

Investment Agreements

Investment Agreements: An overview

- ▶ Globally, there are close to 3000 Investment Agreements or Bilateral Investment Treaties (BITs) in existence today
- ▶ Myanmar has BITs with China, Japan, India, Philippines etc.
- ▶ India has entered into more than 80 BITs till date
- ▶ Out of these: 72 are in force (July, 2012 data)
- ▶ India signed its first BIT in 1994 with the UK
- ▶ Majority signed before 2007, pace of signing slowed after that
- ▶ Additionally, India has Comprehensive Economic Cooperation/Partnership Agreements (CEPA) with various countries like Japan and Singapore, which contain investment chapters as well

What are BITs?

- ▶ BITs are **international treaties** signed **between two countries** that **protect investment made by foreign investors in each other's country**. Duration of BITs – normally ten years, which can be extended; Sun set clause
- ▶ Why countries enter into BITs?
- ▶ Capital Exporting Country perspective
- ▶ Capital Importing Country perspective – Do BITs result in more foreign investment inflows?
- ▶ BITs involve a trade-off between investment protection and sovereign right to regulate of the host country.

Key Features: Investor–State dispute settlement

- ▶ BITs give investors the direct right to bring claims against host states challenging their sovereign actions
 - ▶ Investors do not need the approval of the host state to bring claims
 - ▶ Often are not even required to exhaust local remedies
 - ▶ Process of settlement of disputes is through Arbitration – three privately appointed arbitrators address public law disputes!
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Definition of Investment

- ▶ Broad asset-based definition
 - ▶ Includes both direct and portfolio investment
 - ▶ IPRs are part of definition of investment
 - ▶ Implications of a broad asset based definition of investment
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Fair and Equitable Treatment

- ▶ The most stretchable provision of the BIT because of its vague meaning
 - ▶ Debate on International Minimum standard in customary international law and its link with FET
 - ▶ FET has been interpreted very broadly by arbitral tribunals to even include legitimate expectations within its ambit.
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Expropriation

- ▶ ‘Taking’ of the property – inherent right of every host state – power of eminent domain.
 - ▶ BITs do not prohibit expropriation – they only regulate it.
 - ▶ Countries are allowed to expropriate provided it is for public purpose, due process has been followed and adequate compensation has been paid
 - ▶ BITs include not only direct but also indirect or regulatory expropriation
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Most Favoured Nation

- ▶ Most BITs include the MFN provision
 - ▶ Impact of MFN in BITs – multilateralisation of international investment law.
 - ▶ Foreign investors have used the MFN provision to borrow beneficial provisions from other BITs
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Monetary Transfer Provisions (MTPs)

- ▶ Regulates the right of the foreign investor to transfer funds – in and out of the country
 - ▶ Debate on capital account convertibility
 - ▶ Relationship with the IMF Articles.
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Current Debate on BITs

- ▶ Many developing countries especially in Latin America have started contesting the BIT regime as being pro foreign investors and inimical to the interests of host states
 - ▶ Some countries have terminated their BITs
 - ▶ Countries like South Africa have returned to domestic laws for protection of foreign investment
 - ▶ Many countries have started renegotiating their BITs in order to strike a balance between investment protection and host country's right to regulate.
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India Story...



Top 10 Sources of FDI flows into India (2011–2012)

Rank	Source of FDI	BIT/CEPA
1	Mauritius	Yes
2	Singapore	Yes
3	Japan	Yes
4	Netherlands	Yes
5	United Kingdom	Yes
6	Cyprus	Yes
7	U.S.A	No (Negotiations ongoing)
8	France	Yes
9	Germany	Yes
10	U.A.E	No
		<i>Source: RBI Annual Report 2011–2012</i>

Top 10 Destinations for outward FDI from India (April 2011 – Feb 2012)

Rank	Destination for outward FDI	BIT/CEPA
1	Mauritius	Yes
2	Singapore	Yes
3	U.S.A	No (Negotiations ongoing)
4	Netherlands	Yes
5	British Virgin Islands	No
6	United Kingdom	Yes
7	U.A.E	No
8	Hong Kong	No
9	Switzerland	Yes
10	Cayman Islands	No
		Source: RBI

- ▶ Thus, a substantial chunk of FDI coming into India and going out of India may potentially be protected by BITs/CEPAs
 - ▶ There is no doubt that BITs are used as a tool for attracting investment
 - ▶ However, recent developments indicate that one should not blind ourselves to the potential pitfalls of the system
 - ▶ Case in point: *White Industries v Republic of India*
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White Industries Arbitration

- ▶ One of the first publically known ruling against India relating to BITs
- ▶ In Nov 2011, an arbitral tribunal found that India was guilty of violating its commitment under the **India–Australia BIT**
- ▶ White Industries has obtained an arbitral award in its favour in a contractual dispute with Coal India (an Indian PSU)
- ▶ It had sought enforcement of the award before the Delhi High Court. Simultaneously, Coal India had approached the Calcutta High Court to set aside the award and the request was granted
- ▶ White Industries appealed to the Supreme Court in 2004, but the appeal is still pending

White Industries Arbitration ..contd.

- ▶ In 2010, White Industries took up the matter as an ‘investment dispute’ under the India–Australia BIT for arbitration citing inordinate delay of the Indian courts to enforce the arbitration award.
- ▶ White Industries argued that the delay violated the provisions on MFN treatment, fair and equitable treatment, expropriation and free transfer of funds.
- ▶ The arbitral panel found that the Indian judicial system did not provide White Industries “*effective means of asserting claims and enforcing rights*”, because of the delays inherent in the Indian system.

White Industries Arbitration ..contd.

- ▶ An interesting aspect of this finding was that the India–Australia BIT did not mention any such obligation
- ▶ The tribunal borrowed the ‘effective means’ provision present in the **India–Kuwait BIT** by relying on the MFN provision of the India–Australia BIT

Lessons....

- ▶ Thus, India's experience in White Industries shows that countries need to fully understand the implications of each and every treaty provision before entering into a BIT.
- ▶ In *White Industries*, the MFN clause under India–Australia BIT was very broad and general in content and it facilitated White Industries to indulge in **forum shopping**
- ▶ With respect to the BITs already entered into, countries need to review the agreements in light of the recent developments in International Investment Law and taking into consideration the peculiar feature of Investor–State Dispute that such treaties offer.

Way forward....

- ▶ Taking into account India's recent experience in White Industries and slew of other notices received by India, eg:
 - Post cancellation of 122 2G telecom licenses awarded to various Indian and foreign companies by the Supreme Court of India in February 2012, due to irregularities in the original award process:
 - Sistema JSFC served a notice in February 2012 under Russia India BIT
 - Telenor, a Norwegian firm served a notice through its Singapore subsidiaries under the India- Singapore CECA on March 27, 2012
 - Capital Global and Kaif Investment, owners of Loop Telecom served a notice under the India- Mauritius BIT

Way forward....

- ▶ India is revisiting the commitments undertaken by it under its BITs for effective balance between investor protection and sovereign regulatory discretion:
- ▶ Two ways ahead:
 - Amendment of BITs
 - Termination of BITs

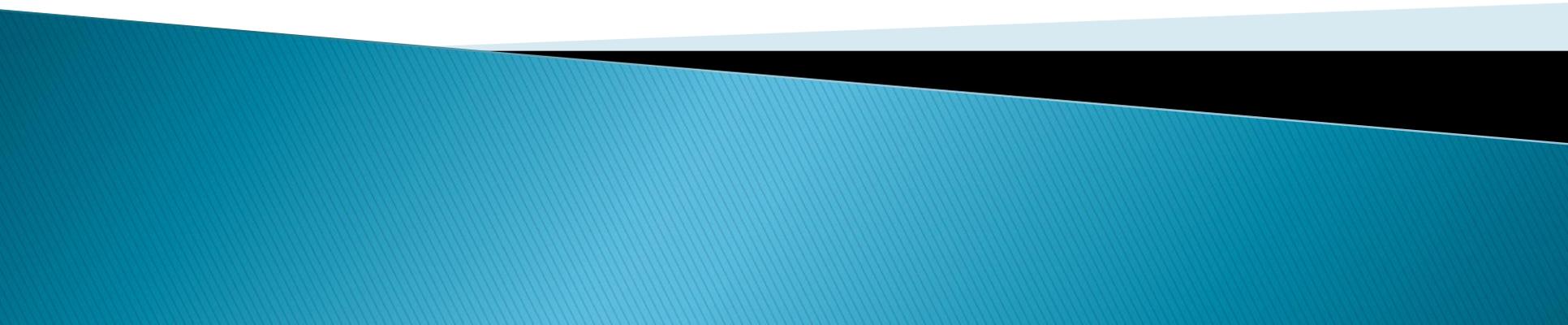
Termination of BITs

- ▶ In recent times, cases of termination of BITs have become known.
- ▶ South Africa recently expressed its intention to terminate its BIT with the Belgo–Luxembourg Economic Union. The BIT will terminate when its ten–year term expires on 13 March 2013.
- ▶ The South African government also announced its intention to not renew twelve other BITs it previously entered into with other European Union (EU) member states
- ▶ In 2011, Bolivia served notice to the USA for termination of the Bolivia–US BIT

Termination of Indian BITs

- ▶ A study of the 72 Indian BITs in force indicate that most BITs follow the below general pattern:
 - An initial period for which the BIT is in force: usually 10 or 15 years
 - After expiry of this initial period, the BIT is automatically extended unless a party gives a written notice seeking termination.
 - The BIT will terminate one year after the written notice
- Notable Exception: India–Slovak Republic BIT:
Termination can take place any time after the agreement came into force by giving 12 months notice.
- A survival clause: The BIT continues to be effective for a set period in respect of investments covered by the BIT before the date of termination. This period varies from 10–15 years across BITs. In certain cases like the India–Oman BIT, India–Saudi Arabia BIT, this period continues for 20 years

Thank You

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