India's Bilateral Investment Treaties: Worst fears realised

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The Government of India has signed at least fifty Bilateral Investment Treaties - we do not know exactly how many because the information is still not in the public domain. In addition, there are at least ten "Free trade" agreements or "Economic Partnership" agreements that include investment chapters or clauses relating to bilateral investment protection, and more than twenty more such agreements are currently being negotiated, according to the website of the Ministry of Commerce.

Bilateral investment treaties have been viewed with serious reservations by independent analysts for several reasons. They can have far-reaching and typically negative implications for host country governments and citizens, because of the sweeping protections afforded to investors at the cost of domestic socio-economic rights and environmental standards.

One of the biggest problems with such treaties - or investment chapters in most FTAs - is that they allow private companies to file cases against governments, instead of confining matters to governments. So they subject countries to the risk of litigation by corporations from or based in another country which is a signatory to the same agreement.

There are also concerns about the nature of the arbitration bodies that rule in the case of disputes. Recently, a number of countries (including Venezuela, Bolivia and Ecuador) have either threatened to begin proceedings to withdraw from the International Centre for Settlement of Investment Disputes (ICSID), the arbitration body affiliated with the World Bank, because of concerns that they are heavily biased in favour of transnational companies.

India has already had to suffer once because of its commitments under a BIT, in the case of the multinational power company Enron vs. the Government of Maharashtra and thereby the Government of India. In this case, the completely one-sided, unfair and ultimately impractical Power Purchase Agreement signed by the Maharashtra State Electricity Board with the Dabhol Power Company (mostly owned by a consortium led by Enron and including GE and Bechtel) had to be repudiated by the government. The Dabhol Power Company and the international sponsors of the project GE and Bechtel filed cases against the government of India through their affiliates in Mauritius. Ultimately, the cases were settled out of court with estimated compensation of around $1 billion. It should be noted that this amount is many multiples of the pathetic and delayed amounts paid as compensation to all the victims of the Bhopal disaster by Union Carbide and its successor Dow Chemical, the company that is now the sponsor of the International Olympic Games.

Now, another case brings out other dangers associated with BITs, which can have serious implications for the future because of the complex ramifications of the decisions. This is a case brought by White Industries Australia Limited against the Republic of India, before an international arbitration tribunal, in a case that was heard in Singapore.

The bare facts of the case relate to an agreement of White Industries with the Public Sector Undertaking Coal India Limited, to supply the equipment for and assist in the development of an open cast coal mine in Piparwar. The contract allowed for bonus to be paid to White Industries in the event of exceeding the production target, and penalty in case of under-fulfilment. It was governed by Indian law but contained a clause requiring all parties to arbitrate under the ICC Arbitration Rules.

This is an extremely worrying clause, because it effectively forfeits the sovereignty of the Indian judicial process, to an ad hoc treaty based international arbitration over which courts have no say by private bodies or, as in this case, by private individuals acting as arbitrators in ad hoc arbitration. It is worth noting that in this case, the chair of the arbitration panel was a very well known commercial lawyer specialising in arbitration working with leading Canadian/UK law firms.

Subsequently, disputes arose between White Industries and Coal India about whether bonus payments or penalty payments were applicable. In this context, Coal India, which felt it deserved to extract a penalty, encashed a bank guarantee of around $2.77 million. White Industries then filed for ICC arbitration in London in 2000, and the tribunal awarded White more than $4 million (with a note of dissent from the Indian judge member). Coal India then applied in the Calcutta High Court to have the award set aside, and won the case. The case has subsequently gone back and forth in Indian courts, with claims and counterclaims filed by both parties. It has gone up to the Supreme Court, where the matter is yet to be heard.

In view of the delay, White Industries has filed a complaint against the Republic of India, arguing that because Coal India is a PSU and therefore controlled by the government, its behaviour amounts to a breach of various clauses of the Australia-India BIT. That judgement has now been delivered. The details of this particular case need not detain us here. Instead, we should be concerned with the specific questions asked and decisions taken by the tribunal, and their implications for future cases involving foreign companies operating in India.

The most critical point relates to the delay in getting the case concluded. To those familiar with the Indian judicial system, a period of nine years from the start of the very first claim (and that too in a civil case involving only contested compensation) may not seem that long. There is no doubt that our judicial system is excessively overburdened and that cases of litigation generally last for inexcusably long times. But the situation is typically much worse for a very wide range of litigants who have much more at stake, including their very lives. It is hard to argue - and indeed the Tribunal also accepted this - that there was any case of discrimination through delay in this particular case.

In spite of this, the Tribunal decided that "the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court's inability to hear White's jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White with ‘effective means' of asserting claims and enforcing rights." On this basis, the Tribunal decided that India is in breach of the BIT!

Further, the Tribunal decided that the failure of the Court to establish the case thus far effectively meant that the government of India is liable to pay "full compensation to White for the loss it has

suffered as a consequence of the breach of India's BIT." This compensation comes to a hefty amount: more than $4 million as compensation; interest on that amount at 8 per cent per annum since March 1998; $84,000 for the fees and expenses of the arbitrators; and $500,000 to cover the costs of White's ICC arbitration!

So now we have an extremely worrying precedent set by this particular case law - the ability of a Tribunal to demand of a state, hefty compensation payments simply for the legal delays involved in a case involving two corporate entities, which has yet to be settled in the highest Indian court! This is not only prejudging the legal result in the Indian judicial process, but then forcing the government to pay and effectively holding it responsible. Given the inevitable delays in India's civil juridical process, one can imagine the several other foreign companies will feel emboldened to file for international arbitration along similar lines.

These and other examples mean that the Government of India must take a serious and careful look at its existing commitments under the various BITs it has signed. At the very least, it must make all the details of all existing and proposed agreements public. If citizens and taxpayers are going to be forced to pay when cases go against India in such arbitrations, at the very least we must know what the Government has already got us into.

* This article was originally published in the Frontline, Volume 29 - Issue 5: March 10-23, 2012.