BILATERAL INVESTMENT TREATIES: KEY PROVISIONS

Dr Prabhash Ranjan

South Asian University, New Delhi

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.

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!

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

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.

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 nut also indirect or regulatory expropriation

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

Monetary Transfer Provisions (MTPs)

- Regulates the right of the foreign investor to transfer funds – in and out of the country
- Relationship between MTPs and balance of payments
- Debate on capital account convertibility
- Relationship with the IMF Articles.

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.