforts of governments to demand an enhanced share of resource rents when there is an unexpected global increase in energy prices. For instance, governments in Central and South America, including Ecuador, Bolivia, and Venezuela, have all taken measures to enhance their share of energy rents.[18] To make these endeavours see the light of the day, the governments introduce new taxes, renegotiate existing agreements, revoke existing agreements, or change the tax treatment of goods supplied to the energy sector.[19]

Third, changes in the host state to the environment within which the energy industry operates can be another source of dispute. For example, an increase in the cost of doing business in some

[15] Whitsitt and Bankes, *supra* note 5.
[16] CMS Gas Transmission Company v. Argentine Republic (2007), ARB/01/8 (ICSID), Annulment Proceeding.
[17] El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15)
[18] "Windfall" tax was introduced in Ecuador on their incremental rents on petroleum. This award was given under Burlington Resources Inc v. Republic of Ecuador (2012), Case No ARB/08/5 (ICSID). See also Sergei Paushok, CISC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, (28 April *2011);* City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petrdleos Del Ecuador (2007), Case No ARB/06/21 (ICSID)
[19] Whitsitt and Bankes, *supra* note 5.

cases may make it impossible to continue with the concerned operation.[20] For instance, Germany's decision to phase out nuclear energy can be cited as an example of the same.[21]

With the aim of promotion of renewable energy in the energy sector, the governments have attempted to incentivise and develop programs such as direct subsidies or feed-in tariff[22] that develop alternate sources of energy and new and innovative technologies like carbon capture and storage Feed-in-tariffs (FiT) policies are an important tool in driving the much needed investment in the renewable energy sector, especially in the form of 'local content' or 'domestic content' requirements, which makes it mandatory for the investor to source a certain percentage of materials from local suppliers in order to be eligible to receive the benefits of the policy. Typically, there have been two distinct trends in the kinds of disputes relating to FiT for renewable energy – first, disputes relating to the withdrawal or modification of the FiT's itself; second, disputes relating to the requirements of local content imposed on investors.[23]

Fourth, disputes can also arise where governments seek to withdraw or alter/modify the investment programs, especially in cases where host governments seek to include domestic performance requirements in order to foster the development of the 'green economy'. Disputes regarding eligibility for these programs may also arise.[24] The reasons governments cite for

[20] Ibid.
[21] Vattenfall AB and others v. Germany (2013), Case No ARB/12/12 (ICSID)
[22] IESO, *Feed-in Tariff Program*, INDEPENDENT ELECTRICITY SYSTEM OPERATOR, accessed on (Feb. 20, 2019, 02:24 PM), available at http://fit.powerauthority.on.ca/program-resources/faqs/general-information-about-fit-and-microfit-programs.
[23] Jha, *supra* note 1, at 109.
[24] Nigel Bankes, *Decarbonising the Eonomy and International Investment Law*, 30 JOURNAL OF ENERGY & NATURAL RESOURCES LAW 497 (2012). European Union and Japan challenged Ontario's FIT and micro-FIT programs at the WTO for discriminating and not according the same treatment to the foreign produced components of renewable energy (Panel Reports in *Canada - Certain Measures*

changing or withdrawing these types of programs are varied. In some instances, the programs prove more expensive than anticipated. Alternatively, such programs are criticised for being philanthropic either because the new technology has come to be seen as a product of the business, as usual, warranting no incentive or because the production costs for the new technology have fallen therefore reducing the need for incentive.[25]

III. Rise in Investor-State Disputes under India's Investment Treaties

In order to attract foreign investment in India, India started entering into BITs in the mid-nineties by offering favourable conditions to the investors.[26] India adopted its first BIT in 1994, and since then it has signed 83 BITs.[27] Each BIT to which India is a party is distinct, yet all the BITs have common characteristics.[28] Indian BITs are unique in many respects. First,

---

Affecting the Renewable Energy Generation Sector and Canada - Measures Relating to the Feed-In Tariff Program WT/DS412/R, WT/DS426/R; Appellate Body Reports in *Canada - Certain Measures Affecting the Renewable Energy Generation Sector & Canada - Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R. Discrimination has also been pointed out by the investors under the subsidy scheme of Ontario (Mesa Power Group, LLC v. Government of Canada, UNCITRAL (4 October 2011)).

[25] Arbitration initiated against the Government of Canada under *NAFTA* Chapter II as a result of changes to the development offshore wind projects in Ontario *(*Windstream Energy LLC v Government of Canada, UNCITRAL (28 January 2013)).

[26] Sherina Petit, Mathew Buckle and Daniel Jacobs, *India releases a new Model BIT*, NORTON ROSE FULBRIGHT, accessed on (Mar. 15, 2019, 10:00 AM), available at http://www.nortonrosefulbright.com/knowledge/publications/136918/india-releases-a-new-model-bit.

[27] Patnaik, *Deconstructing India's Model Bilateral Investment Treaty*, THE WIRE, September 16, 2016, available at https://thewire.in/economy/deconstructing-indias-model-bilateral-investment-treaty.

[28] Prateek Bagaria and Vyapak Desai, *Bilateral Investment Treaties and India*, NISHITH DESAI ASSOCIATES, accessed on (Mar. 12, 2019, 01:04 PM), available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Bilateral_Investment_Treaties_and_India.pdf.

India does not guarantee a 'right to make investments'.[29] Second, the Indian government keeps with itself the power to allow decisions of investment in various sectors. Third, Indian BITs require that investment be made according to the national laws of India.[30]

Indian investment treaties have never been in the limelight until recently. It was in 2012, many foreign investors threatened to sue the Indian government by invoking different provisions of various Indian BITs[31]: the cancellation of 2G licenses of their joint ventures caused Russian telecom company Sistema and Norwegian telecom company threaten to sue under the Bilateral Investment Promotion and Protection Agreement (BIPA) with Russia and the Comprehensive Economic Cooperation Agreement (CECA) with Singapore respectively; a UK hedge fund, the Children's Investment Fund Management is threatening to sue India over its policy to regulate the price of coal at home under the BIPA with Cyprus;[32] and the British telecom company Vodafone has also seeded a tax-related challenge under the BIPA with the Netherlands.[33]

Furthermore, in November 2011, an Australian firm, White Industries won the first-ever known investment treaty arbitration against India.[34] In the dispute between Coal India and White Industries, the latter raised objections against the inordinate

[29] Modak and Parvez Mirza, *Effective Remedies Provided to Investments and Trade Abroad*, ASTREA LEGAL ASSOCIATES LLP, accessed on (Mar. 10, 2019, 01:45 PM), available at https://astrealegal.com/effective-remedies-provided-to-indian-investments-and-trade-abroad.
[30] Jha, *supra* note 1, at 109.
[31] *Id* 109-149
[32] *Jha*, *supra* note 1.
[33] Sujay Melidudia, *Move to Rework Bilateral Treaties*, THE HINDU, July 11, 2016, available at https://www.thehindu.com/business/move-to-rework-bilateral-treaties/article3422322.ece.
[34] Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, INVESTMENT TREATY NEWS, accessed on (Mar. 10, 2019, 04:00 PM), available at https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.

delays on the part of Indian courts to enforce an arbitral award obtained by it against Coal India.[35] It was claimed that the delay violated the provisions on most favourable nation (MFN) treatment, fair and equitable treatment (FET), expropriation, and free transfer of funds under the India-Australia BIT.[36] The UNCITRAL tribunal rejected the claims relating to the violation of expropriation, FET, and free transfer of funds. However, it ruled that India violated the MFN provision of the India-Australia BIT.[37] The tribunal held that non-timely enforcement of the arbitral award by the local courts violated India's obligation to provide the investor with an "effective means of asserting claims and enforcing rights".[38] Furthermore, the tribunal relied on the broad MFN provision in the India-Australia BIT[39] and allowed White Industries to make use of the 'effective means' provision from the India-Kuwait BITs[40] even though the India-Australia BIT does not contain any provision of the similar nature.[41]

These cases, therefore, have contributed to doing away with the myth that a BIT can be invoked only against the actions of the government, i.e. the executive.[42] Professor Ranjan points out that actions of the judiciary, which is a sovereign function, could

[35] Jha, *supra* note 1.
[36] Ranjan, *supra* note 34.
[37] Santosh Tiwari, *Taking notice of investment treaties*, BUSINESS STANDARD, January 24, 2013, available at https://www.business-standard.com/article/opinion/santosh-tiwari-taking-notice-of-investment-treaties-112061400019_1.html.
[38] Jha, *supra* note 1.
[39] Under the India-Australia bilateral investment treaty (BIT), Article 4(2) of that BIT provides for the MFN provision wherein no less favourable treatment shall be granted to investments made by an investor from a contracting party when compared to the treatment granted to the investments or investors of any third country.
[40] Under the India-Kuwait bilateral investment treaty (BIT), Article 4(5) of that BIT mandates the contracting parties to provide the investors with effective means of claiming any right they have pertaining to their investment.
[41] Ranjan, *supra* note 34.
[42] Prabhash Ranjan, *Renegotiating a BIT*, THE INDIAN EXPRESS, July 17, 2012, available at http://www.indianexpress.com/news/renegotiating-a-bit/975397.

violate treaty obligations contained in a BIT as observed in the cases of Sistema's notice to the Government of India, as well as the White Industries arbitration.[43] Besides this, the former Attorney General of the United Kingdom, Lord Goldsmith has also stated that the courts are considered to be part of the State under BITs.[44] the sovereign actions of any organ of the State could be challenged under a BIT whether it is the executive, judiciary or legislature.[45]

IV. Investor-State Disputes Shaping Indian Energy Policies

This section first looks into the traditional energy sector on which the Indian economy is heavily dependent for most of its energy supply and power generation, and it includes the coal-based energy, non-renewable energy.[46] It is argued that the cases of investment treaty arbitration against the government, involving Coal India (an Indian public sector company) could create a 'regulatory chill' and prevent the Indian government from legitimate regulatory action or policy-making to ensure greater energy security and affordable energy access to its 1.21 billion population.[47] Additionally, this section would also look at some relevant ISDS cases in the renewable energy sector, with special

[43] Ibid.

[44] Thomas K. Thomas, *India Cannot Sidestep Obligation under Bilateral Treaties*, THE HINDU BUSINESS LINE, March 12, 2018, available at https://www.thehindubusinessline.com/opinion/columns/thomas-k-thomas/india-cannot-sidestep-obligation-under-bilateral-treaties/article20482526.ece.

[45] Ranjan, *supra* note 42; See *United States of America v. Iran*, 24 May 1980, ICJ.

[46] Jha, *supra* note 1.

[47] The term regulatory chill can be best explained from the instances where the states fear to enact laws pertaining to environment in the prospect of losing competitive edge to other countries when it comes to providing favourable conditions to the foreign investment. *See* Kevin R. Gray, *Foreign Direct Investments and Environmental Impacts - Is The Debate Over?*, 11 RECIEL 307 (2003).

focus on their impact on the Indian regulatory approach towards decarbonization.[48]

A. NON-RENEWABLE ENERGY SECTOR (EMPHASIS ON COAL)

In May 2012, the Children's Investment Fund (TCI), a UK-based hedge fund, issued a formal notice of a dispute and threatened to invoke arbitration against the Indian government under the India-Cyprus BIT[49] for violating its obligations on FET and expropriation under the treaty.[50] The Indian government sold off 10 per cent of Coal India Limited's (CIL) shares in 2010 through an initial public offering making TCI a minority shareholder after it acquired a 1.01 per cent stake in CIL. Following certain developments in Indian framework for energy regulation, TCI alleged that India's conduct "seriously impaired the business activities and operations of CIL" and is in conflict with the India-Cyprus BIT. TCI argued that CIL must be allowed to price and sell its coal supply under Fuel Supply Agreements (FSAs) at market prices as opposed to government-determined prices, which are significantly lower.[51]

Moreover, a Partner at TCI is believed to have said that the "most effective way" to settle the dispute was "to go through the BIT" whereas challenging the Indian government through the local courts could take years and hence a notice of arbitration was served by TCI. Hence, the coal sector in India could prove to be an easy target for investor-State disputes, especially with the TCI

---

[48] Jha, *supra* note 1.

[49] Under the India-Cyprus bilateral investment treaty (BIT), Article 9 of that BIT states the provisions for dispute settlement between the investor and the contracting party.

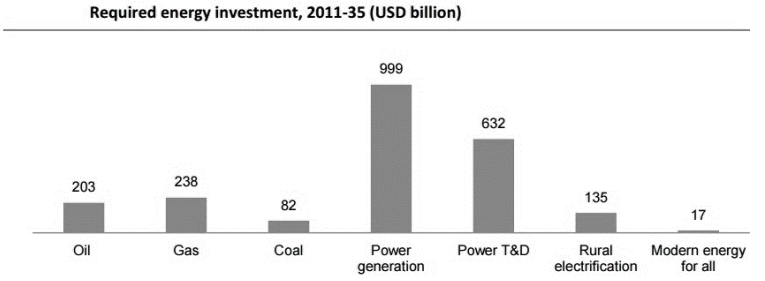
[50] 'Letter from Children's Investment Fund Management (UK) LLP to the Union of India' on May 16, 2012

[51] Mark Tran, *UK Hedge Fund's India Tussle puts Unfair Bilateral Trade in Spotlight*, THE GUARDIAN, May 16, 2012, available at https://www.theguardian.com/global-development/poverty-matters/2012/may/16/uk-hedge-fund-india-bilateral-trade.

arbitration in place.[52] However, as per the information publicly available, no actual investment arbitration has started as of now. Moreover, most tribunals are likely to regard any measure affecting a foreign investor's interests as a breach of the provisions of the relevant investment treaty as they protect the investor's interests over the right of the host State to regulate.[53]

B. RENEWABLE ENERGY SECTOR

As per empirical studies, from 2006 to 2010, India's primary energy consumption increased at a CAGR of 8.3 percent from 381.4 million tonnes of oil equivalent (MTOE) to 524.2 MTOE.[54] It is further estimated that India would need a total investment of USD 2306 billion on energy supply infrastructure from 2011 to 2035, or an average USD 92 billion per year (see the graph below). This is a substantial amount and ensuring this scale of investment for the next two decades will be a challenge for India, making private investment in particular crucial.[55]



Note: for "Rural electrification" and "Modern energy", investment figure is for 2010-30.
Source: IEA, 2011a.

[56]

[52] Jha, *supra* note 1.
[53] Jha, *supra* note 1.
[54] FICCI and Ernst and Young, *India's Energy Security*, NATIONAL SEMINAR FOR ENERGY SECURITY, accessed on (Jun. 3, 2017), available at http://www.ey.com/Publication/vwLUAssets/Indias_energy_security/$FILE/India-s_energy_security.pdf.
[55] Ibid.
[56] Amos Bromhead, *World Energy Outlook 2011*, INTERNATIONAL ENERGY AGENCY, accessed on (Apr. 6, 2019), available at

In 2010, India heralded its National Solar Policy, the Jawaharlal Nehru National Solar Mission (JNNSM). The JNNSM aimed at deploying solar power across the country and laid the foundation for a clean energy future,[57] with development across the entire value chain. In order to develop domestic manufacturing capacity across value chains, the JNNSM introduced a local content requirement.[58]

The United States consequently requested the World Trade Organization (WTO) dispute settlement consultations with the Government of India concerning the issue of solar power developers to use Indian-made cells and modules in India's national solar mission.[59] US claimed that this local content requirement is a violation of Article III:4 of the General Agreement on Tariffs and Trade, 1994 along with the Agreement on Trade Related Investment Measures, i.e. national treatment principle which put US investors at a disadvantageous position.

However, India's argument has been that the local content requirements do not flout the WTO rules. It is evidenced by the Government of India recently announcing a plan for 75 per cent requirement of local content in Phase II projects under the JNNSM.[60] India maintains that the power produced under the

https://www.ief.org/_resources/files/events/2nd-iea-ief-opec-symposium-on-energy-outlooks/world-energy-outlook-2011.pdf.

[57] Indian Government, *Jawaharlal Nehru National Solar Mission: Guidelines for Selection of New Grid Connected Solar Power Projects*, MINISTRY OF RENEWABLE ENERGY, accessed on (Mar. 4, 2017), available at https://mnre.gov.in/sites/default/files/uploads/jnnsm_gridconnected_25072010.pdf.

[58] Ibid.

[59] United States Government, *United States Challenges India's Restrictions on U.S. Solar Exports*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, accessed on (Mar. 4, 2017), available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/february/us-challenges-india-restrictions-solar.

[60] Siddhartha S., *Solar Mission-II projects to have 75% local content*, THE HINDU BUSINESS LINE, June 13, 2013, available at https://www.thehindubusinessline.com/todays-paper/tp-economy/solar-missionii-projects-to-have-75-local-content/article4808076.ece.

mission will be bought by the public sector enterprise NTPC, which amounts to government procurement. Moreover, India has not signed the Government Procurement Agreement under the WTO, forming the premise behind India's reason that it is not under any obligation to follow the rules prescribed by it.[61] In April 2016, however, India lost its appeal at the World Trade Organization, as it upheld an earlier ruling that found India's National Solar Policy mandating local content requirement is inconsistent with its obligations under the WTO Agreement. The Appellate Body recommended India to bring the measure in compliance with its obligation under the WTO Agreement.[62]

V. Review of India's Investment Treaties Concerning Energy Security

It is not clear as to which provisions of the BIT will the investors be relying upon to bring their claims against India or on what stage the existing investor-state disputes are at due to lack information that is available publicly. Nevertheless, India needs to remain attentive to the latest developments in ISDS cases while regulating its domestic energy sector, and negotiating its plans to sign more BITs.[63] The assumption that BITs help attract overseas investors is a questionable one in the light of the experiences faced by countries such as China and Brazil. Neither the restrictive terms in China's investment treaties nor Brazil's failure to ratify BITs has dissuaded foreign investors from entering the

[61] Amiti Sen, *Domestic Sourcing for Solar Mission no violation of WTO Rules*, THE ECONOMIC TIMES, April 09, 2012, available at https://economictimes.indiatimes.com/news/economy/policy/domestic-sourcing-for-solar-mission-no-violation-of-wto-rules/articleshow/12590597.cms?from=mdr.; Amiti Sen, *India worded over WTO's verdict on Ontano solar case*, THE HINDU BUSINESS LINE, May 19, 2013, available at https://www.thehindubusinessline.com/economy/India-worried-over-WTO%E2%80%99s-verdict-on-Ontario-solar-case/article20615849.ece.

[62] Miles, *India loses WTO appeal in U.S. solar dispute*, REUTERS, September 16, 2016, available at http://www.reuters.com/article/us-india-usa-solar-id.

[63] Jha, *supra* note 1, at 128.

country.[64] Recent developments in energy-related ISDS cases, both in India and the rest of the world, have made it amply clear that the existing BIT's could potentially constrain India's autonomy in carrying out these regulations.[65]

Thus, India needs to concentrate on renegotiating its investment treaty provisions and narrowing the scope of its provisions in accordance with its developmental priorities.[66] Although some reports suggest India's plans to exclude arbitration clauses from future BITs,[67] it is argued that it would not be a wise idea for India to completely exclude the ISDS clause from its treaties. The problem with BIT's is not necessarily a result of the ISDS provisions; rather, it results from the broad substantive protections offered within the treaty.[68]

FDI from India increased from $13.2 billion in 2010 to $14.8 billion in 2011.[69] This and the recent investment trends bear the testimony of the fact that India is fast becoming an exporter of capital. Henceforth, a move to remove ISDS clauses from investment treaties could jeopardise the interests of Indian investments abroad, which has exponentially increased over the last five years.[70]

---

[64] Vidya Ram, *Investment deals that BITe*, THE HINDU BUSINESS LINE, April 22, 2012, available at http://www.thehindubusinessline.com/opinion/investment-deals-thatbite/article3342641.ece.
[65] Jha, *supra* note 1, at 128.
[66] Ranjan, *supra* note 42.
[67] Sanjeet Malik, *India is planning to exclude arbitration clauses from BITs*, BUSINESS TODAY, May 27, 2012, available at https://www.businesstoday.in/magazine/columns/india-planning-to-exclude-arbitration-clauses-from-bits/story/24684.html; Eun-joo, *India plans to abolish ISD clause in FTAs*, BILATERALS, accessed on (Mar. 6, 2019, 2:50 PM), available at https://www.bilaterals.org/?india-plans-to-abolish-isd-clause
[68] Ranjan, *supra* note 42.
[69] United Nations, *World Investment Report – Towards a New Generation of Investment Policy*, UNITED NATIONS, accessed on (March. 4, 2019), available at https://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf.
[70] Prabhash Ranjan, *More than a BIT of a problem*, THE FINANCIAL EXPRESS, April 27, 2013, available at https://www.financialexpress.com/archive/column-more-than-a-bit-of-a-problem/1108228/.

VI. Other Landmark ISDS Cases involving India and their Implications on Investment in Energy Sector

A. AUSTRALIA WHITE INDUSTRIES[71]

The far-reaching consequences of this case have altered the scene of international arbitration in India. In this case, India was held liable for damages for judicial delays of over nine years in enforcing an ICC Award between White Industries Australia Ltd. and an Indian Government company, namely, Coal India.[72] The reason for the arbitration was the delay by Indian courts in the enforcement of the award which deprived the Australian investor of '*effective means of asserting claims and enforcing rights*'– an obligation contained in the Kuwait-India BIT, which the Tribunal held the Australian investor could take advantage of.[73]

In this case, White industries was an Australian mining company who entered into a contract with Coal India essential for the supply of equipment as well as the development of coal mine. This contract was governed by Indian law and contained an arbitration clause requiring disputes to be settled as per the ICC Arbitration Rules. Disputes arose between the parties and were referred to arbitration in London resulting in an award dated 27 May 2002 in White Industries favour.[74] Henceforth, on 6th September 2002, Coal India applied to the High Court of Calcutta

[71] *White Industries Australia Limited v. The Republic of India,* Final Award on 30 Nov 2011, UNCITRAL, available at https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/ accessed on Feb 25 2019

[72] Award in this matter of UNCITRAL arbitration was made under the Agreement between the Government of Australia and the Government of Republic of India on the promotion and protection of investment (Treaty).

[73] Sumeet Kachwaha, *The White Industries Australia Limited – India Bit Award: A Critical Assessment,* 29 ARBITRATION INTERNATIONAL 275 (2013); Emily Blanshard, Briana Young and Joanne Greenaway, *India liable under BIT for extensive judicial delays,* HERBERT SMITH FREEHILLS, accessed on (Nov. 23, 2019, 07:52 AM), available at https://hsfnotes.com/arbitration/2012/03/01/india-liable-under-bit-for-extensive-judicial-delays/.

[74] Kachwaha, *supra* note 73, at 276.

to have the ICC Award set aside,[75] while White Industries were unaware of this appeal and they had moved to the High Court of Delhi for the enforcement of the award.[76]

White Industries objected to these efforts and filed a petition challenging the jurisdiction of that Court to admit and listen to a set-aside request.

On 17 May 2003, a Judge of the Calcutta High Court ruled that the Court had jurisdiction over the set-aside proceedings. This was followed by an appeal by White Industries, wherein the panel of the same Court ruled the following year that the Indian courts could consider a setting-aside of the ICC award. The judgement of 7th May 2004, did not rule on the merits of the set-aside application.

White Industries took the matter to arbitration on the grounds that the inordinate delay in Indian courts to enforce the arbitration award violates the India-Australia BIT.[77] White Industries argued that the delay violated the provisions relating to fair and equitable treatment (FET), expropriation, MFN treatment, and free transfer of funds.[78] Although the tribunal dismissed the White Industries allegation related violation of FET and expropriation; it ruled that India violated MFN provisions of the India-Australia BIT, and awarded White Industries 4 million Australian dollars.[79]

---

[75] Section 34 of the Indian Arbitration and Conciliation Act, 1996 which is applicable to the arbitrations having their seat in India.

[76] Section 48 of the Indian Arbitration and Conciliation Act, 1996 Act which provides for the enforcement of foreign awards as under the New York Convention.

[77] *White Industries Australia Limited v Republic of India*, *supra* note 71, paras 11.2.2 – 11.2.8.

[78] Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, INVESTMENT TREATY NEWS, April 13, 2012, available at https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.

[79] India Council of Arbitration, *International Conference on Arbitration in the Era of Globalization*, Federation of Indian Chambers of Commerce & Industry

This case is worth noting as now the new model BIT of India has taken this case into consideration and made amendments to exclude the MFN clause.[80] This is an extreme step and may discourage investment,[81] even more so for the energy sector as has been discussed in the article in the later topic.

B. DABHOL POWER PROJECT IN MAHARASHTRA UNDER INDIA-MAURITIUS BIT[82]

The Dabhol dispute is the largest, most complicated investment dispute in recent Indian history under the subject of international investment law. It has also impacted the FDI dispute settlement procedures.

Dabhol Power Company (DPC) was incorporated in India to administer and operate the Dabhol Power Plant. The Dabhol Power Plant came into the formation through the collective resource utilisation of GE, Bechtel, and Enron. GE was responsible for supplying the gas turbines to the plant, and Bechtel would serve as the general contractor responsible for the construction of the power plant, whilst Enron would manage the project through their entity, i.e. Enron International.

This project was developed with the combined efforts of Enron (having the majority of investment with 65 per cent of shares in

FEDERATION OF INDIAN CHAMBERS OF COMMERCE & INDUSTRY, accessed on (Mar. 23, 2019), available at http://ficci.in/spdocument/20707/arbitration-Background-Paper.pdf.

[80] Prabhash Ranjan and Pushkar Anand, *'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NORTHERWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 24 (2017).

[81] Ranjan, *supra* note 78.

[82] V. Inbavijayan and Kirthi Jayakumar, *Arbitration and Investment-Initial Focus*, 2 INDIAN JOURNAL OF ARBITRATION LAW 33-54 (2013).

this project), Bechtel[83] and General Electric (GE)[84] (each held a 10 percent stake in this USD 3 Billion Dabhol Power Plant.

Accordingly, OPIC entered into political risk insurance contracts with each of the parties, to provide coverage for their equity stakes and loans against political violence, incontrovertibility and expropriation.[85] Under the provisions of the agreement signed between the parties, if the Government of India was found to be breaching its obligation, then they would have to compensate GE and Bechtel with a compensation worth 57.1 million dollars, as it created an obligation for the Indian Government to pay OPIC that sum, free from the interference caused by the injunction on arbitrations issued by the Indian courts.

Once the project started, it became the object of controversy as the energy purchase price was allegedly considerably higher than that of other power producers. These companies brought in claims under the India-Mauritius BIT, alleging that their interests in the power plant had been expropriated by the Indian Government. Dabhol Power Company immediately exercised its right to international arbitration, and the arbitration proceeding commenced in London against the state government for breach of its contractual commitments. The state government, in response to that, challenged the very jurisdiction of that arbitral tribunal; however, it was maintained that the arbitral tribunal had the jurisdiction to hear this matter.

Therefore, the Maharashtra Electricity State Board (MESB) was found in violation of a multitude of its obligations under the

[83] Engineering company from America with headquarters in San Francisco, United States

[84] Multinational conglomerate corporation from America with headquarters in Connecticut, United States

[85] Request for Arbitration under the Incentive Agreement between the government of United States of America and the Government of India (India v US) at 9 (2004) available at https://www.opic.gov/insurance/cliams/awards/documents/GOI110804.pdf

Power Purchase Agreement in the OPIC arbitration. These obligations were counter-guaranteed by the Indian government, making the Indian national government responsible for reimbursement to GE and Bechtel.[86] Thus, GE and Bechtel recovered their costs from OPIC under their political risk insurance policy because MESB had breached its obligations under the power purchase agreement. The Government of India was thereby obliged under the Investment Incentive Agreement to reimburse OPIC for the money awarded to GE and Bechtel.

Hence, the OPIC-GE/Bechtel proceeding is one classic example of how arbitration agreements with a non-Indian venue can allow damaged parties to recover their losses from disputes arising in India in an expeditious manner.

C. CAIRN INDIA[87]

In this case, Cairn Energy Plc. Of the United Kingdom gave indemnity to Cairn India Ltd. Plc. against levy of any tax for past deeds. It included the two-year-old tax demand of 20,495 crore rupees. Cairn India did not deduct and withheld the tax on the capital gain it made from Cairn Energy Plc. and hence Cairn India was fined Cairn Energy claimed 900 million dollars from the Indian government for 'losses' caused to it by the actions of Indian government as part of a 1.6 billion dollar tax dispute.

Consequently, India's Income Tax (IT) department attached Cairn Energy's 10 per cent shareholding in Cairn India provisionally. The controlling stake in Cairn India was sold by Cairn Plc. for 8.7 billion dollars to Vedanta Group. The value of

---

[86] Preeti Kundra, *Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons*, 41 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 907-935 (2008).

[87] Press Trust of India, *Cairn India has indemnity from Cairn Energy on tax demand: Anil Agarwal*, LIVEMINT, accessed on (Apr. 2, 2017, 09:04 AM), available at https://www.livemint.com/Companies/zehaj3WD2BbehwV1bR85TK/Cairn-India-has-indemnity-from-Cairn-Energy-on-tax-demand-A.html.

a 10 per cent stake was 1 billion dollars at the time. Cairn Energy wanted to sell this off to finance its different corporate investments.

Consequently, Cairn Energy initiated international arbitration against the Indian government seeking to 'protect its legal position and shareholder interests' under the U.K.-India Bilateral Investment Treaty (BIT). An arbitration tribunal with 3 arbitrators was appointed, and the arbitration proceedings commenced in January 2016. It has been presented in the recent annual report of Cairn Energy that the tribunal is currently working on the award as all the prior procedures are over.[88] It has also been argued that the "administrative expense towards Indian tax arbitration rose to 22.9 million dollars (about Rs 158.4 crore) in 2018 from 8.1 million dollars (about Rs 56 crore) in 2017".[89]

VII. India's New Model BIT and its Implications

Since India came into the fray of bilateral investment treaties[90] at a very later stage compared to the rest of the countries globally, India signed its first BIT in 1994 with England. Till now, India has signed over 83[91] BIT's with many countries out of which 74 are in force. During that time, there was no model BIT[92] which was being followed or which was adopted in our nation. However, in 2003, India adopted its first model BIT, which was said to lay the pavement for further negotiations with foreign countries. This is not the only development on a multilateral level

[88] Press Trust of India, *Cairn Energy's legal cost for fighting retro tax demand nearly triples*, THE ECONOMIC TIMES, April 08, 2019, available at https://economictimes.indiatimes.com/industry/energy/oil-gas/cairn-energys-legal-cost-for-fighting-retro-tax-demand-nearly-triples/articleshow/68762615.cms?from=mdr.

[89] Ibid.

[90] Bilateral Investment Treaties are at times also referred to as Bilateral Investment Promotion and Protection Agreements (BIPAs) by the finance ministry of India, available at http://finmin.nic.in/bipa/bipa_index.asp.

[91] Gourab Banerji, *GAR Investment Treaty Know-How, India*, (Adwaita Sharma, George Pothan and Sriharsha Peechara, 2015)

[92] India 2003 Model BIT, http://www.italaw.com/investment-treaties.

as India is in the midst of negotiating several Free Trade Agreements with countries such as Indonesia, Mauritius, Australia, New Zealand et cetera.[93]

India also had only marginal involvement with Investment Treaty Arbitration (ITA), which refers to the dispute resolution mechanism available under BITs.[94] During this period, India was involved in only one ITA dispute, and even this dispute did not result in an ITA award (there are, however, a few non-ITA arbitral awards).[95]

India's efforts to attract and safeguard foreign investments while protecting the public interest will be keenly watched in the midst of reforms in international investment agreements.[96] The country's model bilateral investment treaty provides the framework for new negotiations with trading partners such as the US. Furthermore, India is going to use the model treaty to renegotiate existing treaties, including with several European countries.[97]

Released in 2015, a few provisions in the model treaty have drawn attention from trade partners. A closer look at this treaty is clearly necessary as it will be instrumental in shaping the investor-state

[93] Ministry of Commerce and Industry, *India's Current Engagements in RTAs*, GOVERNMENT OF INDIA, accessed on (Mar. 5, 2019), available at http://commerce.nic.in/trade/international_ta_current.asp.
[94] Raju and Prabhash Ranjan, *BIT of a problem down under*, THE INDIAN EXPRESS, October 17, 2011, available at http://archive.indianexpress.com/news/bit-of-a-problemdownunder/860705/.
[95] Capital India Power Mauritius I v. Maharastra Power Dev. Corp., Case No. 12913/MS, (ICC Int'l Ct. Arb. 2005), available at https://jusmundi.com/en/document/decision/en-capital-india-power-mauritius-i-and-energy-enterprises-mauritius-company-v-maharashtra-power-development-corporation-limited-maharashtra-state-electricity-board-and-the-state-of-maharashtra-award-wednesday-27th-april-2005
[96] Patnaik, *supra* note 27.
[97] Prabhash Ranjan, Harsha Vardhana, Kevin James Ramandeep Singh, *India's Model Bilateral Investment Treaty: Is India Too Risk Averse?*, BROOKINGS INDIA, 1 (Sept. 3, 2009), available at https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf.

disputes in the future.[98] The new Model BIT of India has excluded taxation measures from the scope of the treaty, and any tax-related decision is not open to review by any arbitration tribunal, [99] to prevent the consequences that India faced in *Cairn* dispute.[100] This is again not a final BIT, and it is open to negotiations; however, such text in the model BIT gives implication to the investor to consider a Government's stance on an issue.[101] Exclusion of such taxation matters from the scope of BIT is again sure to have a negative impact on the investments in India, and the same may also be seen in the energy sector.

There have been concerns regarding India's model treaty and its seemingly protectionist approach. For instance, the Model BIT contains the enterprise-based definition of investor.[102] It is mandatory under the model BIT to exhaust remedies at the domestic court for five years before initiating investment arbitration.[103] Further, the Model BIT excludes from the purview the matters on government procurement, subsidies, compulsory licenses in the intellectual property rights and taxation.[104] However, the recent decisions, including the verdict in the *Devas* dispute, are also strengthening positions of both investors and the

[98] Government of India, *Model Text for the Indian Bilateral Investment Treaty*, GOVERNMENT OF INDIA, accessed on (January 5, 2019, 10:00 AM), available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411.
[99] Government of India, *Model Text for the Indian Bilateral Investment Treaty*, GOVERNMENT OF INDIA, accessed on (Mar. 4, 2017, 10:33 AM), available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.
[100] Sumathi Chandrashekaran and Smriti Parsheera, *Why New BIT May Not Work*, THE HINDU BUSINESS LINE, May 25, 2016, available at https://www.thehindubusinessline.com/opinion/columns/why-the-new-bit-may-not-work/article8645025.ece.
[101] Ran Chakrabarti and Trisha Raychaudhuri, *India: BITS And Pieces - India's Bilateral Investment Treaty Revisited*, MONDAQ, March 30, 2016, available at http://www.mondaq.com/india/x/477612/international+trade+investment/BITS+And+Pieces+Indias+Bilateral+Investment+Treaty+Revisited.
[102] Model BIT, art 1.4.
[103] Model BIT, art 15.
[104] Model BIT, art 2.6.

government.[105] (In the Devas dispute, the government cancelled an awarded contract, when irregularities were found. The investor's challenge of the government's decision was accepted by the tribunal.)

According to UNCTAD, which keeps an account of the number of disputes, a total of 17 known investor-state dispute settlement (ISDS) cases were filed against India by the end of 2015.[106] Out of these seven are pending, nine were settled, and India lost one case (excluding the recent Devas ruling). India was one of the top 15 most frequent respondent states in 2015 (i.e. sued most often). Currently, there are about three cases where India is the home state of claimants. Since arbitrations can be kept confidential under certain circumstances, the actual total number of disputes filed against countries could be higher than the facts suggest.

In this complex environment of domestic and international realities, how India will negotiate its investment treaties is quite essential. There is also an interest in what the new model BIT has in its bag, not just for India, but even for the Global South in pushing boundaries in investment agreements especially seeking foreign investment for the energy security.

VIII. Conclusion

After examining India's energy demands and investments under the energy sector, it is clear that India has its unique energy security concerns. Based on the past investor-state disputes, unclear provisions under India's investment treaties, and analysis of the new model BIT of India, it is quite challenging to ascertain whether India would be able to keep up the flow of foreign investment under its energy sector.

---

[105] Prabhash Ranjan, *Comparing Investment Provisions in India's FTAs with India's Stand Alone BITs-Contributing to the Evolution of New Indian BIT Practice*, 16 THE JOURNAL OF WORLD INVESTMENT AND TRADE 899-930 (2015).
[106] Patnaik, *supra* note 27.

It is important to make the Indian BIT regime more balanced with equal rights to both the state and the foreign investors. There are specific provisions in the BIT which remain to be without any proper definition and arbitrary giving the interpretative discretion to both the investors and the investment-state dispute settlement tribunals.

Nevertheless, the author believes that a few steps in the right direction would undoubtedly help India in attracting more investors in the energy sector and ensuring the fulfilment of their energy security concerns. Some of these recommended steps involve the inclusion of ISDS clauses in the BITs; more transparent and comprehensive provisions under the investment agreements; extending the necessary protections to the foreign investors; providing favourable conditions for the foreign investment; and trying to minimise the investor-disputes.