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WHAT AILS THE INDIAN BILATERAL INVESTMENT REGIME?
EVADING CONSEQUENCES OF THE COVID-19 PANDEMIC

By : Tanisha Das & Aysancee Das and Shalini

ABSTRACT

This paper examines the landscape of Indian Bilateral Investment (BIT) and delves into its origin, evolution and current status. India entered the niche area of BITs in the year 1994. In the year of 2003 it released her first model BIT - an overly investor centric prototype, which subsequently led to paying huge amount of compensation to investor states deep contemplation on the BIT structure. India framed a Model BIT in 2016, moving away from an overly investor-friendly approach to a somewhat protectionist approach concerning foreign investments. The model BIT has a balanced approach thereby, there is optimism that India should be able to set the framework in which these investors can come in and make significant contribution.

As according to the reports structural reforms are undertaken by India even in restricted sectors such as space, defence and atomic energy for greater private participation. The new BIT model may not hurt India’s interest in the short run as India is now a major investor of capital in other countries and the government would need to consider whether the provisions in the new BIT model provide any support to India’s FDI outflows and protection of its investment outside India. It will have to promote the initiatives of Make in India and Digital India in order to attract more timely investment. It is a tough initiative by the government and the BIT’s would help promote India’s FDI in a positive manner.
INTRODUCTION

Model BITs are non-binding instrument but they have a critical part within the law and arrangement of worldwide investment law. Treaty negotiation regularly actually operates on the premise of model BITs. They are an expression of the arrangement introduction of the State towards outside speculation: speaking to critical issues such as the degree and conditions of foreign investor security and the nature of dispute determination method mulled over. Most importantly they represent state practice of that State and could be an aid for interpretation. The Indian Model BIT speaks to difference with the sweeping interpretative approach of arbitral tribunals and the need to moderate administrative space.

India signed her first BIT with United Kingdom in 1994, with the clear objective of pulling in and incentivizing foreign investment. India’s initial mindset towards IIAs remained unaltered until few a long time. India’s first BIT was based on a Model created by a developed country where the main aimed was solely based on the rights and protection of foreign investors rather than concentrating on its own regulatory norms. However, India’s approach to investment treaties started undergoing a huge change after the case of White Industries in 2011. Several cases were filed against India between 2011 and 2016. As a result of the growing demand of BIT claims, India unilaterally terminated, Several BITs in 2016. India has also introduced a Model BIT in 2016 to serve as the foundation to re-negotiate treaties, with a new approach to strengthen investor state relationship and also to build a better channel for treaty negotiation process but in spite of the introduction of new model in 2016 today, India stands as a Respondent in more than fifteen cases involving investment treaties the highest number of cases against a host State till date. This paper maps out the landscape of international investment treaty law and its connection with India. While it studies the India Model BIT 2016 to inform the new era of investment treaty arbitration, it attempts to identify challenges that India faces distinct from the global landscape of BITs, and views India through a prism of dispute resolution mechanism.

EVOLUTION OF THE BILATERAL INVESTMENT TREATY IN INDIA: DIGGING UP THE DIFFERENT PHASES.

A bilateral investment treaty is an investment treaty which aims to protect investments between investors belonging from two different countries. With the steady increase of the bilateral investment treaties globally from a negligible number of treaties signed in the year 1990 with gradually increasing number of treaties in the following years. Before going into details about the key provisions and comparison in relation to other countries, the first chapter of the paper talks about the evolution of the Bi-lateral Investment treaty in India. There are three phases as pointed
out through Prabash Ranjan’s work.

In this book the first part talks about the period between (1947-1990) which is known as the period of ‘REFUSAL’¹. Each period has been specifically named based on their status in regard to the bilateral investment treaties, this period points out that India during this time did not sign any BIT’S, hence justifies the name. This was the policy that was adopted by Jawaharlal Nehru towards foreign investment, however in the year 1965 it has been said that even though the Nehruvian² Socialism favored the public sector, it did not completely shun foreign investments. Indira Gandhi was said to have taken up a full nationalization spree during her rule but after carefully analyzing it has been pointed out that during this period gradually it was visible that India did not shut doors of foreign investments rather they proposed their own version of several provisions of the proposed ICSID Convention. From the time India was accepted they chose not to stay away from ICSID.³

The second part as mentioned in the book of Prabash Ranjan is known as the ‘phase of Acceptance’⁴, this phase basically marks the journey after the economic reforms of 1991 (liberalization). This is the next phase where India accepted and is also known to have signed numerous bilateral investment treaties, as figured the main aim at that point was that perhaps signing of more treaties would promote the foreign investment to a larger extent.

The third and the final part as known as the flag bearer of India’s adventurous policy making in regard to the International investment law is known as the period of ‘Backlash’. This period has witnessed a divergence in the India’s economic and legal foreign investment. During this period the known ‘White Industries’ played an important role during the period of Backlash, several critical analysis were also done where it was mentioned that bad regulations of the then government at times reflected or had a negative impact on the treaties, however, with the increase of liberalization, the consequent reforms that were witnessed by the Indian Parliament during this period gradually reflected on the Bilateral investment treaties in India which led to the adoption the 2016 model of India’s BIT. In this paper we are going to discuss in detail about the 2016 BIT model, the key provisions and a thorough analysis in understanding the differences between the old and new model and if it has in any way positively or negatively impacted on our economy.

¹ THE WIRE, https://thewire.in/books/prabhash-ranjan-bilateral-investment-treaties
³ Id.
⁴ Supra, note 1

Though India has already negotiated more than 70 treaties but the main hardship had surfaced in the case of White Industries v. India, where it had lost to the Australian Investors and had to pay a huge amount of retrospective taxes and there were also cancellation of telecom licence. White Industries had sued India on the grounds not for providing an effective means of standard for the rights of the investors and also the delay caused by the Indian courts in rendering the arbitral award which almost took 9 years to get enforced. Therefore, the need arose from this particular case to have re-look into the old model.

The 2016 model was drafted in a manner actually to reduce the expenses of investment protection by the host state and majorly to create a balance between the investor’s right and country own domestic policy, which it had failed to provide in the white industries case. Through the 2016 model the major concern was to promote sustainable development of both the contracting states. Another important aspect was to give effect to the substantial treaty provision so as to reduce the arbitral discretion. Thus the research paper aims to throw light on the substantive provision introduced in the 2016 model which include definition of investment, full protection and security, expropriation, general exception, monetary transfer provision and lastly investor state dispute settlement and to figure out how efficiently it balances the rights and state’s own obligation to regulate, keeping the arbitral discretion at least.

Investment

The 2003 model had provided a more asset based definition but the present model has deviated from the asset based definition more to an enterprise based definition where both the asset as well the enterprise are to be taken into consideration. Thus the enterprises located in India have the sole right to make an BIT claim. The overall effort is to reduce the BIT petitions. Article 1.4 talks about the non-exhaustive list of asset but still in midst of this the definition of investment is still silent on certain aspects such as regarding to the characteristics of assets and its contribution in the notable development of the host state is yet to be defined.

5 Ministry of Commerce, Government of India, International Investment Agreements between India and Other Countries
7 2016 Indian Model BIT, art 1.4.
8 Art. 1.3 provides – enterprise means: (i) any legal entity constituted, organized and operated in compliance with the law of a Party, including any company, corporation, limited liability partnership or a joint venture; and (ii) a branch of any such entity established in the territory of a Party in accordance with its law and carrying out business activities there.
9 Srikar Mysore & Aditya Vora, Tussle for Policy Space in International Investment Norm Setting: The Search for a Middle Path? JINDAL GLOBAL L. REV. 135-156, 143 (2016)
Expropriation

Expropriation is being referred as two types as direct and indirect. But the indirect expropriation has become more profound over years, whereby a considerable amount of benefit flowing from an investment is stopped without taking any kind of property. Art 5.1 emphasises on direct expropriation which includes nationalisation or some other way that may be detrimental to public interest and needs to be compensated in a way.

Full Protection And Security

Full protection and security is also an important provision covered under the 2016 model BIT. Under this provision the safety of the foreign investment is ensured. The host state comes under an obligation to put a check on its own regulatory measures so that the rights of the investors does not get violated. Since the present BIT doesn’t provide a clear definition of FPS therefore what kinds of other immunity it provides to the foreign investors is still unknown. An expanded definition of immunity also included legal security and regulatory measures from the host state have also been taken into consideration by some ISDS Tribunals. Thus the following provision aims at providing maximum protection by reducing arbitral discretion.

Monetary Transfer of Funds

The 2016 Model also acknowledges the investor’s right to transfer all the funds related to investment such as contribution to capital, dividends, profits incurred and interest under Article 6(1) allows capital account transaction which is again restricted to 6(2), where RBI along with the consultation of central government steps in to determine the account transaction and also further deciding the limits up to which foreign exchange shall be permissible. Article 6(3) gives the power to RBI to regulate such transaction.

Treaty/General Exceptions

Treaty or general exception are incorporated in the new model in order to secure state’s own security interests in terms of contractual agreements. Most BITs contains some additional clauses.
which provides immunity to the host state against the liability arising out of the action taken in
exceptional circumstances where state own internal security aspects are in risk and immediate
attention is required. Non precluded measures(NPM) allows the host state to escape from the
substantive provision and decide on the non – investment policy without suffering liability. Through permissible objectives host state from its liabilities under a treaty obligation. Nexus requirement draws a link between the state’s regulatory measures and the permissible limits sought to be achieved. It states how a tribunal should decide on the measures that is necessary by considering whether other less alternative measures were available to the country or not by that time.

**Investor State Dispute Resolution Mechanism**

The investor state dispute settlement clause is one of the foremost vital clause display within the 2016 show BIT where it gives the medium for the debate settlement between the outside investor and the host state beneath different arrangement assertions which may too outperform the level of substantive guideline in its claim right. The BIT implies an understanding between signatory States that investors of one contracting state will have the right to start intervention against the host State for breaches committed by the host State beneath the BIT. Chapter IV of the 2016 India Model BIT deals with Settlement of Disputes between an Investor and a Party. In this way there's exclusion of umbrella clause which in a way is vital to fill the hole by the breaches committed by the financial investor to a breach of BIT containing a clause which expands to “any debate related to investment” beneath which investors will get extra security. The BIT moreover places two extra restrictions on the ISDS tribunal. The mechanism of appeal isn't permitted, subsequently ISDS tribunal cannot survey choice made by the Indian Judiciary. India’s assent to arbitration beneath the BIT is qualified as it were after the outside investor depletes nearby cures at slightest for a period of five a long time some time recently commencing

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16 ANDREW NEWCOMBE, General Exceptions in International Investment Agreements in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 356–357 (Marie-Claire C. Segger et. al. eds. 2011)
18 Indian Model BIT 2016, Article 32.1
19 Supra note 17
20 McLACHLAN, SHORE & WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION (Oxford International Arbitration Series, 2010)
21 Article 10 Swiss Model BIT, Article 3(4) Netherlands Model BIT, Article 2(2) UK Model BIT and Article 8 Germany Model BIT 1991(2), See, Christoph Schreuer, Travelling the BIT Route: of Umbrella Clauses
22 Indian Model BIT Article 13.5 provides: In addition to other limits on its jurisdiction, a Tribunal constituted under this Chapter shall not have the jurisdiction to: (i) review the merits of a decision made by a judicial authority of the Parties; or (ii) accept jurisdiction over any claim that is or has been subject of an arbitration under Chapter V.
23 Law Commission Report
WHAT AILS THE 2016 BIT MODEL?

India’s choice to embrace a modern Model BIT particularly in light of the developing wrangle about on how to accommodate venture security with have state’s right to control ought to be invited. The truth that India has embraced a modern Model BIT that proceeds to provide the correct to remote investors to challenge India’s administrative measures beneath ITA appears India’s nonstop engagement with the ISDS framework but it has modified numerous of the terms of engagement for which it may draw in hazard within the future whereas arranging with future treaties.

Exclusion of Most Favoured Nation Clause (MFN)

MFN has moreover been utilized to purport debate determination clauses from other BITs entered into by the have State. In any case, not having an MFN arrangement within the BIT will uncover outside speculation to the hazard of unfair treatment by the have State at two levels. To begin with, have State might offer way better or particular treatment to the outside foreign investor beneath one BIT without giving the same treatment to another outside speculator beneath another BIT. This clearly implies that have States cannot discriminate between outside foreign investors within the application of residential administrative measures.

Absence of Umbrella Clauses

The umbrella clauses are alluded to as ‘observance of endeavours clauses’ since the host State embraces the duty to supply persistent security to remote investment. An umbrella clause would raise a legally binding debate to a treaty debate. It is seen as an arrangement to extend the scope of security beneath venture arrangements past the first thought of States of late, States have been concerned with the way of translation of umbrella clause and have been keeping it out of treaty settlements.

The hone of tribunals has presented vulnerability of approach and permitted more noteworthy tact of referees States. The Indian model BIT is responsive to the arbitral law and prohibits the disputable treatment benchmarks through and through, in this manner, narrowing the plausibility of its utilize for encroaching on the administrative space of the host State.

\[24\] Indian Model BIT 2016, Article 15.1 and 15.2.
**Treatment Standards Narrowed Down**

Narrowing the scope of treatment measures can diminish the chances of victory of challenges to administrative opportunity. And, elaboration of the treatment benchmarks and specify of their particular components may decrease the watchfulness of the arbitral tribunal. In the event that the degree of watchfulness exercisable by tribunals is expansive, they have more noteworthy scope to meddled with the measures of the have State. In this way The Model BIT of 2015 is immensely distinctive from the 2003 Model BIT. The 2015 Model BIT performs invert enactment: tries to redress and alter the statute created by venture tribunals. To that degree it speaks to a move in settlement hone 25.

It is gem clear that the 2016 India Model BIT has been caught on to house a few arrangements that tilt the adjust in support of the have State and provide rise to a protectionist model. Such a protectionist approach involves three major troubles. To begin with, the pro-State position taken by the 2016 India Model BIT awards near-unbridled control to the have State - at the same time dissolving security to investors. Furthermore, the current Show BIT does not instil certainty in remote investors to see India as a favourable goal for remote financial investors. Thirdly, the 2016 India model BIT encompasses a near-sighted vision in terms of giving rights and powers to India as a host State. What it comes up short to consider is that the 2016 India Show BIT would be a respective course of action between India and another State.

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IMPACT OF MODEL BIT ON INVESTOR CONFIDENCE: UNDERSTANDING THROUGH AN EMPIRICAL EVALUATION

The impact of the Model BIT is still to be tested since India has not signed any BIT since the release of the new model. However, it has issued notices of termination to states with whom it has existing BITs. A notice for renegotiations has also been sent out to over 58 countries, including 22 European countries with whom BITs are going to expire soon or has expired.26 It has further declared that it would unilaterally terminate the BIT if the other party did not negotiate the treaty in concurrence to the 2016 model. It is pertinent to mention that although the agreement will be terminated, the investments would still be protected under the treaty because of the presence of “sunset clause”.27 In the event of termination, it shall mean that the countries will not be protected, unless India and the concerned country do not sign a new treaty. That means, in order to get investment, it will have to sign new treaties. This can be effective in attracting foreign investors through various initiatives that the government has launched.

Although the FDI and BIT have no nexus to each other, but the changes brought in in 2016 model to the dispute resolution mechanism will boost Investment into India. There are various other factors as well that sparked confidence among the foreign investors to choose India over any other country. The Transparency International28 during 2013-18 reported that slowly but significantly there has been a rise in India’s Corruption Perception Index. In the year of 2019, India is positioned at 78 in the Corruption Perception Index. Nonetheless, as per statistics by Trading Economics,29 there was an annual shift of position in Business Confidence Index also. The 57.2 in 2015-16, which subsequently increased to 58.3 in 2017 and finally increased to 64.9 index points in 2018.30 This also corresponded to drastic improvement to the Ease of Doing Business Index from 100th rank during 2016-17 to 63rd position in the year of 2019.31 This is a clear indication for the investors that India is a welcoming new businesses and the mechanism is investor friendly.

To understand better, we take into account the EU-India Bilateral Trade and Investment Treaty. The EU is India’s largest trading partner despite the departure of Britain from the European

28 Corruption Perceptions Index 2019, Transparency International (October 8, 2020, 5:00 p.m.) https://www.transparency.org/en/cpi/2019
29 India Business Confidence, Trading Economics (October 8, 2020, 10:40 a.m.) https://tradingeconomics.com/india/business-confidence
30 Id.
Bilateral trade grew from Euro 15.96 billion to Euro 20.41 billion in 2018. In the same period, India’s imports and exports from the EU were USD 35.2 billion and USD 42.3 billion respectively. Overall EU is the second largest investor with 70 billion euro average FDI from April 2000 to March 2017. Almost one quarter of the European FDI flows into India taking in all of cumulative FDI received in India. A statement was issued by the European counterpart in the virtual summit of 2020 stating that the EU is seeking ambitious bilateral trade and investment agreement with India and tries to give a necessary political momentum to the trade talks. Therefore, the termination of BIT between EU countries and India would cause economic harm to both the sides. It is therefore concluded that it would be in the best interest of both the countries to renegotiate terms and enter into a treaty as soon as possible to minimize the losses to be suffered.

The above stats suggest that India is heavily dependent on FDI. Although the 2016 model brought in severe changes to the existing relationship between countries but it is unlikely to bring any negative impact on the economy and will not have a staggering effect in the short run. It is more likely to strengthen the confidence of investors if the treaties are properly negotiated and the provisions guarantee less burden but more profits. India’s effort in identifying and fixing loopholes to its earlier Investment regime can be certainly appreciated.

STEERING BITS AND INVESTMENTS DURING AND AFTER COVID – 19

The world is undergoing a pandemic which has not only lead to several deaths but also devastated major economies. Developing countries have been largely hit by the market fluctuation and are likely to face a recession. In these challenging times, it is pertinent to re-evaluate the Indian global investment scenario as resistance to investment will be common during the pandemic. But a silver lining was observed when the NITI Aayog boast that India received a sum total of 22 billion dollars \(^{35}\) during the pandemic. Moreover India has jumped up about 79 positions in the World Bank’s Ease of Doing Business,\(^ {36}\) establishing that it has the most liberal FDI regime globally. The larger geopolitical scenario, structural reforms undertaken by the government, both at the centre and state levels, are among the several factors that underline India’s attractiveness as an FDI destination. India is actively in talks with potential investors of different countries to persuade them to shift base to India by providing an enabling environment.

At a time when nations are facing an unparalleled crisis, the need to avoid disputes and claims could not have been any greater. The lack of clarity as to how the treaties will balance out COVID-19 breach of obligations, will lead to speculation of claims challenging similar measure. A study of the OECD\(^ {37}\) estimated the average cost to defend a claim is USD 8 million. For a developing country like India, when the economy is in a turmoil, it would not be a good option to give in human resources to an ISDS claim which is expensive and time consuming. To support the financial cause of developing countries which are already debt ridden, liabilities resulting from COVID -19 related investor-state arbitration should be avoided. Owing to this crisis, the UN General Assembly approved a resolution recognizing “the unprecedented effect” of the coronavirus pandemic and calling for intensified international cooperation to “contain, mitigate and defeat” the disease. Conforming with the resolution, it will be liberal for states come together and recognize the overwhelming risks associated with investor-state disputes and shield governments from a worst case scenario.

As majority of nations are under a complete lockdown or shutdown, the clauses under an treaty may be disgruntled.\(^ {38}\) It is obvious that there will be non-performance of an obligation under the treaty but the question lies how nations are going to indemnify the investors. As far as India is

\(^ {36}\) Id. at 35
\(^ {38}\) https://www.lexology.com/library/detail.aspx?g=e21b3a08-9ec8-4b74-af25-98d6a288ee26
considered, it was the *White Industries case*\(^{39}\) that changed the entire BIT landscape. Before the Model Rule 2016, the then provisions were ambiguous which enabled foreign nationals to bend and mould the provisions according to their whims and fancy. If the amendment would not have been brought forward then, the country would have faced major economic and commercial setback. The establishment of a strong base is sine qua non for the growth and stability of investments in specific sectors. A strong incentive mechanism is proven instrumental in channelizing fresh investments.

In India the recently announced production-linked incentive scheme for mobile phone manufacturing, pharmaceutical drugs and medical devices have generated keen interest among investors, who are looking to seize opportunities in these sectors.\(^{40}\) The outbreak of COVID-19 has witnessed China come under scrutiny from world community over allegations of conspiracy of biological war, which led to people pondering about the over-dependency on Chinese supply. The Indian initiative of self-reliance or “Aatma-Nirbhar” as they say in Hindi, has shown significant growth in the manufacturing sector. Similar schemes if announced for other sectors, it will further strengthen India’s position as a credible alternative to China.

It is said that in the middle of difficulty lies opportunity. India has time and again proved its mettle in the field of receiving investments and is getting success at a pace. Moreover, the Model BIT is investor friendly thereby mitigating the ancillary risks that investors might face. India is firm in its intent to drive its economic growth with a strong manufacturing sector that is fuelled by incentives, strength in attracting FDI, and a competitive domestic market. Further with a resurrecting push to the reforms bandwagon, India is signalling the world that we welcome businesses.

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\(^{39}\) *White Industries Australia Limited v. Republic of India*, Final Award dated 30-11-2011 (UNCITRAL)

CONCLUSION

This essay has evaluated the evolution of the international investment regime in India from the 2003 Indian Model BIT era which emerged following various BITs formed by India post-1980s to the current 2016 Indian Model BIT era which emerged as a direct consequence of India's losses in various International Investment Arbitration awards. The emergence of 2016 Indian Model BIT was a direct consequence of a realisation that the “over Investor-friendly” approach of India since the 2003 Indian Model BIT lead to multiple losses for India in the International World by failing to live up to its treaty obligations to the contracting parties in its BITs and BIPAs. The efforts to counter instances like White Industries and Antrix Corporation from ever recurring again drove India to forge a strong regulatory approach to its existing International Investment Agreements. While many of the changes brought in the 2016 Indian Model BIT as well as the Joint Interpretative Statement of February 2016 are not above scrutiny and criticism, they certainly show the efforts which India has made to create a more regulatory regime as well as imbibe mechanisms to protect failures of its international treaty obligations to the other countries and foreign-investors.

Although the framework for the Indian BIT has changed constantly but it does appear as bleak as it seems. By analysing what went wrong, the BIT structure has been evolving time and again. This essay evaluated the changes that have been brought to the structure to address the issue and the challenges that the previous model did not address.

The effect of the CoVID-19 Pandemic cannot be ignored. The revival of the weaker economies was a farfetched dream at the beginning, when the larger economies were largely hit by the fluctuations in the market. But the incentives that we provided by the Indian government to bring about stabilisation is laudable. There will be various claims arising out of the foreign relations, it will be interesting to see how India handles the situation. While it is too early to predict the success of the 2016 Model Draft, a lot can be learnt from countries like India. The continuous change in the BIT structure simply suggest about the increasing diversification in International investment law framework.