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India's Experience with BITs: Highlights from Recent ISDS Cases

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In recent years, India has been involved in several disputes with foreign investors in which the latter have invoked the provisions of the Investor State Dispute Settlement (ISDS) mechanism included in Bilateral Investment Promotion and Protection Agreements (BIPPAs, better known as Bilateral Investment Treaties or BITs) to bring the host country before the private arbitration panels. At the end of 2013, there were 14 disputes against India, the 10th largest among the countries facing investment disputes[1]. But it was not until the end of 2011 that the Government of India, which has signed 82 BITs[2], faced the challenges posed by these agreements. This was the result of a ruling made against the Government of India by a London-based United Nations Commission on International Trade Law (UNCITRAL) tribunal that adjudicated the dispute between the public sector Coal India Ltd. and the Australian firm White Industries Ltd., after the foreign firm had invoked the investor state dispute settlement (ISDS) provisions of the India-Australia BIPPA.

Since the Coal India arbitration, a number of foreign investors have either served notices for arbitration or are actively preparing to invoke the provisions of the ISDS system for enforcing their rights in India. The response of the Government of India to these developments has been two-fold, although none of them were explicitly linked to the challenges posed by the investor disputes. The first was to turn more foreign investor friendly by making the policies governing foreign direct investment more liberal. The second was to initiate an exercise to revise the model act governing the BITs, ostensibly to avoid the problems that the Government of India had faced while defending the dispute brought by White Industries Limited (henceforth, WIL).

This brief looks at India's experience with the bilateral investment treaties focusing on the developments mentioned in the foregoing. At the outset, the brief would discuss the dispute with White Industries, in particular, the issues that the foreign investor had raised while invoking the provisions of the ISDS mechanism. The case that WIL had presented against India before the UNCITRAL arbitration panel brings out the fact that in trying to attract foreign investment into their economies, developing country governments have gone too far in protecting investor rights. In the exercise of the rights that have been granted in these BITs, the foreign investors are able to pose serious challenges to the key pillars of governance structure in their host countries, namely, the judiciary and the executive. As we shall discuss in the paper, the third pillar of the democratic structure of governance, namely, the legislature, can also be challenged by the foreign investor. In the second section, the recent disputes with the foreign investors would be elucidated. In the final section, a case for revising the model BIPPA text would be made.

1. The White Industries Dispute

The case involves an Australian firm, White Industries Limited (WIL), and India's largest state-owned enterprise in the coal mining sector, Coal India Limited (CIL), when the latter undertook expansion of its production capacity in the late 1980s. White Industries' involvement with the project began with its participation in the preparation feasibility report for the development of a mine. The feasibility study was being prepared by a CIL subsidiary, Central Mine Planning and Design Institute Limited (CMPDIL). WIL's primary interest was to negotiate a contract with CIL to supply equipment (an in-pit mobile crushing and conveying system and related technology for the proposed project).

In 1989, WIL entered into a contract with CIL for the supply of equipment related spares/exchange assemblies and to provide technical services for the development of a coal mine. The foreign firm was to be paid 206.6 million Australian dollars.

The Contract provided for a production target of 2.76 million tonnes of washed and processed coal to be produced by the coal preparation plant during an initial six month demonstration period. The Contract also provided that WIL was to be entitled to a bonus where production was in excess of the target figure and, conversely, the equipment supplier was also liable to a penalty where production was below the targeted figure.

The dispute between the two parties arose over the performance of the equipment supplied by WIL and also over the quality of the washed and processed coal and the sampling process by which quality would be measured. CIL demanded a penalty because it felt that the quality of washed coal produced by the coal preparation plant did not meet the standard agreed in the contract. White, on the other hand, demanded a bonus on the coal handling plant and coal preparation plant, which CIL rejected and it cashed the Bank Guarantee amounting to 2,772,640 Australian dollars.

With the dispute remaining unresolved, WIL filed a Request for Arbitration with the International Chamber of Commerce (ICC) in 1999. A majority of the arbitrators ruled in favour of WIL, and consequently, WIL was entitled to an award of 4.08 million Australian dollars.

Between 2002, when CIL appealed against the ICC arbitration before the Calcutta High Court, and 2009, the case went up to the Supreme Court of India. Towards the end of 2009, WIL wrote to the Government of India contending that action of its courts, and CIL, tantamount a breach of Articles 3 (Promotion and Protection of investments), 4 (Treatment of investments), 7 (Expropriation and Nationalisation) and 9 (Repatriation of investment and returns) of the Australia-India BIT. White asserted claims exceeding 10 million Australian dollars for loss and damages.

This case raises a number of important issues relating to the content of the BITs that India has concluded with 72 countries. The first are the definitional issues concerning these treaties. The second is the treatment of investments; the third, the issue of most-favoured nation treatment; and the fourth, the basis for expropriation of investments.

In the following discussion, we first provide the arguments provided by WIL in support of its claims against India. We would then provide the views of the tribunal and its ruling on the claims made by WIL.

(i) Arguments of WIL

Beginning with the arguments it made to justify that its involvement in the CIL project was an "investment" under the definition provided in the Australia-India BIT, WIL claimed compensation under several other provisions of the BIT as pointed out below.

(a) Definition and scope of investment

India questioned the jurisdiction of the tribunal to hear WIL's claim as it held that the complainant was not an "investor" in India, and none of the "assets" on which it relied on constituted "investments". WIL's argument was that its participation in CIL's project constituted an investment, since investment has been defined in the BIT in the "broadest terms". WIL contended that two definitions of investment adopted in the India-Australia BIPPA encompass its rights under the Contract (including the Bank Guarantee). These definitions are: (i) right to money or to any performance having a financial value, contractual or otherwise, and (ii) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to search for, extract and utilise oil and other minerals. WIL argued that the contract it had entered into with CIL, conferred on it the "right to money" and had provided it with the right to "conduct economic activity", both of which were part of the two definitions of investment in the India-Australia BIT. WIL further argued that its provision of the Bank Guarantees constituted an investment under the BIT itself. The firm had committed its own funds in issuing tens of millions of Australian dollars in guarantees to CIL pursuant to the Contract. These Bank Guarantees, according to WIL, qualify as investment as per the India-Australia BIT, since they qualify as "right to money".

A second point of contention was the temporal applicability of the investment agreement, an issue with considerable implications. This arose from the argument presented by the Government of India (GoI) that the Tribunal had no jurisdiction over the acts and omissions of Coal India, because the acts and omissions that WIL had complained against had occurred prior to 1999, whereas the India-Australia BIT has come into effect from 2000. Further, GoI argued that a treaty cannot have retroactive effect under public international law and therefore provisions of Article 2(1), the relevant article in this case, "provides that the Host State must, from the date of entry into force of the BIT, treat pre-existing investments in accordance with the standards set out in the BIT. It does not impose those standards retroactively".[3] White argued that the issue here is not one of retroactivity. Contesting this view, WIL maintained that there is "nothing in the BIT which requires a dispute to have arisen after the entry into force of the BIT"[4]. Article 2(1), in its view, was relevant as long as there are "investments" existing at the time of entry into force. The BIT's temporal restrictions refer to "investments" and not disputes. Thus, the BIT covered any dispute arising out of or relating to an "investment" existing at the time of its entry into force.

(b) Favourable conditions for investors

Article 3(1) gave rise to two substantial obligations for the host states. First, each Contracting Party was required to "encourage and promote favourable conditions for investors of the other Contracting Party to make investments in its territory". Secondly, each Contracting Party had to "admit such [foreign] investments in accordance with its laws and investment policies applicable from time to time".

WIL argued that Article 3(1) of the Australia-India BIT requires each of the Contracting Parties to take concrete, positive steps in the interests of investors. In WIL's view, this provision gave rise to, "at the very least, to three obligations on the part of India: (a) to create a suitable governance framework for supervising the action of state-owned corporations, including Coal India, in their dealings with foreign investors; (b) to ensure that its arbitration laws are administered in line with India's New York Convention obligations; and (c) to take steps to reduce the backlog of cases in its courts, given the prospect that such backlog must necessarily have significant effect on domestic and international businesses, including investors, as defined under the BIT"[5].

India, on the other hand, maintained that Article 3(1) provided for two general obligations: (i) a pre-establishment obligation, which required the Contracting Parties to "encourage and promote favourable conditions" for investors; and (ii) an obligation on each Contracting State to "admit" investments by "investors" of the other Contracting Party, in accordance with its applicable laws and investment policies.

(c) Fair and Equitable Treatment

WIL challenged GoI by invoking Article 3(2) of the Australia-India BIT, which states, "[I]nvestments or investors of each contracting Party shall at all times be accorded fair and equitable treatment". WIL argued that despite assuring foreign investors "fair and equitable treatment at all times", GoI had failed to meet its obligations. In support of its argument, WIL claimed that "Coal India was never entitled to take or retain the bank guarantee" and that India had failed "to exercise proper supervision of Coal India and thereby correct this unlawful retention."[6]

WIL built its case regarding the violation of the provisions on fair and equitable treatment based on two tenets. The first was that its legitimate expectations of India as a place to do business were dented because of acts of the government of India, which included the failure to return the Bank Guarantee. The second tenet was its point about denial of justice by Indian courts. WIL's argument was that its legitimate expectation was that the Indian courts would afford justice by allowing it to enforce the award by the ICC tribunal in the courts of India, in a fair and reasonably timely manner. However, the courts in India failed to provide justice to WIL by not allowing the enforcement process and the setting aside of proceedings for over nine years without any realistic end in sight.

(d) Treatment of investments

WIL claimed that India had breached its obligations under Article 4(2) of the Australia-India BIT[7] because its investment was treated on a less favourable basis than the treatment afforded to investments made by investors of a third country. WIL supported its claim by quoting Article 4(5) of the Kuwait-India BIT in which India had agreed to "provide *effective means of asserting claims and enforcing rights* with respect to investments and ensure investors of the other Contracting State the right of access to its courts of justice, administrative tribunals and agencies and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments" (emphasis added). WIL argued that India's failure to enforce the ICC award in a timely manner because of the delays caused by the judicial authorities, constituted breach of its obligation to provide "effective means of asserting claims and enforcing rights" with respect to WIL's investments. This, according to WIL, was a violation of the most favoured nation (MFN) clause of the BIT.

(e) Expropriation

WIL made a further case against India by arguing that the "effect of the Indian courts' delays in dealing with White's application to enforce the ICC award has deprived White of the benefit of the Award and of its rights to have the Award enforced"[8] and was tantamount to expropriation and a violation of Article 7 of the Australia-India BIT. WIL thus claimed compensation for this expropriation.

(f) Repatriation of investment and returns

The final claim made by WIL was that CIL's improper call on the Bank Guarantee and the "improper retention of those funds" constituted a breach of the obligations that India had taken under Article 9 of the Australia-India BIT. Under this provision, India had agreed to "permit all funds of an investor of the other Contracting Party related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis".

(ii) The Tribunal's Ruling

The Tribunal's main arguments revolved around two substantive issues. First, it dealt with WIL's argument that its participation in the CIL project should be considered as an "investment" in line with the definition adopted in the Australia-India BIT. The Tribunal concurred with the arguments presented by WIL that its involvement in CIL's project did constitute an investment, since the BIT used a broad definition of investment.

The Tribunal also supported WIL's argument that India was in breach of the MFN provisions and had indeed failed to extend to the foreign firm the benefits that it should have enjoyed as under the Kuwait-India BIT, according to which India had agreed to "provide effective means of asserting claims and enforcing rights with respect to investments". The Tribunal concluded that "the Indian judicial system's inability to deal with [WIL's] jurisdictional claim in over nine years, and the [Indian] Supreme Court's inability to hear [WIL's] jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing [WIL] with "effective means" of asserting claims and enforcing rights"[9].

On the critical issue of the grant of compensation to WIL in keeping with the ICC Award, the Tribunal ruled that the foreign firm did have the right to have the award enforced in India. The Tribunal rejected the grounds for non-enforceability of the Award put forth by CIL essentially because the respondent had not provided the necessary evidence in support of its position.

2. Recent Cases of Investment Disputes

These disputes have arisen in two broad domains: the first concerns allocation of the airwaves for telecommunication services and the second concerns tax disputes involving a number of major foreign investors. Most of the disputes in telecommunications arose from the ruling given by the Supreme Court of India in 2012 to cancel 122 second generation spectrum licences (2G licences) allocated to mobile telephone operators, which included those granted to foreign firms. The Court had ruled that the Government of the day had not followed the due process while allocating the licences to the firms that had bought them. Until now, two of the affected firms, Axiata Group, a Malaysia-based investor having a joint venture with an Indian firm, Idea Cellular, and Khaitan Holdings Mauritius Limited, an investor in Loop Telecom, a UK-based telecom firm, have initiated international arbitration proceedings under the UNCITRAL rules. In addition, Russian firm, Sistema, and the Norwegian firm, Telenor, have served notices to the Government of India invoking provisions of the BIPPAs that India had signed with Russia and Singapore respectively.

In 2012, the Switzerland-based firm, Bycell Holding AG, initiated international arbitration proceedings under the UNCITRAL rules complaining about the discriminatory treatment in the allocation of 2G licences. The Department of Telecommunications of GoI had withdrawn letters of intent issued to the firm to launch mobile services in 2009, ostensibly for security reasons. This step was taken after the Home Ministry (ministry of internal security) had withdrawn its security clearance to the firm due to non-availability of authentic information about its promoters. Bycell Holding AG is 97% owned by Cyprus-based Tenoch, which is, in turn, owned by two Russian nationals. The arbitration proceedings were thus initiated using the provisions of Russia-India and Cyprus-India BIPPAs.

The dispute involving the Indian Space Research Organisation and its commercial arm, Antrix Corporation, and Devas Group, a Mauritius-based firm, is being decided through international arbitration proceedings under the UNCITRAL rules. Devas' interests are being pursued by its two US-based private equity investors, Columbia Capital Llc and Telecom Ventures Llc, who have invoked the provisions of the Mauritius-India BIPPA. This case has its origins in 2005, when Antrix Corporation had entered into an agreement with the Devas Group to construct two satellites which Devas would have provided wireless multimedia services for, using the S-band spectrum[10]. The Government of India (GoI) annulled this agreement in 2011 after questions were raised regarding the valuation of airwaves in the deal between Antrix and Devas. Further, GoI ruled that the deal was not in the security interests of the country.

One of the most recent of the disputes involves Vodafone Plc, the UK-based company and world's largest telephone service provider. It had initiated arbitration proceedings under UNCITRAL rules in February 2014. Vodafone invoked the provisions of the India-Netherlands BIPPA, through its Dutch subsidiary Vodafone International Holdings BV against the retrospective application[11] of capital gains tax introduced through the General Anti Avoidance Rule (GAAR) in the Finance Act 2012. The proposal in the Finance Bill 2012 is aimed at plugging a loophole in the Income Tax Act 1961, which, according to the Government, allowed Vodafone to avoid its tax liability arising from the acquisition of Indian telecom company Hutchison Essar in 2007 merely because the transaction took place in the Cayman Islands. And, since the takeover deal was worked out from a tax haven, Vodafone did not have to pay the capital gains tax of US $ 2.2 billion if the deal was conducted in India. The justification used by the Government of India has been that although the deal was concluded in a foreign territory, the assets involved in the deal were located in the territory of India. In response to the move of the Government of India, Vodafone has argued that the tax liability that the firm would incur as a result, would violate a number of provisions of the India-Netherlands BIPPA including fair and equitable treatment, full protection and security and indirect expropriation of investment[12].

This tax dispute is one of the several disputes that the GoI is currently involved in. Several of these disputes concern cases of transfer pricing, which involve some of the major foreign firms, including Vodafone, Royal Dutch Shell and IBM. However, a recent decision by the Bombay High Court that ruled in favour of Vodafone in the transfer pricing case that the firm was involved in could alter the scenario of GoI's disputes with foreign investors.

The disputes with foreign investors are not unique to India nor are they typical of developing countries. A slew of cases have emerged recently involving countries like Germany[13] and Australia[14]. As a settlement in one case, Germany had to withdraw the standards set out in an environmental permit required for the operation of a coal-fired power plant situated on the river Elbe aimed at limiting the increase in water temperatures.

The disputes with foreign investors referred to above signal the emerging struggle between the foreign investors and the sovereign states in the economic spaces that are looking constricted in the face of uncertain growth prospects. In the post-2008 world, governments have increasingly been called upon to "manage" the economies, but their ability to formulate policies has run contrary to the rights granted to the foreign investors. This has forced several governments in the developed world, most notably the European Union, to have a re-look at their bilateral investment treaties and other agreements guaranteeing investor rights.

This paper highlights some of the provisions in India's BIPPAs that have either been invoked by the foreign investors to initiate disputes or could potentially be used in such disputes.

3. Problems with India's BITs

The adverse ruling by the UNCITRAL arbitration panel against India in the White Industries case brought out several weaknesses of the BITs that India endorsed. These weaknesses, in our view, need to be rectified in order to ensure that there is a better balance between the rights and obligations of the foreign investors and India, as a host country. As referred to earlier, the process of revisiting the existing Model Text has already been initiated by India.

The following discussion deals with some of the more critical areas, in which some re-think is required, in our view, to bring a better balance in the BITs[15].

(i) Definition of Investment

What constitutes an investment is a key aspect of an investment treaty for it lays down the areas in which foreign investors can operate in their host countries. Most BITs that are currently in operation include a broad definition of investment. These treaties usually cover "every kind of asset", which is usually followed by a non-exhaustive list of covered assets.

The genesis of this definition lies in the series of BITs that the then Federal Republic of Germany (FRG) had formalised in the early 1960s[16]. The BIT with Malaysia (the then Malaya) signed in 1961 provides the template[17] for the definition of "investment" that has been adopted by all countries. It may be mentioned here that the BITs are essentially agreements that the capital exporting countries have entered into with their partners in the developing world and the former Socialist Republics. In other words, the traditional exporters of capital have not signed any BIT amongst themselves.

India, too, has followed this approach. The definition of "investment" under the Model Text of the Bilateral Investment Promotion and Protection Agreement reads as follows:

> "investment" means every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:
>
> (i) movable and immovable property as well as other rights such as mortgages, liens or pledges;
>
> (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company;
>
> (iii) rights to money or to any performance under contract having a financial value;
>
> (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;
>
> (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals;

Many countries foresaw the danger of leaving the window open for expansionist interpretation and hence incorporated parameters into the investment treaties that would define whether an act is investment or not. The United States, in its Model BIT 2004 and 2012 (Article 1) and Australia in its free trade agreement (FTA) with the US (Article 11.17.4) define investment as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or assumption of risk". This implies that the US and Australia will provide protection only to those investors that have undertaken a degree of risk by committing resources in its territory (Dhar, 2012).

The other aspect of the definition of investment provided in India's BITs is the lack of consistency in what constitutes investment. In one of India's BITs (India-France BIT) the definition of investment explicitly recognises minority and indirect forms of investments. The implication of such broad definition is that even a single individual with 0.01% share in a company which has invested in the territory of a Contracting Party can bring a State to international arbitration. The term "indirect forms" of investment is not defined and the only interpretation available for this term is under the scope of the treaty which states "indirect investment made through another company, wherever located, which is owned to an extent of at least 51 per cent". This clause would extend the benefit of the treaty to investors (subsidiaries) located even in the territory of a non Party. Since investment from subsidiaries located anywhere are recognized as investment originating from within France, the subsidiaries located in those countries with which India has a BIT with more favourable terms can initiate disputes on behalf of the parent company in France. Since this provision is there in one of India's BITs, investors from other Contracting Parties can import this provision using most favoured nation (MFN) provision and initiate disputes through their subsidiaries located in other territories. It should be noted in this context that many other countries in their BITs have confined the scope of the treaty to "covered investments" only, which is defined as investment into the territory of one Contracting Party from an investor in the other Contracting Party[18].

(ii) National Treatment and Most Favoured Nation

National treatment (NT) and MFN guarantee the investment and the investor from a Contracting Party a treatment that is not less favourable than what is given to the host country's own investment and to investors from any third country. Many countries have restricted the scope of application of NT and MFN to similar situations. Investment treaties of the United States (Model BIT and the North American Free Trade Agreement (NAFTA)), Australia - Association of Southeast Asian Nations (ASEAN)-New Zealand FTA state that "treatment no less favourable than it accords, in like circumstances". These treaties also limit the application of NT and MFN to certain aspects of the investment. The US Model BIT 2004 and 2012 limit the scope of these two provisions to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition" of investment and do not extend to other aspects of investment such as dispute settlement. The US Model BIT further states that NT and MFN do not apply to "(a) government procurement or (b) subsidies or grants provided by a Party including government supported loans, guarantees and insurance" (Article 14).

It is very important to clearly define the scope of these terms because often MFN is used to import more favourable provisions. India in its existing BITs has not limited the scope of these clauses. The BIT with France not only states that NT and MFN clauses are applicable to "investments of investors of the other Contracting Party, including their operation, management, maintenance, use, enjoyment or disposal" but also provides that investors are free to resort to any provision in any BIT "whichever is more favourable". Since this a clearly stated position of India, there was no point in arguing during the White Industries arbitration that import of the "effective means" clause from the BIT with Kuwait would subvert the carefully negotiated balance of the BIT. In this regard, the tribunal held that it "achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause" (para 11.2.4. in UNCITRAL, 2011).

The BITs of India has not qualified NT and MFN by the term "like circumstances", whereby the obligation would be not to discriminate between domestic and foreign investors in similar circumstances (Ranjan, 2010). A number of countries insisted on the incorporation of this qualification in the investment agreements. The importance of this qualification was emphasized by the US during the negotiations on the Multilateral Agreement on Investment (MAI) that it "ensures that comparisons are made between investors and investments on the basis of characteristics that are relevant for the purposes of comparison" (Dhar and Chaturvedi, 1998, p. 839). It was further argued that the "objective (of the proposed instrument) is to permit the comparison of all relevant circumstances, including those relating a foreign investor and its investment, in deciding to which domestic or third country investors and investment they should be appropriately compared, while excluding from consideration those characteristics that are not germane to such comparison" (Dhar and Chaturvedi, 1998, pp. 839-40). The NT and MFN provisions in the NAFTA, US Model BIT 2012, and investment chapter of the Australia-US FTA are qualified by the term "like circumstances".

(iii) Expropriation

Expropriation of investment which is often equated with nationalisation is a major issue in the investment context. The recent nationalisation of the hydrocarbon corporation YPF in Argentina owned in majority by REPSOL of Spain has brought this issue to the limelight. The Government of Argentina argues that REPSOL has failed to comply with its obligation in Argentina and has given priority to the international market, thus reducing the domestic production of crude and gas considerably. However, all investment treaties provide for expropriation under certain circumstances. Investment treaties such as NAFTA, the US-Australia FTA, the ASEAN-Australia-New Zealand FTA, and India's BITs provide that expropriation of investment is not allowed except for public purpose, in a non-discriminatory manner and on payment of fair and equitable compensation. All these treaties except the BITs of India clarify that compulsory licenses (CL) granted in relation to intellectual property rights in accordance with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) do not come under the purview of expropriation.

A compulsory license is an instrument resorted to by developed as well as developing countries to serve various public interests. Recently India has issued a CL to Natco over Bayer's patented anti cancer drug (Nexavar) on the grounds of affordability. The drug is used in the treatment of kidney and liver cancer and patients need to take it lifelong. The grounds on which the CL was issued are unaffordable prices and less than adequate availability of the drug. The cost of the drug was Rs. 280,428 per month and Bayer's supply was meeting only 1% of the total requirement in the country. Under the CL Natco agreed to supply the drug at Rs. 8800 per month and to give the drug at no cost to at least 600 patients every year. The CL was issued under the Indian Patents Act which provides that at any time after the expiration of three years from the date of the grant of patent, any person interested may make an application to the Controller for grant of CL if the reasonable requirement of the public with respect to the patented invention has not been met (article 84). Now the drug would cost just 3% of the Bayer's price and many more patients will be able to access the drug.

Nothing prevents Bayer from taking the Government of India to international arbitration invoking India's BITs. Although the CL has not transferred the intellectual property of the investor, this may not be sufficient to disregard it as an act of expropriation. According to Correa (2004), "the concept of expropriation is generally broadly construed and investment agreements do not only include direct and full takings of property but also de facto or indirect expropriation" (page 15). Whether the act amounts to indirect expropriation will be determined by the tribunal. In such situations, the criteria used for deciding whether an act amounts to indirect expropriation are the economic impact of the government action, the extent to which the act interferes with the reasonable expectations of the investor and the character of government action. That the price offered by Bayer is not reasonable (reasonable to whom – the patients, the company, or reasonable price that balances the interests of the patients as well as the company?) and Natco's price is reasonable, and whether all patients will be able to afford the CL price are some of the issues the Government of India will have to prove in the arbitration process.

The other aspect of provisions on expropriation in India's BITs is that it will enable Bayer to claim a compensation that is based on the market value of the investment immediately before the issue of the CL. India's BITs provide that expropriation even for a public purpose will have to be compensated. Whether Bayer will invoke investor state dispute provisions of India's investment treaties is a different matter, but the company is entitled to do that. All these uncertainties can be avoided if it is clarified that CL issued pursuant to TRIPS does not fall under the purview of expropriation. Some countries have been extremely careful that they have clarified that certain acts aimed at protecting public interests cannot be brought under the purview of not only direct expropriation but also indirect expropriation. The annexes on expropriation in both the US-Australia FTA and the investment chapter of the ASEAN-Australia-New Zealand FTA state that "non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives such as the protection of public health, safety, and the environment do not constitute indirect expropriation".

(iv) Investor State Dispute Settlement

The investor state dispute settlement mechanism in the investment treaties provides investors the facility to drag sovereign States to international arbitration process. Even worse are the scenarios where sovereign States are held liable for disputes on commercial agreements between firms. The verdict of the UNCITRAL Tribunal on the dispute brought by White Industries has been an embarrassment for the Government of India. Not only was the Government of India brought into the dispute over commercial engagement between White Industries based in Australia and Coal India Ltd. but India was also held liable to White Industries. This case also brings out yet another aspect of investment treaties that foreign investors are well equipped to bypass even the highest courts of the country.

Realising the potential constraints that this clause will create, countries like Australia has already moved in the direction of excluding investor state dispute settlement provisions from the investment treaties. The investment chapter of the Australia-US FTA has restricted the rights of the investor to initiate a dispute. The investor can initiate arbitration against a Contracting Party only if the law of that Contracting Party permits such arbitration. Article 11.16.2 of the Australia-US FTA states that nothing "in this Article prevent an investor of a Party from submitting to arbitration a claim against the other Party to the extent permitted under that Party's law". If this is not the case, disputes need to be initiated through a Contracting Party in accordance with the dispute settlement provision of the FTA which provides for a dispute settlement panel constituted jointly by both the Contracting Parties. It was reported that the negotiations on the proposed investment chapter of the Trans-Pacific Partnership Agreement involving Chile, Singapore, Brunei, New Zealand, US, Australia, Peru, Vietnam and Malaysia is caught up in a debate as Australia has officially stated that it will no longer agree to any investor-state dispute settlement provisions in its FTAs[19].

It should be noted that the US Model BIT 2012 came in the wake of the Obama Administration's decision to "review of the implementation of our FTAs and BITs to ensure that they advance the public interest"[20]. The decision came in the context of mounting concerns on whether the FTAs and BITs give foreign investors in the US greater rights than US investors have under US law and whether these agreements give governments the 'regulatory and policy space' needed to protect environment and the public welfare.

4. By Way of Conclusions

In this paper our attempt was to present a case for the review / revision of the BITs involving India as one of the Parties, which are currently in force in the country. The review should cover, *inter alia*, issues of more favourable treatment to foreigners than locals, limitations on policy space of government to address public interest concerns, in particular, those in the areas of public health and environment.

In terms of the specifics, the review should have clear and transparent provisions that set the parameters for identifying the investments that qualify for protection under the BITs. The review should also clarify the obligations that India has for protecting foreign investment. The national treatment and most favoured nation treatment provisions should be applicable only to 'like circumstances' and the use of terms such as 'whichever is more favourable', 'enjoyment' and 'effective means of asserting claims' that can be subjected to expansionist interpretation should be avoided. The review should specify that compulsory licences pursuant to the TRIPS Agreement and acts aimed at protecting public interest such as public health, safety and environment are kept completely out of the purview of the clause on expropriation of investments. It may also be necessary to qualify the term 'expropriation' to exclude from its purview results consequent to any legislation passed by a state or national legislature as well as of the orders resulting from a judicial process. The review should also ensure consistency in provisions across all BIPPAs.

End notes

[1] UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, IIA Issues Note # 1 (April 2014), Annex 2, p. 28.

[2] 72 of these BIPPAs are being implemented.

[3] Final Award, White Industries Australia Limited v. The Republic of India, para. 5.1.29, page 56. Available from www.italaw.com.

[4] Final Award, White Industries Australia Limited v. The Republic of India, para. 4.2.10, page 35. Available from www.italaw.com.

[5] Final Award, White Industries Australia Limited v. The Republic of India, para. 9.2.1, page 88. Available from www.italaw.com.

[6] Final Award, White Industries Australia Limited v. The Republic of India, para. 10.2.2, page 92. Available from www.italaw.com.

[7] This article reads: “A Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country.”

[8] Final Award, White Industries Australia Limited v. The Republic of India, para. 4.5.3, page 45. Available from www.italaw.com.

[9] Final Award, White Industries Australia Limited v. The Republic of India, paragraph 11.4.19, pp. 118-119. Available from www.italaw.com.

[10] “Apex court rules for international arbitration between Devas, Antrix”, Live mint, May 10, 2013. Available from http://www.livemint.com/Industry/zwOlVfHgrYNt8D2Wv2576M/Apex-court-rules-for-international-arbitration-between-Devas.html.

[11] The proposed amendment would enable the Government of India to tax such transactions with six years retrospective effect.

[12] The case involving Vodafone has two interesting parallels, both from the United Kingdom. First, Vodafone’s acquisition of Hutchison Essar, and the subsequent reports of tax evasion, is similar to the case in which the firm’s home government had discovered much later that its acquisition of the German firm Mannesmann was completed in 2000 through yet another tax haven, viz. Luxembourg. The UK Government initiated proceedings against the firm soon after, but the dispute could only be settled a decade later with Vodafone agreeing to pay £1.25 billion, while independent assessments of the firm’s liabilities were several times higher. Lending credence to these assessments was the fact that Vodafone had made a £2.2bn provision in its books relating to the dispute. For details, see Armitstead (2010) and Maitland (2011).

The second parallel relates to the imposition of the retrospective tax to plug the abuse of loopholes in the double taxation treaties which exist between the UK and other countries. In 2008, the UK Government introduced a provision in the budget (BN66) expressly aimed at double taxation treaty abuse by its residents. BN66 was introduced with the tagline “UK residents are taxable on their income wherever it arises” and this provision was introduced with retrospective effect, from 1987. For details, see HM Revenue and Customs (2008).

[13] The implementation of the Federal Government of Germany’s decision to phase out nuclear power by 2022 is mired in a dispute with the Stockholm based power generation company Vattenfall. It is one of Europe's biggest electricity producing firms and has stakes in three nuclear plants in Germany. Of the three plants, two have not been functioning for years and would not be allowed to restart, according to the Decision. The third plant will continue to function till 2021 and thereafter it will also shut down. The company initiated a dispute with Germany claiming more than 1 billion Euros compensation. The company had successfully challenged Germany in 2009 in another case involving certain standards set out in power generation (Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG V. Federal Republic of Germany (ICSID Case No. ARB/09/6)).

[14] In November 2011 Australia passed two anti-tobacco bills for restricting the sale of cigarettes. The bills allowed cigarettes to be sold only in packets with large health warnings and no brand logos; company names were permitted in small size. Philip Morris, a firm having considerable presence in Australia, argued that the Government’s move would “substantially diminish the value of PMA's investments in Australia”. The firm initiated arbitration process under the United Nations Commission on International Trade Law (UNCITRAL) invoking the Australia-Hong Kong BIT alleging breach of investor rights, including unlawful expropriation, failure to provide fair and equitable treatment, impairment of investment and failure to provide full protection and security. Australia has already announced that it will not have the investor state dispute settlement provision in its future investment agreements.

[15] This brief was prepared before the draft revised model investment treaty was made available by the government of India for public consultation purposes.

[16] FRG signed the first of these BITs with Pakistan in November 1959, which became effective in 1962.

[17] According to this agreement, the term “investment” shall comprise every kind of asset and more particularly, though not exclusively: (a) movable and immovable property as well as any other rights *in rem*, such as mortgage, lien, pledge, usufruct and similar rights; (b) shares or other kinds of interest in companies; (c) title to money or to any performance having an economic value; (d) copyright, industrial property rights, technical processes, trade-names and goodwill; and (e) such business concessions under public law, including concessions regarding the prospecting for, or the extraction or winning of, natural resources, as give to their holder a legal position of some duration.

[18] For example, the US Model BIT 2012 (article 2), US-Australia FTA (article 11.1), and NAFTA (Article 1101).

[19] International Institute for Sustainable Development, “Investment Developments in the Trans-Pacific Partnership Agreement”, Investment Treaty News, 12 January 2012.

[20] Report of Hearing before the Committee on Ways and Means of the US House of Representatives on “Investment Protections in US Trade and Investment Agreements”, Serial 111-20 (Washington DC, 2009).

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