MUMBAI CENTRE FOR INTERNATIONAL ARBITRATION

INDIA ADR WEEK 2021

Session hosted by:
Allen & Overy

Session theme:
Investment Arbitration - Pendulum in favour of investor or host state?

Transcription of Proceedings

Technology Partner

NMIOKKA ENGINEERS PVT. LTD.

contact@nmiokka.com
+91 7303622930

Ms. Sanjana Promod: Hello everyone. Welcome to day two of MCIA's India ADR week. My name is Sanjana Promod and I work with DLA Piper. This investment arbitration session is hosted by Allen & Overy and will discuss whether the pendulum is in favour of the investor or the Host State. The audience will agree that none of these panelists warrant any introductions. It is nevertheless an absolute honour and a privilege to introduce Mr. Harish Salve QC, who is one of the world's leading arbitration counsel with a global reputation for treaty arbitration, commercial arbitration, public international litigation and litigation. Mr. Salve was awarded one of India's highest accolades the Padma Bhushan and was appointed Queen's Counsel in 2020. Next up we have Ms. Fereshte Sethna, who heads DMD Advocates, international litigation and ADR group and has over 26 years of experience in arbitration and litigation and a significant experience relating to investment treaties. Mr. Howard Rosen, who's the Managing Director with the Secretariat and has been consistently recommended by key listings as a leading expert with over 39 years of global experience. It is finally my pleasure to introduce A&Os very own speakers. Matthew Hodgson, who's a partner in the Hong Kong office and acts as an arbitrator and counsel under various arbitral rules and has represented investors in States in various treaty arbitrations as well. Finally, we have Sheila Ahuja, who's a partner in A&Os Singapore office and co-chair of Young MCIA steering

committee. Sheila has extensive experience in investor state and commercial arbitration and associated court matters. I'd also like to invite the participants to post their questions in the Q&A section. This session will be transcribed. Sheila, I'll leave it to you to take it from here.

Ms. Sheila Ahuja: Thank you very much Sanjana and a good day to everyone who's joined this webinar. I'm delighted to be moderating this session on behalf of Allen & Overy. Also, firstly we'd like to thank the MCIA for organizing the India ADR week, which we as a firm and I in particular, I am very grateful to be a part of. I'm even more delighted to be joined by the panel that we've been able to convene and after those introductions and even without them I'm sure the audience will agree with me that I can only say that with the caliber of individuals we have, I am relieved that I'm the one who only gets to ask the questions. And by no means, am I obliged to answer any of them. So, the topic we've got is investment arbitration: is the pendulum in favour of the investor or the host state? The way that I plan to run this is to divide that session. There's a lot that can be said in it obviously. And what we've done is picked a couple of topics that represent themes we've been seeing lately or the discussions that have been had around this topic more generally. I'm going to introduce therefore four subtopics within them. And then what I'll do is play it out, like for those of you who are

familiar, a bit of a Karan Johar rapid fire round style, where I will put questions to each of you as panelists. Of course, I get to pick the panelists. So apologies in advance. And I'll leave you to respond. Of course, if other panelists wish to add to any question then that would make it even more interactive and I think fun. Without further ado let me get started. The four subtopics we have; I am going to deal with the Model BIT, India's Model BIT, state regulation versus legitimate expectations. Then we will move on to, the role of the discounted cash flow method in making the investor whole in investor treaty claims and finally, Covid state measures and investment arbitration. Moving quickly to topic one India's Model BIT. Now, of course, we know that India unveiled this Model BIT in 2016 and it's since been the base text for India's negotiations of BITs in the last few years. What we've seen around that is commentators noting that this Model BIT significantly limits the protection afforded to investors compared to India's prior BITs. Therefore, the conclusion that this must be a reaction to the cases the significant number of investment treaty claims that India has faced. And for those of you following this closely you'll know that India has 25 publicly known treaty cases against it that have been commenced to date. So, with that ratio of background, Mr. Salve, if I can call upon you first. And may I just say, that I'm going to enjoy this moment of being able to put the tricky questions to you rather than being at the receiving end of

them. Can I start by asking you, in your view, what is your take on India's Model BIT as it stands? And in particular, which feature to you represents the most significant departure from the world prior to this Model BIT?

Mr. Harish Salve: See, I think, we need to coin another acronym. The India Model BIT should be called the India UIP, Unilateral Investment Promise. It is unilateral, because I don't think anybody has agreed to this kind of a joke and it's a promise by the Government saying come invest in India, we promise you, we are nice people. Vodafone may disagree. Devas may disagree. But that's what it is. It is clearly a reaction. And if you find something strange in Article 2.4.2, which says whether or not something is taxation it will be left for the Government to decide which will be non-justiciable. We have Fereshte to blame. So she's responsible for the clause coming into this treaty. And, I think the Government of India finally having signed the treaties came alive to with the proposition that a bilateral investment treaty tribunal can make an award against you notwithstanding a parliamentary legislation or a decision of the Prime Minister's office. Suddenly they had a feeling that the sovereignty of India was being compromised by treaties. Which is the noise I've heard in India. And when I was consulted once informally, I said, if you are so protective of your sovereignty, don't sign a treaty. You can't sign a treaty saying I reiterate my sovereignty and how dare

you tell me what I should be doing. So that's what treaties are for, to govern yourself by the platform of international law. So, this treaty is clearly a reaction. If you see FET has been booted out, national treatment has been watered down, full protection and security has been booted out. All you're left with is expropriation with a major carve out. Basically, this treaty says if you want a relief in India, you must go to an Indian court. That's why I call it a UIP, not a BIT anymore.

Ms. Sheila Ahuja: And looking at it another way. On the flip side, India is also of course increasingly a capital exporting country. And investments in India have led to the reverse as well, which is publicly known treaty cases brought by Indian investment, Indian investors to date. So, and again, half of these were commenced in the last five years. Do you think that if more countries did sign this Model BIT, would there be a balance struck between investors and host states adequately to reflect this fact of India becoming a capital exporting country?

Mr. Harish Salve: I think it would be a more straightforward if Government of India came and said we are a capital exporting country and we don't believe in this BIT culture and said we don't want BITs. Rather than come up with the sad excuse for a bilateral investment treaty like this. If you are

so protective and we are so confident and we say have faith in India and come and invest in India then don't sign a treaty. You can say I'm a capital exporting country. The fallacy of capital exporting is you're confusing the mathematics of it netting off with individual investments being made into India and out of India. There are still sensitive areas where India desperately needs investment and which is not forthcoming because people have questioned marks. I remember of one case where a very large client came to me and said what do I do? How do I proceed? I said, well retrospective law is going to be the order of the day. You can keep fighting your case but it's no use. That client said I've got a billion-dollar lying in a bank account to set up something in India which India desperately needs. I'm not going to bring that money. To say that India is a net capital exporting country doesn't really solve your problem. The exports from India, I, what I have seen go into developed countries. You really don't need this. It's the, it's the capital put into India, which is a noisy democracy. And I mean it in a positive way. We are a noisy democracy. We have, people are assertive. We have a powerful media. Sometimes it goes overboard. So, to prevent against populism you need these kinds of treaties. So, this capital exporting thing, frankly, I find unconvincing. But if the Government of India feels so strongly that they should refuse to sign treaties rather than give this kind of an excuse.

Ms. Sheila Ahuja: And Sir I guess one of the features you were describing, one fairly significant feature of the Model BIT and fairly controversial feature of the Model BIT, is this exhaustion of local remedies, Article 15, which requires that an investor must pursue local remedies for a period of at least five years, before it can bring the claim. Unless that investor can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief of the same measure or similar facts, factual matters for which a breach of this treaty is claimed or that particular treaty is claimed. Again, this exhaustion of local remedies provision to give some meaning to the availability of a treaty protection to begin with. How do you see or how do you expect future tribunals would want to interpret or might interpret this provison of Article 15?

Mr. Harish Salve: I lost you for about five seconds. That was directed to me, right? Sheila?

Ms. Sheila Ahuja: Yes sir. Yes.

Mr. Harish Salve: See, by itself clause 15 speaks of exhaustion of domestic remedies. When you read it in a context it creates serious problems. The language which they have used is remedies in respect to the same measure or similar factual matters for which breach of this treaty is claimed. I know

what the Government of India here is trying to attain. One of the defences they ran in Vodafone and in the connected case, which is still award is awaited in the Singapore arbitration, Vedanta/ VLC. Is that, there is a constitutional remedy and you can challenge an unconstitutional law. We tried arguing that Indian constitutional law may or may not provide a remedy. This is a treaty remedy on the touchstone of FET or FBS. And those are not what the Indian constitution provides. The Vodafone award suggests that argument has been rejected, obviously in Cairn they must have argued the same thing. The Cairn award in public domain. The tribunal is not found that persuasive. To get past that they have added this. So virtually this will mean all disputes must first go to an Indian court, because there is no remedy. There is no measure in respect of which a remedy is not available. If nothing else, on a violation of the rule of law and Article 14 everything can be challenged in India. This will virtually mean your round one is in Indian court. Then they have put in a clause saying, the tribunal cannot get into the merits of the judicial review. So, if an Indian court has said, this is fair and reasonable. Then they will tell the tribunal that conclusion is final. So, this actually shifts all disputes back into Indian municipal courts. And that's why I call this a unilateral investment promise. This is not a treaty at all in that sense.

Ms. Sheila Ahuja: And I suppose. Just to follow up on that, and it's linked to a question we're being asked is, what does that then mean for the investor into India? Is it actually, if one were to, I guess, pick the choice between the two, is it better or are you just better off having the domestic remedies that would be available to you, taken away the Model BIT? Salve sir.

Mr. Harish Salve: We have domestic remedies, which we have. And if you have Indian courts are robust. I'm not for a minute saying that the Indian courts are not robust. But having said that all constitutional principles or administrative law principles recognize that there has to be a great elbow room for fiscal policy. And if you see the jurisprudence of international treaty, then the way international tribunals have understood the fair and equitable treatment clause or the full protection and security clause, it is very different from the way the courts have been more or less hands-off on challenges to economic policy. So, to for somebody to suggest that the domestic remedy more, more than adequately or at least in some measure fills up the gap, is complete and can only be if you don't fully understand what treaty law is all about.

Ms. Sheila Ahuja: Thank you, Sir. I suppose, your point about, legitimate expectations and FET standard brings us to the next

topic, which is the comparison between state regulation and this right, sort of be protected in respect of your legitimate expectations. So, the fair and equitable standard, the fair and equitable treatment standards, we call the FET standard is the most frequently invoked standard in investment disputes. And it's also, it tends to be the basis of majority of successful claims pursued in investment arbitration proceedings. It's generally accepted that the dominant feature of the FET standard is that the statement not defeat or frustrates a foreign investors legitimate expectations, which that investor relied upon at the time its investment was made. So, then the question of whether there's been a failure to meet legitimate expectations, how is that to be determined? It ends up being a fact sensitive exercise and sort of state measures, which in one matter may give rise to a treaty breach may not in another even if the measures are fairly similar, because it's so fact sensitive. And it really does also depend on the specific content of the investor's legitimate expectations. So, the flexibility of that concept explains why it's so popular on the one hand. But I would say it also raises concerns that it may excessively limit the host states regulatory powers by acting as by this treaty standards of being a wide catchall provision. Just with that background, Fereshte, if I can ask you, what factors have tribunals found to be particularly important or even not so important in

determining whether reliance by a foreign investor on Host State conduct is reasonable?

Fereshte Sethna: Sheila, thank you. Let me start by saying that principally there are really three areas in which you will test for state conduct. The first is where the host state has executed a document. For instance, where you have, say an information memorandum of the type you saw in Enron versus Argentina. Where typically there were certain representations, if you will, were held out in an attempt to promote privatization of a state-owned company. Which for all intents and purposes was ultimately found capable of being relied upon, to effectively push back on what was the specification as may know. In so far as concerns, the <inaudible> tariffs that were part of the utilities arrangements that were in place in that case. And, and obviously as we know, there's that entire body of litigation or arbitration that transpired, around that Argentina crisis in the context of emergency laws of 2002. But, that apart therefore where there's a document, where there is an express document that could effectively be relied upon very clearly that by itself does become a matter for the Host State conduct to be tested upon. On the other hand, you have guarantees or licenses or regulatory frameworks of the nature that would be capable of being treated as immutable. Now, obviously insofar as immutability is concerned, that we'll have to be tested on the touchstone of

civilization clauses and obviously a granular read of what it is that the entire framework as it were as a whole were to offer. Whether it be in the form of legislation read with any regulatory directives, read in consonance with a license, all of that would obviously come together in order to eventually test for state conduct. Again, any number of examples there, starting from Enron/ Argentina. But coming then to another category is and what I considered to be a fairly important one for purposes of your question is the one where there is a declaration or a promise or an assurance by the host state. And declarations as we know from the Nuclear Test Case of 1974, which essentially pertained to nuclear tests being run and the ICJ was presented with a case by Australia. In that context the ICJ had opportunity to evaluate the apprehensions that arose from measurable quantities of radioactive matter that were found to potentially be dissipated across the world in varying degrees, which would inter-alia involve a nuclear fallout or the consequences of that radioactive material effects, should be falling on the Australian territory. It was in that context that the ICJ had the opportunity to weigh up what were declarations made by France. To the effect that they would not be continuing those tests otherwise than through underground testing. Now that was held. And I consider that to be fairly landmark because that was held to be a unilateral declaration, which was an undertaken given publicly, with intend to be bound erga omnes. Therefore, available to the

world at large. And therefore, available to the international community to rely upon. And therefore, the ICJ went on to hold that in circumstances where that type of unilateral declaration is available, very clearly the state is bound and required to follow the course of conduct that would necessarily be the concomitant or consistent with that declaration without any requirement for any form of quid pro quo. Obviously relying on the principle of good faith, trust and confidence, which is inherent to international corporation. So that I think sums up my views on your question. I, I wonder if I have answered you fully.

Ms. Sheila Ahuja: Yes. I think you have. And I think your division of the three categories is very helpful. Because of course, as a point of principle, any form of state conduct can in principle give rise to the concept of legitimate expectations. Just building on these three categories in particular, in your view what are the circumstances where an investor can establish its legitimate expectation based on something like a generic form of document, I guess, generic category as opposed to something specific. So, I'm thinking on the one hand laws and regulations more generally versus what you mentioned in one of your categories, the specific licenses or permits or even a declaration for that particular scenario.

Fereshte Sethna: Well, so, let's just look back at the recent

Spanish Renewables Cases. I think, there's a lot to take away from those. Because as we know, legitimate expectation was looked at and was in fact rejected, in the case of say, Stadtwerke. Now the big question is Why? What is it that the tribunals considered? What is it that they weighed up? What were the prevalence socio-economic criteria that they effectively looked at? And how did they eventually conclude, that there was in fact no legitimate expectation in circumstances where for all intents and purposes an illegitimate tariff in the form of paid tax is what was principal in contention? What was effectively being argued by the claimant was that, in the garb of tax, in the garb of exercise of sovereign right of taxation, Spain had gone ahead and laid the tax, which obviously within the contours of the ECT, the Energy Charter Treaty was not capable of being laid in circumstances where it effectively would frustrate or defeat their legitimate expectations. And in that context, the tribunal weighed up the very critical criteria, which I wish I believe is possibly going to be the landscape for these types of claims going forward. And obviously we know that there was an annulment, an annulment proceeding that was brought in respect to Stadtwerke, which culminated eventually in a withdrawal of that annulment proceedings. Because in the meantime, Spain has brought along a new framework and obviously with all of the bells and whistles which included the clear advantage to investors who would not pursue any

longer their arbitration claims and will not pursue their damages, entitlements if awarded to obviously switch out into that new framework as well. But, let's just examine for a moment, what were the defences that were taken by Spain specifically on the issue of legitimate expectation. They were. The first, as to whether or not applicable regulatory framework and its function was to the knowledge of the investor. So, knowledge of course is key to legitimate expectation coupled with the fact that you should have shown yourself to have relied upon that knowledge in taking your decision to invest. The second, whether the appropriate Government authority had in fact made a specific commitment to the investor that the regulation will remain immutable. In other words, therefore, I mean, coming back to the issue of immutability. If there is no absolute assurance of the type that will effectively facilitate the investor to contend that under no circumstances would there be any form of change and so far as concerns, whether it be a tariff or a license condition or otherwise which of course, knowing that these are long-term contracts is almost implausible. But nevertheless. So that was obviously the second key defence that Spain took on the issue of legitimate expectation. And the third was whether it would be reasonable or justified, if you've tested on the plank of economic sustainability and on the principle of a reasonable rate of return that such a tax or tariff or effective variations from where it is that the investment

started out, should occur. And it was in fact on the finding of the tribunal that there was in fact a reasonable rate of return available to the investors. But the tribunal eventually reached its conclusions amongst of course various other things. These things as you know are as very detailed long awards and plenty beyond what I just mentioned, but yeah.

Ms. Sheila Ahuja: What's interesting about your point about knowledge in particular as Ha, Ha, put another way you looked at it, on what is the duty on the investor to begin with? And, Mr. Salve may I ask you to comment on this as well after you Freshte? But what do you think is the duty or the, how would you define the scope of the duty for the investor to do its own homework. So, to undertake due diligence in respect of their investments rather than to rely on this standard as sort of an insurance policy as it's been described against what's nothing more than a bad business judgment. How does one balance that and what is that onus on the investor itself?

Fereshte Sethna: I think we will allow Mr. Salve go first.

Mr. Harish Salve: I would rather you answer that Fereshte. I have a more generic view.

Fereshte Sethna: Okay. Sure. So, let me bring us to the 2019

Case of Soles, which again is another of the Spanish Renewable cases. Involving again, the regime for remuneration of renewable energy providers. Where the tribunal concluded that a formal due diligence process is not a precondition for a successful claim for legitimate expectation. And that I think is again a huge departure from where it is, that we know due diligence requirements to sit at. And therefore, to knowledge and due diligence, we do have as recently as 2019 a tribunal finding to the effect that formal due diligence processes are not a precondition to successful claims for legitimate expectations. What is it that the tribunal looks at? The tribunal says that investors legitimate expectations must necessarily not be permitted to benefit from gaps, it's subjective knowledge of the regulatory environment. And in fact, be tested on an objective standard. Because whether or not a regulatory regime is amenable to change. Whether or not the host state had an obligation to retain the original or essential features or the core features of what it is that was held out at the time, when the investment was made. All matters that a prudent investor may perhaps not necessarily have a full understanding of at the time of the investment. So, for instance, when it came to an issue of cap on hours, something has narrow as cap on hours in the realm of the tariff regime. Whether or not that was in fact envisaged at the time of the investment and the level of attention and detail that was paid by the investor at the stage of the due

diligence to look at that and effectively take away that was an immutable term of the arrangement. It is obviously a factor that tribunal had to take into consideration. In the fact pattern, the tribunal came to its conclusion that well, clearly, there was much to be said. So, I think, given that the levels of due diligence that would typically occur at a time when an investment is made. And, and as we know, there's all types of advice that has taken some legal advice, commercial advice, or techno-economic feasibility advice. Ultimately, all of that gets laid out before the tribunal. A lot of that ultimately has to be carefully navigated including, through the Harvard's of the world. Who would effectively, throwing with Harish's fantastic analyses in terms of how you would effectively present all of that eventually. So, yeah, I think that is where we sit on the due diligence piece for now. It's quite wide open. It differs from case to case as you've just mentioned Sheila. So that's really where we are.

Ms. Sheila Ahuja: Thank you Fereshte. Mr. Salve you had a general comment.

Mr. Harish Salve: If I may just speak up on due diligence. I think, one of the important elements of treaty law is we have to try and make it as black and white as possible. Because if the treaty law starts getting too much grey and too little

black and white then it will suffer from the same disease, it set out to cure. Having said that, due diligence where there is a plea that there wasn't a sufficient understanding of an existing legal regime is something, I can understand. But I have heard and Fereshte will bear this out in two of the cases, we have heard the extreme variants of due diligence arguments. For example, a state arguing saying you invested a lot of money in a mining resource. You should have known whenever we give our mines there's always chaos and you're never likely to get a clear tag. Now is that due diligence. And if that kind in fact which is to prevent against your normal conduct, that you enter into a treaty like this. Or to take the most extreme case. The one of the most strongly argued point in the retrospective tax cases in Vodafone, Cairn and Vedanta is that when you were investing in India, you should have known India has a terrible culture of retrospectively changing tax slab. Now, when you say you sign the investment treaty, what's the whole purpose? The whole purpose says, yes! I know you have a bad history, and that's why you have investment treaty. And hopefully qua a foreign investor, you will not do what you're otherwise known for doing. So, you know, this due diligence sorts of runs in circles. But I just wanted to make one comment. See legitimate expectation, if you take a step back, it started in administrative law. And it actually started with Robertson minister of pensions and High Tress by Lord Denning, brought

in the commercial law notion of promissory estoppel into administrative law. It then got classified as a principle of fairness. And from there we have now chiseled it into legitimate expectations. That you behave the Government to honour its commitments. But that becomes particularly sharpened when it comes to an investment treaty. And invariably, you'll say; for example, Ministry of Power will go and conduct a road show, all over the world saying, come invest in the power sector. Ministry of Telecom will do a road show. Ministry of Roads, will do a road show. And come and say invest. If those are the representations made, surely it hardly behoves a state to turn around and say, you're right. We said this. But you know what, why did you take us seriously. That's exactly the kind of approach that investment treaty is supposed to block. So, there's legitimate expectation. Yes, there are cases. And, there are awards, which you have this lovely expression now called, outliers on both sides. But broadly what tribunals have done is, they have <inaudible> their pants. If you feel that the conduct of a state is unfair, you may put it under FET, you may put it under legitimate expectation. You may put it under any other head. If you feel that given its compelling economic circumstances what the state has done is not inconsistent, with how you, one would fairly treat an investor. It passes muster.

Ms. Sheila Ahuja: Yeah. Thank you. That's a, that's a very helpful sort of way of putting what ultimately the test should come down to. Isn't it? And I suppose you both talked about due diligence in a wider sense. I mean, one of the aspects of due diligence that has come up is also in the context of determining whether or not there's a jurisdictional problem. And Matthew, I wondered whether you wanted to comment on that aspect of due diligence. And I should warn Howard that I am coming to you next.

Mr. Matthew Hodgson: Thank you, Sheila. Yes. We all know that whether it's serious illegality in the making of an investment such as fraud or corruption a tribunal will generally conclude that, it doesn't have jurisdiction or all the claims are inadmissible. But more nuance to the situations where there has been another breach of local laws in the making of an investment which may be less serious. It's nontrivial, but it may be less serious. Question marks over whether the person who signed a contract for the, on the Government side had the requisite authority, for instance, or other local law breaches. The question is sometimes come up in that context, whether an investor's due diligence is relevant. There were a couple of the earlier cases which come to mind immersing Ukraine, Anderson and Costa Rica or Georgia, where the tribunal didn't actually go into that question of investors'

due diligence. They said, well, you were dealing with the state. First you are entitled to see, to consider that the state officials are acting consistent with their own law. Governments can't breach their own breaches of, compete their own breaches of domestic law in defence of breach of an international obligation or else you're, they are stopped from doing. So, they looked it that way. Slightly different was the decision in Anderson and Costa Rica. Where a number of investors, found themselves innocently caught up in what was essentially a ponzi scheme, which was shut down by the authorities and they lost their deposits. And when they sought to recover them through a treaty claim, the tribunal said, well, No! Those investments were made in breach of laws, regarding the use of financial intermediaries. Even though there was certainly no question of any serious wrongdoing by the claimants they had not carried out the proper due diligence as to the local law requirements in that regard. In the end, the tribunal didn't have jurisdiction. I found that was quite an interesting development in the case, it will be interesting to see if further tribunals examine that and consider whether in cases where there is arguably a serious breach of domestic law investors due diligence becomes a relevant consideration.

Ms. Sheila Ahuja: Thanks. Thanks, Matthew. We've talked about the jurisdictional aspect, of course, all along. We've also

been talking about liability. Let's move on, I think to damages. Of course, the next topic is the role of this discounted cash flow method in making the investor whole again, if it, of course prevails on liability. So, despite this wide adoption of DCF, the DCF method in calculating damages, there is a lot of controversy in its use. In particular where the enterprise in question lacks a proven record of profitability, it's then said as what, why is DCF still the right way? Why should it get damages by way of the DCF method? The recent October, 2020 quantum award in the Devas and India decision is a good illustration of this. Where the majority in Devas awarded more than 111 million US dollars by adopting the DCF method, despite the fact that the company in the telecom sector had no historic operational activity. Of course, I also note that the dissenting arbitrator rejected the application of the DCF module and favoured awarding sunk costs instead. So, I have specific questions on this, but how would I wonder whether you wanted to, for those of us who are, I know some of us are very familiar with this decision. But for those in the audience who are less familiar if you can give us a little bit of an overview before I give you my rapid-fire questions.

Mr. Howard Rosen: Thank you very much. I mean I read the decision in the descent and it requires re-reading several times. It is a very rich content award and descent. It's a

very, very important issue for quantum experts and for claimants and respondents alike. The approach taken by the majority looked at through the compensatory aspect of damages and said we've arrived at a decision. We're going to compensate them for the taking of this asset. The various factors they considered not important at this point. But what they arrived at that point in the decision was claimant had put forward an argument that once you make the decision that we have to be compensated, whether it's Chorzow or fair market value, compensatory relief, to put you back in the position you would have been to make you whole. Then it becomes a question of economics and valuation. And so, the tribunal the majority in that case looked at other cases and looked at the very fact specific situation in this case and determined in their view based on the facts as argued, that they could adopt the DCF and then they made that decision. The dissenting opinion, took a slightly different point of view and used a more legal principled approach and sided principally I think three buckets of support for the dissent. The first being that there's lots of other tribunals in other cases that have been faced with DCF for early-stage companies, pre-revenue companies. And the majority of them have found that it is not appropriate <inaudible>. The second thing that the dissenter relied on was two previous cases, the ICC and the DT tribunals and related telecoms cases. And said they also found that it was not appropriate to use a DCF. So, he relied on that

aspect. And the third was a reference to a World Bank document that outlined from again from a legal principle point of view, gave some guidance on approaches to compensation for early stage companies, or at least companies that are pre-revenue and refer to those as not a going concern. And so, you have the majority of looking at something fact specific and it was like your FET discussion something that is fact specific. The dissenter looking at something that is more legal principles. It's really, again, I think there's been lots vast written about this award and this descent the case is cited. I was not involved in this case. But I've been fortunate enough to be involved in a lot of the cases that were cited in both the award and the descent. I have some very definite opinions on the use and misuse of DCF. With that background, I invite your questions.

Ms. Sheila Ahuja: Thank you. I was going to take you on that last comment there on your opinions of the two divergent is, both of which I think you explained, you know at least on its space appear to have very legitimate basis. So, in your view, or at least your take of this what are the factors that you have found, of the cases you've been involved in a more generally, just from your experience, that tribunals have found to be relevant in determining whether the DCF method should be adopted. What the tribunals have found and perhaps

what do you think you know are the factors that really should lean towards the DCF method being adopted?

Mr. Howard Rosen: And again, I think the factors that were outlined in the dissent are frequently cited by respondents. It's a safe place to go because it is a legal principle approach. I find a lot of tribunals find comfort in that because they are not valuation experts and it is difficult to engage with the evidence. That's why I think the Devas award is really important majority because they do engage at a microscopic level with a lot of very difficult issues. I am not commenting on which whether the award of the descent is something that I would prefer because again, I wasn't involved in the cases to have preference one over the other. But I think it is a very fact specific situation. It cannot be that every pre-revenue company, excuse me, every revenue positive company has a particular way of valuing it. I think tribunals are mostly guided by the market and that's the kind of evidence that I find tribunals find compelling. I think they are suspicious of black box Models of party-appointed-experts, you have widely divergent views. I think rightfully so they are suspicious of any of these Models that are created, that are highly sensitive and not reconciled to some measure in the marketplace. So, when I'm speaking to the tribunals, I find that when they engage in this evidence, they are most keenly interested in how does this relate to the real world? How

would these transactions be done by actual parties as opposed to hypothetical parties? What have you looked at in the marketplace to try and reconcile your views whether to use a DCF or not use a DCF with the way actual market participants transact? And I think if the damages experts keep that view in mind, I think they'll find the tribunals engage much more directly with them and much more fruitfully.

Ms. Sheila Ahuja: Thank you, Howard. Just picking what you, how, you know relying on sort of market or actual factors and market related factors. So, talking about early-stage companies, if you have, an early-stage company and you're relying on a DCF calculation what are factors that could be relied upon in that situation, in your view?

Mr. Howard Rosen: I mean, in theory, we could also together produce a projection for, we could make up a business after this conference is over. We can make up a projection and we could apply a very high discount rate to it. We would all come up with a positive value. One of the ideas has merely not. Every MBA class was involved in producing a Model that gave you a value. The exercise of going through and doing the DCF is in itself not of value. It is the inputs that enter that Model. So, if you are an early-stage company and you are interested in putting forth a DCF, the first thing is, in your industry at your stage of development, the risks you are

facing, is it appropriate? Is that the way actual market participants would view your company? That's the threshold question that has to be answered. There are some wonderful companies that are extremely valuable, but because the two obvious inputs to a DCF are the projections of cash flows and they have to be reasonably determinable. Number one. Not in the eyes of the tribunal or the eyes of the law. They have to be reasonably determinable by people who invest in these types of companies. I think that's what the majority found compelling it is. The Model they refer to and the inputs into that Model were things that sophisticated investors were typically relying on. If you're a natural resource company, you're a serial start-up. Every time you put a hole in the ground to dig for something or drill for something there's an expectation based on the commodity you're looking for. That there's going to be success or failure, depending on the stage you get to. There are rules that help guide valuation professionals as to when to use a DCF. Once you crossed a threshold of knowledge that sufficient clear to those cash flows will look like, and it can apply a sensible discount rate, you cross that threshold and you can use a DCF. So, depending on the business, depending on your ability to reasonably predict cash flows, and depending on how the market views those business is, early-stage companies again, it's going to be very fact specific.

Ms. Sheila Ahuja: Thank you. That sounds, that sounds a fair way of looking at it, doesn't it? One comment you made earlier about tribunals. Sometimes we met with experts with widely diverging views. Of course, where DCF is adopted by both sides' experts their calculations and how the Model plays out may have very significant discrepancies. The ultimate number may be very different. So how, what should a tribunal do in that circumstance? As you say their ability to engage with the minutia of the valuation exercise will vary. So, what can it do? What should it do?

Mr. Howard Rosen: I mean, the last thing you want is, the last thing you want on the last day of the hearing typically when damages experts are appearing and everybody's thinking about their schedule post the hearing briefs. So, the last thing you want to do is have two damages experts, debate about things like data and leverage and complicated valuation theory in front of a tribunal. They just, they don't have appetite for it. So, in my experience, the thing that's been most helpful is when tribunals are more proactive in forcing experts to get together to do a joint expert report. At least and the format I use is very, very simple. I think a lot of experts use a very similar format, is you just list all the major inputs into your calculations, into your opinions side-by-side. And where you find you have agreement, you can strike those off

and where you find you have disagreement, but it doesn't have a huge impact on the quantum itself, you can put those in a separate category. And you really want to focus the tribunal on where you have significant differences. If you can narrow it down to, two or three or four issues, then you can have a meaningful discussion. You may have witness conferencing if the tribunal wants to engage the experts. If there's one issue where you're just miles apart. For instance, in Devas there was an issue of whether the projections were done on a nominal or real basis. Now, that's not something that you want to debate in cross examination. You don't want to cross examine me on that. In your counterpart, doesn't want to cross examine any other expert on that. That should have been an issue that the experts could have done together in a joint report, that would have made the evidentiary part of it much easier. But again, the tribunal, weighed in they looked at the evidence there's a thorough discussion in the award. It was quite impressive what they did in terms of engaging with that issue, as opposed to ignoring it. Again, in my experience, a more proactive tribunal that ensures the instructions to the experts are responsive to each other. Then there's an opportunity to narrow the issues through joint expert reports and the use of hot tubs, where you've got significant differences between experts and can put it to them and let them speak to each other. I think that's very helpful for a tribunal.

Ms. Sheila Ahuja: Thank you, Howard. I've got one more question actually from the audience and then I'm move on to flee to our final topic. I thought this was quite a good question. It relates to what you were talking about before, in terms of, looking at the market position on a particular type of business. The question is about would that DCF application favour certain types of businesses? Let's say mining companies as opposed to say other businesses like social media or gaming companies. Is it also a sector specific level of confidence?

Mr. Howard Rosen: Yeah, very much. I mean I do a lot of natural resource work. I do a lot of mining and oil and gas work and so. And you know what the commodity is. There're views in the market what the commodity is going to sell for. There're fairly good views and engineering reports. It'll tell you what it costs to get over the ground. There's usually off take agreements from markets where it readily failed. And so, most of the elements for DCF are fairly objectively determinable. And then it's consideration of things like country risk and how it's finally <inaudible>. So that’s where valuation experts may make <inaudible> for things like social media or high-tech businesses or other businesses that don't produce cash flows. So, we've many valuable billion-dollar valuation unicorn companies that have no cashflow, that are negative cashflow. And, but yet there are worth billions of

dollars. So, you would not use a DCF. Although there are DCF Models for some of these businesses that project the eventual turnaround. In the future, they will have such market share in such market dominance. They will have enormous value. You look at companies like Tesla and other companies with emerging technologies, that have, there's some of the most valuable companies in the world than Inaudible> companies that have stable historical cash flows. Yet they're currently not profitable. And so, there are a market assumption with respect to growth and profitability. You think about Facebook in the early years, it was a losing company. It was a money losing company for years and years, until it wasn't and the investors were paid off handsomely. So, it requires a different approach. I think tribunals should rightly be suspicious of companies that are projected to lose money for 20 or 30 years and suddenly make money. All the values are often the future, because the one thing is change is constant and that risk is indeterminable out that far. But there's other ways of looking at it. So, as long as again you have market participants that are buying in some of these companies, you have analysts who are following these companies that form views and help inform market participants on high value. And so again, you have to be specific to the industry.

Ms. Sheila Ahuja: Thank you, Howard. Just sorry, before I do move on Mr. Salve, I guess within confines, because I know

that there may be some matches, you may not wish to comment on. But is there anything you want to say about that topic before?

Mr. Harish Salve: Sheila, you know, Devas is a very, and I don't want to comment on the majority and the minority. And I think Mr. Rosen has picked it up with such clarity. But, there's only one interesting spin which you should know, which was the real problem which we had in the Devas case. Normally, if you are valuing a telecom company, you would say, if I go into Telecom if I set up a mobile telecom business, applying the growth rates. This is what would happen. I would have so many, a hundred thousand customers and at this growth rate and approximately this, et cetera. You have all the predictions. Devas is contract with the Government of India was sort of satellite. And from that satellite, they their original project was they would give a handheld device. Which you could use for, a) for GPS on cars, GPS in trains, et cetera, et cetera, to see movies. But that does not mean the evaluation was very strong. The Devas valuation was based on the fact of 3 to 4 American investors, two of them of Indian origin, were actually the people who have driven the telecom revolution and they had found a way of reforming the spectrums. So, because of the satellite contract with ISRO, a band of spectrum would be made available to Devas and they claimed that they would be able to reform that spectrum and provide broadband. And you

know today all telephony is broadband. Now that gives a completely different dimension to a business. What is the probability that they would have been allowed to do a broadband? What would have been the figure of that broadband? This is not, this is not what Devas was set up for. Devas was set up for satellite related businesses. But the turnaround of the of the re-farming of the spectrum is really what lend value. And that is what, it's so complicated the valuation in Devas.

Ms. Sheila Ahuja: Thank you. That's interesting. And often as you say, it is a very subjective. I guess the one theme is all these points just do end up being so fact-specific, don't they? And speaking of facts specific scenarios that does bring me to my last topic, and I'm not sure you can get away these days with any talk without mentioning the C word. Covid. So, just quickly to you, Matthew. What types of Covid related claims do we expect to see? I mean, there've been rumours and discussions being floated about it. They've even been some threats. What types of treaty claims do you think that we should see in the horizon in light of Covid?

Mr. Matthew Hodgson: I think there are two main categories to keep in mind. The first, the claims that might result from immediate actions in response to the Covid crisis. The immediate public health measures and the immediate economic

response that Governments have taken. Those cases may come out of restrictions on exports of medical equipment, vaccines, for instance, suspensions of loan repayments, discriminatory treatment in respect of state aid or loan states have made to businesses. That category I suspect will be fairly limited. Today as you mentioned, there have been a number of threatened claims. At least I'm not aware of one that has yet gone through to actual proceedings. They are mostly in Latin America. A number of the measures complained of have no obvious connection with the Covid crisis. The investors position appears to be that Covid is simply a pretext for the actions which are being taken. That includes for instance, the suspension of highway tolls in Peru, changes to guidelines for electricity grid in Mexico. Matters aren't obviously motivated by direct response to Covid. But the second category and I suspect the more substantial number of disputes will relate to what happens after the crisis. We all know that state's balance sheets have taken an incredible hit from the pandemic and state actions in response to it. The IMF has a huge number of warnings about the state budgets particularly in developing states and what we've seen of course in financial crisis in the past. Both localized crises, such as Argentina as Feresthe mentioned already in 2001- 2002 and also global financial crisis in 2008. We have seen a number of investment treaty claims come out of those crises, because of the actions that Governments take in response to them. Which can include at the

extreme end of the scale nationalizations or discriminatory taxes or other mistreatment of foreign investors who may be an easy target. I know anecdotally that is something that multinationals are concerned about. I have one client now who has been reviewing the investment treaty protections. They've got in place across Asia Pacific in particular, because they're concerned that as a foreign investor with generally good balance sheets they may be an easy target in a couple of years' time when states look to plug the gap of their balance sheet. So, I think those really are the two main categories you can expect.

Ms. Sheila Ahuja: Matthew, what would be the defences then that a state may rely on in response? So far, we've been thinking about the angle of the investor and how they can articulate their claim and what might they face but what will the state say if, you know met with a claim that is clearly, I guess, or in some cases not so clearly but somehow triggered as result of Covid.

Mr. Matthew Hodgson: So, well they will only need a defence if there is wrongful conduct in the first place, of course. And the first question. No, the first line of defence for a state will be that we have a right to regulate. As Feresthe covered already, that is, there are certain limits on that but a state does as a starting point and have a general regulatory room as

you would expect. Unless the, if actions are taken for a bona fide purpose for public health protection, for instance, and those are non-discriminatory and non-arbitrary. It may be a challenge for an investor to show that there's a breach of the treaty in the first place. But if there is, prime facie a breach, then potentially defences kick in, and those include the customary international law defences. Most importantly, I think necessity but also potentially force majeure or distress. There may be a specific carve out in the treaty as there are many treaties, including the Indian Model BIT at Article 32, which actually carves out certain measure, including those taken for public health, reasons from a wrongful conduct. Just looking briefly at those defences necessity was litigated a number of times in the Argentinian contacts through essentially three aspects to it. You need to show the state would need to show that it acted to safeguard an essential interest against grave and imminent peril. And that the action they took was the only way of safeguarding that essential interest. So, as you can probably summarise, the first two of those elements, safeguarding essential interest against grave and eminent peril may be satisfied in the context of the Covid crisis. The last one that this was the only way of safeguarding that essential interest may well prove more challenging because if there are a range of legitimate policy responses available then an investor may be able to defeat defence. That was, of course, what happened in

the case of CMS and Argentina. Even though the facts were relatively extreme there have been significant civil unrest in response to the financial crisis. The tribunal concluded that actually the devaluation of Peso, a very substantial devaluation, was not the only policy response available. And they rejected the necessity defence. It was also I think, relevant as they were separate findings. Tribunal held that actually Argentina had contributed to that situation. Because the seeds of the economic crisis lay in, lay in the past, which the Government had itself contributed. So arguably its decision was influenced by the feeling that Argentina itself had some responsibility for bringing about the circumstances. And states may try to distinguish their response to Covid on that basis. But that's necessity. And then just to complete the picture on force majeure. There are a number of requirements there. But I think the one that's likely to be most challenging for states is that it must be materially impossible to perform the relevant obligation as a result of the, of the external event. So, there is no sort of wriggle room on policy there essentially. It's an involuntary choice. The state has no alternative. So force majeure, again, likely to be a high threshold.

Ms. Sheila Ahuja: Thanks, Matthew. And I guess, and I'm afraid this may be our last question. But I'll ask you Matthew, and then may ask, we have list to comment. Let's go back to the

beginning, which is the draft or the text of investment treaties. How do you think the Covid pandemic experience will or do you think it will at all influence the drafting of treaties going forward?

Mr. Matthew Hodgson: I think it's likely to be taken into account in future negotiations. I mean, there was already a very clear shift to treaties becoming ever more complex and ever more carved out some qualifications. One of them, as I already mentioned is the general exception making clear that measures which are not arbitrary or discriminatory in pursuit of public health objectives for instance, will not breach a treaty. That was lifted from GATT's practice into trade law, Article 20 of the GATT. It has been amended in different versions of investment treaties. There's a question how much that really adds actually to a tribunals analysis as to whether something constitutes a breach of treaty in the first place. Because tribunals have repeatedly confirmed there is a right to regulate irrespective of whether you have this kind of exception. But I suspect they will continue to be included in treaties. Another approach is to qualify the substantive standards of protections to try to clarify what is not covered. Particularly for instance, the standard of expropriation, it's quite common now for treaty to contain an annex clarifying for avoidance of doubt in direct expropriation, doesn't mean any regulatory act, which happens

to destroy the value of an investment. And I think that type of language is likely to continue to proliferate. Finally, and this one, I think more a theoretical possibility at this stage. It's not beyond the realms of possibility that states might seek to amend their existing treaties with some kind of Covid exception. There have been circumstances where states have done that before after the Phillip Morris in Australia case you saw. Australia and Singapore agreed amendment to their FDA to carve out claims coming from tobacco legislation. There have been noises around whether they should be Covid related treaty claims at all, including from the Columbia centre sustainable investment. It's a possibility that some states will seek by amendment of the treaty to carve out certain Covid claims.

Ms. Sheila Ahuja: Mr. Salve, Feresthe, do you have any views on that last question on what impact Covid will have on the I'm am going to ask Mr. Salve about the Model, will there be a new Model BIT or an amended version?

Mr. Harrish Salve: See, the problem is as follows. As Matthew very rightly said, there are a number of defences. And I, if you take a step back and look at it more globally, barring a few outlandish awards what you call outliers. Broadly tribunals have recognized problems of states and have always accommodated States genuine compulsions. I don't think any

country has been spared by ravages of Covid. I think it would be a particularly insensitive tribunal which does not recognize what States have had to do. Secondly, there is no measure by which one could gauge the reaction of a State. Economic crises are things which the world has seen before. You can broadly have a cut-off line at which you realize that the State is doing something which really is not connected with an economic crisis or a devaluation or a crash in its economy and it's using it as a reuse to expropriate foreign investments. The thing about Covid is honestly very few states knew what they were doing and I don't know how much of it we know even today. And heads of States have admitted that they are in a situation which is unprecedented a situation the enormity of which nobody has been able to understand. If there have been measures taken, which can broadly be correlated to genuine concerns of Covid, I'm sure tribunals will not give awards. And if they do, it may prompt revision of treaties. But there's something else which worries which is very important. There is a degree of insularity, which is coming into countries post Covid. Especially when the vaccine wars have started. I've just got a message somewhere saying, AstraZeneca has given a notice to Indian manufacturer now. The Indian manufacturer's problem is he not allowed to export vaccine. Now these, at some point may become treaty claims, if there are international cross border investments. And the vaccine wars, if they really take off, as the doomsday

scenario suggests, then there are own problems. And there are the degrees or eventuality coming into countries because this is such an emotive topic that you cannot inoculate your own country. Why are you talking of free trade? And coupled together with the fact that today when this is what this is not my subject, but this is what I read. There is so much capital available, somebody gave a figure 18 or 19 trillion or 17 trillion of capital available at virtually no interest rates. That is why economies are picking up despite the Covid doctrine. The Indian economy's picking up despite the Covid down trend. So large availability of capital and these kinds of a growing sense of nationalism everywhere need to protect your own <inaudible> may create the right emotional backdrop for revisiting investment treaties. So, let's see watch the space as they say.

Ms. Sheila Ahuja: Thank you Sir. Feresthe, I don't know whether you had anything to add. I think we've got a minute before we need to wrap up with apologies <inaudible>

Fereshte Sethna: Just two words, I think public interest. That is what is going to be effectively the key to determining whether or not a State is entitled to act in a manner in which it did. I think that's a very critical area. Again, for the want of time I won't to expand on that.

Ms. Sheila Ahuja: Thank you. All I can say is that there might need to be a sequel to this session at some point as we see how it all turns out. In the meantime, what I can say is thank you all so much for your invaluable comments. I don't know about the audience but I certainly scribbled down a lot of knowledge that I've acquired through this session. Thank you very much for your insights and for taking the time to engage with me on this topic.

Ms. Sanjana Promod: All right. That wraps up an excellent session and gives us a lot of food for thought, a big thanks to all the panelists and to Sheila for brilliantly moderating the panel on a very difficult and interesting topic. And thank you to the audience for all the enthusiasm and questions. Before we drop off, the last session for the day, which is also on investment arbitration is hosted by the ICSID and starts at 6:00 pm IST. If you have any questions that could not be answered I suggest you ask in the next session. So, stay tuned and login. Thank you very much for your time.