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Perspectives

**Structural Issues in Interpretation of Bilateral Treaties:
A Critical Analysis**

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ABSTRACT

This article provides an incisive critique on the structural issues in interpretation of Bilateral Investment Treaties (BITs). Indeed, structural issues in interpreting BITs invariably put the state parties at the receiving end. Investor protection takes primacy in international trade and investment disputes by leveraging interpretative lacunae. Hence, most of the international trade and investment disputes are adjudicated in favor of the investors. However, now the World Trade Organization (WTO) has shown openness to consider the concerns of the state parties in international trade and investment disputes. BITs covered under the WTO enable the parties to adopt joint interpretations of the prevailing legal framework. Besides, developing countries are now rectifying the interpretative loopholes in legacy BITs by promoting Model BITs.

KEYWORDS: Bilateral Investment Treaties (BITs), Interpretation of Statutes, Vienna Convention on the Law of Treaties (VCLT), World Trade Organization (WTO), Investor-State Dispute Settlement (ISDS) mechanism

INTRODUCTION

Structural issues in interpretation of Bilateral Investment Treaties (BITs) are major roadblocks in international investment arbitration. International investment tribunals depend on the

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principle of effective interpretation for adjudication¹. Vienna Convention on the Law of Treaties (VCLT) is the cornerstone for the interpretation of BITs and related documents. VCLT provides broad outlines for interpreting the clauses of BITs by examining objects of the treaty and the purpose. Unfortunately, the Investor-State Dispute Settlement (ISDS) tribunals tend to overemphasize investor rights while adjudicating rather than looking at the object of the treaty or purpose of either the investor or the host country. Hence the justifiable relief is denied to the host country due to the doctrine of maximizing investor protection which does not have any legitimacy in the international trade and investment laws.

Furthermore, texts of the BITs are the most formidable reference points for interpretation during arbitration at ISDS tribunals. Critical reading of the texts of the BITs, thus forms the first step towards holistic interpretation of the clauses. It is important to examine each word in the treaty as ‘the meaning of a word is its use in language’². Article 31 of VCLT emphasizes literal interpretation of the treaties. All the parties, therefore, should focus on looking for the plain meaning of the words used in the clauses of BITs to develop a common ground of understanding in good faith. Once the parties agree on the plain connotations of the words and phrases in the Bilateral Investment Treaties, they can move on to figure out special meanings imbued in socio-cultural ethos of the host country or the investors. It is possible that despite their best efforts, the parties may find the meaning obscure and subsequent interpretations may appear bizarre to them. VCLT allows use of supplementary resources in facilitating appropriate interpretation of the treaty in a few specified cases. Unfortunately, the textual interpretations of the BITs take back seat during the adjudication process at ISDS tribunals.

Purpose of interpretation of the BITs is to figure out context, object and purpose in an impartial manner. Indeed, interpretation of treaties in general may be construed as ‘integrated operation which uses several tools simultaneously to shed light from different angles on the interpreted text; these tools should not be seen as watertight compartments or a series of separate sub-operations but, rather, as connected (even overlapping) and mutually reinforcing parts of a whole, of a continuum or a continuous and multifaceted process that cannot be reduced to a mechanical operation and which partakes as much of art (the art of judgment) as of science (the

¹ Noble Ventures v. Romania (Award), 12 October 2005, para. 50.

² L. Wittgenstein, *Philosophical Investigations*, para. 43 (G.E.M. Anscombe trans., 1953).

science of law)³. However, members of the panel and Appellate Board generally ignore the need for an impartial examination of the intent of the parties enshrined in the preamble of the BITs.

Interpretations of BITs in ISDS tribunals have been quite challenging due to ambiguities in the definition of investments. The older BITs have broad-based definition of investments that covers varied economic activities sans any boundary or specification. The issue revolving around ambiguous definition of investment has been addressed in the model BITs which invariably excludes portfolio investment from the scope of protection. Fair and equitable treatment is another area of concern when it comes to interpretation of BITs by ISDS tribunals. The draft of the treaties is prepared meticulously to confuse the authorities of the ISDS tribunal.

Thus, the investors might be absolved of their responsibilities even if they have failed to meet their obligations on matters related to appropriation or non-discrimination. On several occasions, such violations may not have appropriate apparatus of legal scrutiny in the host country. Further, fair and equitable treatment gets a passing reference in the BITs without explicit mention of legitimate expectations and concomitant obligations. Hence, in case of breach, the victims may not get relief from the perpetrators through ISDS mechanisms due to constraints of interpretation of the relevant clause which does not have well-structured guidelines regarding obligations and consequences of non-compliance. Using legitimate expectations of the investors as pretext, the ISDS tribunals have accorded benefit of doubt to the investors by instructing the host country to restore environmental permits denied to them in various cases.

Interpretations of substantive rights in BITs have often been contested by the host countries. Fair and equitable treatment and expropriation clauses are misused by the investors against the host countries in the name of full protection and security. Hence, ISDS tribunal may adjudicate in favor of the investors on flimsy grounds of possibility of losses in business operations due to regulations in the host country. Lacunae in interpretations of fair and equitable treatments and expropriation clauses help the investors attain compensable expropriation in the wake of legitimate regulations by host country. Even though the rights of the host country to regulate

³ G. Abi Saab, 'The Appellate Body and Treaty Interpretation', in G. Sacerdoti, A. Yanovich and J. Bohanes (eds.), *The WTO at Ten-The Contribution of the Dispute Settlement System* (Cambridge University Press, 2006).

business operations are recognized in the BITs, the provisions are marred by phrases like reasonable exercise of discretion. When the disputes arise, perceptions regarding reasonable exercise of discretion by investors and the host country, and above all the ISDS tribunals may not have common ground. Generally, the host country loses the game as the investors' rights get primacy in the ISDS tribunals.

STRUCTURAL FALLACIES AND INTERPRETATIVE FAILURES

At times, varied meanings of even simple terms can cause delay and complications in adjudication by the dispute settlement body of the WTO. For example, International Court of Justice (ICJ) referred to the Oxford English Dictionary to get usual meaning of the word 'commerce'.⁴ Likewise, in another instance, a member of the WTO dispute settlement body referred to the Shorter Oxford Dictionary for further clarification on the connotations of the word 'commerce'.⁵ Regrettably, semantics are ignored while interpreting BITs during adjudication of international trade and investment disputes. At times, answers to most difficult questions may come from ordinary meanings of words used in the preamble of the BITs.

Intentions of the parties are as important as the implication of the ordinary or special meanings of the words used in the treaties for the purpose of interpretation. For example, the case concerning the navigational and related rights of Costa Rica over San Juan River was adjudicated by considering intention as a decisive factor while also looking at the simple and special meanings of the words used in the 1858 treaty between Nicaragua and Costa Rica⁶. In the adjudication, it was observed thus: 'a treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected in the text of the treaty and the other relevant factors in terms of interpretation'.⁷ Taking cue from the Costa Rica vs. Nicaragua case adjudicated by ICJ, the Appellate Body of the WTO used Rio Biodiversity Convention to interpret the notions of sustainable development and exhaustible resources in the US-Shrimps

⁴ Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment on Preliminary Exception, ICJ Reports 1996, p. 818, para. 45.

⁵ Claus-Dieter Ehlermann, 'Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization', *Journal of World Trade* 36 (2002), 605-639, 616.

⁶ Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), 13 July 2009.

⁷ Ibid.

case⁸. The Appellate Body maintained that the term exhaustible resources included both living and non-living materials.

The dispute settlement or appellate body of the WTO rely on *dubio mitius* principle when the terms used in the treaty are ambiguous and intentions are also not clear. For example, the WTO appellate body gave primacy to international standards while adjudicating in the EC-Hormones case⁹. In this case, it was observed that the dispute settlement panel cannot assume that a particular entity consciously chose a rather burdensome obligation out of volition¹⁰. Thus, the interpretation of the intentions of the contracting parties becomes crucial when the terms of contract appear to be asymmetrical. In such scenarios, the international standards or the Global Best Practices can guide the adjudicating members of the dispute settlement panel or appellate body of the WTO. However, ambiguity in intentions are generally used against the state parties in adjudication of international trade and investment disputes.

On several occasions, far-reaching views on intentions as reflected in the preamble of the BITs are taken in case of disputes between parties. In the *SGS vs. Philippines* case, the disputes panel interpreted ‘desire to create favorable conditions for investment’ as ‘intention to provide effective protection for investors,’¹¹ though prima facie they appear disparate. Moreover, the dispute settlement panel or members of the Appellate Body of WTO can also emphasize one clause indicating broad intention to adjudicate in a matter while sidestepping the entire preamble of the BITs. Thus, investors may get overarching protection while the host country partners may suffer due to arbitrariness of the adjudicators in international trade disputes. Truncated views taken by members of the tribunals or Appellate Body of WTO may jeopardize the justifiable interests of the state parties while providing seeping relief to the investors in disputed matters.

Despite being mandated by VCLT, the adjudicators tend to ignore comprehensive textual interpretation or line reading of the Bilateral Trade Investments to understand the broad contours of the treaty. In the *Siemens vs Argentina* case¹², the tribunal looked at creation of

⁸ WT/DS58/AB/R, 12 October 1998.

⁹ WT/DS26/R/USA, paras. 8.48 et seq.

¹⁰ WT/DS26/AB/R, paras. 154, 165.

¹¹ *SGS Société Générale de Surveillance SA v. Republic of the Philippines* (2004) 8 ICSID Reports 515, para. 116.

¹² *Siemens v. Argentina* (Jurisdiction), at para. 81.

favorable conditions for investment as broad investment protection which are literally two different things. Even in the *Eureko vs. Poland*¹³ case, there is no mention of investor protection. Yet, most of the cases in international disputes are decided based on the investor protection norms irrespective of inferences from textual analysis or critique of objects and intentions enshrined in the Bilateral Investment Treaties. It is therefore imperative that the notion of investment protection is clearly defined in the preamble of the Bilateral Investment Treaties to provide safeguards to the host country against blatant misuse of the clause pertaining to creation of a favorable investment ecosystem.

CONCLUSION

Structural issues in interpreting BITs invariably put the state parties at the receiving end. Investor protection takes primacy in international trade and investment disputes by leveraging interpretative lacunae. Hence, most of the international trade and investment disputes are adjudicated in favor of the investors. However, now the WTO has shown openness to consider the concerns of the state parties in international trade and investment disputes. BITs covered under the WTO enable the parties to adopt joint interpretations of the prevailing legal framework. Besides, developing countries are now rectifying the interpretative loopholes in legacy BITs by promoting Model BITs.

¹³ *Eureko v. Poland (Partial Award)*, 19 August 2005, para. 248.