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From Ford to Ferrari? A Brief Look at the Changes Introduced in the Draft Model Indian BIT

Bhushan Satish (Willkie Farr & Gallagher) and Shreyas Jayasimha (Aarna Law) · Wednesday, April 29th, 2015

Introduction

The Government of India recently released the [Draft Indian Model BIT](#) (“Draft BIT”) for public consultation. India has an extensive BIT network with over 72 BITs in force. In 2012, following the investment treaty award against India in *White Industries award*, the Government initiated a comprehensive effort to revise the Model Indian BIT (“Old BIT”). The Draft BIT is radically different from the Old BIT, making substantial changes to provisions in the Old BIT, and deleting many other provisions such as the FET and MFN provisions, as well as the clear consent to arbitration under the ISDS clause.

Changes Introduced in the Draft BIT

The preamble of the Draft BIT contains an explicit right of the States to regulate and to change the conditions applicable to investments. It also states that the objectives of the investment must be in line with sustainable development and inclusive growth. This contrasts with the Old BIT which contained language common to many first generation BITs, describing the objective of the BIT as creating conditions to foster greater investment.

Investor is defined as an Enterprise owned or controlled by an Investor. An Enterprise, in turn, is defined as an entity incorporated in the Host State with “real and substantial business operations” in India, such as commitment of capital, engaging a substantial number of employees, etc. It specifically excludes stock and land. It may be noted that that the definition of “Investor” includes only those Investors which are incorporated in the Home State and conducting “real and substantial business operations” in the Home State. Hence holding companies in the Home State are not included and indirect or complex corporate structures are ruled out.

While the Old BIT contained a wide definition of Investment, the Draft BIT narrows the categories of what may constitute an Investment. The Draft BIT expressly excludes government debt securities, portfolio investments, claims to money under commercial contracts, and judgments and arbitral awards.

The Draft BIT includes protections against denial of benefits, un-remedied and egregious violations of due process, and manifestly abusive treatment involving continuous and outrageous coercion and harassment. These provisions indicate that India has decided to supplant the vague

FET standard existing in the Old BIT and rely on the Minimum Standard of Treatment in customary international law instead.

The National Treatment provision does not apply to measures by the State Government and Local government, and hence applies only to measures by the Central Government. This is a potentially fatal provision for Investors because the highly federal structure of India causes a lot of the power on issues such as taxes and police to vest with the State and local government. As a consequence many decisions affecting the Investment are made by the State and local government. This can be best observed by the recent investment claim made by [Louis Dreyfus Armateurs](#), which based its claim on allegations that the Government *inter alia* failed to provide protection and security to the project, its employees and their families – an obligation of the police and, primarily, the State government.

The BIT contains an entirely new chapter dedicated to Investor, Investment and Home State obligations. For example, Art. 9 prohibits the Investor or Investment from engaging in ‘corruption’ – which is widely worded and includes facilitation payments and illegal contributions to political parties. It may be noted that although all the protections in the BIT do not apply at the pre-establishment stage, the anti-corruption obligation applies at all stages. Any violation of these obligations bars the Investors’ access to the BIT’s protections and can become the basis of counterclaims by the Host State.

Importantly, Chapter IV of the Draft BIT which contains the Dispute Settlement provisions does not contain any clear consent to arbitration by the Host State. Art. 14.4(i) provides that the Disputing Investor *may* submit a claim to arbitration pursuant to the treaty. To reinforce this understanding, Art. 14.4(ii) provides that a claim may be submitted only if a “written consent for the submission of the claim to arbitration by the Parties” exists, thereby implying that the BIT does not form the basis for such written consent. The preamble defines the “Parties” as the Contracting Parties.

In a radical departure from the Old BIT, the Draft BIT does not give Investors an option between ICSID and UNCITRAL arbitration, and states that arbitration shall be conducted under the UNCITRAL Rules unless the disputing parties agree otherwise. This may be because India is not an ICSID signatory and it does not seem that it will sign the ICSID Convention anytime soon. The provision expressly allows counterclaims by the Host States. The ISDS provisions do not provide jurisdiction for reviewing the merits of judicial decisions and require a mandatory exhaustion of local remedies, coupled with a compulsory negotiation period of 1 year.

Importantly, the Draft BIT states that the tribunal can only award monetary damages and this does not include punitive, moral damages, or injunctive relief. This contrasts with the tribunal’s authority in counterclaims by the Host State for violations of Investor’s obligations under Chapter III, where the tribunal is not restricted to awarding only monetary damages.

Conclusion

Although the Draft BIT borrows heavily from the International Institute for Sustainable Development Model International Agreement on Investment, clearly, a lot was invested in its drafting. Some changes in the Draft BIT are in line with the general movement of States towards more circumspect and cautiously drafted investment obligations, whereas others are specific to India’s experience with Investment Treaty Arbitration. Changes such as introducing investor

obligations are in response to the widely felt perception of the “asymmetry” in BIT commitments. Some changes introduced are in response to the tribunal’s holding in *White Industries*, and others to the slew of investment treaty claims introduced recently in response to tax demands from the taxation authority in India. For instance, the Draft BIT excludes from its scope both governmental services which are supplied on a non-commercial basis which arguably include the Court system and all tax measures by the Host State. The Draft BIT’s exclusion of disputes arising out of commercial contracts which have a specific dispute settlement provision is an instance of a change introduced in response to investment treaty claims by Investors such as *Devas* and *Louis Dreyfus Armateurs* who initiated parallel commercial arbitration proceedings.

Whether all of the provisions in the Draft BIT will be incorporated in new BITs will depend on the bargaining dynamic between the Contracting States. In light of India’s large volume of Outward Direct Investment, this Draft BIT might be criticised as being too conservative, failing to provide adequate protection to investors, and hence against the strategic interests of Indian investors with investments abroad. However, apart from the *Ashok Sancheti case*, there are no other publicly known instances of Indian investors using Indian BITs to protect their investments abroad. This indicates that Indian investors do not use Indian BITs for investment protection. The public consultation of the Draft BIT is currently underway and it is possible that concerns of the investor community might be reflected in the final text of the Model BIT. However, it is highly improbable that the consultation will change the fundamental pillars of the Model BIT, which are designed to give the Host State maximum regulatory space rather than offer protections to Investors.

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