Measuring the Strength of Sustainability in India's New Model Bilateral Investment Treaty 2015: A Legal Discourse

Rashmi Patowary
Jindal Global Law School, O.P. Jindal Global University, Sonipat - Haryana, India

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Abstract: This research addresses the question; does the Indian Model Bilateral Investment Treaty (BIT) 2015 encourage parties to promote Sustainable Development (SD)? In other words, does the Model BIT 2015 integrate SD objectives into the investment rules to actively promote sustainable investments? Given the word constraints of the present work, the analysis has been made from the examination and review of selective substantive provisions, namely – the Preamble, Definition of Investment, Expropriation, Corporate Social Responsibility (CSR) and General Exceptions. This work is a step forward in understanding better how well the substantive dimension of India's Model BIT integrates SD objectives.

The work consists of five sections; each section is dedicated towards the analysis of one of the aforementioned provisions. The analysis of every single provision begins with a brief insight on the relevance of the provision toward the integration of SD objectives. Secondly, the analysis makes a comparative study of the provision under scrutiny in India's Final Model 2015 with India's Model BIT 2003 and India's Draft Model BIT 2015. The focus here is on the change in the language of the treaty text to reveal the intention of the drafters. The analysis also studies the comments made by the Law Commission in their Report No. 260 to see to what extent, their suggestions were incorporated in order to shed light on the intention of the legislators and thus, achieve clarity on the purpose of the provision under evaluation. The third and final stage of the analysis assesses the treaty text in the light of the contentious issues surrounding each of the provisions, which may be a prospective challenge in the integration of SD objectives. This involves attempts to estimate the efficacy of the treaty language at the backdrop of the trends set by tribunals and viewpoints of various scholars. This will help in understanding the potential of the provision in furthering SD objectives.

Keywords: Bilateral Investment Treaty; Corporate Social Responsibility; Expropriation; Investment; Sustainable Development.

Introduction

According to Arias (2001), "For far too long, many have believed economic interests and environmental interests to be *intrinsically opposed*" [1]. Rooted in this old-fashioned thought critiqued in the quote is one of the main challenges in International Investment Law (IIL) that scholars have identified. According to Segger and Kent (2011) this specialised regime remains shielded from broader issues concerning public interest such as environmental protection, social development and human rights. This is a challenge because consequent to this separation, any essential regulatory changes in these areas often face the risk of upsetting investors' interests and as these investors are often foreigners, investment treaties, thus, bringing states under the threat of heavy compensation claims (also known as regulatory chill). Factors such as power balances during negotiation processes between states/ stakeholders often cause these investment agreements to be imbalanced (pp. 771-792) [2]. Striving to undo this isolation of discipline is the new thought, which propounds that the main motive of IIL is the realisation of Sustainable Development (SD). Scholars like Federico Ortino (2017), have concluded that though investment protection has been the principal focus of the investment treaties, their chief (or underlying) purpose is the attainment of SD (p. 90) [3]. Furthermore; various global summits such as 1992 United Nations Conference on Environment and Development (Brazil); 2002 World Summit on Sustainable Development (South Africa) and others; have considered Foreign Direct

Investment (FDI) as one of the requisites for SD. This view has been fuelled from the acknowledgement that international investments have a prolific impact (positive as well as negative) on the societies and the environment of the host countries. Yet, many International Investment Agreements (also known as IIAs (a generic term in this work which includes Bilateral Investment Treaties (BITs), Regional Investment Treaties (RITs) and investment chapters in Free Trade Agreements (FTAs)) continue to exclude SD goals. An OECD survey (2014) shows that treaty language referring to SD concerns is rare; only, 12.1 % of the entire sample (only 252 out of 2107 IIAs) contains a reference to SD [4]. Though this frequency has progressively increased in recent years, it is not enough to complement the growing urgency of strengthening SD policies. Thus, it is incumbent that investment rules be drafted so as to support sustainable objectives. Scholars have already begun the work of shaping a more "sustainable investment law" by adopting an integrated approach wherein they recognize and reconcile that SD law and principles need to co-exist within the legal framework of IIL [5]. Following this balanced model, this work explores, analyses and evaluates the position of the newly drafted Model Bilateral Investment Treaty (BIT) of India in this *new generation of IIAs*, that strives or claims to strive to promote SD.

On 28 December 2015, India released its new Model BIT replacing the Model BIT 2003 to form the basis of India's negotiations with other countries for redrafting of existing BITs. This transition came in the wake of numerous Investor-State Dispue Settlement (ISDS) cases against India. By the end of 2015, India was one of the top 15 most frequent respondent states [6] [7]. Thus, according to Blanke (2016) the expectation while drafting the new Model BIT 2015 was to wipe off the interpretative uncertainties that persisted in its previous version and to extenuate India's exposure to unmeritorious investment claims arising from the older ambiguous wording of BIT provisions with regard to culturally, socially and environmentally motivated State measures [8]. The Government of India had sent notices to terminate BITs with 58 countries. Many of these BITs have ceased to apply to new investments from as early as April 2017 [9]. As the world's largest democracy and a critical player in the developing world, the views of India cannot be ignored [10] [11]. In the serpentine environment of domestic and international realities, where issues such as climate change are an ever-growing grave concern, India's approach in negotiating it's investment treaties is important not just for India, but for the world as a whole in re-inventing sustainable boundaries in investment agreements.

This research addresses the question; does the Indian Model BIT 2015 encourage parties to promote SD? In other words, does the Indian Model BIT 2015 integrate SD objectives (according to Ortino (2017), a complex concept involving simultaneous pursuit of economic prosperity, environmental quality and social equity [12]) into the investment rules to actively promote sustainable investments? According to Gehring and Kent (2013), SD objectives can be integrated in several ways, for instance (p. 286) [13]:

a) Integration of SD in the process of negotiations before concluding IIAs.
b) Integration in the procedural dimensions of dispute settlement mechanisms.
c) Integration within the substantive provisions.

Adopting the above line of thought, it follows that in order to examine whether the Indian Model BIT 2015 encourages parties to promote SD, one has to evaluate provisions relating to procedural dimensions of dispute settlement as well as substantive provisions. But, given the word constraints of the dissertation of mine from where the work has been inspired, I have tried to answer the question by analysing only selective substantive provisions. They are: the Preamble, Definition of Investment, Expropriation, Corporate Social Responsibility (CSR) and General Exceptions. Therefore, I am not be able to give an entirely definite answer, but it is a step forward in understanding better how well the substantive dimension of India's Model BIT 2015 integrates SD objectives. My conclusion has been that though the new Model BIT is a successful step towards the much-needed integration of SD, but it has been largely of covert nature and has scope for improvement from the qualitative aspect.

The work consists of five sections, each being dedicated towards the evaluation of one of the aforementioned provisions. Each section focuses on examining whether the given substantive provision encourages (or integrates) SD objectives in order to answer the bigger question i.e., does the Indian Model BIT 2015 encourage parties to promote SD?

Every section (each dedicated to a given provision) consists of three subsections, namely:

a) *Relevance*

It justifies the cause of selecting the said provision in assessing if the Indian Model BIT 2015 integrates SD objectives.

b) *Analysis*

It examines whether the said provision encourages SD objectives. It scrutinises the provision in one or both of the following ways:

i. Comparative Analysis

It offers a comparative study of the provision under scrutiny between the Indian Model BIT 2003 and the Draft Indian Model BIT 2015 with the Final Indian Model BIT 2005. The focus here is on the transition in the language of the treaty text to reveal the intention of the drafters. The analysis also studies the comments made by the Law Commission in its report to see to what extent, their suggestions were incorporated or deviated from to shed light on the intention of the legislators and thus, achieve clarity on the purpose of the provision under evaluation.

ii. SWOT Analysis [*Strengths, Weaknesses, Opportunities, and Threats*]

This involves examining the efficacy of the language at the backdrop of the trends set by tribunals and viewpoints forwarded by scholars in light of contentious issues. This will help in understanding the potential of the provision in furthering SD objectives.

c) *Observations*

It summarises the plight of the provision under analysis in relation to the integration of SD objectives and suggests improvements.

Preamble

Relevance

Analysis of the Preamble of India's Model BIT 2015 serves as a good starting point to know whether the treaty text encourages parties to promote SD. This is because of the following reasons, making it a crucial tool for integrating SD into the investment law framework of the country:

Firstly, a preamble to an international agreement is like a mirror, reflecting the goals and aspirations of the parties. It plays a pivotal role in assisting the parties to chalk out their respective goals during the negotiation process [14]. According to Ranjan (2011), the language of the preamble can lend direction towards the interpretation of the various open textured standards through the identification of the object and purpose of an investment agreement, especially in a dispute settlement process [15]. Furthermore, Segger and Kent (2011) emphasis on -

> The importance of such pre-ambular language for elaboration of an international investment law that can support sustainable development is evident, as Article 31 (2) of the Vienna Convention on the Law of Treaties (VCLT) instructs tribunals to take such provisions into account in determining the context and purpose of a treaty. (p.785) [16]

Secondly, over the past few years, the importance of these articles has become apparent as several investment arbitrations (Such as: Siemens v Argentina (ICSID Case No. ARB/02/8: Decision on Jurisdiction, 03 August) at paras 80-81; Saluka v Czech Republic (UNCITRAL (1976): Partial Award, 17 March 2006); Azurix v Argentine (ICSID Case No. ARB/01/12, Award, 14 July 2006) have focused on pre-ambular provisions that highlight the goal of protecting investors and investments [17]. According to Miles (2013), they have begun to lay emphasis on the preamble of BITs to assist them with their interpretation of the rights and obligations of the parties to the agreement (p. 353) [18].

Analysis and Comparative Analysis

Through the analysis of preambles in various IIAs, scholars such as Gehring and Kent (2013) have found four main ways of structuring preamble language to promote SD objectives (pp. 290-291) [19]:

a) Firstly, by declaring SD as a *specific objective of the treaty*.
b) Secondly, by declaring parties *to act in accordance to the principle of SD*.
c) Thirdly, by using *non-derogation language*.
d) Fourthly, by *referring to* SD treaties.

The Preamble of India's Final Model BIT 2015 (hereinafter *Final Preamble*) clearly and expressly states SD as a *specific objective of the treaty* when it reads that:

> ... Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and *to the promotion of sustainable development*...[20]

Unlike it's successor, the Indian Model BIT 2003 that made no mention of SD in any form [21]. Thus, apparently the New Model BIT 2015 encourages the parties to promote SD unlike its former version. However, a comparison with the Preamble of the Draft Model BIT 2015 (hereinafter Draft Preamble) raises a few concerns as to which direction the intention of the legislators headed to in encouraging SD.

The Draft Preamble reads, "... Seeking to align the *objectives of Investment with sustainable development* and inclusive growth of the Parties..." [22]. Though the Draft Preamble makes an express reference to SD, there is a subtle difference in the way; it is regarded as a treaty objective. It seems to portray that the treaty by uniting the aim of 'investment' with SD tends to draw independent obligations upon the host state and the investor. However, it is ironic that the analysis drawn by the Law Commission (2015) states that the Draft Model Treaty 2015 at no stage imposes any related independent obligations on the investor and holds no substantive value (para 2.1.6.) [23].

On the other hand, the Final Preamble states that it is the investments and investors' interests which should be promoted and protected respectively in order to promote SD, indicating that the obligation lies on the respective host states to encourage investments in a manner to foster SD. This then becomes a state responsibility, in the Indian case certainly supported by the Constitution itself. This may be defended through a basic and conceptual argument that since "a BIT is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory" [24]; the investor cannot be expected to hold any obligation, let alone the obligation to promote SD as that shall be counter-intuitive. In other words, one cannot expect that an investor would have the interest of India and her people at the top of the agenda, while the state clearly has to take this stance as a matter of public interest.

In order to dig further into the intention of the drafters, it is pertinent to note that the Law Commission (2015) stated the following points in its analysis of the Draft Preamble:

> Some countries have expressly included a reference to the right to adopt laws to protect health, environment and labour standards. Incorporating a statement of this nature in India's Model BIT may help to defend legitimate social welfare laws adopted by India in public Interest...'*Sustainable development*' and 'inclusive growth' are a sign of '*new generation*' investment policies,... (para 2.1.5 & 2.1.6) [25]

The Law Commission in its revised version of the Draft Preamble, made clear use of two tactics in the Preamble language to promote SD i.e., SD as a *specific treaty objective* and *non-derogation language* (which was intelligently of implicit nature).

> ... Reaffirming the right of the Parties to adopt laws in *public interest* generally, and specifically, for the *protection of environment, human health and labour standards*; and Seeking to align the objectives of Investment with *sustainable development* and inclusive growth of the Parties; ... (para 2.1.7) [26]

The above shows that promotion of SD as an objective was one of their pronounced intentions. In fact, given the past dichotomous situation between regulatory space of host state (especially for public interest) and protection of investment, clearly the Commission did not want to leave any gap.

> [T]he object and purpose of most older IIAs is narrowly focused on investment protection and promotion, many investor–State tribunals have, after applying the VCLT, determined that such treaties' provisions must be interpreted in favour of the protection of foreign investment.... Even when tribunals have disavowed an intention to interpret an IIA presumptively in favour of investment protection, the narrow object and purpose set forth in most preambles has influenced decision-making (p. 291) [27].

This emphasizes the importance of using broader preambular objectives in treaties. It helps tribunals to avoid interpretations that highlight singular (narrow and biased) objective of the BIT i.e. protection of foreign investment. Thus, the Law Commission not only suggested that SD should be mentioned as a specific treaty objective (broadening the objective and purpose of the treaty beyond investment protection) but doubly ensured the protection of states' regulatory power by *reaffirming* the power of States to adopt laws in public interest.

Observation(s) & Suggestions (s)

Despite the use of such sound and crisp language that could not only promote SD in a broad manner but also enabled the state to make laws on those lines, the Preamble suggested by the Law Commission was not adopted verbatim in the Final Preamble. This implies that the drafter might not be inclined to promote SD in the *real sense*; or perhaps they omitted the 'clear granting' of regulatory space so as not to scare away prospective investors. Meanwhile, they

maintained the apparent *status quo* by keeping SD, which can be used to defend their regulatory power in the future if the need arises. The challenge that might arise for India (as a host state) in future arbitration is that SD is a broad and ever-evolving concept, which involves blending of economic growth, environmental protection and social development. The balancing of these three elements or aspects has no prior correct outcome. It will essentially be determined how the arbitral tribunal addressing the issue lends perspective to SD in that given scenario. Also, it is important to take note that in making such determination, the tribunal is most likely not bound by a commitment to the Indian Constitution.

Definition of Investment

Relevance

Gehring and Kent (2013) have suggested "language clarification" provisions or "improved definitions" as a tool for states to promote SD objectives in IIAs (p. 293) [28]. The interpretation of the term *investment* is important in the possible list of *improved definitions* for two reasons –

a) Firstly, it is the first threshold that an investor must meet in order to gain legal standing before an investment tribunal [29].

b) Secondly, it has significant policy considerations for the host states as the definition of investment shows the kind and nature of activities that are protected and promoted by the state under a given IIA (here India's Model BIT 2015).

In other words, as Ranjan (2017) emphasises "the definition of investment in a BIT plays a very important role in determining the scope of application of rights and obligations under the treaty and to the establishment of jurisdiction of ITA tribunal" [30]. Thus, the manner in which tribunals address the standards of this threshold is crucial towards the promotion of SD objectives by a BIT. Therefore, in order to examine if India's Model BIT 2015 enables parties to promote SD objectives, it is pertinent to analyse the definition of investment in the new BIT.

Analysis

Comparative Analysis

As Hanessian and Duggal (2017) state, the definition of investment under Article 1.4 in India's Final Model BIT 2015 is a hybrid, asset-based and enterprise-based definition (p. 218) [31]. It defines investment as an 'enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made' along with a list of assets the enterprise may possess. It also requires the investment to possess certain characteristics, such as (art. 1.4) [32]:

a) Commitment of capital or other resources;
b) Certain duration;
c) The expectation of profit or gain (thereby excluding claims from non-profits);
d) The assumption of risk' and
e) Significance for the development of the Party.

The definition of investment in the Draft Model BIT 2015, in contrast, was a pure enterprise based definition and did not list assets that would be considered an investment but, instead, merely required that an investment must be made in good faith and subject to a tightly defined real and substantial business operations (art. 1.6). It also provided the requirements for an investor to 'control' a host State enterprise or to 'own' an enterprise, which is not found in the Final Model BIT (art. 1.6.1). However, like the Draft Model BIT 2015 (art. 1.7), the Final Model BIT 2015 (art. 1.4) excludes several items from the definition of 'investment,' such as portfolio investments, debt securities, pre-operational expenditures, claims arising from purely commercial contracts, goodwill, brand value and orders or judgments from judicial, administrative or arbitral proceedings [33]. On the other hand, the Model BIT 2003 was purely an open-ended asset-based definition setting forth the categories of assets that mattered (art. 1 (b)) [34]. Thus, the transition directs towards the adoption of a middle approach. The basis of this sea change is to protect the regulatory space of the country. The Law Commission (2015) in its analysis had commented that in the current Indian context (wherein the country is both a capital-exporting and a capital-importing state) an open-ended asset-based definition is not the best option (para 2.2.1) [35]. The definition so adopted aligns itself with the suggested draft of the Law Commission, which is a closed asset-based definition (para 2.2.7). Though the aim to leave regulatory space for the host state does not blindly direct towards the sole desire of promotion of SD, it does open the gates for India's internal policy as a host state, one of them being undoubtedly promotion of SD.

In order to integrate SD objectives in IIL, Jeżewski (2011) calls for redefinition of the concept of investment by focusing on the *contribution of development of the host state* both at the level of substantive obligations of the investor as well as investments deserving protection under the investment agreements, thus discarding the widely accepted notion that IIAs only encourage investment and protect investors' interests (p. 211) [36]. Here, it is noteworthy to emphasise that the requirement of an investment to possess the characteristic – *Significance for the development of the Party* has been clearly incorporated by the drafters in India's Final Model BIT 2015. This was found neither in the Draft Model BIT 2015 nor in the Model BIT 2003. The Law Commission in its suggested draft did mention:

> Provided that each kind of assets...shall satisfy the following conditions individually and collectively.... (d*) it has made a substantial contribution to the development of the Host State* through its operations along with transfer of technological knowhow,... (para 2.2.7) [37].

The inclusion of words on the above lines essentially shows that the drafters did consider and paid attention towards the promotion of sustainable investments.

SWOT Analysis

Analyses of the definition of investment in various actual and model IIAs reveal that there is no common concept of *investment*. Due to the lack of institutional and juridical coordination between particular tribunals no strict rules have emerged so far with regard to the interpretation of the term *investment*. Given this indeterminacy, the role of arbitration tribunals in interpreting the term has significantly increased [38]. Thus, to examine the efficacy of the definition of investment in India's Final Model BIT 2015 towards the promotion of sustainable investments, it is pertinent to look into the trends set by tribunals with regard to its interpretation. Herein, emphasis has been laid on those aspects of the definition of investment that may have a connection towards the promotion of SD objectives.

Significance for the development of the Party

The characteristic that an investment should make *substantial contribution towards the development of the host state* was born from the criteria approach adopted by the tribunal in *Fedax v Venezuela* [39]. Later it became popular under the Salini Criteria in *Salini v Morocco* [40], cited and accepted by several arbitral rulings [41]. Williams and Foote (2011), state that -

> In their review of ICSID awards and decisions between 2003 to 2007, Happ and Rubins have observed that, "These [Salini] criteria have been used frequently during the 2003–2007 period as an indicator that an investment exists for ICSID Convention purposes." They comment that most tribunals have taken a flexible approach to the criteria, incorporating a review of the totality of the alleged investment, but others have taken a stricter view... [42]

However, tribunals in cases such as *Biwater Gauff v Tanzania* [43] and *MHS v Malaysia* [44] have shown divergence from this line of thought. Meanwhile, there are also cases wherein tribunals continue to apply Salini Criteria but have modified the original concept by way of eliminating the requirement of *a contribution to the host state's development*, which complicates the picture [45]. For instance, in *Phoenix v Czech Republic* [46], factors such as commitment, duration and risk were considered. A contribution to the host state's development was not required as it was impossible to ascertain.

Dolzer and Schreuer (2008) note that, arbitral practice reveals that the list of criteria for a transaction to be an investment has fluctuated. Among them, the most controversial criterion has been *the need for contribution to the development of the host state* (p.75) [47]. Notably, the requirement that an investment constitute a significant contribution to the economy of the host State has been severely diluted if not eliminated [48]. This dodgy situation is rooted in the failure of developing clear and uniform conceptual features about *investment*, due to different conceptual approaches coupled with the broad scope of ICSID Article 25 (1). Dolzer and Schreuer (2008) aptly summarise the problem –

> A review of the use of the term in treaty practice and in economic discourse establishes that the two approaches may lead to different results in individual cases, but also the variants of the two versions may turn out to yield very similar or identical outcomes. The divergence in the conceptual premises has so far been resolved neither by arbitral jurisprudence nor by academic commentary (p.61) [49].

Addressing this riddle, William and Foote (2011) propose that the focus must be on the *exact terms* of the relevant treaty. It is for each Contracting State to decide on the balance of the bargain as to the nature of investments they are willing to protect in order to promote economic growth and welfare in its territory, which is recorded in the terms of

the relevant treaty. Therefore, making it the natural starting point for any tribunal in determining whether a particular transaction should enjoy treaty protection (p. 64) [50]. Reflecting on these lines, it is commendable that the definition of Investment under India's Final Model BIT 2015 clearly lays down the characteristic features of an investment, especially the contribution to host state's development as *Significance for the development of the Party* art. 1.4) [51].

One of the potential obstacles that the definition of investment under India's Final Model BIT 2015 may face is lack of clarity with regard to whether this characteristic of investment has to be satisfied by the assets of the enterprise or by the enterprise itself. In addition, the definition considers "rights conferred by contracts of a long-term nature such as those to cultivate, extract or exploit natural resources in accordance with the law of a Party" (art 1.4 (e)) [52], as one of the assets that an enterprise may possess. It may give rise to challenges due to ambiguity of the term *long-term*. It is recommended that during negotiation processes, the parties should draw out a clear understanding of what this means to them, depending on the variables such as nature/ kind of natural resources. Perhaps, an appendix may be useful.

Observation(s) & Suggestion(s)

With explicit use of the phrase, *Significance for the development of the Party*, the definition of investment has taken a new turn towards the direction of new generation of IIA that seeks to integrate SD. It will be truly beneficial for the country if it is able to adopt it at the conclusion of their respective negotiations. However, the efficacy of the language has scope for improvement. A word of caution would be to provide further clarity on the nature of *development* and *significance/contribution*. This is because these words are vulnerable to manipulation. For instance, *contribution* may mean a positive action whereby an investment enhances the host state's capabilities towards their basic public functions, or a negative action wherein the existing quality of the host state's performance is not reduced. *Development* may be limited to economic issues and fail to cover areas of environmental protection, good governance and social development. Though the preamble language shall serve as a guide, preciseness accords greater certainty, clarity and consistency. In addition, conceptual conflict with regard to SD must also be considered. Furthermore, it is recommended that during negotiation processes, the parties should draw out a clear understanding of whether the characteristics need to be satisfied by the assets individually/cumulatively, depending on the variables such as nature/kind of natural resources. Perhaps, an appendix may be useful.

Expropriation

Relevance

Understanding Expropriation: In Brief

According to Dolzer and Schreuer (2008), expropriation means taking away of property by the government from its owner for public use or benefit. In IIL, there are two kinds of expropriation, direct and indirect (p. 101) [53].

a) Direct Expropriation - Also known as formal expropriation, it is recognized and regulated in national legislation. Nowadays, direct expropriation is rare, as any official act that takes away a foreign investor's property will draw negative publicity, jeopardising the state's reputation as a venue for foreign investments.
b) Indirect Expropriation - In this case, an investor's legal title to the investment remains unaffected by the State's regulatory measures but they hamper the ability of the investor to draw benefit from its investment in a meaningful way.

The Awkward Situation with Expropriation

The concept of expropriation is one of the most controversial with regard to interpretative issues in IIL, especially as to what constitutes indirect investment. It creates a plethora of challenges for the host states (especially developing countries) as they lack financial resources needed to compensate investors for their losses arisen from public interest regulations. Being at the nascent stage of development, they often require frequent adjustments to their internal policies. Thus, if they adopt a broad definition of indirect expropriation, it may result in a situation where any State measures that works against the interest of an investor can be considered as indirect expropriation irrespective of the underlying reasons. Even measures regarding human health, the environment and labour rights may make the State liable for violation of obligations pursuant to its investment treaties. Nikièma (2012) explains the aforesaid conundrum in the following words -

> In short, the host State needs to protect the public interest and meet its international commitments by maintaining a set of regulations under which it cannot be pursued for compensation. The challenge is therefore to identify a set of criteria governing indirect expropriation that enable the State to regulate

> without having to pay compensation for every single investment harmed by its actions. Nevertheless, the expropriation clauses that appear in investment treaties do not provide a clear response regarding how to strike that balance [54].

A sustainable development motivated debate thus as Nathalie (2012) puts it, focuses on the unclear line distinguishing between what indirect expropriation and thus requires compensation, and what may be considered as legitimate State regulation, which although potentially affecting the value of investment, is not to be considered as compensable [55]. As already mentioned language clarifications or improved definitions can be an effective tool to promote SD objectives in IIAs. Thus, clarifying expropriation can help to solve this sustainable development motivated debate. Since, this work is trying to examine if India's Final Model BIT 2015 encourages parties to promote SD or not, in the light of the above debate and possible solution, analysis of the provision on expropriation in the treaty becomes pertinent.

Analysis

Comparative Analysis

Most investment treaties mention indirect expropriation and specify a duty to compensate. However, they do not provide a definition of indirect expropriation, although some recent treaties do contain more explicit clauses. Despite vague variations, the fact remains that BITs do not define expropriation [56]. Nikièma (2012) advises States signatory to the investment treaties to establish precise details on the definition of indirect expropriation, especially with regard to legitimate regulations as a possible solution to the aforementioned SD motivated debate (p. 21) [57].

According to Nikièma (2012), provisions containing a definition of indirect expropriation in recent investment treaties can be divided into three categories (p. 7) [58]:

a) Reaffirm State's right to regulate.
b) Exclude certain types of State regulation from the definition of indirect expropriation.
c) Inserted in explanatory annexes intended to help tribunals in assessing an indirect expropriation claim.

Unlike the Model BIT 2003 and the Draft Model BIT 2015, the provision on Expropriation in the Final Model BIT 2015 (Article 5, Chapter II – Obligations of Parties) defines expropriation in the nature of the second category (art. 5.3) [59].

Furthermore, the Final Model BIT 2015 varies noticeably from the Draft Model BIT 2015 in the given aspects, preserving the regulatory power of a State in certain crucial areas [60]:

a) It does not include any provision that bars a tribunal from reviewing the nature of a host state's regulatory measure.
b) It does not contain any provision on damages.
c) It replaces the phrase procedure established by law (a narrower formulation) with due process.
d) It contains exhaustion of local remedies as a condition precedent to submission of a claim to Arbitration.

Thus, the attempt to increase preciseness over the concept of expropriation and harnessing greater regulatory power for the host state, (indirectly) signals the desire to blend SD objectives within the treaty text.

SWOT Analysis

Dolzer and Schreuer (2008) have observed that tribunals use three main criteria to identify an indirect expropriation - detrimental effect (sole effect doctrine), proportionality and legitimate public interest [61]. These three approaches are fundamentally different and there are discussions analysing their interaction with the concept of SD [62]. But, this work shall not delve into that aspect.

The third criterion is pertinent for our analysis. It postulates that certain legitimate state measures with specific characteristics cannot be considered as indirect expropriation, even if they, seriously and irreversibly harm an investment. Often termed as Police Power Measures, they are not compensable, because public interest regulations remain financially sustainable for the State, while not completely discouraging private endeavors. Several awards have acknowledged a distinction between indirect expropriation and a non-compensable police power measure [63]. However, there are tribunals, interpreting police power measures like any other State measures, and therefore consider it resulting in indirect expropriations (especially where injurious effects are substantial) [64]. Meanwhile, some tribunals have, rejected the existence of a category of State measures that cannot constitute indirect expropriations because they serve a legitimate public interest and are non-discriminatory [65].

The crux of the problem is that police power measures are difficult to identify, as there is no precise definition of this functional concept. In addition, it refers to standards of conduct that are difficult for tribunals to examine in practice. Furthermore, expropriation clauses in majority of investment treaties, do not expressly exclude the legitimate general regulations of their scope of application [66]. The Indian Model BIT 2015 seems to take care of this problem in the following words:

> Non-discriminatory *regulatory measures* by a Party or *measures or awards by judicial bodies* of a Party that are *designed and applied to protect legitimate public interest* or public purpose objectives such as public health, safety and the environment *shall not constitute expropriation* under this Article (art. 5.5) [67].

Observation(s) & Suggestion(s)

An attempt to give further clarity on the concept of expropriation is a commendable step, but a close reading of the provision reveals a problem that can be a devil in disguise with regard to interpretation. The provision begins as – "*Expropriation* may be *direct or indirect*" (art. 5.3) [68], thus implying that for this treaty the term Expropriation invariably refers to either direct/ indirect expropriation. Then, it goes on to define both these categories:

> direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
> indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investor of the fundamental attributes of property... (art. 5.3) [69]

Now the confusion arises, when it continues as "The determination of whether a measure or a series of measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, that takes into consideration...". If not a typographical error, the purpose of the provision in clarifying expropriation and its types fails miserably because they clearly seem to challenge a harmonious reading of the provision (and especially clarifying indirect expropriation which is the debatable aspect). It should logically be indirect expropriation and not expropriation. It is suggested that due note should be taken of this anomaly and accordingly corrected.

Corporate Social Responsibility

Relevance

CSR as a concept resists containing itself in a universally accepted definition. As Megan (2014) puts it, such definitional challenges arise from the techniques of defining CSR supplemented by the differences in the repressed agendas of the parties that try to define the term, further influenced by the changing culture, scientific innovations and political transitions (p. 64) [70]. However,

> CSR generally embodies the notion that a corporation must act in a responsible manner with regard to the environment, community and broader society in which it operates. In its most basic form, CSR emphasises an approach to corporate governance and operations that integrates and balances the self-interest of the corporation, those of its investors, with the concerns and interests of the public [71].

As already mentioned, foreign investment have a vigorous and potentially damaging impact on social, economic and environmental issues of the host state. These states, which are usually developing, are often characterised by ineffective regulatory systems to regulate this interaction and impact. This increases the potential of giant corporations to indulge in exploitative behaviour. In India, the Bhopal Gas Tragedy stands as a particularly shameful example of such abuse. CSR assists these corporations to manage their wide effects and can play a transformative role by setting standards of good behaviour for corporations and host states [72]. Inclusion of CSR provisions can be a great way to integrate SD objectives into the investment law framework of the country. Gehring and Kent (2013) have suggested that IIAs can promote SD objectives through the use of CSR. They state that CSR norms can be incorporated in various ways, such as [73]:

a) By including specific treaty provisions with respect to CSR.
b) By incorporating respect towards CSR norms in the preamble of the treaty text.
c) By prescribing ex ante review of an investor's CSR policies as a precondition for certain types of investments.

India's New Model BIT 2015, contains specific treaty provision on CSR under Article 12, Chapter III (Investor obligations) as follows –

> Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption [74].

Therefore, an examination of such provisions becomes pertinent to analyse integration of SD objectives in the treaty text.

Analysis

Comparative Analysis

Neither the 2003 Indian Model BIT nor the 2015 Indian Draft Model BIT had any specific provision on CSR. Thus, the inclusion of Article 12 in the 2015 Final Model BIT seems an important step towards the integration of SD objectives within the treaty text.

SWOT Analysis

A close reading raises certain reservations on the effective role that this provision might play in practice. Firstly, traditionally BITs are agreed between two nation states promising each other that they shall provide a certain standard of treatment to foreign investors in their respective territories, without placing any obligations on the investors themselves. Though in recent years, trends towards rebalancing rights and obligations between host states and investors have emerged, provisions that create obligations on investors are not often seen in actual treaty practice [75]. Article 12 is contained under Chapter III *Investor obligations*. Since, this is merely a blueprint setting out India's interest area at the negotiation table, it remains to be seen how successful India will be in having future BITs adopt this provision from its new model BIT. The country's bargaining power will have a tremendous role to play coupled with socio-political factors at the national and global level.

Secondly, assuming that India successfully adopts Article 12 in future BITs, the actual wording of the provision blurs its effectiveness. It does not have real substantive value because it does not appear to be directly enforceable. The wordings that investors *shall endeavor to voluntarily incorporate* merely captures a commitment on the lines of the recent trend favouring CSR. Though it may be argued that if investors incline towards exploitative behaviour and fail making contributions in the light of CSR, the host state and its people can seek redress in the domestic courts under domestic law; which for India, shall be S.135 of the Companies Act 2013 read with the Companies (Corporate Social Responsibility Policy) Rules, 2014 which set out the regulatory framework for CSR of companies (incorporated/having a presence) in India. The drawback for India is that even in the domestic framework; CSR is not mandatory in the real sense. This is because, there are no penal sanctions attached on failing S.135. The companies have to simply submit a written explanation justifying their failure. Such superficially binding nature of the provision leaves little room for common people to seek adherence from these companies to CSR objectives. Indian Courts have asserted that "... the concept of CSR is still at a nascent stage and there is no mechanism in place, which popularizes and facilitates donation" [76]. Furthermore, against the backdrop of one of the current debates of CSR i.e., "whether corporations should be trusted to discharge their moral obligations to society and the environment by *voluntarily* implementing CSR policies, or whether they should *legally* be compelled to do so?" [77] It is relevant to point out that such voluntariness given by law exists to feed into the companies goodwill and make good business and may not genuinely or morally add to the welfare of the society at large. Voluntary CSR is weak in ensuring SD as investors can side step this with shallow excuses for the sake of their profit graphs.

Thirdly, Article 12 does not specify any *international recognised standards* of CSR [such as OECD guidelines for Multinational Enterprises, ISO 26000 Guidance on Social Responsibility, UN Global Compact (UNGC) or UN Guiding Principles on Business and Human Rights (UNGP)]. This could be because it is in its model form, thus leaving space for negotiations between India and another party to make a choice in their agreement. Furthermore, Gradert and Engel (2015) assert that the aforementioned guidelines have differences in their content with regard to human rights, labour, environment, economic and business issues, consumer issues and community development [78]. Thus, India must sincerely consider if it should specify the international standard. This would be important not just for India's place as a host state but also for Indians and others as foreign investors.

Observation(s) & Suggestion(s)

The provision on CSR in India's Model BIT 2015 will have no substantive value unless the domestic laws of the country are upgraded to bring strict liability over investors. Its place in the text will be no more than that of a trophy-wife for it to be regarded as a so-called new generation IIA.

General Exceptions

Relevance

Gehring and Kent (2013) suggest that a clause on exceptions and reservations can be used by host states to adopt regulatory measures in order to promote SD objectives as they ensure that a state's ability to regulate is not restricted by investment treaties. Exceptions in IIA appear in several forms, most notably as follows (pp. 292-293) [79] -

a) Provisions allowing treaty reservations (sector-specific carve-outs from treaty obligations).
b) General Exceptions provisions (modelled on the lines of Article XX of the General Agreement on Tariffs and Trade (GATT)).
c) Non-Precluded Measures (NPMs).

The Indian Model BIT 2015 consists of Exceptions in the form of a General Exceptions provision under Article 32, Chapter VI (Exceptions). Thus, in examining whether the Indian Model BIT 2015 integrates SD objectives, a review of this clause in the model treaty text becomes crucial and relevant.

Analysis

Comparative Analysis

The Model BIT 2003 did not contain any provision with regard to exceptions and reservations. Thus, the incorporation of Article 32 is a big leap towards the direction of harnessing greater regulatory power for India

On comparing the Draft Model BIT 2015 with the Final Model BIT 2015, some differences are visible (p. 225) [80]. Firstly, the provision under Final Model BIT 2015 article is no longer self-judging like the Draft. It allows the given Tribunal to examine the feasibility and legitimacy of a State's defenses based on such General Exceptions, as seen below:

> Draft: Nothing in this Treaty precludes the Host State from taking actions or measures of general applicability which it considers necessary with respect to the following...
>
> Final: Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability on a non-discriminatory basis that are necessary* to... (*Footnote – In considering whether a measure is necessary, the Tribunal shall take into account whether there was no less restrictive alternative measure reasonable available to a Party)

Furthermore, the kinds of General Exceptions have been reduced from 9 to 5. In addition, the clause in the Draft, which exempted application of the treaty to regulatory measures adopted by local bodies, was removed from the Final version. These differences are a product of the concerns expressed by the Law Commission in its Report. It commented that though inclusion of a General Exceptions clause is a great way to balance right of the host state to regulate and investment protection. But, a self-judging General Exception and exempting regulations by local bodies would mean that the balance tilts towards host state, making it vulnerable to abuse (para 6.1.1 to para 6.1.4) [81].

SWOT Analysis

Use of General Exceptions in BITs is infrequent. The few exceptions that exist, IIA tribunals till date have interpreted them narrowly (mostly in light of the narrow object and purpose of those treaties in their respective Preambles), for instance, *Siemens v Argentina* [82] and *SGS v Philippines* [83]. Meanwhile, tribunals in *Saluka v Czech Republic* [84] and *Palma v Bulgaria* [85] have cautioned against excessive tilting towards the interest of the investor by laying disproportionate weight on the narrow object and purpose of the treaties. Now, considering that reading of General Exceptions under Article 32 in India's Model BIT 2015 shall be guided by its Preamble, there should be less fear of narrow interpretation as the Preamble expressly contains SD attainment as its bigger goal. However, due care should be laid on the language of the Preamble, as well given its sensitivity and importance in interpretation (as previously discussed).

Regarding scholarly viewpoints, Newcombe (2011) has evaluated the advisability of a General Exceptions Clause as a preferred treaty mechanism (in IIA) to solve legitimacy and sustainability concerns in relation to regulatory space of host state at one end and protection of the rights of foreign investors on the other. The following points of his observations are noteworthy and should be a guiding light for negotiators while bargaining for the respective BITs based on the 2015 model (pp. 355-370) [86]:

a) It is *unclear* how investment treaty tribunals will interpret general exceptions.
b) However, for future purposes, tribunals have possible approaches to chose from:
    - Firstly, one that provides greater regulatory flexibility to host state in pursuing legitimate objectives listed in the exceptions.
    - Secondly, one that views these exceptions as codification of the host state's regulatory flexibility.
    - Lastly, a restrictive interpretation that limits the regulatory flexibility of the host state.
c) It is *arguable* that the regulatory flexibility will be enhanced by adopting general exceptions as they may merely give direction to regulators on the nature of policies that they may adopt without breaching treating obligations.

Observation(s) & Suggestion(s)

From the analysis above, clearly, the intention of the drafters has been to strive for SD objectives and not exploit the concept of SD, as they have tried to balance interests of the host state and investors. However, based on the above viewpoints and case trends, it is recommended that excessive confidence should not be placed on Article 32 of India Model BIT 2015 for the proliferation of SD objectives. Negotiators should be mindful in making their expectations clear from the use of a General Exceptions clause. Perhaps, (if not overly ambitious) parties can try and consult together to illuminate their intention in an appendix.

Conclusion

Vandana Shiva (2017) says "It's not an investment if it's destroying the environment" [87]. Scientific forecasts of global environment indicate that the need for health and environmental standards at all levels of society will not decline, but rather grow stronger [88]. Thus, promotion of SD through IIL is not an option but a necessity. SD can blend in international investment regime at three levels, within the negotiation process, within dispute settlement mechanisms and within substantive provisions. Thus, in order to evaluate whether the new Indian Model BIT 2015 integrates SD objectives, the assessment has to be made both of the substantive provisions and procedural provisions of dispute settlement. Due to word constraints only selective provisions have been reviewed, namely the Preamble, Definition of Investment, Expropriation, CSR and General Exceptions. Hence, a definite conclusion is difficult on *whether the Indian Model BIT 2015 encourages parties to promote SD or not.*

However, from the analysis of the aforesaid substantive provisions, it can be asserted that, the new Model BIT 2015 is a successful step towards the much-needed integration of SD within the country's investment law framework. Compared to the Model BIT 2003, the new Model BIT 2015 incorporates substantial and critical changes that reflect that legislators have been conscious about promotion of SD objectives. But, the evidence also has the potential to reflect a not so cheerful picture. Assessment of the language shows that SD has been more of an implicit goal (except the Preamble), within the greater goal of harnessing regulatory power for the state. In addition, a lot needs to be improved when it comes to the qualitative aspect of promotion of SD. From the observations, an indication lies that the new Model BIT 2015 still has scope for giving rise to interpretative issues. This is primarily because of the plasticity of the very concept of SD and many of the conceptual conundrums that are embedded within the IIL framework (since time immemorial), which is further twisted by variables such as geography, socio-economic and political factors and culture. Being a blueprint, the Model BIT 2015 has an important role to play during the negotiation process, but it is not an end in itself. India can address the potential conflict areas during the negotiation process as suggested in the Observation(s)/ Recommendation(s) for the respective provisions. As investors want to invest in India, it holds an impressive bargaining position. India has been a rule-maker rather than rule-taker in many of its BIT negotiations, but with the new Model BIT 2015, it remains to be seen, what the future would be like. Despite this blurry future, India's adoption of the new Model BIT 2015 in the ever-growing need of harmonising SD objectives in the IIL should be applauded and welcomed.

Meanwhile, further research needs to be done with regard to the integration of SD objectives into the remaining substantive provisions and procedural provisions of dispute settlement of the Model BIT 2015, so that the potential

conflict areas or hurdles can be well taken care of in future negotiations as well be lessons for drafting a more sustainable model BIT in future.

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ABOUT THE AUTHOR

Name: Rashmi Patowary
Mailing address: O.P. Jindal Global University. Sonipat Narela Road, Near Jagdishpur Village, Sonipat, Haryana (India) 131001
Tel: +91-9101356822
e-mail : rpatowary@jdu.edu.in; rashmi92p@gmail.com