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摘要

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内容

Article 文章

BITs - Is foreign investor protection 'fair and equitable treatment'?

双边投资协议 – 是否是国外投资者 "公平和平等待遇" 的保护伞?

By **R. Subhashree**

The UNCITRAL (United Nations Commission on International Trade Law) recently ruled in favour of White Industries, Australia[1] holding that, by inordinate delay in enforcing the award granted by the ICC Arbitration Tribunal, India had failed to provide adequate safeguard to foreign investment. Two telecom majors Sistema and Telenor have initiated proceedings under the Bilateral Investment Treaty (BIT) between Russian Federation and India and India-Singapore Comprehensive Economic Cooperation Agreement (CECA) respectively, seeking compensation for the loss arising out of cancellation of licenses by the Supreme Court of India. It is also reported that The Children's Investment Fund (TCI) of UK, as an investor in an Indian coal PSU, has invoked the provisions of the India-UK BIT and the Cyprus-India BIT alleging losses due to improper pricing of coal.

If business is all about entrepreneurial skill, risk bearing and pushing boundaries the investor-state arbitration clause would seem to be all about the opposite, negating risks and widening goalposts. The investor-state arbitration clause in the Bilateral Investment Promotion Treaties or in the investment chapter of trade agreements like FTA or CEPA enables a foreign investor to proceed against the host state - sovereign government to recover damages for any losses caused by change in legislation, failure to maintain stable investment climate or alleged discrimination.

Is it an easy task for an investor (mostly corporate) to sue a foreign government? Treaties between nations are negotiated over years. Would a government fail to arm itself with adequate flexibilities to legislate for public health, national security, financial crises or shield itself from claims by foreign investors? Let us briefly examine some of the clauses in treaties negotiated by India under which it is being proceeded against.

The MFN clause

Bilateral Investment Treaties or BITs generally contain the Most Favoured Nation (MFN) clause which means that the contracting states are obliged to provide equal benefits to investors from the other contracting state as they provide to any other state. They cannot place the other contracting party at a disadvantage. The parties resolve to provide terms more favourable to an investor, negotiated in later treaties as in the case of India-Netherlands BIT [2]. The MFN clause and provision for fair and equitable treatment enable a disputing investor to import more favourable terms from other treaties. In *Siemens* v. *Argentina* [3], the more favourable terms in the Argentine-Chile treaty were invoked to do away with

[1] http://ilcurry.wordpress.com/tag/white-industries

[2] Article 4, para 2 of Agreement between Republic of India and Kingdom of Netherlands for Promotion and Protection of Investments

[3] UNCTAD Report prepared by Goh Chien Yen, Third World Network. Statistics and case notes have been taken from various issues of INVEST-SD: Investment Law and Policy News Bulletin and reports by Luke Eric Peterson. They are available at www.iisd.org.

the requirement to approach local courts before seeking international arbitration.

The India-Japan CEPA defines investment in very broad terms and includes 'expectation of profit' (Note 2 to Article 3)[4]. It would thus be possible to invoke this definition in BITs with Russia, UK or Cyprus when an investor finds that the treaty with his home country does not provide sufficient protection or remedy. The India-Singapore CECA is, however, cautiously worded stating that the parties will consider a request to incorporate such benefits without disturbing the balance of commitments arrived at in the treaty [5].

Ideally treaties which are negotiated between two parties should be unique to them taking into account their relationship, trading pattern and volumes, size of economy and so on.

Multiple forum and remedies

Pursuit of parallel and multiple remedies by approaching various fora simultaneously or in case the award conferred is perceived to be insufficient is another aspect of investor-state arbitration. The foreign investor has a wide choice of forums like ICC arbitration panel, UNCITRAL or the International Centre for Settlement of Investment Dispute (ICSID). The decisions of the forum are binding only on the parties approaching it and not on other fora. In the cases of CME *(Netherlands)* v. *Czech Republic* (Partial Award) and *Lauder (US) v. Czech Republic* (Final Award) [6], two claims were pursued simultaneously in UNCITRAL against the Czech Republic.

The India-Singapore CEPA (Article 6.21, para 4) provides that the disputing party shall waive *'its right to initiate or continue any proceedings (excluding proceedings for interim measures of protection referred to in paragraph 5) before any of the other dispute settlement fora referred to in paragraph 3 in relation to the matter under dispute'.* It also lists courts and tribunals of disputing party as an option. The India-Japan CEPA provides an option to approach local court though the foreign investor can withdraw his case within 30 days and approach international agencies for dispute settlement.

However, the Indo-Russian BIT does not provide for local remedy. The foreign investor can try to solve the dispute through consultation or conciliation and, if unsuccessful, he may opt for any chosen international agency. The other party to the dispute has no say in the choice of agency to be approached for arbitration.

Time- limit

There are almost no limitations as to time within which a dispute has to be brought. In recently negotiated agreements like CECA (Singapore) [7] and CEPA (Japan) [8], the investor may not submit a

4 Note 2 to Article 5 of Comprehensive Economic Partnership Agreement between the Republic of India and Japan - "Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit through the commitment of the capital, or the assumption of risk."

5 Article 6.17 of Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore

6 OECD Working Papers on International Investment (Number 2006/1)

7 Para No.4 of Article 6.21 of Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore

8 Para No. 9 of Article 96 of Comprehensive Economic Partnership Agreement between the Republic of India and Japan

dispute for conciliation or arbitration *'if more than three years have elapsed since the date on which the disputing investor acquired or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred loss or damage'* . Generally the terms negotiated in a treaty are in effect during the currency of the treaty. The India-UK BIT [9], India-Cyprus [10] and India-Russia BIT [11] provide a further period of 10-15 years during which the provisions will apply to investment made before the date of termination of the treaty.

Rationale

One of the reasons advanced for binding a sovereign government to international arbitration is that the other country may not provide fair, quick or effective legal remedy to a foreign investor. The principle of exhaustion of local remedies was followed by China until recently. [12] Australia has now adopted a stand against incorporating the investor-state arbitration provisions in treaties signed by it reasoning that it has well-functioning legal systems. The Productivity Commission of Australia in its report in 2010 recommended avoiding conditions like MFN and *'the inclusion of investor-state dispute settlement provisions in BRTAs that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors'.* [13]

Another argument which is put forth in favour of including investor-state arbitration clause is that it is reciprocal and investors in both countries stand to benefit. However, given the cost and time involved in such processes net-capital importing countries have little to gain from it. Again Australia's veto against this clause has not made it less attractive as an investment destination and it continues to be a strong force in the Trans-Pacific Partnership Agreement negotiations.

In keeping with the preamble of BITs and other agreements which seek to foster enhanced cooperation, prosperity and reciprocal protection for investment, it would be prudent on part of the negotiating states to not bind themselves to broad and vague terms which can be interpreted to the disadvantage of the other.

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9 Article 15 of Agreement between Government of United Kingdom of Great Britain and Northern Ireland and Republic of India for Promotion and Protection of Investments

10 Article 16 of Agreement between the Government of the Republic of India and the Government of the Republic of Cyprus for the mutual promotion and protection of investments

11 Article 13 of Agreement Between The Government Of The Russian Federation And The Government Of The Republic Of India For The Promotion And Mutual Protection Of Investments

12 Yang Shu-dong, *Investment Arbitration and China: Investor or Host State?, Op. J.,* Vol. 2/2011, Paper n. 6, pp. 1 - 19, http://lider-lab.sssup.it/opinio, online publication December 2011

13 Recommendation No.4 in chapter 14 of the Report of Productivity Commission of Australia, 2010

Trade Remedy News 贸易救济新闻

对中国发起的贸易救济措施 Trade remedy measures against China

Product 产品	Country 国家	Measures 措施	Notification 通知
Bicycles 自行车	EU 欧盟	Anti-subsidy proceedings initiated 发起反补贴调查	Regulation (EU) No 2012/C 122/06 ,dated 27-4-2012 2012年4月27日，欧盟第2012/C 122/06通知
Electrical insulators 电绝缘体	India 印度	ADD investigation initiated 发起反倾销调查	Notification No. 14/6/2011-DGAD, dated 9-4-2012 2012年4月9日，第14/6/2011-DGAD通知
Fresh garlic 新鲜大蒜	USA 美国	ADD to continue – Sunset review affirmative 肯定日落复审 – 继续征收反倾销税	US ITC News Release 12-037, dated 12-4-2012 2012年4月12日，美国国际贸易委员会发布新闻12-037
Galvanized steel wire 镀锌钢丝	USA 美国	Negative injury determination 确定否定性损害	US ITC News Release 12-045, dated 23-4-2012 2012年4月23日，美国国际贸易委员会发布新闻12-045
Hot-Rolled Steel Plate 热轧钢板	Canada 加拿大	ADD Sunset review initiated 发起反倾销日落复审	Expiry Review No.: RR-2012-001, dated 26-4-2012 2012年4月26日，期终复审第RR-2012-001
Ironing boards 烫衣板	EU 欧盟	ADD Sunset review initiated 发起反倾销日落复审	Regulation (EU) No. 2012/C 120/06, dated 25-4-2012 2012年4月25日，欧盟第2012/C 120/06通知
Oxalic acid 草酸	EU 欧盟	Definitive ADD imposed 征收最终反倾销税	Regulation (EU) No 325/2012 , dated 12-4-2012 2012年4月12日，欧盟第325/2012通知
Partially Oriented Yarn (POY) 涤纶预取向丝	India 印度	ADD imposed 征收反倾销税	Notification No.22/2012-Customs (ADD), dated 2-5-2012 2012年5月2日，第22/2012 -Customs (ADD) 通知

Product 产品	Country 国家	Measures 措施	Notification 通知
Peroxosulphates 过硫酸盐	India 印度	ADD extended till 18-3-2013 反倾销税延长至2013年3月18日	Notification No. 20/2012-Cus. (ADD), dated 4-4-2012 2012年4月4日，第20/2012-Cus. (ADD)通知
Sodium cyclamate 环氨酸钠	EU 欧盟	ADD proceedings terminated for 2 specific entities 对2家企业终止反倾销调查	Commission Decision of 4 April 2012 in 2012/ 185/EU 2012年4月4日，欧盟委员会决定2012/ 185/EU
Stainless steel sinks 不锈钢水槽	Canada 加拿大	Final determinations of dumping and subsidizing 最终确定倾销和补贴	Dumping case number: AD/1392 & Subsidy case number: CV/129 , Order dated 24-4-2012 2012年4月24日，倾销案件号：AD/1392；补贴案件号：CV/129
Stainless steel sinks 不锈钢水槽	USA 美国	Affirmative determination of injury 确定肯定性损害	US ITC News Release 12-038, dated 13-4-2012 2012年4月13日，美国国际贸易委员会发布新闻12-038
Steel wheels 钢圈	USA 美国	Negative injury determinations 确定否定性损害	US ITC News Release 12-041, dated 17-4-2012 2012年4月17日，美国国际贸易委员会发布新闻12-041
Stilbenic optical brightening agents 荧光增白剂	USA 美国	Affirmative determination of injury 确定肯定性损害	US ITC News Release 12-044, dated 19-4-2012 2012年4月19日，美国国际贸易委员会发布新闻12-044
Tartaric acid 酒石酸	EU 欧盟	Definitive ADD imposed 征收最终反倾销税	Regulation (EU) No 349/2012, dated 24-4-2012 2012年4月24日， 欧盟第349/2012通知
Tyre curing presses 轮胎平板硫化机	India 印度	Midterm review recommending exclusion of Six Day Light Curing Press for curing bi-cycle tyres 中期复审建议排除硫化自行车轮胎的六日轻平板硫化机	Notification No. 15/40/2010-DGAD, dated 29-3-2012 2012年3月29日， 第15/40/2010- DGAD通知

Product 产品	Country 国家	Measures 措施	Notification 通知
New pneumatic tyres 新充气轮胎	India 印度	ADD extended till 7-10-2012 反倾销税延长至2012年10月7日	Notification No. 17/2012-Cus. (ADD), dated 30-3-2012 2012年3月30日， 第17/2012-Cus. (ADD)通知
Vitamin A Palmitate 棕榈酸维生素A	India 印度	ADD extended till 27-3-2013 反倾销税延长至2013年3月27日	Notification No. 21/2012-Cus. (ADD), dated 12-4-2012 2012年4月12日， 第21/2012-Cus. (ADD)通知

中国发起的贸易救济措施
Trade remedy measures by China

Product 产品	Country 国家	Measures 措施	Notification 通知
Electrolytic capacitor paper 电解电容纸	Japan 日本	Sunset review initiated 发起日落复审	Announcement No. 15 of 2012, dated 28-4-2012 2012年4月28日第15号公告
Nonyl Phenol 壬基酚	India 印度	Sunset review initiated 发起日落复审	Announcement No. 7 of 2012, dated 13-4-2012 of Ministry of Commerce of China 2012年4月13日， 中国商务部第7号公告

WTO News 世贸组织新闻

印度向世贸组织提出挑战美国对钢材的反补贴税

印度已经向世贸组织争端解决机构提出了关于美国发起的对来自印度的某些热轧碳钢板材产品征收反补贴税的争议。自2001年以来，对来自印度的这些产品一直被征收反补贴税以抵消各种所谓的政府补贴。根据2012年4月12日印度代表团向世贸组织争端解决机构以及美国代表团之间进行的沟通，印度已经请求就该争议进行磋商。

根据磋商请求，印度认为美国1930年关税法的某些条款以及包含19CRF351条款的美国联邦法典构成法律"本身"违反补贴和反补贴协议第12条、14条、15条、19条和32条的内容。印度进一步主张就印度政府规定的某些项目造成裁决中所谓的补贴和征收反补贴税，即由国家矿业发展公司销售铁矿石、授予铁矿石和煤炭开采权、以及钢铁发展基金，与补贴和反补贴协议第1条、2条、10条、11条、12条、13条、14条、15条、19条、21条和22条的规定不相符。由于上述的违反，印度还主张这些措施与关税与贸易总协定第I条、VI条不一致，并且造成抵消或损害在这些协议下印度的利益。

去年10月，美国已经向世贸组织提交了一份列表列明50项印度政府措施，称这些构成了未经公布的不公平补贴。

上诉机构发布丁香香烟争议报告

贸易争端解决机构上诉机构于2012年4月4日，发布关于"美国-影响丁香香烟生产和销售的措施" (WT/DS406/AB/R)的上诉报告。报告指出产品之间的竞争关系以及关于潜在措施的法律如与产品有关的健康风险，同样应在确定产品是否"相同"时进行考虑。因此，上诉机构认为丁香香烟与薄荷香烟"相同"并且任何限制前者而不限制后者的措施存在歧视。上诉机构已经要求美国按照技术性贸易壁垒协议修改其法律。

世贸组织讨论印度新公布的反倾销法中的反规避条款

印度已经于4月23日澄清了由美国、中国和土耳其于4月2日在世贸组织提出的一些质疑，并解释了印度新的关于反倾销税的反规避条款。一些重要问题及回复如下：

美国-在怎样的基础下可发起确定规避程序并且需要确认哪些证据以确定规避？

印度-如果受到反倾销税制约的出口商或生产商改变其产品的贸易操作、贸易模式或销售渠道以将其产品通过其他未受到反倾销税制约的国家的出口商或生产商出口到印度时，可发起规避程序。这些条件应当在没有适当的理由的情况下发生、从经济学上理解，也就是实施的反倾销措施已经生效。同样也需要考虑反倾销措施的救济影响是否被削弱或不是由于这些规避行为造成的。

土耳其-反倾销协议第5.4条是否也适用于发起规避调查？

印度-反规避申请可由根据印度反倾销规则确定的国内产业提出，这也与反倾销协议规定的国内产业一致。

土耳其与美国-澄清规避复审条文中"合理期限"术语。

印度-合理期限是根据反倾销协议第11.2条的内容确定的，并且通常调查机关认为12个月是合理期限。

中国-印度调查机关是否会在反规避调查中确定对国内产业造成损害？

印度-没有义务作出新的损害认定因为已经在确定损害后对产品征收了反倾销税并且反规避调查只是针对已经受到反倾销税制约的产品。

News Nuggets 新闻精华

中国和韩国开展自由贸易协定的对话

亚洲的主要两个经济国即中国和韩国,已经于本月正式开展自由贸易协定的谈判。按照中国商务部部长的讲话，两国的目标是在2016年将贸易额增长到3000亿美元。两国部长于5月2日在北京举行会议并达成协议。据报道，基于之前的自由贸易协定的可行性研究以及为了在可能的两年内完成谈判，该协议将继续推进包括货物和服务以及投资贸易的谈判。两国同时希望该自由贸易协定可以在东亚地区提供更为广泛自由的贸易环境基础，这将可能同时包括日本。中国从韩国购买的大部分产品是汽车和电子产品，而向韩国主要销售矿产品和电子零件。

进口控制遭致贸易保护主义

世贸组织货物贸易理事会于2012年3月最后一个星期举行会议对阿根廷关于进口的法规包括新公布的于2012年2月生效的法规提出强烈抗议。而哥伦比亚和欧盟也分别提出抗议，美国以包括日本和澳大利亚在内的其他12个成员国的名义宣读了一份联合声明。

为了更好保持其贸易平衡和削减进口，阿根廷制定的措施要求对每一次进口交易进行事前注册、审核和批准，并且有义务或者在国内生产进行投资或出口与进口货物相似价值的货物，这些措施被认为是违反了其对世贸组织协议的承诺，阿根廷认为这些措施类似于新的特殊进口许可证，这促进了加工并且进口实际上获得增长。

墨西哥相关的以规定参考价值方式由海关对进口货物定价的行为在特定的案件中受到批评。

协议的模板

美国谈判的新的双边协议模板于2012年4月20日发布。美国国务院发布的情况说明书表明新的模板将关注关于在发展和执行法律法规方面的透明度争议，根据多边上诉法庭进行的投资者和国家之间的仲裁拓展审核授予奖励的可能性，并且要求国家加强国内劳动和投资法律，以鼓励投资。该新的双边投资协定模板也谈到国有企业的义务并提出缔约国不应强加履约要求，如根据要求的水平出口或购来来自其地区的货物。

该提议的新模板受到来自不同学派的批评。而总的投资者国家仲裁的批评依旧存在，贸易部门认为该法律没有充分关注国有企业的影响。另外投资的定义非常广泛，扩展到一个企业、股份、知识产权和承担风险。利益拒绝给与条款包括了对一个在另一缔约国地区内没有实质业务活动的企业的投资被视为无法充分防止跨国企业通过外国子公司起诉本国政府。