

Transforming the International Investment Agreement Regime: The Indian Experience

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Background of the Indian IIA regime

- India's story on IIAs is one of evolution and shared experiences.
- IIAs, were initially part of a package of the economic reforms introduced in 1991.
- At that time, little importance to the legal intricacies and consequences of these agreements was attached, primarily because of the economic need behind such agreements.
- **Evident by the fact that the first IIAs were signed with the OECD countries (UK, Germany, France, Spain, Netherlands, Switzerland, Finland, Australia etc).**
- **In fact, the Indian 1993 Model was itself based on the OECD Draft Convention for the Protection of Foreign Property, 1967.**

Background to the Indian IIA regime

- In 2009, White Industries served a notice of dispute to enforce its contractual award against Coal India.
- In a November 2011 decision, the tribunal ruled that the delay in enforcement of the award prevented White from having an “effective means” of enforcing its claims.
- The award is an interesting read as one wonders on which exact clause in the India-Australia BIT did the tribunal rely. **“Effective means” was borrowed from the India-Kuwait BIT.**
- **The award caused a rethink on the approach by which we negotiate our BITs.**

Phases of evolution

Three phases of India's IIA regime

Evolution: 1993-2000

1. Rapidly signing agreements with the developed nations
2. Draft Model BIPA of 1993 based on the OECD Draft Convention, 1967

Growth: 2000-2010

1. Significant growth in the number of BITs since late 1990s.
2. Model BIPA revised in 2003 to include a chapter on expropriation
3. Introduction of investment chapters in FTAs

White Industries and beyond: 2010-present

1. Complete overhaul of the IIA system
2. Paradigm shift in approach to substantive and procedural issues

Need for transforming the IIA regime

- Two principal concerns arose out of the White decision:
 - IIAs contained provisions that could be subject to ambiguous interpretations; and
 - does not adequately take into account the socio-economic policy realities (e.g., judicial system in India).
- In July 2012, a high level Government body met to discuss the implications of the Indian IIA regime and made sweeping recommendations for reform.
- **One of the first things to be recognized was how important it was to have a uniform policy for IIAs.**
- As a part of this exercise, recently, the Government has completed the review of the **Indian Model BIT of 1993** and come out with a new **model treaty**.

Revised Model text – Goals

- The Model BIT is aimed at legal protection of foreign investor.
- Not an instrument for investment promotion as little evidence linking IIAs to increase in FDI.
- The attempt to create a neutral treaty keeping in mind investor rights while preserving the **right to regulate**.
- Recent developments in the investment policy space, arbitration as well as certain new generation of treaties taken into account.
- The overall goal is to allow investors to take cases of **genuine and gross violations of investor rights** before tribunals. The ordinary cases must be settled before domestic courts.

Investment

- Historically, two approaches to defining investment:
 - **asset based;**
 - **enterprise based.**
- Asset based approach contradicts the purpose of FDI, which is long term in nature.
- The Model has an “***enterprise***” based definition has been chosen to align it with the goals of FDI.
- Also protects an enterprise, which could be **directly or indirectly “owned” or “controlled” by an investor.**
- Requirement of enterprise to have “***substantial business operations***” in Host State to prevent paper companies and to prevent pre-establishment issues from being adjudicated.

Investor

- The definition of “*investor*” important to determine who is protected by the treaty.
- Companies and natural persons are qualified as investors, but investors must have **substantial business activities** in the Home State which prevents treaty shopping.
- Both **direct and indirect investors** are protected.
- Portfolio investors have also been protected by introducing appropriate language.

Definition of Government

- The model defines Government to include only Central and State governments and its instrumentalities.
- Local bodies have been excluded as under Indian law they have minimal role in foreign investment regulation and are mainly involved in **delivery of services**.
- **State Governments have been included.**

Scope of the Model BIT

- Applies to investments existing on the date of entry into force as well as thereafter.
- Does not bind States for any actions existing before the treaty.
- Further, it provides protection to investors **only after establishment**.
- A pre-establishment approach has been avoided as investment policy in India is constantly evolving, and such an approach would risk “*freezing*” of policy space for the Government.
- Certain sensitive policy issues such as **taxation, government provided services and public procurement** have been kept out in view of evolving regulation.

Fair and Equitable Treatment

- Almost all existing IIAs have traditionally the FET standard. In a small number of treaties, FET is linked the customary international law minimum standard of treatment.
- Meaning and content of FET is uncertain and this has led to numerous controversies in disputes.
- Assessing liability under FET is difficult as the content of the FET obligation is vague
- The Model BIT does not therefore have the FET standard but provides protection only against **manifestly abusive treatment or egregious violations of due process.**
- It is expected that tribunals will apply **a deferential standard of review** when assessing claims made under the new standard of the Model.

Non-discrimination

- National treatment is retained as the sole non-discrimination standard.
- Violation of this standard found if a measure **illegitimately and intentionally** discriminates against investors & if investments are in *like circumstances*.
- **Model BIT does not have MFN.** The main concern from a State's perspective is the manner in which jurisprudence on MFN has developed.
- Claiming benefits from third-country treaties defeats the objective of having bilateral treaties/negotiations.

Expropriation

- Consistency in approach to expropriation between the 1993 and the revised Models.
- Only change has been that the model adopts the “**permanent and complete or near complete deprivation**” test to determine indirect expropriation.
- General exceptions for **compulsory licenses, protection or improvement of human, animal or plant life, environmental protection**, etc.
- Compensation is restricted to what is **adequate and based on fair market value**.

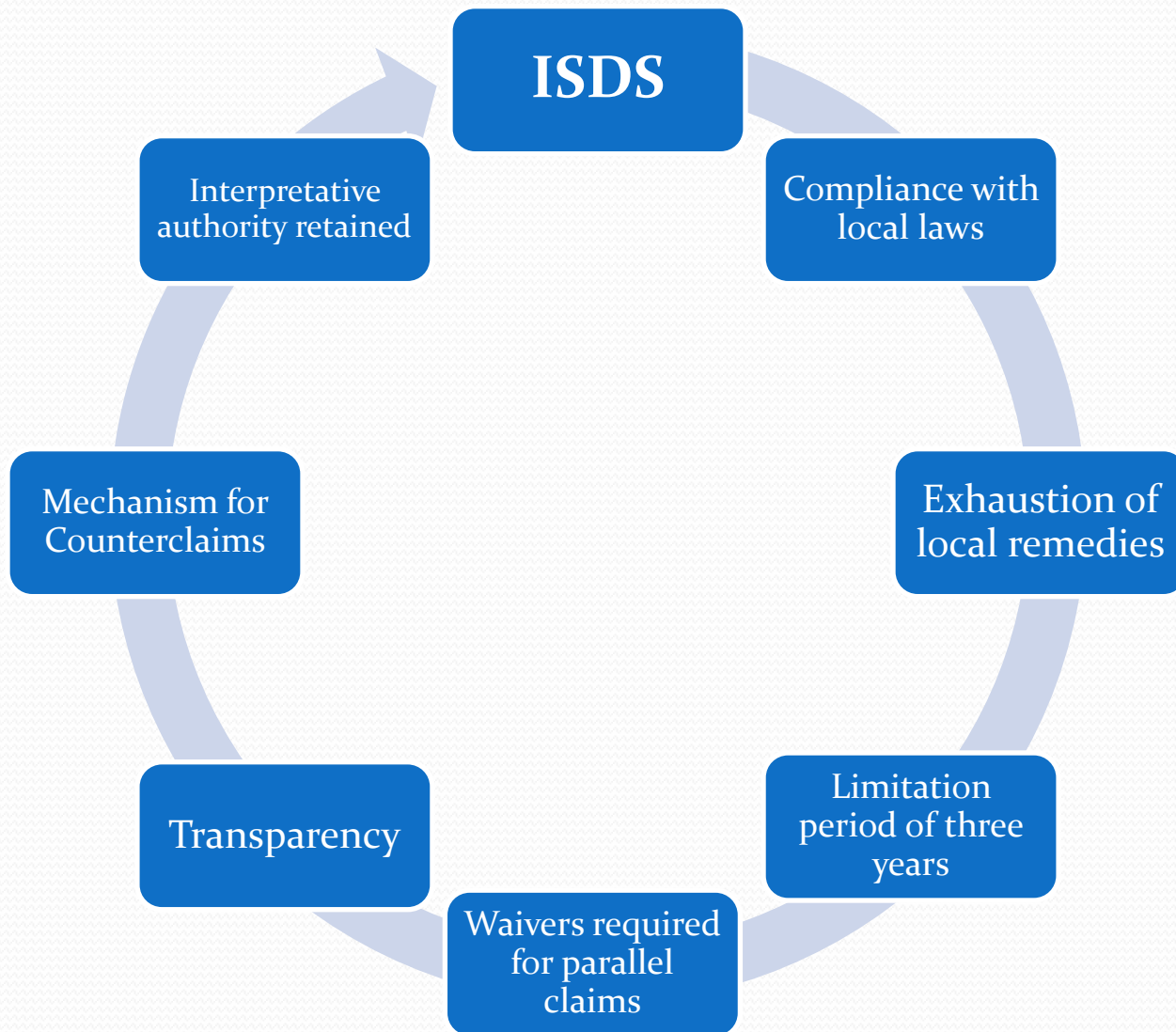
Investor Obligations and CSR

- **Asymmetry** of the IIA regime is a key concern among states.
- A new approach in the revised Model is to recognise that corporations too have obligations towards the society.
- The new model relies on the approaches in some of the new treaties to introduce a chapter on investor obligations.
- Requires foreign investors to comply with core obligations - **taxation, anti-corruption and financial disclosures**.
- If investors do not comply, the protection of the treaty is withdrawn.

Investor-State dispute settlement

- Investor-state dispute settlement (ISDS) is a powerful tool for protection of investors.
- Attempt has been made to strike a **balance between the costs and benefits of ISDS**.
- After extensive deliberations, it has been retained.
- However, safeguarding State's interests is important to ensure no exposure to undue liability.

Safeguards for ISDS



Exceptions

- There are two types of exceptions: **general and security**.
- General exceptions include protection of environment, financial emergencies, public health, labour reforms etc.
- Another innovative feature is that it introduces a **first level of review** with regard to the application of exceptions.
- Done through a joint review mechanism of the host and home states within 120 days.
- **Joint decisions binding on tribunals.**

Way forward

- The Indian approach has been realistic - there are no magic wands or tailor-made solutions for resolving the IIA system instantly.
- Reform is a gradual process, and the Model is merely a first *macro* level step in the overhaul of the entire system.
- Expectation from the Model BIT is that it will become a template for integrating development concerns in the treaty system.
- International Organizations can play an important role in disseminating information about the work being done by States with regard to IIAs
- IO's can also play bring the developed and developing nations on common ground with regard to the form/structure of treaties.



Thank you