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**India Arbitration Week 2022**

**Session: Investment Arbitration: Boon or bane for developing countries?**

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**SPEAKERS NAMES:**

1. **Amit Misra,** : Partner, P&A
2. **Madhvendra Singh,** : Ministry of External Affairs, GOI
3. **Pinky Anand,** : Senior Advocate
4. **Sudhanshu Roy,** : Partner, Foley Hoag

## Pratik Singhvi

Good afternoon, everybody. It's 12 noon, and we will be starting our session. All panelists have joined us today and we're ready to start. My name is Pratik Singhvi and I'm a senior associate at Shardul Amarchand Mangaldas with their dispute resolution team in Mumbai. Today, I have the pleasure of introducing our very vastly experienced and diverse panel that is going to speak on the issue, whether international arbitration is a boon or a bane in developing countries.

Today's discussion is sponsored by P&A Law Offices. The configuration of the panel is indeed very interesting. We have with us a government official, a Senior Advocate and law firm partners, their positions and experience set us up for an engaging discussion for the next hour and on a topic that is really both contemporary and commercial in nature, so the listeners will definitely have a good time listening in.

On the panel today, we have four members, I start with Mr. Amit Misra, who is a partner at P&A Law Offices. Mr. Misra leads the dispute resolution practice at P&A Law Offices. Mr. Misra focuses on international arbitration and appears before various courts on arbitration related litigations. Mr. Misra also regularly advises the government of India and various public sector undertakings in India on their dispute strategies. He remains connected to Academia and is a visiting faculty at NLU, Delhi and Jindal Global Law School. Welcome, Mr. Misra.

We next have Senior Advocate, Pinky Anand on the panel. Dr. Anand is a Senior Advocate with a diverse practice in constitutional civil arbitration and criminal law matters. She's a former additional Solicitor General for the Republic of India and is the second woman in India to have held this office. She holds a Master's degree in law from the Harvard Law School. She is registered as an arbitrator with the Dubai International Arbitration Centre and a registered legal practitioner in DIFC courts. She's also a member of number five barrister's chambers in the UK as a **[Inaudible 00:02:22]**. She has represented India in various national and international forums, including BRICS and SCO.

She is the governing body member of the Indian Council of Arbitration and associate members constituency of India Council of Arbitration. She is a founding member of the BRICS legal forum, and she is also the Vice President of the Bar Association of India and has been actively associated

with the Bar Association of India for several years in various capacities. She has authored several books, including Trials of Truth, which was published by Penguin, International Relocation of Children in India that was published by Thomson Reuters and family law jurisdictional comparisons, which was also published by Thomson Reuters. Welcome Dr. Anand.

We next have Mr. Madhvendra Singh on the panel. He is a senior Navy officer who's currently appointed in the Ministry of External Affairs government of India. He is a qualified and experienced international arbitrator and fellow at the **[Inaudible 00:03:30]** of London. He is an alumnus of Queen Mary University, London and the South Korea Maritime and Ocean University. He is the supporting member and arbitrator with the London Maritime Arbitrators Association and is an adviser to the Indian Ocean Rim Association. He is on the Governing Council of the MCI Maritime Users Council and is a member of the LMMA, the MARC and other international institutions. He is a reputed arbitrator, and he is also a negotiator and has participated in many negotiations on behalf of government of India in relation to treaty work, welcome Mr. Singh. We finally have last but not the least, Mr. Roy on the panel. He's an attorney with Foley Hoag in Washington, DC. His practice focuses on investor state and International Commercial Arbitration, as well as arbitration related to litigation before US courts.

He represents sovereign and private clients both before arbitration panels administered under the ICSID UNCITRAL, ICC SIAC and other Ad-hoc arbitration rules. Sudhanshu has represented a number of Asian, African and European states and state-owned entities in several high stakes, investment arbitrations and international commercial arbitrations for over 12 years now. Sudhanshu also represents sovereign and private clients in the international litigation and arbitration matters before US courts in the New York and District of California. I welcome the entire panel and I will now hand it over to Mr. Misra to start with the proceedings.

## **Amit Misra**

Thank you, Prateek, for this lovely introduction of all the speakers and I welcome all the speakers here as well as the participants for this next 1 hour, where I hope that we seek to answer this question, which is a topic of the session today whether investment arbitration is actually boon or bane for the developing and emerging countries. So, in order to before I call upon the speaker, I just want to introduce the topic by giving my initial thinking as to why this topic has been chosen for next 1 hour session that we intend to speak upon and deliberate.

So, basically, the debate that all of you know, which is going about this Bilateral Investment Treaties, is actually splits between two **[Inaudible 00:05:58]**, in particular, causal maintain that these VIPs of investment arbitrations, they actually encourage the investment or the idea is in the developing countries, since it provides enforceable rights and protection for these investors who are securing their belief that once they are coming into the country, they have their protection in place, so there's something wrong with the investment on any action of the state.

Whereas on the contrary, it is very significant key convincing argument by the second camp, which says that these rights are protected rights being loaded on investors will be on the regulation for Public and Environmental Welfare and actually the argument being led there is that hinders development instead of encouraging the developing countries, the protection that the state is giving, whereby curtailing its own right to secure what it can legislate for its citizens is not the production for this industry, which is coming. This one will deliberate into this and I of course, look forward to my esteemed speakers, to give their views on this topic. I have to call upon Pinky Anand to throw some light on the topic as to whether in your view, the BITs arbitration you feel itself is a boon or a bane for emerging and developing economics in general.

## **Pinky Anand**

Amit, thank you very much and Prateek, thank you for having me here. It is, indeed, a delight in the middle of the day, even more, so normally, we'll end up with very strange timings and admit, but coming to the subject at hand, the BITs, whether it's a boon or a bane, and indeed, it's a very difficult

world, you know, when you're dealing with the concerns of the developing and the developed countries. When you're dealing with the concerns of the developing countries, which include development, at the same time, concern for environment, Human Rights, other issues of Sovereignty, that come across, it's a crossfire at the least.

So, I don't know whether we can ultimately ever come up with a consensus of this, but the position is this. The reality check is this that we India, for example, has been having an FDI inflow of 2021 and 2022 of about 83.57 USD billion, and this has increased about 20 times in the last 20 years or so. And particularly even post COVID incidentally, there has been a large increase in the investment itself. On the other hand, you have as far as BITs are concerned, you have about 37 disputes pending. At the present point of time, you have terminated about 77 BITs, you're signed only 4. Since the BIT came into being in 2016. And we are now renegotiating with about 57 countries. So, if you look at the entire chart and the circumference on this subject, it appears that we are having tremendous difficulty with the BITs.

And at the least, we need to really revisit our position on BITs. We can't afford to have so many disputes, we can't afford to have so much weakness, we can't afford to have so much protection, as we have sometimes circumscribed for ourselves, we can't have so much protection for the investors as we wanted to have. At the same time, now we've diluted in our various forms of what BIT. We have to consider various options such as ICSID sign in particular, we do have to consider what we have done with the model BIT. I mean, just as a matter of discourse, the whole watershed really has arisen from White Industries case after we lost out and following on the MFN clause as it's true. So ultimately in the model BIT, we quickly diluted it, and we removed that MFN clause. So, basically not giving that Most Favored Nation, which is very particular in the BIT.

We also tried to do, for example, changes in enterprise definition. We tried to widen it, but it is totally vague, we don't have where it is, how long it is supposed to be, what is the duration of it. Investment again is something we have dealt with. Similarly, also, for example, dealt with the issue of the investor having to exhaust all domestic remedies for 5 years, which indeed is one of the most critical issues that can you be forced into this kind of forum, when you're dealing with situations, you also

have, at the same time in the model BITs, it is the fact that we are exposing investors to various difficulties on ground in India.

And we because of it being a BIT, it ultimately is an agreement between two countries to give each other each country and investor from each country similar rights. So, ultimately, we are against struggling with that concept, if we give difficulty to investors, we are going to face as India goes. Similar difficulties in countries outside and the same kind of broad platforms. So, having put out this very broad kind of key points on the subject, I think that we have not had a tremendous success with the BIT. There has not been amazing link, which we might demonstrate that BITs have actually shown a great future progress into investment into India, for FBI. So, for us to say that we do the BITs is a big question mark, according to me.

And at this point of time, we do need to re-examine our existing what will BIT, which came into being in 2016, particularly because of the experiences. Incidentally, the globe is also struggling, and I know that you might have some questions data, so I'll respond later on that part. But developed countries are also facing similar problems, it is only for developing countries, because this crossfire between development and protection is something, which is always a current situation. But what we do need to do, Amit we are doing talking about this is.

Whatever we may do with the BITs, whether we ultimately detain them, whether we have a hybrid of BIT, and possibly there is now talk of special notes on the subject, which may protect investors, as some other countries have in particulars, for example, South Africa has that kind of legislation, we do need to consider to bolster up our own judicial regime. We do need to ensure for example, we've had the Commercial Courts Act Amendment, if we brought into being a completely different regime, and we are now like the law minister was saying recently, from about 1000 days plus for disposal of a matter, it has come down to what 400 days.

So, if it can't improve our system more, we will give the maximum confidence to any investment regime, if we can give investors possibly equal rights to domestic investors, within the state domestic investors, as well as give them a safeguard our judicial process that is efficient, which is loaded in favor of both parties rather than a single sided loading. Due process is something that we do really

need to concentrate on it. Incidentally, we've been doing that across the judicial platform, in the sense that we've seen lesser and lesser intervention, as far as courts are concerned.

But I believe that BITs by themselves don't seem to signal in anything very major for the country and we really can't do only with the BITs as a concept, we do have to consider them in line with the hybrid combination of other things, while at the same time forcing of the BITs. We can add them there's no difficulty of having the BITs, but right now, as we exist, we are not able to give full justification to the net effect of that on the economy or to the benefit to India, as a country and the concerns that India would have as a country and we are having FDI flows coming in on a very large scale, which would seem to offset the theory that BIT have a direct connection that there is no causal connection that anybody has really found within BITs and FDI.

It's a general statement made, but there is nothing to really demonstrate that. I believe that we are at a stage right at the threshold of going forward in a different way, so that we can actually protect investment, encourage investment, protect India and ensure that the economy takes a foot forward as we are discussing.

### **Pratik Singhvi**

Thank you, madam, In fact, for your very detailed and deep insight into how in your view, the actually BIT's as you said rightly, you know there isn't seem to be no direct causal relationship that FDI is will stop it there is no BITs or FDI is will increase in BIT, of course, that's a very powerful argument you make on how there is no direct relationship there. So, at this stage, we're picking from dates and then continuing that thought, can I invite Mr. Madhvendra Singh, Mr. Singh in your view, this is what ma'am said I can do it from there.

And of course, **[Inaudible 00:15:21]** also clearly asking whether the new thing, absolutely it's required that the country must have a strong BIT place for FDI investment to flow in, as ma'am said, India we have almost terminated all its other record. Investments continue to flow in, so what's your view on that? Does it for emerging countries generally, is it the BIT of us to attract investment.

## **Madhvendra Singh**

So, thank you for inviting me, Prateek, thank you for the introduction. And good afternoon, everyone. So, this duality of good and bad, the boon and the bane would always continue to remain with almost everything. So, as regards the BIT is concerned, we must see why we are talking about this subject at all today, we must understand that why we have actually reached this point, as far as India is concerned. In fact, it when we signed the first BIT in the 94, with UK, we actually adopted the model BIT of the 93, which was based on the UK template. So, the template we started to use at that point in time was itself investor friendly, as we can call it like that. So, that's when it all started. In fact, we took a lot of credit for having signed more than around 80 BITs, thereafter, up to 2000s.

So, that was a good thing, unless actually speaking, the Enron case was actually the canary, the coal mine, but we actually ignored that we didn't learn our lessons. And also, if we see that the customary international law at that point in time when India was getting into the BITs, did not really have much of jurisprudence, as far as the investment arbitration is concerned. So, there were no lessons learned. It all came down to the White Industries case, where actually it split the temporal landscape in India to the before and after. And that's when we went ahead and actually learned our lessons. And we do all our BITs to more than 70 countries then, and then came up with this model BIT in 2015.

So, if you see what actually was happening was that the investors were actually challenging the legitimate domestic regulations, which were created in India and the things like the full protection and security clauses were actually made absolute flow tests, whereas they were not absolute obligations, if you see today's customary international law, these are not the absolute forecasts. So, if what we have done with the model BIT is and also with respect to the earlier Australian case of White Industries, we realized that the most favored nation clause, which India had with a Kuwait, BIT was actually adopted and used against us.

And in that matter, if you realise that matter, when it went to the international tribunal under ISDS, was not awarded on the merits of it, but actually on the effective means of basically bringing in the claims and providing justice. So, that clause of denial of justice was actually made as an absolute



performance on part of the state. So, what India has now done is, see, what I'm trying to say is that existence of good or bad does not really matter. BIT is may not be the cynical unknown of foreign investment, but it does affect if you compare the legal entities of the private investors. Private investors would probably know the landscape of India, know the investment environment, the stability of the government, they are okay to come inside. But on a larger context, I think any kind of formal agreement between two parties could provide some kind of a confidence for the parties to come in with the large investments in the country. So, what happened with the developing countries as such was that because after the World War II, the colonizer's actually they came up with their own template of BITs, which was to protect their investments and we adopted that model. Now, as we are learning our lessons, I think we are retracting those models and coming up with our own models.

And of course, what we are adopting is not any template, so to say that model BITs is a good template, but still when we are going into negotiations, one to one with our specific countries, where we have good diplomatic and strategic engagements, we are actually I mean, the iterating this model BITs also to that effect, as it basically suits both the countries in the trade relationships. So, I think saying that BIT is good or bad is not the right context to give. It's actually how we utilize the BIT is of course, because the global ratings of ease of doing business is important, people need to have confidence in a particular investment environment in the country, that government is not going to take manifest arbitrary policy decisions, which may affect the investments in the long run.

So that is what considering those I think, the BITs may not be the cynical unknown for investors, but it may be required to have a formal agreement and what we can do is go to go like one to one with the countries that we want to engage with, and then probably utilize our modal BIT tools. And in fact, we are doing that we are engaging with more than 37 countries now and we have signed BITs with 4. So, I think that is what I would like to say about it being a boon or the bane.

**Pratik Singhvi**

Thank you, Mr. Singh, I was saying that it's not really a **[inaudible 00:20:56]** on, but at the same time, you know, for ranking of the ease of doing business and for other factors investment

environment in the country, actually, sometimes is required and it's very difficult to do away with of course, that very thin line balance is something I understand we have to achieve, especially when it comes to emerging or developing countries.

At this stage, could I invite Sudhanshu you to weigh in on your thoughts as to basis of what you have heard the previous two speakers and, in your view, we really think that for a developing country and emerging economies, it's important whether to trade that thin line balance [inaudible 00:21:35] the investors as well as protecting the rights of the state. It does increase because we're developing economics very important to be attractive destination and it's important that you be more friendly environment regime through where it is. yes Sudhanshu.

### **Sudhanshu Roy**

Thank you very much Amit and thank you to Prateek and all the other speakers for their very insightful thoughts. I mean, I largely agree with whatever is been said so far, honestly, this question of whether VITs are a boon or a bane, whether they are a major disadvantage or an advantage to developing countries? It's a very difficult question to answer. But, that being said, this is a question that, you know, I mean, as counsel, as someone who works on these types of cases, often I don't think about it, because when you're working as counsel, when you're working as lawyers, you actually are in the weeds and, you know, you're in the daily grind of representing your clients.

But sometimes, it's often good to take a step back and look at the bigger picture, so certainly, from the perspective of policymakers, government officials, and people who are invested in good governance issues, especially in developing states, this is a very important topic and something that I personally have come across very often. So, you know, as I was saying, I agree with the other speakers that there is no right or wrong answer to this particular question. In my view, and in my experience, despite all the shortcomings, that you know, people have mentioned about investor state arbitration, and we've been hearing all of this for the last, I would say at least 10 years, 15 years, on the whole system has been a success.

I mean, you only no need to look at to evaluate whether any judicial or any dispute settlement system has been a success or whether, you know, how effectively it is working, you need to look at whether the people who access the system really benefit from it. So, on the whole, if you look at the numbers broadly, you would see that everybody, all the stakeholders who participate in the investment arbitration system do derive certain benefits from it. It's not like developing states who are subjected to lawsuits are subjected to these types of arbitrations are always ending up on the losing side.

I mean, statistics as a whole bear the reality that I think I haven't looked at it recently, but the statistics are something like 35% of the cases are resolved in favor of the states, which includes developing states obviously, around 30 to 35% of cases are resolved in favor of the investor and the rest are settled. So, on the whole, the system has been working for everyone who's participating in the system, but that being said, no system is perfect, right? So, we have always got to work on improving the system as a dispute settlement system, there are certainly many shortcomings with the investment arbitration system, we can go on and talk about it endlessly.

But it is reasonable to assume at least partially that investment treaty arbitration is a reliable dispute settlement system as a whole. I mean, you can talk about the specifics. And, I mean, that's basically summing up my view. And I certainly have worked a lot with the states lot, you know, a lot of my work has been with sovereign states, especially in Asia, especially in Africa, a lot of developing states. So, I have seen the, you know, it's not like I'm, you know, talking or taking this side of one particular side.

So, I have seen the picture from both the sides and therefore, I would urge caution, you know, in arguing that we should completely abandon the system, or we should dump it in favor of something, which is completely different, because I think the system as a whole works and I think, at the beginning of this panel discussion, I think Amit, you were the one who were mentioning that there have been increasingly, for example, investors from India, who are accessing the system and initiating arbitrations against foreign governments.

So, I think that's another very valid practical reason why we shouldn't, you know, be in a rush to kill the system. Because, you know, the developing states of today are the developed states of

tomorrow, I mean, India is so called developing state, but at the same time, we are probably the third or the fourth largest economy in the world in terms of purchasing power parity. So, and we have vast number of Indian multinational corporations, which are investing in foreign companies, or foreign countries, rather. So, these companies, these corporations, face political issues, face legal issues when confronted with an alien environment in a foreign country.

And, you know, in that case, you know, although, when you're looking at it from the government side, when you're looking at it from the sovereign state side, there are problems with the system, but when you look at it from, you know, if your outward investment flows, the system actually may work because it provides protection to your own investors who are operating in a very foreign and alien environment. So, I think that's one reason I mean, I could give another reason, for example, the politicization of disputes is another very important reason. And, you know, something which is very well known. But if you look at, for example, the current war that's happening in Europe, between Russia and Ukraine and by proxy between the European Union and Russia, there are, you know, the atmosphere is highly charged, you know?

I mean, it's literally there are people being killed and bombs being, infrastructure being devastated in both countries, and, you know, a lot of political highly charged political rhetoric everywhere, but at the same time, if you look at it, there have been many, you know, avenues for investors, for companies from both Russia, Ukraine and the European Union to litigate the problems that they are faced in connection with this ongoing war in a neutral and less politically charged and less toxic environment where, you know, three arbitrators, or one arbitrator to sit and adjudicate the dispute in a very neutral and sort of, as I said, non-political forum. So that I mean, these are some of the reasons and we can go on and talk about this, but as I said, the conclusion, you know, there's no easy answers to this question, that's what I would like to say.

### **Amit Misra**

Thank you Sudhanshu, as you definitely rightly said, there is no easy answer to find to this debate as to whether it's a boon or a bane and, of course, as you said, developing countries of today are developed countries of tomorrow and it's very difficult to have that comparison, where the developed

countries BITs have done more good to them, then we are just for the developing countries. But it is just becoming interesting, one set of you saying that it's not really working out or not having any causal relationship with the FBI incoming.

While, of course, there is a very valid second side of the coin where it means that it's too early. Its best to, as you rightly said Sudhanshu, to have a caution and create a line of balance between protecting the rights of the investor, but moving on, maybe deliberating upon a second set of really a concern that from a state perspective we see is that many of the BITs claims actually targeted and brought upon, when the state take upon to legislate for in an own issues, which are about the public welfare. So, most of these policies which come about for a public welfare, or something is not to say, strike down the caption without going into names of you have seen recently, certain actions are required or compared to the right on a certain Corrupt Acts, or to bring about policies for the public welfare, it does affect some investor and we see a big claim being brought on by this against the state.

So, on this basically what I wanted my panel of speakers to express the views, you think, why it's necessary to have them, but maybe a developing and emerging economic issue, see that there are more of exceptions like the model BIT we even mentioned taxes and can go into right. So, we have seen that for a case of India, where **[inaudible 00:31:10]**, so why we can agree or disagree whether we have it or not. But if we haven't, does it make more sense to have a wider acceptance or a defence by developing countries include in the BITs? What do you think, Mr. Singh, from your experience on this issue?

### **Madhvendra Singh**

So, Amit. I think Dr. Anand and Mr. Roy, have already taken two sides of the ring, so I am basically happy to be a referee here. So as long as see the states must protect the right to regulate, that's where the whole debate is all about bringing in that balance, about the protection for the investors versus the right of the state to regulate. So, what happens is when the government goes, making on policies for the betterment of their own people, that might sometime be construed by the international tribunals to be indirect expropriation, but when the liberals actually look into this particular aspect of

dispute, they must actually look at from the perspective of intent, versus the actual economic development that has happened to that policy change.

Whereas the one of the most problematic areas of ISDS claims have been the lack of transparency in the civil rules and lack of consistency is making these decisions, which also actually emerges from lack of an appellate authority, which has been a big concern for India because award comes out of let's say, we are not a signatory to the ICSID convention, but claims can still be brought under the ICSID additional facility rules, they have an award is given by the ICSID tribunal, let's say you have nowhere to go except enforcing it.

So, India in a BIT, we have actually brought a lot of exceptions, but we have given an appropriate measure to basically mitigate those. Like, for example, the most favored nation clause, we have given an exception, we have not included it, but what we have said is that any conduct of the state must not be against the Customary International Law. Similarly, we have given an exception for the FET, we don't have a fair and equitable treatment, but we have said that we have actually included in the chapter two about the treatment of investments, so that's where it is covered, if the claim has to be brought, it cannot be said as an FET, but yes, it can be brought under the treatment of investment claims.

As similarly for the full protection and security, actually, very frankly, speaking, having read lot of tribunal awards, and getting into the negotiations of these treaties. FPS is not an absolute requirement. It's not an absolute liability on the state because that whole concept of full protection and security actually comes down to the physical security of the foreign investment or the assets that they have. It has really cannot be interpreted into the policy frameworks, which must protect and promote their investments that actually not the part of the deal. What actually it means is that you're basically providing the physical security and that's it. And also with the FET, when it happened, there was also conjoined concept of legitimate expectations.

There have been times when investors have picked up the political manifestos of parties which have risen to power and taken them as legitimate expectations. I mean, that could be I mean, extreme ends of how you would take legitimate expectations of who are the people who can actually, whose,

let's say, words can be actually taken as legitimate expectations. And then also, when we talk about the fundamental breach of the due process that we have talked about a model BIT also. What exactly this fundamental breach means?

So, there is a little bit of ambiguity and provides a lot of discretion for the tribunals for interpretation and also if we realise these treaties are actually less specialists, and the Customer International Law actually is a less generalist, but what happens in the interpretation on after a breach interpretation of this treaty clauses, the Tribunal's land up and making these interpretations based on the Customer International law rather than on the actual explicit language and the intent in the preamble of that particular treaty or the BIT, which must be awarded. So, India has very, you know, efficiently come up with this model BIT, which a lot of people or many experts, both domestic international would feel are not necessary.

But once again, I'm mentioning this that the model BIT is template, but when we are going into the negotiations, it depends on both the countries how much they're willing to accept not. For example, the exhaustion of the local remedy clause of 5 years that we have plus 1 year of after having gone the causation. So, this is being negotiated. I mean, what exactly we lost to in the case of White industry is also was basically not providing that, you know, I mean, that forum for bringing in claims and basically enforcing the rights. So that's basically a judicial problem.

And although they recognized I mean, the tribunal recognize the fact that Indian judiciary is overburdened with a number of commercial cases and matters is pending in the courts, which does not really, is not an illegitimate excuse for not providing, because it went for 9 years and the Supreme Court itself, that is understandable, these things are understandable. Although, the tribunal did not give anything on the merits. So, these are the concerns I think are very well addressed with our model BIT and as we are engaging 1 to 1, it is providing us enough opportunity to basically negotiate our terms for the mutual benefit of both the parties, which are getting into this.

In fact, most of the international treaties and organizations do have a monolithic character actually. If you see many of these developing countries are actually withdrawing from these kind of treaties and international organizations and you see a lot of debates and our internal affairs minister has

also gone to the UN and spoken about it how there must be reforms in the United Nations itself, how the international organizations are working on and how it should bring in more transparency, it should bring in more decentralization of power.

So that is what in essence is that though India, as a country, I mean, all developing countries, we must do follow BIT is important in that sense and however, but the way we deal with it, the way we deal with the exception process is basically has to be **[inaudible 00:37:50]**.

### **Amit Misra**

Thank you, Mr. Singh, we have, of course you know, in the sense mentioned about how it's best to be neutral, and not really take a stand on either side, which the other speakers are taking at this stage, you know, as you mentioned, it's sometimes advisable to have a BITs like, we have a model BIT and we you were saying, it's more of, you know, more focus could be given on strengthening the judicial system and access and of course, ensuring that the, you know, the investors don't have really a reason to have any costs to BITs something what madam you also mentioned.

At this stage, what can I invite you to the ma'am, I know what you said, clearly, it's not really worked out opening sentences, but you think, can we keep a BITs in place, but have them because it's really addressed the concerns of ease of business and investment environment in the country. While it may not really have a casual and of course, with the FBI, as you mentioned, but you can do the having a flexibility as Mr. Singh was mentioning, while these are now being re-negotiated while the state is entering a new BITs. Maintaining flexibility on what to have in the last 5, 7 or 10 years of experience to **[Inaudible 00:39:18]**, but not completely do away with it. Do you think that could be a more pragmatic approach Ma'am.

### **Pinky Anand**

Actually, Mr. Amit, you are right and Mr. Singh to this extent that, you know, when we talk about one way or so to say. So, there really sometimes it's not a clear answer, I was ultimately only saying because of the difficulties that have arisen with the BITs and their enforcement and the specific



issues that have arisen. This has led to some complications, which may be well be sorted out by other means, for example, as I mentioned, a special law to deal with foreign investments, which could also come into place, but ultimately these are hybrid combination or countries all of us ultimately experiment, we develop, we revisit, and at this process we are constantly revisiting. In fact, the Standing Committee on external affairs, which recently examined the issues of BITs came out with a very comprehensive document and suggested for example, definitely revisiting of BITs.

The one thing, Mr. Singh that is absolutely right. We have a model BIT while they exist, let's talk about it at that speed. While the important bit is there it is up to us to negotiate and re-negotiate, of course, the negotiations have revised in certain sovereignties of countries, and the interaction, which ultimately puts the same into place.

So, we can negotiate to our satisfaction. But one thought I have on the subject aside from a special law concept that we are talking about it. We also incidentally have the PCA system into place. There's an agreement with the Permanent Court of Arbitration, which has been noticed by the Standing Committee also.

And we can ultimately oppose this as a method of resolving disputes, but my one thought is what Australia, for example, has been facing this entire concept of expropriation, in the context of labelling of tobacco products, which is common to several claims, and possibly even the trade route is comment of UNCTAD, which was a few years back on the list, but reviewing the entire situation, that we should not at this stage, and particularly talk about India, talk about special protection for investors. And that is something that Mr. Singh also voiced when he was talking about it, we actually should talk about a parallel system, what is the whole concept of the BIT? The concept of BIT is to ensure security for the foreign investors as well as the concerns of the whole state.

India, of course, has some specific concerns, which are not being met at this time. So, the most favored nation clause, for example, is completely out of context as far as I was concerned, and White & Case went completely the other way, frankly, this entire concept of a prudent investor, a prudent investor knows, which country is investing in, and what should be the expectation. So, to actually come around White & Case that watershed with you've learned a tremendous amount of lessons.

But possibly what we do need to think when we get to negotiating these 37 BITs are in the process of re-negotiating as we talk, when we're talking about is to ensure some reasonable equality to foreign investors, what foreign investors really want possibly, is they may want, we want a preferential treatment, but really speaking, they want protection that they are not discriminated against.

So, I think you do veer around a lot more to that concept of saying domestic legislation in any country, as long as it doesn't take away any substantial right of investors is something that should govern the rights of parties in BITs. And if you're able to meet that, we will develop ourselves as much as to ensure that the investors also understand that they are coming into a country for example, like India, which has the fourth standing in the world, in the global economy as far as **[inaudible 00:43:03]** concerned. And therefore, the investment is welcome, but the investment has to be ultimately on terms that are acceptable to India, as a sovereign nation.

You mentioned taxation Amit, when you were talking about taxation has been excluded in the domain of the model BIT, of course, subject to any further discussion, following again, the aftermath of Vodafone, that, again needs to be looked at fairly closely, because can you discriminate, should you discriminate between a foreign investor on any grounds if there is provision for exemption. And thirdly, I'd like to flag one issue specific exemptions, we must avoid too many exceptions. We must avoid ambiguity in exceptions even more. So, in this entire concept, I spoke about investment enterprise these are concepts, which are subject to so much of sometimes of bigness, that they lead to a lot more disputes that we can imagine.

So, we need to kind of tweak our BIT definitely to ensure that there is as much certainty. The more certainty there is the more rule of law there is this is the basic principle of democracy of law as we might say, so therefore, we need certainty in our definitions, when we are putting down to terms the actual BITs as compared to the model BIT Model BIT is a way forward it was 2016 we are considering it, but tweaking at the stage of negotiations and finalizing the BITs is something that we do need to put into place totally. ICSID should also had flagged as a concern because a number of countries large number of countries are members of ICSID even though incidentally as we speak, some countries are choosing to get out of ICSID.

Three countries have chosen to get out of ICSID too, but it is another common international platform that could be considered and while we as India, do believe in our sovereignty and continue to believe so we must ensure that we have an international platform so that everybody is at a common page in terms of resolution of disputes, so that it is satisfactory. And finally, just one last statement on this aspect, I do feel that the Arbitral Tribunals sometimes are more investor friendly than otherwise there is a bias, and that bias possibly has to be considered on a 2-way street and the concerns that countries have we have BITs.

The idea is to ensure the protection of both, and definitely their principal concern is also the host country, because how an investor going to benefit from a relationship with the host country unless and until the host country is able to take its own agenda forward. That investor friendly bias as to definitely give way to an equal way traffic for both.

### **Amit Misra**

Thank you, madam, investor friendly bias, yes, you hope someday some, definitely, there must be a detailed study on this because we represent a lot and you know, to state and, of course, that's something that's another debate to once we have a little more in-depth study and data on it. But Sudhanshu calling upon you, what ma'am said? Why we are extra for a foreign investor, if you can strengthen your judicial system and, in any case, you know, if you are legislating and going in for a new BIT with so many exceptions and things being carved out what you can do a BIT for, so instead of really doing that, why can **[Inaudible 00:46:28]** Mr. Singh also said.

Why can be domestic in the context of India, almost all the BIT today are not in place, and still a record? Investment is coming in since we must assess costs and not really going to old questions are answered that it's not really answer a boon or bane. **[Inaudible 00:46:51]** Which is coming for foreigners, but these treaties we have these elevate the right of the foreign investor as compared to a domestic investor within the country **[Inaudible 00:47:02]** for that. We really elevate the rights of the foreign investor. We think the domestic laws if that still doesn't equal access and judicial thing, which can be quick and enforcing that can confidence investors, Sudhanshu?

## **Sudhanshu Roy**

Yes, very interesting discussion. So I mean, I think that, you know, certainly, again, there's nothing much to disagree with what has been said there, you know, there's certainly a case for a carefully balancing the sovereign right of the state the right to regulate of a sovereign state with the interests of a foreign investor, when you're negotiating BIT, certainly, you know, there cannot be any dispute about the fact that a state has to carefully consider its defensive position when acting as respondent in these investor state arbitrations when negotiating those treaties, so I don't dispute that point.

As to your question, whether these treaties elevate the status and rights of foreign investors, I mean, certainly they do, because, you know, they provide foreign investors with access to a system of dispute resolution that is not available to domestic investors, but again, that being said, when those domestic investors for example, would go to a foreign country, right, they would have access to BITs that have been negotiated, so when by the coast state, so, for example, if Indian investors go to Mauritius and invest in Mauritius, they will have the benefit of the India Mauritius BIT which is also now terminated.

But, you know, I mean, there have been examples where cases have been initiated under the India, Mauritius BIT on both sides by foreign investors against India, but also at the same time by Indian investors against the Republic of Mauritius. So, there is a, you know, we have to look from both sides. I mean, and from my experience against being purely as counsel, You know, I have worked on a number of these types of cases under treaties that were drafted, let's say 30, 40, 20 years ago, and treaties, which were very recently drafted. So, I mean, I've seen all kinds of disputes.

I've seen, you know, disputes, which were, adjudicated under very carefully and very, you know, very, I would say modern drafting of modernly drafted provisions, which sort of protected the, the right of the state to regulate in public interest. So, I've seen both those kinds of disputes, but ultimately, you know, no matter what you write, in the treaty, no matter what kind of clauses you put, you know, the arbitral discretion that the mean I mean, It's the same as judicial discretion, the discretion to interpret and apply that provision always remains in the hands of the tribunal. So, you

know, you will also have to be, and I think Ms. Anand was saying this, but you will also have to be careful about putting too many words in the treaty.

And one example that comes to mind recently, I mean, you know, it's a long ongoing case, but this I've been involved in a case for a developing state, again, Asian developing state, where one of the main defence that we have in that case is that the investor engaged in corrupt conduct in the making of an investment. And there's an extreme case, there's a case under ICSID, so if you know, the ICSID as a very well developed jurisprudence, very filter block rule of law, on the fact that any sort of corrupt conduct by an investor in the making or procurement of investment automatically precludes the jurisdiction of an exit tribunal on the grounds of violation of international public policy, basically, prohibition of corruption is a rule of international public policy and ICSID tribunals take it very seriously.

So, there is you know, that well defined rule of law body of law that exists, but when it's actually applied, in some of the cases, the outcomes are absurd. So, when in the case that I was, you know, I've been involved in there is actual evidence of corruption on the part of the investor, so there is a guilty plea, that the investor entered into in its home state, so some from the state from which it invested into the developing state. It admitted that it bribed one of the ministers that was involved in the approval of its investment up, but, you know, that was not enough for the tribunal. I mean, that's, you know, that's where the absurdity comes from, so despite evidence, despite admitted guilty plea, the tribunal held in that case that there is no concrete causal link between the guilty plea of the investor and the procurement of the investment.

I mean, the tribunal basically said that, yes, the investor admitted that it engaged in corrupt conduct, but then there is no direct evidence to show that that corrupt conduct procured its investment. I mean, that sort of evidence, especially in an international arbitration proceeding, where the rules of evidence are not so strong, it's almost impossible to find, where would you find, you know, somebody admitting that, yes, I paid like, you know, this much amount of money to get an approval for an investment. I mean, you know, the fact that the minister who was responsible for approving the investment was bribed, was not enough for the tribunal because of this lack of direct causal link. So, as I was saying, you know, these things are, you know, these rule of law protections and standards

of protection are always there in investment treaties, but ultimately, there's a lot of arbitrarily discretion.

So perhaps we also need to, you know, focus on you know, the standards of evidence, for example, that we apply in these types of proceedings, you know, for corruption, especially whether there must always be a requirement of direct causal link, or whether, you know, circumstantial evidence is enough things like that. So, you know, I mean, there are many issues to consider, but certainly, I would agree that, as a whole states must balance the right of investors to access these treaties with their own right to regulate in sovereign and public interest under their domestic and international law.

### **Amit Misra**

Well, I think we are almost approaching to our close time, a very interesting debate, which I only hope should have continued, but as everything would be comes to an end, maybe what I do foresee is that what began with a very diverging view of no, it's not really worked out to something like, it's very much necessary to have his own business and for various other factors. What I do realise on this 1-hour period is that we have almost come to a conclusion to see that it's good that the developing countries and of course, perspective is using experience and all the criticisms and the advantages that we have seen over the last 10 years in while we re-negotiating BITs based on the model BIT and of course, as Ma'am says and Mr. Singh says, Mr. Roy, that you know, the processes are important, equally the judicial system in India equally important, only to really elevate the rights of investor.

But at the same time, you know, it's **[Inaudible 00:54:57]** but I think it's the best thing and the only thing we have done hopefully, this panel discussion is to really throw out people what are the areas where you should look into why we need BITs or things, which are important from the investor perspective **[Inaudible 00:55:25]**. Ma'am anything on the topic just 5 minutes left, all of us can give a remark

## **Pinky Anand**

See what I can say is that, ultimately, we, as a country are looking forward to this entire prospect of beating in FDI and investment. And as long as we can tweak our systems appropriately, keeping in mind the developments that are happening, it is this ultimately, still an opening regime, I mean, we started from a socialist kind of era in economics to globalization in 1990s, and then opening the way forward. So, we have, from time to time considered our options and even as we stand and we speak, the government is also consciously looking at this through the Standing Committee and the deliberations that are happening.

We have reached further, and we can still continue to do so, what I liked his most Sudhanshu comment, which is that model BIT, we might be critical of some of the aspects as they stand, but that is ultimately a leg room to stand on. So, it's not a final stage, it is something that can be revisited, and I am today very hopeful of a hybrid combination in any case, BIT is or needed to give confidence to investors, which we all need, and we want to develop, so be it, but maybe we should just consider the lines that today is a time when India is standing strong as a giant in the global field.

And we can consider equality of treatment to domestic investors as an option, whichever way whether through the BITs, or whether through a special law that ultimately entails that, but specificity and equality is possibly today more the order of day than other things. But the arbitral tribunals viewpoint on fraud, incidentally, Sudhanshu very well taken. I was instrumental in one of the arbitration, international arbitrations that dealt with the question of fraud, and ultimately had the arbitration thrown out on that account. And you're right on the standard of proof. I think fraud is a complete no, if I might use that expression, fraud and corruption has to be opted out and there is no way out of that situation.

The standard of proof circumstantial, is getting to be a way of life in most criminal jurisprudence even otherwise, why not in the field of arbitration equally, so that you safeguard, you cannot have a country's sovereignty being taken away by any foreign investment of any country. I'm not talking about India right now, but the global picture. So, these best practices of ICSID tribunals and customary international law, are something that have to be taken completely at the original value so

that we, as a country, with any country, is not taken for a ransom on any concept of investments. So, with that, thank you very much, Amit. We look forward to further deliberations.

**Amit Misra**

Thank you, ma'am. Mr. Singh, any comment? Final comments on the topic?

**Madhvendra Singh**

So, thank you, Amit. I mean, I know MCAI is very strict about the timing. So, I'll just take 30 seconds to sum up. You know, I agree with what Dr. Anand has said, but the Tribunals are very investor friendly, I mean, investor oriented. But that is how everything is we all like underdogs. So, you have to play your cards well. You know, but as far as a BIT goes, I could agree to the point that having mindless application of exclusion clauses may not be the right option. But having those clauses with more meaningful clarity and certainty in their clauses is what is required, actually. But I'm also happy that Dr. Anand has shifted her point of view and acknowledged the importance of the BIT's to have, so thank you.

**Amit Misra**

Okay. Sudhanshu, you are concluding remark?

**Sudhanshu Roy**

I just wanted to thank everyone. You know, on the panel, and thanks for the opportunity to speak speaker. I mean, in terms of the concluding remarks, I mean, I will just be end where I began in the sense that there's no right or wrong to this answer. And as states, certainly, you know, we should, India or any other sovereign state should carefully think and negotiate these treaties. Certainly, the approach that India adopted in the 90s and I've been, again, looked at those issues very closely.



That was not the correct approach, like blindly signing treaties, just as photo ops or just because, you know, somebody, official or minister, you know, pushed for the signing of such a treaty. I mean, that's not the right approach. Certainly, a lot of thought a lot of policy making, lot of legal and economic policymaking has to go behind the signing and negotiation of the treaties, which thankfully is happening now and which I'm sure we're all glad to see. So, with that, I mean, that's all I have to say, thanks again.

**Amit Misra**

Thank you everyone, over to you Prateek, we have come to the end of this. I know time is up.

**Pratik Singhvi**

I'd like to thank all the panelists for a really exciting discussion over the course of the last hour in Mr. Misra for really directing it in a manner where we could explore the various aspects of the topic, not just the one side of the other side, but really dive into the cases and the practical experience of the panelists as they spoke, to really flesh out the issue. So, thank you, everyone. Thank you, Mr. Misra. Finally, just for the benefit of the participants, the video recordings and the transcripts of this session will also be available on [www.adr.week.in](http://www.adr.week.in), which is the official website of this event. And I believe I speak for all the panelists as well that we hope to catch up in person fairly soon in the near future. Thank you all.

**Madhvendra Singh**

Thank you.

**Amit Misra**

So, everyone, thank you.