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EVOLUTION OF THE INTERNATIONAL INVESTMENT LAW AND
THE INDIAN PERSPECTIVE ON BIT

(By Khushi Aswal)

ABSTRACT
“The International Investment Law predominantly deals with the Laws surrounding Bi-
Lateral Investment Treaties (BIT) which are signed between the Host State and the Investors.
Historically, before BITs were conceived of foreign investments were protected by customary
international law. The evolution of the International Investment Law can be said to be
coterminous with the expansion of international trade and investment from Europe to other
continents. Investment Law generally works on BIT signed, which could be traced back to the
medieval period, when, Britain encouraged China for the opium trade, which were unequal
treaties. These investment laws have evolved during the colonial era and more rapidly after
the World War-II. India’s inclination towards the BIT and Investment law began in the 1990s
when the country decided to open the economy to the world at large for the promotion of
trade and commerce and significantly in India there was an increase in the number of BITs
signed by them. The law aims at protecting the investors and making it obligatory on the
capital-importing States to facilitate trade and investment. The international Investment Law
was encouraged across the globe, through various approaches such as Gun- Boat
Diplomacy, the Calvo Doctrine Most Favored Nations and the debate between National
Treatment and International Minimum Standard with many other principles. Also, the United
Nations Conference on Trade and Development (UNCTAD) dealing with trade, investment
and development was established in 1964. International Centre for the Settlement of
International Disputes (ICSID) was set up in 1965, keeping in view contract-based
arbitration. However, presently it deals mostly with the disputes arising from the violation of
BITs. India started participating in bilateral treaties post 1990’s. Further the position of Bi-
Lateral Investment Treaties posts 2005 would be discussed in this paper from the Indian a
perspective along with relevant case laws such as the White Industries Case”.

Keywords: International Investment Law, Bi-Lateral Investment Treaties, Friendship
INTRODUCTION

The research paper deals with the concept of the International Investment Law and how did the evolution in the principles of Investment Law throughout the world has impacted India in the formation of its Investment Policy and the BIT which were framed in 2016. The Investment Law or the Law of Investment from different perspective and various concepts of International Investment Law such as the BITs, Gun- Boat Diplomacy, Calvo Doctrine and many other concepts in detail. International investment law governs foreign direct investment and the resolution of disputes between foreign investors and Sovereign States. Investment law may be either international law on foreign investment or national law. This would be further discussed in depth in the research paper. In order to determine the applicability of the investment law, some of the basics of commercial law, public law and other relevant laws in this context would be discussed in brief.

Commercial law developed through practice by merchants and the State ‘received’ it into a legal system\(^1\). In the current times, it has been observed that the developing countries such as India are facing more stringent State regulation in order to save themselves from the liability and with the creation of public utilities owned by the State have led to the intrusion of public law into the realm of commerce. The State tries to escape the liability occurred from the investor by signing the BIT (Bi-lateral Investment Treaty), the first BIT was signed between Pakistan and Germany in the year 1959. Public law is a body of law dealing with the relations between individuals and the government. Investors are individuals and the government regulate investment. Therefore, law of investment is a public law. The primary domain of Investment Law is to determine the relationship of the investment and investor and the role of the Host State in the investment.

The Investment Law also defines important terms like investment and investor. International investment agreements are international investment law that define these terms. National laws also devote certain provisions to define investment and investor.\(^2\) In so doing, the investment law regulates investment. For example, many international agreements define investment as something established according to the laws of the Host country.\(^3\) The Host State are been defined in the research paper. The main purpose of such definition is to ensure that investment has been properly registered and licensed in accordance with the laws of the Host

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\(^1\) See D Pelsch, ‘Companies Want Power without Responsibility’, Financial Times, 24 August 2004, 17


\(^3\) UNCTAD, International Investment Agreements: Volume 1(2004), P.122
country. As we have discussed earlier, investment law classifies investment in to various categories, such as foreign direct investment, portfolio investment, domestic investment etc. The paper also gives a glimpse of the BITs, the Indian BITs to be specific post 2005 along with case laws.

Also, the research paper discusses the formation of Indian Model of BIT on the grounds of the principles of investment law and how the Indian Model of BIT needs to bring a reform in the clauses that they have formed because the Indian Model of BIT is based on the protectionist approach which infers the Indian Model of BIT is focused on protecting India from the investor and is trying to escape any form of liability for which the investor may sue the Host State.

**INTERNATIONAL INVESTMENT LAW- A GENERAL OVERVIEW**

The International Investment Law is an emerging concept all over the world, as due to the advent of globalization countries are trying to dive into the world with the purpose of the expansion of the trade and commerce. The role and significance of foreign investment is expanding, this could be seen as there were two waves in order to study the emergence of investment law. The first wave began from the 1870–1914 in which the international financial mobility led to immense growth in foreign investment. However, new international rules on telecommunication and transport facility influenced the first wave which dealt with the changing dynamics between national economies. But this first internationalized economy was halted in 1914 (World War-I) by the subsequent troubled economic relations in the 1920s following the World War-II.

After 1945, with the end of World War-II, the rate of the growth of foreign investment declined as it was the period of reconstruction. It came to its peak in the 1990s when a foreign investment quadrupled in the 1990s-2000 which was spurred by the technological innovations and reduced cost of transportation. Due to these changes, the rate of foreign investment again took a turn and it was seen that there was an increase in the number of signing of BITs. Interestingly, it was observed that during this era 80% of the foreign investment in developing countries went to only a dozen States, especially in Asia, whereas, a downfall was seen in the African continent. Post 2005, the worldwide total inflow of foreign direct investment rose to an historical peak of 916 billion US$ and the number of signed investment protection treaties were up to 2500.
VARIOUS CONCEPTS WHICH HELPED IN THE EMERGENCE OF INVESTMENT LAW IN THE INTERNATIONAL PLATFORM

National Treatment Versus International Minimum Standard

In the 18th -19th century was an era when decolonization happened, countries governed by the Crown Sovereign began to attain independence they started to challenge the concept that foreigners residing and doing business in those countries could not be governed by the law enacted by the local population. Gradually, the doctrine of Sovereignty and Sovereign equality was accepted by the citizens which asserted that every Sovereign State had the right to expropriate or nationalize foreign assets provided that the foreign investor was provided with compensation. It has been contended that the very notion of Sovereignty meant that foreigners residing within the national borders of the country were subject to the law of the land.

It has been observed that Article 9 of the Convention on the Rights and Duties of States, one of the first international instruments to support the idea of national treatment, signed at the Seventh Pan-American Conference, provided that:

The jurisdiction of States within the limits of national territory applies to all the inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.4

Gun-Boat Diplomacy

In the 19th century, the power-conferring individuals and organizations were seen influencing the government to send a small contingent of warships to moor off the coast of the Host States until reparation was forthcoming. This was practiced frequently by the major trading nations of Europe. Some of the instances such as in 1902 the governments of Great Britain, Germany and Italy sent warships to the Venezuelan coast to demand reparation for the losses incurred by their nationals by Venezuela defaulting on its Sovereign debt. However, the provision for the settlement of international disputes between States by peaceful means by the Second International Peace Conference of The Hague in 1907, which adopted the Convention

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4 The Convention on the Rights and Duties of States (Montevideo Convention, 1933), text in (1976) 70 AJIL 445
on the Peaceful Resolution of International Disputes, opened the possibility of State-to-State arbitration on investment disputes.⁵

**The Calvo Doctrine**

This doctrine was introduced for those who opposed the law of investor’s countries as they exploited them on the grounds of international minimum standards were of the view that no State should be required to offer more protection to foreign investors than that accorded to its own nationals. There had to be equality of treatment.

The central element of the Calvo doctrine was to require aliens to submit disputes arising in a country to that country’s courts. In other words, it is about requiring foreign companies or other foreign investors to exhaust local remedies prior to resorting to international arbitration or international adjudication. According to Verwey and Schrijver, the Calvo doctrine basically stipulates that the principle of territorial Sovereignty of the State entails:

(a) the principle of absolute equality before the law between nationals and foreigners;

(b) the exclusive subjection of foreigners and their property to the laws and juridical regimes of the State in which they reside or invest, and

(c) strict abstention from interference by other governments, notably the governments of the States of which the foreigners are nationals, in disputes arising over the treatment of foreigners or their property (abstention from diplomatic protection).⁶

**Bi-Lateral Investment Treaty (BIT)**

Bi-Lateral Treaty or BIT is one of the major components to promote the investment law worldwide. Generally, it has been viewed that foreign investment plays a major role in the economic growth of a country and it is a major source of revenue for foreign currency income. Foreign investment takes place in different forms, including through committing capital resources abroad either directly or through portfolio investment and by licensing the use of technology, etc. Because of the form such investment takes, it requires special protection under the law of the country concerned.⁷ In BIT, the commitment to the Host State

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⁷ International Investment Law Reconciling Policy and Principle by Surya P Subedi
is long term, and hence there is a need for long-term protection under special laws. Such protection has traditionally been sought under international law and more recently under BITs. Unlike local laws on foreign investment, which can also offer adequate protection and incentives to foreign investors but are liable to change with a change of government, no State can unilaterally change international law or the provisions of BITs. The duration of these treaties depends on the terms of the investor and the Host State, but generally such treaties are formed for ten to twenty years. The formal safeguards and guarantees that BITs provide for non-commercial risks have acted as an incentive to potential investors and as a useful reassurance to those with existing investments in the signatory States. Therefore, when it comes to promoting foreign investment, States have sought additional safeguards and guarantees under international law and BITs, which are designed to set standards of protection. Although any protection provided for foreign investment is always under the law of the Host country, this law has to conform to the commitments undertaken by the State concerned either under BITs, FTAs or other principles of international law.

In order to determine that a BIT is signed between the investor and Host State, the basic characteristics of such treaties are more or less the same. The BIT is designed to regulate some of the substantive areas mentioned below:

(i) Definition of investment and investor;
(ii) Admission of foreign investors;
(iii) Fair and Equitable treatment of investors;
(iv) Compensation in the event of expropriation; and
(v) Methods of settling disputes.

Despite that there is a designated criterion is given to establish a BIT in some of the substantive area. Most BITs are designed to extend fair and equitable treatment, full protection and security, and MFN and national treatment to investors. BITs are intended to protect such investment from expropriation without compensation and against any mistreatment and to provide a legal remedy, generally through international arbitration not only between States but also between an investor and the Host State, against any violations of the provisions of the BIT concerned. Some of the more recent BITs impose a ban on performance requirements and on restrictions on the expatriation of profits and investments, etc.

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BITs are premised on the assumption that they promote investment from investor countries to investor-receiving countries. This is the basis on which both the World Bank and IMF have encouraged various developing countries to conclude BITs with developed countries. The objective is not only to outline a set of standards of protection available to foreign investors but also to provide for international investor–State arbitration as a substantive incentive and protection for foreign investors. However, there is no conclusive evidence to suggest that the conclusion of a BIT between a developed country and developing country has necessarily increased substantially the flow of investment from the former to the latter.⁹

**INDIAN PERSPECTIVE ON BIT**

India had started validating BITs from the 1990s which was also known as the second wave of International Investment Law. It has been observed from the Indian Perspective that the signing of the BITs was a part of the economic liberalization as India was facing an economic crisis in the 1990s which led them to the opening of the economy by introducing the LPG (Liberalization, Privatization and Globalization). The first BIT signed by India was in the year of 1994 with the United Kingdom. Though the Indian Model of BIT attempted to involve a number of countries but it failed to attract many investors towards the BIT. It has been observed that in the period till 2011, there were nine BIT cases which were brought against India they all pertained to just one project – the Dabhol power project, and none of these challenges resulted in an ISDS award though there were a couple of other arbitral awards.

Currently, India is the fastest growing economy in the world. At USD 2.6 trillion, currently we are the sixth largest economy of the World and shortly aim to be the fifth largest economy i.e. ahead of U.K. In order to become a world economic power, we need to have pragmatic approach towards investment laws. Framing of our BIT should be guided by a balanced approach keeping in view the various developments in the contemporary world. In order to have a rightful place in world order, we should frame our BIT in such manner that it turns out to be a win-win situation for both sides. The lack of critical attention to BITs is evident from

⁹ Mann and von Moltke assert that there is ‘no recognizable relationship between IIAs [international investment agreements] and investment flows. Some countries that are party to no IIAs receive significant international investment and many countries that that are party to numerous IIAs receive almost none.’ H Mann and K von Moltke, A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States (Winnipeg, International Institute for Sustainable Development, 2005) 4.
the following facts: barring some occasions, Indian Parliament rarely debated BITs\(^\text{10}\); there was dearth of academic literature on Indian BITs during this period; and Indian BITs during this period\(^\text{11}\) were hardly debated in academic and policy circles within India\(^\text{12}\).

Many renowned scholars and academicians have suggested that India should re-visit its BIT clauses in order to escape the lacunas. The Indian Model of BIT came into limelight with the case of White Industries. The White Industries award was criticized in the Parliament as ‘an attack on the Sovereignty of the Indian Judiciary.’\(^\text{13}\) ‘Similarly, civil society organizations, in the aftermath of White Industries case and ITA notices against India, are now demanding a review of India’s existing BIT treaty, arguing that the threat of BIT arbitrations ‘will have a chilling effect on the ability of different ministries (of the Indian government) to regulate different social and economic needs.’\(^\text{14}\)

The White Industries award, a spate of ISDS notices coupled with other developments mentioned above resulted in a fundamental rethink in India on BITs and paved the way for the review of BITs which began in 2012.\(^\text{15}\) This review process led to two important public admissions being made by the Indian government. First, Indian government admitted, as also evident from the Commerce Ministry paper discussed above, that Indian BITs were not well-drafted because they contained broad and vague provisions that could be subjected to wide

\(^{10}\) One such occasion was when P.K. Javadekar, Member of Parliament in Rajya Sabha (Upper House of the Parliament in India), asked the government to explain why India has entered into BITs – see Rajya Sabha, List of Questions for written answers to be asked at a sitting of the Rajya Sabha to be held on Tuesday, April 20, 2010, Unstarred Question No. 2615, asked by Shri Prakash Javadekar, http://164.100.47.5/EDAILYQUESTIONS/sessionno/219/1552RS.pdf.

\(^{11}\) Some notable exceptions to this are - Sreenivas Rao, Bilateral Investment Promotion Agreements: A Legal Framework for the Protection of Foreign Investments 26 COMMONWEALTH L. BULL. 623 (2000); KRISHAN, India and International Investment Law, supra note 5; Prabhash Ranjan, International Investment Agreements and Regulatory Discretion: Case Study of India, 9 J. WORLD INV. & TRADE 209 (2008) [hereinafter Ranjan, Regulatory Discretion-Case Study of India]

\(^{12}\) Ranjan, PhD Thesis, supra note 52. Similar arguments have also been made in context of China. It has been argued that while China has changed many of its laws due to WTO obligations, the Chinese BITs have not received equal attention – G. Wang, China’s Practice in International Investment Law: From Participation to Leadership in World Economy, 34 YALE J. INT’L L. 575, 585-586 (2009)

\(^{13}\) Forum against FDAs, We Call Upon the Government to Review and Rescind Its Decision to Sign BIT/ BIPA With the USA - Open letter to the Indian Prime Minister, Dr Manhoman Singh (Sept. 26, 2013), http://www.bilaterals.org/IMG/pdf/letter_forum_ag_ftas_us_india_bits_26_sept.pdf.


interpretations by ISDS tribunals. India’s 2014 Statement during UNCTAD’S World Investment Forum, specifically mentioned that the FET and MFN provisions in Indian BITs are vague. Specifically, India said that MFN ‘has been expanded to include rights beyond what is granted by a treaty’. India’s concern about the broad interpretation of MFN provisions stems directly from the White Industries case.

The review process launched in 2012 led to three outcomes:

First, the adoption of the Model BIT on 14 January 2016. This adoption was preceded by the circulation of the draft version of the Model BIT in March 2015, for comments. The draft Model BIT attracted considerable attention including a full report from the Law Commission of India.

Second, subsequent to the adoption of the 2016 Model BIT, India issued notices of BIT termination to 58 countries as mentioned before. The reason behind terminating these treaties is to negotiate new BITs based on the 2016 Model BIT.

Third, India has requested 25 of its BIT partner countries to issue joint interpretative Statements in order to resolve, what India describes as ‘uncertainties and ambiguities that may arise regarding interpretation and application of the standards contained’ in India’s

16 Department of Economic Affairs, GoI, The Indian Experience, supra note 35; SAURABH GARG ET AL., Continuity and Change, supra note 35, at 76-77. The first author of this article has consistently argued that Indian BITs contain broad and vague provisions that could be subject to very different interpretations depending on the discretion exercised by ITA tribunals; see Ranjan, PhD Thesis, supra note 52; Ranjan, Changing Landscape, supra note 52. Also, see Henckels, Protecting Regulatory Autonomy supra note 27, who argues that ‘international investment treaties…typically contain broadly worded, open-textured obligations that do not address the relationship between investment protection and the continuing powers of Host States to regulate. These provisions give investment tribunals significant discretion in interpreting State’s obligations towards foreign investors and investments.

17 India 2014 Statement, supra note 15
18 India 2014 Statement, supra note 15
BITs.\textsuperscript{25} If these joint interpretative Statements are finalized, India expects that they would become an important element in the process of treaty interpretation.

\textbf{CONCLUSION}

The research paper deals with the evolution of international investment law and how did this evolution affect India and contemporary Indian BIT. The International Investment Law predominantly dates back in history to the 18\textsuperscript{th}-19\textsuperscript{th} century, which was also peak of decolonization, when Countries governed by the Crown Sovereign began to attain independence and they started to challenge the concept that foreigners residing and doing business in those countries could not be governed by the law enacted by the local population. Also, this doctrine of Sovereignty and Sovereign equality was accepted by the citizens which asserted that every Sovereign State had the right to expropriate or nationalize foreign assets provided that the foreign investor was provided with compensation which is one of the standard criteria for the National Treatment. Later the concept of BIT has been explained and how these concepts such as the Gun-Boat Diplomacy, Calvo Doctrine and the debate between National Treatment and International Minimum Standard which helped India and the World at large to form their BIT. But the main focus of the paper is the Indian Model of BIT and how it was formed. The history of Indian Model of BIT can be dated back to the 1990s which was a crucial time for India when they opened their economy to the world through LPG (Liberalization, Privatization and Globalization), when India signed its first BIT with United Kingdom in 1994 and further went on to sign more. But after few prominent cases such as the White Industries case, the Indian Model of BIT was required to change drastically, which it did and then became a protectionist Model, which ensured that the Host State i.e., India should be protected from the investor. Due to our protectionist attitude towards the BIT, it is observed that in the present time Vietnam is the only single country which is signatory to the Indian Model of BIT. Though if we observe the Indian Model of BIT, it could be understood that the Indian Model is based on protectionist approach which ensures that the State i.e., India should be protected from the investors. But if we critically analyze this approach then this approach is not viable and thus is hampering the growth and development of the country. In the contemporary world, where the technology, trade, commerce is moving at a fast pace, where people are focusing on the advancement of the

world, if the potential developing countries like India which has the scope of becoming the third largest economy of the world by 2030. If our country would have such a protectionist approach it would prove to be treacherous. As this approach on which the Indian Model of BIT formed would drive away potential investors from the country, which can also result in the decreasing rate of investment in the near future. If we analyze the concept of BIT from the world’s perspective, it has been seen that African Union has one of the best BIT Model all-over the world as they have made an effort to protect both the investor and the Host State from each other and both are given rights through which they can take action against each other in case of any liability incurred by both of them. Generally, BITs should be formed in order to ensure that the treaty should be profitable for both the investor and the Host State as it may help them to develop the trade and commerce as well as the economy of the country by increasing the investment and the profit gained by the investor. Currently, India is the fastest growing economy in the world. At USD 2.6 trillion, currently we are the sixth largest economy of the World and shortly aim to be the fifth largest economy i.e. ahead of U.K. In order to become a world economic power, we need to have pragmatic approach towards investment laws. Framing of our BIT should be guided by a balanced approach keeping in view the various developments in the contemporary world. In order to have a rightful place in world order, we should frame our BIT in such manner that it turns out to be a win situation for both sides.