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Bilateral Investment Treaties - Striving to Balance Investor Protection with State Interests

NEHA[1]

ABSTRACT

On September 25, 2020, the Permanent Court of Arbitration at the Hague ruled in favour of the telecom giant Vodafone in a $2 billion (Rs. 20,000 crores) retrospective tax dispute against India, initiated under the India-Netherlands Bilateral Investment Treaty (BIT). The Tribunal ruled that the Government's imposition of tax liability on Vodafone is in breach of Article 4.1 of the India-Netherlands BIT providing for fair and equitable treatment (FET). India had 90 days to file an appeal against the aforesaid decision in a Singapore appeals court, which it did in the month of December 2020, quite close to the deadline. The Indian Government has challenged the award on the ground that India has the sovereign right of taxation on which private individuals cannot decide and that the matter falls outside the domain of a bilateral investment treaty rendering it beyond the jurisdiction of international arbitration. The Government apparently thought it fit to challenge the award as it had questioned the right of a sovereign to levy tax and not on the tax demand per se.

The above stance taken by the Government in the appeal raises issues pertaining to the objective of standard bilateral investment treaties, which are generally titled as agreements for promotion and protection of investments, and contain provisions on 'protection' of investment. A good bilateral investment treaty, which is necessary for adequate FDI inflows, is characterized by ensuring a balance between the competing interests of the foreign investor and the host country. India's previous BIT Model of 2003 was known to be excessively investor-friendly, giving preference to investment protection over the State's right to regulate. On the other hand, the 2016 Indian BIT Model is drastically different in form, structure, content, and accords increased importance to the State's regulatory powers. India is now signing BITs either based on the 2016 Model, which has a highly restrictive ITA (Investment Treaty Arbitration) provision, or which do not have ITA provisions at all, such as the India-Brazil BIT.

One wonders as to why there is this sudden and significant shift in the Indian Government's approach towards investment treaty disputes and whether or not an ideal balance between

[1] Author is a LL.M. (Corporate Laws) Student at National Law University, Jodhpur, India.

protection of foreign investment and the State's regulatory powers is achievable. What is the nature of bilateral investment treaties, and do they inherently tend to unduly restrict the sovereign space of host countries? This paper attempts to find answers to these questions through an informative study of BITs and the 2016 Indian BIT Model in particular.

I. INTRODUCTION

Recent events like the Vodafone retrospective tax dispute case award against India have prompted a discussion on the extent to which India is willing to compromise with its sovereignty so as to attract foreign investment. Is it even advisable to tie the hands of the country's policymakers by forcing them to adopt only pro-investment policies in line with international rules governing investment and at what cost? Developing countries tend to accept such restraints on their policymaking autonomy with the objective to gain a considerable increase in foreign direct investment (FDI). This, Salacuse and Sullivan (2005) argue, is the "grand bargain" of the treaties.[2] There is no denying the fact that foreign investment is regarded as being crucial for the economic development of a state. In India, the New Economic Policy, through the implementation of Liberalization, Privatization and Globalization (LPG), opened up sectors for international trade so as to allow the global economy to contribute towards the development of the Indian economy. It is fairly logical to assume that foreign investors tend to be attracted towards those counties that are willing to protect their investments by way of favourable provisions governing the relationships in question. Earlier countries would enter into friendship, commerce and navigation treaties (FCN) in order to delineate the terms and conditions governing the commercial transactions between the participating states.[3] Over the past several years, starting from the late 1950s, the practice of concluding bilateral investment promotion and protection treaties (or BITs) has gained traction, with more than 1,100 BITs having been signed mostly between industrialized countries and developing countries. Apart from BITs, there has been a rise in the signing of multilateral treaties like the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty, with provisions similar to those of BITs. BITs and multilateral treaties serve to secure the interests of foreign investors in the host state by way of certain substantive guarantees in the form of standards of protection clauses like Most Favoured Nation (MFN), National Treatment, Fair and Equitable Treatment (FET), Full Protection and Security (FPS) and rights to compensation in the event of expropriation. These substantive guarantees come into the picture only after states parties to the investment treaties admit investment subject to their own

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[2] Jason Webb Yackee, Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?, 42 L&SR 805, 806 (2008).

[3] Alejandro Escobar, Daniel M. Price and David H. Small, An Overview of the International Legal Framework Governing Investment, 91 CUP 488, 488 (1997).

laws and regulations.[4] Although many provisions of the BITs may seem to be similar, on a more detailed inspection, it becomes clear that when it comes to the important elements, one treaty varies considerably from the others.[5] Despite the popular opinion suggesting that provisions of these agreements irrespective of the participating states are predominantly uniform, important details of the treaties are actually negotiated on a treaty-by-treaty basis.[6] Among these carefully negotiated provisions is the dispute settlement mechanism in order to deal with future disputes that may arise between foreign investors (individuals and entities) and the governments they invest in (investor-state disputes). The dispute settlement clauses in the BITs differ in a number of ways; some provide direct access to international arbitration, some allow for ad hoc arbitration, and others dictate the use of domestic courts to resolve disputes.[7] The International Centre for the Settlement of Investment Disputes (ICSID), an independent organization affiliated with the World Bank, is the most important institution for the settlement of these types of investment disputes. Home governments of foreign investors prefer disputes to be settled through international arbitration, whereas host governments typically want disputes over the treatment of foreign investment and investors to be adjudicated by domestic courts. It is this clause where the grand bargain as mentioned earlier usually takes place, wherein home governments (industrialized countries) with greater bargaining power succeed in obtaining the inclusion of ICSID arbitration in their BITs with developing countries as host states who often resign to accept the delegation of dispute settlement authority to ICSID so as to see an increase in their FDI inflows.

From the above account, it seems as if developing countries more often than not have to agree to clauses that may have a negative impact on their domestic interests and, most importantly, their sovereignty. One very strong justification developing countries have for agreeing to such restrictive clauses is a supposed increase in the FDI. But, do we know for sure that BITs actually lead to an increase in foreign investment in the host countries? Are BITs the only way to ensure a balance between the protection of foreign investment and the State's regulatory powers? Is it even possible to achieve this balance, or the bargain is justified in light of the differing interests and needs of the states involved? This paper attempts to provide an answer to these questions through an analysis of BITs in general. More importantly, India, too, apparently started out as an investor-friendly country, as is evident from the 2003 India BIT model but switched to its 2016 Model, giving more importance to its regulatory powers. Can this shift be attributed to a more secure status that India has achieved over the past several years as the seventh-largest economy of the world and can now afford to completely do away with clauses that pose a risk to its interests? In the last decade, economies

[4] *Ibid.*
[5] Todd Allee and Clint Peinhardt, Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions, 54 Wiley 1, 2 (2010).
[6] *Ibid.*
[7] *Ibid.*

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have become far more protectionist and regulation-centric. Sustainable development of the host State has begun to assume more importance amid capital-gaining activities of foreign direct investors. With rising State regulation in diverse areas such as public health, environment, economic reforms and security, amongst others, international investment treaty law is striving to balance investor protection with State interests. This paper will deal with the effects of the White Industries case (*White Industries Australia Limited v. The Republic of India*, Final Award, November 30, 2011) on India's stance regarding BITs in order to develop an understanding of the current scenario in the international investment regime and whether or not BITs continue to be relevant in today's times.

Part II deals with the origin, nature and purpose of BITs. Thereafter, Part III mentions the basic aspects of the 2003 India BIT Model. Part IV is an account of the White Industries case in brief. Part V deals with the Post-White Industries case scenario, particularly the shift to the 2016 India BIT Model. The author in Part VI describes the stringent provisions of the 2016 BIT Model. Part VII deals with whether or not BITs are in general indispensable for promoting foreign investment. Lastly, in Part VIII, the author concludes the paper by highlighting the observations made over the course of writing the paper at hand.

II. BITS – ORIGIN, NATURE AND PURPOSE THEREOF

Commercial agreements between states have been a traditional method for promoting trade and commerce between nation-states. The great expansion in the United States foreign investment, particularly during the two world wars, is credited to a large number of such agreements, generally known as treaties of friendship, commerce, and navigation (FCN) which the US entered into with developing countries. The treaties contained provisions to protect American-owned property in the host states from arbitrary or discriminatory action, the mechanisms for the settlement of disputes etc. This trend soon lost its significance as the developing nations became more and more sceptical about unregulated foreign investment and made evident their reluctance to secure the guarantees which the US wished to be accorded to the businesses established by the US nationals in the host states.

In the 1960s, European countries, on the other hand, started to negotiate bilateral treaties that, unlike previous commercial agreements, dealt exclusively with foreign investment and sought to create a basic legal framework to govern investments by nationals of one country in the territory of the other country.[8] Thus, began the era of modern BIT. Germany, having signed its first such bilateral treaty with Pakistan in 1959, took the lead in this direction owing to the

[8] Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 The International Lawyer 655, 657 (1990).

massive loss of its foreign investment as a result of its defeat in World War II.[9]

What mainly drove the countries to negotiate bilateral treaties was the fact that International Law did not prove to be very helpful towards protecting the interests of foreign investors because of a sheer lack of binding rules and a mechanism to resolve investment disputes. While capital-exporting countries maintained that customary international law imposed an obligation on the host country to respect a minimum standard of protection in dealing with foreign investors, many developing countries rejected this view of customary international law. Their position appears to be summarized in article 2(c) of the United Nations Charter of Economic Rights and Duties of States, which provides that each State has the right to nationalize or expropriate foreign property and that the exercise of this right is not subject to any condition beyond the duty to pay appropriate compensation having regard to all the circumstances.[10]

Under customary international law, what is undisputed is the norm that the ability of a foreigner to undertake an investment in the host country is subject exclusively to the sovereignty of the host country. The host country has the right to control the movement of capital into its territory, to regulate all matters pertaining to the acquisition and transfer of property within its national boundaries, to determine the conditions for the exercise of economic activity by natural and legal persons, and to control the entry and activity of aliens.[11] Foreign investors view these rights as barriers to foreign capital and limitations on their freedom to undertake investments in the first place. No multilateral arrangements could help in effectively dealing with these concerns of the foreign investor. Eventually, western countries resorted to concluding bilateral treaties with host nations so as to clearly define the specific legal rules governing investment, while the third world countries agreed to ratify such treaties so as to promote foreign investment in their respective territories.

The ever-increasing need of the third world countries for capital coupled with the growing willingness to accept foreign investment has been one of the main driving factors behind the signing of more and more BITs since the 1950s.[12] BITs are known to be negotiated and concluded typically between a capital-exporting state (Home country, most industrialized nations) and a capital-importing state (Host country, majorly developing nations) any investment for the reasons stated above. In recent years, BITs have also been entered between two developing nations. It has been noted that at times, a middle-income country might be the home state in one BIT but the host state in another.[13] The popularity

[9] *Ibid.*
[10] Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 The International Lawyer 655, 660 (1990).
[11] *Ibid.*
[12] Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 The International Lawyer 655, 656 (1990).
[13] Todd Allee and Clint Peinhardt, Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions, 54 Wiley 1, 6 (2010).

of BITs has greatly increased over the past few decades owing to the interest shown by the developing nations to attract foreign investment and the desire on the part of the capital-exporting countries to protect their investments.[14] This is substantiated by the number of treaties that over seventy developing nations have signed with developed countries to date, which is roughly more than 300.[15]

Hence, it can be concluded that the BIT treaty rules and enforcement mechanisms are intended to supplant local legislation and institutions and also to avoid disputes over the content and applicability of customary international law.

Most BITs follow a similar and identifiable pattern - starting from titles, such as: *'Treaty between [one contracting party] and [the other contracting party] concerning the encouragement and reciprocal protection of investment.'* Next, the introductory part, typically the preamble, lays down the object and purpose of the BIT. Following the preamble, a BIT generally incorporates a definition clause that outlines the scope and ambit of the BIT by defining an 'investor' and 'investment' – the key qualifiers of protection under the BIT. These definitions give way to standards of protection and treatment of foreign investments - addressing standards such as fair and equitable treatment, full protection and security, national treatment, and most-favoured-nation treatment. Provisions dealing with state measures such as nationalization, expropriation or other similar measures, their permissibility under specific circumstances, and compensation for losses incurred by foreign investors form a core part of BITs and usually follow the standards of protection.

The most important provision of a BIT is the investor-state dispute resolution clause – involving cooling-off periods, negotiation, mediation, exhaustion of local remedies etc. However, the majority of BITs involve international arbitration as the long-stop of dispute resolution. The home countries insist on resolving disputes through unbiased international tribunals (ICSID, UNCITRAL and ICC – common routes for international investment treaty arbitration), and the host states readily agree to it to show their commitment towards according adequate protection to foreign investments.[16]

Having discussed the origin, nature and purpose of BITs, we now have the foundation needed to understand the peculiarities of BITs in the Indian context so as to reach to a conclusion on whether it is possible to balance the interests of both the foreign investors and the host state without the host state having to surrender its sovereign rights or it is bound to be an either-or situation with BITs continuing to take the lead in international investment treaty regime.

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[14] Asoka de Z. Gunawardana and José E. Alvarez, The Inception and Growth of Bilateral Investment Promotion and Protection Treaties, 86 Cambridge University Press 544, 545 (1992).

[15] *Ibid.*

[16] Nishith Desai Associates, Bilateral Investment Treaty Arbitration and India With special focus on India Model BIT, 2016 (Feb. 2018).

III. INDIA'S 2003 MODEL BILATERAL INVESTMENT TREATY

Once the need for a bilateral investment treaty to protect their foreign investments became clear, capital-exporting countries did not get down immediately to enter into BITs with developing nations. Instead, they first devoted considerable time and effort to the preparation of what they call a 'model treaty,' 'prototype treaty,' or 'draft treaty,' to serve as a basis for their negotiations with individual developing countries.[17]

India signed its first BIT with the United Kingdom in 1994, with the clear objective of attracting and incentivizing foreign investment. India's first BIT was based on a Model created by a developed country - where emphasis lied on the protection of foreign investment rather than internationally recognized regulatory powers of the State. This excessively investor-friendly regime remained unchanged for nearly two decades. The India-UK BIT served as the base template for India to negotiate further BITs. In fact, the Indian Model BIT of 2003 closely resembled the India-UK BIT. The regime attracted hardly any attention, and until 2011, only one arbitration was initiated against India internationally, which was ultimately settled and did not result in an international investment arbitration award.

IV. WHITE INDUSTRIES CASE

White Industries, an Australian mining company, entered into a long-term mining contract with Coal India Limited (Coal India), a State-owned Indian company, in 1989. Disputes relating to quality, bonus and penalty payments arose between Coal India and White Industries, prompting the latter to commence arbitration under the ICC Arbitration Rules. In May 2002, the ICC tribunal awarded USD 4.08 million to White Industries. In September 2002, Coal India applied to the Calcutta High Court to set aside the ICC Award under the Indian Arbitration and Conciliation Act. Simultaneously, White Industries applied to the High Court of New Delhi to enforce the ICC Award in India. Both proceedings experienced significant delays. The enforcement proceedings eventually stayed pending a decision in the set-aside proceedings. White Industries appealed to the Supreme Court while the High Court of New Delhi stayed the enforcement proceedings. The matter was pending before the Supreme Court for nine years until 2010. White Industries finally invoked arbitration under the India-Australia BIT. The Tribunal ultimately awarded White USD 4.08 million as compensation as it found that India had violated its obligation to provide to the investor 'effective means of asserting claims and enforcing rights, i.e., a provision borrowed from the India-Korea BIT by way of a most-favoured-nation clause in the India-Australia BIT.

V. POST WHITE INDUSTRIES SCENARIO – 2016 INDIA BIT MODEL

After White Industries, a number of investor-state proceedings were initiated against India, predominantly because of the regulatory and

[17] Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 The International Lawyer 655, 662 (1990).

legislative measures adopted by the Indian Government in the later years. The award in White Industries served to awaken India to the ill-effects in the form of significant encroachment upon State regulatory powers of the investor-friendly BITs, which led to India drastically changing its approach towards investment treaties. In 2012, India started working towards creating an investor-state dispute resolution regime that would balance investor rights with State regulatory obligations. From the period between 2011 and 2015, India signed only one BIT with the UAE. This shift in India's stance further led to the adoption of the new Indian Model BIT in 2016.

VI. An overview of the 2016 India BIT model

The India Model BIT, 2016 ("2016 India Model BIT") is clear evidence of the largely altered position of India in the investment regime. The provisions of the 2003 India Model BIT were very broad and accorded more importance to investment protection over the State's right to regulate. On the other hand, the 2016 India Model BIT is drastically different in form, structure and content and accords increased latitude to regulatory powers of the State.[18] The Preamble in 2016 India Model BIT is quite indicative of India's intention to bring the State back in. It significantly departs from the earlier preamble. It provides for sustainable development of the parties in addition to the promotion of bilateral cooperation in investment. It specifically lays down the right of the Parties to regulate the investments in their territories in accordance with domestic law and policy requirements.

Article 2.4 of the India Model BIT specifically excludes from its scope certain regulatory measures, including any measures by local governments, taxation measures etc. The 2016 India Model BIT provides immunity to local governments from fulfilling obligations undertaken by the host State under the BIT. The specific exclusion of taxation measures entails that India will have the sole jurisdiction to decide as per the domestic laws, the taxability of gains obtained from the investments carried out in India, which again acts as a deterrent and no foreign investor would be comfortable with having to rely on the domestic courts as regards taxation related disputes.

The jurisdiction of international arbitral tribunals under BITs is determined by the definition of investment and investor. The 2016 India Model BIT provides for an exhaustive definition of investment which in turn attempts to place various impediments on the Party claiming to have an 'investment' to invoke the BIT.

The 2016 India Model BIT does not contain a FET clause but rather a "treatment of investments" clause under Article 3.1. While it provides for the protection of foreign investment against denial of justice, incorporation of other key guarantees like 'legitimate expectations' and 'arbitrariness' of state action has been

[18] Jesse Coleman & Kanika Gupta, *India's Revised Model BIT: Two Steps Forward, One Step Back?*, Investment Claims, (Oct.04, 2017), https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/112

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conspicuously avoided. Article 3.2 incorporates the full protection and security standard (FPS), that too after the lack of this provision in the 2015 Draft Model was pointed out in the suggestions. The national treatment clause provides that a Party shall not apply measures that accord less favourable treatment than that it accords, in like circumstances, to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory. Here also, the arbitral Tribunal would be compelled to check for like circumstances in order to effectively apply the benefits meant to be associated with the national treatment clause.

The 2016 India Model BIT does not contain an MFN clause which is speculated to be a direct effect of the White Industries case award passed against India, as mentioned earlier. The Tribunal in *White Industries v. India* awarded White USD 4.08 million as compensation as it found that India had violated its obligation to provide to the investor 'effective means' of asserting claims and enforcing rights, i.e., the effective means standard. The effective means standard was not organically applicable to White, as it was not present in the India-Australia BIT. However, the Tribunal applied this standard by importing it from the India-Kuwait BIT through the MFN clause contained in both the BITs.

A perusal of the Expropriation provision (Host State may not expropriate investment except for reasons of public purpose, in accordance with due process and on payment of adequate compensation under the BIT) reveals that it is clearly Host State-centric and empowers the host State to adopt indirect regulatory measures, with the only check available of non-discrimination.

Chapter IV of the 2016 India Model BIT deals with Settlement of Disputes. India's consent to arbitration under the BIT is qualified only after the foreign investor exhausts local remedies at least for a period of five years before commencing arbitration. This again is not very conducive to the object of speedy disposal of disputes, particularly in a country like India where the rate of disposal of cases is abysmal and runs for decades.

After having dealt with the basic features and purpose of BITs in general and the specific provisions of the 2016 India BIT Model, we can conclude that BITs have to be carefully negotiated and drafted so as to be beneficial to both the foreign investors and the host state. It should not have to be excessively investor-friendly, thereby compromising with the sovereignty of the host state, and at the same time, the provisions should not be so stringent that the very purpose of entering into BITs is reciprocal protection of investment gets defeated. US-Korea BIT, free trade agreements among nations like Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), The EU-Canada Comprehensive Economic and Trade Agreement (CETA), MERCOSUR (Argentina, Brazil, Paraguay and Uruguay) Protocol on Investment Cooperation and Facilitation are a few examples where a balance between the interests of investors and host states has been considerably achieved among the participating states through several rounds of negotiations.[19] These agreements can serve as a starting point for negotiating such BITs. It is understandable, though, that such intricate negotiations may consume a lot of time and may not even result in a consensus as regards the final form which the provisions should take in the BITs. This brings us to the next issue as to whether BITs are the only recourse that states are to take so as to bring in more and more foreign investment in their respective territories.

VII. ARE BITS ABSOLUTELY INDISPENSABLE FOR FOREIGN INVESTMENT?

It is not in dispute that BITs originated because of the inadequacies of customary international law to provide for a consistent mechanism for investment-related disputes. BITs do have their benefits which prompted so many countries to adopt the same in order to negotiate the terms of the investment activities. But, this does not in the slightest entail that the international community has practically no other way to carry out investments in other countries. Foreign investors have always been aware of their ability to give rise to their own instruments in writing in the form of a legally binding investment contract. Investment contracts typically include binding, enforceable agreements to arbitrate investment disputes. These contract-based arbitration agreements often incorporate the same arbitral tribunals and dispute settlement mechanisms commonly found in BITs (e.g., the ICC or ICSID), and they, as well as any resulting arbitral awards, are just as enforceable against host states as are BIT-based arbitrations and awards.[20] Long-standing international arbitral practice demonstrates that international tribunals are very willing to enforce investment contracts against host states.

It is not absolutely certain that BITs are solely responsible for the increase in foreign investments. This is so because it has been widely observed that investor knowledge of BITs is weak and that that reputational concerns of the host states to treat current foreign investors favourably irrespective of the supposed fear of any international sanction are sufficient to ensure the protection of foreign investments. In addition to these factors, widespread use of investment contracts renders the BITs mostly redundant in the present context.

Therefore, in light of the above, another recourse available to the foreign investors seems to be one of the individual investment contracts in case they are deterred by the restrictive and overtly protectionist BITs like India's 2016 BIT Model.

VIII. CONCLUSION

In the last decade, countries across the world seem to be shifting their stance towards according more importance to their regulatory powers as opposed to being entirely investor-friendly. The developmental goals of the host State are being given precedence amid capital accumulating activities of foreign investors.

[19] Nilanjan Sen and Amarendu Nandy, *What ails India's Model BIT?* BusinessLine (Jun. 28, 2020), https://www.thehindubusinessline.com/opinion/what-ails-indias-model-bit/article31939413.ece.

[20] Jason Webb Yackee, Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?, 42 L&SR 805, 812 (2008).

With rising State regulation in various fields, international investment treaty law is striving to balance investor protection with State interests.

Since the adoption of the 2016 India Model BIT, India too has unilaterally terminated around 66 BITs between 2016 to 2019, which does not paint a very good picture of India before the prospective investors.[21] From a cursory reading of the provisions of the 2016 India Model BIT, it becomes quite clear that not much thought has been accorded to the detrimental effects of the same on future foreign investments in India. It also fails to take into account that the 2016 India Model BIT would be a bilateral agreement between India and another State, and the stringent provisions of the 2016 India Model BIT would equally have a negative impact on the Indian investor's interests in the other State. The investors, whether foreign or Indian, would be at the mercy of the unrestrained regulatory powers of the host state, with very limited protection in the form of standards of treatment from the concerned host state, as is evident from the discussion in Part VI of this paper. Moreover, the investors would be compelled to first exhaust local remedies in the courts of the host state before approaching an international arbitral tribunal under the BIT. In other words, the 2016 India Model BIT as it currently stands would harm Indian investors and their investments in foreign countries - with whom India will now negotiate BITs as per the new Model BIT.

FDI has been an important source of finance and other technical know-how required for the overall development of the economy of any country. The need to attract foreign investment has further grown considerably amid the ongoing Covid pandemic. Though there have been praiseworthy initiatives like Make in India 2.0 and liberalization of FDI caps across sectors, these will not be enough unless the Government decides to revise the 2016 Model, thereby taking up a more balanced approach as is the case with US-Korea BIT, free trade agreements among nations like Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), The EU-Canada Comprehensive Economic and Trade Agreement (CETA), MERCOSUR (Argentina, Brazil, Paraguay and Uruguay) Protocol on Investment Cooperation and Facilitation to name a few.[22] A balance between the competing interests of foreign investors and the State's interest is achievable, as has been illustrated by the progressive terms of the aforesaid free trade agreements and trade blocs. Opening up of sectors for FDI will not be very helpful so long as the current 2016 Model continues to be in operation because any rational investor would be reluctant to invest in India owing to the stringent provisions contained therein.

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[21] Nilanjan Sen and Amarendu Nandy, *What ails India's Model BIT?* BusinessLine (Jun. 28, 2020), https://www.thehindubusinessline.com/opinion/what-ails-indias-model-bit/article31939413.ece.

[22] *Ibid.*