
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

**INVESTMENT ARBITRATION IN ACTION: P.C.A. AND NISSAN vs
INDIA**- Mansi Beniwal¹**INTRODUCTION**

Alternative dispute resolution is an emerging legal profession that offers alternative methods for parties to settle disputes without going to court, aiming to achieve a prompt and cost-efficient resolution. Dispute resolution techniques can be modified to incorporate additional methods and procedures that align with the parties' appropriateness. It reduces the burden on the Courts, enabling them to prioritize and dedicate their time and resources to more pressing problems as they arise. Parties who engage in these Mechanisms with a sense of confidence, possess greater trust in the outcomes, rely on participants who value their decisions, and thus create a confidential environment for peaceful resolution that cannot be attained in Courts and Tribunals governed by laws.

Arbitration is a widely promoted and utilized process in both domestic and international contexts. It often entails a decisive resolution, a prompt agreement, and an adaptable approach. International Arbitration harmonizes aspects of both Civil Law and Common Law to ensure equitable treatment of parties with diverse socio-legal backgrounds. The rise of enduring and trustworthy institutions such as the Permanent Court of Arbitration (PCA), International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA), and others has resulted in an increasing inclination towards arbitration as a method of resolving forthcoming conflicts. This preference extends not only to corporations and financial organizations but also to governments within nations².

JURISDICTION OF THE P.C.A.

The emergence of the P.C.A is owed to the Convention of 1899 and 1907, in which the signatories committed to establishing and maintaining the P.C.A. There is a misunderstanding regarding the requirement to adhere to Arbitration only when members have ratified one or both of the Conventions. It is not necessary to strictly follow the guidelines outlined in either of the two conventions when opting for arbitration under the P.C.A. The Arbitration clause/ Agreement

¹ Student at LL.M (Alternative Dispute Resolution), Jindal Global Law School (JGLS)

² Madhu Sweta, *Investment Arbitration – The Assignment & Its Way Ahead In India*, MONDAQ (July 31, 2018, 9:29 PM), <https://www.mondaq.com/advicecentre/content/3742/investment-arbitration-the-assignment-its-way-ahead-in-india>.

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serves as the authoritative source for determining the extent of applicability of the P.C.A Convention. The principle of Severability is relevant in this case - meaning that the illegality of the main contract does not automatically remove the jurisdiction of the P.C.A.³.

Given that P.C.A. clients operate in several jurisdictions, including private parties, international organizations, and intergovernmental organizations, it is possible that members of the court may or may not serve as arbitrators in proceedings that are of a "summary" character or when a "special tribunal" is established. However, if parties choose to engage in the P.C.A. Arbitration Tribunal, they must choose Arbitrators from the given List of members. The arbitral award issued by the P.C.A. is conclusive and obligatory, although alternative mechanisms such as mediation and fact-finding are not legally binding on the involved parties⁴.

The P.C.A., headquartered in The Peace Palace in The Hague, conducts arbitration proceedings in locations other than The Hague, as specified by the parties' agreement about the "seat" of arbitration. It also guarantees that there are no barriers in using the official language and that the proceedings are handled in a language that both parties have mutually agreed upon for their convenience. Distinct treaties and regulations are established in the domains of energy, human rights, investment, and finance, offering appropriate options for mediation, conciliation, or arbitration. Mauritius has become a favoured neutral venue for international arbitration, with the establishment of the first permanent office of the P.C.A. outside of The Hague. This office has been granted the necessary authority to provide court-related assistance in arbitration matters, with the exception of interim reliefs. The decisions made by this office are final and cannot be appealed.

FACTUAL BACKGROUND OF THE CASE

The Nissan v. India⁵ case revolves around Nissan's participation in the "Ultra Mega Integrated Automobile Project," which entailed establishing a car production plant at Oragadam Industrial Park, situated near Chennai, the capital of Tamil Nadu. Nissan and Renault s.a.s. established the R&N Consortium through a joint partnership.

The Government of the Nation (GoTN) and the R&N Consortium signed a Memorandum of Understanding (2008 MoU). According to the agreement, the R&N Consortium had a duty to invest a predetermined sum of money over a period of seven years in order to create integrated production and assembly facilities for automobiles. The GoTN pledged to offer a range of investment incentives, including as fiscal incentives, under the Investment Incentives Scheme. Nissan earmarked INR 6,092 crores (equal to around USD 890 million) for the construction of a

³PERMANENT COURT OF ARBITRATION | PEACE PALACE, "<https://www.vredespaleis.nl/jurisdiction/permanent-court-of-arbitration/?lang=en>" (Last Visited Nov. 30, 2023).

⁴BROOKS DALY ET AL., GUIDE TO THE PCA ARBITRATION RULES (Oxford University Press 2013).

⁵Nissan V. India, UNCTAD INVESTMENT POLICY HUB", (Nov. 30, 2023, 6:40 PM) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/828/nissan-v-india>.

manufacturing plant capable of producing 400,000 vehicles per year, as per the incentives specified in the 2008 MoU⁶.

Nissan claims that the GoTN did not pay certain incentives (referred to as the "Claimed Incentives") in a timely manner, resulting in an overdue amount of INR 2,057.36 crores as stated in the Statement of Claim. Nissan argues that this failure was "obviously random" and without any "convincing or appropriate justification," which constitutes a violation by India of the CEPA, specifically infringing upon its FET clause⁷. Nissan is pursuing complete compensation for the failure to pay the claimed incentives and any relevant interest.

India refutes any responsibility towards Nissan and contends that the Tribunal should abstain from assessing the merits of the case. India has expressed its objections to the jurisdiction of the Tribunal, arguing that it is inappropriately constituted and lacks jurisdiction because Nissan's claims about taxing policies are not covered by the CEPA. Additionally, India contends that Nissan's claims are time-barred⁸. In addition, India asserts that Nissan's claims under the CEPA are exempted by Clause 15 of the 2008 MoU, and the Tribunal does not have the authority to hear the case because of the ongoing legal actions started by Nissan in India. India formally petitions the Tribunal to completely reject Nissan's arguments.

KEY ARGUMENTS

India contends that the Secretary-General of the P.C.A. did not adhere to the prescribed process for selecting a Presiding Officer as outlined in Article 96(11)⁹ of the CEPA and Article 9¹⁰ of UNCITRAL Rules. This process necessitates the appointment of a Presiding Officer based on mutual agreement between the involved parties. India asserts that it was not given the chance to scrutinize potential conflicting interests between its selected arbitrators and those included in the roster.

Nissan disputes India's understanding of these regulations, asserting that Article 96(5) takes precedence over Article 9 with regards to the selection process for appointments. Furthermore, Nissan argues that the P.C.A. was responsible for intervening after 60 days had passed without the appointment of an arbitrator following the submission of the dispute. India willingly and actively took part from the beginning and did not raise any objections, even after it was made aware that the list was being compiled by the P.C.A.

⁶Sarthak Malhotra, *PCA Tribunal Upholds Jurisdiction Over Disputes Under India-Japan Comprehensive Economic Partnership Agreement – Investment Treaty News*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Oct. 5, 2020, 1:50 PM), <https://www.iisd.org/itm/en/2020/10/05/pca-tribunal-upholds-jurisdiction-over-disputes-under-india-japan-comprehensive-economic-partnership-agreement/>.

⁷Comprehensive Economic Partnership Agreement Between The Republic Of India And Japan, Article 87(1) (2011).

⁸Dr Ram Upendra Das, *India-Japan Comprehensive Economic Partnership Agreement (CEPA): Some Implications for East Asian Economic Regionalism And RCEP*, SSRN ELECTRONIC JOURNAL, RIS DISCUSSION PAPERS, DISCUSSION PAPER # 186 (2014).

⁹Comprehensive Economic Partnership Agreement Between The Republic Of India And Japan, Article 96 (2011).

¹⁰UNCITRAL Arbitration Rules, Article 9 (2010).

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Nissan further asserts that the Tribunal solicited opinions regarding the selection of all arbitrators, and that the Presiding Arbitrator was chosen subsequent to the appointment of J. Khehar as the second arbitrator. The Tribunal is responsible for ensuring that all arbitrators fully declare any conflicts of interest they may have¹¹.

India's subsidiary NMIPL lodged a Writ Petition with the Madras High Court, contending that the dispute's source is either identical or significantly overlapping, resulting in the same outcome in both processes. Nissan contends that Article 96(6) explicitly emphasizes the Triple Test, stating that NMIPL cannot be considered a "Disputing Investor" if it has initiated arbitration and falls beyond the scope of the Tamil Nadu VAT Act.

The Tribunal must carefully evaluate the three-pronged condition of the Triple Test, as any leniency in doing so will have consequences for the presentation of investment disputes, even inside domestic legal systems.

The issue pertains to the taxation system described in article 10(1) of CEPA¹², which confers the power to levy taxes on inter-state trade, commerce, and intra-state transactions of goods to both the Central and State Governments. The Central Sales Tax Act was enacted to govern commerce between several states, whereas the TNVAT Act was introduced to offer distinct tax advantages and incentives to investments in the state's infrastructure and heavy industries. A Nissan subsidiary has updated its Initial Business Scheme for Engine Manufacturing by incorporating NMIPL and RIPL as sales and marketing organizations for their respective branded vehicles.

India argues that the revised Business Scheme contradicted the long-term advantages, which were determined based on a maximum duration of 21 years by GoTN. In order to rectify this unwarranted advantage, the Government Orders have been enacted to reconcile the Input Tax with the Total Output Tax and relinquish the remaining portion of the Input Tax.

Nissan claims that the MOU did not establish any logical link between the 21-year limitation and the total investment and incentive payment rate. They contend that the concept of return for convenience is not explicitly addressed in any specific Taxation Statute, and that the incentives were provided to promote investment rather than taxation¹³.

The dispute is precluded by the time limit specified in article 96(9) CEPA, which stipulates that a strict time limit cannot exceed the underlying reason for the dispute. Nissan argues that GoTN's repeated failure to pay the promised incentives should be regarded as an acknowledgment of violating legitimate expectations, especially considering GoTN's assurance to settle all outstanding payments.

¹¹*Nissan V. India*, UNCTAD INVESTMENT POLICY HUB”, (Nov. 30, 2023, 6:40 PM) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/828/nissan-v-india>.

¹²Comprehensive Economic Partnership Agreement Between The Republic Of India And Japan, Article 10(1) (2011).

¹³*Nissan V. India*, UNCTAD INVESTMENT POLICY HUB”, (Nov. 30, 2023, 6:40 PM) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/828/nissan-v-india>.

RULING OF THE TRIBUNAL

The tribunal's jurisdiction to make decisions based on its own power is stated in both UNCITRAL and CEPA, which suggest different methods for appointing arbitrators. The CEPA does not specify two simultaneous time periods for appointments, and the Presiding Arbitrator was also appointed within the same timeframe. India successfully adhered to the 60-day timeline and promptly nominated the Presiding Arbitrator within the stipulated time period. The Supreme Court behaved judiciously in the nomination of Arbitrators, and the authority was delegated to the Parties for a period of 60 days. In the event of non-compliance, the authority was transferred to the Supreme Court¹⁴.

The tribunal's examination of concurrent legal actions found that a litigating investor is required to present an Investment Dispute to an alternative forum. Constitutional challenges and Investment Disputes, although arising from similar circumstances, are not equivalent. The Tribunal's examination of the taxation system found that GoTN's defensive action to stop activities leading to Double Benefit for Nissan was excessively arbitrary based on a flawed notion. Article 10 explicitly excludes Taxation Measures, unless they are incorporated into a Treaty or Agreement by the States¹⁵.

The Tribunal's examination of the applicability of limitations determined that Article 10 presents a constraint that can be either explicitly stated or indirectly implied. Emphasizing the tangible damages suffered is of utmost importance and is not reliant on awareness of the violation itself.

ANALYSIS

The dispute between Nissan and India bears resemblance to the legal disputes between Cairn Energy and Deutsche Telekom, as both parties are advocating either for the use of caution or the initiation of legal procedures. The noteworthy aspect lies in Nissan's objective evaluation of the claims and the Tribunal's comprehensive grasp of pertinent information. The Indian Corporate Laws explicitly define the criteria for piercing the corporate veil and determining whether a company and its affiliates should be treated as a single entity or separate entities.

The GoTN established efficient mechanisms for verification and distribution through "State Industries Promotion Corporation of Tamil Nadu" and MOU Cell. However, it is perplexing because India claims that the final decision rested with MOU Cell. The List Procedure is a conventional method for choosing arbitrators, and India should have examined Article 96 CEPA and P.C.A. Appointment Rules. The concept of interpretation asserts that there is a distinction

¹⁴Kshama A. Loya & Ritika Bansal, *Resolving Disputes — Between Foreign Investors & The Indian State / State Entities*, NISHITH DESAI ASSOCIATES (Jan. 2023, 5:40 PM), https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Resolving-Disputes-Between-Foreign-Investor-and-The-Indian-State-States-Entities.pdf.

¹⁵Aditi Shah & Sudarshan Varadhan, *Exclusive: Nissan Settles Dispute With Tamil Nadu Over Unpaid Dues – Sources*, REUTERS (May 28, 2020, 5:20 PM), "<https://www.Reuters.Com/Article/Us-Nissan-India-Arbitration-Exclusive/Exclusive-Nissan-Settles-Dispute-With-Indian-State-Over-Unpaid-Dues-Sources-Iduskbn2342ar/>."

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between being similar and being identical, and it is not acceptable to overlook the critical details that are essential to the disagreement being resolved.

CONCLUSION

India has been proactively endeavouring to enhance its legal framework to conform to global benchmarks, including implementing Alternate Dispute Resolution Modes and advocating for Arbitration. The amendment of the Domestic Arbitration Act has enhanced its appeal as a centre for International Arbitration. The key to India's prosperity lies in the seamless implementation of Foreign Arbitral Awards without any obstacles. Nevertheless, the recent Nissan Case, which pertained to the payment troubles that occurred in the past, has conveyed an unfavourable message to the international commercial and investment sectors, deterring potential investments in India.

Although the Tribunal provides a quick alternative solution, it still requires time to listen to the parties and deliver the Award. The GoTN delayed prompt payment owing to financial constraints and the revised business scheme to impede the state's economic interests. Bringing up this matter in a court or tribunal would be deemed inappropriate and would place a heavy burden on the party asserting their financial incapacity to make payment. Additionally, it would result in dissatisfaction from the other party and lead to the creation of unfavourable evaluations, significantly affecting the potential to attract business and investment in India. India's dedication to enhancing its legislation and implementing cutting-edge ideas has positioned it as an appealing centre for International Arbitration.