MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY: AN ANALYSIS

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The 2016 version of the Model Bilateral Investment Treaty unveiled by India reflects a major step towards clearing India's not-so-attractive reputation in the world of international investment. The Model text however, though a revised version of the draft text released in 2015, still does not elevate India to the standard of an investment friendly country. Various provisions of the Model Bilateral Investment Treaty are a knee-jerk reaction to the investment claims faced by India in the past, and they seek to safeguard the regulatory powers of the State more than the catering to the objective of investment promotion and protection. The Model Bilateral Investment Treaty also deviates from various traditional norms of Bilateral Investment Treaties, which could backfire in the long-run as the scope of application and interpretation of these new standards could remain with the arbitral tribunals which may choose a liberal interpretation over a narrow one. Therefore, India should embrace the current trends in investment protection from around the world even more to remain in competition for attracting foreign investments.

I. INTRODUCTION

Since the time of liberalisation of the Indian economy in 1991, India had signed a total of 82 Bilateral Investment Treaties ('BITs'), out of which 72 BITs have come into force.[1] However, of late, as many as eleven disputes have arisen with regard to the country's obligations under the respective BITs,[2] which led to debates over a serious reconsideration of the policy informing the

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[1] Ministry of Finance-Government of India, *Bilateral Investment Promotion and Protection Agreements*, http://finmin.nic.in/bipa/bipa_index.asp?pageid=1 (Last visited January 23, 2016).

[2] Anirudh Wadhwa and Ashutosh Ray, *A BIT of a secret*, January 22, 2014, available at http://indianexpress.com/article/opinion/columns/a-bit-of-a-secret/ (Last visited on January 23, 2016).

BITs entered into by India.[3] As a result, in April 2015, India released a draft text of a Model Bilateral Investment Treaty ('Model BIT'), which aimed to "provide appropriate protection to foreign investors in India and Indian investors in the foreign country.....while maintaining a balance between the investor's rights and the Government obligations."[4] Following the submission of comments and expression of apprehension by stakeholders that the Model BIT could jeopardise entry of foreign investments,[5] the Ministry of Finance unveiled the revised and the final version of the Model BIT in January 2016.[6]

The Model BIT aims to act as a base for negotiating new BITs with other States, as well as for re-negotiation of the existing ones. However, it incorporates within it various provisions which should be viewed with caution. A comprehensive reading of the BIT would, in fact, suggest that it has been drafted by considering India as a capital-importing nation. The strict provisions and broad regulatory space for the Host State under the Model BIT could potentially affect Indian investments abroad, especially since many Indian corporations are currently attempting to expand overseas.

In this article, I would attempt to delve into an analysis of certain specific provisions that should be carefully dealt with in order to ensure that India is not branded as a nation with an unfriendly attitude to foreign investments.

II. ANALYSIS OF SPECIFIC PROVISIONS

A. DEFINITION OF INVESTMENT

Articles 1.3 and 1.4 of the Model BIT indicate that India proposes a narrow 'enterprise-based' definition for investment, whereby only direct investments are protected under the treaty. Most modern BITs, as can be seen from current practice, follow a close-ended or an open-ended asset-based definition, covering a wide range of investments including portfolio investments and intangible assets, as can be seen in the US and Canada Model BITs.[7] While enterprise-based definitions, such as those followed in the Indian Model BIT,

[3] *See* Biswajit Dhar, Reji Joseph & T C James, *India's Bilateral Investment Agreements: Time to Review* XLVII (52) ECO. & POL. WEEKLY (2012).

[4] *See* Draft Indian Model Bilateral Investment Treaty Text, 2016, available at https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/ (Last visited on January 23, 2016).

[5] Prabash Ranjan, *India's draft BIT policy could end up scaring foreign investors: Here's why*, September 21, 2015, available at http://indianexpress.com/article/blogs/indias-draft-bit-policy-could-end-up-scaring-foreign-investors-heres-why/ (Last visited on January 23, 2016).

[6] Ministry of Finance, *Model Text for the Indian Bilateral Investment Treaty*, available at http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf (Last visited on January 23, 2016).

[7] US Model BIT, Art. 1, available at http://www.state.gov/documents/organization/117601.pdf (Last visited on December 14, 2015); Canada Model BIT, Art. 1, available at http://www.

are not uncommon, it is a more traditional view on the definition of investment, which only covers direct investments and thereby, does not take into account the increased scope of foreign investments in the modern era of globalization and liberalization.

Besides this, the definition of investment in the Model BIT also contains a negative list, which precludes portfolio investments, interest in debt-securities, intangible rights, etc. from the definition of investment.[8] While this increases the immunity of BIT claims against India, the narrow scope of protecting investments would also be extended to Indian investments abroad.

An option for the Indian Model BIT would therefore be to revise the definition of investment in the form of a hybrid between an asset-based and enterprise-based definition, while keeping intact a negative list (to exclude those specific categories or sectors that the Parties deem necessary). Such a definition would ensure that direct and indirect investments are protected under the BIT, while still leaving scope for exclusions for regulatory reasons by the State.

For instance, Article 1.2 of the 2002 Japan-Korea BIT[9] defines investment to include "… an enterprise;… shares, stocks or forms of equity participation… bonds, debentures, loans and other forms of debt, including rights derived there from,… rights under contracts,…claims to money and to any performance under contract having a financial value, intellectual property rights,… any other tangible and intangible… property". In addition, the term investment includes "the amounts yielded by investment, in particular profit, interest, capital gains, dividends, royalties and fees". Moreover, the 2000 Mexico-Korea BIT also contains a negative list, stating:

> "… but investment does not include, a payment obligation from, or the granting of a credit to a Contracting Party or to a state enterprise… but investment does not mean, claims to money that arise… from (i) commercial contracts for the sale of goods or services by an investor in the territory of a Contracting Party to a company or a business of the other Contracting Party, or ii) the extension of credit in connection with commercial transaction… iii) any other claims to money that do not involve the kinds of interests set out in subparagraphs a) through e)".[10]

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italaw.com/documents/Canadian2004-FIPA-model-en.pdf (Last visited on December 14, 2015).

8 Model Text for the Indian Bilateral Investment Treaty, Art. 1.4.

9 Japan-Korea BIT, 2002, Art. 1.2, available at http://www.bilaterals.org/IMG/pdf/korea_japan.pdf (Last visited on January 23, 2016).

10 Korea-Mexico BIT, 2000, Art. 1.1, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1809 (Last visited on January 23, 2016).

The abovementioned examples illustrate two of the many ways in which a hybrid definition of investment is adopted in BITs, striking a balance between the objectives of protecting the investor and safe guarding the regulatory authority of the sovereign State in a reasonable manner.

B. DEFINITION OF INVESTOR

The definition of investor under Article 1.5 of the Model BIT[11] follows an apt approach. Under international investment law, a BIT may include the place of incorporation test or the effective control test for qualification as a protected investor. The place of incorporation test merely requires the investor to be incorporated in the Home State in accordance with its laws, even if the entity is actually controlled by nationals of the Host State or a third State. This problem can be seen in *Tokios Tokeles* v. *Ukraine,*[12] wherein Tokios qualified as a protected investor for being a Lithuanian company, despite being controlled by Ukrainian nationals, merely because the Lithuania-Ukraine BIT contained only the place of incorporation test. The effective control test, on the other hand, requires the investor to be effectively controlled by the nationals of the Home State, thereby avoiding the indirect use of BITs by non-nationals of the Home State.

The definition of investor in the Indian Model BIT encompasses the place of incorporation test and the effective control test, adding the requirement that the entity should conduct real and substantial business operations in the Home State. This would act as a shield for claims from shell companies in the Home State, and prevent a Host State national, or a national of any third State from setting up a company in the Home State to merely take advantage of the BIT.

C. SCOPE AND GENERAL PROVISIONS

However, this retrospective protection does not apply to Law or Measures taken by the Host State prior to the entry into force of the BIT. As detailed in Article 2.2 of the Model BIT, the protection under the BIT does not extend to any pre-investment activities, or any Law or Measure regulating

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[11] Model Text for the Indian Bilateral Investment Treaty, Art. 1.5 states –

"investor" means a natural or juridical person of a Party, other than a branch or representative office, that has made an investment in the territory of the other Party; For the purposes of this definition, a "juridical person" means: (a) a legal entity that is constituted, organised and operated under the law of that Party and that has substantial business activities in the territory of that Party; or (b) a legal entity that is constituted, organised and operated under the laws of that Party and that is directly or indirectly owned or controlled by a natural person of that Party or by a legal entity mentioned under sub clause (a) herein.

[12] ICSID Case No. ARB/02/18, Tokios Tokeles v. Ukraine, Decision on Jurisdiction (April 29, 2004).

such pre-investment activities. Accordingly, it would seem that India is not following the 'admission model', as no protection or safeguard is granted for establishing an investment in India. This may act as a negative signal to foreign investors, as they will not be treated at par with local Indian investors in making an investment. While there are BITs that do not follow the admission model, it may be advisable to extend protection to admission of investments as well, in order to attract new foreign investments in India. In fact, the current India-Australia BIT contains a provision to prevent discrimination at the stage of admission of investments, provided such investments are made according to the law of the Host State.[13]

Article 2.3 prevents parties from claiming protection under the BIT with respect to claims arising from events that occurred or claims that were raised prior to the entry into force of the BIT. However, there may be situations when some of the events giving rise to the BIT claim arose prior to the BIT entering into force, while certain others occurred after the BIT entered into force. The BIT claim (say expropriation) would be the cumulative result of all these events. For instance, the Host State may have imposed additional licensing conditions affecting a foreign investor prior to the BIT entering into force. Afterwards, the Government might have taken actions to reduce the price of the product for local investors. Cumulatively, these events could have resulted in creeping expropriation such that it was no longer profitable for the foreign investor to continue in the market. In such cases, the Model BIT is ambiguous as to whether protection under the BIT can be availed, which may be interpreted differently by an arbitral tribunal and a Court of the Host State.

Article 2.4(ii) states that if the Host State decides that the alleged breach under the BIT is a subject matter of taxation at any point in time, the decision of the Host State therein shall be non-justiciable and exempt from review by any arbitral tribunal. This could potentially give a wide discretion to the Host State to unilaterally exclude any dispute from the jurisdiction of a tribunal, merely by asserting that the conduct in question relates (even remotely) to taxation. Moreover, it may allow the Host State to justify any tax measure, without giving an arbitral tribunal the opportunity to examine the possible arbitrariness of such measure. Given that India's tax policies do not enjoy a favourable reputation in the international sphere (in view of the BIT claims currently filed against India),[14] this provision maybe seen as a red flag by foreign investors, while considering India's viability for investment.

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[13] India-Australia BIT, 1999, Art. 3.1, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/154 (Last visited on January 23, 2016).

[14] James Crabtree, *New Blows Hit India's Investment Reputation*, February 12, 2014, available at http://www.ft.com/intl/cms/s/0/a2987c2c-93da-11e3-bf0c-00144feab7de.html#axzz3y4ZRCUQ6 (Last visited on January 23, 2016).

D. STANDARD OF TREATMENT

Article 3.1 of the Model BIT sets out the standard of treatment for foreign investments. The form in which this provision is found in the Model BIT, however, is unique, as it is different from the traditional standards of treatment under international investment law. Generally, BITs endorse a fair and equitable treatment standard.[15] However, the Model BIT does not provide for this traditional standard of protection, but instead provides a unique standard in the form of protection from (i) denial of justice in any judicial or administrative proceedings; (ii) fundamental breach of due process; (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief and (iv) manifestly abusive treatment such as coercion, duress and harassment.

These standards, particularly denial of justice, are open to interpretation, and when faced with the question, it would be the prerogative of the tribunal to interpret these standards in the manner they deem fit.

The standard of denial of justice under customary international law, which could very well be used for interpretations in investment treaty arbitrations, could potentially pose a contradiction within Article 3.1. Under customary international law, this principle is used in three senses.[16] The broad interpretation of the concept covers the entire field of any wrongful conduct of States towards aliens, from every organ of the Government. The narrowest interpretation, on the other hand, could be limited to refusing access to justice to an investor or delays in the granting of such justice. At the same time, a middle path to both these interpretations would cover improper administration of justice on part of the State including, but not limited to, access to courts and adequacy of procedural justice. Since denial of justice can be defined in all three senses under customary international law, it opens up the possibility that the arbitral tribunal may interpret the standard broadly or narrowly, in light of the arguments presented before it.

Moreover, denial of justice under customary international law also includes inadequate administration of justice or a clear and malicious misapplication of law.[17] However, as can be seen from the subsequent dispute settlement provision under Article 13.5 of the Model BIT, the merits of a judicial decision in the Host State cannot be reviewed by the arbitral tribunal. Thus, the

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[15] *See generally* Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, 20 EJIL (2009); OECD Publishing, Fair and Equitable Treatment Standard in International Investment Law (OECD Working Papers on International Investment, 28, 2004/03), available athttp://dx.doi.org/10.1787/675702255435 (Last visited on January 23, 2016).

[16] OECD, *Fair and Equitable Treatment Standard in International Investment Law* 28 (OECD Working Papers on International Investment, 2004/3, 2004).

[17] ICSID Case No.ARB(AF)/97/2, Azinian v. Mexico, Award, ¶¶102-103 (November 1, 1996).

provision of standard of treatment under Article 3.1(i) has the potential to be directly in conflict with the definition section and the dispute settlement section of the BIT. Since the treaty itself provides for a standard of protection involving denial of justice, but later contradicts the same in a subsequent provision, an arbitral tribunal faced with the question would have to disregard one of the provisions, creating unwanted uncertainty and confusion.

Again, since the traditional fair and equitable treatment standard is absent in the Model BIT, the tribunals under Chapter IV would be free to develop their own broad interpretation of Article 3.1. In this regard, it may be noted that the fair and equitable standard can be interpreted as including only the minimum standard according to international law, or as a stand-alone standard encompassing a higher level of protection than the international minimum standard. The standard of denial of justice is usually present when tribunals interpret fair and equitable treatment as an autonomous standard, providing for a higher protection than the international minimum standard.[18] Thus, an arbitral tribunal would be guided to interpret Article 3.1 as providing a high standard of protection, more than that of international minimum standards, in view of the absence of traditional standards of protection as well as the indications within Article 3.1 that an autonomous standard of protection is envisaged.

Accordingly, India may explore the option to revise the standard of treatment clause to align it with international practices and include the traditional standard of protection of fair and equitable treatment, so as to avoid any confusion. Failure to do so could result in India facing more BIT claims, as international tribunals may give loose interpretations to the standard of treatment within their sphere of authority.

Therefore, the framers of the Model BIT should consider incorporating the traditional standard, and define its scope precisely to meet international minimum standards. For instance, the US Model BIT adheres to the traditional fair and equitable standard, but adds a provision stating that -

> "For greater certainty, paragraph 1 prescribes the customary international minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."[19]

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[18] *Supra* note 18, 26.

[19] US Model BIT, Art. 5.2, available at http://www.state.gov/documents/organization/117601.pdf (Last visited on January 23, 2016).

E. EXPROPRIATION

The wording of Article 5.1 suggests that protection should be granted to foreign investors from direct and indirect expropriation, as it prohibits Measures having an effect equivalent to expropriation. Article 5.2 further lists out the conditions for determining whether a Measure would have the effect of an expropriation. The protection under Article 5.1, however, does not prohibit discriminatory Measures against foreign investors. Thus, if a Measure, despite being discriminatory on the face of it, is for a public purpose, according to the procedure established by law and with payment of adequate compensation, it would constitute a lawful expropriation against which the investor has no remedy. In fact, this is not in line with the international trend which requires that lawful expropriation be non-discriminatory, as evident in the US Model BIT, Japan-Korea BIT and the Korea-Mexico BIT.[20]

In light of the above, India may want to explore the option to revise the provision on expropriation to expand the scope of lawful expropriation.

F. INVESTOR-STATE DISPUTE SETTLEMENT

Chapter IV of the Model BIT provides for the settlement of disputes between an investor and the Host State. Investor-State Dispute Settlement (ISDS) is one of the important features of any BIT. The decision of an arbitral tribunal under ISDS against a Host State gives rise to an international obligation on the latter, which cannot be avoided on the basis of any domestic law or procedure.[21] Moreover, a basic intent of bilateral investment protection is to ensure that foreign investors are not forced to have their disputes decided in an alien legal system. The ISDS provision under the Model BIT, however, provides considerable safeguards for the Host State, thereby limiting the scope of arbitration to a great extent.

Article 13.5(i) of the Model BIT states that an arbitral tribunal cannot review the merits of a decision made by a judicial authority of the Host State. This provision has the potential of allowing the Host State to remove any dispute from the purview of arbitration. For instance, the Host States passes a law that results in a measure discriminating against foreign investors. Since the dispute must mandatorily be submitted to courts pursuant to Article 15.1, it is possible that the courts reach a decision that the Measure is valid as per the law of the Host State (since courts are bound by the domestic law). One of

[20] US Model BIT, Art. 6.1(b), available at http://www.state.gov/documents/organization/117601.pdf (Last visited on January 23, 2016); Korea-Japan BIT, 2003, Art. 10.2(b), available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1727 (Last visited on January 25, 2016); Korea-Mexico BIT, 2002, Art. 5(1), available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1809 (Last visited on January 25, 2016).

[21] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, Art. 27.

the benefits of a BIT is that arbitral tribunals formed therein are not bound by the national laws,[22] and can decide against them if unreasonable. However, the ISDS in the Model BIT precludes an arbitral tribunal from reviewing the merits of any decision of a Court. As seen above, if a court pronounces that a Measure is reasonable and lawful, such a question may be interpreted to mean that it cannot be revisited by an arbitral tribunal for a BIT violation under Chapter II.

A way out of this paradox would be to say that the courts of the Host State can only decide an issue based on domestic law, and would not deal with questions under the BIT (even though the subject matter and scope of the proceedings would be exactly the same). In such a situation, technically, the courts' decision will not be on the treaty obligation and hence, the issue may be revisited by the arbitral tribunals. The legal basis for the tribunal and the court to decide the dispute, therefore, would be different (despite the overlap in facts and contentions). It would thus mean that an arbitral tribunal can, in effect, review any decision of a domestic court on the basis of this technicality.

Article 15.1 provides for the exhaustion of local remedies clause, wherein an investor must first approach the domestic courts of the Host State for resolving a dispute, prior to submitting the dispute to arbitration. However, a situation may arise when, say even after two years of pursuing the dispute locally, the matter has not been dealt with by the court. At this stage, the investor may decide to proceed to arbitration. However, the Host State can approach the local courts for an injunction against the investor, which may be granted on the ground that the exhaustion of local remedy requirement is not fulfilled by the investor.[23] In such situation, the arbitral tribunal would be precluded from reviewing the decision of the local court on reasonableness of time, by virtue of the earlier Article 13.5(i). The investor would thus be bound by local standards for the dispute, and will not be able to rely on the international standard of protection that the BIT aims to provide. This is more so relevant in the context of India where there exists huge backlog of cases before the judiciary, and a dispute of this nature which could ideally be dealt with in arbitration would be added to this backlog of cases. This situation may be resolved if, as in various BITs,[24] the exhaustion of local remedies requirement is deemed to be fulfilled if the investor has pursued local courts for at least 18 months, in good faith.

G. GENERAL EXCEPTIONS

Article 32. 1 lists out a set of general exceptions whereby the Host State can take actions without the risk of committing a breach of the BIT. The

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[22] ICSID Case No.ARB/81/1, Amco v. Indonesia, Award, ¶ 177 (November 20, 1984).

[23] *See* Model Text for the Indian Bilateral Investment Treaty, Arts. 15.1 and 15.2.

[24] *See*, *e.g.*, Argentina-Spain BIT, 1991, Art. X.3(a), available at http://www.investorstatelawguide.com/documents/documents/BIT-0008%20-%20Argentina-Spain%20(1991)%20[english%20translation]%20UNTS.pdf (Last visited on 4 February 2016).

inclusion of general exceptions is a relatively new concept in BITs. The Canada Model BIT has also incorporated certain general exceptions.[25] These exceptions aim at providing a higher regulatory space for the Host States in taking certain actions necessary for the economy, environment or security of the State. They are seen as a balancing provision in favour of the Host States in the sphere of investment protection. As can be seen in the Model BIT, certain BITs follow GATT Article XX-like general exceptions, the interpretation of which may be drawn from GATT jurisprudence by a BIT tribunal.

Since these general exceptions are new, sufficient jurisprudence does not exist in order to predict as to how an arbitral tribunal would interpret the same. Generally however, the approach in international investment arbitration jurisprudence has been to construe express exceptions and defences narrowly and to highlight the investment promotion and protection function of international investment arbitrations. For example, in *Canfor Corporation* v. *United States of America* and *Terminal Forest Products Ltd.* v. *United States of America,*[26] the Tribunal referred to GATT jurisprudence and stated that the exceptions in international instruments are to be interpreted narrowly.

Scholars have opined that the inclusion of general exceptions in a BIT has the potential for them to be narrowly defined by arbitral tribunals, giving Host States lesser regulatory flexibility. The reason for this is that tribunals are already reading in general exceptions in interpreting international investment arbitration obligations and they do so without being constrained by a GATT Art. XX-like closed list of exceptions.[27] As opined by Nicholas Di Mascio and JoostPauwelyn, the absence of express exceptions allows tribunals to consider an unlimited list of legitimate government concerns as part of general exceptions against BIT obligations[28].

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[25] Canada Model BIT, Art. 10, available at http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf (Last visited on January 4, 2016).

[26] Decision on Preliminary Question, ¶187 (June 6, 2006) ("The present Tribunal subscribes to the view expressed by the GATT Panel in Canada - Import Restrictions on Ice Cream and Yoghurt: "The Panel . . . . noted, as had previous panels, that exceptions were to be interpreted narrowly and considered that this argued against flexible interpretation of Article XI:2(c)(i)." citing Canada - Import Restrictions on Ice Cream and Yoghurt, *Report of the Panel adopted at the Forty-fifth Session of the Contracting Parties on 5 December, 1989* (L/6568 - 36S/68), ¶59 (September 27, 1989) and Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, CDA-95-2008-01, ¶122 (December 2, 1960) ("Exceptions to obligations to trade liberalization must perforce be viewed with caution.").

[27] A. Cosbey, The Road to Hell? Investor Protections in NAFTA's Chapter 11 in International Investment for Sustainable Development: Balancing Rights and Rewards (L. Zarsky ed., 2005).

[28] N. DiMascio & J. Paulwelyn, *Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin*, 102 A.J.I.L 48(2008).

III. CONCLUSION

The scheme of the Indian Model BIT, thus, does not indicate a series of incremental reforms of India's already existing practice, but reflects a radical departure from the same. This is in contrast to the other recent Model BITs, such as that of US and Canada, which reflect incremental reforms on already existing practices. In fact, the situation in India may be compared to that of the Norway Model BIT, which also contained a radical departure from its existing practice (by including stringent requirements for qualifying as a protected investor, exhaustion of local remedies, curbs on substantive protection, etc.). However, in view of the wide array of public criticism, the Norway Model BIT was never put into practice.

The Model BIT reflects certain lessons learned in the recent past from investment arbitrations around the world. For instance, the text excludes the possibility of a Most Favoured Nation (MFN) clause, under which a party would be able to rely on the more favourable provisions of another BIT India has entered into, even if such protection is not present in the BIT on which the dispute is based. In other words, an investor may use the MFN clause in a BIT based on the Model text to demand more protection than what is envisaged, by extending the protection from another BIT India has entered into. Given the higher level of regulatory space envisaged in the Model BIT, it would be logical to exclude the MFN provision, so as to prevent investors covered under the Model BIT from claiming protection envisaged in the other 83 BITs that India has currently entered into with other States, especially since India has had an inconsistent BIT practice till now. In addition, under international investment law, there have been recent instances wherein mass claims were filed against a Host State, such as in *Abaclat* v. *Argentina*[29] ('Abaclat'). In Abaclat, the ICSID tribunal allowed the mass claim brought by 60,000 bondholders as a result of sovereign debt. While the case of sovereign debt would not arise under the current form of the Model BIT, the Abaclat tribunal allowed the mass claim on the ground of denial of justice (which is a standard present in Article 3.1 of the Model BIT). Since investment law jurisprudence is ever-evolving, it would be advisable to have a specific provision in the Model BIT preventing mass claims by investors, so as to avoid serious economic impacts as faced by Argentina.[30]

At the same time, the general attitude and structure of the Model BIT, as discussed, has the potential to be excessively restrictive. One of the important aspects of our Model BIT in this regard is its unique standard of treatment, which deviates from the traditional standards of protection (fair

[29] Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction (August 4, 2011); *See also* Deepu Jojo Sushama, Mass Claims in Investment Arbitration - The Need of the Hour, available at http://kluwerarbitrationblog.com/blog/2015/03/04/mass-claims-in-investment-arbitration-the-need-of-the-hour/ (Last visited on January 23, 2016).

[30] R. Kabra, *Has Abaclat v. Argentina left the ICSID with a 'Mass'ive Problem?*, 31 Arb. Intl. 3 (2015).

and equitable treatment). However, the manner in which this standard is incorporated could potentially allow an arbitral tribunal to afford a liberal interpretation, indicating a high level of protection for investors. In fact, it is also noteworthy that while the draft Model BIT of 2015 did not contain the traditional standard of full protection and security, the final version of the Model BIT did include the same.[31] It would be advisable to accord the same treatment to the standard of fair and equitable treatment. Further, the obligations under the BIT extend only to acts of the Central and State Governments. Many actions which may affect investments may be taken at the local level, however these will now not be covered under the BIT. Under international investment law, on the other hand, the Host State is responsible for all the actions of its organs at every level.[32] The internal structure of the Host State cannot be an aspect that could excuse the State from an international obligation it enters into.

In short, therefore, the framework envisaged by the Model BIT would make it difficult for India to negotiate BITs keeping it as a base. At the same time, these provisions, if entered into force, have the potential to harm Indian investments abroad. While it is true that there is no direct nexus between increase in foreign investments and BITs, the existence of an excessively strict and narrow BIT could have the negative effect of discouraging investments that would otherwise have been attracted to India. Moreover, various provisions of the Model BIT, such as the exclusion of disputes related to tax measures, seems to be a reaction to the BIT claims currently filed against India by various investors. Such a reaction is clearly short-sighted and could potentially harm the attractiveness of India as an investment-friendly country.

It is perhaps in view of these obstacles that the Government had called for public comments on the 2015 draft text of the Model BIT from various sectors and thereafter, revised the draft text to a certain extent before unveiling the Model BIT in 2016. Nevertheless, there remain quite a few aspects of the Model BIT that would prevent the international community from viewing India as an investment friendly state. In fact, the provisions of the Indian Model BIT, as it stands now, may not be acceptable as a base for most countries that would negotiate or renegotiate its BIT with India. This is more so evident from the fact that, after India shared a copy of the draft Model Text, the United States objected to several provisions of the same.[33] This could easily be a recurring situation with many countries with whom India would want to enter into bilateral investment relations, even with the final version of the Model BIT, given the nature and narrow scope of the same.

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31 Model Text for the Indian Bilateral Investment Treaty, Art. 3.2.

32 Christoph Schreuer, *Investments, International Protection*, ¶ 96, available at http://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf (Last visited on 4 February 2016).

33 Kavaljit Singh, *The India-US Bilateral Investment Treaty will not be an easy ride*, February 10, 2015, available at http://www.eastasiaforum.org/2015/02/10/the-india-us-bilateral-investment-treaty-will-not-be-an-easy-ride/ (Last visited on February 17, 2016).