

Interpretation of India's Investment Treaties with Foreign Countries

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Abstract :- Interpretation of bilateral investment treaties (BITs) poses unique challenges since one cannot rely on domestic case-law for interpreting treaties. The paper begins with understanding the Ground Rules as laid by Vienna Convention. It also examines the problems that typically arise in interpretation of BITs and sources of support for the exercise of interpretation. At the end the paper looks at India's BITs and special conditions that have developed post-2015 with India terminating all old BITs, signing Joint Interpretative Statements and executing new BITs based on an entirely new model.

Keywords :- Bilateral Investment Treaty, BIT, BIPA, Investment Treaties, India's Investment Treaty, India's Investment Treaties, Interpretation of Treaties, Interpretation of Investment Treaties, Vienna Convention on Law of Treaties, investor-state disputes, Joint Interpretive Agreements, International Investment Agreements, key terms in investment treaties

Introduction :- India executed eighty-three (83) Bilateral Investment Treaties (BITs) with different countries during 1995 to 2015. These BITs provided for a third country arbitration or Investor State Dispute Settlement (ISDS) in case of dispute between a foreign investor and the host state.

ISDS proceedings and awards are above all domestic judicial processes including Honourable Supreme Court of India. This means that for interpretation of BITs one cannot rely on judgements of High Courts and Supreme Court of India. The BITs have to be interpreted as treaties and as per international norms. This presents unique challenges especially for Indian lawyers who are used to treating the judgements of Honourable Supreme Court of India as God's words.

This research paper examines the General Rules for interpretation of international treaties based on Vienna Convention¹ also looks at other sources of basis for interpreting BITs as well as problems associated with interpretation of BITs. The paper also looks at the special conditions associated with India's BITs.

Methodology :- This research paper is based on doctrinal research on the subject of rules of interpretation of India's investment treaties. Since treaties between two or more countries cannot be interpreted on the basis of domestic laws, the first step is to understand the framework laid by Vienna Convention². After studying the ground rules, the researcher looks at the problems encountered in interpretation of bilateral investment treaties and the aids to interpretation in case of investment treaties. The researcher also looks at BITs executed by India during 1995-2015 and also post-2015.

Interpretation of Treaties – General Rules :- Interpretation of any treaty is different from interpretation of domestic laws. In case of domestic laws, domestic courts interpret laws and the interpretation by the highest court of the country has the force of law. Interpretations by domestic courts have no relevance in case of treaties. Indian lawyers, who are used to referring to judgments of the Supreme Court of India as the final word on all matters regarding interpretation of laws, find themselves at sea when interpreting bilateral and multilateral treaties since judgements of Supreme Court and High Courts of India cannot be referred to.

The first and foremost guide for interpretation of treaties is Vienna Convention on

¹ Rules International: Vienna Convention, 1969

² Ibid.

Law of Treaties (VCLT)³. Article 27 of VCLT clearly excludes application of internal law of a state for the purpose of interpretation of treaties. Article 27 reads as follows:

Article 27

Internal law and observance of treaties :- A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Having excluded the provisions of internal law, VCLT lays down the general rules of interpretation of treaties vide Article 31 which reads as follows:

Article 31

General rule of interpretation :-

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - a. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - b. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Reading the above article, one can understand that the following are relevant aids for interpretation of treaties:

- a) Ordinary meaning of the terms
- b) Context of the treaty
- c) Objects and purpose of the treaty as given in the treaty or as given in common declaration signed by both parties to the treaty
- d) Preamble and annexes to a treaty
- e) Any subsequent agreement or instrument related to the treaty executed by the parties to the treaty
- f) Any subsequent agreement executed by the parties relating to interpretation of the treaty
- g) Any subsequent practice adopted by the parties which establishes that the parties agree to a certain interpretation
- h) Any relevant rule of international law applicable to relations between the parties to the treaty
- i) A special meaning given to a term of the treaty if it is established that the parties intended for the said meaning of the specific term.

Interpretation of Investment Treaties :- The parameters mentioned in the previous section clearly indicate that the interpretation of a treaty has to be done as per the understanding and intention of the parties to the treaty. However, this poses a problem when dealing with investment treaties. Issues of interpretation often arise in investor-state-disputes. In such cases, while the party to the treaty is the state which on one hand is supplying interpretation of terms of the treaty and on the other hand is the respondent facing a claim from the investor. Anthea Roberts sums up this problem beautifully as follows:

A key problem in the investment treaty field is that the balance of power between treaty parties and tribunals concerning the authority to interpret investment treaties is askew. In theory, treaty parties are supreme when creating the law and tribunals are supreme when applying it in particular cases. In practice, this separation is never complete. How treaty parties interpret and apply the law affects what tribunals decide in particular cases. And tribunal awards in particular

³ Ibid.

cases informally contribute to the interpretation, and thus the creation, of the law. As a result, some interpretive balance exists between treaty parties and tribunals, though neither enjoys ultimate interpretive authority in all circumstances.

As investment treaties create broad standards rather than specific rules, they must be interpreted before they can be applied. Investor-state tribunals have accordingly played a critical role in interpreting, hence developing, investment treaty law. Yet their jurisprudence frequently resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular. This disconnect alienates treaty parties from the interpretive process, which increases prospects for dissonance between states and tribunals about interpretation and adds fuel to the growing fire about the legitimacy of investment treaty arbitration.

The Vienna Convention on the Law of Treaties (Vienna Convention) provides that the treaty parties' subsequent agreements and practice shall be taken into account in interpretation, recognizing the significant and ongoing role of the parties in interpreting their treaties. Yet investor-state tribunals have tended to shun this interpretive approach, apparently because of concerns about ensuring the equality of arms between claimant investors and respondent states and protecting against the adoption by states of self-interested interpretations.⁴

While acknowledging the difficulties of interpretation in case of investment treaties, Anthea Roberts argues for the states to play a more pro-active role by setting up mechanisms for interpretation of the treaties and also, if need be, to provide mutually agreed interpretations of various terms used in the investment treaty. The argument for Joint Interpretive Agreements has found support in the working paper prepared by David Gaukrodger and published by OECD. Relevant extract from conclusion of the working paper is as follows:

With an increasing number of investment treaties covering relationships where governments have more complex and more overlapping interests, joint interpretive agreements are likely to be an increasingly important tool for ensuring that treaties are interpreted in accordance with the treaty parties' intent and achieve their purposes.

Where governments have not set out an express regime for joint interpretive agreements in their investment treaty, such agreements are governed by more general principles of international law. An understanding of these principles and their application to the specific characteristics of investment treaties should help governments to use joint agreements effectively where they are appropriate. In some cases, governments may wish to consider explicitly addressing the temporal application of binding interpretations that would otherwise apply retroactively.⁵

One can conclude by saying that the treaty states as well as ISDS tribunals both interpret provisions of investment agreements. The position was also confirmed in a working paper prepared by the Secretariat of UN General Assembly which states as follows:

13. Although treaty Parties and ISDS tribunals play different roles in the interpretation of investment treaties, they share interpretive authority. By introducing ISDS in investment treaties, treaty Parties have delegated the authority to ISDS tribunals to settle investor-State disputes by applying the relevant investment treaty provisions to a particular fact situation relating to a specific dispute.

14. Interpretation of treaty provisions by ISDS tribunals is necessary to delineate the scope of the rights and obligations of the disputing parties and thereby helps distinguish between those acts that constitute an interference with investors' rights and those that fall within a State's legitimate conduct. Lack of precise wording of many investment treaties amplifies the need for

⁴ Articles and Studies: Anthea Roberts, 2010

⁵ Working Papers: David Gaukrodger, International Investment, 2016

interpretation that allows these broadly worded provisions to be applied to specific fact situations.

15. While it remains the task of the arbitral tribunal to decide a case and interpret and apply an investment treaty to this end, the treaty Parties retain the power to clarify the meaning of a treaty through an authoritative interpretation. By virtue of general public international law, they can clarify their authentic intentions and issue authoritative statements on the interpretation of their treaties.¹⁶ The most widely used interpretative rules are found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). These rules establish the elements interpreters must take into account when giving meaning to treaty provisions.⁶

The above discussion about interpretation of terms used in investment treaties is intended to only highlight the problem involved in understanding meaning of key terms used in International Investment Agreements (IIAs).

India's Investment Treaties :- It is not surprising that each Bilateral Investment Treaty (BIT) signed by India defines the key terms that are relevant to investment treaties in general. Notably, almost each BIT executed by India has somewhat different definitions of the key terms.

Before trying to understand the key terms involved in investment treaties, it is worthwhile to remember that definitions of key terms are not objective truths defined by some globally accepted authority. The definitions keep changing in each BIT. In this context, the following extract from UNCTAD document related to key issues in investment agreements makes interesting reading:

Definitions serve many purposes. In international agreements, they raise difficult policy issues and are often the subject of hard bargaining between the negotiating parties. Accordingly, they should be seen not as objective formulations of the meaning of terms, but as part of an agreement's normative content, since they

determine the extent and the manner in which the other provisions are to be applied.⁷

BITs executed by India can be divided into two categories as follows:

- (a) BITs executed by India during 1995 to 2015
- (b) BITs executed by India after 2015

In the first category of BITs executed by India, the following key terms are generally defined:

- ❖ Investment
- ❖ Investor
- ❖ Expropriation
- ❖ Fair and Equitable Treatment (FET)
- ❖ Most Favored Nation (MFN)
- ❖ Investor State Dispute Settlement (ISDS)

Notably, the definitions of the above terms in BITs executed by India during 1995-2015 were largely in line with the generally accepted definitions across the world. Hence, one can rely on awards of investment arbitration tribunals in any part of the world to interpret the above terms with reference to the said BITs.

During the post-2015 period, India unilaterally terminated all the eighty-three BITs signed by India. There is controversy about India's right to unilaterally terminate a bilateral treaty. After termination, Joint Interpretative Statements (JISs) have been signed with two countries namely, Bangladesh and Colombia. In other words, the BITs with these two countries have been revived subject to the terms contained in the JISs. It is notable that the rules of interpretation given in the JISs are applicable only for these two BITs and cannot be used for other BITs. This presents a peculiar challenge for persons involved in studying the BITs.

Post 2015, India has signed BITs / Investment Agreements with Belarus, Kyrgyzstan, Taiwan and Brazil. These four BITs have a different structure compared to the previous generation of BITs executed by India. The principles propounded by various global investment arbitration tribunals cannot hence be applied for interpretation of these new BITs. Under these BITs the procedure for ISDS is extremely cumbersome. Hence, there have been no ISDS cases under these new BITs.

⁶ Working Papers: UN General Assembly, Possible reforms of ISDS, 2020

⁷ International Reports: UNCTAD, 2004 p. 115

This means that we have no guidance about interpretation of the new BITs as of now.

In the years to come, as the BITs evolve, the rules of interpretation of investment treaties will also need to develop and grow.

Conclusion :- Bilateral Investment Treaties have the force of law and hence must be interpreted as any other law. However, since one cannot rely on domestic case-law, one must first understand the Ground Rules as laid down by Vienna Convention. One must also be aware that in any investor-state dispute under a BIT, the state has a special position since it is a party to the BIT (investor is not) and can even act to modify the BIT. For interpretation of BITs, one can rely on the awards of various investment arbitration tribunals across the globe. This applies for all BITs executed by India during the period 1995-2015. However, this does not apply in case of new BITs executed by India post-2015 which are based on a very different model.

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