UNCTAD Expert Meeting on Taking Stock of IIA Reform

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India

INDIAN MODEL BILATERAL INVESTMENT TREATY

Background

1. In 1991, the Government of India had initiated the exercise to negotiate and enter into BITs as part of the Economic Reforms Programme, essentially to attract Foreign Direct Investment (FDI) into India and additionally to create a stable legal regime for espousal of claims of foreign investors as per international law. Till date, India has signed BITs with 83 countries. These reciprocal agreements have been negotiated on the basis of the Model Text adopted in 1993, and as amended in 2003. The 1993 Model BIT contained provisions which were susceptible to broad and ambiguous interpretations by arbitral tribunals regarding provisions of existing Indian BITs that do not adequately take into account the socio-economic conditions found in India and the broad objectives of government policy. As a result, the Government began receiving a number of dispute notices under these treaties since 2009.

2. The aforesaid developments led to the exercise of understanding and identifying the legal and policy challenges emanating from existing BITs. As a part of this exercise, the Government completed the review of the earlier Model BIT and came out with a revised Model BIT version, which has been approved by the Committee of Secretaries on 16th July 2015 and approved by the Cabinet on 16th December, 2015.

Main goals/objective behind the revised Model BIT

1. The Indian BIT regime is based on a fundamental premise: while it is important to have investment treaties to provide a normative institutional framework to foreign investors to enforce their rights and claims, it is also important to ensure that BITs do not impede on the policy space or impede the Government's power to regulate foreign investments for legitimate public purposes. Further, as stated above, the main objectives behind India's revision of its model are to address issues related to **overly broad interpretations** of certain provisions by arbitral tribunals, to adequately reflect and take into account **India's socio-economic policy realities.** Accordingly, the Model BIT attempts a delicate balancing act between the competing interests of investors to protect their investments and obligations of the investors and host state/Government's right to regulate. The important goals behind the Model BIT may be summarized as follows:

   (i) The objective of the Model BIT is to provide appropriate protections for foreign investors in India, in the light of the relevant international precedents and practices, while appropriately preserving the regulatory powers of the Government. The fundamental premise on which the Indian Model BIT is based is that treaties are to be only **an additional layer of protection for foreign investors** with well-drafted commercial contracts between investors and State/private agencies being the primary source of protection. The intention behind the text is to ensure that

that only the “hard cases”, i.e., those involving genuine and gross violations of investor rights or manifestly arbitrary treatment by the State are adjudicated before tribunals, whereas the ordinary cases are settled before domestic Courts.

(ii) The Model BIT also recognises the fundamental principle of **exhaustion of local remedies**. It is expected that investors will give precedence to the Indian domestic court system rather than invoke BITs for settling all types of disputes. Towards this end, further steps to reform commercial laws and court system to ensure access and efficiency of justice delivery for foreign investors are also expected in the near future to complement the objectives of the Model BIT.

(iii) Next, the scope of investment treaties is a key concern reflected in the Model BIT. Traditionally, the fundamental premise for investment treaties is to protect foreign direct investments (**FDI**), i.e., investments which are **long term in nature**. The classical definition of FDI as per the OECD benchmark is that FDI reflects the objective of establishing a lasting interest by a resident enterprise. Current treaties do not reflect this approach and as a result of this, all kinds of indirect and minority shareholders and their reflective losses are protected under BITs. The new model is to align the IIA regime with the FDI regime by taking into account the fundamental basis of FDI, which is that it is long term in nature. Keeping in view this objective, “investment” has been defined in the Model BIT as an enterprise and reflects the objective of establishing a lasting interest by a resident enterprise by an investor.

(iv) Next, the Model recognizes the need to **change the asymmetry** in the current BIT system, by which investors are provided protections and procedural avenues irrespective of their conduct. From an Indian perspective, investments treaties are not just instruments of investor protection, but also a valid tool promote sustainable development goals, transparency in corporate dealings and prevent unethical business practices. The Indian Model BIT text has adopted a substantive approach to promoting these legitimate policy goals by having a chapter on investor obligations and requiring investors to comply with host state legislation before commencing dispute settlement under the treaty.

(v) Attempts have been made to strike a balance between the costs and benefits of ISDS. After extensive deliberations within the Government and outside, the model BIT retains the **investor state dispute settlement system**, reinforcing its status as a powerful tool for protection of foreign investors. However, it has also introduced detailed rules on various issues, including compulsory negotiations, prevention of conflict of interest for arbitrators, transparency, interpretation and review to safeguard the interest of State parties to ensure no exposure to undue liability.

(vi) Last, the Model recognises that there is **no substitute for well drafted treaties**. Another change has been in the form and structure of the agreement itself. Until now, Indian IIAs adopted a minimalistic approach with a typical 10-12 page model containing vague and innocuous provision, which left too much interpretative authority in the hands of the tribunal. This approach has been attempted to be done away with in the new Model, which is now fairly detailed in its provisions, especially in its approach to substantive protections and dispute settlement.

Some main provisions of the Indian Model BIT

2. The revised Indian model includes a number of innovative provisions that aim at maintaining investor's rights while preserving the right of the State to regulate in public interest. These provisions include, among others:

- A post-establishment model of protection of investment;
- A careful definition of the scope of the treaty - exclusion of sensitive public policy issues from the scope – such as taxation, government procurement and public services;
- National Treatment
- No fair and equitable treatment or no most favoured nation treatment. However, the duty to afford due process and the protection is granted against manifestly abusive treatment or targeted discrimination on manifestly unjust grounds or denial of justice in any judicial or administrative proceedings;
- Other substantive rights granted to investors include protection against direct and indirect expropriation, a test for determining whether indirect expropriation occurred, and compensation based on fair market value,
- A free transfer of funds clause subject to detailed list of exceptions.
- Introduction of a chapter on investor obligations;
- Introduction of a first level of joint state party review for determining the applicability of treaty exceptions;
- Non-justiciability of the national security exception;
- Transparency and interpretative control over the treaty;
- A list of State obligations that include a prohibition on the denial of justice,
- ISDS mechanism that provides, among others, for exhaustion of local remedies prior to commencing arbitration and strict timeframes for the submission of a dispute to arbitration, and the selection of arbitrators and how to prevent conflict of interest of arbitrators.
- Excludes disputes arising under contracts so as to ensure that such disputes are governed by the terms of the contract.

Outlook and way forward

3. The Indian Model BIT is based on a realistic proposition - there are no magic wands or tailor-made solutions for resolving the IIA system in an instant. Reforming the regime is a gradual process, which must be done step by step taking each treaty and action into account. The Model is merely a first *macro* level step in the overhaul of the entire system. Along with it, Model BIT includes a provision for joint interpretative statement, providing leeway to states to take control of their treaties and limit the discretion to tribunal in their reading of treaty obligations by issuing interpretative statements, which have a strong persuasive value before tribunals and can be a strong tool for States to review/revise their treaty practice.

4. The Model reflects the common international investment policy of the Government and is expected to become the basis of all BIT negotiations involving India in the future. It is also hoped that the Model BIT will become a template document worldwide for integrating sustainable development concerns in the investment treaty system and will motivate other States to reform their regimes.

5. We believe that the current reforms in BIT including on most disputed provisions in International Investment Arbitrations would create more stable investment regime and minimize misuse of ISDS mechanism.