

BITs: An Overview

Bilateral investment Treaties (BITs) are agreements between two Countries (States) for the reciprocal promotion and protection of investments in each other's territories by individuals and companies situated in either State. The following are the essential clauses covered under BITs:

1. Applicability
2. Fair and Equitable Treatment and Full Protection & Security
3. National treatment and Most-favored-nation treatment,
4. Expropriation,
5. Dispute settlement mechanisms, both between States and between an investor and a State.

BITs encourage foreign investors to invest in a State and there by contributing towards overall developments and advancements of the economy.

India and its Tryst with BITs

It was in mid 90s that the BITs were initiated by the Government of India. The pretext was to offer favourable conditions and treaty based protection to the foreign investors and investments. For example, the India-Singapore Comprehensive Economic Cooperation Agreement (CECA) provides for exemption on import duties for investment in infrastructure sector, which would eventually attract the investors from abroad to invest in the growing economy of India with enhanced securities against adverse changes, thus promoting investment inflow. Though it is difficult to quantify the benefits of BITs, it invariably results in increased investments inflows, encourages transfer of technology and modern management skills.

A look at various BITs to which India is a party will make it clear that each BIT is quite different from the other in its own way although there are many common characters present. These common characters are in form of specific rights. The basic premise is that the government will not put the investors and their investments to risks which are either unreasonable or inappropriate.

One of the most noticeable features of the Indian BITs is that it does not give '*a right to make investments*' in India. All rights, under the BITs to which India is a party, can be exercised only after making investments in India. However, this issue can be debated considering Article 3.1 of Model BIT of India, which promises to provide favorable conditions to make investment in India. It is important to note that the Indian government retains the freedom to determine which sectors are open to foreign investments and under what terms and conditions can those investments be made. It is of utmost importance to note that the investments made in India must be established or acquired in accordance with the national laws of India.

1. Applicability:

With regard to applicability of the BITs, the general trend remains that the Indian BITs generally apply to existing and future investments pursuant to the date on which India entered into the BIT. Nevertheless, there remains exception to this rule. The BITs with few States

like Egypt, Sweden, and Romania etc have a limited scope and their applicability is only to the investments which have arisen after the treaty has come into force. The disputes that may have arisen prior to these BITs are excluded.

Indian BITs give a very broad definition to the terms “investment” and “investor”. The foreign investor, in such circumstances, even if its home State is not having a BIT with India, can have the benefits by creating a Special Purpose Vehicle (SPV)/ Special Purpose Business (SPB) in a State, which has a BIT with India. However, there are few BITs which mandate that investor should be having substantive business operations where it has been incorporated for example the BITs with Netherland, Switzerland and Singapore.

2. Fair & Equitable Treatment and Full Protection & Security:

Almost all the Indian BITs contain the Fair and Equitable Treatment (FET) which again is a principle very strongly attached to the genesis of a BIT. The principle of FET creates minimum standards of treatment which has to be followed by the host state. A number of successful investment claims are based on breach of FET standard. In wide terms the FET principle mandates States to have a stable and predictable legal framework regulating investments which meets the reasonable expectations of the investors. The FET standard, though a common feature is an elastic concept which may vary in different treaties. The four basic “pillars” as has developed over the period are protection of legitimate expectations of investors, transparency and stability, non-denial of justice and prohibition of coercion and harassment.

Another principle near to the FET principle but different from it is the principle of Full Protection and Security (FPS). The understanding of the FPS is protection from physical violence, which might be against the assets of the investments. The violence may be by the host State or even by third parties, though the host State has only an obligation of due diligence and not binding obligations to prevent third party violence. In case of India, there are a number of BITs requiring the host State to provide protection and security. However, there are exceptions such as BITs with Egypt, Ghana, Sri Lanka, Australia etc which do not have an FPS clause. There are few BITs which require only “Protection and Security” which may be arguably differentiated from “Full Protection and Security” as being a lesser degree of protection.

3. National Treatment and Most favoured Nation Treatment:

The principle of National Treatment which is quintessential is part of the all the Indian BITs but the Most Favored Nation (MFN) Treatment principle is not present under the investment chapter of CECA with Singapore and also Comprehensive Economic Partnership Agreement (CEPA) with Korea. While the principle of National Treatment ensures that a foreign investor is treated at par with the domestic investor and is not subject to any unfair treatment, a MFN clause enables the investor to claim any favorable right that is available to any other State having BIT with the host State. It is interesting to note a MFN clause offers both procedural and substantive protection to the investors. However, again both MFN and National Treatment clause are not absolute in nature and are subject to conditions and restrictions in some respects.

4. Expropriation:

It is universally recognized the host States have limited conditions which give them right to expropriate investment of foreign investments. A legal expropriation should satisfy the following conditions: (1) It must have a public purpose, (2) It should be not be discriminatory or arbitrary, (3) It must be conducted in accordance with due process and (4) It must be accompanied by adequate compensation.

Expropriation can be of 2 types:

A. Direct expropriation: It occurs where the host State formally takes title of the expropriated asset and

B. Indirect Expropriation: This happens where there is a substantial and lasting or long-drawn-out interference with the investment which divests the investor of host of incentives.

The Indian BIT is in lines with the international standards and is usually followed uniformly. The Indian Constitution also entails the principle in Article 300A which encompasses only to direct expropriation. Whether indirect expropriation is covered by Article 300 A remains a debatable issue.

5. Investor-State Dispute Resolution:

Probably, the most important factor that makes BIT very important in the eyes of investors is that under a BIT an investor can directly initiate arbitral proceeding against a State without approaching its own government. In Indian BITs, the investors have an option of approaching ICSID or initiating arbitration under the UNCITRAL rules. However, it is an important concern that India is not party to the ICSID convention. Though there is a possibility of having arbitration under the Additional Facility Rules of ICSID, it still remains different from a typical ICSID arbitration and a party will nevertheless have to enforce the award under the New York Convention.

The Journey so far:-

India had an unpleasant experience with the Dahbol Project which led to a least 2 BIT claims by the project companies, as well as 7 BIT claims by the project lenders. All of these 9 claims against India have since been settled.¹ Post the dispute, India has been contemplating to amend its BITs so as to attenuate the protections accorded to foreign investors under the BITs. Nothing has been evident so far on the papers. However, in light of increasing knowledge and publicity of BITs and increasing number of companies being interested to know more about it and use it in actuality a lot has to be seen in near future.

¹ source http://www.unctad.org/en/docs/webiteit20052_en.pdf

INDIAN BITs AT A GLANCE*

- India signed *its first BIT in 1994 with the United Kingdom* .
- Since 1994, India has signed BITs with 75 States
- Out of which 66 are already in force and 9 are yet to be entered into force.
- Negotiations with another 25 States are underway.
- Around 40 BITs are with developing and less developed States.
- Around 20 of the BITs enforced have been done in last five years.
- Also, India has concluded Comprehensive Economic Cooperation Agreements (CECAs), This includes a chapter on investment with Korea and Singapore;

(*source: - www.unctad.org)

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