671

2020 - Volume 1 - Issue No 1

JSS LC

JSSLC Journal of Law

plinary Approach to Law

JSS Law College, Autonomous, Kuvempunagar, Mysuru

23672

JSSLC Journal of Law

Volume 1 | July - 2020 | Issue No 1

Table of Contents

6?3

* * * * *

674

A STUDY ON HISTORICAL DEVELOPMENT OF BILATERAL INVESTMENT AGREEMENTS

Priya A. Jagadish *
Dr. Tharanath**

Abstract

International investment rule-making at the beginning of the 21st century is a universal and dynamic process that aims at improving countries' investment policy environment in order to attract foreign direct investment that is conducive to economic growth and sustainable development. According to the report of United Nations Conference on Trade and Development (UNCTAD)bilateral investment treaties are the most important instrument for the protection of foreign investment. Bilateral investment treaties have gained significant prominence in an ever increasing globalised world and rising importance of foreign investment for both developed and developing countries. There hasbeen an exponential growth in the number of BITs in the 1990s, there was a sudden rise in the numberof BITs concluded (especially in Asia). This was also the era when India made its gateway to liberalization. These treaties were viewed as a way for developing countries to get a foot in the door by increasing their investment potential and promoting an "open door policy".

Key Words: Bilateral Investment Treaties, Environment, Liberalization, Sustainable Development, Foreign investment.

I. Introduction

"There is no principle of the law of nations, more firmly established, than that which entitles the property of strangers, within the jurisdiction

* Research Scholar, Karnataka State Law University, Hubballi & Guest Faculty, JSS Law College, Autonomous, Mysore. priya.jagadish2010@gmail.com

** Principal, SDM Law College, Mangaluru.

695

of another country, in friendship with their own, to the protection of its sovereign, by all efforts in his power."[1]

- U.S. Secretary, John Adams (1796)

The Bilateral Investment Treaties (BIT)[2] plays a very important role in international investment law and it is hard to believe that BITs are a fairly recent phenomenon from a contemporary perspective because of their high number. During 18th century several capital exploring countries particularly the United States relied on their old Friendship, Commerce and Navigation Treaties (FCN) to grant protection to their investors. The capital importing countries showed their disinclination to conventional investors' protection as showed by several UN General Assembly Resolution the wave shift and all capital exporting countries started a major campaign to conclude BITs with capital importing countries which led to a current number of BITs exceeding 2947.

Bilateral investment treaties are defined as 'agreements between two countries for the reciprocal encouragement, promotion and protection of investment in each other's territories'[3].In other words Agreement between two countries to ensure, among other things, that (1) investors of either country are allowed to hire top management personnel of any nationality, (2) have the right to make investment related transfers, (3) assets belonging to one country's investors in the other country can only be expropriated in accordance with the international law, and (4) investors will have access to binding international arbitration in dispute settlement[4]

In the latter half of the 20th century, bilateral investment treaties (BITs) emerged as the first international agreements exclusively focusing on the treatment of foreign investment. In view of their similar legal structure, as well as the fact that BITs have flourished, these agreements

1. Quoted in R. Dolzer and C. Schreuer, Principles of International Investment Law (Oxford: Oxford University Press, 2008), page no. 11.

2. The Bilateral Investment Treaties means General Bilateral Treaties. Specifically does not mention any Double Taxation Agreements and Preferential Trade Agreements.

3. This definition is stated by the UNCTAD and is available at http://www.unctadxi.org/templates/Page1006.aspx, visited on 28-04-2020

4. Business Dictionary definition, http://www.businessdictionary.com/definition/bilateral-investment-treaty.html, visited on 29-04-2020.

its second bilateral treaty with Dominican Republic, subsequently proceeded to negotiate similar investment treaties with countries throughout the developing world[38].

Other Western European countries quickly followed Germany's lead. France[39] concluded its first BIT in 1960, Switzerland[40] in 1961, the Netherlands[41] in 1963, Italy[42] and Belgium-Luxembourg Union[43] in 1964, Sweden[44] and Denmark[45] in 1965, and Norway[46] in 1966.

Additional expropriations during the 1970's and the adoption of the NIEO[47] and CERDS[48] resolutions triggered additional BIT programs in the 1970s. The United Kingdom[49] concluded its BIT in 1975, Austria[50] in 1976, and Japan[51] in 1977. The United States made the decision to

38. Jeswald W. Salacuse& Nicholas P. Sullivan, Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 Harv. Int'l L.J. 67, VOLUME 46, NUMBER 1, WINTER 2005.
39. Agreement was with Chad.
40. Agreement was with Tunisia on the Swiss BIT program.
41. Agreement was with Tunisia
42. Agreement was with Guinea
43. Agreement was with Tunisia
44. Agreement was with Ivory Costa
45. Agreement was with Madagascar
46. Agreement was with Madagascar
47. At the Sixth Special Session of the United Nations General Assembly in 1975, a declaration was made for the establishment of a New International Economic Order (NIEO). It is regarded as "a turning-point in the evolution of the international community." NIEO is to be based on "equity, sovereign equality, common interest and co-operation among all States, irrespective of their social and economic systems, which shall correct inequalities and redress existing injustices, make it possible to eliminate the wide ning gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations." http://www.yourarticlelibrary.com/trade-2/nieo-new-international-economic-order-objectives-programme-of-action/26271/, Visited on 02-05-2020.
48. Charter of Economic Rights and Duties of States, G.A Res. 3281 (XXIX), UN GAOR, 29th Sess., 2315th plen, mtg., UN Doc. A /RES/3281(XXIX) (Dec, 12, 1974), reprinted in 14 I.L.M 251 (1975), for detailed discussion visit http://www.un-documents.net/a29r3281.htm.
49. Agreement was with Egypt
50. Agreement was with Romania
51. Agreement was with Egypt.