

**10**

**COMMITTEE  
ON EXTERNAL AFFAIRS  
(2020-2021)**

**SEVENTEENTH LOK SABHA**

**MINISTRY OF EXTERNAL AFFAIRS**

**INDIA AND BILATERAL INVESTMENT TREATIES**

**TENTH REPORT**



**LOK SABHA SECRETARIAT  
NEW DELHI**

***SEPTEMBER, 2021/BHADRA, 1943 (Saka)***

**TENTH REPORT**  
**COMMITTEE ON EXTERNAL AFFAIRS**  
**(2020-2021)**  
  
**(SEVENTEENTH LOK SABHA)**  
  
**MINISTRY OF EXTERNAL AFFAIRS**  
  
**INDIA AND BILATERAL INVESTMENT TREATIES**

*Presented to Hon'ble Speaker on 10 September, 2021*  
*Presented to Lok Sabha on --- September, 2021*  
*Laid on the Table of Rajya Sabha on ---- September, 2021*



**LOK SABHA SECRETARIAT**  
**NEW DELHI**  
  
***SEPTEMBER, 2021/BHADRA, 1943 (Saka)***

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## COMPOSITION OF THE COMMITTEE ON EXTERNAL AFFAIRS (2020-21)

### 1. Shri P.P. Chaudhary, Chairperson

#### Lok Sabha

2. Smt. Harsimrat Kaur Badal
3. Shri Abhishek Banerjee
4. Shri Kalyan Banerjee
5. Kunwar Pushpendra Singh Chandel
6. Shri Dileshwar Kamait
7. Shri Suresh Kumar Kashyap
8. Smt. Preneet Kaur
9. Smt. Goddeti Madhavi
10. Smt. Poonam Mahajan
11. Shri P. C. Mohan
12. Ms. Chandrani Murmu
13. Shri Ritesh Pandey
14. Dr. K. C. Patel
15. Shri N.K. Premachandran
16. Shri Navneet Ravi Rana
17. Shri Soyam Babu Rao
18. Shri Manne Srinivas Reddy
19. Shri Rebati Tripura
20. Vacant<sup>\$</sup>
21. Vacant<sup>\*</sup>

#### Rajya Sabha

22. Shri K. J. Alphons
23. Smt. Jaya Bachchan
24. Smt. Misha Bharti
25. Shri P. Chidambaram
26. Shri Ranjan Gogoi
27. Shri Swapan Dasgupta<sup>#</sup>
28. Shri Kapil Sibal
29. Shri Abdul Wahab<sup>@@</sup>
30. Shri Brij Lal
31. Vacant<sup>@</sup>

#### Secretariat

1. Shri P.C.Koul - Additional Secretary
2. Dr. Ram Raj Rai - Director
3. Ms. K. Muanniang Tunlut - Deputy Secretary

<sup>\$</sup> Shri Ram Swaroop Sharma passed away on 17 March, 2021.

<sup>\*</sup> Smt. Meenakshi Lekhi ceased to be Member of the Committee on her appointment as Minister w.e.f. 07.07.2021.

<sup>#</sup> Shri Swapan Dasgupta resigned on 17.03.2021 and has been re-nominated w.e.f. 11.06.2021.

<sup>@@</sup> Shri Abdul Wahab retired on 21.03.2021 and has been re-nominated w.e.f. 11.06.2021.

<sup>@</sup> Shri Jyotiraditya M. Scindia ceased to be Member of the Committee on his appointment as Cabinet Minister w.e.f. 07.07.2021.

## INTRODUCTION

I, the Chairperson of the Committee on External Affairs, having been authorized by the Committee to present the Report on their behalf, present this Tenth Report of the Committee on External Affairs (2020-21) on the subject 'India and Bilateral Investment Treaties'.

The Committee selected the subject 'India and Bilateral Investment Treaties' for detailed examination during the year 2020-21. The Committee held briefing/took oral evidence of the representatives of the Ministry of External Affairs, Ministry of Finance (Department of Economic Affairs), Ministry of Law and Justice (Legislative Department and Department of Legal Affairs) and Ministry of Commerce and Industry (Department of Commerce and Department for Promotion of Industry and Internal Trade) on 7 September, 2020; 20 October, 2020 and 4 February, 2021. Further, the Committee sought views of the experts namely, Dr. Prabhash Ranjan, senior Assistant Professor, Faculty of Law, South Asian University, New Delhi; Ms. R.V. Anuradha and Shri. Manab Majumdar from the Federation of Indian Chambers of Commerce and Industry (FICCI); Dr. Saugat Mukherjee, Shri James Nedumpara, Shri Vijayendra Singh and Shri Pranav Kumar from the Confederation of Indian Industry (CII) on 12 January, 2021; 28 January, 2021 and 11 February, 2021 respectively in accordance with Rule 331 (L) of the Rules of Procedure and Conduct of Business in Lok Sabha.

3. The Report was considered and adopted by the Committee at their Sitting held on 11 August, 2021. The Minutes of the Sitting of the Committee are appended to the Report.

4. The Committee wish to express their gratitude to the Ministry of External Affairs, Ministry of Finance (Department of Economic Affairs), Ministry of Law and Justice (Legislative Department and Department of Legal Affairs) and Ministry of Commerce and Industry (Department of Commerce and Department for Promotion of Industry and Internal Trade) along with the experts for placing material information as well as tendering evidence and views before the Committee.

5. For facility of reference, the Observations/Recommendations of the Committee have been printed in bold letters in the Report.

**NEW DELHI;**  
**11 August, 2021**  

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**20 Sravana, 1943 (Saka)**

**P.P. CHAUDHARY,**  
**Chairperson,**  
**Committee on External Affairs**

## CHAPTER I

### BILATERAL INVESTMENT TREATIES AN OVERVIEW

Bilateral Investment Treaty (BIT) is an agreement for according protection to investments by nationals and companies of one State in another State. International Investment Agreements (IIAs) which include Bilateral Investment Treaties and Investment Chapters of Trade and Economic Agreements provide for a reciprocal commitment to protect the private foreign investments in each other's countries. India signed its first Bilateral Investment Treaty with the United Kingdom (UK) in 1994. Post 1991 economic reforms and up to 2015, India signed BITs with 83 countries out of which 74 were enforced. These BITs were largely negotiated on the basis of the Indian Model BIT text of 1993.

1.2. India's approach in regard to BIT was highlighted by the Secretary (ER), Ministry of External Affairs in his opening statement during the course of briefing on the subject on 7 September 2020:

“India's approach to BITs has been aimed at providing appropriate protection to foreign investors in India and Indian investors in foreign countries in the light of the relevant international precedents and practices while maintaining a balance between the investor's rights and the Government's obligations by accommodation and cooperation. Our interests in this domain have grown with our rising stature in global affairs. We also remain conscious of the realities of negotiations with sovereign Governments while upholding our national interests and priorities”.

1.3. India has also entered into Free Trade Agreements (FTAs) some of which have a dedicated chapter on investment, that are substantially similar to the standalone BITs. Explaining about IIAs/BITs and Free Trade Agreement (FTA)/Comprehensive Economic Cooperation Agreement (CECA)/Comprehensive Economic Partnership Agreement (CEPA), the Department of Economic Affairs (DEA) in the Ministry of Finance, in its written reply informed the Committee that investment agreements could also form part of FTA or CECA/CEPA. In such cases, this is usually one among the several chapters in the CECA/CEPA. CECA/CEPA/FTAs are dominated by trade in Goods and Services issues. Free Trade Agreements generally focus only on trade issues but trade being a major portion in a CECA/CEPA, the terms FTA/CECA/CEPA are used interchangeably. BITS/IIAs can also be in the form of investment chapters of such a comprehensive regional agreement, for example, covering the countries in the Association of Southeast Asian

Nations (ASEAN) or the Regional Comprehensive Economic Partnership (RCEP). Investment chapters in FTA/CECA/CEPAs negotiated in the past are similar to the BITs signed in the pre-2015. They have liberal commitments like MFN, ISDS with fork-in-the-road approach, non-conforming measures with Reservation Lists. One of the differences between a BIT and an FTA Investment Chapter is that Investment Chapters do not carry a separate termination clause and hence is linked to the tenure of the FTA, with a common termination clause for the entire FTA. There are, however, renegotiation clause/amendment clauses in most FTAs applicable to investment chapters. Till 2005, there was wide variability and liberal approach in undertaking investment protection commitments in a BIT/Investment Chapters of a FTA/CECA/CEPA. After the Cabinet approved the Model BIT Text 2015, this has been the guiding force and has led to uniformity in the approach towards different IIAs – be it a BIT or an Investment Chapter.

1.4. The Ministry of Commerce and Industry (Department of Commerce), in a written note furnished to the Committee, have also stated that some of the Free Trade Agreements have investment chapters as part of the agreement, such as India - Japan CEPA, India - Republic of Korea CEPA, India - Singapore CECA, etc. Though the FTA of negotiations, as a whole, are coordinated by the Department of Commerce, the investment chapters under these FTAs are negotiated by DEA and cover provisions related to investment protection.

1.5. There are different nomenclatures for FTAs. In general, FTAs are related to liberalization of tariff / market access under trade in goods or in other cases on goods and services, whereas CEPA or CECA are extended versions of FTAs and cover alternate tracks beyond goods and services such as investment, trade facilitation, etc. Some examples for such comprehensive FTAs entered into by us are India-Japan CEPA, India-Singapore CECA, etc.

1.6. The Department of Commerce in a written note have further stated that there is no international agreement on investment at the World Trade Organization (WTO) as many of the members including India consider investment as a non-trade issue, thereby keeping it outside the purview of WTO, which is a trade body. WTO however has an agreement on Trade-Related Investment Measures (TRIMs) but it does not govern the issue of entry and treatment of foreign investment. The TRIMs Agreement rather prohibits application of any investment measure that is



prohibited by GATT under the provisions of national treatment or restricts the Trade (quantitative restrictions).

1.7. MEA has further informed the Committee that from 1994, when India started its BIT programme, until the end of 2010, BITs in India did not attract much attention. India also had only marginal involvement with Investment Treaty Arbitration, which refers to the dispute resolution mechanism available under BITs. During this period, India was involved in only one Investment treaty dispute, and even this dispute did not result in an arbitral award. Towards the end of 2011, India received its first adverse award in relation to a BIT in the White Industries Australia Limited V. Republic of India Case. The tribunal found that India had violated its obligations to the investor under the India-Australia BIT. This Award holds significance as the first Investment Treaty Arbitration Award against India.

1.8. As a result of the adverse award in the White Industries case and the notices of dispute under different BITs, there was a renewed focus on India's BIT regime and questions were raised about balancing investment protection with India's regulatory power, compelling India to re-think its BIT programme. Over time, especially after 2010, global and Indian experience with Investment Treaties, and the substantial increase in international arbitration cases arising out of these Investment Treaties, led to a revisit of India's earlier Model BIT text.

1.9. With the approval of the Cabinet, a new **Model text was adopted in 2015**. The Cabinet also approved (i) to use the Model text in 2015 as the starting point for renegotiations of existing and future BITs and investment chapters of CECAs/CEPAs/FTAs with appropriate modifications, alterations or concessions as approved by the Minister of Finance, and (ii) adopting the strategy of terminating existing BITs whose initial treaty period was over and issue Joint Interpretative Statement for those BITs whose initial treaty period is still valid.

1.10. The model BIT, unlike the earlier BITs, has an enterprise based definition for investments covered by the treaty. It also does not contain Fair and Equitable Treatment (FET) clause but rather has a treatment of investments clause that prohibits the host country from

subjecting foreign investments to measures that constitute a violation of customary international law through denial of justice (judicial and administrative), breaches of due process, and targeted discrimination on manifestly unjustified grounds or manifestly abusive treatment, such as coercion, duress and harassment. While the new model BIT does not include an MFN (Most Favoured Nation) clause, it does provides for national treatment to the extent that a Party shall not apply measures that accord less favourable treatment than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory. The new model BIT also states what would constitute like circumstances.

1.11. In the dispute resolution provisions in the new model BIT, the focus has been on domestic remedies with investors having to exhaust local/domestic remedies including invoking the jurisdiction of the domestic courts of the host country for a minimum period of five years before being able to resort to arbitration under the treaty. This condition is however exempt if there is no domestic remedy available to the investor and the only remedy available is under the BIT. The new model treaty also elaborates the mode and requirements for arbitrator appointments and also tries to elaborate the possible conflict of interest issues. Further, the new model BIT tries to incorporate principles of transparency by having provisions which require the proceedings under the BIT to be made available to the public, subject to applicable law on protection of confidential information.

1.12. After the approval of the new model BIT by the Cabinet, GoI has initiated the process of termination of the existing BITs whose initial duration/term as concluded and began the process of renegotiating these treaties based on the new model BIT. Based on the Cabinet decision, till date India has issued termination notice to countries with whom the initial period has expired.

1.13. The list of Countries to whom Notice of Termination for terminating respective BITs were issued is as under:

<b>S No.</b>	<b>Country</b>	<b>Date of Initial Expiry of the BIPA agreement</b>	<b>Date on which Notice of Termination issued by India</b>
1.	Mongolia	28 <sup>th</sup> April, 2012	23 <sup>rd</sup> March, 2016
2.	Denmark	27 <sup>th</sup> August, 2006	23 <sup>rd</sup> March, 2016
3.	Thailand	12 <sup>th</sup> July, 2011	23 <sup>rd</sup> March, 2016
4.	Sweden	31 <sup>st</sup> March, 2011	23 <sup>rd</sup> March, 2016
5.	Philippines	28 <sup>th</sup> January, 2011	23 <sup>rd</sup> March, 2016
6.	Indonesia	21 <sup>st</sup> January, 2014	23 <sup>rd</sup> March, 2016
7.	Austria	28 <sup>th</sup> February, 2011	23 <sup>rd</sup> March, 2016
8.	Australia	03 <sup>rd</sup> May, 2010	23 <sup>rd</sup> March, 2016
9.	Argentina	11 <sup>th</sup> August, 2012	23 <sup>rd</sup> March, 2016
10.	Morocco	21 <sup>st</sup> February, 2011	23 <sup>rd</sup> March, 2016
11.	Bulgaria	22 <sup>nd</sup> September, 2009	23 <sup>rd</sup> March, 2016
12.	Mauritius	19 <sup>th</sup> June, 2010	23 <sup>rd</sup> March, 2016
13.	South Korea	06 <sup>th</sup> May, 2006	23 <sup>rd</sup> March, 2016
14.	Kazakhstan	25 <sup>th</sup> July, 2011	23 <sup>rd</sup> March, 2016
15.	Vietnam	30 <sup>th</sup> November, 2009	23 <sup>rd</sup> March, 2016
16.	Russia	04 <sup>th</sup> August, 2006	23 <sup>rd</sup> March, 2016
17.	Oman	12 <sup>th</sup> October, 2010	23 <sup>rd</sup> March, 2016
18.	Switzerland	15 <sup>th</sup> February, 2010	23 <sup>rd</sup> March, 2016
19.	Taiwan	24 <sup>th</sup> February, 2015	22 <sup>nd</sup> March 2017
20.	Kyrgyz	11 <sup>th</sup> May, 2010	23 <sup>rd</sup> March, 2016
21.	Romania	08 <sup>th</sup> December, 2009	23 <sup>rd</sup> March, 2016
22.	Israel	17 <sup>th</sup> February, 2007	23 <sup>rd</sup> March, 2016
23.	Czech Republic	05 <sup>th</sup> February, 2008	23 <sup>rd</sup> March, 2016
24.	Tajikistan	22 <sup>nd</sup> November, 2013	23 <sup>rd</sup> March, 2016
25.	Italy	27 <sup>th</sup> March, 2008	23 <sup>rd</sup> March, 2016
26.	Germany	12 <sup>th</sup> July, 2008	23 <sup>rd</sup> March, 2016
27.	Portugal	18 <sup>th</sup> July, 2012	23 <sup>rd</sup> March, 2016
28.	Cyprus	11 <sup>th</sup> January, 2014	23 <sup>rd</sup> March, 2016
29.	Sri Lanka	12 <sup>th</sup> February, 2008	23 <sup>rd</sup> March, 2016
30.	France	16 <sup>th</sup> May, 2010	23 <sup>rd</sup> March, 2016
31.	Poland	30 <sup>th</sup> December, 2007	23 <sup>rd</sup> March, 2016
32.	Slovenia	Never enforced	23 <sup>rd</sup> March, 2016
33.	Hellenic (Greece)	12 <sup>th</sup> April, 2008	23 <sup>rd</sup> March, 2016
34.	Belgium	07 <sup>th</sup> January, 2011	23 <sup>rd</sup> March, 2016
35.	Spain	15 <sup>th</sup> October, 2008	23 <sup>rd</sup> March, 2016
36.	Ghana	Never enforced	23 <sup>rd</sup> March, 2016
37.	Egypt	21 <sup>st</sup> November, 2010	23 <sup>rd</sup> March, 2016
38.	Hungary	01 <sup>st</sup> January, 2016	23 <sup>rd</sup> March, 2016
39.	Malaysia	11 <sup>th</sup> April, 2007	23 <sup>rd</sup> March, 2016
40.	Slovak	Valid for 12 month after issue the Notice of Termination	23 <sup>rd</sup> March, 2016

41.	Uzbekistan	Valid for 12 month after issue the Notice of Termination	23 <sup>rd</sup> March, 2016
42.	Croatia	18 <sup>th</sup> January, 2012	23 <sup>rd</sup> March, 2016
43.	Qatar	14 <sup>th</sup> December, 2009	23 <sup>rd</sup> March, 2016
44.	Ukraine	11 <sup>th</sup> August, 2013	23 <sup>rd</sup> March, 2016
45.	Yemen	24 <sup>th</sup> February, 2015	23 <sup>rd</sup> March, 2016
46.	Belarus	22 <sup>nd</sup> November, 2013	23 <sup>rd</sup> March, 2016
47.	Turkmenistan	26 <sup>th</sup> February, 2016	23 <sup>rd</sup> March, 2016
48.	Armenia	29 <sup>th</sup> May, 2016	23 <sup>rd</sup> March, 2016
49.	Netherlands	30 <sup>th</sup> November, 2016	23 <sup>rd</sup> March, 2016
50.	Djibouti	Never enforced	23 <sup>rd</sup> March, 2016
51.	Ethiopia	Never enforced	23 <sup>rd</sup> March, 2016
52.	Zimbabwe	Never enforced	23 <sup>rd</sup> March, 2016
53.	Congo	Never enforced	23 <sup>rd</sup> March, 2016
54.	Uruguay	Never enforced	23 <sup>rd</sup> March, 2016
55.	Britain	05 <sup>th</sup> January, 2005	23 <sup>rd</sup> March, 2016
56.	Seychelles	Never enforced	23 <sup>rd</sup> March, 2016
57.	Nepal	Never enforced	23 <sup>rd</sup> March, 2016
58.	Brunei Darussalam	14 <sup>th</sup> February, 2019	22 <sup>nd</sup> March, 2019
59.	Jordan	21 <sup>st</sup> January, 2019	22 <sup>nd</sup> March, 2019
60.	Serbia	23 <sup>rd</sup> February, 2019	22 <sup>nd</sup> March, 2019
61.	Mozambique	22 <sup>nd</sup> September, 2019	22 <sup>nd</sup> March, 2019
62.	Myanmar	07 <sup>th</sup> February, 2019	22 <sup>nd</sup> March, 2019
63.	Mexico	22 <sup>nd</sup> February, 2018	31 <sup>st</sup> July, 2018
64.	Turkey	17 <sup>th</sup> October, 2017	09 <sup>th</sup> July, 2018
65.	Kuwait	27 <sup>th</sup> June, 2018	26 <sup>th</sup> June, 2017
66.	Macedonia	16 <sup>th</sup> October, 2018	01 <sup>st</sup> August, 2018
67.	Iceland	15 <sup>th</sup> December, 2018	01 <sup>st</sup> August, 2018
68.	Finland	08 <sup>th</sup> April, 2018	01 <sup>st</sup> August, 2018
69.	China	31 <sup>st</sup> July, 2017	04 <sup>th</sup> October, 2017
70.	Lao PDR	04 <sup>th</sup> January, 2018	01 <sup>st</sup> August, 2018
71.	Saudi Arabia	19 <sup>th</sup> May, 2018	01 <sup>st</sup> August, 2018
72.	Bosnia & Herzegovina	13 <sup>th</sup> February, 2018	01 <sup>st</sup> August, 2018
73.	Trinidad & Tobago	06 <sup>th</sup> September, 2017	16 <sup>th</sup> August, 2017
74.	Bahrain	4 <sup>th</sup> December, 2017	23 <sup>rd</sup> March, 2020
75.	Syrian Arab Republic	21 <sup>st</sup> January, 2019	20 <sup>th</sup> June, 2019
76.	Sudan	17 <sup>th</sup> October, 2020	19 <sup>th</sup> October, 2020
77.	Latvia	26 <sup>th</sup> November, 2020	26 <sup>th</sup> November, 2020

1.14. The details regarding older BITs which are still in force with six countries is as under:

Sl. No	Country	Date of Expiry of the BIPA agreement	Remarks
1.	UAE	12 <sup>th</sup> September, 2024	The BIT was signed with the understanding that both countries would commence negotiations no later than January 1 <sup>st</sup> 2016. (as per Article 18 of the India-UAE BIPA). The negotiations are ongoing.
2.	Colombia	1 <sup>st</sup> July, 2022	Joint Interpretative Declaration (JID) has been signed on 4 <sup>th</sup> October, 2018.
3.	Bangladesh	6 <sup>th</sup> July, 2021	Joint Interpretative Note (JIN) has been signed on 4 <sup>th</sup> October, 2017.
4.	Senegal	16 <sup>th</sup> October, 2024	Notice of Termination is proposed to be issued in 2024 if no response received on JIS.
5.	Lithuania	30 <sup>th</sup> November, 2026	Notice of Termination is proposed to be issued in 2026 if no response received on JIS.
6.	Libya*	24 <sup>th</sup> March, 2019	Termination notice could not be conveyed due to the lack of a credible institutional counterpart

1.15. Out of the above mentioned BITs still in force, Joint Interpretative Statements (JISs) have been signed with 2 countries namely, Bangladesh and Colombia as per the details below:

Sl. No.	Country and Name of Agreement	Date of Agreement	Date of Enforcement	Present Status
1.	<b>Bangladesh:</b> Joint Interpretative Statement	4 October, 2017	4 October, 2017	Active
2.	<b>Colombia:</b> Joint Interpretative Declaration	4 October, 2018	4 October, 2018	Active

1.16 Post 2015, India has signed BITs/Investment Agreements with Belarus, Kyrgyzstan, Taiwan and Brazil. The date of agreement, date of enforcement and present status of the BITs/BIAAs/Agreements signed subsequent to adoption of the Model BIT text 2015 is as under:

<b>S.No.</b>	<b>Country/Region</b>	<b>Date of Agreement</b>	<b>Date of Enforcement</b>	<b>Present Status</b>
1.	<b>Belarus</b>	24 September, 2018	5 March, 2020	Active
2.	<b>Taiwan</b>	18 December, 2018	14 February, 2019	Active
3.	<b>Kyrgyz Republic</b>	14 June, 2019		To be ratified
4.	<b>Brazil</b>	25 January, 2020		To be ratified

1.17. The Committee have also been informed that negotiations of various IIAs are in various stages with 37 countries/blocks as given below:

<b>Sl. No.</b>	<b>List of countries with whom negotiations are ongoing</b>	<b>List of countries with whom negotiations are at a preliminary stage:</b>
1	Switzerland	Mongolia
2	Argentina	Thailand
3	Morocco	Philippines
4	Mauritius	Australia
5	Russia	Oman
6	Israel	Egypt
7	Tajikistan	Turkmenistan
8	Uzbekistan	Armenia
9	Qatar	Ethiopia
10	Ukraine	Zimbabwe

11	Mexico	Kuwait
12	Saudi Arabia	HongKong
13	United Arab Emirates	Ivory Coast
14	Iran	San Marino
15	Canada	Zambia
16	USA (Investment Incentive Agreement)	European Union
17	Azerbaijan	Asia-Pacific Trade Union
18	Cambodia	
19	Peru	
20.	Sri Lanka	

### **Role of MEA**

1.18. Matters pertaining to Investment treaties involve origin countries/foreign relations and also issues pertaining to international law. The Ministry of External Affairs (MEA) is an integral part of BIT negotiations and also provides requisite inputs. Correspondence about BIT with other countries is routed through the MEA by means of Note Verbales, etc. through the Economic Diplomacy Division which is the nodal division in MEA for Bilateral Investment Treaty or such matters.

1.19. In accordance with the Transaction of Business Rules, the Legal and Treaties (L&T) Division of the MEA renders legal opinion on all international law issues to the Government of India as a whole and this division of the MEA responsible for international law and treaties is also part of the delegation negotiating the BITs and provides advice from an international law perspective during the treaty negotiations. MEA also handles and assists the GoI in disputes arising out of BITs from an international law perspective as these are disputes under treaties before international tribunals.

1.20. During the course of oral evidence on 20 October, 2020, the Secretary (ER) further elaborated on the role of the L&T Division as under:

“The Division forms part of Indian Delegations in the capacity as legal advisors in international conferences and in bilateral negotiations locally and abroad. The Division also participates in the drafting of the Indian legislation giving effect to the provisions of a treaty in India, including amendments thereof when required, for implementing the treaty obligations”.

1.21. In response to a query on whether the MEA has in-house legal experts or is utilizing the services of legal consultants or law firms, the Ministry, in its written reply, stated that it is responsible for matters pertaining to international law and treaties. Officers in the Legal and Treaties Division of the Ministry are recruited through the UPSC and are required to possess a minimum qualification of Masters degree in International Law and sufficient experience which is based on the level at which they are recruited. The Ministry has also engaged Legal Consultants who have experience and expertise in terms of qualification and work in the field of arbitration and investment treaty law and investment treaty arbitration.

1.22. The Department of Economic Affairs also apprised the Committee regarding drafting of these agreements/treaties or bilateral investment treaties or model treaties, through a written reply that drafting and negotiations are carried out in consultations with Department of Legal Affairs and Ministry of External Affairs as well as other departments where required, which in turn have extensive and long experience in treaty drafting. Various Ministries, Legal experts, Business organisations, international legal experts and International Organizations were consulted while drafting new Model BIT 2015, which is the starting point for negotiations. Besides this, Department of Economic Affairs have in-house Legal Consultants who assist during BIT negotiations.

1.23. When asked whether the services of outside experts, people from academia etc., has been utilized for drafting BITs, the MEA informed that experts from India and abroad have been engaged in organizing capacity building workshops and courses.

1.24. Under the Host Country Agreement signed with the Permanent Court of Arbitration (PCA), The Hague, MEA has organised the PCA - India Conference series where workshops in investment treaty and investment treaty arbitrations were conducted. The resource persons at these workshops included Judges, PCA officials, people from academia and lawyers from various jurisdictions across the world. The resource persons were selected by the PCA and the PCA-India Committee. The Ministry has also been engaging with the UNCITRAL and the UNCITRAL



National Coordination Committee regarding capacity building exercises and for advice. The MEA had also organised a virtual course for GoI officials, conducted by the Chartered Institute of Arbitrators (CI Arb) London.

**1.25 The Committee note that India started its Bilateral Investment Treaty (BIT) programme in 1994 and up to 2015, BITs were signed with 83 countries out of which 74 were enforced. BITs in India did not attract much attention until the end of 2010 and India also had only marginal involvement with investment treaty arbitration. Since 2011 when India received its first adverse award in the White Industries Australia Limited V Republic of India case, global and Indian experience with investment treaties and the substantial increase in international arbitration cases arising out of these treaties, the earlier Model BIT text was revisited and a new Model text was adopted in 2015. Based on the new model BIT, the MEA has issued termination notice to 77 countries starting since 2016 and BITs are still in force with 06 countries out of which Joint Interpretative Statements have been signed with Bangladesh and Columbia. The Committee, however, are astonished to note that India has signed BITs/ Investment Agreements only with Belarus, Kyrgyzstan, Taiwan and Brazil and negotiations of various International Investments Agreements (IIAs) are in the various stages. The Committee treat the number of BITs/Investment Agreements signed post 2015 and the number under negotiations as inadequate and find that it is not commensurate with the growth of India's interest in this domain and our rising stature in global affairs. The Committee are of the view that signing of new BITs/Investment Agreements especially in priority/core sectors particularly with the countries with whom there were such treaties in the past should be encouraged while keeping in mind**

**the need for balancing investment protection of foreign investors in the country and Indian investors abroad with India's regulatory power without compromising our national interests and priorities. The Committee, therefore, desire that MEA being responsible for international treaties and being an integral part of BIT negotiations should actively facilitate the process so that more and more negotiations for BITs/IAs are initiated in the shortest possible time.**

**(Recommendation No.1)**

**1.26 The Committee are not satisfied with the progress of the negotiations of International Investment Agreements with 37 countries/blocks. Presently, negotiations are ongoing with 20 countries while it is still at the preliminary stage in respect of 15 countries/blocks. The Committee are conscious of the realities of negotiations with sovereign Governments but are of the view that the long drawn out process of negotiations should be reduced especially if there appears to be limited areas of convergence. In view of the likely impact of such delays on investment, FDI inflow and increased production under the BIT regime, the Committee urge the Ministry to take pro-active steps and coordinate with the concerned Ministries/Departments so that negotiations are concluded and the agreements are finalized at the earliest.**

**(Recommendation No.2)**

**1.27 The Committee feel that the drafting of international treaties, whether it is investment related or trade specific is crucial to avoid any ambiguity or leave scope for wider interpretation by arbitrators and tribunals as well as abuse of certain provisions by investors. Loosely drafted or broad provisions should be avoided and safeguards put in place at the drafting stage itself. The**

**Committee, therefore, desire that the MEA should work in close coordination with the Department of Legal Affairs, Department of Economic Affairs and other concerned Ministries/Departments and make a combined effort to develop in-house expertise and panel of lawyers who have experience in investment treaty law so that best international treaties are drafted with least scope of arbitrations.**

**(Recommendation No.3)**

**1.28 The Committee note that the Ministry is organizing capacity building workshops and courses by engaging experts from India and abroad. Under the PCA - India Conference series, workshops in investment treaty and investment treaty arbitrations were conducted. MEA has also conducted capacity building exercises with UNCITRAL National Coordination Committee and virtual course for GoI officials has also been conducted by the Chartered Institute of Arbitrators, London. While appreciating the efforts made by the Ministry in this regard, the Committee desire that a full term course for Government officials in the field of investment treaty and investment treaty arbitration may also be started and the workshops for training and developing young counsels of the country in these fields may also be organized on priority.**

**(Recommendation No.4)**

## CHAPTER II

### DISPUTES AND ARBITRATION UNDER BITs

Post the White Industries award, India has received numerous notices from various investors under various BITs. Claims by foreign investors against India have included challenges to various regulatory measures such as cancellation of telecom licences, imposition of retrospective taxes, actions by the State Governments, etc.

2.2 So far, there have been 37 notices of dispute or letters intending to raise a dispute by claimants or investors against Republic of India. Out of these only 16 have proceeded to arbitration. The List of investment disputes and arbitration cases under BITs/Investment Chapters of CEPA/CECAs along with the status of the case, as furnished by the Department of Economic Affairs, is given below:

Sl. NO	NAME	BIPA	Status of the Case
	White Industries Australia Limited v. Republic of India	India-Australia BIPA	Lost
2	Deutsche Telekom A.G v. Republic of India	India-Germany BIPA	Lost
3	Cc/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited., and Telcom Devas Mauritius Limited v. Republic of India	India- Mauritius BIPA	Pending challenge to the arbitral award at the seat of arbitration.
4	Vodafone International Holdings B.V. v. The Republic of India	India-Netherlands BIPA	Pending challenge to the arbitral award at the seat of arbitration.
5.	Cairn Energy PLC & Cairn UK Holdings Limited v. The Republic of India	India-UK BIPA	Pending challenge to the arbitral award at the seat of arbitration.
6	Dabhol Power Corporation v. Republic of India	Various BIPAs – Netherlands, UK, France, Switzerland, Austria and Mauritius	Settled outside arbitration.

<b>Sl. NO</b>	<b>NAME</b>	<b>BIPA</b>	<b>Status of the Case</b>
7	Nissan Motor co. Ltd. (NML) vs Republic of India	India – Japan CECA	Settled outside arbitration
8.	Nokia Corp v. Republic of India	India-Finland BIPA	Settled under Double Taxation Avoidance agreement (DTAA)
9.	Carissa Investments LLC	India-Mauritius BIPA	Withdrawn
10.	M/s Louis Dreyfus Amateurs v. Republic of India	India-France BIPA	Won and has also awarded costs.
11.	Tenoch Holdings Limited & others v. GOI	India-Russian BIPA and India-Cyprus BIPA	Won
12,13	Astro All Asia Network Ltd. & other (2015).	India-UK , and India-Mauritius BIPA,	Won  Consent Arbitration Award issued and all costs were awarded to India
14	Vedanta Resources PLC v. The Republic of India	India-UK BIPA	Arbitration submissions completed. Final Award awaited
15	Maxis Communications Berhad(“MCB”) and Global Communications Services Holdings Limited (“GCSHL”)	Malaysia- India BIT  Mauritius – India BIT	Notice of arbitration served/ongoing
16	Ras-Al-Khaimah v. Republic of India	India – UAE BIPA	Ongoing arbitration.
17	M/s Khaitan Holdings v Republic of India	India-Mauritius BIPA	Ongoing arbitration.
18	Korean Western Power Company Ltd. (KOWEPO) v Republic of India	India-Korea BIPA	Ongoing arbitration.
19	GPC Mauritius IX LLC (GPIX)	India - Mauritius BIPA	Ongoing arbitration.
20.	Earlyguard	India-UK BIPA	Notice of arbitration served/ongoing.

Sl. NO	NAME	BIPA	Status of the Case
<b>Other New Notices/Letters received which has not proceeded to arbitration</b>			
S.No	Name	BIPA	
21, 22	GETI AG & LA Financieri Finvestia KB (Two Notices)	India -Germany and India-Sweden BIT	
23	KeyTrade AG	India - Switzerland BIPA	
24	Vodafone Group Plc. & Vodafone consolidated Holdings Limited v. The Republic of India	India- UK BIPA	
25.	Astro All Asia Network Ltd. & others	India-Malaysia BIPA	
26.	Jaldhi Overseas Pte Ltd.	India-Singapore CECA	
27	Thakur Family Trust	India-UAE BIPA	
28.	Essar Power Holdings	India- Mauritius BIPA	
29	Cc/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited.	India-Mauritius BIPA	
<b>Non Active Disputes which have not proceeded to arbitration</b>			
S.No	Name	BIPA	
30	Mascarenhas Family	India - Portugal BIPA	
31	Federal Agency for the State Property Management of the Russian Federation	India-Russia BIPA	
32	M/s Chaucer Capital Limited	India-UK BIPA	
33	Axiata Investment Ltd. & Axiata Investment 2 Ltd. ,	India-Mauritius BIPA	

Sl. NO	NAME	BIPA	Status of the Case
	Mauritius		
34	Sistema Joint Stock Financial Corporation		India-Russia BIPA
35	Telenor Asia Private Limited		India - Singapore CECA
36.	The Children Investment fund v. Republic of India		India- UK BIPA
37	PLUS BKSP Mauritius Ltd.		India-Malaysia BIPA and CECA, India- Mauritius BIPA

2.3 India has won 4 arbitration, lost 2 arbitrations, received adverse award in 3 arbitrations out of which all three cases are pending challenge to the arbitral award at the seat of arbitrations. In 1 dispute the investors withdrew their claim and 3 disputes have been resolved amicably. 8 disputes are still active at different stages of arbitration and in another 14 disputes, the claimants did not pursue the matter after the initial request under BIPA. 2 new notices have been received.

2.4 When asked to state the reasons for the said disputes, the low rate of success in arbitration and the delay in arbitration, the MEA in a written reply informed that the disputes have arisen out of alleged claims by various alleged investors that certain actions of the State (India) have violated the protection offered to such alleged investors under the investment treaties. However, it may be noted that until date, out of the 9 disputes concluded thus far (apart from the two disputes resolved amicably), only one case (White Industries Case) has resulted in India paying the claimant the arbitral award; in four cases, India has had favorable decisions and 3 cases are pending challenge to the arbitral award at the seat of arbitration or at various stages post arbitration.

2.5 The process of investment treaty arbitration is complex and time consuming as in many cases. The process of arbitration is lengthy and it requires coordination between multiple Ministries/ Departments/ Agencies of the Government.

2.6 On the role of the MEA in settlement of disputes arising out of BITs, the Ministry, in a written note furnished to the Committee, stated that in case of investment treaty disputes, the cases are handled

by an Inter Ministerial Group (IMG) which is chaired by the Secretary of the nodal Ministry to which the dispute pertains and MEA is part of the IMG. In its capacity as a member of the IMG, the MEA handles and assists the GOI in disputes arising out of BITs from an international law perspective as these are disputes under treaties before international tribunals.

2.7 The Department of Economic Affairs, in a written reply furnished to the Committee elaborated on the steps taken to avoid the large number of disputes under BITs. They stated that world over, UNCTAD has documented around 1024 ISDS disputes of which 343 are pending. India is 11<sup>th</sup> in the list of countries arranged in descending order of cases pending, with Argentina, Spain and Venezuela having 62, 52 and 51 cases respectively.

2.8 Hence, there has been considerable rethink in the developing world as to the need for and structure of BITs. While developed countries, which are the key sources of investment, have a very liberal approach to protect the large investments made in other countries, the policies of developing countries which are largely recipients of FDI is generally conservative.

2.9 Most of the disputes are from what can be called the first generation BITs prior to 2015, which have very liberal provisions capable of wide interpretation as well as abuse by investors. India learnt from its experience and redrafted the Model in 2015 with an attempt to improve the treaty negotiations. Hence the drafting has been tightened with the following goals:

1. Protect enterprise based investments that qualify as per the characteristics of investment, exclude sensitive policy matters such as taxation that are integral functions of the sovereign.
2. Remove provisions prone to abuse
3. Carefully drafted articles so as to reduce arbitral discretion for varied interpretations.

2.10 Disputes are mainly on account of commitments like Most Favored Nation (MFN) and Fair and Equitable Treatment (FET) in the first generation treaties. Most Favored Nation (MFN) in investment treaties have been misused to import favorable clause from other treaties, which is known as treaty shopping. In order to prevent treaty shopping, in the new model BIT (2015) text, there is no MFN clause. There has been expansive interpretation by arbitral tribunals of the FET provision. The Indian Model BIT of 2015 does not have the “FET term” standard but provides protection only against treatment such as manifestly abusive treatment or fundamental breach of due process. It is expected that



discretion of the arbitral tribunals assessing claims made under the new standard of the Model is circumscribed leaving little scope for wide interpretation under the FET regime.

2.11 The absence of the FET provision explicitly in the Indian Model BIT 2015 safeguards India's right to regulate by minimizing the possibilities of unexpected restrictions on its regulatory power that broad interpretations of an undefined FET may bring".

2.12 On being asked about the efforts being made for early settlement of disputes, the Ministry, in its written reply, stated that the MEA is a part of the Inter Ministerial Group (IMG) handling investment treaty disputes. These IMGs are chaired by the respective Ministry to whom the dispute pertains. MEA offers its inputs as and when sought. The investment treaties provide for a cooling off period for amicable settlement of the dispute failing which the claimant can proceed with arbitration. The MEA has always asked the respective Ministries to analyze each case on its merits and to take a call on the feasibility of settlement of the dispute or the need for arbitration.

2.13 In regard to India as a seat of arbitration, the DEA, in a written reply, have stated that in the Model BIT 2015, specific reference to India has not been made as a place of arbitration considering the practice of arbitration under Investment Treaties and UNCITRAL Arbitration rules provide for due consideration of both the parties to be made by the Arbitral tribunal. However the Model BIT text of 2015 states that the tribunal shall give special consideration to the capital city of the Defending Party i.e. New Delhi in case a dispute is brought against India. However, no country would normally agree for the arbitration in the other party country on grounds of non-neutrality.

2.14 The New Delhi International Arbitration Centre (NDIAC) which replaced the International Centre for Alternate Dispute Resolution (ICADR) or any other World class arbitration centre in India can be used as a place of Arbitration subject to the agreement of the tribunal and the parties of the arbitration. However, the acceptability of India as a dispute resolution centre in cases of disputes involving India may not be acceptable.

2.15 When asked whether any effort has been made to make India as a hub for international arbitration in the context of Atmanirbhar Bharat, the MEA informed that it has signed a Host Country Agreement with the Permanent Court of Arbitration (PCA) which is an intergovernmental organization located in The Hague, Netherlands. The PCA is the oldest institution for international dispute

resolutions. It was established in 1899 and administers disputes that arise out of international agreements between member States, international organizations or private parties.

2.16 Through this Host Country Agreement, India and the PCA have established a legal framework under which future PCA administered proceedings can be conducted in India. The Host Country Agreement allows parties to a dispute (both within India and abroad) to take full advantage of the flexibility and efficiency of PCA administered proceedings in the territory of India. The implementation of this Agreement could make India a preferred location for international arbitration.

2.17 In response to the specific query by the Committee whether the Government has a legal department internally to handle arbitration cases and develop young lawyers from the country for the purpose or there is a panel of lawyers outside DEA whom they consulted, the representative of DEA during the evidence on 4<sup>th</sup> February, 2021 submitted as under:

“Investment arbitration has been a very rarefied space where the country has very few people who really have experience at the international forums.....I am talking about a decision which was taken in 2015 when the whole process of arbitration started. The architecture has been that there would be a domestic law firm which would be engaged and there would be a foreign law firm also which would be engaged. So, the intention was right from the beginning that we need to develop local expertise. So, over the last five years this architecture has been continued and, therefore, a number of local laws firm and a number of chambers of law have been involved in the international arbitration. As a result, they have built up a fairly good level of experience. There is one more angle to it. The arbitrators are also mostly based in Paris or Hague or London. However, in one of the recent cases, Indian judges also have been appointed as our arbitrators in the panel. Therefore, the Government of India is taking very measured but calibrated steps.

2.18 In a written reply furnished to the Committee, the DEA informed that internally, the Government of India follows an inter-ministerial mechanism with representatives of DEA, DoLA and MEA along with subject matter Ministry/Department to jointly handle disputes internally, with advice of external law firms and Government Law Officers. Additionally, the DEA and MEA have in-house legal persons to assist in such disputes in addition to DoLA and advice of Ld. Attorney General of India/Ld. Solicitor General of India and the Ld. Additional Solicitor General of India. The external law firms and lawyers, both Indian and international are engaged to represent the Republic of India in the hearings of arbitration, depending on the place (seat) of the arbitration. DEA had created a panel of law firms both

domestic and international. DoLA has also created a list of law firms both domestic and international for reference of Ministries/Departments.

**2.19 The Committee note that there have been thirty seven notices of dispute or letters intending to raise a dispute by claimants or investors against Republic of India under various BITs out of which India has won only four arbitrations so far; lost two arbitrations; received adverse award in three arbitrations and all the three cases are pending challenge to the arbitral award at the seat of arbitrations. Further, in one dispute the investors withdrew their claim; three disputes have been resolved amicably and in fourteen disputes, the claimants did not pursue the matter after the initial request under BIPA. Eight disputes are still active at different stages of arbitration and two new notices have been received. The Ministry has also stated that till date, out of the nine disputes concluded so far, only the White Industries case had resulted in India paying the claimant the arbitral award. Keeping in view the huge cost to the Exchequer in just one arbitral award, the Committee feel that such losses to the country are unaffordable and should be avoided at all costs in future by leaving no ambiguity in BITs. The Committee, therefore, desire that the Ministry, in consultation with other concerned Ministries/Departments should make all out efforts to draft BITs cautiously leaving no scope of investment disputes and reduce the number of BIT claims against India. Steps may also be taken to settle such disputes outside of arbitration/before it proceeds to arbitration or comes up before the Tribunals through mechanism of pre-arbitration consultation/negotiation.**

**(Recommendation No. 5)**

**2.20 The Committee note that the process of investment treaty arbitration is complex, lengthy and involves coordination between multiple Ministries/Departments/Agencies of the Government. In the opinion of the Committee, delay in arbitration is very costly and should be avoided through effective coordination among the concerned Ministries/Departments/Agencies of the Government. MEA being a part of the Inter Ministerial Group handling investment treaty disputes, the Committee desire that the Ministry should take proactive steps for better coordination and strengthening of the IMG.**

**(Recommendation No. 6)**

**2.21 The Committee note that the New Delhi International Arbitration Centre has been established by replacing the International Centre for Alternate Dispute Resolution and subject to the agreement of the tribunal and the parties of arbitration, this Centre can be used as a place of arbitration. The Committee desire that this Centre should be promoted and strengthened to become a world class arbitration centre which is widely accepted as a dispute resolution centre by all countries involved in investment disputes.**

**(Recommendation No.7)**

**2.22 The Committee note that the Ministry has signed a Host Country Agreement with the Permanent Court of Arbitration (PCA) and through this Agreement, India and the PCA have**

established a legal framework under which future PCA administered proceedings can be conducted in India. The Committee welcome this step as it could result in India being a preferred location for international arbitrations. The Committee, therefore, urge the Ministry to ensure the implementation of this Agreement at the earliest so as to make India a hub for international arbitration. The Committee would like to be apprised of the endeavours made by the Ministry and the result thereof, at the earliest.

**(Recommendation No. 8)**

2.23 The Committee note that investment arbitration requires lawyers/judges who possess the expertise and experience at international fora. India is still lacking in adequate number of persons who have the expertise and experience in this domain. The Committee have been informed that law firms and lawyers, both Indian and international have been engaged to represent the country in the hearings of arbitration. In order to avoid payment of huge fees for foreign lawyers and international law firms and costly arbitral awards against the country, the Committee feel that developing local expertise in this domain is crucial. The Committee, therefore, recommend that MEA, DoLA, DEA and other concerned Departments/Agencies should work in close coordination to develop domestic talent in the form of panel of domestic lawyers and law firms who will have the requisite expertise and experience to represent India successfully in investment treaty arbitrations.

**(Recommendation No. 9)**

## **CHAPTER III**

### **COST- BENEFIT ANALYSIS OF BITs**

The Department of Economic Affairs, in a written note furnished to the Committee have stated that the cost of a BIT includes expensive litigations through international arbitration, including legal and arbitrator fees and arbitration costs, liability for the Government in case of adverse award, reputational cost in international investment arena, reduced policy space due to commitments in international treaties, distorted power dynamics between capital exporting and capital importing countries and uncertainty in the law arising out of the inconsistent interpretations by different tribunals.

3.2 The benefits of the BITs include expectation that the BITs would lead to higher investment and thus higher employment and job creation. It would also provide comfort of protection to Indian investors investing in other countries.

3.3 Explaining the challenges and also the opportunities for the country's Bilateral Investment Treaties with various countries, the DEA, in a written reply, stated that investment decisions depend on a wide variety of factors – infrastructure, political stability, market size, human resources, ease of doing business, availability of raw-materials and intermediates, investment protection policies, rule of law, etc.

3.4 Investment protection is offered through a variety of ways – local laws, robust justice system upholding rule of law, BITs offering international arbitrations, etc. Investors look for political stability and good governance including a robust justice system. Hence, availability of a BIT is not a necessary condition for investments.

3.5 BITs may therefore provide comfort to some foreign investors while making their investment decisions in countries with high risk in terms of political stability or policy uncertainty. It would also provide comfort of protection to Indian investors investing in other countries. BITs reduce the uncertainty and hence risk for the investors and therefore, investors feel confident in investing.

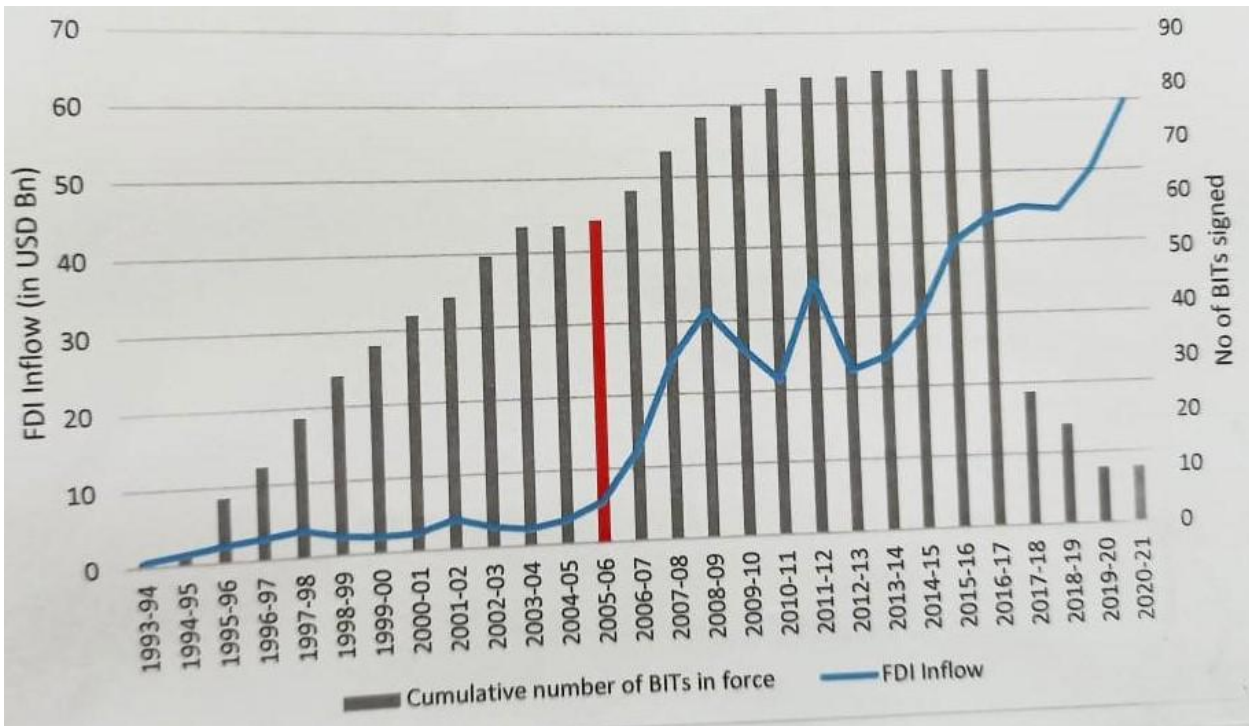
3.6 BITs essentially take away policy space ceded in the treaty articles, especially in more liberal BITs. Hence, for a developing country this poses challenges in terms of inability to change policies that may impact existing investors. Liberal provisions in BITs signed by India in the past have been causes of investment disputes.

3.7 As regards to challenges, there has been a remarkable rise in the number of BIT disputes globally and BIT disputes are very expensive. In the absence of any jurisprudence regarding BIT interpretations and the fact that there are more than 3000 BITs internationally, the arbitral tribunals have wide ranging powers in interpretation of the clauses. Sometimes, the arbitral awards in BIT disputes tend to undermine the sovereignty, democratic decision making and right to regulate.

3.8 The nature of disputes and the awards have also brought forth the problems of inconsistent and selective interpretations adopted by tribunals handling arbitrations worldwide, leading to adverse orders against the states.

3.9 In order to assess the benefits, DEA has examined the relationship between BITs and FDI flow. It has not seen a direct causal relationship between BITs and FDI inflow. It may also be noted that that recent decline in number of BITs in force (due to termination post approval of the Model BIT text 2015) did not result in decline in annual FDI inflow. The graph representing relationship between cumulative number of BITs in force and the FDI inflow is enclosed. *FDI* investment decisions and inflows into India are a complex function of several factors including market, ease of doing business, infrastructure, human resources, availability of raw materials, competitiveness and productivity, etc.

3.10 Causality between BIT and investment inflows appear to be weak and insignificant as per various studies.



3.11 Hence, Government of India has been lately pursuing a very cautious approach to signing BITs.

3.12 Responding to a query on impact assessment of IIAs/BITs on India, the Department of Economic Affairs, in a written reply, informed that in 2016, Department of Economic Affairs commissioned a study to ICRIER to study impact assessment of IIAs on India. It was an empirical study based on the Gravitational Model of FDI. From the econometric analysis, it was inferred that the size of bilateral trade, the presence of a CECA/CEPA and lagged FDI are causally and positively related with FDI inflows. Even as the individual BIT dummy (which captures whether or not a BIT exists between India and the partner country in a particular year) is not significant in any of our three models, the cumulative BIT variables are significantly positively related with FDI inflows. A charitable reading of this result is that it suggests that there may be some spill-over benefits for investment inflows from the BIT regime as a whole, though a relationship between investment and signing a particular treaty cannot be established. Investment decisions depend on a wide variety of factors – infrastructure, political stability, market size, human resources, ease of doing business, availability of raw-materials and intermediates, investment protection policies, rule of law etc.



3.13 As regards the impact of BIT on employment generation, the DEA informed that there has not been any study. However, it is taken for granted under standard economic theories that investment lead to more employment and more production in the economy”.

3.14 Elaborating on the need for having BITs even though there is no direct correlation between FDI and BIT, the representative of the Federation of Indian Chambers of Commerce and Industry (FICCI) submitted before the Committee:

“...One is the strategic and symbolic perspective, the signalling factor. That is one aspect because it is something which does reveal a commitment from the Government. It is almost like a public statement saying that this is important.

The second aspect is that even though an investor may not be looking at it as the only factor, it is still constituting as one of the factors which plays an important role as far as investment is concerned.

The other important aspect is, as a country when we are negotiating agreements, there is practically no international agreement today that will give us a leeway that we need not negotiate on investment. So, whether we want stand-alone BITs is a separate question. But that investment chapter has to be there in practically any trade agreement that India negotiates”.

3.15 When enquired whether the possibility of signing BITs in high-technology manufacturing/Sectors with countries like USA and EU has been explored in keeping with the Government’s initiatives of „Atmanirbhar Bharat“ and „Make in India“, the MEA informed that Negotiations with US on a Bilateral Investment Treaty (BIT) are being held since 2009. However both India and USA adopted in parallel their own Model BITs replacing existing ones. During the last round of discussions on BIT in 2016, both sides had different positions on issues related to Market access, Definition of Investments, Dispute settlement, taxation issues etc. Since then the talks have been dormant. Nevertheless India has been a recipient of increasing US FDI and many US companies are operating in India.

3.16 In the interim to ensure continuity and facilitate investments from USA we have extended till December 2021 the Investment Incentive Agreement signed in 1997 with US Development Finance Corporation. A new Investment Incentive Agreement is being negotiated.

3.17 With regard to the EU, During the India-EU Leader’s Meeting held on May 8, 2021, both sides agreed to restart negotiations on a stand-alone investment protection agreement. Preparations are underway on both sides to start negotiations soon. Nodal Department for the

Investment Protection Agreement is the Department of Economic Affairs, Ministry of Finance. Such an Investment Protection Agreement along with trade agreement with EU as envisaged in the above mentioned India-EU Leaders meeting, once concluded will give mutual benefits to Investor of EU and India and will contribute towards increasing investment.

**3.18 The Committee note that FDI decisions and inflows into the country are a complex function of several factors including market, ease of doing business, infrastructure, human resources, availability of raw materials, competitiveness and productivity etc. As per a study commissioned by DEA to ICRIER, though there may be some spillover benefits for investment inflows from the BIT regime as a whole, a relationship between investment and signing a particular treaty cannot be established. The Committee are aware that BITs are not the sole factor for attracting FDIs into the country. However, it has been taken for granted under standard economic theories that investment lead to more employment and more production in the economy. The Committee feel that in a developing country like India, FDI inflows is essential for economic development and BITs have the potential to attract FDIs in that they could provide foreign and Indian investors a higher degree of confidence in investment. The Committee, therefore, desire that signing of BITs should be encouraged selectively in identified core/priority sectors/areas to attract more FDIs which will lead to growth and development of the economy. The Ministries/Departments/Agencies concerned may identify the core/priority sectors in this regard and MEA may facilitate the same.**

**(Recommendation No. 10)**

**3.19 The Committee note that negotiations with the USA on a BIT are being held since 2009. The Investment Incentive Agreement signed in 1997 with the US Development**

**Finance Corporation has been extended till December 2021 and a new Investment Incentive Agreement is being negotiated. With regard to the EU, preparations are underway on both sides to start negotiations on a stand-alone investment protection agreement. The Committee feel that signing of BITs/Investment Protection Agreements in high-technology manufacturing/sectors with USA and EU is in keeping with the Government's initiatives of Atmanirbhar Bharat and Make in India and would benefit the country's manufacturing sector especially in high-tech goods. The Committee, therefore desire that the process of negotiations should be started and concluded early so as to contribute towards increasing investment in priority sectors and high technology manufacturing.**

**(Recommendation No. 11)**

## CHAPTER IV

### ANALYSIS OF THE PROVISIONS OF THE REVISED INDIAN MODEL BIT, 2015

The Department of Economic Affairs, Ministry of Finance has provided an analysis of the provisions of the Model BIT 2015 as under:

**(i) Preamble:** The Model BIT has a focused preamble referring to the key objective of bilateral cooperation between Contracting Parties in matters relating to the encouragement and reciprocal protection of investments to stimulate the flow of capital. The use of terms such as “sustainable development” reinforces the development goals of investment in terms of the overall framework of the BIT.

**(ii) Definition of “Investment”:** The Model BIT adopts an “enterprise” based definition. An “enterprise” based approach equates “investment” with an “enterprise” incorporated in the Host State and aligns the BIT regime with the Indian FDI Policy. The definition also clarifies the types of assets of the enterprise which are entitled to protection of the treaty. These include equity and debt instruments, IPRs, long-term contracts, licenses conferred by domestic law and property rights as long as such assets are owned by the enterprise. Further, an investment also has to demonstrate certain minimum characteristics such as commitment of capital, the expectation of gain or profit, the assumption of risk and have significance for the development of the host state in order to qualify for protection under the treaty.

**(iii) Definition of “Investor”:** The definition of “investor” is important to determine who is protected by the treaty. While both juridical and natural persons are qualified as investors, the Model BIT requires investors to have substantial business activities in the Home State. In terms of natural persons, dual nationals are deemed to be protected under their dominant and effective nationality.

**(iv) Definition of “Measures”:** The definition of “measures” is important to determine what type of actions by the Contracting Parties can lead to a claim. The Model BIT defines “measures” in a broad manner to include law, regulation, rule, procedure, decision, administrative action, practice, etc.

**(v) Scope:** The Model BIT protects investments existing at the time of entry into force of the Agreement as well as those made thereafter till the validity of the agreement. However, it excludes any disputes relating to investments prior to entry into force of the agreement. Further, matters relating to public procurement, taxation, public services provided by state enterprises, compulsory licenses and measures by local government have been excluded from the scope of the treaty.

**(vi) Substantive obligations:** In focusing on the substantive investor protection clauses, the Model BIT has two objectives: (i) clarifying the interpretation and application of substantive obligations by having contemporary language; and (ii) taking into account the recent jurisprudence emanating out of decisions of various investor state arbitrations.

**(a) Standard of treatment:** The Model BIT does not have the terms „Fair and Equitable Treatment” (FET) or the Minimum Standard of Treatment (MST) clause. Without referring to any such pre-existing standards, it seeks to define the core elements of the MST standard as found in customary international law by replacing it with specific obligations such as denial of justice, fundamental breach of due process or targeted discrimination or manifestly abusive treatment. The intention behind using such language is that the standard of review of the measure in question should be deferential towards governments and that the threshold for finding a violation rather high.

**(b) Non-discrimination:** Traditionally, the two core non-discrimination obligations are National Treatment (NT) and Most Favoured Nation (MFN). However, the MFN obligation has in the past allowed investors to selectively “import” favourable substantive provisions from other treaties concluded by the Host State. MFN clauses have also been used to waive jurisdictional/dispute settlement requirements. The MFN clause is accordingly removed in the Model BIT. NT is retained as the sole non-discrimination obligation. The Model clarifies that a violation of NT will only be found if the measure discriminates against foreign investors and if the Investments being compared are in “like circumstances”.

**(c) Expropriation:** The Model BIT protects investors against both direct and indirect expropriation. For defining the scope of indirect expropriation, the Model text adopts the “substantial or permanent deprivation” test to determine whether an indirect expropriation has

occurred. The provision also clarifies that non-discriminatory measures of general applicability such as public health, safety and environment are not considered expropriations. For the calculation of compensation, the standard provided for is the fair market value of investment.

**(d) Transfers:** The Model BIT provides investors the right to transfer funds relating to their investments in and out of the country without restrictions as permitted under domestic law. However, there are broad exceptions to allow the state parties to introduce capital control measures in the event of serious balance of payment problems and in times of monetary crisis.

**(vii) Investor State Dispute Settlement (ISDS):** ISDS is a powerful tool and protection for foreign investors, but also raises extensive and diverse policy concerns for States. The Model BIT text attempts to strike a balance between those potential costs and benefits of ISDS – retaining it for foreign investors while minimizing Host States’ undue exposure to claims and liability. It does so through the following approaches and principles outlined below:

**(a) Scope of ISDS:** The Model text focuses ISDS mechanisms only for an alleged breach of the substantive investor protection clauses found in Chapter II, other than the obligations of transparency and entry and sojourn of personnel. The tribunal’s power has been limited to awarding monetary compensation alone.

**(b) Conditions precedent:** The Model requires the investor to exhaust all local remedies for five years prior to commencing international arbitration. The investor is only excused from this requirement if the Investor can show that there is no domestic remedy capable of reasonably providing any relief. This exception is based on the recognition that that are certain BIT obligations (e.g., national treatment or restrictions on transfers) for which there may not be a domestic remedy as the measure will be valid under domestic law, but may violate international obligations. After exhaustion of remedies, the investor has the duty to engage in good faith consultations or negotiations in order to attempt to find a resolution for a period of six months. A failure to comply with that requirement bars the investor from pursuing investor-state arbitration. Initiating arbitration also requires the Investor and Investment to provide a clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures in question.

**(c) Dismissal of frivolous claims:** The Model introduces a mechanism by which the State can raise a preliminary question that a claim is frivolous or without jurisdiction. The tribunal is then

required to suspend the merit based review of the claim and first decide the jurisdictional question.

**(d) Prevention of conflict of interest of arbitrators:** In recent years, there have been several instances where arbitrators have a personal or pecuniary interest in proceedings they adjudicate. The Model BIT addresses this concern by providing clear and unequivocal language requiring arbitrators to be impartial, independent and free of any conflict of interest for the entire period of the arbitration.

**(e) Transparency:** The Model BIT permits non-disputing States to make submissions before the tribunal. These obligations also provide for Parties to make available documents relating to the arbitration such as the notice of arbitration, pleadings, transcripts, orders and awards at a publically available source, subject to protection of confidential information in accordance with law. These provisions are now common worldwide and are likely to increase public confidence in the BIT regime.

**(viii) Exceptions:** The Model text contains two types of exceptions: general exceptions and security exceptions. The attempt is to carve out a policy space for the State. The general exceptions include, among others, the protection of environment, ensuring public health and safety, and protecting public morals and public order.

**(ix) Investor obligations:** A key concern with the investment treaty regime is that it is asymmetrical in as much as it provides investor's important protections and procedural avenues to challenge Host State action irrespective of their own conduct. The Model BIT adopts an approach whereby it seeks to balance investor rights with their obligations under domestic law. Consequently, it has a chapter on investor obligations which requires that foreign investors comply with domestic laws on corruption, disclosures, transparency at all times. Further, a clause has been added to the chapter on investor-state dispute settlement prohibiting an investor from submitting a claim if the investment was been made through fraudulent misrepresentation, concealment, corruption, money laundering or similar illegal mechanisms.

4.2 During oral evidence on the subject on 4<sup>th</sup> February, 2021, the representative of the Department of Economic Affairs elaborated on the scope of the ISDS mechanism as under:

“As far as the Investor State Dispute Settlement mechanism is concerned, the ISDS scope has been limited to awarding monetary compensation alone. There would not be any right to restitution which might be provided in other agreements. So, an award can contain only a monetary compensation for whatever claims they have made against the State.

There is also a provision which provides for conditions precedent, which indicates basically that the investor must access domestic remedy before he actually approaches the international tribunal. So, the investor is excused from this requirement only if he can show that there is no domestic remedy available for him to get any relief within the country. If that is so, then he is permitted to directly go in for international arbitration. So, after exhaustion of local remedies for a period of five years, the investor has to engage in good faith consultation in order to find resolution within a period of six months, failing which he is free to actually initiate an international arbitration dispute in an international arbitration tribunal”.

4.3 The representative of Confederation of Indian Industry (CII) while giving his expert view before the Committee, stated as under:

“...when we generally speak about BITs, we know that most of the courts even in India, are basically clogged. It is absolutely unreasonable to expect a quick decision on most of the concerns of the foreign investors and maybe even of the domestic investors. That process will take its own time. But the requirement to actually pursue a matter for a period of five years before a local court in India, in my opinion, appears like a harsh requirement. Even if there is such a requirement, it should be shortened or the investor should be given some kind of flexibility to pursue this kind of matter in an International Investment Tribunal. So, on that particular point, I feel that it requires some kind of a revisiting in the future”.

4.4 Giving her expert view on the restrictions regarding the ISDS, the representative of FICCI also stated as under:

“...But as far as the restrictions on ISDS is concerned, in our current model BIT, some of the restrictions are far too far-reaching, which leads to the question, specially when we are thinking of BITs with countries when Indian investors are going, will these provisions actually work against Indian investors? Indian investors have used BITs in miniscule cases. But these cases are gradually increasing. So, from an Indian investor’s perspective, specially in countries where rule of law may not be on as solid basis as we offer in our country, it is area we may think of slightly less stringent approach to ISDS”.



4.5 On the provision regarding „Investor obligations“, the representative of DEA during oral evidence on 4 February, 2021 submitted as under:

“This model BIT has also brought in an important element of investor obligations because while the model BIT provides a lot of rights for the investors, there is also a counter obligation which has been imposed under the new model BIT which actually makes the agreement a lot more balanced. So, it requires the foreign investors to comply with domestic laws on corruption, disclosure, transparency at all times. Although this provision is non-mandatory, it still brings a lot of responsibility in the conduct of the foreign investors”.

4.6 The DEA, in a written reply furnished to the Committee, provided the key provisions in recent agreements of other countries as under:

**1) North America Free Trade Agreement 2.0 (NAFTA 2.0) or the United States Mexico Canada Agreement – Entry into force 1 July, 2020**

- Canada is not a party to the ISDS mechanism provided in Chapter 14. This means that ISDS claims cannot be asserted by Canadian investors, nor asserted against Canada.
- Chapter 14 of USMCA (Investment) *now includes a local litigation requirement as a prerequisite for ISDS claims between USA and Mexico. Once that requirement is exhausted (or 30 months have elapsed) then only an investor may move to ISDS.*
- **Claims under ISDS mechanism also limited to for articles such as:** (1) direct (but not indirect or “creeping”) expropriation (Annex 14-B (Expropriation), Article 2), (2) violations of national treatment (Article 14.4.1) etc.

**2) Colombia–United Arab Emirates BIT (September, 2017)**

- **Facilitating counterclaims by the respondent party against the claimant investor.** Establishing a mechanism for obtaining investor’s consent for counterclaims.

**3) EU – UK Future partnership Agreement ( Post Brexit) Draft Agreement (March 2020) –**

**No substantive provisions relating to expropriation, fair and equitable treatment, or full protection and security**

- **No ISDS** - No specific provision for the resolution of disputes between investors and a Party by an international arbitral tribunal. There is a provision of Accelerated Consultations through Partnership Council to resolve the dispute within 30 days of the date of delivery of the request, unless the Parties agree to continue consultations. If the Partnership Council has failed to resolve the dispute within 180 days after the notification referred to [Consultations in the framework of the Partnership Council], or if the Parties agree not to have or continue consultations, the complaining Party may request the establishment of an arbitration tribunal. The rules of procedure is not present in the text as per the draft of March 2020.

#### **4) Review of Australia's Bilateral Investment Treaties (August 2020)**

Australia is reviewing the bilateral investment treaties (BITs) to which Australia is a party. In this regard Government of Australia has called for public and stakeholder comments on various policy options including the following –

- a. full renegotiation of a BIT;
- b. amendment of a BIT;
- c. negotiation and adoption of a Joint Interpretative Note;
- d. adoption of a Unilateral Interpretive Note;
- e. termination of a BIT
- f.* replacement of a BIT with an FTA chapter that may or may not include ISDS.

#### **5) Australia Uruguay FTA ( April 2019)**

**Taxation is excluded from all other Articles of Investment treaty except for Expropriation.** Even for raising a claim of Expropriation, investor must first refer to the competent authorities of the Party, the issue of whether that taxation measure is not an expropriation. If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of the referral, the investor may submit its claim to arbitration.

**6) Japan Morocco BIT ( 2020)**

**Taxation** – An arbitral tribunal shall not have the authority for interpretation or application of the tax laws of either Contracting Party.

**7) Treaties concluded in 2019 with reforms under ISDS approaches:**

- i. No ISDS: Brazil has signed treaties with Ecuador, Morocco and UAE without ISDS. India also signed ICFT with Brazil in January, 2020 which focuses on dispute prevention institutions vide National Focal Point/Ombudsman and Joint Committee. There is no ISDS.
- ii. Limited ISDS (Limiting treaty provisions subject to ISDS and/or excluding certain policy areas from ISDS): Australia-Indonesia CEPA.

4.7 The comparison of the provisions which exist in the BITs and the Investment Chapters of FTAs that India signed with various countries is as under:

PROVISIONS	INDIAN MODEL BIT 2015	APPROACH TAKEN BY INDIA IN THE FTAS INVESTMENT CHAPTER/INVESTMENT AGREEMENT				
		India – Korea CEPA	India – Japan CEPA	India – Singapore CECA	India – Malaysia CECA	India – ASEAN Investment Agreement
<b>Definition of Investment</b>	Enterprise based definition with a list of assets Complete exclusion of Portfolio investments	Asset based definition	Asset based definition	Asset based definition	Asset based definition	Asset based definition
<b>Taxation</b>	Taxation is expressly excluded from the scope of the BIT	Taxation is expressly excluded from the scope of the Investment	Taxation is excluded for Investment chapter	Taxation is excluded only from National Treatment obligation	Taxation is excluded except for Transfers (of capital) Article	Taxation is excluded except for Transfers (of capital) Article

		Chapter				
<b>Most Favoured Nation (MFN)</b>	No MFN clause	No MFN clause  Clause on Review of Reservations	MFN clause for Post-establishment – only (use of words management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investment)	No MFN clause  Clause on Review of Reservations	No MFN clause  Clause on Review of Reservations	No MFN clause  Clause on Review of Reservations
<b>Pre-establishment</b>	Post Establishment Only	Includes Pre – establishment	Includes Pre – establishment	Includes Pre – establishment	Includes Pre – establishment	Includes Pre – establishment
<b>Prohibition of Performance Requirements (PPRs)</b>	No PPR Article	PPR Article	PPR Article	PPR Article	No PPR Article	No PPR Article
<b>Senior Management And Board of Directors (SMBD)</b>	No SMBD Article	SMBD Article	SMBD Article (in PPR Clause)	SMBD Article	No SMBD Article	No SMBD Article
<b>Investor-state dispute settlement (ISDS)</b>  <b>Local remedies</b>	5 year Mandatory exhaustion of local remedies before resorting to International arbitration. It generally takes 4-5	No mandatory exhaustion of Local remedies. Fork in the road Clause i.e Investor can choose either local remedies	No mandatory exhaustion of Local remedies. Fork in the road Clause i.e Investor can choose either local remedies or international	No mandatory exhaustion of Local remedies. Fork in the road Clause i.e Investor can choose either local remedies	No mandatory exhaustion of Local remedies. Fork in the road Clause i.e Investor can choose either local remedies	No mandatory exhaustion of Local remedies. Fork in the road Clause i.e Investor can choose either local remedies

	years in Tribunal decision and thereafter there is a process of appeals based on the seat of arbitral tribunal. Putting a 5 year local remedy clause gives a low cost option for both the parties and also is ample time for reaching a certain level of finality in the case.	or international arbitration	arbitration	or international arbitration	or international arbitration	or international arbitration
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4.8 Responding to a query on whether the new model BIT would strengthen the position of India in dealing with disputes in international arbitration, the DEA in its written reply informed that the Model BIT 2015 attempts to create a balance between the Government's right to regulate and investment protection. The Model has several safeguards inbuilt based on experiences of India and other cases worldwide, to deal with disputes by having a more detailed Dispute settlement provision to govern the arbitration proceedings and several exceptions in the Scope and Definition of Investment to preserve policy space. Further there are several provisions to dismiss frivolous claims and prevent broad interpretation of the substantive obligations of the treaty. Therefore, it is believed that in any treaty based on Model BIT 2015 text, the position of India in dealing with international arbitration as a respondent would improve.

4.9 On being asked whether the template used in the Model BIT is our own or we have borrowed from abroad, the DEA informed that the Model BIT template has been prepared based on analysis of various other Models and agreements, comments of stakeholders and jurisprudence in treaty arbitration. There are more than 3000 existing BITs in the World and none of them might be exactly similar to other. For every provision, present in the Model BIT, there are some examples of some other treaty that may have inspired that provision.

4.10 In response to a query regarding engagement of a team of experts for drafting the BIT, the DEA stated in a written reply that the Model BIT 2015 was prepared pursuant to extensive consultations with several stakeholders, including national and international legal experts. All agreements are subsequently vetted by in-house legal team and Department/Ministries concerned with the negotiations of BITs. In case of any policy concerns, the views of independent stakeholders are also taken from time to time.

4.11 When the Committee enquired during oral evidence whether the draft Model BIT was put in public domain and comments have been received from Indian and international investors, the DEA informed in a written reply that the Model BIT was placed on [www.MyGov.in](http://www.MyGov.in) portal for comments/suggestions from interested individuals/organizations. Separately, the Model BIT had also been circulated to various academicians and experts working on the subject for comments. Moreover, consultations on the Model BIT were also held with industry groups such as FICCI, CII, ASSOCHAM, and law firms. Consultations were also held with many non-governmental, inter-governmental and academic institutions. Besides the above, various comments were received from organizations and individuals, which include Hon'ble Ambassador of India to the World Trade Organization, Geneva; Law Commission of India; Permanent Court of Arbitration; National Academy of Legal Studies and Research; National Association of Manufacturers; Geneva University School of Law; South Asian University, New Delhi; ESSEC Business School, Singapore; Forum Against FTAs; PLR Chambers; South Centre, Geneva; United States India Business Council and Hind Mazdoor Sabha.

4.12 On the need to revisit the Model BIT, an Assistant Professor at the South Asian University while giving his expert view before the Committee, stated as under:

“India needs to revisit its Model BIT in order to strike a balance between giving investors the rights and also recognising the right of the Host State to regulate in public interest”.

**4.13 The Committee note that the Model BIT 2015 attempts to create a balance between the Government's right to regulate and investment protection. They have been informed that in any treaty based on Model BIT, 2015 text, the position of India in dealing with international arbitration as a respondent would improve. The Committee are aware that the Model BIT 2015 is an improvement over the earlier and older BITs as it addresses several issues faced in the past. The Committee, however, feel that there is still scope for fine tuning, especially in some of the provisions like Investor State Dispute Settlement mechanism in which the scope is limited to awarding monetary compensation alone, exhaustion of local remedies for five years prior to commencing international arbitration, non mandatory investor obligations, enterprise to be operated by an investor in good faith etc. It should be the endeavour of MEA, DEA, DoLA and other concerned Departments/Agencies to bring about improvement and suitable amendments in the light of new experience gained in disputes and arbitration arising out of BITs and the overall change in the global economic outlook. The Committee, therefore, desire that review of the Model BIT 2015 should be a continuous process for a balanced and comprehensive BIT.**

**(Recommendation No. 12)**

**4.14 The Committee note that in a departure from the open ended asset based definition of investment in the older BITs, the Model BIT, 2015 adopts an enterprise based definition of**

investment and aligns the BIT regime with the Indian FDI policy. This definition also clarifies the types of assets of the enterprise which are entitled to protection of the treaty. Further, an investment also has to demonstrate certain minimum characteristics such as commitment of capital, the expectation of gain or profit, the assumption of risk and have significance for the development of the host State in order to qualify for protection under the treaty. While appreciating the intention of the Government to reduce the number of BIT claims and adverse arbitral awards against the country, the Committee feel that there is still ambiguity in certain areas like duration of the enterprise, significance for the development of the host State, etc. They, therefore, desire that continuous efforts are required to remove any ambiguity so as to reduce arbitral discretion for varied interpretations.

**(Recommendation No. 13)**

4.15 The Committee note that the Model BIT 2015 has been prepared based on analysis of various other models and agreements, extensive consultations with national and international legal experts, consultations with industry groups, law firms, non-governmental, inter-governmental and academic institutions, comments of stakeholders and jurisprudence in treaty arbitration, academicians and experts working on the subject, etc. The Committee also desire that an indepth study may be made of the working and outcome of such treaties adopted by advanced countries and their best practices and provisions may be incorporated in the Indian Model BIT.

**(Recommendation No. 14)**

**NEW DELHI;**  
**11 August, 2021**  
**20 Sravana, 1943 (Saka)**

**P.P. CHAUDHARY,**  
**Chairperson,**  
**Committee on External Affairs**



**MINUTES OF THE TWENTY-FIFTH SITTING OF THE STANDING COMMITTEE  
ON EXTERNAL AFFAIRS HELD ON 7 SEPTEMBER, 2020**

The Committee sat from 1500 hrs. to 1730 hrs. in Committee Room „C“, Parliament House Annexe, New Delhi.

**Present**

**Shri P.P. Chaudhary – Chairperson**

**Members**

**Lok Sabha**

2. Smt. Meenakashi Lekhi
3. Shri Ritesh Pandey
4. Shri Ram Swaroop Sharma
5. Shri Ravindra Shyamnarayan Shukla alia Ravi Kishan
6. Shri Manoj Tiwari
7. Shri N.K. Premchandran

**Rajya Sabha**

8. Shri K. J. Alphons
9. Shri Swapan Dasgupta
10. Shri Ranjan Gogoi

**MINISTRY OF EXTERNAL AFFAIRS**

<b>S. No.</b>	<b>Name</b>	<b>Designation</b>
1.	Shri Rahul Chhabra	Secretary

**MINISTRY OF FINANCE (DEPT OF ECONOMIC AFFAIRS)**

<b>S. No.</b>	<b>Name</b>	<b>Designation</b>
1.	Shri Tarun Bajaj	Secretary

**Secretariat**

1. Shri Paolienlal Haokip - Additional Director
2. Shri Maneesh Mohan Kamble - Under Secretary

2. At the outset, the Chairperson welcomed the Members of the Committee and the representatives of the Ministries of External Affairs, & Finance (Dept. of Economic affairs) to

the Sitting of the Committee convened to have a briefing on “India and Bilateral Investment Treaties”. After giving cue of the discussion, the Chairperson drew the attention of all the representatives to Direction 55 (1) of Directions by the Speaker, Lok Sabha in order to maintain the confidentiality of the proceedings. The Chairperson also apprised the witnesses about the provision of Direction 58 of Directions by the Speaker, Lok Sabha.

3. After introductions, the Secretary Ministry on External Affairs briefed the Committee on the subject in detail. Thereafter, the representative from Ministry of Finance (Dept of Economic Affairs) also briefed the Committee extensively on the subject.

4. During the deliberations, Members of the Committee raised certain queries such as Text of Bilateral Investment Treaty of 2015, Fair and Equitable Treatment (FET) clause from Model BIT of 2015, impact of BIT on Foreign Direct Investment (FDI) specifically in a post – COVID scenario, signing of Free Trade Agreements (FTA’s) mainly with South East Asian countries, presence of International Centre for alternate dispute resolution etc.

*The Committee then adjourned*

*(The witnesses then withdrew)*

A verbatim proceeding of the Sitting has been kept on record.

**MINUTES OF THE THIRD SITTING OF THE STANDING COMMITTEE ON  
EXTERNAL AFFAIRS HELD ON 20 October, 2020**

The Committee sat from 1100 hrs. to 1250 hrs. in Committee Room „D“, Parliament House Annexe, New Delhi.

**Present**

**Shri P.P. Chaudhary – Chairperson**

**Members**

**Lok Sabha**

2. Smt. Harsimrat Kaur Badal
3. Smt. Preneet Kaur
4. Smt. Meenakashi Lekhi
5. Smt. Goddeti Madhavi
6. Smt. Poonam Mahajan
7. Shri N.K. Premchandran
8. Shri Manne Srinivas Reddy

**Rajya Sabha**

9. Shri Swapan Dasgupta
10. Shri Ranjan Gogoi

**MINISTRY OF EXTERNAL AFFAIRS**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Shri Rahul Chhabra	Secretary (ER)
2.	Ms. Uma Shekar	Additional Secretary (L & T)
3.	Shri Anil Kumar Rai	Joint Secretary (Parl & Coord)

**MINISTRY OF FINANCE (DEPARTMENT OF ECONOMIC AFFAIRS)**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Shri Tarun Bajaj	Secretary
2.	Shri K. Rajaraman	Additional Secretary

**MINISTRY OF LAW AND JUSTICE (LEGISLATIVE DEPARTMENT)**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Dr. G. Narayana Raju	Secretary (Legislative Dept.)
2.	Shri K. Biswal	Additional Secretary

**MINISTRY OF LAW AND JUSTICE (DEPARTMENT OF LEGAL AFFAIRS)**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Shri Anoop Kumar Mendiratta,	Secretary
2.	Shri S.R. Mishra	Additional Secretary

**MINISTRY OF COMMERCE AND INDUSTRY ( DEPARTMENT OF COMMERCE)**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Dr. Anup Wadhawan	Commerce Secretary
2.	Shri Bidyut Behari Swain	Special Secretary
3.	Shri Shyamal Misra	Joint Secretary

**Secretariat**

- |    |                           |   |                     |
|----|---------------------------|---|---------------------|
| 1. | Dr. Ram Raj Rai, Director | - | Director            |
| 1. | Shri Paolienlal Haokip    | - | Additional Director |

At the outset, the Chairperson welcomed the Members of the Committee and the representatives of the Ministry of External Affairs, Ministry of Finance (Department of Economic Affairs), Ministry of Law and Justice (Legislative Department and Department of Legal Affairs) and Ministry of Commerce and Industry (Department of Commerce) to the sitting of the Committee convened to have oral evidence in connection with detailed examination of the subject „India and Bilateral Investment Treaties“. The Chairperson then drew the attention of all the witnesses to Direction 55 (1) of the Directions by the Speaker,

Lok Sabha pertaining to maintaining the confidentiality of the Proceedings and Direction 58 of the Directions by the Speaker, Lok Sabha. He then requested the witnesses to introduce themselves before making submission before the Committee.

2. The Secretary (ER) presented an overview of Bilateral Investment Treaties in the Indian context and the present status of such treaties. Then the representative of the Department of Economic Affairs made a detailed statement which includes the genesis of BITs in the country and the circumstances that led to the adoption of the new Model BIT in 2015. The representatives of the Department of Commerce, Department of Legal Affairs and Legislative Department also apprised the Committee regarding the various aspects pertaining to them.

3. Thereafter, the Members raised various issues such as model agreement or template for BITs; legal experts for drafting BITs; vetting of such agreements; purview of BITs; FTA negotiations; coherence between concerned Ministries; negotiations on BITs; arbitration proceedings etc.

4. The representatives of the Ministries responded to the queries of the Members. Before the Sitting concluded, the Chairperson directed the witnesses to furnish written replies on the points raised by the Members to the Secretariat of the Committee at the earliest.

*The witnesses then withdrew.*

*The Committee then adjourned*

A Verbatim record of the Proceedings has been kept.

**MINUTES OF THE THIRTEENTH SITTING OF THE STANDING COMMITTEE  
ON EXTERNAL AFFAIRS HELD ON 12 JANUARY, 2021**

The Committee sat from 1230 hrs. to 1310 hrs. in Committee Room „C“, Parliament House Annexe, New Delhi.

**Present**

**Shri P.P. Chaudhary – Chairperson**

**Members**

**Lok Sabha**

2. Kunwar Pushpendra Singh Chandel
3. Smt. Meenakashi Lekhi
4. Smt. Goddeti Madhavi
5. Shri P. C. Mohan
6. Dr. K. C. Patel
7. Shri Rebati Tripura

**Rajya Sabha**

8. Shri K. J. Alphons
9. Shri Swapan Dasgupta
10. Shri Shamsheer Singh Manhas
11. Shri Brijlal

**Non-official Witness/Expert**

Dr. Prabhash Ranjan, Senior Assistant Professor, Faculty of Law, South Asian University, New Delhi

**Secretariat**

1. Dr. Ram Raj Rai - Director
2. Md. Aftab Alam - Additional Director
3. Shri Paolienlal Haokip - Additional Director

At the outset, the Chairperson welcomed the Members of the Committee and the non-official witness (Dr Prabhash Ranjan, Assistant Professor, South Asian University) invited to give his expert view on the provisions of the Model BIT-2015 in connection with detailed examination of the subject „India and Bilateral Investment Treaties“ and in accordance with

Rule 331L of the Rules of Procedure and Conduct of Business in Lok Sabha. He then drew his attention to Direction 55(1) of Directions by the Speaker, Lok Sabha pertaining to maintaining the confidentiality of the Proceedings and Direction 58 of the Directions by the Speaker, Lok Sabha.

2. After taking oath, Dr Prabhas Ranjan tendered his views/suggestions before the Committee which *inter- alia* included the need to revisit the Model BIT – 2015 so as to strike a balance between giving investors the rights and also recognizing the right of the Host State to regulate in public interest; having qualified MFN clause; expansive element prescribed regarding treatment for investment which continue to confer a lot of discretion on arbitration tribunals; termination of investment chapters in FTAs/CEPAs/CECAs not possible without terminating the entire agreements, involvement of people from academia or experts in the field for drafting model investment treaty etc.

3. The Members of the Committee then raised various queries ranging from drafting of the Model BIT; benefits to Host State and investors; seat of arbitration; BITs and investment chapters of FTAs; impact of unilateral termination of BITs; status of investments made before termination of the BITs; reforms needed in the Model BIT; protections under the Arbitration and Conciliation Act; public and expert consultations on the Model BIT; enforcement and adjudication of arbitral award etc.

4. The witness/expert responded to the queries of the Members. The Chairperson then thanked the witness for his valuable inputs on the subject.

*The witness then withdrew*

*The Committee then adjourned*

A verbatim record of the Proceedings has been kept.

**MINUTES OF THE FOURTEENTH SITTING OF THE STANDING COMMITTEE  
ON EXTERNAL AFFAIRS HELD ON 28 January, 2021**

The Committee sat from 1500 hrs. to 1630 hrs. in Committee Room No. 2, Block „A;, Parliament House Annexe, New Delhi.

**Present**

**Shri P.P. Chaudhary – Chairperson**

**Members**

**Lok Sabha**

2. Shri Dileshwar Kamait
3. Smt. Preneet Kaur
4. Smt. Meenakashi Lekhi
5. Smt. Goddeti Madhavi
6. Shri Ritesh Pandey
7. Dr. K. C. Patel
8. Shri Rebati Tripura

**Rajya Sabha**

9. Shri K. J. Alphons
10. Shri Brijlal

**FEDERATION OF INDIAN CHAMBERS OF COMMERCE &  
INDUSTRY(FICCI)**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Ms. R.V. Anuradha	Partner and Lead – International Trade and Investment Law Practice, Clarus Law Associates and Member, FICCI Foreign Trade and Trade Policy Committee.
2.	Shri Manab Majumdar	Deputy Secretary General, FICCI

**Secretariat**

1. Dr. Ram Raj Rai - Director
2. Md. Aftab Alam - Additional Director
3. Shri Paolienlal Haokip - Additional Director



1. At the outset, the Chairperson welcomed the Members of the Committee and the non-official witnesses invited to give their expert views before the Committee on the provisions of the Model BIT-2015 in connection with detailed examination of the subject „India and Bilateral Investment Treaties“ and in accordance with Rule 331L of the Rules of Procedure and Conduct of Business in Lok Sabha. He then drew their attention to Direction 55(1) of Directions by the Speaker, Lok Sabha pertaining to maintaining the confidentiality of the Proceedings and Direction 58 of the Directions by the Speaker, Lok Sabha.

2. After taking oath, the witnesses/experts tendered their views/suggestions before the Committee which *inter- alia* included impact of lack of BITS on flow of investment; Brazil model of BIT; ambiguity in the definition of investor; limiting the scope of MFN treatment rather than removing it completely; less stringent approach to ISDS; need to strike a balance between foreign investors“ rights and protection with Government“s sovereign decision-making policy space and regulatory capability etc.

3. The Members of the Committee then raised various queries such as, importance of BITS; correlation between FDI and BITS; standard agreement for BITS and status of BITS in other countries; improvement in the new Model BIT; protections under the Arbitration and Conciliation Act; BITS and WTO; MFN issue; Inter State Disputes Settlement under BITS; internal legal team for BIT litigation; exhaustion of local remedies before proceeding for arbitration; difference between BITS and CECA/CEPA; measures to address corruption for investment in the new Model BIT and cases pending before international tribunals in this regard etc.

4. The witnesses/experts responded to the queries of the Members. The Chairperson then thanked the witnesses for their valuable inputs on the subject.

*The witnesses then withdrew*

*The Committee then adjourned*

A verbatim record of the Proceedings has been kept.

**MINUTES OF THE SIXTEENTH SITTING OF THE STANDING COMMITTEE ON  
EXTERNAL AFFAIRS HELD ON 4 February, 2021**

The Committee sat from 1400 hrs. to 1545 hrs. in Committee Room 63, Parliament House, New Delhi.

**Present**

**Shri P.P. Chaudhary – Chairperson**

**Members**

**Lok Sabha**

2. Kunwar Pushpendra Singh Chandel
3. Shri Dileshwar Kamait
4. Smt. Preneet Kaur
5. Smt. Meenakashi Lekhi
6. Shri P. C. Mohan
7. Shri Ritesh Pandey
8. Shri N.K. Premachandran
9. Smt. Navneet Ravi Rana
10. Shri Manne Srinivas Reddy
11. Shri Rebati Tripura

**Rajya Sabha**

12. Shri K. J. Alphons
13. Shri Swapan Dasgupta
14. Shri Brijlal

**MINISTRY OF EXTERNAL AFFAIRS**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Shri Rahul Chhabra	Secretary(ER)
2.	Smt. Uma Sekhar	Additional Secretary (L&T)
3.	Shri Anil Kumar Rai	Joint Secretary (Parliament & Coordination)

**MINISTRY OF FINANCE (DEPARTMENT OF ECONOMIC AFFAIRS)**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Shri K. Rajaraman	Additional Secretary

**MINISTRY OF LAW AND JUSTICE (LEGISLATIVE DEPARTMENT)**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Shri R.S. Verma	Additional Secretary(LA)
2.	Shri K. Biswal	Additional Secretary
3.	Dr. Rajiv Mani	JS and LA

**MINISTRY OF COMMERCE & INDUSTRY (DEPARTMENT OF COMMERCE)**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Shri Amit Yadav	DGFT cum Additional Secretary
2.	Shri Shyamal Misra	Joint Secretary

**MINISTRY OF COMMERCE & INDUSTRY (DEPARTMENT FOR PROMOTION OF INDUSTRY AND INTERNAL TRADE)**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Shri Shailendra Singh	Additional Secretary
2.	Ms. Manmeet K. Nanda	Joint Secretary

**Secretariat**

1. Dr. Ram Raj Rai - Director
2. Md. Aftab Alam - Additional Director

1 At the outset, the Chairperson welcomed the Members of the Committee and the representatives of the Ministry of External Affairs, Ministry of Finance (Department of Economic Affairs), Ministry of Law and Justice (Legislative Department) and Ministry of Commerce and Industry (Department of Commerce and Department for Promotion of

Industry and Internal Trade) to the sitting of the Committee convened to have oral evidence in connection with detailed examination of the subject „India and Bilateral Investment Treaties“. The Chairperson then drew the attention of all the witnesses to Direction 55 (1) of the Directions by the Speaker, Lok Sabha pertaining to maintaining the confidentiality of the Proceedings and Direction 58 of the Directions by the Speaker, Lok Sabha. He then requested the witnesses to introduce themselves before making submission before the Committee.

2. The Secretary (ER) presented a brief overview of the Indian BIT scenario. Then the representative of the Department of Economic Affairs made a detailed submission on the broad goals and objectives of the revised Model BIT-2015.

3. Thereafter, the Members raised various issues relating to status of BITs in other countries and particularly in the EU; independent consultants for drafting of BITs; definition of investment and pre-investment; provision for amendments in the BITs; investment protection and attracting of more investment; exhaustion of local remedies for a period of five years before proceeding to arbitration; ICSID convention; international arbitration mechanism; MFN clause and WTO related issues; developing local expertise for arbitration; International Arbitration Centre in Delhi; efforts made to make India a hub for international arbitrations etc.

4. The representatives of the Ministries responded to the queries of the Members. Before the Sitting concluded, the Chairperson directed the witnesses to furnish written replies on the points raised by the Members at the earliest to the Secretariat of the Committee.

*The witnesses then withdrew*

*The Committee then adjourned*

A Verbatim record of the Proceedings has been kept.

**MINUTES OF THE SEVENTEENTH SITTING OF THE STANDING COMMITTEE  
ON EXTERNAL AFFAIRS HELD ON 11 FEBRUARY, 2021**

The Committee sat from 1400 hrs. to 1545 hrs. in Committee Room No. 2, Block „A;, Parliament House Annexe Extension Building, New Delhi.

**Present**

**Shri P.P. Chaudhary – Chairperson**

**Members**

**Lok Sabha**

2. Smt. Preneet Kaur
3. Smt. Meenakashi Lekhi
4. Smt. Goddeti Madhavi
5. Smt. Poonam Mahajan
6. Shri P. C. Mohan
7. Shri Ritesh Pandey
8. Shri N.K. Premachandran
9. Smt. Navneet Ravi Rana

**Rajya Sabha**

10. Shri K. J. Alphons
11. Shri Brijlal

**CONFEDERATION OF INDIAN INDUSTRY(CII)**

<b>S.No.</b>	<b>Name</b>	<b>Designation</b>
1.	Dr. Saugat Mukherjee	Head, CII Public Policy
2.	Shri James Nedumpara	Head of Centre for trade and investment law and Head International Law, CII Trade Policy Council
3.	Shri Vijayendra Singh	Sr. Partner & Head Disputes (Delhi), AZB, Senior member of the CII MNC Council
4.	Shri Pranav Kumar	Head, CII Trade Policy
5.	Shri Ranjit Jabbi	Head, CII Parliamentary Forum
6.	Shri Vijay Kashyap	CII Public Policy Department

### Secretariat

1. Shri P.C. Koul - Additional Secretary
2. Dr. Ram Raj Rai - Director
3. Shri Paolienlal Haokip - Additional Director
4. Shri Surender Chaudhary - Under Secretary

1. At the outset, the Chairperson welcomed the Members of the Committee and the non-official witnesses invited to give their expert views before the Committee on the provisions of the Model BIT-2015 in connection with detailed examination of the subject „India and Bilateral Investment Treaties“ and in accordance with Rule 331L of the Rules of Procedure and Conduct of Business in Lok Sabha. He then drew their attention to Direction 55(1) of Directions by the Speaker, Lok Sabha pertaining to maintaining the confidentiality of the Proceedings and Direction 58 of the Directions by the Speaker, Lok Sabha.

2. After taking oath, the witnesses/experts tendered their views/suggestions before the Committee which *inter-alia* included improvements in the Model BIT-2015; categories of investment under the Model BIT; treatment of investment; MFN issue; direct and indirect expropriation; exhaustion of local remedies for a period of five years before proceeding to arbitration; ad-hocism in the context of international investment arbitration; need for appeal mechanism for investment treaty disputes; issue relating to bringing investment under WTO; restrictive definition of `investor`; dropping of the word „substantial“ in the definition to cut down on the arbitral tribunal“s discretion; special provision for rejecting frivolous claims etc.

3. The Members of the Committee then raised various queries like bringing investment under the WTO regime; issues relating to the MFN clause; exhaustion of local remedies for a period of five years before proceeding to arbitration; conflict between local law and certain provisions in the BIT; drafting and vetting of BITs; breach of treaties; fine-tuning of the Model BIT etc.

4. The witnesses/experts responded to the queries of the Members. The Chairperson then thanked the witnesses for their valuable inputs on the subject.

*The witnesses then withdrew*

*The Committee then adjourned*

A verbatim record of the Proceedings has been kept.

**MINUTES OF THE TWENTY-EIGHTH SITTING OF THE COMMITTEE ON  
EXTERNAL AFFAIRS (2020-21) HELD ON 11 AUGUST, 2021**

The Committee sat on Wednesday, 11 August, 2021 from 1013 hrs. to 1027 hrs. in Committee Room No. B\*, Parliament House Annexe, New Delhi.

**1. Shri P.P. Chaudhary, Chairperson**

**Lok Sabha**

2. Shri Dileshwar Kamait
3. Shri Suresh Kumar Kashyap
4. Smt. Goddeti Madhavi
5. Smt. Poonam Mahajan
6. Shri P. C. Mohan
7. Dr. K. C. Patel
8. Smt. Navneet Ravi Rana

**Rajya Sabha**

9. Shri K. J. Alphons
10. Shri Swapan Dasgupta
11. Shri Abdul Wahab
12. Shri Brijlal

**Secretariat**

1. Shri P.C. Koul - Additional Secretary
2. Dr. Ram Raj Rai - Director
3. Ms. K. Muanniang Tunlut - Deputy Secretary

2. At the outset, the Chairperson welcomed the members to the Sitting of the Committee.

3. The Committee took up for consideration the following two draft Reports:-

- (i) Draft Report on the subject „India and Bilateral Investment Treaties“
- (ii) XXX XXXX XXXX.

4. The Chairperson invited the Members to offer their suggestions, if any, for incorporation in the draft Reports. The Members suggested some minor modifications. After deliberations the Committee adopted the draft Reports.

5. The Committee then authorized the Chairperson to finalize the Report incorporating the suggestions made by the Members and present the same to Parliament.

*The Committee then adjourned.*