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**SHRI DHARMASTHALA MANJUNATHESHWARA
LAW COLLEGE & CENTRE FOR
POST GRADUATE STUDIES & RESEARCH IN LAW**

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EDITORIAL

Mankind faced unprecedented and devastating damage with outbreak of pandemic bringing transformational changes in economic, social and spiritual life of everyone. The only difference is difference of impact be it for nation or for an individual. The legal system and legal institutions faced onslaught of pandemic in diverse ways. Thanks to technology and comity between the nations resulting in combating the menace posed by dreaded disease whose impact otherwise would have been Catastrophic. Question have been raised how far laws on disasters are effective in preventing, mitigation and addressing contingencies arising out of disaster and questions have been equally raised as to effectiveness of judicial instruments in correcting executive measures such as problems faced by migrant labourers, supply chain management, compensatory schemes etc. Its heartening to know that legal academics raised host of issues which is the food for thought in various webinars, social media discussions. Continuing our quest of inquisitiveness within inquiry, we have brought out the present issue of legal opus dealing with divergent matters. The articles contributed have undergone a blind peer review and reflects burning issues amidst pandemic. I place on record my deepest gratitude to Poojya Dr. D. Veerendra Heggadeji for his benevolent blessings and Dr. B. Yashovarma, Secretary, SDME Society for his everlasting support and all the members of the management for their encouragement. Special thanks to Mrs. Deepa Salian for taking all pains in coordinating various aspects in bring out this issue of Legal Opus. My thanks to Udaya Printery for nice compilation of the present issue. I wish all our well wishers a happy and prosperous new year 2022.



DR. THARANATH
Editor in Chief

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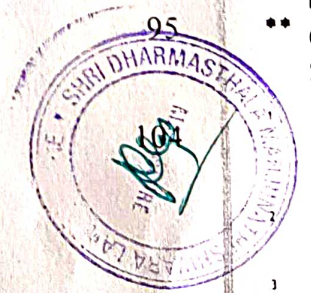
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An Analysis of Treaty making Provisions under 2015 Bilateral Investment Treaty Model

Priya A. Jagadish **

Dr. Tharanatha *

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Model

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Introduction:

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The Indian BIT model was approved by the Cabinet in December 2015, this adoption was preceded by the circulation of the draft version of the model BIT in March 2015.

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The draft model BIT attracted considerable attention, including a full report from the Law Commission of India¹. Compare to 2003 India's model BIT, 2015 model BIT is very detailed containing 38 Articles divided into seven chapters². It was a bold attempt

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on the part of India as for the first time a capital receiving/ host state has made a draft to protect the interest of its citizens and sustainable use of its resources³. India's new

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model is different approach from its earlier model as it incorporates significant changes in its attempt to safeguard the interests of the host states. This model bilateral

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investment treaty text provides the protection to foreign investors in and investor profile that India wishes to venture into and attract over the next decade. The ambitious

India

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"Make in India" campaign suggests that the current government is keen on making India "a global manufacturing hub." The success of this campaign (and others India

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and Indian investors in the foreign country. This new model ought to have targeted the economy) hinges on the ability to attract long-term foreign investments. This, in

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turn, requires institutional and governance reform in the medium- to long-term, supported by BIT commitments to assure similar outcomes in the short-term. Given

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this background, negotiating partners may not be impressed by the model BIT's stance on matters such as taxation and exhaustion of local remedies, which have consistently

been sore points for foreign investors in India⁴.

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¹ Government of India, Law Commission of India, Report No. 260, Analysis of the draft model Indian Bilateral Investment Treaty, August 2015, <https://lawcommissionofindia.nic.in/reports/Report260.pdf>, visited on 02-01-2021.

² See the Model Text for the Indian Bilateral Investment Treaty, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf, visited on 02-01-2021.

³ Gaurav Rai, Indian Model BIT 2015: An Alternate Approach to Investment Treaty Drafting, file:///C:/Users/PRASHANTH/Downloads/SSRN-id3053410.pdf, visited on 26-12-2019.

⁴ Hits and Misses of India's New Model BIT, <https://casi.sas.upenn.edu/iit/chandrashekarparasheera>, Visited on 26-12-2019.



India's 2015 model BIT is a significant improvement over the earlier 2003 model. Yet, it falters critically in appearing to conclude, rather boldly, that India will remain a largely capital-importing economy, that too with much bargaining power on its side. The model BIT's true test will lie in India's ability to use this model to negotiate new treaties or re-negotiate existing ones, while not losing sight of its economic goals and interests.

Some of the Key concepts of the New Model BIT:

Preamble:

The Model BIT preamble represents the key objectives and intent of the parties to join the BIT. Its key aim is to foster bilateral cooperation with regard to foreign investment between the parties. It also promotes the mutual security of business activities with a view to improving economic relations between the parties and fostering sustainable growth. This preamble points to investment regulations in compliance with their law and policy objectives⁵.

Definition of Investment:

A very important role is played by investments in deciding the extent of rights and obligations under the treaty and in defining the ISDS tribunal jurisdiction. The 2003 model adopts an asset-based investment concept that applies to 'any type of asset,' including shares, intellectual property rights, money or performance rights, etc⁶. Instead of an asset-based description investment, under the 2015 model, an 'Enterprise' is defined with reference to a 'Enterprise' that an investor has constituted, organised and managed in good faith in accordance with the country's domestic laws. Article 1.4 also sets out a non-exhaustive list of assets for which a company must meet those investment characteristics, such as the commitment of capital and other resources, the length of the investment, the expectation of benefit or gain, and the presumption of risk and importance for the development of the country in which the investment is made⁷.

The 2015 model does not include assets such as portfolio investments, government debt securities interest, pre-operational expenditures, money claims that do not include the form of interest or operations set out in the investment concept⁸.

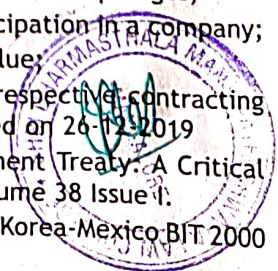
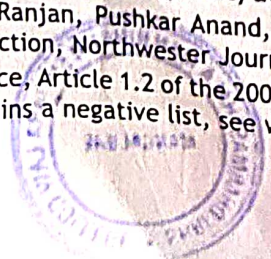
⁵ See the preamble of the Model BIT 2015.

⁶ 2003 Model BIT, Investment means every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the contracting party in whose territory the investment is made and in particular, though not exclusively, includes:

- i. Movable and immovable property as well as other rights such as mortgages, liens or pledges;
- ii. Shares in & stock and debentures of a company and any other forms of participation in a company;
- iii. Rights to money or to any performance under contract having a financial value;
- iv. Intellectual property rights, in accordance with the relevant laws of the respective contracting party, www.italaw.com/sites/default/files/archive/ita1026.pdf, visited on 26-12-2019

⁷ Prabhash Ranjan, Pushkar Anand, The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction, *Northwestern Journal of International Law and Business*, Volume 38 Issue 1.

⁸ For instance, Article 1.2 of the 2002 Japan-Korea BIT defines investment and Korea-Mexico BIT 2000 also contains a negative list, see www.investmentpolicyhub.unctad.org.



Definition of investor:

The place of incorporation test and the successful control test are covered by Article 1.5 of the BIT model, incorporating the condition that the company should perform real and substantive business operations in its home state. This will serve as a protection for claims from shell companies in the Home State and would prevent the creation of a business in the Home State by a national of the Host State, or by a national of any third State, solely for the benefit of the BIT⁹.

Scope and General Provisions:

Measures introduced or retained by a party relating to investments made by an investor of another party in its territories shall be protected by the treaty in accordance with its rules, regulations and policies, as applicable from time to time. But this does not include establishment-related pre-investment operations. That means there will not be retrospective security. Moreover, this Treaty does not refer to any steps taken by the local government, to laws or measures relating to taxes, to the issuance of compulsory licences in relation to IPRs, to government procurement, to subsidies or grants and to services rendered in the exercise of the power of government¹⁰.

Exclusion of MFN treatment

The most significant feature of the 2015 model is that the Most Favored Nation (MFN) clause that was originally used in the 2003 model has been omitted.

It is possible to explain the MFN clause with an analogy. Let's say that there are three states: A (the granting state), B (the beneficiary state) and C (the granting state) (the third state). Further assume that a treaty containing an MFN clause has been signed by States A and B (primary treaty). Now, if State A extends certain benefits to State C, State B may invoke the MFN clause in the primary treaty to ensure that State A extends the same benefits to State C, provided that the benefits granted to State C fall within the scope of the MFN clause contained in the primary treaty between State A and State B. In the ISDS claims, the MFN provision of the primary BIT (under which the dispute arises between investor and state) has often been successfully used by foreign investors to borrow a favourable substantive provision granted under another BIT by the host state¹¹.

In recent years, complaining foreign investors have sued India, arguing that companies from other countries have to receive the same beneficial treatment. This occurred in the White Industries case. The Australian company has highlighted the MFN status given to claim government compensation under the India-Kuwait BIT and won an international arbitration. The case of White Industries is cited as the main factor that caused the MFN clause to be deleted¹².

⁹ Manu Thadikaran, Model Text for The Indian Bilateral Investment Treaty
¹⁰ Supra note no.2. Article 2.
¹¹ Supra note no.7
¹² What is Model Bilateral Investment Treaty 2016? <https://www.indianeconomy.net/spot/classroom/what-is-model-bilateral-investment-treaty-bit-2016/>, visited on 27/01/2019



Standard of Treatment

India has in the past assumed the obligation to grant its foreign investors Fair and Equitable Treatment (FET). The 2015 model is guided by the “Options for negotiations and policy makers” of UNCTAD, which means that parties can clarify and narrow down the FET standard by providing specific obligations such as denial of justice prohibition, flagrant breaches of due process and manifestly arbitrary treatment¹³.

The standard of treatment for foreign investments is laid down in Article 3.1 of the model BIT. A fair and equitable treatment standard is generally approved by BITs. However, this traditional standard of protection is not provided for by the Model BIT, but instead provides a unique standard in the form of protection against (i) denial of justice in any judicial or administrative proceedings; (ii) fundamental infringement of due process; (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief and (iv) Treatment that is manifestly abusive, such as coercion, duress and harassment.

National Treatment: -

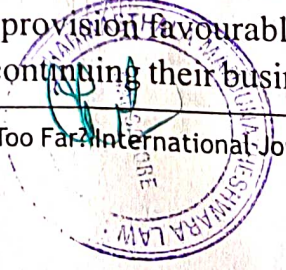
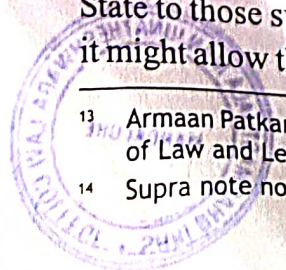
Since India is quasi-federal, the Constitution gives the state governments several powers to make independent decisions. State governments’ actions are included in the scope of national treatment. Therefore, in similar circumstances, the sub-national government should not give foreign investors less favourable treatment with regard to the management, conduct, operation, sale or other disposal of investments¹⁴. However, this type of action by the state government is excluded from the draft model.

Expropriation: -

Article 5.1 deals with the protection afforded to foreign investors against expropriation, either directly or by means of measures having an effect equivalent to expropriation, with the exception of public expropriation, in accordance with the law and through the payment of compensation. In addition, Article 5.2 lays down the conditions for determining whether an expropriation would have the effect of a measure.

Subrogation

The Model BIT has a Subrogation provision that was not covered by the Draft BIT. It foresees the situation of subrogation of rights to a State or its agency if the investment has been paid to the investor under a warranty or an insurance policy. A Contracting Party (the State of the investor) could then exercise its rights against the other Contracting Party (the Host State) with regard to the entitlement of that Contracting State to those subrogated rights. The investors will view this provision favourably as it might allow them to transfer the burden to their state while continuing their business



¹³ Armaan Patkar, Bilateral Investment Treaties-Has India Taken It A 'BIT Too Far? International Journal of Law and Legal Jurisprudence Studies, Volume 2 Issue 7.
¹⁴ Supra note no. 7

without extreme financial disturbances. It would also allow Indian investors when making outbound investments to make use of this provision.

Transparency

In the Model BIT, a new transparency provision has been introduced. This clause is different from the transparency clause in arbitration proceedings. There was no corresponding clause in the Draft BIT. This provision requires the Contracting Parties to ensure that all rules, legislation, procedures and administrative decisions of general application relating to matters covered by the BIT are released or accessible to interested persons for the purpose of getting to know them. It, therefore, supports the consistency of investors' laws and policies¹⁵.

Under Article 22.1 of the Indian Model BIT, the defending party¹⁶ shall make available the following documents:

1. The dispute notice and the arbitration notice;
2. Pleadings and other written representations made to the tribunal concerning jurisdiction and the merits;
3. A non-disputing party's submissions
4. Hearings transcripts;
5. The tribunal's rulings, orders and awards.

Subject to applicable legislation on the confidentiality of confidential records, these documents should be made publicly accessible.

Article 22.3 also reiterates that the award granted by the tribunal is also open to the public. It is the responsibility of the host state, irrespective of the foreign investor's permission, to make all these documents publicly accessible. It is not only mandatory, but also automatic, to release these records.

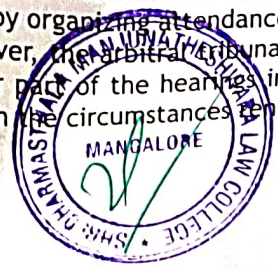
Public access to hearings:

Article 22.2, which sets down the provisions applicable to public hearings¹⁷. This definition of 'hearing shall be made public' is borrowed from Article 6(1) of the disclosure laws of UNCITRAL. The inclusion of the word 'made' in Article 22.2 may be interpreted as implying that there is no need to make the hearing public

¹⁵ Ashutosh Ray, unveiled: Indian Model BIT, <http://arbitrationblog.kluwerarbitration.com/2016/01/18/unveiled-indian-model-bit/>, visited on 28-12-2019

¹⁶ Article 13.7(i) defines defending party, means a party against which a claim is made under this article

¹⁷ Hearings for the presentation of evidence or for oral argument ("hearings") shall be made public in accordance with the following provisions: a. Where there is a need to protect confidential information or protect the safety of participants in the proceedings, the Tribunal shall make arrangements to hold in private that part of the hearing requiring such protection. b. The Tribunal shall make logistical arrangements to facilitate public access to hearings, including by organizing attendance through video links or such other means as it deems appropriate. However, the Tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearing in private where this becomes necessary for logistical reasons, such as when the circumstances preclude any original arrangement for public access to a hearing infeasible.



(when it actually occurs) by simultaneously saying live-streaming, but that a recording of the hearing could later be held in the public domain. Doing so can easily be considered a 'made' public compliance with the duty of listening. Arguably, when read with the second clause that imposes a duty on the tribunal to make logistical arrangements to 'facilitate' public access to hearings, this point is not very good. This gives the tribunal a more clear responsibility to take action to ensure better public access to hearings. As more challenging clauses such as 'tribunals shall hold hearings open to the public' are provided for in Article 29.2 of the UA Model BIT or 'hearings shall be open to the public' in Article 8.36(5) of the EU-Canada CETA, it would have become easier and clearer to ensure public access to hearings.

Secondly, the duty to publish the proceedings does not depend on the agreement of the parties to the dispute. Disputing parties do not veto making the proceedings public, acting personally or collectively. This is a substantial improvement compared to ISCID Arbitration Rule 32(2), according to which a non-disputing party can attend a hearing only if both the parties to the dispute, i.e. the investor and the state give consent¹⁸.

Investor Obligations

In terms of investor obligations, the Model BIT is significantly leaner than the Draft BIT. The Model BIT demands that its laws be complied with by the investor. It removed the provisions on "Obligations against Corruption" as well as "Disclosures" in the Draft BIT. The former clause provided that the investor will not participate in any corruption-causing activity. The latter provision required the investor to keep all records on its investments. As required by the law of the host state, the higher standard of disclosures was beyond the compulsory and minimum disclosures, much to the disadvantage of investors. Similarly, the "Home State Obligations" provision in the BIT draft is absent from the Model BIT. The clause mandated the investor to be liable to the courts for civil proceedings in its own State (Home State) in respect of all decisions taken in respect of investments made in the host State. It put liability on the home state to ensure that the initiation of such acts in the courts was not limited by anything. Not only would these obligations have made it impossible for investors to invest, but it would also have made it difficult for their home states to enter into a BIT because of those strict obligations.

Corporate Social Responsibility

The Model BIT has an interesting Corporate Social Responsibility clause that allows investors in their practises and internal policies to voluntarily adopt globally recognised principles of corporate social responsibility. It is a welcome development to allow foreign investors in their host state to support numerous social causes.



¹⁸ Prabhash Ranjan, ISDS Transparency Provisions in the Indian Model BIT: A Half-Hearted Attempt? Transnational Dispute Management 2(2018)

Settlement of disputes between an investor and a Party

The Model BIT needs local solutions to be exhausted as well as discussions and consultations until an investor is allowed to arbitrate against the host State. The restriction for filing a lawsuit before the court of law shall be one year from the date on which the claimant first acquires knowledge of the measure at issue and knowledge that the loss as a result of the investment has been sustained. The Model BIT also leaves room for the preceding conditions to be non-applicable if the investor can show that there are no domestic legal remedies available which are capable of fairly offering any relief in respect of the same measure or related factual matters for which the investor claims a violation of the treaty.

General Exceptions

The State measures under the General Exceptions have been reduced in the Model BIT. Noteworthy in the Model BIT is the definition of the word "necessary" added by way of a footnote, for application of such measures. The footnote guides the tribunal to consider whether a measure is "necessary" by questioning if there were no less restrictive alternative measure reasonably available to a Party. This standard was not present in the Draft BIT.

The exceptions apply to measures of general applicability applied on a non-discriminatory basis that are necessary under certain circumstances such as to protect human, animal or plant life or health; public morals or maintains public order, *et al.*¹⁹

Conclusion:

India's 2015 BIT Model is a significant improvement over the old Model 2003 to attract the Foreign Direct Investment. It is a part of the 'Make in India' Mission of the government. It provides the provisions like Preamble, definition of Investment and Investor, Standard of treatment, National treatment, Expropriation, Subrogation, Transparency provisions, Public access to hearing and main important clauses of Dispute Settlement provision and Survival clause.

Some of the changes Improvements of the 2015 Model are:

1. The definition of Investment is given a wide analysis. Instead of 'asset based' definition 'enterprise' based definition has given a prominence.
2. In this model Most Favoured Nations Cluse has been removed.
3. Arbitration provisions of dispute resolution mechanism has given an importance

This 2015 Model provide the reciprocal protection of investment.

* * * *

¹⁹ Supra note no. 54

