



**INVESTORS v. SOVEREIGN – AN  
ANALYSIS OF INDIA’S RESPONSE  
TO BILATERAL INVESTMENT  
TRIBUNAL DISPUTES IN THE WAKE  
OF COVID-19**

*By Tara John and Saumya Yadav  
From National Law University, Jodhpur*

**Abstract**

Bilateral Investment Treaties became a rage in the international investment arbitration world in the 1990’s. So much so that, even the UNCTAD, noted that BIT’s have become a very significant instrument for the protection of Foreign Investment. However, they are non-binding in nature and in India, the national Courts do not give importance to the treaty thus making it just a piece of document between two countries. However, the BIT acts as a formal offer of protection from the Host country to the investor, giving them a sense of security by including provisions like expropriation, compensation for losses occurred due to any acts of the Host country, nationalization, dispute resolution clauses.

India has adopted its Model BIT, 2016 after the 2011 White Industries case that went against India. The present BIT has given more importance to the regulatory powers of the State, thus misbalancing the interests of the investors.

COVID 19 pandemic has left States across the world to choose between health and wealth, and India too is grappling with this extreme situation. This situation has led to investors crying foul over the steps taken by the National government to secure the country using emergency measures of all degrees to limit the impact of the virus like

the nationwide lock-downs, thus, restricting business and investments and resulting in bear markets and the unlock phases being discriminatory towards some business. In this situation, it is inevitable that Investors will invoke the treaty provisions to claim their demands. India will need strong defences against this and given the fact that India still needs its foreign investments, the State will have to find proper middle grounds.

India needs to upgrade its BIT’s to make it more investor friendly thus gaining a balanced approach to Investor- State dispute resolution clauses. Otherwise, in the current economic scenario, all the investments will go on to other investor friendly states in the South Asian region. It is imperative to attract more investors to India, while Balancing State interests and for that proper suggestions will be put through this project being undertaken.

**Research Questions to be undertaken: -**

- 1- What are Bilateral Investment Treaties
- 2- Discuss the Model BIT, 2016 of India.
- 3- What are the issues between investors and India in the wake of COVID 19 pandemic?
- 4- How can India improve its Investment Arbitration regime?
- 5- Suggestions and Conclusion

**Key Words:** Bilateral Investment, Investors, Sovereignty, COVID-19, pandemic, MFN, National Treatment, Fair and Equitable Treatment.

**Introduction- Concept of Bilateral Investment Treaties**

Investment knows no boundaries and limits apart from the ones set out by the countries themselves. These can be in the nature of between two countries or between groups of



countries coming together at different levels. “Bilateral Investment Treaties” (*‘BIT’*) are such agreements entered into between two countries for the protection of investments and investors engaged between themselves<sup>1</sup>. It is important to abide by a BIT in the present- day investment regime for the promotion of Foreign Direct Investments. Countries need investors to bring in Foreign Direct Investments and for their own economic development. If the investment regime in a country is very strict, it will affect the domestic markets very badly, as no investor will want to invest in the country which will eventually lead to a low GDP for the country and such related losses. But the investments need to be regulated as per the norms of the regulated market. To reach a middle point, countries made BIT’s which grant essential protections to foreign investors and investments. BITs make the investments made by foreign investors in a host country placed on a better pedestal due to the legal obligations created between two states.

### **Roles of the Parties involved**

The Bilateral Investment Treaties entered into by the Host Country and the Home country make it easier for the investors to have proper guidelines regarding the parameters of investment and the substantive and procedural requirements to be followed. These treaties between countries also make it clear as to who can be an eligible investor and what can be categorised as a foreign investment in the Host country and what all businesses are open for the investors to invest in. When an investor makes investments in a

country, they should comply with the domestic laws of the host country as well. In case of any disputes, local remedies should be exhausted first, after which the investors will be provided diplomatic protections. Investment law dispute thus has the capability of changing its nature from a private law dispute between investing parties to a public law dispute between sovereign states.

### **Investor v. Host Country**

Both host country and the Investor have powers that are speculated and regulated using BIT’s. In case of any infringement of rights, the Home country of the investor interferes for its national. It is however imperative to note that the Host country needs these investors. The investor can invest in any country suited for him and his business as per the regulations of the countries and find chances of investment elsewhere. However, if the host country does not make its domestic markets, and international investment laws investor friendly, it will be difficult for the country to grow economically. The country will be bound to lose on Foreign Exchanges and thus leading to a much dire situation.

### **Basic Principles followed while formulating a BIT**

Although BITs are not binding on the parties per se, they are made as a guarantee of goodwill between countries. The Host countries majorly provide some protections to foreign investors some of which are as follows

- Fair and Equitable treatment,

<sup>1</sup>Nishith Desai Associates, *Bilateral Investment Treaty Arbitration and India With special focus on India Model BIT, 2015* Feb. 2018, [https://www.nishithdesai.com/fileadmin/user\\_upload/](https://www.nishithdesai.com/fileadmin/user_upload/)

pdfs/Research\_Papers/Bilateral\_Investment\_Treaty\_Arbitration\_and\_India-PRINT-2.pdf (Jan. 5, 2020, 11:09 am).



- Full protection and security clause,
- Most favoured nation treatment clause,
- Minimum standards of treatment,
- National treatment and
- No expropriation or interference by the host country in the use, value and effect of the investments made by the investor in Home country.

### **BITs and International customary law**

To be considered as customary law in the International law, certain essentials need to be fulfilled. They are<sup>2</sup>:

- Similar practices that are repeated time and again by the States constantly.
- *opinio juris* or an obligation to the similar practices by the States by law.
- A major or significant portion of the sovereign States must accede to the practice that is sought to be customary and should not be against it.

BITs do not conform to these requirements as each BIT has its own peculiarity. When it comes to inserting protections and defences it varies from BIT to BIT. They lack the element of consistency, and uniformity. BIT entered into by the same country with different parties would have different format

and principles involved. This leads to a situation where each party gets different legal protections as included in the BIT<sup>3</sup>. Further, it should be noted that, the general ‘sense of obligation’ is lacking between States and is entered into for investment purposes alone. If a country does not want investment opportunities with a country, there is no obligation to enter into a BIT there. BITs are mostly signed by developing countries with other developed countries, for more inflow of money, where there is an already perceived lack of balance between the sovereign powers. Although there are umpteen number of BITs in existence that does not prove any existence of commonality between them and their contents.

### **India’s Model Bit 2015**

After coming out as one of the most sued countries in 2015 for the breach of BIT, India reiterated by replacing its 2003 Model BIT with a new model on Dec 28, 2015<sup>4</sup>. Looking at both the models simultaneously, one might be tempted enough to use the word ‘reformed’ instead of ‘replaced’ as there has been a major deviation in the approach of India from its earlier model.

### **Salient Features**

Some of the salient features which reflect upon India’s current approach are as follows<sup>5</sup>:-

<sup>2</sup> INTERNATIONAL LEGAL RESEARCH TUTORIAL,

[https://law.duke.edu/ilrt/cust\\_law\\_2.htm](https://law.duke.edu/ilrt/cust_law_2.htm), (last visited Jan 6, 2021, 12:30 pm).

<sup>3</sup> Patrick Dumberry, *Are BITs representing the “new” Customary International Law in the International Investment Law*, KLUWER ARBITRATION BLOG, (January 6, 2021, 10:00 am) [http://arbitrationblog.kluwerarbitration.com/2009/09/02/are-bits-representing-the-new-customary-international-law-in-international-investment-](http://arbitrationblog.kluwerarbitration.com/2009/09/02/are-bits-representing-the-new-customary-international-law-in-international-investment-law/#:~:text=BITs%20are%20the%20product%20of,been%20explicitly%20rejected%20by%20States.)

[law/#:~:text=BITs%20are%20the%20product%20of,been%20explicitly%20rejected%20by%20States.](https://law.duke.edu/ilrt/cust_law_2.htm)

<sup>4</sup> Priti Patnaik, *Deconstructing India’s Model Bilateral Investment Treaty*, <https://thewire.in/economy/deconstructing-indias-model-bilateral-investment-treaty> (Jan 6, 2021, 7:30 pm)

<sup>5</sup> Department of Economic Affairs, ‘*Model Indian Bilateral Investment Treaty*’ [https://dea.gov.in/sites/default/files/ModelBIT\\_Anne\\_x\\_0.pdf](https://dea.gov.in/sites/default/files/ModelBIT_Anne_x_0.pdf) (Jan 7, 2021, 7:34 pm).



### 1- Criterion for Investment

For what shall be classified as an investment in order to seek protection under the BIT is now tested on the basis of enterprise approach instead of the earlier asset approach. According to the definition of 'Investment' under article 1.4, it means an Enterprise as defined in the preceding article which along with the assets it possesses, must have the characteristics of the Investment as given in the 'Salini test' that are:

- Capital and resource commitment
- Commitment for a certain duration
- Expectation of gain or profit
- Assumption of risk

### 2- General scope and applicability

It is prospective in its application and does not provide protection to 'pre-investment activities' which are defined under the Act. Also, the following are expressly excluded from the applicability of BIT under Article 2.

- Measures by local government
- Measures by any Party to enforce tax obligations or any other measure relating to taxation
- Issuance of compulsory license with respect to Intellectual property
- Government procurement by a party
- Subsidies and grants provided by a party
- Services provided under the authority of the Government by any party

### 3- Meaning of 'Breach'

For an act to constitute a breach of the treaty, then according to Article 3.1, it must also be a violation of customary international law which is further defined as general and consistence practice of states which results from a sense of legal obligation.

### 4- Security

The security provided to Investors as well as Investment under this treaty is confined to physical security only according to Article 3.2.

### 5- National Treatment

In the 2015 model, instead of the 'Most favoured nation' treatment clause, India has stuck to only providing a general blanket protection to all the nations from discrimination. Hence, according to Article 4 no party will accord a treatment to investors of other party which is less favourable to what it accords to its own investors.

### 6- Role of State Government

The provisions of the national treatment clause have been extended to state Governments as well which are referred to as sub-national Government, and thus 2015 model has made the state governments one of the stakeholders under Article 4.

### 7- Expropriation principles

Expropriation is not allowed under Article 5; however, the successive articles lay down the exceptional conditions in which expropriation can be made and these are as follows:

- Public purpose
- Action taken in commercial capacity
- Measures or awards by judicial bodies which are to protect public interest such as public health, safety etc.

### 8- Maintenance of Transparency

Transparency has been ensured under Article 10 by obligating the parties to publish in a reasonable manner the general laws, regulations, rules etc. of the respective countries which are relevant thereto and also promptly respond to the queries, if any, by any interested person regarding those



published laws. Provision also mandates the requirement of inviting comments from the interested person in case a law is modified or a new law introduced.

### 9- Dispute settlement

Arbitration has been provided as the method of dispute settlement and Chapter 4 which lays down a comprehensive scheme for the same. However, parties are required to exhaust all the domestic remedies available first, then only they can claim their dispute to be settled by arbitration under this treaty.

#### Deviations from 2003 model

India has finally moved two steps away from its earlier 'investor-friendly' approach to a protectionist approach and narrowing down the protection provided to foreign investors to a great extent.<sup>6</sup> This is further asserted by the fact since its coming into force. Some of the provisions which can be cited as the reasons for diverting the interest of investors from India are as follows:

#### 1- Narrow definition of Investment

In the 2003 model, the definition of investment was asset based and covered enterprise as well as its assets including intellectual property. It was much wider than the current enterprise- based approach.

#### 2- Meaning of 'Breach'

The 2015 model has confined the meaning of breach to those acts only which constitute a violation of customary international law only.

#### 3- Most Favoured Nation status

The 2015 model BIT has not retained the 'Most Favoured Nation' clause which was there in the 2003 model. Most Favoured Nation status, unlike its name, is a concept used in International Trade law which means that if any nation is giving any concession or privilege to one nation, then it has to provide the same to all other WTO nations.

#### 4- Exhaustion of domestic remedies

One of the regressive provisions in the 2015 model BIT is the condition to exhaust all the available domestic remedies before applying for arbitration under the BIT.

#### Potential implications of the current approach

It is clearly visible that's is no keener to show liberty towards its foreign investments and is keeping the interest of the nation at a higher notch. This protectionist approach might have serious consequences for the investment regime and the FDI in future. For instance, the clause providing for exhaustion of domestic remedies before subjecting the dispute to arbitration is flawed in its very foundation as the foreign investors are expected to trust the judicial system of the adverse party. Also, one of the major problems Indian judicial system is facing is a large number of pending cases and the Model BIT provision is only making it worse. The narrow definition of investment has already resulted in the limited number of investors being subjects to BIT. All these contentious provisions may have a deterrent effect on investment thus causing a setback to India's foreign trade regime.

<sup>6</sup> Nilanjan Sen, Amarendu Nandy, 'What ails India's Model BIT'

<https://www.thehindubusinessline.com/opinion/what-ails-indias-model->

<bit/article31939413.ece#:~:text=India%20framed%20a%20Model%20BIT,to%20the%20global%20investor%20community> (Jan 6, 2021, 6:30 pm).



### **POTENTIAL CLAIMS INDIA MAY FACE IN THE WAKE OF COVID-19**

The investors can at this point of time take the help of the provisions of BIT that could be of help to them to stop the host country from backing out of treaties. These measures would include the contention of:

**a. Violation of Fair and Equitable treatment-**

this claim covers both procedural and substantive aspects. Usually, investment in the international space necessitates the States to ensure a more investor friendly regime, or at least that they get a fair and equitable treatment. Procedurally, the host country should be able to provide the foreign investor procedural fairness and due process while exercising its powers. Transparency is the main aim of this principle. Once a mandate is given by the host country to its investors, it should not back out from it even during dire circumstances. The host country should be able to provide the foreign investor procedural fairness and due process while exercising its powers.

Substantively, the adjudicating authority must ensure that the measures adopted by the Host country to restrict the rights of an investor is reasonably proportionate and a necessary measure to stop the spreading of the Corona virus. There should not be any arbitrariness with respect to action taken by the State towards its investors.

**b. Violation of national treatment standards-**

regulatory measure taken up by the Host country is discriminatory towards foreign investments and is more lenient towards domestic investments. The standards prescribe that foreign investors must be treated in the same way as that of the domestic investors within the Host country.

There should not be any favourability or impartiality with respect to rules, regulation or restrictions only towards the domestic investments and should equally be available to the foreign investments. In the present-day situation, the investors can claim this violation of national treatment against India, since the regulatory measures like lockdown undertaken by virtue of a domestic law was arguably unfavourable to them and foreign investments met with more losses than domestic investments since transportation within the country from one place to another had been started in a few months itself.

**c. Indirect expropriation by the Host Country-**

claims of indirect expropriation will be made if the regulatory measures are so stringent that it leads to denial of property rights to the foreign investors. In case the government of India have rolled out controlling measures that in some way interfered with the use, value or benefit of any investment made by the foreign investor, such investor can claim settlement of dispute under this principle. In the current pandemic, the investors can claim that the regulatory measures imposed by the state for such a long time has invidiously affected their investments to an extent of expropriation, since the value, use and benefit of the investments have been affected.

**d. Breach of Full Protection and Security clause:**

The full protection and Security are given in the physical realms as well as with respect to commercial interests and legal protection. In the current scenario, the investors can claim the physical protection against regulatory measures taken up by the State to combat COVID-19. Another way this can be claimed is by way of breach of protection by host country with respect to



legal and commercial interests of the Investor and his investments within the host country.

### **GENERAL DEFENCES AVAILABLE TO INDIA**

A model BIT is first formulated by India and it serves as a standard for opening the negotiations with the other country. BIT is then finalised on the basis of further negotiations between the countries. However, there are some principles of international trade law which are incorporated in almost all the BIT signed across the world. Some examples of these common clauses are Fair and Equitable Treatment (FET) clause, National Treatment clause, Most Favoured Nation clause, Arbitration, etc.

BIT also contain within themselves some exceptions which could be later used as a defence by the countries in case of dispute arising out of emergency situations such as 'Public purpose', 'Police Power', 'Taxation measures' etc.

#### **Public Interest or Public Purpose**

Public purpose is a well-established defence to an investor's claim against the host country. It was affirmed by the arbitral tribunal in the case of *Phillip Morris v. Uruguay*<sup>7</sup>, in which the government of Uruguay had imposed some measures to regulate the business of tobacco in the

country. The investor's claim was not allowed as the measures were held to be bona-fide exercise of 'police power' of state to safeguard public health.<sup>8</sup>

It has been included as a defence to Expropriation or Nationalization of Assets of investors in almost all the BITs signed by India.

For example, In the India- Senegal BIT<sup>9</sup>, measures taken for Public health are outside the purview of the treaty according to Article 13 which reads as:

*"No provisions of this Agreement shall be interpreted as preventing the host Contracting Party from taking any measure necessary for the protection of its essential interests as regards security or for public health reasons or to prevent diseases affecting animals and plants or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis."*

Similarly, in the India-Belarus BIT<sup>10</sup> which is signed on the basis of 2015 model, human, animal and plant health are mentioned expressly as exceptions under Article 32.

Thus, measures taken by India in the wake of COVID-19 will be protected under public

<sup>7</sup> Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7.

<sup>8</sup> Claudia Annacker et al, *Worldwide: COVID-19: Public Health Emergency Measures And State Defences In International Investment Law*, <https://www.mondaq.com/france/litigation-contracts-and-force-majeure/937558/covid19-public-health-emergency-measures-and-state-defenses-in-international-investment-law> (Jan 7, 2021, 8:09 pm).

<sup>9</sup> Department of Economic Affairs, 'Agreement between the Government of the Republic of India and the Government of the Republic of Senegal for the promotion and protection of Investments' (July 3, 2008), <https://dea.gov.in/sites/default/files/Senegal.pdf>.

<sup>10</sup> Department of Economic Affairs, *Treaty between the Republic of India and Republic of Belarus of Investments*, (Sept. 24, 2018), <https://dea.gov.in/sites/default/files/Belarus.pdf>.



purpose clause incorporated in India's BIT with the respective country.

### **Extreme emergency situation and essential security**

With COVID-19 possessing an unforeseeable emergency to the humankind, it will be highly unreasonable to expect that States would not be effected by it or their working would remain unchanged.

To effectively deal with situations like COVID-19, many BIT India has signed include 'extreme emergency' and 'essential or national security' as express exceptions to the BIT.

For example, in the India-China BIT<sup>11</sup>, it has been incorporated under Article 14 which reads as:

*"Nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis."*

Similar clause has been incorporated in Article 31 of India-Mexico BIT<sup>12</sup> also.

However, to successfully establish this defence, India must prove that the measures it took were reasonable and non-discriminatory.

### **Necessity**

Taking the sovereigns to be contracting parties with each other, apart from force Majeure and distress, India can also make use of the plea of necessity to back-out of promises made to investors by virtue of its BITs. However, India can claim this defence only in case of grave and imminent risk, where it threatens any essential interest of the country and that the State's actions taking such legal and regulatory measures have not impaired the essential interest of the investor, and that these regulatory acts were the sole way India could safeguard its essential interest from the upcoming danger. In the present situation of a pandemic, wherein the whole world has been threatened by a common enemy, it is only imperative that India as a host country would take such regulatory measures as was taken in other parts of the world and such measures are to protect the essential interest of the State and its citizens- the essential interest being to stop or lessen the spreading of the corona virus and it could have only been possible if such measures were taken. Imposing lockdown, curbing flights and preventing flights from other countries to land in the country were not extraordinary measures taken by the country and was only reasonable given the emergency and wide reach of the impending necessity<sup>13</sup>. It is also to be taken into consideration that India was taking the regulatory measures for a situation that was already existing in the world and it was only

<sup>11</sup> Department of Economic Affairs, *Agreement between the Government of The Republic of India and the government of The People's Republic of China for the Promotion and Protection of Investments*, (Nov. 21, 2006), <https://dea.gov.in/sites/default/files/China.pdf>.

<sup>12</sup> Department of Economic Affairs, *Agreement between the government of The Republic of India and the Government of The Republic of United Mexican*

*states on the promotion and protection of Investment*, (May 21, 2007), <https://dea.gov.in/sites/default/files/Mexico.pdf>.

<sup>13</sup> Michael Ostrove et al, *COVID-19 – a legitimate basis for investment Claims?*, DLA Piper (Apr. 16, 2020), <https://www.dlapiper.com/en/us/insights/publications/2020/04/covid-19-a-legitimate-basis-for-investment-claims/>.



until it became a ‘can’t-do-without-it’ situation that the Government imposed these restrictions. The necessity was not one purposefully created by the Government of India.

### **Force majeure**

India can also invoke the plea of force majeure at this point, considering pandemic as an unforeseen event or an irresistible force. Since the pandemic was so sudden and beyond the control of the India as a host country, that it became impossible for the government reasonably foresee and assume the risk of the situation to perform its obligations under the BITs and only thus were the obligations not heeded to.

### **Distress**

The government of India can also show that there was huge loss of lives within the country. The situation got so worse that even after taking all the required measures, many people lost their lives and the rate of patients affected by the virus is still not going down. At that point of ‘distress’ it was only practical to impose the regulatory measures which affected many stakeholders. The regulatory measures were not intended to target only the foreign investors, but equally put a huge bump on the road for domestic investors as well, as transportation within the country was also at a stop<sup>14</sup>. The fact that so many migrant labourers were stranded on roads, lack of public transport within the country, lack of work from home provisions, lack of stable internet facilities in remote areas, are examples of how the domestic markets themselves were suffering. The regulatory measures themselves were not contributing

factors to the dim investment situations and imposing them were on the contrary a bit helpful to control the sudden surge in the corona-positive patients and helped the government to make arrangements for further patients.

### **DEFENCES AVAILABLE UNDER THE CURRENT MODEL BIT**

The COVID-19 pandemic has brought forth the dilemma of health versus wealth in front of the world. It posed a challenge before the nations to safeguard the health of its citizens without causing any unreasonable interference in their private rights. At the same time another challenge was to maintain the delicate balance between keeping the spread of virus in control by adhering to social distancing while at the same time preventing the economy from shattering. Most of the countries including India ensured the former by enforcing strict lockdowns all over the country resulting in shutting down of business, manufacturing units and minimization of supply. This certainly did not go down well with foreign investors who are promised a number of rights and protections under the respective BITs. This might give rise to a number of investor-sovereign disputes in the future which have already been discussed.

Some of the defences which India can undertake to shed off its liability as claimed by the investors can be as follows<sup>15</sup>:

#### **1- Dispute not related to Investment**

With definition of investment being narrowed down to enterprise having characteristics of investment, one defence

<sup>14</sup> *Ibid.*

<sup>15</sup>Department of Economic Affairs, ‘*Model Indian Bilateral Investment Treaty*’

[https://dea.gov.in/sites/default/files/ModelBIT\\_Anne\\_x\\_0.pdf](https://dea.gov.in/sites/default/files/ModelBIT_Anne_x_0.pdf) (Jan 7, 2021, 7:34 pm).



that India may seek to establish could be that the subject matter of the dispute does not fall within the purview of the word 'Investment' as per Model BIT 2015. If established successfully, the claim of investor will not then be entertained under the BIT arbitration, but in domestic Courts or tribunals.

**2- Act not a violation of customary international law and defence of Force Majeure**

For an act of India to constitute a breach of the BIT, the act must violate customary international law. Thus India may plead that its act did not violate any customary international law or that it may seek that customary law which is asserted to be violated by the investor does not actually falls under the category of custom. Customary international law is already defined in the treaty as – 'resulting from a general and consistent act of a party which it follows due to a sense of legal obligation.'

Even if the investor successfully establishes the act being violative of customary international law, India can plead the defence of force majeure i.e. unable to perform the obligations of a contract due to some unforeseeable event.

**3- Security confined to physical securities only**

Under the model BIT 2015, India has obliged itself to providing only physical security, not commercial or trade security, thus India cannot be made liable for these.

**4- Non- exhaustion of domestic remedies**

Exhaustion of domestic remedies is a condition prior to subjecting the dispute to arbitration under the model BIT 2015. India can plead this as one of the defence since it is

not clarified as to what shall constitute the exhaustion of local remedies.

**5- Expropriation for reasons of Public purpose such as public health and safety**

In simple terms, expropriation refers to an act of a government to seize or take control of assets of any foreign investor for the time being. Due to lockdown and subsequent conversions of a large number of buildings into quarantine centre, indirect expropriation might be one of the dispute to be raised by the maximum number of investors.

In such cases, India can easily establish the defence of 'Public purpose' as COVID-19 is a direct threat to the general population of the country and measures taken by the government will therefore fall under 'public purpose', hence an exception.

**6- Subject matter of the dispute falls within General exceptions provided in the treaty**

Article 32 expressly mentions some situations under the head 'Exceptions' to which BIT will not be applicable. These situations can be pleaded directly as defence by India to counter claims of breach of BIT. These exceptions are as follows:-

- “(i) protect public morals or maintaining public order;
- (ii) protect human, animal or plant life or health;
- (iii) ensure compliance with law and regulations that are not inconsistent with the provisions of this Agreement;
- (iv) protect and conserve the environment, including all living and non -living natural resources;
- (v) protect national treasures or monuments of artistic, cultural, historic or archaeological value.”



The measures taken by the government with respect to trade in order to tackle the COVID-19 crisis fall within exception second and thus, India can plead it as a defence for its acts.

COVID-19 was an unforeseeable event which caused a state of health emergency across the world forcing the countries to compromise with their economy in lieu of public health. In such situations, defences such as 'Public purpose' and 'Force majeure' can come forward for the rescue of India to counter the claims of foreign investors.

### **CONCLUSION AND SUGGESTIONS**

Although the measures taken during the pandemic are imperative in terms of controlling the virus or in terms of securing the country from falling prey to the virus completely, it is hard hitting the corporate regime and businesses within the country. India has taken a number of supervisory measures that could impact foreign investors negatively which will force the foreign investors to raise dispute with India using the investor-State dispute settlement mechanism in BITs. There arises a need therefore to look into the investor-state arbitration systems in these times and what all measures and defences can be taken by both investors and host countries in terms of treaty-based arbitration for COVID-19 related measures. It must be kept in mind the previous times whenever investors have claimed such disputes over regulatory measures taken up by Host States when there was a crisis in the country.

Although most of the BITs signed by India have been concluded unilaterally, they still function with respect to those investments that were made before such termination and

therefore a major part of foreign investment in India still has the backing of BITs.

Due to withdrawal from a significant number of BITs in 2015, India needs to improve its image from disrespecting international laws. The priority of domestic interests over foreign investments has been a key feature in the new Model BITs signed by India, after engaging in a number of disputes in the international arbitration tribunals due to the prior badly designed BIT policies. Moreover, the judiciary did not give importance to the BITs signed by India and did not consider the obligations on the part of the State and the retrospective amendments to taxation laws by the government left investors in a poor state. But now, during the new Model BIT regime, there is still a lack of balance between investor and state responsibilities.

### **Investor – friendly policies**

India should aim at keeping the markets investor friendly and continuing the present favourable policies and schemes initiated by the Government. With the present unemployment rates of over 6% which have increased due to the pandemic, India needs investors to pick up its unemployed workforce without undue exploitation. The advantages of lower salary packages to employees, tech-savvy employees and with a lot of opportunities for investment getting better profits, attract more investors to India, but it will be the legal provisions, rules and regulations associated that will be key in deciding whether the investors are there to stay or not. Even State governments are doing their part in attracting foreign investors. For example, Samsung Display Noida Private Limited was provided with incentives to start a manufacturing unit in



Uttar Pradesh as per the SPECS program<sup>16</sup>, thus initiating an export hub in UP. Again, there has been changes in the guidelines regarding change in the sectoral caps in different sectors for investment<sup>17</sup>. To increase the current FDI rates, we need to integrate a better banking sector, more economic reforms, well-codified labour laws, and better infrastructure, so that India can attract more investors than other South Asian countries.

### **Dialogue and negotiations**

India can indulge in proper dialogue with different states, and take its time to negotiate the terms of BITs before entering them so that there will be a ground for emergency and unprecedented situations like the current COVID-19 pandemic<sup>18</sup>. It is imperative for the governments to keep the economy of the country going even during such situations and the measures adopted will surely affect investors in many ways. The BITs must include provisions to support the interests of Investors as well for smooth sailing.

### **Harmony between labour laws implementation and interest of investors**

India has taken a number of measures that have infringed the rights of investors more than proportional during the pandemic. The Ministry of Labour and Employment have also prescribed guidelines to the employers to try and not dismiss the employees and workers, especially those on contractual basis. This has always been a question before each and every government as to how to

strictly protect rights of the labours while keeping the market investor friendly at the same time. A harmony is required to be maintained between the two conflicting interests by indulging in frequent dialogues with all the stakeholders. The Government may think of some kind of reward or incentive for those investors which uphold rights of their workers.

### **REFERENCES**

1. Government of India, Ministry of Finance, Department of Economic Affairs (Investment Division), *India's Model Bilateral Investment Treaty (BIT) Text*, (28th December, 2015).
2. Dr. Martin Jarrett, *The Covid-19 Pandemic and Investment-Treaty Arbitration*, YouTube, (Dec 10, 2020), [https://www.youtube.com/watch?v=9MLu\\_0pXoO0](https://www.youtube.com/watch?v=9MLu_0pXoO0).
3. International Law Institute, <https://www.ili.org/training/ili-brochure/upcoming-programs-and-events/1192-webinar-investment-disputes-and-covid-19-crisis-the-view-ahead.html>, (Jan 2, 2021, 9:30 am).
4. Patrick Dumberry, *Are BITs representing the "new" Customary International Law in the International Investment Law*, KLUWER ARBITRATION BLOG, (January 6, 2021, 10:00 am) <http://arbitrationblog.kluwerarbitration.com/2009/09/02/are-bits-representing-the-new-customary-international-law-in-international-investment-law/#:~:text=BITs%20are%20the%20produ>

<sup>16</sup> scheme for promotion of manufacturing electronic components and semiconductors (SPECS)

<sup>17</sup> DTH- 100%FDI, automatic route in Defence Manufacturing from 49% to 74%.

<sup>18</sup>Yas Banifatemi, *COVID-19 & INTERNATIONAL INVESTMENT PROTECTION*

<https://www.shearman.com/perspectives/2020/04/covid-19-international-investment-protection> (Jan 8, 2021, 10:30 pm).



---

ct% 20of,been% 20explicitly% 20rejected% 20  
by% 20States.

5. Mihir Pandey, *India's Economy Is Ailing From More than Covid-19*, <https://www.bloomberg.com/opinion/articles/2020-06-26/india-s-investment-crisis-exacerbates-covid-19-gdp-slowdown>. (Jan 10, 2021, 7:30 pm)

\*\*\*\*\*

