Bilateral Investment Protection Agreements in India: An Analysis

Abstract

As part of the Economic Reforms Programme initiated in 1991 in India, the foreign investment policy of the Government was liberalized and negotiations were undertaken with a number of countries to enter into Bilateral Investment Promotion and Protection Agreements [BIPAs]. The objective of the BIPA is to promote and protect the interests of investors on a reciprocal basis. As on March 2015, the Government of India had signed BIPAs with 83 countries of which 72 BIPAs have come into force. The BIPAs were expected to encourage Foreign Investment into Developing Countries in return for the guarantee of standards of treatment that they provide.

The right of Investor-State Dispute Settlement (ISDS) under the BIPA provides for an *ad hoc* international arbitration forum to cause the State hosting the investment (the Host State) to compensate the aggrieved foreign Investor for any breach of treatment standards under the BIPA, in accordance with the decision of the arbitration tribunal. The ISDS mechanism is being used extensively by international business and legal firms to the extreme discomfiture of the Host States since the late 1990s. This is because the interpretation of BIPA language by the international arbitration tribunals has, in a majority of known cases, resulted in a BIPA turning out to be a comprehensive insurance against any kind of economic/business failure. Such tribunal awards have changed the international and national context of investment decisions and squeezed sovereign policy space.

This study delineates the BIPA legal framework and the current international context. The economic impact on the investment decision of the domestic firm when foreign investors and investments are provided protection under BIPAs, in the changed international ISDS scenario, is analysed in this study using simple microeconomic theory. The study brings out how BIPAs could reduce global economic efficiency by condoning higher costs, promoting inefficient market structures and promoting IPR/brand based foreign investments and other forms of flight money investment. BIPAs also have inadvertently bred the moral hazard of feigned business failures ever since ISDS started yielding damages in billions of US Dollars. Finally, the preliminary empirical analysis on

Indian Foreign Direct Investment (FDI) data using T-tests, did not support the hypothesis that FDI inflow into India from BIPA partner countries increased consequent to the ratification of the BIPAs. Thus, Developing Countries, particularly India could consider reassessing their BIPA policies. A draft Model BIPA text which addresses all the extant legitimate concerns of sovereign states, is also provided.

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