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How States Manage Their Obligations Under Bilateral Investment Treaties: Opportunistically Changing The Rules of The Game or Legitimately Exercising Their Sovereign Rights? (Part I)

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There are around 3,000 bilateral investment treaties (BIT) in force worldwide. Most of them are concise with broadly formulated investor rights and host state obligations. In practice, it is up to arbitral tribunals to give them the actual meaning.

Many of those BITs are now being revisited. This recast movement comes from the policy concern that the balance between investor protection and host states' sovereign rights has not been struck right. Increasingly, the way that some standards and clauses common to many BITs have been applied by arbitral tribunals has come under criticism as shifting the balance in favour of investor protection and unduly restricting host states' sovereign rights.

The argument on which this criticism builds is that through broad treaty language, states delegate to arbitral tribunals the task of specifying states' obligations in a relatively unconstrained manner, often leading to divergent and unpredictable results. Undoubtedly, the amount of discretion which arbitral tribunals enjoy at the interpretation stage is a function of particular treaty language. It is true that open-ended standards provide tribunals with more flexibility than rules specifying in detail required or prohibited conduct or action. However, such legislative technique often allows attainment of tailored and equitable results, which is not always possible in a system of rigid rules that have been set ex ante and in isolation from the actual dispute. In case of standards, tribunals fill them ex post, adjusting their meaning to facts of the case. However, some applications of, for example, the "fair and equitable treatment" (FET) standard or the "most favoured nation" (MFN) clause have particularly disturbed states, so they have been voicing concerns that arbitral awards are unpredictable and can expand their treaty obligations.

Not addressing the merits of those concerns, this two-part note looks into the ways that states can control the exercise of tribunals' discretion and their implications. Of course, states can prevent unintended results from happening by simply adding more specific language to their new BITs. But what can they do with the existing treaties?

"Rebalancing" tools

Seeking to protect their "regulatory sovereignty" and to "reassert control" over their BIT frameworks, states resort to various strategies. Some states are not interested in just “rebalancing” their approach to investment protection and choose to terminate the most “problematic” or simply all of their BITs. Others prefer to renegotiate and amend their treaties. However, renegotiation of a treaty is costly and time consuming. Those states which are sensitive to cost and time concerns may resort to the third strategy available for constraining arbitral tribunals’ discretion: joint authoritative interpretation of provisions that raise their concerns.

In theory, it is straightforward and simple. State parties to a treaty can get together and issue a joint statement on a specific issue, such as, for example, the definition of the FET standard. They can do so on an ad hoc basis or through a formal mechanism, if such has been provided in a treaty. In practice, though, both states must agree on the interpretation, so it needs to be in their joint interest. Looking at the existing treaty practice, one can see that states have been resorting to joint interpretations rather rarely. A possible explanation for this rare use can be the asymmetry of interests of particular treaty parties, when one of them prevalently is a capital exporting and the other a capital importing state. “Joint Interpretative Notes” (JIN) recently agreed by India and Bangladesh with respect to their BIT are therefore a good excuse for taking a brief look at this relatively low-cost tool for controlling “unintended” interpretations by arbitral tribunals.

India and Bangladesh joint interpretative statement

On 12 July 2017, India’s Government announced that it approved the JIN on the 2011 India-Bangladesh BIT. As provided in press release, “[t]he JIN includes interpretative notes to be jointly adopted for many clauses, including, the definition of investor, definition of investment, exclusion of taxation measures, Fair and Equitable Treatment (FET), National Treatment (NT) and Most Favoured Nation (MFN) treatment, expropriation, essential security interests and Settlement of Disputes between an Investor-and a Contracting Party”. Such interpretative notes, according to India’s Government, “would impart clarity to the interpretation of the existing Agreement between India and Bangladesh for the Promotion and Protection of Investments (BIPA)”. India’s Government also notes that “issuance of such statements is likely to have strong persuasive value before tribunals”.

Approval of the JIN is a step in the India’s program to recast its entire investment treaty framework. In 2016, India sent notices to 58 countries announcing its intention to terminate (or not renew) respective BITs. As to the remaining 25 BITs that cannot yet be terminated because the initial period for which the treaty was signed has not expired, India has circulated to the counterparties a proposed Joint Interpretative Statement (JIS). JIS contains clarifications similar in their approach to the text of India’s 2015 Model BIT, i.e., seriously reducing investors’ rights. Whereas the text of JIS has been made public, India’s Government has not published the JIN with Bangladesh. Thus, one can only speculate to what extent it reflects India’s approach to investment protection set out in its “model” JIS.

Interpretation or amendment?

The strategy of adopting joint interpretative statements, as employed by India, looks like an efficient and easy way for states to reassert control over their foreign investment regimes. Assuming that arbitral tribunals will defer to clarifications contained in the JIN, India has in fact “amended” its original BIT with Bangladesh without going through a lengthy and costly process of formal treaty renegotiation and amendment. If so, the question is what status such a “backdoor” treaty amendment has under international law and what signal such a practice sends to potential foreign investors.

The question whether the JIN is a true interpretation or “disguised” amendment of India-Bangladesh BIT is not easy to answer. As observed by Gabrielle Kaufmann-Kohler, it is often difficult to draw the line between a true interpretation and an amendment. (G. Kaufmann-Kohler, ‘Interpretive Powers of the Free Trade Commission and the Rule of Law’ in E. Gaillard and F. Bachand (eds.), Fifteen Years of NAFTA Chapter 11 Arbitration (Juris 2011), p. 191.) A true interpretation should clarify what the norm has always been. The JIN provide clarifications but mainly by adding limitations to the meanings of original provisions, thus re-examining the original text quite thoroughly. Further, pursuant to Article 39 and Article 11 of the Vienna Convention on the Law of Treaties (VCLT), states can amend treaties by “any means if agreed”. This means that JIN can in fact be treated as an amendment of the India-Bangladesh BIT.

Some NAFTA tribunals have addressed the interpretation/amendment distinction with respect to the NAFTA Free Trade Commission (FTC) “Notes of Interpretation of Certain Chapter 11 Provisions” (FTC Notes) of 2001 on the FET standard. NAFTA, unlike India-Bangladesh BIT, explicitly provides for an institutional mechanism for interpretation by its state parties and specifies that interpretative notes issued by the FTC are binding on Chapter 11 arbitral tribunals.

The tribunal in Pope & Talbot v. Canada viewed the FTC Notes as an amendment of the NAFTA. It held, however, that this classification had no impact on the case before it (already in the merits phase), because the conclusion it had reached in the partial award rendered before the issuance of FTC Notes would hold under the new regime as well. The tribunal in ADF v. United States did not address the distinction between an “interpretation” and an “amendment” of Article 1105(1) NAFTA but observed that the FTC statements are to be treated as the most authentic and authoritative “source of instruction on what the Parties intended to convey in a particular provision of NAFTA”. In view of the tribunal in Merrill & Ring v. Canada the FTC Notes looked “closer to an amendment of the treaty, than a strict interpretation”. The tribunal did not draw any consequences from this classification but stressed the evolutionary nature of the FET standard.

Although joint interpretative statements prima facie look like an easy tool to control “unintended” tribunal interpretations, they have been rarely used by states in their treaty practice. Asymmetry of interests of particular treaty parties, when one of them prevalently is a capital exporting and the other a capital importing state, can possibly explain this rare use of joint interpretative statements. The JIN recently signed by India and Bangladesh substantially affects their BIT which puts to the fore the question how to distinguish treaty interpretation from treaty amendment. Part II explains why the interpretation/amendment distinction is important for the international investment community.

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