Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues
No. 154 August 17, 2015
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Bringing the state back in: India's 2015 model BIT

by
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On March 24, 2015, India released the latest draft of its Model Bilateral Investment Treaty (BIT). It reflects India's recent experiences with investor-state dispute settlement. It is also a response to treaty claims faced by other governments in sensitive areas of regulation that have spurred a backlash in many parts of the world. With substantive changes, this draft is designed to provide greater protection for host countries and their ability to regulate investors. This is important as states' rights were previously signed away in many treaties without significant understanding, analysis or debate. However, in an attempt to bring the state back in, the Indian Model adds significant qualifications for investor protection, thereby curtailing the usefulness to foreign investors.

The new Model BIT signals a clear shift toward governing the conduct of foreign investors, whereas previous treaties focused on the protection of investors. This is evident in two ways:

- *Developmental/social goals*. Through several articles (e.g. Preamble, Articles 5, 9-12), the Model BIT requires foreign investors to contribute to the development of the host country and to operate by recognizing the rights, traditions and customs of local communities in order to obtain treaty benefits. Investors are also required to make long-term commitments, hire local employees, avoid corruption, be transparent about financial transactions and governance mechanisms, and comply with host country taxation policies.
- *Holding foreign investors accountable*. The Model BIT gives host countries the right to initiate counterclaims in international arbitration for any violations of obligations imposed on foreign investors. Foreign investors may be subjected to civil action in their home countries for actions in their home countries that conflict with obligations in the host country.

The Model BIT is more precise than earlier ones. The treaty is specific about the definitions of "investor" and "investments". For example, it excludes passive holdings of

stock or property and does not cover portfolio investment, brand value, pre-operational expenditures, or holding companies.

Additionally, several articles reinforce the state's discretion and the right to regulate. In contrast to standard provisions in earlier BITs, India has reserved for itself and its treaty partners greater leeway in managing macroeconomic or balance-of-payment crises and in prioritizing non-commercial objectives. The draft excludes actions by local levels of government from challenges by foreign investors. The Model BIT requires signatories regularly to consult and review the treaty's effectiveness, interpret and implement treaty clauses and provide written consent for renewal.

While the 2015 Model BIT includes an investor-state dispute-resolution clause, it departs from traditional treaties:

- Reflecting a global trend, India's Model BIT mandates greater transparency in tribunal constitution, claims, proceedings, and awards.
- The Model BIT also provides more direction to arbitration tribunals and places restrictions on their discretion when interpreting the Model's substantive obligations. For instance, while the Model provides that foreign investors are to be accorded no less favorable treatment than is accorded in like circumstances to domestic investors, the factors used by the host country in establishing whether foreign and domestic investors are "in like circumstances" are to be given substantial deference.

Remarkably, the Model BIT excludes the most-favored-nation and the fair-and-equitable-treatment clauses. Included, however, is a "denial of benefits" clause, a relatively new article to Indian practice meant to counter treaty-shopping.

Some changes in the Model BIT build on existing traditions in international law. For instance, counterclaims by the state build on provisions already offered by the International Centre for Settlement of Investment Disputes (e.g., Article 46) and UNCITRAL (e.g., Article 21) rules and prior practice.[1] Other aspects reflect effective management practice. Adopting strategies to win stakeholder approval and operating with developmental and social goals can result in significant financial returns for investors. However, including such provisions in a BIT could be challenging in practice, given the difficulty of articulating these concepts in treaty language.

Two other concerns remain. The investor-state arbitration mechanism appears biased against small and medium-size investors.[2] The additional burden of exhausting local remedies can deter such firms from pursuing arbitration. Further, treaty clauses that restrict tribunals (e.g., Article 5.5. which prevents them from determining whether an expropriation measure was, in fact, taken for a public purpose or in compliance with host country law) severely curtail the usefulness of investment arbitration.

Given that the model treaty deviates in major ways from the positions of other countries (including the United States with whom a treaty is currently under negotiation), the extent to which any future treaty will reflect these changes in India's position is debatable.

Nonetheless, India would be well-advised to consider balancing provisions for investor protection, transparency and predictability through more narrowly tailored clarifications and procedures, while retaining the ability to regulate in the public interest and defeat frivolous claims.

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[1] *See* Jean E. Kalicki, "Counterclaims by states in investment arbitration", *Investment Treaty News*, January 14, 2013, available at https://www.iisd.org/itn/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/; Stephen M. Schwebel, "In defense of bilateral investment treaties", *Columbia FDI Perspectives*, No. 135, November 24, 2014.

[2] Srividya Jandhyala and Robert J. Weiner, "*Institutions sans frontières*: International agreements and foreign investment", *Journal of International Business Studies*, vol. 45 (2014), pp. 649-669.

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