

To
Dr. Manmohan Singh
The Hon'ble Prime Minister
Government of India
South Block, Raisina Hill,
New Delhi
India-110011

26 September, 2013

**REF: We call upon the Government to review and rescind
its decision to sign BIT / BIPA with the USA**

Dear Dr. Singh,

On the occasion of your visit to United States, we are writing to you to convey our serious concerns over government of India's policy on investor protection provisions in Bilateral Investment Treaties (BITs) also known as Bilateral Investment Promotion and Protection Agreements (BIPAs) and Comprehensive Economic Partnership/Cooperation Agreements (CEPA/CECAs).

As you know, the Government of India has received around eight notices from foreign investors threatening to invoke investor state arbitrations under various investment agreements India signed since 1995. In a response to questions in the parliament, Shri Namo Narain Meena, the Minister of State, Ministry of Finance stated that India has initiated a review of its bilateral investment agreements and also declared a moratorium on new negotiations of BIT¹.

However, we are surprised to see newspaper reports that India's Commerce Minister Shri Anand Sharma has agreed to negotiate a bilateral investment agreement with the United States during his recent visit to US.² According to a briefing note by US India Business Council (USIBC), a key lobbying and advocacy group, such a treaty aim to provide most favored nation (MFN) treatment and fair and equitable treatment, not under Indian laws but under International law standards, to US investors.³ Further, the treaty may include clauses including provisions such as no expropriation without due process and full compensation. Additional protections to safeguard investors from conditionalities such as domestic content requirement, export performance and regulations on financial transfers are expected from India in order to provide a 'stable' environment for US investors in India.

Sources also suggest that the US government would expect pre-investment protection i.e providing market access even before the actual investment. Such provisions, for example, seek to

¹ All BIPA negotiations put on hold: Govt, PTI, New Delhi March 22, 2013, Source: http://www.business-standard.com/article/economy-policy/all-bipa-negotiations-put-on-hold-govt-113032200183_1.html

² India ready for bilateral investment treaty talks with US: Sharma , PTI, 13 July 2013. Source: <http://www.thehindubusinessline.com/economy/india-ready-for-bilateral-investment-treaty-talks-with-us-sharma/article4911724.ece>

³ Information Brief on US India Bilateral Investment Treaty by US India Business Council, Source: <http://www.usibc.com/sites/default/files/initiatives/files/usindiabitooverview.pdf>

remove some of the recently announced rules related to FDI in Multi Brand Retail which restricts foreign investors from buying existing retail establishments and mandate the investor to establish new facilities. On the other hand, the GOI's BIPAs till now have been post-establishment agreements and retain the policy space to place pre-establishment conditions including performance requirements.

It is expected that the treaty may also bind parties for arbitration of investor claims before an independent ad-hoc tribunal. It is important to underline that the US government is always hawkish in supporting its business interests. In 2012 it excluded Argentina from the list of countries benefitting from trade preferences, until Argentina pays on International Centre for Settlement of Investment Disputes (ICSID) awards in favour of US investors. The proposed treaty may expose India to similar US strategies in the future.

Earlier, in our letter dated 12 July 2013 (attached), we expressed our concern about undue pressure from US business groups on many aspects of the Indian government's economic policies that impact the country's development objectives. Our apprehensions are further strengthened as the United States International Trade Commission (USITC) launched investigation on India's trade, industrial and investment policies in late August.⁴

We request you to take a position against the US India BIT based on the following facts.

As experienced by the government of India in recent times, the BITs / BIPAs signed by the GOI so far have seriously undermined the government's ability to tailor foreign investments according to India's development needs and pose serious threats to the authority of the Indian Parliament and Judiciary. Debilitating impacts of BITs / BIPAs are exemplified by the arbitration award relating to M/s White Industries Australia Limited (WIAL), Australia, where Coal India Ltd paid Australian dollar 98,12,077 (Apprx INR 531,502,000) to the investor. Various reports suggest that international arbitrations against India to the tune of over \$ 5 billion are in process. A number of companies and foreign investors including those listed below have either launched or threatened to launch international arbitrations processes against the government of India⁵.

1. CC/Devas (Mauritius) Ltd., Devas Employee Mauritius Pvt. Ltd. (Devas) and Telecom Devas (Mauritius) Ltd. under BIPA with Mauritius
2. Axiata Investment 1 Ltd. & Axiata Investment 2 Ltd. , Mauritius and Axiata Berhad Group under BIPA with Mauritius
3. Deutsche Telekom, Germany under BIPA with Germany; Vodafone International Holdings BV Limited under BIPA with Netherlands;
4. Sistema Joint Stock Financial Corporation and Bycell under Russia India BIPA;
5. Telenor Asia Pte Ltd under Singapore India CECA;

⁴ USITC, India's trade, investment, and industrial policies will be focus of new USITC investigation, News Release 13-080, August 29, 2013, Source: http://www.usitc.gov/press_room/news_release/2013/er0829111.htm

⁵ Response to a parliamentary question by Shri Namo Narain Meena, Minister of State for Finance. Source: Lok Sabha, Unstarred question No 4322, Answered on March 22, 2013, <http://164.100.47.132/LssNew/psearch/QResult15.aspx?qref=137667>

6. Capital Global Limited and Kaif Investment Limited, both Mauritius based investors in Loop Telecom Limited and under BIPA with Mauritius;
7. Children's Investment Fund Management (U.K.) LLP under BIPA with UK;
8. Mr. Maxim Naumchenko, Mr, Andrey Polouektov and Tenoch Holdings Limited, Cyprus.

India's experience in the past with US investors, for example, the whole episode of Enron which occurred in Dabhol Power Corporation, already establishes a concrete case against investor protection. Both Bechtel and GE used investor state arbitration processes to pressurize the Government of India. Arbitration Award of \$125 Million to Bechtel and GE and subsequent secret commercial settlement brokered by a negotiation committee of the government is an example of how a US corporate can hold governments like India to ransom.

It is also important to note that in recent times, foreign investors around the world are increasingly resorting to investor-state arbitration and holding sovereign governments at ransom. According to UNCTAD report⁶, the total number of treaty based cases reached 514 in 2012. At the same time in 2012 alone 58 new cases were initiated, 'which constitutes the highest number of known treaty-based disputes ever filed in one year'. It is also important to note that many of the forums of international arbitrations smacks of secrecy. According to UNCTAD most of them do not maintain a public registry of claims.

Further, developing countries like Argentina, Venezuela, Ecuador, Mexico and Czech Republic are being subjected to a higher number of international arbitrations by investors. Notably, 'Investor-State arbitrations have been initiated most frequently by claimants from the United States (123 cases, or 24% of all known disputes), the Netherlands (50 cases), the United Kingdom (30) and Germany (27)'. The cases launched by investors against state measures include several on financial policy decisions to mitigate economic crisis and environmental measures. In 66 % of cases respondents are developing countries while 61% of cases originate from investors in developed countries. In these cases, a broad range of government regulations were challenged including those related to revocations of licenses, changes to domestic regulatory frameworks, withdrawal of previously granted subsidies and tax measures. Thus the investor state dispute is a one-way tool used by foreign investors against governments, which prevents the latter from pursuing development policies. It is a well known fact that an arbitration industry is at work to extract money from governments.⁷

Apart from investor state dispute provisions, many other provisions of investor protection agreements also curtail the policy space of the Indian government and tie its hands to pursue a socio economic development policy. Regulation-free 'transfer of returns' from investments would increase India's vulnerability to finance capital. This would also restrict India's ability to use policy tools like 'capital control' to arrest flight of capital at the time of economic crisis. The broad

⁶ http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

⁷ See CEO report on International arbitration

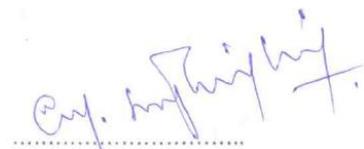
definition of investment can even prevent issuance of compulsory license and thus compromise access to affordable life saving medicines. India's experience with BIPAs also confirms that investment agreements have mostly benefitted corporations from developed countries while limiting India's economic sovereignty.

The present critical economic scenario of increasing trade deficit and current account deficit also provides unique opportunity to revisit some of the major policy stances and to change course. The government's approach to attract FDI should not prevent it from assessing the consequences of its obligations under various international investment protection agreements. India should not sign any investment protection agreements including Comprehensive Economic Cooperation/Partnership Agreements (CECA/ CEPAs). There should be a comprehensive review of India's investment protection agreements/chapters so as to make recommendations to effectively address the threat of investment protection provisions on policy space.

Against this background, **we call upon the Government of India to**

- 1) Put on hold all negotiations of investment protection agreements including the BIPA with US;**
- 2) Appoint an independent commission to conduct comprehensive assessments of India's obligations vis-à-vis investment protection under BIPAs and CECAs, on the country's ability to pursue a comprehensive socio economic development policy and also make recommendations to regain the policy space to pursue socio economic development goals.**
- 3) Make publicly available the information related to details of investor-state disputes already initiated against or notice of arbitration received by the Government of India from investors under the various investment protection agreements.**
- 4) Make publicly available the information on details of compensation/damage paid to investors as a result of arbitration awards under various investment protection agreements.**

Yours Sincerely



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