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Evaluating India's Bilateral Treaty 2016 Model: Putting Pieces Together

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Abstract
In this research paper, the author aims to study the BIT program of India with a little bit of more detail into the new Model BIT of 2016 and has divided the whole study into pre and post 2011. The paper also highlights the vital reasons which led to numerous investor-state dispute notices increasing in leaps. The paper also focuses on the major developments that took place after 2011 which caught the attention of the policy makers and academicians towards India's extensive but highly skewed BIT program. These developments post 2011 were the major trigger that resulted into Indian government terminating as many as 59 BITs just to renegotiate these. The renegotiation is done on the terms of new Model BIT of 2016. By the end of the paper authors examine the factors that led to India not succeeding in persuading some of its cardinal treaty partners to agree to the new terms owing to huge policy gaps in the newly drafted treaty and what measures can be taken to do away with the loopholes. Furthermore, in support of the same, the authors conducted a survey by sending a structured questionnaire to relevant professionals and individuals belonging to various fields such as academics, legal practice, law research, judicial officers, organizations and so on and so forth. The results of the survey aided the authors in recommending suggestions projecting India's stance in the global economic stage.
Keywords: BIT, Model BIT 2016, Investor obligations, Transparency, ISDS

I. INTRODUCTION

Bilateral Investment Treaty (BIT) is an investment arrangement between two countries that aims at conferring protection to the investors of both the countries (N.D.Associates, 2015). BITs protect investments by setting constraints on the host state's (investment accepting State) regulatory behavior in order to prevent undue interference with the foreign investor's rights (Dolzer and Schreuer, 2012). One major constraint that sets a BIT distinct from any other treaty is the individual investor's right to sue host state directly for monetary compensation if the host state's sovereign regulatory measures are in violation of the provisions of BIT.

In 1994 India had signed the very first BIT with the UK (GOI, 1994), the pretext was to offer favorable conditions and protection to foreign investments and by extension to foreign investors. India signed around eighty BITs till 2011 and all the BITs were negotiated on a draft which was excessively investor friendly. Despite such a colossal BIT program India did not garner much scorn up until 2011.

Although there were a total of nine BIT cases as against India, all of it were related to a single project namely the *Dabhol Power Project (*ICC Case No 12913/MS, IIC 43 (2005). To add to it, neither of these cases resulted into an ISDS award. However, this scenario started to shift from 2012 owing majorly to three developments.

1. *Firstly*, India begin to witness an ever increasing involvement with Investor-State-Dispute-Settlement (ISDS) from 2011 onwards as against its clean past till 2011. The case of *White Industries v. India (*UNCITRAL Case No [IIC

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529] (30 November 2011) wherein India was found to be breaching its obligations under India-Australia BIT (DEA, 2022) led to a spur of similar investor claims from all over the world.

2. *Secondly*, the in-depth study of the *White industries case [*Final Award, November 30, 2011 (hereinafter White Industries)] brought to fore the demands of various actors namely, academicians, and parliamentarians etc to revisit BITs. Issuance of several ISDS notices against India added much gravity to such demands. Also, the fact that the academic literature on BIT shot up vastly in India post 2011 is also one big indicator of escalating attention to BIT regime in India. The harsh debate took place in the Indian Parliament on the judgement of the White Industries and referring the same as equivalent to an attack on the sovereignty and integrity of the judicial body of India. The statement was made by a Member of Parliament, P. Rajeeve in the May, 2012 and the increased worry for BITs was obvious.
3. *Thirdly*, there is a discussion paper titled "International Investment Agreements between India and other Countries" the author of which was the then Ministry of Commerce as an internal parley within the Government about Bilateral Investment Treaties. The paper highlights the importance of making arrangements in such a manner to meet half way between foreign investor's rights and domestic policies of the host state. To explain a few clauses, over exhaustive definition of the term investment, FET provisions which means fair and equitable, absolute and expansive expropriation clauses with no exceptions are some of the clauses that could give birth to a scenario in which India's exercise of regulatory powers gets compromised. The study concluded that the existing Indian BITs must be assessed and if we decide to keep them, investors' rights should be in symmetry against India's sovereign capacity to act in the public interest namely health and environmental protection.

The White Industries Case coupled with an outbreak of other ISDS notices to the Indian Government along with the above-mentioned developments did lead to revisiting of the existing BITs in India. This revising resulted into two major public declarations by the Indian Government. *Firstly*, acceptance of the fact that the Indian BITs are not adequately drafted and they contain some very vague provisions which can attract wide interpretations by the ISDS tribunals. At the World Investment Forum in 2014, India even specifically highlighted that the FET provision i.e. Fair and Equitable Treatment clause along with the most favored nation (MFN) treatment clause has been inflated to include rights which are far off what is granted by a treaty (WORLD INVESTMENT FORUM, 2014). Secondly, Indian Government recognized that a BIT which has very broad provisions can interrupt upon the State's bureaucratic powers (Rajya Sabha Questions, 2017). One important outcome of all of the above-identified discussions and debates resulted into review of the BIT model of India and the Indian Government adopted a new Model BIT in 2016 (GOI, 2015) with an aim to address the problems of the then existing BIT regime of India and the Government did to a large extent introduced changes for the same. Subsequently to the adoption, Indian Government terminated 59 BITs (BIPA, GoI, 2022) so that they can all be renegotiated on newly amended terms and contexts. However, the Standing Committee of External Affairs (SCEA) in its report (SCEA, 2020-21) has stressed on reviewing the 2016 Model as well mainly because the new model is inclined heavily towards the host State's official powers – which is one considerable reason as to why India still is unsuccessful in convincing its

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crucial treaty partners such as USA, EU, Canada so on and so forth.

II. MODEL BIT, 2016 : A RECONSIDERATION

The Authors conducted a survey by sending structured questionnaire to relevant professionals and individuals belonging to various fields such as academics, legal practice, law research, judicial officers, organizations and so on and so forth. The survey comprised of questions related to the Model BIT of 2016. The Authors jotted down the observation of the survey in this part of the paper and proceeded accordingly. The Authors received fifty seven responses on the questionnaire sent. Out of fifty-seven respondents, twenty-eight percent of the respondents are academicians and expert in the subject area revolving around International Arbitration and BITs. Thirty six percent of the respondents are legal students, researchers, and legal practitioners comprise of the twenty six percent. The bracket of judicial officers and NGO falls at three and half percent each along with one percent of respondents classifying themselves in the *others* category (Please refer the chart below). The questionnaire targeted only the subject experts and legal professionals.

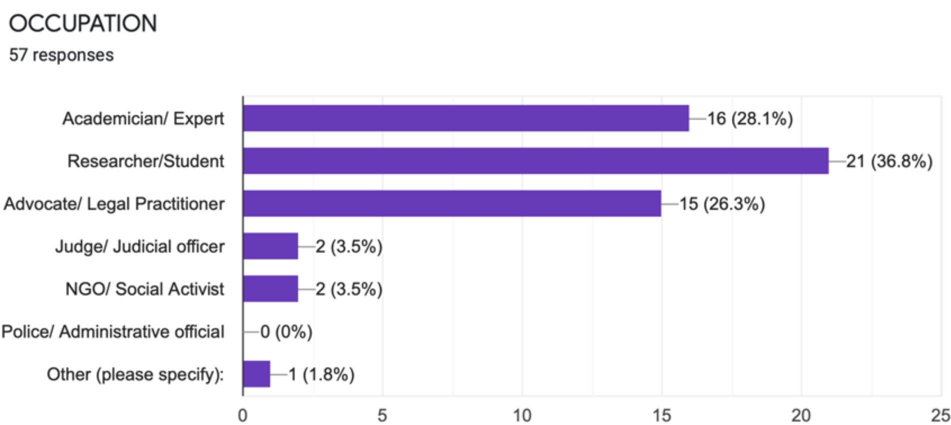

Figure 1: *Occupation of the respondents.*

The result of the survey clearly shows that 'Obligations of investors' and 'Transparency of ISDS proceedings' as the two major factors that will enable India in having a strong stance while entering into a BIT with any other nation as also supported by the data collected by the authors (Please refer Figure 2). Any substantial revision of the Model that is acceptable to other countries must include a balance of rights as well as responsibilities for both investors and the host nations. To strike this balance, the authors have highlighted majorly on 'Obligations of investors' and 'Transparency of ISDS proceedings as was analysed from the survey conducted.

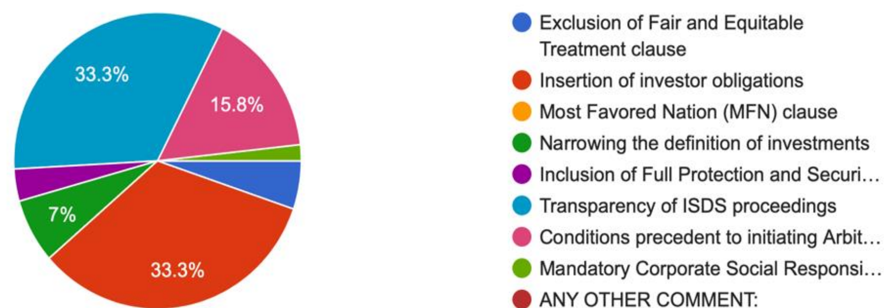

Figure 2: *Major changes introduced in the Model BIT, 2016 to strengthen India's stake*

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Investor Obligations

The older generation of BITs that were signed prior to the enforcement of new Model were highly skewed. While these treaties offered the investors rights and foist commitments on the host nations, they were noticeably quiet on foreign investors' obligations. The 2016 model addressed this discrepancy in part by requiring investors to accept the CSR duties i.e. Corporate Social Responsibility duties by way of addressing issues such as environment, labor, anti-corruption activities, and philanthropic activities on a discretionary basis. However, such a provision cannot be implemented owing to the non-mandatory nature of the clause (Please refer Figure 3). The host state's procedural inability to file counter-claims against the erring investor is intimately tied to the lack of a required investor obligation.

4. In your opinion, do you think the non-mandatory nature of “investor obligations” is fulfilling the very purpose of inserting this provision?

57 responses

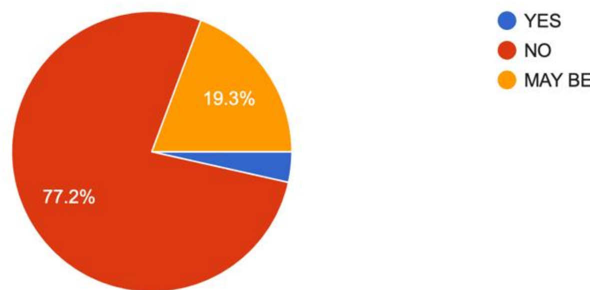

Figure 3: *Respondent’s opinion on non-mandatory nature of investor obligation clause.*

In an ISDS proceeding, the respondent State has a chance to file counter allegations upon the foreign investors. Such counter allegations may allege breaking any domestic law, philanthropic commitments and environmental duties, and so on. However, the host state cannot bring a counter-claim if the signed BIT does not include *mandatory* investor requirement clause even if the investor's conduct has a negative impact on the environment or human rights. At the same time, it's critical that the Bilateral Investment Treaty specifically permits the sued state to file counterclaims. In case of such an articulated and illustrated clause, the arbitral tribunal's discretion will determine whether or not the claim can be brought which hinders the growth of India as an important player in the global economy. Around sixty eight percent of the respondents are of the opinion that Arbitral tribunal shall have no discretion in this regard (Please refer Figure 4). On these points, India's 2016 model falls short.

In your opinion, is it right if the arbitral tribunals have the discretionary power in deciding if the respondent State can file counter claims or not.

57 responses

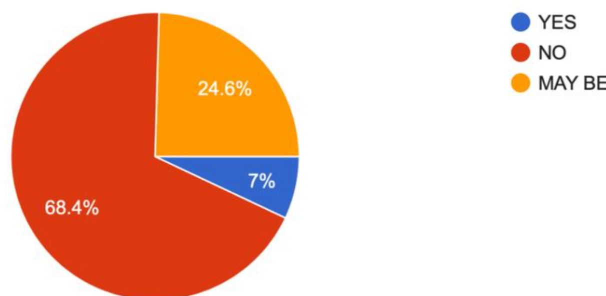

Figure 4: *Respondent’s opinion on arbitral tribunal’s discretion over respondent’s right to file counter claims*

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Transparency

Owing to the heavy number of current ISDS notices being served on India, the report of the Standing Committee on External Affairs (SCEA, 17th Lok Sabha Report, 2019) point out that the cost of compensation to the public purse is enormous. The literal financial figure for all the awards falling on the public exchequer amounts to billions in legal tender of India. Thus, any act by the government of India as a sovereign, which is being challenged in ISDS, is the cause of this cost to the public purse. As a result, a concern of accountability arises, which can only be addressed by ISDS proceedings that are transparent as also evidenced by the data collected by the authors wherein seventy nine percent of the respondents are in favour of inserting strict transparency provisions (Please refer Figure 45. Around seventy nine percent of our respondents have agreed blatantly that full transparency of the ISDS arbitrations is a must in order to make our Government more accountable to the public money. ISDS arbitrations are hugely distinct from previous commercial arbitrations in that it raises "serious concerns revolving around the interests of the common public and policies problems affecting a sovereign who is lastly responsible to its citizens."

8. In your opinion, will a strict transparency provision make the government more accountable to the public as huge amount of public money is involved in the investor-state dispute settlement?
57 responses

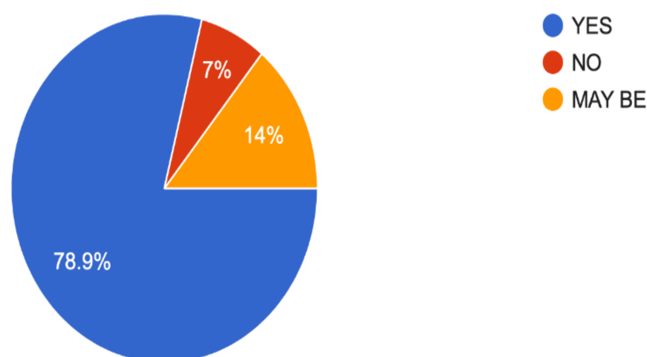

Figure 5: *Respondent's opinion on a nexus between transparency provision and Government's accountability*

Taking an example of 'The Ras Al-Khaimah Investment Authority (RAKIA)' of the United Arab Emirates (UAE). RAKIA sued India for $ 44.71 million in damages after India cancelled the supply of bauxite to an aluminum project in which the UAE is a participant. The investment protection agreement entered into between India was cited in the international arbitration notice. This issue revolved around environmental concern and qualifies as a bonafide public interest and $ 44.71 million is a significant burden on public money.

The 2016 model does integrate provisions related to transparency of investor state dispute proceedings. However, the attitude of the government of India is seen to be rebuffing any such information. Notice of arbitration, awards of proceedings are few such documents that can be publicly exposed under those provisions but the Indian government still attempts to dodge such requests under the confidentiality order given by the international tribunals and refuse to provide such information even under RTI. By adapting such a mild approach, Indian government is only making a mockery of itself. There was a time when the Indian government did not move a bit when the Vodafone issue was to be handed over to the international tribunal. The Government had firmly stated its stance that it has no intention of handing the tax issue over to such a tribunal and now, it is the same government that has so humbly complied

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with the decisions and rulings of the international tribunal. The true mindset or the intention of the law makers behind enacting the RTI was never to help the government in hiding behind the curtain of confidentiality orders.

III. CONCLUSION AND SUGGESTION

The new Model of 2016 was introduced to do away with all the impractical promises made by the earlier model of BIT. The overly investor friendly regime led to about seventeen ISDS notices against India by the foreign investors just by the end of the year 2015. Insertion of mandatory 'Investor obligation' clause in the treaty agreement will provide the host States with a solid legal ground to make counter claim. Absence of such an obligation puts the entire onus on the discretion of the tribunal. In sensitive issues such as human rights and environmental concerns, a compulsorily enforceable investor obligation must be integrated. This will also facilitate India's obligation to the United Nations guiding principles towards human rights.

So far as the transparency of proceeding is concerned, the new 2021 Canadian Model is a very good example for Indian scenario. It contains an enhanced transparency provision along with multiple minor traits to diversify the investor-state dispute vehicle. Canada's BIT approach when it comes to transparency in ISDS proceedings seems to be very instructive. They specify which documents must be made public, what information must be concealed and provisions for a "Non-Disputing Party." The mode also lays stress on the fact that investor state dispute related information must be circulated publicly even if the tribunal expressly assign such data as confidential. Such a model will provide great foundation for a prospering BIT arbitration to India. As agreed by fifty six percent of the respondents (Please refer Figure 6), both the concerns, *Investor obligations* and *Transparency* goes hand in hand.

9. In your opinion, do you think that the "investor obligations" and "transparency" provisions in a BIT program go hand in hand?

57 responses

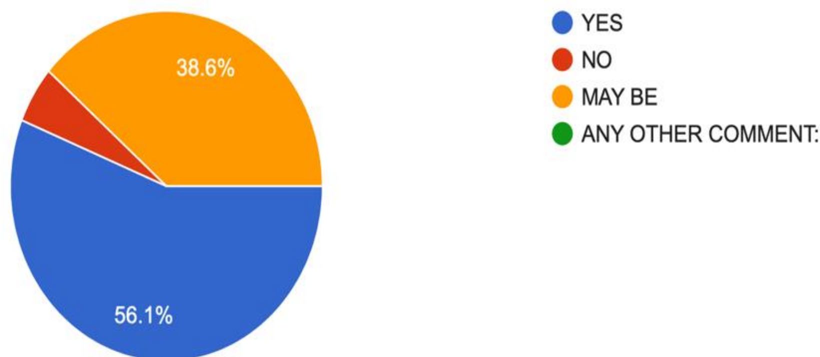

Figure 6: *Data depicting respondent's stance on inter relation of investor obligations and transparency.*

Hence, a higher degree of responsibility can be ensured on the part of the Government in tackling foreign investors only when it is transparent with its citizens about a matter which involves hefty money that falls directly on the citizens themselves.

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