

BILATERAL INVESTMENT TREATY: HISTORY AND INDIAN POSITION

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ABSTRACT

India has been an inward looking economy and has stressed more on the development of indigenous industries before 1990s rather than giving chance to those foreign investors. The liberal policies which motivated the investors in the 1990s had brought so much change in the country and we are still developing. Through this research paper, the history of Bilateral Investment Treaties with India and the current situation is aimed to be studied. Moreover, with the suspension of many BITs, much stress has been given to the world and its people as to how India's foreign policies and relation with the other states is going to be. With India giving importance to self-reliance, it is evident that someday, treaties won't be relevant to the country and this paper aims to study whether the government of India with the lessons of self-reliance and suspension of BITs with many countries of the world, is going to set a new benchmark of economic development and independence.

KEY WORDS:

Treaties; Convention; Agreement; inward-looking economy

INTRODUCTION

Bilateral Investment Treaties comes under the meaning of treaty under Article 2 (1) (a) of the Vienna Convention on the Law of Treaties (VCLT) as they are international agreements concluded between States in written form and governed by international law. They normally pursue two main objectives. On the one hand, they aim at stimulating the flow of foreign investment and creating a stable and predictable legal environment for their management; on the other hand, they promote the economic development of the host State and the economic relations between the parties.² Bilateral Investment Treaty is a contract entered between the

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² Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, para 300

host state and the investor state in the matters relating to investment. This treaty shall contain details like that of the scope of application of treaty, procedure of screening of the companies who intend to invest, provisions relating to the promotion and protection of the investors, the general clause for treatment of the investor and the code of conduct, expropriation and compensation and some other requisite provisions. The treaty is the golden document which governs relations of the host state and the investor state.

The treaty is entered into only for the protection of the parties and the parties, if at any time enter into a dispute will have access to international arbitration forum. The decision as to which forum is to be approached in case of a dispute is predetermined by the parties at the time of entering into the treaty and dispute settlement is carried on according to the terms and conditions of the treaty.

Moreover, there is an obligation on the parties to act in good faith, to comply with the law of land (i.e. local law of investor state) and not to act in contravention of the treaty provisions.³ The Bilateral Investment Treaties are no doubt an advantage to those investors and host state so as to strengthen their ties and work more on the FDI while contributing much to the development and benefit of themselves.

INDIA FROM 1990s TO PRESENT

India wasn't open for any other country before 1990s. Mostly it is because of the situation we were left in after 1947 that India focused much on the development of the local countries. It is only after 1990s that India starting considering Bilateral Investment Treaty and to expand and grow its relationship with other nation states as the financial crises which was faced by India during that period became the only reason for the same. India entered into Bilateral Investment Treaties in the 1990s and since then never looked back until recent times. Mostly it is because of the flaws in the drafting of such Bilateral Investment Treaties that India had been dragged into many disputes as party.

In 2000, the United Nations Conference on Trade and Development (UNCTAD) noted that BITs are the most important instruments for protection of foreign investment. The pattern followed by a BIT starts with, a preamble expressing the object and purpose of the BIT.

Post the preamble, a BIT generally incorporates a definition clause that outlines the scope and ambit of the BIT by defining an 'investor' and 'investment' – the key qualifiers of protection

³ Phoenix Action, Ltd. v. Czech Republic, ICSID ARB/06/5, Award, 15 April 2009, para 106

under the BIT. These definitions give way to standards of protection and treatment of foreign investments - addressing standards such as fair and equitable treatment, full protection and security, national treatment, and most-favored nation treatment.

BITs also contain provisions relating to nationalization, expropriation or other similar measures, their permissibility under specific circumstances, and compensation for losses incurred by foreign investors form a core part of BITs and usually follow the standards of protection.

India signed its first BIT with the United Kingdom in 1994. The Indian model of BIT, 2003 contained close semblance with the India-UK BIT. From 1994 to 2011, India had signed more than 80 BITs and ratified over 70. White Industries case was an eye opener for India.

THE WHITE INDUSTRIES CASE

On 28 September 1989, White entered into a contract with Coal India (a Government of India Public Sector Undertaking) for the supply of equipment and development of a coal mine in India. The contract was governed by Indian law and contained an arbitration clause requiring disputes to be settled as per the ICC Arbitration Rules. Disputes and differences arose between the parties and the same were referred to arbitration in London resulting in an award dated 27 May 2002 in White's favour (hereinafter 'ICC Award'). On 6 September 2002, Coal India applied to the High Court of Calcutta to have the ICC Award set aside.³ Unaware of this application, White moved the High Court of Delhi on 11 September 2002 to have the ICC Award enforced. When White became aware of Coal India's application to set aside the ICC Award, it applied to the Supreme Court of India to transfer the Calcutta High Court proceedings to the High Court of Delhi and also applied for an interim stay of the Calcutta proceedings.⁵ On 29 October 2002, the Supreme Court of India granted an ex parte order staying the Calcutta proceedings. On 2 January 2003, Coal India's application to have the ICC Award set aside came up for hearing before the Calcutta High Court but could not be heard in view of the Supreme Court's stay order. On 20 January 2003, the transfer petition was heard by the Supreme Court of India. The BIT Award records that

the Supreme Court advised White that it was inclined to dismiss its transfer petition, whereupon White withdrew the same.⁴

The ICC Tribunal ultimately awarded White USD 4.08 million as compensation as it found that India had violated its obligation to provide to the investor ‘effective means’ of asserting claims and enforcing rights, a provision borrowed from the India-Korea BIT by way of a most-favored nation (MFN) clause in the India-Australia BIT.

AFTER WHITE INDUSTRIES CASE IN 2011

Agitation after the white industries case was quite visible with the government of India. The white industries case acted as an eye opener to India and that is when India decided not to enter into every Bilateral Investment Treaty which is being offered. India was the only country at that time with the highest number of bilateral investment treaty existing and India decided to scrap off many of those Bilateral Investment Treaties without even a second thought as it was much of a threat to the country rather than a benefit in the international world of friendship.

India has been entering into BITs without fully understanding their implications. The sanguine belief in the Indian official establishment is that Indian BITs adequately balance investment protection with India’s ability to exercise sovereign powers. This erroneous belief has been strengthened over the years because India’s regulatory actions have so rarely been challenged under BITs. It is a mistake, however, to believe that all is well with Indian investment treaties.

The White Industries award draws attention to the fact that BIT provisions like the MFN clause are often vague and broad. This enabled White Industries to indulge in treaty shopping and arrive at a result that India did not anticipate. The ruling also clearly demonstrates how sovereign functions of the Indian judiciary could amount to violation of India’s BITs. Hence, one expects that this ruling should trigger a critical review of India’s BIT program. Such a review is imperative in light of India’s deepening

⁴ Summet Kachwaha, “The White Industries Australia Limited – India BIT award: a critical assessment” 29(2) JLCIA 276 (2013).

integration with the global economy and increasing number of new trade and investment agreements, such as the India-EU free trade agreement.⁵

This decision highlights the possibility of using investment treaty arbitration as an alternative route for enforcing commercial awards in circumstances where the foreign investor's efforts are frustrated by delays in local courts. While a claim based on denial of justice may be difficult to establish, it may suffice to rely on breach of the effective means standard, which is potentially easier to establish. As the decision illustrates, it may be enough when the effective means standard is contained in another treaty of the host State as an investment treaty will usually contain an MFN clause which will allow the foreign investor to rely on a substantive standard contained in the other treaty. However, other tribunals may not regard a commercial award as a continuation of the original investment as readily as the Tribunal in this case. Of course UNICTRAL awards have no formal precedent value although in practice they can be followed.

Although this award could meet a similar fate to the ICC award, the key advantage for White is that it can seek to enforce this award against Indian assets outside of India as opposed to merely against the assets of its former contractual counterparty, Coal India. It appears that India has not sought to challenge the award in London or in India.

In the Indian context, this award is topical in light of the long-awaited appeal before the Supreme Court of India in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc & other consolidated appeals*. A five-judge bench is revisiting a controversial line of judgments holding that the 1996 Act allows Indian courts to intervene in arbitrations seated outside India, just as the Calcutta High Court intervened in the underlying ICC award in this case. White and a number of other parties have been joined as petitioners in these proceedings. A&O is acting for one of the interested parties to the appeal.⁶

⁵ Prabhash Ranjan, "The White Industries Arbitration: Implications for India's Investment Treaty Program" *The Investment Treaty News*, April.13 2012.

⁶ "India liable under bilateral investment treaty for extensive judicial delays" *available at*: allenoverly.com/en-gb/global/news-and-insights/publications/india-liable-under-bilateral-investmenttreaty-for-extensive-judicial-delays (last visited on Nov 27, 2020).

INDIAN MODEL BILATERAL INVESTMENT TREATY, 2016

India has adopted an 'enterprise-based' definition of investment under which investment is treated as the one made by an enterprise incorporated in the host state.

Intellectual property assets aren't considered here. We have dropped the Most Favored Nation (MFN) status. Now the Bilateral Investment Treaty links "Fair and Equitable Treatment" to international laws, aimed at countering a broad interpretation and risk misuse. Hence, State cannot nationalize or expropriate except for reasons of public purposes. Moreover, Inclusion of new clause on non-discriminatory treatment for compensation of losses in circumstances like armed conflict, natural disasters and in the state of national emergency. It also aims to incorporate a clause for transparency, requiring the Parties to ensure that all the laws, regulations, procedures and administrative rulings regarding matters covered in the BIT are published. The Indian model BIT mandates foreign investors to voluntarily adopt internationally recognized standards of corporate social responsibility(CSR). Also the aggrieved investor should use all local remedies as well as negotiations and consultations initiating arbitrations against the host State and excludes matters relating to taxation.

The significance here is that it helps in maintaining a balance between the investor's rights and the Government obligations. The New Model BIT, 2016 provides for an elaborate dispute resolution regime by arbitration following exhaustion of local remedies. The exhaustion of local remedies is a precondition for referral to arbitration, except where the foreign investor can demonstrate that no local remedies capable of reasonably providing any relief are available. A foreign investor that meets the conditions precedent has a choice to refer to arbitration under (i) the International Centre for Settlement of Investment Disputes (ICSID) Convention, (ii) the Additional Facility Rules of ICSID or (iii) the UNCITRAL Arbitration Rules. It gives an option for contracting states to agree to an appellate body for review of investment tribunal awards.

Although a model BIT has not got any hard and fast rules to be followed. It is just guidelines for the drafting of Bilateral Investment Treaty so that certain things have to be kept in mind while drafting the treaty and negotiating with nations states in this regard.

It is a necessity to keep in mind by the Indian administration as we have been dragged to the International Dispute Resolution Forums a little too much and this precautions and guidelines are for the avoidance of the same.

With the proposal of Model BIT, many Bilateral Investment Treaties with nation states have been suspended by the Indian government and maybe this passes a wrong message to the international investors as to the safety and security of their investment.

Maybe this step taken by India wouldn't pass a positive message to the investor state, but the decision taken in this regard is apt. The exploitation done by the investor states when it comes to dragging the host state everywhere in matters of dispute without even exhausting the local remedy would only bring a bad impact on the government of India. And this wasn't something the government of India wished for. So, it's better to have made a correction now by suspending all the Bilateral Investment Treaty which were not drafted as according to our terms and suspension of treaties doesn't mean India ended up suspending every BIT we have ever entered into.

India entered into near to 80 BITs from 1990s and now as of current situations, we have only 8 BITs with some of the nation states of the world.

INDIA BACK WITH AN INWARD LOOKING ECONOMY?

Although India is a developing country and the measures taken by India for the development of its people are many, is India trying to minimize the dependence of foreign nations so as to be the one and only independent nation in itself? Is the suspension of these many Bilateral Investment Treaty and promotion of pointing to a more inclusive look to the economy rather than being an open economy to the world?

Our Prime Minister repeatedly focusses on the need and importance of goods produced and developed in India. He always highlights the importance of Khadi and the revolution it brought to the country. 'Atma Nirbharta' is the focus of the current government where the government wants to develop the local economy. And that isn't bad as the country is developing in one way or the other. Being 'vocal about the local' and relying much on local goods would no doubt support the local producers and it would help India to be an independent country.

The Indian economy is trying to support the local producers and the indigenous industries but that in no way means that the Indian government doesn't want to enter into a Bilateral Investment Treaty with other nation states. This simply means that the Indian government wants to help the local producers to develop and foster. The investor states may enter into a BIT with India or vice-versa and it shouldn't be the concern of the investing company, the policies for the local producers.

Most BITs have provisions in this regard as it is the duty of those foreign investors to respect the laws of the land and if the local producers are given more preference than that of the foreign ones, they shouldn't bother about that because it is the policy and the decision of the host country and not on the foreign investor to make an all here.

The investors are granted full protection in the host country but it is the duty of the investor company to respect the laws of the host country and act according to that. This is an obligation and no investor state can get away with this.

CONCLUSION

Bilateral Investment Treaty has no doubt contributed in one way or the other to the development of the nation and helped the country. But in one way or the other, entering into these many Bilateral Investment Treaty has pushed India into such a position that the image of the country as a host state is harmed. The current efforts made by Indian government in no way has impacted the BITs and will not in future effect the same. It is the duty of any state to protect the interest of its citizens and that is to considered in public interest. An investor state or the investors need not bother about the same and it's the duty of the investor to respect the laws of the host state and reservations provided to the local companies in no way should effect the investor. Although India is trying and working real hard to be an independent producer of almost everything and this would for sure mean, less foreign investors in the future but that isn't the internal matter of the investor state and they shouldn't be bothered about the possible threat at all.

This tuff between the foreign and local companies has to continue and India cannot be blamed for trying to be an independent producer. With the kind of dynamic relations, we see in the international front, it is in the best interest of the country and the effect of such efforts by India would be soon visible. India has the possibility of turning into a

closed economy or India will end up being a supplier of all kinds of products to different nation states and India is in the right path of development.