World Investment Forum 2014: Investing in Sustainable Development

IIA Conference - 16 October 2014

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A. COMMON ISSUES WITH THE IIA REGIME: AN INDIAN PERSPECTIVE

The Indian IIA regime consists of about 90 agreements, including both standalone BITs and investment chapters under Comprehensive Economic Partnership/Cooperation Agreements. All these agreements have been signed in the last 20 years, a period which has coincided with a proliferation of IIAs worldwide. The current IIA regime has to be viewed in context of the economic reforms programme that the Government initiated in 1991, essentially to attract FDI in India. Besides attracting FDI, the intention behind these agreements was to create a stable legal regime for espousal of claims of foreign investors as per international law.

However, recent developments indicate that the IIA regime not just in India, but also globally, is in need of reform on account of the inconsistent interpretations adopted by arbitral tribunals. In India, since 2009, we have been receiving a number of dispute notices under various IIAs. In particular, we were at the receiving end of a first adverse award in the case of *White Industries v. Republic of India*[1]. Since the White Industries award, the number of dispute notices received by India has kept on increasing. These developments have put the spotlight on the current investment treaty regime, which can be viewed as unfair for states' in the exercise of their regulatory power. The issues which need attention are as follows:

- *First*, as policymakers in developing countries, we have found that IIAs can encroach upon the policy space available to Governments in several ways. IIAs have been used as tools for reviewing of not just regulatory measures of general application (*environment, public health, human rights, labour etc.)* but also decisions rendered by the highest courts of the land.

- *Second,* tribunals may use IIAs to rule on their own jurisdiction. Because of this, often decisions can result in awards on cases which otherwise would not have been brought before tribunals. Further, the broad definitions of terms such as "*investor*" and "*investment*" in existing IIAs may encourage treaty and/or forum shopping.

[1] *White Industries Australia Limited v Republic of India,* Final Award, UNCITRAL, 30 November 2011 (The tribunal held that delay by Indian courts violated the "*effective means*" obligation, despite the fact that the India-Australia BIPA did not contain such a right. Significantly, the tribunal borrowed the provision from the India-Kuwait BIPA by relying on the MFN clause.

- *Third,* existing IIAs contain several provisions which are susceptible to wide interpretations. Two most common examples are the fair and equitable treatment (**FET**) and most favoured nation treatment (**MFN**) obligations. FET is now the standard claim in almost all arbitrations. On the other hand, MFN has been expanded to include rights beyond what is granted by a treaty.

- *Fourth,* the present system of investor-state dispute settlement (**ISDS**) has created a body of inconsistent jurisprudence. Arbitrators may lack independence and often have fixed views on specific issues. In an ongoing arbitration involving India, we have got the appointing authority to uphold a challenge to disqualify an arbitrator on the ground of having a rigid view of national security.[2]

- *Last,* in the absence of an institutional basis, awards lack precedential value. For a common law system like India, this issue is hugely significant as our judicial system is based on the system of precedent. There is no appeals facility which may lead to awards which are bad in law.

B. WAY FORWARD

States have adopted several mechanisms to reform the current IIA regime. Some have withdrawn completely from the investment treaty regime by abandoning IIAs or by denouncing investor-state dispute settlement. On the other hand, there are many states which believe that the present system has been working perfectly well. From an Indian perspective, there is ample scope for gradually making changes to the current system. The following steps need consideration:

- The *first* step towards implementing reforms is to understand the universe of IIAs. In our case, we are now in the process of looking at each treaty individually in order to make an assessment of the provisions. The objective behind our review process is to two-fold: (a) to understand and identify the legal/policy challenges from the existing treaties; and (b) to revise the Indian Model BIPA. Once an overall policy approach is developed, treaties that are deemed to be too troublesome may be terminated or renegotiated.

- *Second,* and perhaps more importantly, states should consider playing a pro-active role in the IIA regime. While a tribunal may decide a case and interpret an IIA, states retain the power to clarify the language/meaning of a treaty through authoritative interpretations.

- *Third*, any new treaty must be subject to rigorous review, with a careful analysis of clauses such as definition of investment and investor, FET and MFN. In the Indian experience, MFN has proved to be disadvantageous as we negotiate bilateral agreements based on a variety of strategic, diplomatic and political reasons.

- *Fourth*, in relation to ISDS and systemic issues, the primacy of domestic courts over international arbitration must be recognised. While we believe that arbitration offers an efficient means to resolve disputes, decisions of the highest constitutional courts cannot be challenged before tribunals. To prevent this, a strict fork-in-the-road clause which compels an investor to choose between domestic courts and arbitration in the first instance may be introduced.

- *Fifth*, detailed rules concerning prevention of conflict of interest for arbitrators must be provided. We must also have a debate on whether the party appointments system has worked well so far.

- *Last*, States may think about internal capacity building to defend disputes and to reform our existing system. International organisations such as UNCTAD or the World Bank can play an important role in helping states to bridge this gap. International organizations can also place the issue of IIA reform on their primary agenda and speak on behalf of states expressing concern about expansive interpretations adopted by tribunals.

[2] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic of India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuna as Co-Arbitrator, PCA CASE No 2013-09, September 30, 2013.