Revised Version of India's New Model Bilateral Investment Treaty

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Introduction

The initial 2015 draft of a new model Indian bilateral investment treaty contained stringent provisions concerning the definition of investment covered, non-applicability, the obligations of the two parties in the case of claims, and exceptions. These provisions were criticised at the time as likely to hinder foreign direct investment and thus as counterproductive. Revisions of the model in a new draft have introduced greater flexibility under some but not all of these headings and have also included some extensions of rules in the initial draft (F. No.26/5/2013 IC, Government of India, Ministry of Finance, Department of Economic Affairs (Investment Division)).

Definition of investors/investments

Investor is now a legal entity, other than a branch or representative office, that has made an investment in the host state. Gone is the requirement in the initial draft that the investor own or control an investment in the host state. But legal incorporation in the host state would seem to be required.

Categories of permitted investment are specified in a list which includes shares, certain debt instruments, intellectual property rights, and "any other interests…which involve substantial economic activity and out of which the enterprise derives significant value" (a phrase whose coverage will require adjudication in particular claims by investors). Permitted investments do not include portfolio investments and debt instruments issued by government-owned or government-controlled enterprises. In the original draft investments were subject to the more restrictive requirement that the investor own or control the investment.

National treatment

Actionable breaches of national treatment by the host country no longer cover only measures which constitute intentional and unlawful discrimination on the basis of nationality, as in the initial draft, but all discriminatory measures (Article 4). As in the initial draft, measures taken by local governments are not covered by the obligation of national treatment. Local government here includes urban local bodies, municipal corporations and village-level governments and enterprises owned or controlled by such bodies. However, in the new draft national treatment does apply to sub-national governments, i.e. State Governments or Union Territory Administrations which were excluded from this obligation in the initial draft.

Compliance with laws and corporate social responsibility

The obligations in the new draft (in Articles 11 and 12) have been considerably shortened in comparison with those in the original. Listed obligations now include general compliance with laws, regulations, administrative guidelines and policies of the host country towards investments; no corruption of public officials; compliance

with tax law; and the provision of information required by both parties - presumably both host and home governments – concerning the investment. Internationally recognised standards of corporate social responsibility are now to be voluntarily incorporated in investors' practices and internal policies.

The initial draft was emphatic on the fundamental importance to the treaty of obligations under the headings of compliance and corporate responsibility. Although there was no explicit reference to the latter term, there was a more detailed listing of obligations classified under the headings of corruption, disclosures, and the law of the host state. Moreover the initial draft contained a reference to the need to recognise the rights, traditions, and customs of local communities and indigenous peoples, which has not been retained.

The new draft omits the right of the host state to make counterclaims (some implications of which are discussed below). Moreover the new draft has omitted the obligation of the home state to have in place arrangements for civil actions directed at the liability of investors for acts, decisions, and omissions leading to damage, personal injuries or loss of life in the host state.

In the new draft, as in the original one, the rules for procedures in disputes between parties concern the interpretation or application of the treaty and whether there has been compliance with obligations as to consultation in good faith. In the new draft these rules are classified explicitly under State-State dispute settlement (Article 31), a subject to which there was no explicit reference in the initial draft. The subjects covered by the rules for disputes between parties are natural subjects State-State dispute settlement. However, State-State arbitration is rare. As of 2008 the only example of State-State arbitration involved the Peru/Chile Bilateral Investment Treaty (BIT), under which Peru invoked the State-State dispute mechanism against Chile after being served with a notice of arbitration by a Chilean investor under the same BIT (Douglas, 2009: 3).

Conditions which must be met before the submission of a claim to arbitration

Exhaustion of local remedies is still required before claims can be submitted to arbitration (Article 15). The requirements are now more flexible regarding the time limit within which satisfactory resolution of the claim must be achieved. In the new draft the claim can be submitted at any time within five years from the date when the investor acquired or should have acquired knowledge of the damage to the investment.

Fora for arbitration

In the initial draft arbitration was to take place under the rules of the United Nations Commission on International Trade Law (UNCITRAL). These rules were adopted by the United Nations in 1976 to provide a framework for international commercial arbitration. They both are used by individual parties and serve as a model for the arbitration rules of arbitral institutions.

Claims may now also be submitted under the International Centre for Settlement of Investment Disputes (ICSID) or the Additional Facility of ICSID Article 16). The scheme of the ICSID Convention, which entered in to force in 1966, is a set of

procedures for the settlement of disputes between host states which are parties to the Convention and investors whose home states are also parties. In 1978 ICSID opened a so-called Additional Facility for arbitration in disputes between host states and investors when jurisdiction would not be available under the Convention itself because either the host state or the home state of the investor making the claim, are not parties to the Convention.

In the new as in the original draft arbitral tribunals are to consist of three independent arbitrators, one selected by each of the disputing parties and the third by agreement of the co-arbitrators and the disputing parties (Article 18). In the case of arbitrations under ICSID rules, if the tribunal has not been constituted in 120 days, the appointing authority is to be the Secretary-General of ICSID. In the case of arbitrations under UNCITRAL rules this role will be filled by the Secretary–General of the Permanent Court of Arbitration(an institution with its seat in the Hague that was established in 1899 to facilitate arbitration, conciliation and fact-finding).Under the original model treaty the appointing authority for the third party was to come from the International Court of Justice(ICJ) judge according to the following order: first the President and second the Vice-President or the next most senior Judge of the ICJ. In the new draft such a role for the ICJ is only retained in cases where the appointing authority would otherwise be a national of one of the two parties to the dispute.

Expropriation

Expropriation occurs when an investment is nationalised or expropriated through formal transfer of title or outright seizure (direct expropriation) or when measures of a party have an equivalent effect by substantially or permanently depriving an investor of fundamental attributes of property in its investment (indirect expropriation) (Article 5). Key rules of the initial draft are retained such as the exception for non-discriminatory measures which are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment. The list of mitigating factors which should be taken into account by the arbitral tribunal in eventual assessment of the value of damages is less prominent in the new than in the original draft, being shifted from the article on expropriation itself to a footnote to the article treating judgements concerning awards (Article 26).

Capital and exchange controls

Short-term restrictions on cross-border financial transfers – including capital transfers - remain subject to the same rules in the new as in the initial draft. The wording in Article 6 is as follows: “the Parties may temporarily restrict transfers in the event of serious balance-of-payments difficulties or threat thereof, or in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular monetary and exchange rate policies”. Exchange controls are now also covered amongst the general exceptions of Article 32 which include “non-discriminatory measures of general application…in pursuit of monetary and related credit policies or exchange rate policies.” There is also a reference in Article 32 to the rights and obligations of IMF members under the IMF Articles of Agreement which are to prevail in the case of any inconsistency between the Articles and the investment treaty.

These rules accord with the now standard recognition (for example, in Article XII of the WTO General Agreement on Trade in Services) that a country may need to restrict cross-border transfers in response to serious balance-of-payments and external financial difficulties. The original draft included among general exceptions actions and measures "ensuring the integrity and stability of [the host country's] financial system, banks and financial institutions". The new model treaty does not contain an explicit reference to the objective of ensuring financial stability, confining itself to the more general reference to macroeconomic, monetary and exchange-rate policies. This change is a little surprising in view of the emphasis in Post-Global-Financial-Crisis agendas on rules for maintaining financial stability, which may require interventions involving restrictions on capital movements – such as destabilising capital inflows -in situations where external balance-of-payments difficulties are neither present nor threatening.

Other exceptions

In the new draft the lists of general exceptions (Article 32) and security exceptions (Article 33) are shorter than in the original model treaty. However, whereas in the initial draft the host party was accorded the role of judging whether action was necessary under both categories of exceptions, self-judgement in the new model treaty is limited to security exceptions.

Appeals facility

An insistent criticism of procedures for dispute settlement under bilateral and multilateral investment treaties is that the tribunals for arbitration are "offshore" – in other words that they are independent of national legal systems and that appeals against their rulings are difficult or impossible.

Under Article 53 of the ICSID Convention appeals against awards are not admitted (though an ad hoc committee may annul an award in response to a challenge to the legitimacy of the process leading to the award - but not in response to a challenge to its substantive correctness). The 1985 UNCITRAL Model Law on International Commercial Arbitration, which may apply in non-ICSID arbitration, provides some grounds for setting aside or non-recognition of an award by a domestic court in the host country. The grounds include invalidity of the arbitration agreement, lack of proper notice concerning the proceedings, a decision beyond the scope of the submission to arbitration, improper composition of the tribunal, and an award in conflict with the public policy of the host state (Dolzer and Schreuer, 2008: 278).

The new draft includes a provision for the establishment of an appellate body or similar mechanism to review awards made by the arbitral tribunals. The objective of such a body will be "to provide coherence to the interpretation of provisions in this Treaty". This parallels initiatives with a similar purpose – and driven by similar criticisms - regarding other bilateral and multilateral investment treaties.

Objectives and shortcomings

The Model Draft Bilateral Investment Treaty was a reaction to the proliferation of notices of arbitration against India since 2011. It parallels ongoing efforts elsewhere

to remedy perceived flaws and biases in trade and investment treaties. However, these efforts are not yet addressing what are arguably fundamental shortcomings.

Such treaties are designed to provide protection against treatment of foreign investors which are perceived as unfair. Although there is no global consensus as to precisely what is or what is not unfair in this context, the treaties cover major headings like expropriation without adequate compensation and standards of protection for foreign investors such as full protection and security, access to justice and fair procedure, national treatment, most-favoured-nation treatment– which is designed to ensure that the parties to a treaty treat each at least as favourably as they treat third parties but which is not included in India's new model treaties -, and fair and equitable treatment - a slightly nebulous standard whose purpose "is to fill gaps that may be left by the more specific standards, in order to obtain the level of protection intended by the treaties"(Dolzer and Schreuer, 2008: 122) and for which the Indian model investment substitutes a reference to obligations under customary international law.

Commercial treaties including provisions relating to investment have a long history, investment initially being included in treaties primarily covering trade matters. In recent years the coverage of investment treaties has greatly expanded to the parts of countries' regulatory regimes that cover cross-border as well as domestic transactions. An objective of such expansion is "regulatory convergence" between different jurisdictions, a concept lacking theoretical justification once a sufficient minimum level of convergence has been attained by a country. A result of the expansion is that the number of parties in host countries significantly affected by the provisions of investment treaties has greatly expanded. Yet despite this expansion the treaties continue to cover relations primarily between foreign investors and host states, and accord no explicit recognition to other economic actors.

It could – and no doubt would – be argued by supporters of the present approach that the interests of other affected actors in host states are covered by the participation of these states – i.e. the governments of these states - in investment disputes. Yet such a view seems simplistic. States represent several different parties including domestic enterprises and investors and many other different public and private bodies. Effective representation of parties with a major interest in the issues covered in an Investor-State Dispute is by no means thus guaranteed under current rules. Moreover scope for counterclaims by such parties against the investor is typically not explicitly included in investment treaties.

The initial draft of India's model investment treaty contained a provision – abandoned in the new draft - for counterclaims against the investor before the arbitral tribunal for breaches of obligations under the treaty concerning corruption, disclosures, taxation, and compliance with the law of the host state. The remedy for the counterclaiming party could be "suitable declaratory relief, enforcement action or monetary compensation". Such counterclaims would have to be made by the host state, and thus for reasons given above would not be assured for another party. Nevertheless the avenue of counterclaims as a vehicle for asserting the claims of parties hitherto unrepresented seems promising. But clearly the conditions for their use by parties other than the host state or by the host state acting on the part of other economic actors need further thought.

References

Dolzer R and Schreuer C (2008), Principles of International Investment Law, Oxford, Oxford University Press.

Douglas Z (2009), The International Law of Investment Claims, Cambridge, Cambridge University Press.