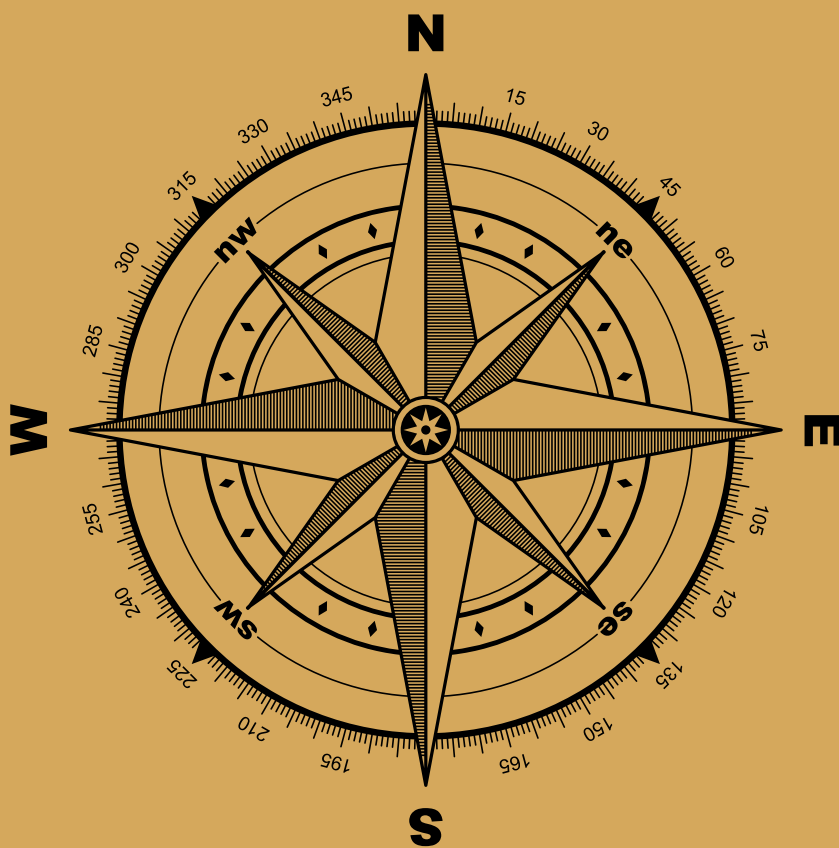




Centre for Trade and Investment Law

Investment Law **compass**



navigating through

GLOBAL INVESTMENT FRAMEWORK

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The Investment Law Compass is CTIL's monthly newsletter on the global investment framework and developments. Our vision is to inform professionals and policy makers on topics related to investment laws and treaty arbitration, thereby fostering informed decision-making.

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UNCITRAL Adopts the Code of Conduct for Arbitrators in International Investment Dispute Resolution: A Milestone in Enhancing Integrity and Accountability in Investment Arbitration

BACKGROUND: REFORMING THE ISDS LANDSCAPE

Since 2017, UNCITRAL Working Group III (WGIII) has led efforts to reform the Investor-State Dispute Settlement (ISDS) system amidst growing criticisms of its legitimacy, consistency, and transparency. The adoption of the Code of Conduct for Arbitrators in International Investment Dispute Resolution (Code) marks a concrete step toward these goals. This Code is a part of UNCITRAL's broader reform package, which also includes the Code of Conduct for Judges in International Investment Disputes, the UNCITRAL Model Provisions on Mediation, and the Guidelines on Investment Mediation.

Purpose and Vision: A Universal Ethical Framework

The Code aims to establish a universal ethical standard for arbitrators, thereby harmonizing existing best practices across treaties and arbitral institutions. It complements rather than replaces frameworks such as the IBA Guidelines on Conflicts of Interest (IBA Guidelines), offering a unified benchmark for integrity and professionalism.

Objective	Description
Uniform Standards	Harmonizes ethical obligations across institutions and treaties.
Strengthen Trust	Addresses perceptions of bias and conflicts of interest among party-appointed arbitrators.
Build Legitimacy	Promotes impartiality, transparency, and professional integrity in ISDS proceedings.

Key Features of the Code

1. "Double-Hatting" Prohibition

Article 4 prohibits arbitrators from holding conflicting roles, such as acting as counsel or expert witness, in related disputes. It also introduces 'cooling-off' periods, exceeding the IBA Guidelines' flexibility.

Situation	Restriction
Acting in related proceedings involving same measures or parties	3-year cooling-off
Acting in proceedings under same treaty provisions	1-year cooling-off

2. Independence and Impartiality

The Code establishes an objective 'justifiable doubts' test for assessing independence and impartiality. Arbitrators must avoid both direct and indirect conflicts of interest, codifying a transnational standard for integrity.

3. Disclosure Obligations

Article 11 introduces a mandatory and ongoing disclosure regime, requiring arbitrators to reveal relationships within the past five years with disputing parties, counsel, co-arbitrators, expert witnesses, or third-party funders, as well as any interest in the outcome of related disputes.

4. Professional Conduct

Arbitrators must perform duties diligently, competently, and with integrity; maintain confidentiality; avoid ex parte communications; and ensure transparency in fees and assistant roles. These provisions institutionalize global best practices.

Challenges: Implementation and Enforcement

Challenge	Explanation
Limited Applicability	Applies only when expressly incorporated by parties or in new treaties, limiting its immediate impact.
Lack of Enforcement Mechanism	No standing body or sanction mechanism ensures compliance. Without such measures, its authority risks dilution.

Looking Ahead: Toward an Enforceable ISDS Ethics Regime

The UNCITRAL Code marks a global step forward in enhancing the legitimacy and consistency of ISDS proceedings. Its long-term success hinges on institutional adoption, integration into treaties, and the establishment of effective enforcement mechanisms.

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Data in Disputes: ISDS and the Future of Digital Investments



Source: UNIDROIT: Digital Assets and Private Law

As the global economy becomes increasingly digitized, intangible assets such as data are emerging as key drivers of business value. Most international investment agreements (IIAs) predate the digital era, leaving significant ambiguity about whether and how data qualifies as a protected investment. Consequently, tribunal jurisprudence on the treatment of intangible assets and especially digital assets under Investor–state dispute settlement remains limited. This raises a broader conceptual question: whether existing investment treaties are adequately designed to address non-physical and non-analogue forms of investment.

Regulations and policies that affect digital assets may also affect the rights and obligations of foreign investors and host states. For example, data disclosure regulations may reduce the value of such data assets. Such localization may impose investment costs on investors. Measures may call for content moderation on social media companies or ban their operation if certain conditions like local appointments are not made. These regulations may amount to a breach of an investor's obligations, such as fair and equitable treatment or expropriation, among others. Therefore, it is increasingly important to understand how investment treaties and investor–state dispute settlement should deal with digital assets.

Do Digital Assets Qualify as 'Protected Investments'?

Under investment law jurisprudence, intangible assets do qualify as protected investments. This has been decided in the landmark decision of *Bridgestone v. Panama* (2020).^[1] In the present case, the asset in question was a registered trademark. The investor successfully proved that the asset had consistently committed capital towards this investment.

Unlike traditional investments, digital assets need not have a physical presence, even in the investing country. For example, social media companies and their platforms rely on intangible intellectual property assets, including algorithms, and often treat any requirement of source code disclosures as violative of their rights. While for physical assets like data centers and offices, the point of contact may be established. The most essential assets for them include algorithms, data, and contractual relationships.

Data itself is a contentious asset. It refers to any information that can be collected, stored, processed, analyzed, or exchanged in digital form, but there is no uniformly accepted definition of 'data.' Additionally, data need not be stored physically in the investing country. It can be classified as an asset in the following ways:

- (a) the underlying contractual rights, licenses or concessions involving data use, are considered as the asset;
- (b) the intellectual property rights over the data can also be considered as the asset; and
- (c) where data, either raw or processed, constitutes as a core intangible asset for a business.

Most IIAs, drafted before the digital economy was established, are assumed to be covering physical assets. However, most IIAs define investments to be every kind of economic interest. This would also include data as data is increasingly being considered as a currency in modern commercial parlance. Additionally, contractual rights and user agreements are often explicitly considered as assets under IIAs. Under the *Salini* test, the investment must entail a commitment of resources, a certain duration, an element of risk, and a contribution to the economic development of the host state.^[2] Data, which has the potential to generate returns for its investors and requires substantial commitment of resources over time, can be considered as an investment under the *Salini* test.

Territorial Nexus and Data

In addition to qualifying as a protected investment, the Tribunal must also meet the jurisdictional hurdle. Many investment treaties state, that the investment must be made in the territory of the host state to qualify for the tribunal to have jurisdiction. For instance, the Brazil-India BIT defines an investor as a natural person or an enterprise of one Party that "makes an investment in the territory of the other Party". Some IIAs include the territoriality requirement in the definition of investment. The Argentina-US Bilateral Investment Treaty (BIT), for example, defines investments

as "every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party".

However, considering that intangible assets cannot have a territorial link, the tribunal in *Abaclat v Argentina*[3] stated that the relevant test for determining the location of the investment would be to look at whether the ultimate beneficiary of the intangible asset is the host state. A territorial nexus based on benefit to the host state has also been decided in *Nova Scotia Power v Venezuela (II)*[4]. Further, tribunals in *Deutsche Bank v Sri Lanka*[5] and *Fedax v Venezuela*[6] have stated that this benefit need not even be an economic benefit. This view has, however, been criticized by both the dissenting arbitrator in *Abaclat v Argentina* as well as the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[7]. It has been argued that the flow of investment into the territory of the host state is the "primary purpose of the Convention."

Breach of Investor Obligations and the State's Right to Regulate in Public Interest

A government measure would be considered to be a breach of an IIA obligation if, for example, in a claim for expropriation, the measure substantially deprives the investor of the value, use, or control of the investment; in this case, of the data or related assets, either directly or indirectly. For example, this may be achieved through the confiscation of data without adequate compensation or due process, or through the use of data without adequate authorization or compensation. A host state may also breach its IIA obligations, including FET obligations, if it shares confidential data shared with it, for example, in compliance with a regulatory requirement or as part of a regulatory sandbox operation. Similarly, there can be a violation of FET or expropriation obligation if a regulatory measure restricts or prohibits data by blocking or censorship without due justification or proportionality, or imposing conditions on its use, including through data localization requirements.

When states regulate or ban data under domestic regulations, such measures must be evaluated in light of their obligations under public international law, particularly under IIAs. Accordingly, states can take the defence of necessity, a right to regulate in the public interest. This may entail the protection of health, safety, environment, or human rights. Additionally, states can also justify banning social media platforms on grounds of national security.

It must be kept in mind that necessity as a defence will only be available in exceptional situations, as observed in the *Gabcikovo-Nagyros Project* case where the state was threatened with "grave and imminent peril." [8] Such measures must represent the only means of safeguarding the state's essential interests, and the state must not have contributed to the wrongful act itself. Nonetheless, the threshold for invoking necessity remains particularly stringent under the investment dispute settlement system.

On the other hand, national security clauses under IIAs, unlike the jurisprudence at the WTO, are not always considered to be self-judging unless the treaty explicitly says so. This was laid down in *Mobil Expl v Argentina*.^[9] Tribunals have also observed, for example, in *Deutsche Telekom v India*, that while states should be given some degree of deference while assessing "essential security interest", such deference is not unlimited.^[10]

The Valuation Challenge

Valuation of data is dependent on context, usage, and market relevance. Such data also has to be accounted for its highly globalized and transnational nature. However, quantifying such data is complex. For certain investors, especially those for whom data is the primary asset, its monetization often emanates from its assignment or sale. The valuation of such data depends on how it is legally characterized as a protected investment. If data itself is treated as the investment, its valuation will be dependent on the business resources dedicated to it, including workforce, capital and opportunity cost. Conversely, if data is viewed through the underlying contract that grants rights over its use, valuation would reflect revenue losses or contractual benefits. Finally, if data is classified in terms of intellectual property rights, the valuation of the IP would determine the compensation paid.

Case Law in Focus: Einarsson and GSI v. Canada^[11]

A significant case in this context concerns the Canadian Government's regulations mandating that marine seismic data, used to identify oil and gas reserves, be disclosed to the state. As per the notice of arbitration, the investor's business model centered on creation, licensing, storing, processing, and reprocessing of such data, which incurred a cost amounting to approximately USD 781 million, and licensing agreements valued at approximately USD 2.53 billion. The claimants argued that these measures breached their trade secrets and violated the confidentiality obligations embedded in their licensing arrangements.

The claimant who had previously brought their case before the Supreme Court of Canada- where they ultimately lost- contended that Canada's regulatory regime amounted to an indirect expropriation of their data and IP rights as well as a breach of Canada's FET obligations under NAFTA. They argued that data itself qualified as an 'investment' under Article 1139 of NAFTA, making particular reference to time, effort, and money expended in its creation and maintenance. The Canadian government, conversely, argued that it had acted within its sovereign authority and regulatory discretion, emphasizing that the measures were non-discriminatory and served legitimate public interests. It further noted that the regulatory framework required data submission and public disclosure, while still providing for a defined confidentiality period. This matter now rests before an ISD Tribunal, which must determine whether 'data' qualifies as a protected investment while also assessing how to quantify the value of such data.

Implications for India and the Global South

For emerging economies like India, digital economy governance intersects with investment policy. Future IIAs may need explicit provisions on data and intangible assets to balancedigital sovereignty with investor certainty. As data localization and AI regulation expand, clarity in treaty drafting will be essential to avoid disputes.

Regulatory space	Developing countries should insert explicit digital policy exceptions (data, cybersecurity, AI ethics) in IIAs to avoid being trapped by rigid interpretations.
Interpretation flexibility	Tribunals' openness to evolutionary interpretation can be a <i>double-edged sword</i> , helpful to include digital assets, but risky if it expands investor claims beyond intent.
Future treaty design	Model BITs should define ' <i>digital investment</i> ,' ' <i>digital investor</i> ,' and territorial criteria clearly
Future Proofing ISDs	Developing states should anticipate digital disputes (e.g., data localization, content moderation, cybersecurity measures) becoming new ISDS triggers.

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UNCITRAL INVESTMENT MEDIATION GUIDELINES

PURPOSE & NATURE

- Non-binding guidance: Explains how mediation can resolve Investor–State disputes. Parties and mediators may adopt or adapt any of its parts at their discretion.
- Flexible, party-driven process: Emphasizes amicable negotiation and preserving relationships. Mediation lets parties control the process and craft creative solutions. The mediator's role is to facilitate discussions, not to impose decisions or give legal advice.

Suitability & Consent

- When to use mediation: Ideal if preserving the investment relationship or saving time/cost matters, or if parties seek a flexible solution. Factors include willingness to negotiate, urgency and complexity of issues, number of parties, and the desire for control over outcomes.
- Flexible timing: Mediation can occur any time, before a dispute crystallizes or even after arbitration/litigation has started. Parties often find it easier to settle before taking rigid adversarial positions.
- Consent to mediate: Mediation is voluntary. Parties must agree to mediate, either via prior treaty/contract clauses, often as a "multi-tier" requirement to try mediation before arbitration, or by one party inviting the other to mediate after a dispute arises. Any party can withdraw at any stage unless they've contractually committed to continue for a set period.

Mediator's Role & Qualifications

- Neutral facilitator: The mediator assists negotiations, helps identify issues and options, and manages the process through conduct of opening sessions, joint discussions, separate caucuses. A mediator does not decide the outcome or pass judgment. Instead, they support parties in finding their own solution.
- Skills and neutrality: The mediator should have proven mediation experience, strong communication and negotiation skills, and awareness of all parties' cultures and interests.
- Independence and impartiality are essential; any conflicts must be disclosed so parties can agree on or replace the mediator.
- Appointment: Parties typically select one or more mediators, co-mediation by two mediators is common in complex cases. They can agree on names directly or use an institution (like ICSID or others) to propose or appoint mediators. Institutions can also provide rosters of qualified mediators

Confidentiality & Transparency

- Confidential process: By default, what is said or shared in mediation is confidential. Parties normally agree that statements and documents exchanged cannot be used as evidence in any arbitration or court proceeding. This encourages open, candid discussion of issues. If information is publicly available, it is not automatically protected.
- Agree on scope: Parties should clarify which aspects are confidential: the fact of mediation, the content of discussions, and/or the settlement terms. They may choose to allow certain disclosures, for example to the public or to a supervising court, depending on legal requirements or public interest.
- Balancing transparency: Given that Investor–State disputes can involve public funds and policy, the Guidelines urge balancing confidentiality with transparency. For instance, a public body might decide to publish a summary of the outcome or the settlement terms, while keeping sensitive negotiation details private.

Process & Rules

- Phases of mediation: While flexible, a typical mediation might include an opening session, involving introduction, agenda, ground rules, issue exploration involving joint discussion of dispute points, private caucuses involving separate meetings of each party with the mediator to explore options, and negotiation/settlement phase where parties work toward agreement, often with the mediator shuttling proposals back and forth. The mediator may draft and review any settlement as discussions progress.
- Choice of rules: Parties should agree on procedural rules to structure the process. They can use established frameworks like the UNCITRAL Mediation Rules 2021, ICSID Mediation Rules 2022, IBA Investor–State Mediation Rules 2012, or tailor their own. Rules help avoid gaps accruing due to scheduling conferences, costs, communications while still allowing flexibility.
- Timing and duration: Parties may set target dates or a fixed period for mediation. It should be long enough to be meaningful but limited to keep it efficient. Some treaties or institutional rules may require a minimum period once mediation starts.
- Institutional support: Mediation can be ad hoc or run with institutional support. Institutions like ICSID and CI Arb can handle admin tasks like arranging meetings, either in-person or virtual, providing meeting rooms, securing translations, and holding deposits or advances for fees. They may also certify that mediation took place, which can be useful if a future enforcement, for instance under the Singapore Convention, is needed.

Settlement & Enforcement

- **Settlement agreement:** The goal of mediation is to arrive at a mutually acceptable settlement. The agreement is voluntary and negotiated; it is only binding if all parties sign it. Because it is self-imposed, parties are normally expected to comply with its terms. The agreement should clearly document all obligations and often includes legal boilerplate on validity and enforcement.
- **Legal requirements:** For enforceability, parties should meet any form requirements, for instance, signature and mentioning the date of the agreement, witness or notarization if needed, and specifying that it arose from mediation. If domestic or treaty law requires a certain formality, that must be observed.
- **Cross-border enforcement:** An important benefit is that settlement agreements from Investor-State mediation can be enforced internationally through the UN Singapore Convention on Mediation. This Convention makes it easier to recognize and enforce agreements in countries that have ratified it. Choosing mediation: Knowing that an enforcement mechanism exists, parties and States should consider mediation as a genuine alternative to arbitration. Settlement enforcement need not be a major obstacle, given the Singapore Convention and the existence of similar national laws implementing the UNCITRAL Model Law on Mediation

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Source: Canva

Tribunal Dismisses Khaitan v. India Claim: No Legitimate Expectations or Expropriation from Invalid 2G Licences



Source: Canva

**The judgment referred to in this article is not yet publicly available. The information provided here is based on preliminary reports and should not be treated as a substitute for the official text of the judgment. Compass Newsletter will undertake a detailed analysis and provide a comprehensive review once the full judgment becomes public.*

An UNCITRAL tribunal has dismissed all claims brought by Mauritius-based Khaitan Holdings against India under the India–Mauritius Bilateral Investment Treaty (BIT), finding that the investor could not have had legitimate expectations or expropriable rights in relation to 2G telecom licences that had been issued unlawfully. The tribunal’s award, delivered on 19 September 2025, puts an end to one of the long-running investment arbitration cases arising from India’s 2G spectrum allocation controversy, as reported by IAREporter.

Background: The 2G Licensing Controversy

The dispute originated from India’s 2007–2008 allocation of telecom licences under a “first-come, first-served” policy introduced by the Department of Telecommunications (DoT) Unified Access Service Licences (UASLs). In September 3, 2007, Loop Telecom obtained 21 UASLs, with the objective of providing 2G services. Soon after, allegations of procedural irregularities and corruption surfaced, and two operators challenged the process before Indian courts regarding the allocation of licenses.

India’s Supreme Court, in its landmark judgment of February 2, 2012 (the “2G Decision”), quashed all 122 licences issued during that period. The Court held that the allocation process was arbitrary, discriminatory, and contrary to the public interest. It further declared that the licences were void ab initio, meaning they had no legal effect from the outset, and ordered Loop Telecom and other operators to pay penalties because they had benefitted from the process.

Moreover, over the years, Loop Telecom had seen multiple investments from Mauritius-based entities pertaining to the Khaitan group. Following this ruling, Loop Telecom and its investors, including Mauritius-based Khaitan Holdings (Mauritius) Limited (KHML), claimed that India's actions had unlawfully expropriated their investment and breached the Fair and Equitable Treatment (FET) standard under the BIT.

Procedural Developments and Jurisdiction

The arbitration was conducted under the UNCITRAL Rules. The tribunal comprised Professor Campbell McLachlan as Chair, J. William Rowley as the claimant's appointee, and Professor Brigitte Stern as India's nominee. As reported by IAREporter, the composition of the tribunal became a matter of contention. India had successfully sought the disqualification of the claimant's initial appointee, Francis Xavier, after concerns were raised regarding conflicts of interest. Mr. Rowley was later appointed as a replacement, but India challenged his appointment as well—citing his prior role in *White Industries v. India*—a challenge ultimately rejected by International Court of Justice President Joan Donoghue, acting as the appointing authority. India also sought to suspend the arbitration after filing a set-aside application in Dutch courts against the tribunal's earlier Decision on Jurisdiction. However, the Dutch court dismissed India's application as inadmissible, and the tribunal decided to proceed with the case.

Later, India also raised two new jurisdictional objections: one based on a Joint Interpretative Statement (JIS) concluded between India and Mauritius in July 2022, and the other based on a 2022 Supreme Court decision that had rejected Loop Telecom's plea for a refund of licence fees. As reported by IAREporter, the tribunal found both objections inadmissible. It held that the JIS, adopted after the arbitration had been initiated, could not retroactively affect jurisdiction. Likewise, the 2022 Supreme Court judgment did not present new facts that could alter the tribunal's prior findings.

Tribunal's Findings on the Merits

On the merits, the tribunal examined claims under Articles 4(1) (Fair and Equitable Treatment) and 6 (Expropriation) of the BIT. It began by reaffirming that property rights are created and defined by domestic law. Since the Indian Supreme Court had found the 2G licences to be void *ab initio*, the tribunal reasoned that Loop Telecom never possessed a legally valid asset that could qualify as "property" under international law.

In this context, the tribunal cited the *Azinian v. Mexico* award, which held that there can be no expropriation of a contract declared invalid by a competent domestic court. Applying this principle, the tribunal concluded that the claimant could not have been deprived of a lawful asset under Indian law and therefore could not sustain an expropriation claim.

No Legitimate Expectations in an Unlawful Process

Turning to the FET claim, the tribunal clarified that “the concept of legitimate expectations was not a standalone standard in the India–Mauritius BIT”. Nonetheless, the tribunal drew a parallel from the decision in *Waste Management v Mexico* and stated that legitimate expectations could in principle play a role in assessing whether an FET breach had occurred through conduct by a state’s executive branch. As reported by IAREporter, the tribunal emphasized that legitimate expectations must be reasonable and based on an objective assessment of the surrounding circumstances. The tribunal states that the claimant could not have reasonably expected the licences to be valid, as the allocation process itself had been arbitrary and non-transparent.

By the time KHML made its initial investment in 2009, several court challenges and public allegations had already been filed questioning the legality of the 2G allocation process. Moreover, the cover letters to the licences themselves had stated that their validity was subject to the outcome of pending judicial proceedings. The tribunal noted that any prudent investor would have been aware of these risks. When KHML made further capital injections in 2011–2012, those risks had become even more pronounced. The Comptroller and Auditor General (CAG) had issued a critical report identifying serious irregularities, and the Central Bureau of Investigation (CBI) had filed criminal charges against several officials and companies, including Loop Telecom. Consequently, the tribunal found that the claimant could not claim to have held legitimate expectations about the continued validity of the licences.

Further, the tribunal also observed that the FET standard does not protect investors from the consequences of participating in processes later found unlawful under domestic law. The claimant, therefore, could not claim protection for expectations arising from an arbitrary and unconstitutional licensing scheme.

No Compensable Loss

The tribunal also examined whether the claimant had suffered any compensable loss. It found that by the valuation date, February 2, 2012, when the Supreme Court issued its 2G Decision, Loop Telecom was already a failing business. It had only around 6,000 subscribers, had accumulated USD 81 million in debt, and had failed to roll out its services nationwide as required. Loop Telecom had also chosen not to participate in the subsequent 3G and broadband spectrum auctions, limiting itself to a soon-to-be-outdated 2G technology. Therefore, the tribunal concluded that Loop Telecom was not a viable business by 2012, and that its losses resulted from its own commercial choices rather than state measures. Accordingly, no compensation was awarded.

Costs and Outcome

Both parties incurred significant expenses. The claimant spent approximately USD 10 million across the proceedings, while India's costs amounted to about USD 13 million. The tribunal fixed the total arbitration costs at USD 1.9 million and decided that each side would bear half of those costs as well as their own legal expenses.

Broader Implications

The *Khaitan v. India* award, as reported by IAREporter, reinforces a core principle of international investment law: investors cannot invoke treaty protections for assets obtained through processes that violate domestic law. It also underscores the limited role of "legitimate expectations" under India's older BITs, clarifying that investors must bear the risk of entering a market where the legality of their assets is uncertain.

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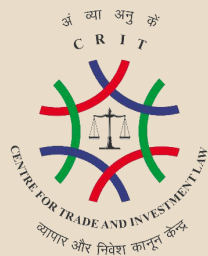
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