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

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 the requirement to approach local courts before seeking international arbitration.

[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 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 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*

[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

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