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INTERNATIONAL TRADE

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An e-newsletter from
Lakshmikumaran & Sridharan, New Delhi, India

April 2015 / Issue 47

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April
2015

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Investor and (host) state protection - India proposes a new model for BIT

By **Subhashree**

Investor State Dispute Settlement (ISDS) mechanism which allows a foreign investor to sue sovereign states claiming compensation for loss of investment has been in focus for a number of reasons ranging from enormity of compensation awarded[1], use of multiple forums and almost endless litigation in enforcement of award[2] to genuineness of claims[3] and against regulatory laws[4]. India has ratified over 70 such investment protection agreements (including the investment chapters in CEPA, CECA) and has recently faced claims based on taxation and failure to provide proper investment climate and so on. On the international front, the ISDS has been a much debated provision in the Trans Pacific Partnership (TPP) as well as EU-US Trade Promotion Agreement. It is in this background that India has proposed the new model for Bilateral Investment Treaty (BIT) agreements. This article seeks to highlight provisions which are new, may be unique and perhaps herald a change in the way investment should be attracted /protected without compromising on sustainable growth.

Though every BIT is supposed to be unique, the terms of the existing BITs are broadly similar. Some of the most interesting and important changes in the language of the existing BITs vis-à-vis the model BIT and the provisions are as follows:

Model provision	Existing terms	Issue sought to be addressed
Preamble uses the words - 'Reaffirming the right of Parties to regulate Investments..... including the right to change the conditions applicable to such Investments'	Mostly seek to enhance cooperation and proper protection of investments.	The preamble has often been interpreted to enhance the scope of protection to the investor and interpret investor protection in preference to any other objective a host state may put forth.
Article 1.1 describes enterprise as one having real and substantial business operations in the host state besides having carried out all operations according to applicable domestic law.	Generally reference is only to the entity being incorporated/ constituted in the respective states.	A claim like Philip Morris suing as an entity in Hong Kong to take advantage of the provisions of Australia- Hong Kong treaty might be rendered impossible by the new provision.

1 *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador,* ICSID Case No. ARB/06/11

2 *Chevron* v. *Ecuador* refer Case 1:11-cv-00691-LAK-JCF Document 1874

3 ISDS against Argentina post financial crisis of 2001 refer UNCTAD IIA Issues note No.1 March 2011

4 *Vattenfall AB and others* v. *Federal Republic of Germany* (ICSID Case No. ARB/12/12)

Model provision	Existing terms	Issue sought to be addressed
Article 1.6 - Investment means an enterprise which also complies with articles relating to anti-bribery, applicable taxation and domestic laws.	Investment has been defined extensively to include a host of things including immovable property, intellectual property and upto expectation of profit (India-Japan CEPA)	Clarifying the scope of protection to avoid vague, non-exhaustive definition.
Article 2.3 envisages right of parties to modify the treaty and also undertake periodic review	Usually no express provisions exist for modification and review	
Article 3 deals with standard of treatment which shall not be denial of justice, unremedied egregious violations of due process or manifestly abusive. National treatment is denied only if there is intentional and unlawful discrimination on the basis of nationality.	Most treaties call for fair and equitable treatment along with national treatment and MFN provisions.	The MFN clause is frequently used to import more favourable terms from other treaties and terms 'fair and equitable' have worked more often than not against host states *[Siemens v Argentina]*
Specific exclusion to laws of regional or local governments and exercises of discretion on when to enforce a law from breaching national treatment requirements.	This is not a commonly seen provision.	This can be important in a federal set up and in the context of recent *Bilcon* decision involving provincial and federal regulations.
Article 5 on expropriation excludes action of state in commercial capacity from the ambit of the treaty as also action to protect public welfare, health, safety and environment.	More recent treaties like India Japan CEPA devote some provisions to protection of environment though there is not much emphasis on public health.	Criticism levelled against the treaties restricting the policy space for governments.
Introduction of concept of mitigating factors like conduct of investor contributing to the damage, relevant considerations need to balance public interest and damage to local community, etc., to decide the quantum of compensation payable.	Provisions relating to calculation of damages are negligible.	The grant of award in an arbitrary fashion with the host state bearing costs of pollution in addition to paying compensation, interest and litigation costs.

Model provision	Existing terms	Issue sought to be addressed
Article 8 on obligations of the investor to act in a responsible manner. Also Article 12 requires the investor to respect rights and customs of local communities, adhere to fair competition and conservation of natural resources and so on.	Some treaties require the investor to comply with applicable local laws but this has not been very effective. For instance the oil major which was held to have violated the law was still considered to have been subject to unfair treatment by the state [*Occidental*].	Lack of specific obligation cast on investors except vague terms on respecting domestic laws or any discussion on information and reporting requirements in treaties.
Article 8 on disclosures call for maintenance of records by the investor for 10 years (period in which treaty is in force) and further 3 years in case of a dispute after the termination of arbitration.	Such provisions are not usually part of treaties or envisage only protection of confidential information or providing relevant information.	
Article 14 provides for lodging of a counterclaim by the host state. Also the tribunal may award costs if the investor brings a claim to obtain money, property or any other thing of value or threatens to do so.	This provision is not usually present in treaties.	Seeks to address the concern that treaties tend to favour investors who can threaten use of ISDS to force the host state to accede to their claims.
Specific requirement to exhaust local remedies in Article 14. Also the investor has to establish that 'continued pursuit of domestic relief would be futile' before he can seek arbitration.	This is not present in many treaties or is not adhered to. *[India-UK BIT]*	Ensuring proper procedure and requiring investor to submit to the judicial process in the host state. This can counter the argument that foreign investors are treated more than equal and also bring cost savings for the host state.
There is a limitation period of 3 years *'from the date on which the Investor or Investment first acquired, or should have first acquired, knowledge of the Measure in question and knowledge that the Investment, or the Investor with respect to its Investment, had incurred loss or damage as a result'* to institute a claim. Also no more than 18 months should have elapsed after the conclusion of domestic proceedings or their abandonment.	Exhaustion of local remedies and limitation are provided in some of the more recent treaties like India-Japan CEPA.	

Model provision	Existing terms	Issue sought to be addressed
The claim by the investor shall be with respect to ' *actual and non-speculative damages as a direct and foreseeable result of such breach by the Respondent Party*'.	Claims generally relate to expropriation with adequate compensation, other damages, etc.	The use of actual damages is in consonance with definition of a 'measure' being one which directly applies on the investment. Also loss of goodwill, reputation, etc., are not covered.
At all times, the investor shall bear the burden of proving the breach of obligations by the host state.	Usually absent in treaty texts	
A separate chapter devoted to general exceptions and state exceptions which reiterates certain protections for the host state.	Generally exceptions are carved out for critical balance of payments positions, war and emergencies.	
Article 24 provides that the treaty shall remain in force for a duration of 10 years and that protection for investments made prior to termination for upto 5 years after date of termination.	Different treaties provide for different periods.	Brings uniformity in duration as opposed to current treaties with varying protection periods.

Other provisions seeking to restrict scope of protection

Article 1.7 excludes goodwill and similar intangible rights, pre-operational expenses, portfolio investments, etc., from the definition of assets. Article 1.11 defines measure as any form of *legally binding action applying directly* to an investment. Any activity pursuant to compliance with sectoral limitations relating to admission of investment is defined as investment activity excluded for purposes of claims. Government procurement and subsidies are excluded for purposes of claims as also disputes arising out of commercial contracts between a state and an investor shall be resolved in accordance with the contract and not as per the treaty. Taxation has been specifically excluded by Article 2.6. Despite the debate over use of compulsory licensing (CL) as per the flexibilities in TRIPS agreement, CL is specifically excluded. Further revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the law of the host state will also not be within the purview of claims.

ISDS mechanism

Special provisions have been laid down for constitution of arbitral tribunals, qualification of arbitrators, ruling out conflict, conduct and transparency of proceedings. Various bodies like ICSID, ICC and UNCITRAL do not find a mention as appropriate forum. Also under various

exceptions, specific defences are available to the host state as per Article 17 including war, emergency, critical public infrastructure, etc., and they may be asserted at any time during the proceedings. On diplomatic exchanges, the treaty envisages that if a disputing investor has commenced an investment dispute against a respondent host state the non-disputing party shall not give diplomatic protection, or bring an international claim, in respect of that investment dispute between one of its investors and the respondent host state, unless the respondent party has failed to abide by and comply with an award or the decisions of its courts and other applicable law regarding recognition and enforcement of foreign judgments and arbitral awards.

To conclude

Besides the provisions listed above the model BIT contains a number of do's and don'ts to enable investment protection which balances the interest of both parties. However if we look at the text of recent treaties, Canada-China FIPA or Canada-EU CETA it is doubtful if states will agree to radically change the tenor of investment protection agreements. For instance, the protection of intellectual property rights is among the most negotiated provision in recent ongoing exercises like TPP. Even with elaborate provision for conduct of the arbitral proceedings the host state may find it difficult to put forth its position strongly. Going by the experiences so far exclusion clauses have not been enough and a fair trial is far from reality.[5] An important question is whether to have ISDS at all since Brazil has not ratified such agreements and the recent Australia-Japan FTA does not contain ISDS provisions and EU is engaged in a massive debate about its desirability. If the objective is to take into account experiences with earlier BITs, common criticisms and protect the host state, the model BIT does quite well.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acrylic Fibre	Korea RP and Thailand	F.No.15/16/2013-DGAD	23-3-2015	Sunset review recommends imposition of anti-dumping duty
Barium Carbonate	China	F.No.15/27/2014-DGAD	19-3-2015	ADD sunset review initiated
Coumarin	China PR	F.No.15/26/2014-DGAD and 8/2015-Cus. (ADD)	16-3-2015 and 7-4-2015	ADD Sunset review initiated and ADD extended till 22-3-2016
Flexible Slabstock Polyol	Australia, European Union and Singapore	9/2015-Cus. (ADD)	7-4-2015	Definitive ADD imposed

[5] Occcidental – apportioning responsibility for damage - *refer Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11

Product	Country	Notification No.	Date of Notification	Remarks
Hot Rolled Flat Products of Stainless Steel 304 Series	China, Korea RP and Malaysia	F.No.14/30/2013-DGAD	9-3-2015	Definitive anti-dumping duty recommended
Poly Vinyl Chloride Paste Resin	Norway and Mexico	10/2015-Cus. (ADD)	7-4-2015	Definitive ADD imposed
Recordable Digital Versatile Disc [DVD-R]	Vietnam and Thailand	F.No.15/01/2015- DGAD	27-3-2015	ADD sunset review initiated
Saturated Fatty Alcohols	All countries except developing countries other than Malaysia, Thailand and Indonesia	1/2015-Cus. (SG)	13-3-2015	Safeguard duty imposed
Sheet Glass	China	7/2015-Cus. (ADD)	13-3-2015	Definitive anti-dumping duty imposed
Vitamin E	China	F.No.15/31/2013-DGAD	23-3-2015	Sunset review recommends definitive anti-dumping duty

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbazole Violet Pigment 23	USA	[A-533-838] 80 FR 17388	1-4-2015	ADD sunset review initiated
Commodity Matchbooks	USA	[A-533-848] 80 FR 12801	11-3-2015	ADD sunset review recommends continuation of anti-dumping duty
Commodity Matchbooks	USA	[C-533-849] 80 FR 12800	11-3-2015	CVD sunset review recommends continuation of Countervailing duty
Frozen Warm water Shrimp	USA	[A-533-840] 80 FR 12147	6-3-2015	Preliminary affirmative results of anti-dumping duty administrative review for Feb 1, 2013 –Jan 31, 2014.
Lined Paper Products	USA	[A-533-843] 80 FR 15553	24-3-2015	Partial recession of anti-dumping administrative review for Sep 1, 2013 – Aug 31, 2014 with respect to three companies
Pre-stressed Concrete Steel Wire Strand	USA	[C-533-829] 80 FR 12804	11-3-2015	CVD sunset review recommends continuation of countervailing duty

Product	Country	Notification No.	Date of Notification	Remarks
Pre-stressed Concrete Steel Wire Strand	USA	[A-533-828] 80 FR 13827	17-3-2015	ADD sunset review recommends continuation of anti-dumping duty
Stainless Steel Bar	USA	[A-533-810] 80 FR 12439	9-3-2015	Preliminary negative results of anti-dumping duty administrative review for Feb 1, 2013 –Jan 31, 2014 in respect of two exporters
Tubes and pipes of ductile cast iron	EU	(2015/C83/04)	11-3-2015	Anti-subsidy proceedings initiated
Zinc Coated (Galvanised) Steel	Australia	Anti-dumping Notice No. 2015/37	18-3-2015	Time granted to issue Statement of Essential Facts extended

WTO News

India's local content requirement and import licensing or quota questioned by EU

European Union has again voiced its concerns about India pursuing the policy of local content requirements in the solar power generation sector. As per EU's communication dated 17-3-2015 circulated in the WTO on 19-3-2015, India's local content requirements appear to contravene India's G20 commitments on non-imposition of protectionist measures and raise questions on their compatibility with the provisions of the GATT and the Agreement on Trade-Related Investment Measures. EU's communication also seeks further information on India's recently announced two of the solar power projects while also questioning the rationale for such local content requirements, bearing in mind that Indian domestic operators do not currently have the capacity to fulfil such requirements.

Further, India's import licensing and quota relating to import of marble and marble products was questioned by the EU before the Committee on Import Licensing. In the document G/LIC/Q/IND/24, dated 6-3-2015, EU seeks clarification as to how India's import licensing and quota system could be justified from the point of view of conservation of its domestic exhaustible natural resources, and what measures India has put in place to ensure commensurate quality for India's domestic industry, if the Minimum Import Price according to India is justified for quality reasons. India has on its part while answering to the questions raised by EU earlier in December 2013, stated that India's domestic marble mining is also subject to licensing and production control due to concerns of environmental safety. According to the document G/LIC/Q/IND/25, dated 17-3-2015 (circulating Indian communication dated 11-3-2015), there are

various judicial pronouncements forbidding mining activity in reserve forests.

Panels established at request of Pakistan, European Union and Korea

On 25 March 2015, the WTO's Dispute Settlement Body has established three panels to study complaints by Pakistan against the EU on latter's countervailing measures over Polyethylene Terephthalate (PET) products (DS486); the EU against Russia over tariff treatment of agricultural and manufacturing products (DS485); and Korea against the United States over anti-dumping measures on oil country tubular goods (DS488). India has reserved its third party rights in the disputes DS485 and DS488.

Indonesia files dispute against USA over anti-dumping duties on paper products

On 13 March 2015, Indonesia has notified the WTO Secretariat of a request for consultations with USA regarding anti-dumping and countervailing measures applied by the United States on coated paper imported from Indonesia (DS491). According to Indonesia, USA's findings violate Articles 2.1, 12.7, 14(d), 15.5, 15.7 and 15.8 of the SCM Agreement and Articles 3.5, 3.7 and 3.8 of the AD Agreement. This is the third major dispute among the parties, after the *clove cigarette* dispute and the dispute relating to *importation of horticultural products, animals and animal products.*

Ratio Decidendi

Anti-dumping duty – Authorities to supply relied upon information – Timelines for investigation/review to be followed

Delhi High Court has quashed the final findings of the Designated Authority (DA) recommending imposition of definitive anti-dumping duty on USB pen drives imported from China, Taiwan and Korea RP. It was observed that the DA had not provided the information or material considered by him, to the other party (petitioner), and has hence violated the principles of natural justice which was fatal to the final findings rendered. The court in this regard noted that the DA had relied upon the transactions-wise import data as new evidence at the fag-end of the investigation (after seventeen months of initiation of investigation) without supplying a copy thereof to the petitioner (exporter) and hence without providing a reasonable period of time to the parties to review and comment upon the new evidence. Noting that DA here had not only refused to supply the non-confidential summary of the sourced data but had also not disclosed the non-injurious price of the subject goods as determined by him, it was held that for an effective hearing, the DA is required to make available the evidence presented to it by one party to other interested parties participating in the investigation and also the evidence or the material sourced by the DA from other sources to all the parties.

Further, on the question of remanding the matter to the Designated Authority for post-decisional hearing, the court was of the view that since the statutory period for investigation was over, the matter could not be remanded to the DA for fresh consideration. It was in this regard noted that timelines provided under

various provisions of the anti-dumping law have to be strictly followed and investigation and review have to be completed within the statutory period. The High Court was of the view that if investigations are not completed within the respective statutory period the proceedings would be vitiated. Lastly, the court also held under Article 226 of the Constitution of India, it was empowered to entertain a petition challenging the final findings even before its acceptance by the Central Government. [*Sandisk International Ltd.* v. *Designated Authority* - WP(C) 744/2015 & CM Nos. 1319/2015, 2662/2015, decided on 18-3-2015, Delhi High Court]

Anti-dumping – Non-grant of effective hearing and ex post facto extension of investigation

In another case involving violation of natural justice, the Delhi High Court has also set aside the final finding in respect of anti-dumping investigation concerning imports of Alloy Road Wheels from China, Korea RP and Thailand. The final finding was set aside as the Authority violated the principles of natural justice by not according adequate opportunity of hearing to the interested parties subsequent to change in the Designated Authority. In coming to the conclusion, the court held that the opportunity of hearing must not be illusory and that merely because there was paucity of time (due to no fault on the part of the interested parties), the Authority cannot ride roughshod on the principles of natural justice. It was observed that the Authority is bound to grant a meaningful opportunity of hearing to the interested parties and written submissions or comments are not substitutes for an oral hearing.

However, on the question of whether *ex-post facto* extension of time granted to complete the investigation is valid or not, the court held that the Central Government can grant such extension provided it is done within the overall period of six months beyond one year, and when the extension does not spill over beyond the eighteen-month period. It was noted that there is no bar or prohibition in Rule 17 of Anti-dumping Rules preventing the Central Government from doing so. It was held that between the expiry of stipulated time and revival of time by further extension, the investigation would, in a sense, be suspended till it is revived by an *ex post facto* extension. [*Mahindra & Mahindra Ltd.* v. *Union of India* - WP(C) 3022/2014, 3023/2014, 3250/2014, 3251/2014, 633/2015 and 634/2015 decided on 27-3-2015, Delhi High Court]

Anti-dumping duty – "Interested party", scope clarified

Delhi High Court has held that term "interested party" as defined in Rule 2(c) of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, refers to a party who is interested in investigation and the ultimate outcome of it. The court in this regard held that the interested party may be in support of imposition of anti-dumping duty or may oppose it, but the 'interest' must be real and proximate and not just casual or academic. Department's view, that only importers of product from specified country during period of investigation are covered, was hence not accepted by the court. [*Bharat Solvent & Chemical Corporation* v.

Union of India - W.P. (C) 401/2015, decided on 9-3-2015, Delhi High Court]

Anti-dumping circumvention investigation – Transshipment and change in pattern of trade

The Court of Justice of the European Union has annulled the imposition of anti-dumping duty on bicycles from Sri Lanka by specified exporter, whether or not the same are declared as originating from Sri Lanka. The ADD was imposed after a finding of circumvention of the duty by imports which were originating from China. On the question of finding of carrying out of transshipment operations by the Sri Lankan exporter, the court was of the view that even if the applicant was unable to show that it was indeed a Sri Lankan producer or that it satisfied Article 13(2) of the basic regulation, it did not enable the EU authorities to conclude by default that the applicant was engaged in transshipment. It was noted that no such power was apparent either from the basic regulation or the case-law. The court in this regard also noted that the EU authorities had no evidence from which it could expressly conclude that the applicant-exporter was involved in transshipment operations.

However, it was held that there was no alternative explanation for change in the pattern of trade, where the imports of bicycles from China to European Union decreased by 84%, exports of said product from China to Sri Lanka increased by 132% and imports from Sri Lanka to the EU also increased by a factor of 3.8 following the implementation of the original anti-dumping duty. Argument of the Sri Lankan exporter that in 2009 the Sri Lankan imports from China decreased by 9.9%, while the Sri Lankan exports to the EU increased by 35%, was also rejected by the court observing that such an annual variation cannot call in question the trend emerging from the figures of the EU institutions. The court in this regard upheld the finding of the authorities that a time lag between the change in flows between China and Sri Lanka and between Sri Lanka and the EU may arise, because of the existence of stocks. [*City Cycle Industries* v. *Council of the European Union* - Case T-413/13, decided on 19-3-2015, CJEU (General Court)]

News Nuggets

India announces Foreign Trade Policy 2015-2020

With an aim to double India's export of merchandise and services by 2020, the Indian Commerce and Industry Ministry has on 1-4-2015 announced the new Foreign Trade Policy 2015-2020. According to the FTP statement, the Policy seeks to accelerate exports through various schemes intended to exempt and remit indirect taxes on inputs physically incorporated in the export product, import capital goods at concessional duty, stimulate services exports and focus on specific markets and products.

The new Policy announces two new export promotion schemes for exports made on or after 1-4-2015. One is for promotion of export of goods while another aims to promote export of services. 5 different schemes for promotion of export of goods namely, Focus Product Scheme, Market Linked Focus Product Scheme, Focus Market Scheme,

Agri. Infrastructure Incentive Scrip and Vishesh Krishi Gram Udyog Yojana (VKGUY), have been merged into one scheme called Merchandise Exports from India Scheme (MEIS). Similarly, Served From India Scheme (SFIS) has also been replaced with the new Service Exports from India Scheme (SEIS). These freely transferable scrips can be used for payment of customs duty, central excise duty or service tax on procurement of goods or services.

The new Policy further announces host of trade facilitation and ease of doing business measures like online filing of documents, online inter-ministerial consultations, simplification of various procedures, digitization, etc. Export obligation for Advance Authorization holders can now also be met by way of export to SEZs, while there will be reduced export obligation if the EPCG holder procures capital goods from the domestic market. Export Oriented Units (EOUs) have also been given number of incentives to boost exports there from.

Canada held responsible for actions of its agency on account of unfair treatment

The recent decision of the Permanent court of Arbitration in *Bilcon (& individual investors)* v. *Canada* opened fresh discussion on investor state disputes, investor protection and interpretation of various treaty terms. The investor - a supplier of construction material claimed that in calling for the joint review panel (JRP) as regards the environmental impact of the proposed blasting of quarry and marine terminal near a river site amounted to unfair treatment and discrimination on basis of nationality. It argued that the encouragement given by Canada prior to start of the project had led the investor to expect that approval would be given and it had invested millions of dollars in the project. The investor also assailed the constitution of the JRP, the actions of the province (Nova Scotia) and the standard of core community values adopted by the JRP which had not been mentioned earlier. The investor argued that the host state should not only act in a non-arbitrary and non-discriminatory manner but also to act reasonably and protect legitimate expectations. The tribunal while stating that states are free to enact their own laws as regards environment opined that the mere fact that environmental regulation is involved does not make investor protection inapplicable. Also on facts, the state had breached its obligations as regards national treatment and fair and equitable treatment.