



A UNIT OF
LAW LABORATORY

MAY 2022

Law Laboratory

Research Journal of Law & Socio-Economic Issues

ISSN: 2583-0783

VOLUME 1 | ISSUE 3

WWW.LAWLABJOURNAL.IN

BILATERAL INVESTMENT TREATY AND THE INDIAN JUDICIARY

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ABSTRACT

A bilateral investment treaty (BIT) are international agreements between two states establishing the terms and conditions for private investments by nationals and companies of one state in another state. BITs play a significant role in Foreign Direct Investment (FDI). BIT allows investors to sue the countries they invested in for claiming compensation of breach of BITs by arbitration instead of approaching local courts. Its intention was to provide investors with an amicable climate and treaty-based protection to foreign investors and their valuable investments. India signed its first BIT with the United Kingdom in 1994, with crystal clear objective of incentivizing and inviting foreign investment. FDI is seen as a major non-debt financial resource for developing countries. It is seen as one of the most essential factors in enhancing its economic development.

Keywords: Domestic Courts, Bilateral Investment Treaty, Foreign Direct Investment, Arbitration

INTRODUCTION

Bilateral Investment treaties can be termed as an agreement between any two countries for fulfilling the purpose of protection and promoting their investments in or by companies or by individuals in each other's territories. The first time a bilateral investment treaty was signed was in the year 1959 which was between the countries Pakistan and Germany. The aim of bringing up BIT was safeguarding and protecting the investments that was made between countries. The courts in India have restricted scope when it comes to dealing with Bilateral Investment Treaty (BIT) arbitrations. The first and foremost things which India needs to take care is that of the legal aspect.

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BILATERAL INVESTMENT TREATY & FREE TRADE AGREEMENTS

When two different nations have objective of safeguarding investments that are made by investors from either nation in the region of other are often Bilateral Investment Treaties i.e., BITs. India being one of the rapidly expanding economies all over the world set its foot into Bilateral Investment Treaties as well as Free Trade Agreements i.e., FTAs which holds portions on protection of investment. The first BIT that was entered into by India was with the United Kingdom (UK) in the year 1994. After this it has engaged in several BITs of around eighty-six in number out of which seventy-three are currently operative in nature. Out of the seventy-three operative Bilateral Investment Treaties, sixty-nine are self-standing investment treaties. Considering the case of the other four nations i.e., Singapore, Malaysia, Korea and Japan, the part of Free Trade Agreements is investment protection. Besides investment protection, all these FTAs also cover investment liberalization, trade liberalization (goods and services), trade facilitation, rules of origin, competition policy, and intellectual property rights.

ITA and INDIAN JUDICIARY-

Recently India attracted a lot of attention by being slapped by foreign investors with ITA notices. In the year 2010, in case of *White Industries v. India*², India lost the case to Australia investor under the India Australia Bilateral Investment Treaty. Disturbed by constant ITA notices due to losing of the case, India has set down all the occurring BIT negotiations on halt. These notices have provoked in the Government of India on the interrelation between Indian Judiciary and Indian Bilateral International Treaties. The top law officer of the country i.e., the attorney general of that period made a statement that foreign tele communication companies like Telenor as well as Sistema are unable to assert damages or compensation from the Government of India under several Bilateral Investment Treaties for the losses emerging from the orders of the highest court since commands of court do not account for any cause of act against the Government of India. He also said that claiming for the damages caused by the foreign investors on the basis of complete misunderstanding of the provisions of constitution that prevails all over India that acknowledges separation of powers between the executive, judiciary and the legislature. Following to such notices several functionaries of the Indian state have shown their distress with regard to the interrelation between Bilateral Investment Treaties and Indian judiciary. Taking an

² *White Industries Australia Ltd vs. India*, IIC 529 (2011)

example, the then Finance Minister of India made a statement that, India's highest court could not be subjected to the jurisdiction of foreign tribunals.³

It was held by the ITA tribunal that delay in judicial proceedings by Indian courts in implementing an international commercial arbitration award has created violation of the India-Australia Bilateral Investment Treaty. It was stated by a member of the Indian Parliament that the award relating to White Industries "is an attack on the sovereignty of the Indian Judiciary."

Courts in our nation have counted on Article 51 of the Constitution of India in introducing as well as implementing several international treaties.⁴ Taking account of this provision the Supreme Court, in the case of *Shukla v. Delhi Admin.*, held that the international law is binding and it performs as piece of Indian law as long as it is consistent with the law.⁵

WHITE INDUSTRIES AUSTRALIA LIMITED V. REPUBLIC OF INDIA⁶

India missed a case relating to BIT conflict to a company relating to Australia in the year 2011. The company had acquired an arbitral award, following the arbitration rules of the International Chamber of Commerce i.e., ICC, in its benefit in a contractual clash with Coal India which is an Indian public sector company and sought implementation of the award before the High Court of Delhi in India. Along with this the Coal India had also approached the High Court of Calcutta to put away the award and this demand was granted by the Hon'ble Court. The White Industries had appealed before the Supreme Court in the year 2004 and after around seven years of the appeal being pending, they started a Bilateral Investment Treaty arbitration against India under the India-Australia BIT in the year 2010.⁷ Among other things they claimed that the delay in proceedings that was done by the Indian courts in implementation of the ICC award resulted in violation of the just and impartial treatment level on account of two aspects, the first being denial of justice and the second is the infringement of White Industries lawful presumption that India

³ Investment Pacts Can't Be Subject to Foreign jurisdictions: Chidambaram, TIMES INDIA (Apr. 16, 2013, 2:11 PM), <http://timesofindia.indiatimes.com/business/international-business/Investment-pacts-cant-be-subject-to-foreign-jurisdictions-Chidambaram/articleshow/19576234.cms>

⁴ INDIA CONST. art. 51, amended by The Constitution (Eightieth Amendment) Act, 2000

⁵ *Shukla v. Delhi Admin.*, (1980) 3 S.C.C. 526, 532 (India)

⁶ *White Industries Australia Ltd v India*, IIC 529 (2011)

⁷ Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, INVESTMENT TREATY NEWS, Apr. 2012, at 13; see also Manu Sanan, *The White Industries Award-Shades of Grey*, 13 J. WORLD INVESTMENT & TRADE 661, 673-74 (2012)

would stick to the New York Convention's standards while enforcing the awards for foreign countries. The tribunal, after conducting proper examination prior to the investment arbitration jurisprudence came to a conclusion that the ICC award acted as a crystallization of the rights of White Industries as per a contract and therefore they can be indicated as a portion of White Industries original "investment" in India. Following this, the tribunal then set aside the White Industries' claim of a "legitimate expectation" regarding the Indian courts not taking into account an application to put away a foreign award and noted that taking into account an application to put away an award belonging to foreign country was of streamlined nature in the legal system of India about which the White Industries should have been conscious. Along with this the tribunal declined the White Industries' contention of expropriation and noted that the award was not yet been taken or set aside.

RISK MINIMIZATION OF JUDICIAL REVIEW

Talking about India's position about BIT assertions as opposed to India due to the measures taken by the Judiciary and in context of the BIT rules on "denial of justice" and the operation of the other BIT standards to inspect the judicial conduct we can go through the possibility of minimizing the dispute between the BITs and the Indian judiciary. Then it talks about three different measures, firstly, particular treaty language that excludes the judicial conduct from the chances of review by the ITA tribunals, secondly, treaty language pointing that the substantive obligations that comes under the treaty doesn't extend to the judicial conduct, and thirdly, the language of the treaty imposing a requirement of the exhaustion of local remedies. It is of serious concern to differentiate between the rights that are entitled to a foreign under international law and those to which he is entitled under the Bilateral Investment Treaty.

CONCLUSION

In ITA case of India, it was clearly seen that how the Bilateral Investment Treaty's assertions have been put as opposed to India due to the activity and operating methods of the Indian judiciary. And in the case of White Industries v. India, such assertion was even successful. Such claims are made not only on the factors of denial of justice that needs a higher approach while proving a BIT violation but also by adhering to various other BIT standards such as expropriation and the "effective means" requirement. The scope of evaluating of the domestic

judicial conduct is doubtful as it is dependent on arbitral discretion. Therefore, in this light, it can be concluded that the foreign telecommunication companies can definitely come up with a BIT conflict against India for the cancelling of the telecommunication licenses although these licenses have been cancelled by both the executive as well as the judiciary. Whether the foreign companies are going to thrive in making such BIT claims is a totally different topic altogether. If at any time India wishes to enforce or implement such change in the near future Bilateral Investment Treaties, it can easily use the tool of international law by meticulously compromising and negotiating in the drafting of its BITs toward this end. Now such an opportunity is accessible to in its current occurring review of BITs.⁸

⁸ Rajeev Sharma, Russia Asks India to Amend Bilateral Investment Pact, Russ. & INDIA REP. (May 20, 2013), http://indrus.in/economics/2013/05/20/russia-asksindiato_amendbi_lateral_investmentpact25159.html