

14

**COMMITTEE
ON EXTERNAL AFFAIRS
(2021-22)**

SEVENTEENTH LOK SABHA

MINISTRY OF EXTERNAL AFFAIRS

[Action Taken by the Government on the Observations/Recommendations contained in the Tenth Report of the Committee on External Affairs on the subject 'India and Bilateral Investment Treaties']

FOURTEENTH REPORT



**LOK SABHA SECRETARIAT
NEW DELHI**

APRIL, 2022 / CHAITRA, 1944 (Saka)

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(2021-22)

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[Action Taken by the Government on the Observations/Recommendations contained in the Tenth Report of the Committee on External Affairs on the subject 'India and Bilateral Investment Treaties']

Presented to Hon'ble Speaker on 09.05.2022

Presented to Lok Sabha on 22.07.2022

Laid on the Table of Rajya Sabha on 07.04.2022



LOK SABHA SECRETARIAT
NEW DELHI

APRIL, 2022 /CHAITRA, 1944 (Saka)

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COMPOSITION OF THE COMMITTEE ON EXTERNAL AFFAIRS (2021-22)

1. Shri P.P. Chaudhary, Chairperson

Lok Sabha

2. Smt. Harsimrat Kaur Badal
3. Shri Abhishek Banerjee
4. Shri Kalyan Banerjee
5. Shri Dileshwar Kamait
6. Shri Suresh Kumar Kashyap
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12. Shri Ritesh Pandey
13. Dr. K. C. Patel
14. Shri N.K. Premachandran
15. Smt. Navneet Ravi Rana
16. Shri Soyam Babu Rao
17. Shri Manne Srinivas Reddy
18. Shri Rebati Tripura
19. Dr. Harsh Vardhan
20. *Shri E.T. Mohammed Basheer
21. Vacant

Rajya Sabha

22. Shri K. J. Alphons
23. Smt. Jaya Bachchan
24. Smt. Misha Bharti
25. Shri Brijlal
26. Shri P. Chidambaram
27. Shri Swapan Dasgupta
28. Shri Prakash Javadekar
29. Shri Sanjay Raut
30. Shri Kapil Sibal
31. **Vacant

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- | | | | |
|----|-------------------------|---|----------------------|
| 1. | Shri P. C. Koul | — | Additional Secretary |
| 2. | Dr. Ram Raj Rai | — | Joint Secretary |
| 3. | Smt. Maya Lingi | — | Director |
| 4. | Ms. K. Muanniang Tunlut | - | Deputy Secretary |

* Shri E.T. Mohammed Basheer, Member of Parliament, Lok Sabha nominated to the Committee *w.e.f.* 7.02.2022.

** Shri K. Somaprasad, Member of Parliament, Rajya Sabha ceased to be Member of the Committee consequent upon his retirement on 02.04.2022.

INTRODUCTION

I, the Chairperson, Committee on External Affairs (2021-22) having been authorized by the Committee to present the Report on their behalf, present this Fourteenth Report (17th Lok Sabha) on action taken by the Government on the Observations/Recommendations contained in the Tenth Report of the Committee on the subject 'India and Bilateral Investment Treaties'.

2. The Tenth Report was presented to the Hon'ble Speaker under Direction 71A of the Directions by the Speaker, Lok Sabha on 10 September 2021 and presented to the Parliament on 6 December, 2021. The Action Taken Replies of the Government on all the Observations/Recommendations contained in the Report were received on 21 February, 2022.

3. The Committee considered and adopted this Action Taken Report at their Sitting held on 6 April, 2022. The Minutes of the Sitting of the Committee have been given at Appendix-I to the Report.

4. An analysis of the action taken by the Government on the Observations/Recommendations contained in the Tenth Report of the Committee on External Affairs is given at Appendix-II.

NEW DELHI
06 April, 2022
16 Chaitra, 1944 (Saka)

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

CHAPTER-I

REPORT

This Report of the Committee on External Affairs deals with the action taken by the Government on the Observations/Recommendations contained in their Tenth Report on the subject „India and Bilateral Investment Treaties“ which was presented to Hon’ble Speaker on 10 September, 2021 under Direction 71A of the Directions by the Speaker, Lok Sabha and presented to Lok Sabha/laid on the Table of Rajya Sabha on 06 December, 2021.

2. The Action Taken Notes have been received from the Ministry of External Affairs on all the 14 Observations/Recommendations contained in the Report. These have been categorized as follows: -

(i) Observations/Recommendations which have been accepted by the Government.

Recommendation Nos. 1, 2, 3, 4, 6, 7, 9, 10, 12 and 14

Total – 10
Chapter - II

(ii) Observations/Recommendations which the Committee do not desire to pursue in view of the replies of the Government.

NIL

Total – Nil
Chapter - III

(iii) Observations/Recommendations in respect of which replies of the Government have not been accepted by the Committee.

Recommendation Nos. 5, 11 and 13

Total – 03
Chapter - IV

(iv) Observation/Recommendation in respect of which final reply of the Government is still awaited.

Recommendation No. 8

Total – 01
Chapter – V

3. The Committee desire that final replies to the comments contained in Chapter-I and the Observation/Recommendation contained in Chapter-V of this Report should be furnished to them at an early date.

4. The Committee will now deal with the action taken by the Government on some of their Observations/Recommendations.

MORE NEGOTIATIONS ON BITs/IAs TO BE INITIATED

(Recommendation No. 1)

5. The Committee had noted 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 Vs 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 had been revisited and a new Model text was adopted in 2015. Based on the new model BIT, the MEA had issued termination notice to 77 countries since 2016 and BITs are still in force with 06 countries out of which Joint Interpretative Statements had been signed with Bangladesh and Columbia. The Committee, however, had been astonished to note that India had 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 had treated the number of BITs/Investment Agreements signed post 2015 and the number under negotiations as inadequate and had found that it was not commensurate with the growth of India's interest in this domain and our rising

stature in global affairs. The Committee were 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, had therefore, desired 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.

6. The Ministry of External Affairs has stated that the Economic Diplomacy Division of the MEA, which is the nodal division within the MEA for matters pertaining to investment treaties, with the assistance of the Indian Missions abroad and the territorial divisions, have been facilitating negotiation of investment treaties with various countries.

7. The Committee had treated the number of BITs/Investment Agreements signed post 2015 and the number under negotiations as inadequate and had desired 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. The Committee are aware about the role played by the Ministry of External Affairs in investment treaties matrix. However, the Committee do not recognize any fresh result-oriented initiative taken by the Ministry or any change in approach leading to tangible outcome and reasonable number of BITs/IAs signed, in keeping with the growing interest of the country in this domain. The Committee, therefore, urge the

Ministry to improve/strengthen its coordination with concerned Ministries/Departments so that adequate number of BITs/IAs are negotiated and signed without much delay.

COORDINATION BETWEEN MINISTRIES/DEPARTMENTS FOR EARLY CONCLUSION OF INVESTMENT AGREEMENTS

(Recommendation No. 2)

8. The Committee were not satisfied with the progress of the negotiations of International Investment Agreements with 37 countries/blocks. Presently, negotiations are ongoing with 20 countries while they are still at the preliminary stage in respect of 15 countries/blocks. The Committee were conscious of the realities of negotiations with sovereign Governments but were of the view that the long drawn out process of negotiations should be reduced especially if there appeared 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 had urged 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.

9. In its Action Taken Reply furnished to the Committee, the Ministry has informed that MEA has been coordinating with the respective Indian Missions abroad and proactively facilitating negotiations. However, it may be noted that the Department of Economic Affairs, Ministry of Finance leads the Indian side at the negotiations and are responsible for the conclusion of negotiations and implementation of the investment treaties.

10. The Committee had urged the Ministry to take pro-active steps and coordinate with the concerned Ministries/Departments so that negotiations of International Investment Agreements are concluded and finalized at the earliest. The Ministry, in its Action Taken Reply, has submitted a stereotype

reply that MEA has been coordinating with the respective Indian Missions abroad and proactively facilitating negotiations. The Committee are aware that the Department of Economic Affairs, Ministry of Finance leads the Indian side at the negotiations and are responsible for the conclusion of negotiations and implementation of the investment treaties. However, it is the responsibility of the Government as a whole and MEA cannot absolve itself of the responsibility for conclusion of negotiations and finalization of Agreements, especially as the Ministry has to play an instrumental role in this regard through a separate Division i.e, the Economic Diplomacy Division for dealing with matters pertaining to investment treaties. Since there is a significant impact of International Investment Agreements on FDI inflow and increased production under the BIT regime, such delays are not desirable at all. The Committee, therefore, urge the Ministry to play a pro-active role and extend all possible assistance to the Department of Economic Affairs for an early conclusion of negotiations and finalization of investment Agreements. The proactive contribution of the Ministry is all the more imperative as the country aims to be a \$ 5 trillion economy by 2025.

COMBINED EFFORTS FOR DEVELOPING IN-HOUSE EXPERTISE AND PANEL OF LAWYERS

(Recommendation No. 3)

11. The Committee had felt that the drafting of international treaties, whether it was 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, had therefore, desired 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.

12. The Ministry, in its Action Taken Reply, has stated that the investment treaty negotiations are carried out by a team which comprises of representatives from the Department of Economic Affairs and Department of Legal Affairs apart from representatives from the Ministry of External Affairs. The Ministry, under the Host Country Agreement signed with the Permanent Court of Arbitration (PCA), The Hague has organized 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 organized a virtual course for GoI officials. 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.

13. The Committee had desired that combined efforts should be made to develop in-house expertise and panel of lawyers who have experience in

investment treaty law. The Ministry, in its Action Taken Reply, has informed that PCA-India Conference series has been organized in which workshops in investment treaty and investment treaty arbitrations were conducted. The Ministry has also been engaging with the UNCITRAL and the UNCITRAL National Coordination Committee regarding capacity building exercises and for advice. Virtual course for GoI officials has also been organized and 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 had been engaged. While appreciating these initiatives, the Committee are constrained to point out that the Ministry has chosen to remain silent on the important issue of making combined efforts with the Department of Legal Affairs, the Department of Economic Affairs and other concerned Ministries/Departments to develop in-house expertise and a panel of lawyers who have experience in investment treaty law. The Committee desire a specific reply on the issue at the earliest.

DISPUTES UNDER BITs

(Recommendation No. 5)

14. The Committee had noted 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 had 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 had felt 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 had, therefore, desired 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 the mechanism of pre-arbitration consultation/negotiation.

15. In the Action Taken Reply of the Government, it has been stated that the disputes under the BITs pertain to BITs signed prior to the new Model BIT of 2015. The new Model BIT of 2015 was drafted by the DEA after inter-ministerial consultations taking into view the loopholes in the earlier BITs and it tries to address the issues.

16. On the disputes under the investment treaties, 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 and has always asked the respective Ministries to analyse each case on its merits and to take a call on the feasibility of settlement of the dispute or the need for arbitration.

17. The disputes/notices/awards have arisen not only on account of ambiguity in older version BITs but also on account of wide interpretations of BITs by respective adhoc Tribunals. The disputes under the BITs pertain to BITs signed prior to the new Model BIT of 2015. The new Model BIT of 2015 was drafted after inter-ministerial consultations taking into view the limitations in the earlier BITs. 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.

18. Further, in the absence of any jurisprudence regarding BIT interpretations and the fact that there are more than 3000 BITs world over, the arbitral tribunals while giving the arbitral awards in BIT disputes tend to undermine the sovereignty, democratic decision making and right to regulate. The nature of disputes and the awards have also brought forth the problems of inconsistent and selective interpretations adopted by some of the tribunals handling arbitrations worldwide, leading to adverse orders worldwide. Nevertheless, to balance the demand of many countries to include the international arbitration as a mode of dispute resolution, India has formulated a mechanism of dispute settlement which provides an option for international arbitration after an investor has exhausted local remedies before domestic courts for five years. This duration can also be utilized at the same time to enter into talks with the claimants and attempt to settle the dispute, based on the genuineness of the claim. GoI has also been advising to the concerned Ministries (handling the dispute), to try to settle the dispute amicably wherever it's possible and it is in the interest of country and/or has been advised by Counsels.

19. The Committee acknowledge that investment disputes, both settled and ongoing under the BITs, have arisen due to ambiguity in older version BITs as well as on account of wide interpretation of BITs by respective adhoc Tribunals. It was against this backdrop that the Committee had desired drafting of BITs cautiously and settlement of disputes/claims before it proceeds to arbitration or comes up before a Tribunal. The new Model BIT of 2015 addresses some of the issues but certain areas of ambiguity still remain. Moreover, the concerns of the Committee are based on past experience and are still relevant since BITs are signed separately with different

countries/blocks/regions and variation in the provisions exists for each BIT signed. The Committee, therefore, reiterate their earlier recommendation and urge that BITs should be drafted cautiously after extensive consultation among all the Ministries/Departments concerned so as to leave no scope for ambiguity and consequent investment disputes and costly arbitral awards against India. All out efforts should also be made to settle such disputes amicably through pre-arbitration mechanism.

INDIA AS A HUB FOR INTERNATIONAL ARBITRATION

(Recommendation No. 8)

20. The Committee had noted 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 could be conducted in India. The Committee had welcomed this step as it could result in India being a preferred location for international arbitrations. The Committee, had therefore, urged 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.

21. In its Action Taken Reply furnished to the Committee, the Ministry has informed that MEA has organized the PCA-India Conference series under the ambit of the Host Country Agreement with the PCA. The Ministry is also coordinating with the PCA and internally to work out the modalities of establishing arbitration hearing facilities in India.

22. The Committee are pleased to note that the Ministry is coordinating with the PCA and internally to work out the modalities for establishing

arbitration hearing facilities in India. The Committee urge the Ministry to finalize the modalities at the earliest so that arbitration hearing proceedings could commence as a step towards India becoming a hub for international arbitration.

DOMESTIC TALENT FOR INVESTMENT TREATY ARBITRATION

(Recommendation No. 9)

23. The Committee had noted 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 had 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 had felt that developing local expertise in this domain is crucial. The Committee, had therefore, recommended 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.

24. The Ministry, in its Action Taken Reply, has stated that the MEA has been organizing capacity building workshops and seminars aimed at developing domestic expertise in the field of investment treaty arbitration. Indian Judges and lawyers and law firms, have been invited to these workshops and seminars.

25. The Ministry has informed that it has been organizing capacity building workshops and seminars aimed at developing domestic expertise in the field of investment treaty arbitration. Indian Judges and lawyers and law firms have been invited to these workshops and seminars but since such seminars and

workshops have not been able to achieve this objective, the Committee had recommended 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. The Committee, therefore, reiterate that combined efforts are needed to create a pool of domestic lawyers and law firms with the desired expertise and experience to represent India successfully in investment treaty arbitrations.

SIGNING OF BITs FOR ATTRACTING MORE FDI

(Recommendation No. 10)

26. The Committee had noted 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 were aware that BITs are not the sole factor for attracting FDI 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 had felt that in a developing country like India, FDI inflows is essential for economic development and BITs have the potential to attract FDI in that they could provide foreign and Indian investors a higher degree of confidence in investment. The Committee, had therefore, desired that signing of BITs should be encouraged selectively in identified core/priority sectors/areas to attract more FDI 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.

27. In its Action Taken Reply furnished to the Committee, the Ministry of External Affairs has stated that the treaties are signed with particular countries and not sector based. The MEA has always been facilitating BIT negotiations with any country as requested by the nodal Ministry.

28. The Committee had desired that signing of BITs should be encouraged comprising 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 incorporation of the same in treaties. In its Action Taken Reply furnished to the Committee, the Ministry has rightly stated that the treaties are signed with particular countries and are not sector based. But it is also true that the MEA has always been facilitating BIT negotiations with any country as requested by a particular Ministry. The Committee, therefore, would like to emphasize the need for identifying the core/priority sectors in the country for signing of BITs/IAs incorporating specific sectors with the particular country, region or block. MEA may play a more pro-active role as facilitator and the Economic Diplomacy Division in the Ministry may also be made more effective.

EARLY CONCLUSION OF BITs/IAs WITH USA AND EU

(Recommendation No. 11)

29. The Committee had noted 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 had felt 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 had, therefore, desired 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.

30. The Government has stated in an Action Taken Reply furnished to the Committee that the India-USA IIA was signed in 1997 (the total investment support till date being of USD 2.88 billion comprising of loan of USD 0.99 billion, investment guarantee of USD 1.5 billion, insurance of USD 13 million and equity support only of USD 100 million). India received the request for the negotiation of a new Agreement from USA in June 2020. This proposal was analysed and in view of the possibility of limiting the policy space of the country and chances of bringing in of claim under dispute arbitration mechanism under the said agreement, it was decided to terminate the 1997 Agreement and renegotiate a replacement Agreement. The latest text of the Agreement under negotiation is to provide investment protection to investment support of a US organization i.e., US Development Finance Corporation (USDFC).

31. With regard to India-EU BIT, both India and EU have agreed for a stand-alone investment protection agreement" and the DEA has requested EU for their written text proposal, so that the negotiations of a standalone investment agreement may be commenced.

32. Investment decisions depend on a wide variety 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. Also, investment protection is offered through a variety of ways, local laws, robust justice system, upholding rule of law, BITs offering institutional arbitrations etc. Investors while investing, look for a political stability and good governance including a robust justice system. While, BIT is not the only condition for investments, but it may provide comfort to some foreign investors while making their investment decisions in countries with high risk in terms of political stability or political uncertainty. It also provides comfort of protection to Indian investors in other countries. Thus, in negotiations under BIT a fine balance has to be maintained in terms of investor protection and sovereign country rights to regulate and policy space therein, which requires consensus on both the sides negotiating the text.

33. The Committee had desired that the process of negotiation of an Investment Protection Agreement with USA and a standalone Investment Agreement with EU should be started and concluded early so as to contribute towards increasing investment in priority sectors and high technology manufacturing. The Committee note with regret that not much headway has been made in this regard. The Ministry has also stated that in negotiations under BIT, a fine balance has to be maintained in terms of investor protection and sovereign country rights to regulate and policy space therein, which requires consensus on both the sides negotiating the text. While acknowledging the constraints being faced by the Government, the Committee desire that all out efforts should be made to arrive at a consensus with the USA and the EU on the Investment Agreements through skilled negotiations and deeper engagements for finalization of the said Agreements without

further loss of time. The Committee also desire to be apprised of the progress made in this regard.

REMOVAL OF AMBIGUITY IN BITs

(Recommendation No. 13)

34. The Committee had noted 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 had felt that there is still ambiguity in certain areas like duration of the enterprise, significance for the development of the host State, etc. They had, therefore, desired that continuous efforts are required to remove any ambiguity so as to reduce arbitral discretion for varied interpretations.

35. It has been stated in the reply of the Government that definition of „investment“ has been related to that of the characteristics of investment. The most influential decision in this respect has been the decision of an ICSID tribunal in *Salini Costruttori SpA v. Kingdom of Morocco*; ICSID Case No. ARB/00/4, para 46 (“Salini”). In *Salini*, the tribunal, while recognizing that the parties could, in principle, agree on the kind of disputes that could be submitted to arbitration under the treaty, explicitly recognized the existence of objective criteria that have to be met if a particular asset is to be considered an “investment” for the purposes of the ICSID Convention. The tribunal considered that its jurisdiction depended upon not only the existence of an “investment” within the meaning of the applicable International Investment Agreement (IIA), in this case the BIT between Italy and Morocco (1990), but also on the basis of the ICSID Convention, in accordance with case law. *Salini* is often quoted as the key case espousing the objective, which

requires five conditions to identify such an investment under the ICSID convention:

- 1) certain duration;
- 2) regularity of profit and return;
- 3) assumption of risk;
- 4) substantial commitment; and
- 5) significance for the host State's development.

36. Although there is no concept of binding precedent in investment treaty jurisprudence, subsequent tribunals have referred to the Salini approach. India has also adopted the „Salini“ test. Accordingly, the definition of an investment under revised Model BIT must also meet the objective Salini criteria. Substantively, however, in the absence of specific treaty provisions, tribunals have held that duration is a flexible term¹ that could range from months to years and that the requirement is to be considered holistically. Many tribunals have determined to this extent that a period of two to five years meets the requirement of certain duration², thus excluding ordinary or one-time commercial transactions. Further, it is worth noting that tribunals have found that a contribution to the development of the host State is rather an “expected consequence” of the investment instead of a requirement in itself.

37. Using an enterprise-based approach enables a government to provide enhanced treaty protections to those companies that have actually made a commitment to pursue economic activity in the host country.

1 Mason Capital v. Republic of Korea, PCA Case No. 2018-55

2 Manchester Securities v. Poland, PCA Case No. PCA Case No. 2015-18

38. The Committee had felt that there is still ambiguity in areas like duration of the enterprise, significance for the development of the host State etc. in the Model BIT 2015 and had desired that continuous efforts should be made to remove any ambiguity so as to reduce arbitral discretion for varied interpretations. In its action taken reply, the Government has stated that many Tribunals have determined that a period of two to five years meets the requirement of certain duration and a contribution to the development of the host State is rather an 'expected consequence' of the investment instead of a requirement in itself. The Government has further averred that using an enterprise-based approach enables a Government to provide treaty protections to those companies who have actually made a commitment to pursue economic activity in the host country. The intention of the Committee was to have precise and clear-cut provisions in the Model BIT thereby obviating the need for interpretation by Tribunals. The Committee, therefore, reiterate their earlier recommendation and urge the Government to make continuous efforts in consultation with all the Ministries/Departments concerned for removal of any ambiguity in the Model BIT 2015 so as to avoid arbitral discretion for varied interpretations.

CHAPTER II

OBSERVATIONS/RECOMMENDATIONS WHICH HAVE BEEN ACCEPTED BY THE GOVERNMENT

(Recommendation No. 1)

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/IIAs are initiated in the shortest possible time.

Reply of the Government

The Economic Diplomacy Division of the MEA, which is the nodal division within the MEA for matters pertaining to investment treaties, with the assistance of the Indian Missions abroad and the territorial divisions, have been facilitating negotiation of investment treaties with various countries.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022

(Recommendation No. 2)

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.

Reply of the Government

The MEA has been coordinating with the respective Indian Missions abroad and proactively facilitating negotiations. However, it may be noted that the Department of Economic Affairs, Ministry of Finance leads the Indian side at the negotiations and are responsible for the conclusion of negotiations and implementation of the investment treaties.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

(Recommendation No. 3)

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.

Reply of the Government

The investment treaty negotiations are carried out by a team which comprises of representatives from the Department of Economic Affairs and Department of Legal Affairs apart from representatives from the Ministry of External Affairs. The Ministry under the Host Country Agreement signed with the Permanent Court of Arbitration (PCA), The Hague 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, 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.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

(Recommendation No. 4)

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.

Reply of the Government

The Ministry of External Affairs has been organising capacity building workshops and webinars and some of these workshops have been open to lawyers from across the country. The MEA continues to engage with the Indian legal fraternity through these workshops and capacity building workshops.

[O.M No. AA/Parl/125/61/2021] dated 21/02/2022]

(Recommendation No. 6)

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.

Reply of the Government

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 MEA has also been proactively assisting the IMG and the nodal ministry whenever the assistance of the MEA is sought.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

(Recommendation No. 7)

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.

Reply of the Government

The Centre is being set up by the Ministry of Law and Justice. The MEA is willing to extend all possible support to the New Delhi International Arbitration Centre.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

(Recommendation No. 9)

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.

Reply of the Government

The MEA has been organising capacity building workshops and seminars aimed at developing domestic expertise in the field of investment treaty arbitration. Indian Judges and lawyers and law firms, have been invited to these workshops and seminars.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

(Recommendation No. 10)

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.

Reply of the Government

The treaties are signed with particular countries and not sector based. The MEA has always been facilitating BIT negotiations with any country as requested by the nodal ministry.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

(Recommendation No. 12)

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.

Reply of the Government

DEA along with suggestions of DoLA and MEA, is considering to amend certain provisions and add new proposals in the current ongoing BIT negotiations taking cue from global developments in the BIT regime. The ongoing BIT negotiations focus on both the investor's right to get protection and also sovereign interest and States right to regulate. The negotiations also focus on the type of dispute settlement mechanism to later avoid the interpretations by the Tribunals.

For example, recently signed, India-Brazil ICFT does not include ISDS mechanism for dispute settlement and only has SSDS. India-Brazil ICFT creates a Joint Committee composed of government representatives of both state parties to oversee the resolution of disputes, followed by arbitration. **Unlike most investment agreements, it expressly provides that a tribunal set up between State- State dispute cannot award compensation. Instead, it only permits a**

tribunal to interpret the BIT without awarding compensation. It is noted that continuous endeavour shall be made on Model BIT to achieve a balanced and comprehensive BIT.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

(Recommendation No. 14)

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.

Reply of the Government

DEA has in-house consultants/Young Professionals having legal expertise who provide their inputs based on learning from developments across world during the negotiations of BIT with a country. Before the negotiations, a comparative analysis of the important provisions of BITs, signed by the specific country (with which the negotiation takes place) with other countries is done by the team of the DEA. At the same time, research on the country position of that particular country in UNCITRAL and also on the ISDS disputes brought in by the investors against that country is done by DEA. DEA also seeks suggestions of DoLA and MEA during the negotiations.

Further, the BITs are in an evolving state since the adoption of Model BIT and it aims to provide appropriate protection to foreign investors in India and Indian investors in the foreign country, while maintaining a balance between the investor's rights and the Government obligations. Indian BITs endeavour to incorporate the relevant and suitable provisions from different BITs, signed world over and has adopted the mechanism of Joint Committee for resolution of disputes from Brazilian model BIT. The exhaustion of local remedy before the domestic courts for 5 years included in the model BIT (before the parties go for international

arbitration) is also a departure from the usual fork in the road clause in other international BITs. However, it may be noted that the BITs conclude with the consent of both the parties and both the parties should agree on all the proposals which are to be included in the BIT.

[O.M No. AA/Par1/125/61/2021) dated 21/02/2022]

CHAPTER III

OBSERVATIONS/RECOMMENDATIONS WHICH THE COMMITTEE DO NOT DESIRE TO PURSUE IN VIEW OF THE GOVERNMENT'S REPLIES

NIL

CHAPTER IV

OBSERVATIONS/RECOMMENDATIONS IN RESPECT OF WHICH REPLIES OF THE GOVERNMENT HAVE NOT BEEN ACCEPTED BY THE COMMITTEE AND REQUIRE REITERATION

(Recommendation No. 5)

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.

Reply of the Government

The disputes under the BITs pertain to BITs signed prior to the new Model BIT of 2015. The new Model BIT of 2015 was drafted by the DEA after inter-ministerial consultations taking into view the loopholes in the earlier BITs and it tries to address the issues.

On the disputes under the investment treaties, 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 and has always asked the respective Ministries to analyse each case on its merits and to take a call on the feasibility of settlement of the dispute or the need for arbitration.

The disputes/notices/awards have arisen not only on account of ambiguity in older version BITs but also on account of wide interpretations of BITs by respective adhoc Tribunals. The disputes under the BITs pertain to BITs signed prior to the new Model BIT of 2015. The new Model BIT of 2015 was drafted after inter-ministerial consultations taking into view the limitations in the earlier BITs. 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.

Further, in the absence of any jurisprudence regarding BIT interpretations and the fact that there are more than 3000 BITs world over, the arbitral tribunals while giving the arbitral awards in BIT disputes tend to undermine the sovereignty, democratic decision making and right to regulate. The nature of disputes and the awards have also brought forth the problems of inconsistent and selective interpretations adopted by some of the tribunals handling arbitrations worldwide, leading to adverse orders worldwide. Nevertheless, to balance the demand of many countries to include the international arbitration as a mode of dispute resolution, India has formulated a mechanism of dispute settlement which provides an option for international arbitration after an investor has exhausted local remedies before domestic courts for five years. This duration can also be utilized at the same time to enter into talks with the claimants and attempt to settle the dispute, based on the genuineness of the claim. GoI has also been advising to the concerned Ministries (handling the dispute), to try to settle the dispute amicably wherever it's possible and it is interest of country and/or has been advised by Counsels.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

(Recommendation No. 11)

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.

Reply of the Government

The India-USA IIA was signed in 1997 (the total investment support till date being of USD 2.88 billion comprising of loan of USD 0.99 billion, investment guarantee of USD 1.5 billion, insurance of USD 13 million and equity support only of USD 100 million). India received the request for the negotiation of a new Agreement from USA in June 2020. This proposal was analysed and in view of the possibility of limiting the policy space of the country and chances of bringing in of claim under dispute arbitration mechanism under the said agreement, it was decided to terminate the 1997 Agreement and renegotiate a replacement Agreement. The latest text of the Agreement under negotiation is to provide investment protection to investment support of a US organization i.e., US Development Finance Corporation (USDFC).

With regard to India-EU BIT, both India and EU have agreed for a stand-alone investment protection agreement” and the DEA has requested EU for their written text proposal, so that the negotiations of a standalone investment agreement may be commenced.

Investment decisions depend on a wide variety 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. Also, investment protection is offered through a variety of ways,

local laws, robust justice system, upholding rule of law, BITs offering institutional arbitrations etc. Investors while investing, look for a political stability and good governance including a robust justice system. While, BIT is not the only condition for investments, but it may provide comfort to some foreign investors while making their investment decisions in countries with high risk in terms of political stability or political uncertainty. It also provides comfort of protection to Indian investors in other countries. Thus, in negotiations under BIT a fine balance has to be maintained in terms of investor protection and sovereign country rights to regulate and policy space therein, which requires consensus on both the sides negotiating the text.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

(Recommendation No. 13)

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.

Reply of the Government

Definition of „investment“ has been related to that of the characteristics of investment. The most influential decision in this respect has been the decision of an ICSID tribunal in *Salini Costruttori SpA v. Kingdom of Morocco*; ICSID Case No. ARB/00/4, para 46 (“Salini”). In *Salini*, the tribunal, while recognizing that the

parties could, in principle, agree on the kind of disputes that could be submitted to arbitration under the treaty, explicitly recognized the existence of objective criteria that have to be met if a particular asset is to be considered an “investment” for the purposes of the ICSID Convention. The tribunal considered that its jurisdiction depended upon not only the existence of an “investment” within the meaning of the applicable International Investment Agreement (IIA), in this case the BIT between Italy and Morocco (1990), but also on the basis of the ICSID Convention, in accordance with case law. Salini is often quoted as the key case espousing the objective, which requires five conditions to identify such an investment under the ICSID convention:

- 1) certain duration;
- 2) regularity of profit and return;
- 3) assumption of risk;
- 4) substantial commitment; and
- 5) significance for the host State's development.

Although there is no concept of binding precedent in investment treaty jurisprudence, subsequent tribunals have referred to the Salini approach. India has also adopted the „Salini“ test. Accordingly, the definition of an investment under revised Model BIT must also meet the objective Salini criteria. Substantively, however, in the absence of specific treaty provisions, tribunals have held that duration is a flexible term³ that could range from months to years and that the requirement is to be considered holistically. Many tribunals have determined to this extent that a period of two to five years meets the requirement of certain duration⁴, thus

3

Mason Capital v. Republic of Korea, PCA Case No. 2018-55

4

Manchester Securities v. Poland, PCA Case No. PCA Case No. 2015-18

excluding ordinary or one-time commercial transactions. Further, it is worth noting that tribunals have found that a contribution to the development of the host State is rather an “expected consequence” of the investment instead of a requirement in itself.

Using an enterprise-based approach enables a government to provide enhanced treaty protections to those companies that have actually made a commitment to pursue economic activity in the host country.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

CHAPTER V

OBSERVATION/RECOMMENDATION IN RESPECT OF WHICH FINAL REPLY OF THE GOVERNMENT IS STILL AWAITED

(Recommendation No. 8)

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.

Reply of the Government

The Ministry of External Affairs has organised the PCA-India Conference series under the ambit of the Host Country Agreement with the PCA. The Ministry is also coordinating with the PCA and internally to work out the modalities of establishing arbitration hearing facilities in India.

[O.M No. AA/Parl/125/61/2021) dated 21/02/2022]

NEW DELHI
06 April, 2022
16- Chaitra,1944 (Saka)

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

Appendix I

MINUTES OF THE EIGHTH SITTING OF THE COMMITTEE ON EXTERNAL AFFAIRS (2021-22) HELD ON 6 APRIL, 2022

The Committee sat on Wednesday, 6 April 2022 from 1000 hrs. to 1030 hrs. in Committee Room 'C', Parliament House Annexe, New Delhi.

PRESENT

1. Shri P.P. Chaudhary, Chairperson

Lok Sabha

2. Shri Dileshwar Kamait
3. Smt. Preneet Kaur
4. Smt. Poonam Mahajan
5. Dr. K. C. Patel
6. Shri N.K. Premachandran

Rajya Sabha

7. Smt. Jaya Bachchan
8. Shri Brijlal
9. Shri Swapan Dasgupta
10. Shri Prakash Javadekar
11. Shri K.J. Alphons

Secretariat

- | | | | |
|----|--------------------------|---|------------------|
| 1. | Dr. Ram Raj Rai | - | Joint Secretary |
| 2. | Smt. Maya Lingi | - | Director |
| 3. | Ms. K. Muanniang Tunglut | - | 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 draft Report on Action Taken by the Government on the Observations/Recommendations contained in the Tenth Report of the Committee on the subject „India and Bilateral Investment Treaties“

4. The Chairperson invited the Members to offer their suggestions, if any, for incorporation in the draft Report. The members suggested some minor modifications. The Committee adopted the draft Report with these minor modifications.

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

The Committee then adjourned.

(Vide Para 4 of Introduction of Report)

ANALYSIS OF ACTION TAKEN BY THE GOVERNMENT ON THE OBSERVATIONS/ RECOMMENDATIONS CONTAINED IN THE TENTH REPORT OF THE COMMITTEE ON EXTERNAL AFFAIRS (17TH LOK SABHA)

- (i) **Total Number of Recommendations 14**
- (ii) **Observations/Recommendations which have been accepted by the Government.**
- Recommendation Nos. 1, 2, 3, 4, 6, 7, 9, 10, 12 and 14
- Total-10**
Percentage: 71.43%
- (iii) **Observations/Recommendations which the Committee do not desire to pursue in view of the Government's replies.**
- NIL
- Total- Nil**
Percentage: 0 %
- (iv) **Observations/Recommendations in respect of which replies of Government have not been accepted by the Committee and require reiteration.**
- Recommendation Nos. 5, 11 and 13
- Total-03**
Percentage: 21.43%
- (v) **Observation/Recommendation in respect of which final reply of Government is still awaited.**
- Recommendation No. 8.
- Total- 01**
Percentage: 7.14%