Transforming the International Investment Agreement Regime: The Indian Experience

Department of Economic Affairs
Ministry of Finance
Government of India
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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

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1. Rapidly signing agreements with the developed nations
2. Draft Model BIPA of 1993 based on the OECD Draft Convention, 1967
3. Significant growth in the number of BITs since late 1990s.
4. Model BIPA revised in 2003 to include a chapter on expropriation
5. Introduction of investment chapters in FTAs
6. Complete overhaul of the IIA system
7. 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.
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

- Compliance with local laws
- Exhaustion of local remedies
- Limitation period of three years
- Waivers required for parallel claims
- Transparency
- Mechanism for Counterclaims
- Interpretative authority retained
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