Regulatory Framework Of Bilateral Investment Treaties In India

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Abstract: Most of the Bilateral Investment treaties (BITs) contain similar standard terms and provisions, even though relatively minor differences in the drafting of these clauses can often have profound effects upon the scope of the protection afforded by the treaty. In BIT, a government commits to protect investment in their territory by the other country's national. A BIT assures substantive protection to foreign investors. There are a variety of standards of treatment provided for bilateral investment treaties.

Key Words: BIT, Regulatory Framework, Foreign Investment

INTRODUCTION

Bilateral and multilateral investment treaties are a tool used to promote investment between nations. These tools spell out the rights and an obligation of each participating state party as far as treatment provided to their investors and their investments, while in the other country, is concerned. Increased globalization has seen an increase in foreign participation in investment in various countries and also led to increased action by states to attract and encourage both domestic and foreign investment within their economic boundaries.BITsare defined as Agreement between two countries for the reciprocal encouragement, promotion and protection of investment in each other's territories this treaty are considered the most important instrument in respect of the international protection of foreign investment .It is true that in recent years foreign investment is increasing among countries all around the world the most important thing is that the parties who are involved in foreign investment transactions have different interest and rights and the basic aim of host states is to develop their economy. Sometime every party has their disputes; therefore to resolve these disputes an effective international dispute settlement mechanism is needed. The rise of BIT which includes investor state dispute settlement provisions has an important role in the development of international investment arbitration. A bilateral investment treaty is treaty made between two countries in which each country agrees to give a minimum level of protection to investment made within its territory by investors from the other country. Bilateral treaties on the protection and safeguard of investments of investors of one contracting party in the territory of the other contracting party date back to 1959, when the first BIT was signed between the Federal Republic of Germany and Pakistan. A BIT serves to protect investments in both countries. Since the mid-1990s, however, the addition of investment protection provisions within larger trade agreements and the submission of a growing number of investment disputes to arbitration under investor–State dispute settlement provisions have led to some improvement in BIT practice, resulting in greater variation among these agreements than in the past. BITs have Substantive and Procedural Rules that secure foreign Investment.

HISTORICAL DEVELOPMENT OF BITS

Before analyzing the substance of BITs, it is more important to explain the origin of BITs Bilateral commercial treaties have been a traditional method of facilitating trade between states. Since its earliest days, the United States has made a large number of such agreements, generally known as treaties of friendship, commerce, and navigation (FCNs). Although these early treaties were intended to facilitate trade and shipping, they occasionally contained provisions affecting the ability of one country's nationals to do business or own property in the territory of the other state. After World War I, the United States treaties of friendship, commerce, and navigation increasingly dealt with investment abroad by securing agreement with other states on the treatment to be accorded US nationals with respect to the establishment of businesses, the protection of American owned property from arbitrary or discriminatory action, the mechanisms for the settlement of disputes, and the protection of patents and trademarks. BIT agreements got their start during the Post-Colonial Era when decolonialization was occurring after World War II and many newly independent and economically undeveloped countries were formed. At that time the GATT had recognized itself as the principle forum for regulating and protecting international trade but there was no equal organization for investments. BITs can be deemed as a successor to the friendship commerce and navigation treaties. In particular, the USA negotiated and signed FCNs with many European states including France, Italy and Latin America states so as to improve and to protect foreign trade relationships with each other. These treaties provided international legal standard for the protection of natural and legal persons and they did not directly include investment issues. Thus European countries realized that there should be treaties that there address investment related issues. Later on most European countries commenced to sign BITs with developing countries. From 1946 until 1966 the United States signed approximately twenty-two such treaties. A new and important phase in the historical development of the BIT began on the eve of the 1960s, as individual European countries undertook to negotiate bilateral treaties that, unlike previous commercial agreements, dealt exclusively with foreign investment and sought to create a basic legal framework to govern investments by nationals of one country in the territory of the other country. Germany, which had lost all of its foreign investments as a result of its defeat in World War II, took the lead in this new phase of bilateral treaty making. After concluding the first such agreement with Pakistan in 1959, Germany proceeded to negotiate similar treaties with countries throughout the developing world, and today it numerically remains the leader, having signed nearly seventy BITs. Within seven years France, Switzerland, the Netherlands, Italy, Belgium-Luxembourg, Sweden, Denmark and Norway had established BIT programs of their own. Ten years later the United Kingdom, Austria, Japan and the United State followed suit. However, these BITs were signed fairly irregularly until the Global Era of 1980 where there was "an explosion in the number of BITs." By the beginning of 1980. The reason for the greater success of the European programs, as compared to earlier American efforts, is not completely clear, but it may lie in the fact that the European countries were less demanding than was the United States with respect to guarantees on such matters as free convertibility of local currency, abolition of performance requirements, and protection against expropriation. Moreover, the special relationship between European countries and their former colonies may have predisposed some newly independent nations to look favorably on concluding investment treaties with their previous colonial rulers. Encouraged by the experience of the Europeans, the United States in 1981 launched its own program to negotiate specific BITs with developing countries. By 1986 the United States had signed ten such treaties.

THE AIM AND STRUCTURE OF BITs

BITs are the main international instrument used to protect and promote investments by nationals or companies of one contracting party in the territory of the other contracting party. By providing protection to foreign investments under international law, BITs reduce the political risks of the foreign investor in the host country and may promote FDI to signatory host countries by improving their investment climate. Although they vary across countries, all BITs cover four main areas: admission of foreign investments, treatment, expropriation, and dispute settlement. The First BITs signed focused on the protection of investments. Only later on BITs started emphasizing the promotion of investments, claiming that BITs would increase the economic development and prosperity of the contracting parties. BITs stipulate standards of treatment that foreign investments are to receive in the host country. The principal general standards cover fair and equitable treatment, national treatment, and the most favored nation standard (MFN). BITs also include provisions dealing with the free transfer of payments, conditions under which an expropriation is considered lawful, and compensations in case of expropriation, armed conflict, or internal disorder. Most importantly, BITs include dispute settlement provisions. These ensure the effective implementation and enforcement of the treaty, so as to reduce uncertainty to foreign investors, and constitute one of the key elements in diminishing the country risk, and thus encourage investors of one contracting party to invest in the territory of the other. In short, BITs provide transparency with respect to all non-commercial risks investors face when investing abroad, and thus lower the fixed costs of such investments. For example, the right given to investors to initiate arbitral proceedings against a state relieves investors from the need to use that country’s domestic courts, and from the related costs that would follow suit.

The structure of different bilateral treaties has a basic similarity. The treaty begins with a prefatory statement as to the aims of the treaty, which are usually the reciprocal encouragement and protection of investment flows between the two states. This is followed by an identification of the types of property which are protected and the nature of the link of nationality to one of the parties that entitle the foreign investor to the protection of the treaty. The standard of treatment to be accorded to the foreign investor is established. The right of repatriation of profits is asserted. There are statements on the nature of the compensation, if any, to be provided to the foreign investor for the loss occurring during wars and civil riots. The standard of compensation in the event of a takeover of the foreign investor’s property is identified. The procedures for the settlement of disputes arising from the investment by the arbitration are stated. These are standard contents in all bilateral agreements. But, there are variations of the statement of the rules that are to be applied as between the parties on each of these areas. To understand these variations, it is necessary to analyze the contents of these treaties separately. The variations indicate the impossibility of customary principles arising from these treaties. A recent study by UNCTAD of investment treaty mentions that an increasing number of countries include specific language in the preamble to their treaties aimed at making clear that the objective of investment promotion and protection must not be persuade at the expense of other key public goals, such as protection of health safety the environment and the promotion of internationally recognized labor standard

REGULATORY FRAMEWORK OF BITS

Most BITs contain similar standard terms and provisions, even though relatively minor differences in the drafting of these clauses can often have profound effects upon the scope of the protection afforded by the treaty. In BIT, a government commits to protect investment in their territory by the other country’s national. A BIT assures substantive protection to foreign investors. There are a variety of standards of treatment provided for bilateral investment treaties. In December 2015, the Indian Ministry of Finance released an updated and approved version of the Indian Model Bilateral Investment Treaty. The Ministry of Finance confirmed that the Indian Model BIT will be used as the starting point for the negotiation of all standalone BITs and the investment chapters of Free Trade Agreements.

a) Full security and protection

The Article 3.2 sets out that investors and investments will be given full protection and security. This creates an obligation on the host state physically to protect investors and their investments. In practice, what constitutes adequate protection, and what should be protected, can be heavily contested and often reaches arbitral tribunals.

b) National treatment

As per Article 4.1 sets out that investors will be treated no less favorably than nationals of the host state. This creates an obligation on the host state not to act in a discriminatory manner against foreign nationals, therefore providing an important fundamental protection to attract foreign direct investment.

c) Expropriation

According to Article 5.1 an investment may not be expropriated, except in accordance with the law of the host state and upon payment of satisfactory compensation. In common with most BITs, this does not prevent the host state from nationalizing an investment; rather, it ensures that any nationalization must be carried out with due process and that investors will be adequately compensated. Adequate compensation is set out to be at least the fair market value of the investment on the day before the expropriation takes place and must be paid in freely convertible currency. Article 5.3 clarifies that this provision covers both direct and indirect expropriation. Direct expropriation covers situations where the host state takes actual ownership of the investment. Indirect expropriation covers situations where the state interferes with an investment, to the extent of depriving the investor of the use or benefit of it, as though it had been nationalized.

d) Consensus to arbitration

As per Article 14.4 of the previous draft of the Indian Model BIT released in March 2015 (March Draft) did not contain any perfect consensus to arbitration by the host state. This was mainly disturbing for investors, as the investment arbitration mechanism gives the investor friendly techniques by providing a method of enforcing these rights directly against the host state. This has now been changed and article 17.1 contains a standing offer by the host state to adjudicate any dispute under the Indian Model BIT. Article 15 sets out that in order to submit a dispute to arbitration, bar certain exceptions, an investor must first exhaust all local remedies for a period of five years. There is current debate about the status of such a clause and non-compliance with it, but it is clearly something that would need to be considered prudently before beginning any claim.

CONCLUSION

The Indian Model BIT has addressed many of the worries in the March Draft concerning India's agreement to the arbitration of disputes and should give investors relief that they have a direct route to commence proceedings. At the same time as there are certain prominent omissions against a standard BIT, which are most likely due to India's recent negative BIT experiences, the Indian Model BIT still presents significant protections to investors. Certainly, the Indian Model BIT is only the starting point for negotiations between India and its trading partners. The outcome of any future BITs will depend on the relative negotiating power between the contracting states.

REFERENCE

[1] Rukhaiyar, Ashish, "Bombay High Court to Hear Writ Plea on MAT Issue on 6 May," Live mint, May 01, 2019

[2] Law Commission of India, *Arrears and Backlog: Creating Additional Judicial (wo)manpower,* Report No. 245, July 2014

[3] Kachwaha, Sumeet, "The *White Industries Australia Limited – India* BIT Award: A Critical Assessment," The Journal of the London Court of International Arbitration 29, no. 2 (2013): 275-294

[4] Singh, Kavaljit, and Burghard , "India Overhauls Its Investment Treaty Regime," Financial Times, July 15, 2016

[5] Vandevelde, J.Kenneth "*A Brief History of International Investment Agreements*" (2005)