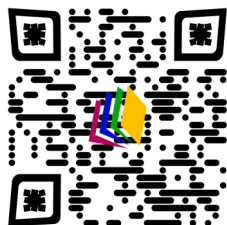




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## Post-COVID 19 Investment opportunity and India: Measures Necessary to Establish India as a World Investment Hub

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### ABSTRACT:

It is seen that besides single tax structure, reformed FDI approval process, reduced corporate tax, India has not been able to attract huge foreign investment inflows as expected and required. The COVID 19 catastrophe has brought hope, an opportunity before dispirited India to wrest investment from the firms moving out from the Chinese region due to China's role in COVID – 19. Still, many have expressed the doubts that it is not certain that companies will shift India.

Investors' dissatisfaction against India which started over delay in implementing arbitration award, cancellation of 2G spectrum licences and retrospectively amending the tax law, were the previous challenges which India was facing. In this study, we would examine how to grasp that opportunity. Besides fulfilling other infrastructure requirements such as matching production cost, supply chain, the legal and regulatory requirements would also be checked. This study is required as presently India is a party to only 14 BITs and negotiations on future BITs is pending.

**KEY WORDS:** Bilateral Investment Treaty, Investment opportunity and India, Foreign Direct Investment, COVID 19

### 1. Background

The present government led by Prime Minister Narendra Modi has introduced several measures to attract foreign investment into India. The government has been reluctantly taking several reformative actions such as implementing a single tax structure in the form of Goods and Service Tax (GST), liberalising FDI policy, reducing corporate tax to attract Foreign Direct Investment (FDI).<sup>88</sup> GST resulted in uplifting India's ranking in ease of doing business.<sup>89</sup> The government has reformed the FDI approval process and made easy by abolishing the Foreign Investment Promotion Board in the year 2017. The government has opened many sectors for FDI, such as defence, aviation, telecom, private security, information and broadcasting, education, e-commerce and also increased the limits of FDI through

automatic route. The government has also reduced the corporate tax for existing companies to 22 percent and for new manufacturing firms, incorporated in between 1 October 2019 – 31 March 2023 to 15 percent.<sup>90</sup> This is the most competitive, lowest in South Asia. The Apex Court of India has also shown a positive attitude towards foreign investors.<sup>91</sup>

India witnessed a 30 percent increase in the FDI due to 'Make in India' initiative and rose to USD 43, 478 million in 2016-17. Later, India saw a decline of 3.08 percent to USD 30,286 million in 2017-18.<sup>92</sup> UNCTAD in its Global Investment Trend Monitor report January 2020 informed that the global FDI saw a 1% decline in FDI inflows. South Asia recorded a 10% increase in the FDI inflows. India recorded a 16% increase in inflows to an estimated USD 49 billion.<sup>93</sup> India has not been able to attract huge foreign investment inflows as expected and required. Let every other aspect of the economic downfall on the side and focus on employment issues. It is worrisome that in a recent recruitment drive by Railway, 25 Million applications have been received for 90,000 positions.<sup>94</sup> This shows the pathetic condition of the Indian job market and economic downturn. The unemployment would probably cause ripple effect such as inflation, non-consumption of consumer products. As per the latest report, the consumer spending capacity has declined for the first time in the last 40 years.<sup>95</sup>

## 2. Corona Virus (COVID – 19) pandemic

In the meantime of this economic slump and amidst India's effort for renewing its legal and policy framework for attracting foreign investment, the world has witnessed a new kind of health

challenges due to Corona Virus (COVID – 19). Globally, the corona virus has killed over 5 million people and infected over nine million populations.<sup>96</sup> By the time of writing this thesis, India has also suffered considerably. COVID 19 has killed more than 9000 Indian population and infected over 4 lac people. Major economies like the US, Germany, Britain, India has followed complete lockdown to contain the spread of this deadly virus which is weakening the global economy unlike anything before.<sup>97</sup> The successful testing of COVID 19 vaccine is on the way and/or not guaranteed. Recovery from this catastrophe or becoming normal as before 2020 may take more than a year or half and/ or this is probably going to be a new normal.

## 3. Post-pandemic economic opportunity for India

The COVID 19 catastrophe has brought hope, an opportunity before dispirited India. The Chief Economic advisor of India on 21 March 2020 said that "*the outbreak of corona virus provides a good opportunity for India to follow an export-driven model.*"<sup>98</sup> Due to COVID 19 catastrophe, the world has lost faith in the Chinese market. It is rumoured that foreign investors are to move their manufacturing unit from China.<sup>99</sup> It is claimed that no country will be better suited to avail this than India. Sending medical supplies and drugs, going friendly hand would affect the minds of the investors of those countries which were helped during this crisis.<sup>100</sup> India needs to find new economic opportunity by reshuffling the world economic order – where states would buy the product either will prefer buying the 'National product' (Swadeshi product) or because of the trust in the home Country of the investors. A majority of the States such as Japan<sup>101</sup>, the US<sup>102</sup>, South Korea

currently rely on Chinese market for its manufacturing and supply. They are insisting on their corporations to either set-up units outside China or to relocate production units.<sup>103</sup>

The president of the US – India Business council Nisha Biswal on 23 April 2020 said that *“businesses will want to de-risk in having too much of a supply chain concentrated in one area. India will have the opportunity to attract hundreds of foreign companies into the country.”*<sup>104</sup> Government of India has also confirmed this. Minister of Micro, Small and Medium Enterprises Nitin Gadkari on 23 April 2020 said that India could benefit from the critical situation caused by the corona virus epidemic. He informed that many multinational corporations (MNCs) want to bring their industrial unit to India. He emphasised that India should provide facilities for these companies to come here. It is also claimed by Uttar Pradesh state government that more than 100 companies currently having their manufacturing plant in China are willing to shift UP, and they are in a talk.

### 3.1 Opportunity as unnecessary excitement?

Many have seen this opportunity as unnecessary excitement and they have doubted about these opportunities coming to India.<sup>105</sup> It is warned that foreign investors are going to Vietnam. It is asserted that investors don't come under emotions. Although there are points in favour of India, for example, the population, democracy as China is not a democracy. It is alleged that India democracy is a vibrant democracy and judiciary has not been able to hold when a powerful executive is in the contest. It is submitted that everyone is mindful of lacunas in the system still since independence the India is a better choice than China in terms of its

transparent and democratic governance. Unlike other newly independent states, India since its independence has not supported expropriation alien's property and particularly the property of former colonial powers. Even if expropriation of foreign property took place, that on a non-discriminatory basis.

The democratic form of the government may help India. The population may also be helpful as an investor need not find a market if he has a manufacturing unit in India. India imports electronics, electrical items from the country such as China, the US. Hence, the manufacturing unit in India will provide a market for them and will also save export cost. Still, pro-investor legal and regulatory framework, and also, a pro-foreign investment policy is lacking in India. After the termination of BITs, the introduction of a new Model BIT and emphasis on 'Swadeshi' has given a red signal to foreign investors.

Nobel laureate Abhijit Banerjee has expressed that it is not certain that companies will shift India.<sup>106</sup> It is submitted that Vietnam is reeling with labour shortages and its roads and ports are already clogged.<sup>107</sup>

In April 2020, Facebook announced that it will invest USD 5.7 billion in Reliance Jio. This investment is a reflection of the faith that foreign companies have in the Indian market. The portfolio investment is not that much beneficial for the host States like India. In a recent amendment to its FDI rules, India has restricted the portfolio investments coming from China and other neighbouring countries. India needs direct investments in labour-intensive sectors such as textiles, food processing,

leather and footwear. A blow to India's opportunity is coming as the US president has warned and put pressure on the industries currently having their manufacturing plant in China, not to shift India and other countries.

It is submitted that this is a big opportunity for India. Still, it may lose this opportunity due to investors' mistrust created through several contradictory actions of the government.

#### 4. Challenges ahead

These are the few challenges which India needs to resolve soon to grab this opportunity:

- i) The investors' dissatisfaction against India which started over delay in implementing arbitration award, the cancellation of 2G spectrum licences and retrospectively amending the tax law which results in several BIT arbitration claims against India. The introduction of new Model BIT of 2015 and unilaterally terminating the BITs also fuelled this antagonism of foreign investors against the Indian market. Presently India does not have any method of protecting the foreign investment or make them trust the India market about speedy adjudication of breach of contract or foreign investors' right if any. It is also uncertain that what rights is to be given to foreign investors in the absence of any established legal and regulatory framework and also in the absence of adjudicatory mechanism once India terminated BITs with most of the countries.
- ii) India has created a situation which is adversarial, uncertain and/or difficult for the foreign investor and instils confidence and faith to nurture smooth and beneficial economic relations towards effective and sustainable development of both –

the foreign investor and India.

- iii) The production cost is about 10-12 percent different in India and Southeast Asian countries. Matching the production costs with China is a challenge for India.

- iv) In comparison to China, India lacks the supply chain. China has the extensive network of suppliers which ease the logistics process involved in manufacturing.

Another setback has come in the way that China market has started working from last April and did the fast recovery. However, India with other developed countries of the world (which may be a potential market) is still suffering from this pandemic.

- vi) It is uncertain that India will have the necessary infrastructure to replace China as World investment hub. It is alleged that India does not have potential to match China in terms of skilled labour and scale. For example, Apple Inc started its manufacturing in India in 2016. Since 2016, Apple could produce only four old models. The new models are still manufactured in the Chinese region. Also, the quality of infrastructure and connectivity issues does not aid India's cause.<sup>108</sup> It is submitted that the alleged lacunas may not be found in reality. Still, India is required to make satisfy the foreign investors that due to the new government's emphasis on skills and training India may fulfil their requirements.
- vii) Many State governments in India made key changes in the application of labour laws for the next three years. It is acclaimed that the aforesaid amendment has been introduced to match the Chinese or global labour standards.<sup>109</sup> Prabhash Ranjan has asserted that *'if India suspended labour laws for 3 years do you think that foreign investors are coming in India only for 3 years*

*and what after this three year.*<sup>110</sup> It is submitted that the government are not considering the complexity of investments and also not showing any foresight.

### **5. What should be India's future course of action to grab this opportunity?**

The post-COVID opportunity has come as a onetime opportunity and India should not lose this. Indian economy is on the slump and the population is in dire need of employment opportunity which is not possible without additional capital pumping.

a) **Proper and sensitive assurances on the part of the government;** instead of giving superfluous statement to foreign investors, the government could provide reasonable assurances to the foreign investors. For instance the PM on 2 June 2017 in St. Petersburg International Economic Forum, the PM on 27 February 2018, the PM at the Davos meeting of the World Economic Forum 2018, Finance Minister at IMF's headquarters, Anurag Thakur on 26 May 2020 has made several superfluous statements, which specify the confused state of mind of the government. It is noteworthy, that the government on international platforms shows its commitment for integrating the world economy and in contracting following the popularity approach and on national platforms showing its commitment for '*self-reliant*' and '*vocal for local.*'

b) The Government of India ministers must stop soaring-up unnecessarily. For instance, the Law Minister R S Prasad on 2 March 2020 showing antagonism against foreign investors<sup>111</sup>, and the Commerce Minister Piyush Goel's response in Amazons and e-commerce giant may have negative consequences for India. Such statements must find a negative effect on foreign investors.

c) PM Modi has recently held a meeting on 30 April 2020 to discuss strategies to attract more foreign investments into India against the backdrop of the Covid-19 pandemic shows government's readiness for relaxing regulatory norms and giving fiscal incentives to foreign investors.<sup>112</sup> PM Modi asked ministers to prepare a list of 10 priority areas and also the important decisions to be taken soon after this pandemic.

d) After PM Modi's call for global companies that want to shift from China, Uttar Pradesh (UP) government has also promised several facilities to giant corporations of the US, including UPS, FedEx, Adobe, Cisco, Honeywell and others if they shift their units from China to UP. The government conducted a video conference with over 100 investors from the US. The government of UP has claimed that the firms shifting its base from China could be given a tailor-made facilities per their needs.<sup>113</sup>

e) The government must assure the foreign investors that the land and other requirements of the foreign investors will be fulfilled.

### **5.1 Protection to foreign investment through BIT/IIA**

Since its formal inception of Bilateral Investment Treaty (BIT) and/or International Investment Agreement (IIA) in 1959, this has emerged as the prevalent method of protecting the foreign investment. India signed 83 plus BITs since it has signed its first BIT in the year 1994. It has also signed 13 plus IIAs. After facing a spate of BIT arbitrations,<sup>114</sup> India has introduced a new Model BIT of 2015 replacing 2003 Model BIPA.<sup>115</sup> It was alleged that the 2003 Model BIPA was providing wide and vogue rights to foreign investors and shrinking host State regulatory powers.

Subsequently, India has unilaterally terminated BITs with 66 plus countries.<sup>116</sup> The State-centric standards of treatment such as requiring investors to exhaust local remedies before commencing ISDS claim, excluding government procurement, taxation, absent MFN treatment put forward through India's new Model BIT of 2015 and the unilateral termination of BITs was largely criticised by the world, mostly the capital-exporting states like the US, Canada and the member of European Union. India has failed to negotiate new BITs with many of its previous BITs partners and presently India has BIT only with 14 plus countries. Also, India has issued joint interpretative statements with few countries and hopeful for negotiating BITs with many other countries.<sup>117</sup>

This pandemic has brought urgency before India to re-think its foreign investment policy. Role of the BITs in attracting the foreign investment inflows is mixed. Few have argued that there is no relationship or having a minimal relationship between IIAs and investment inflows<sup>118</sup> but many have argued positive links between the IIAs and FDI inflows.<sup>119</sup> New research shows that the collective consequence and cumulative effect of signing a series of investment treaties by India have had a beneficial effect on the inflow of FDI. Institutional support is important for investment flows.<sup>120</sup>

Once India has terminated BITs, it is not possible to negotiate a BIT soon in near future. This requires a tough negotiation process and as India has drafted a state-centric Model BIT, may take more than a decade to sign the BITs. Therefore, this may not be held a preferable way to attract foreign investors in such urgency.

## 5.2 Protection through a universal applicable Protection for Foreign investors

Therefore, to grab this post-COVID investment opportunity, India may assure the foreign investors that the standards of treatment such as '*national treatment*', '*Monetary transfer provisions*', '*Fair and Equitable Treatment*', '*guarantee against Expropriation*' '*Full Protection and Security*' as provided under the New Model BIT of 2015 would be given to every foreign investor, shifting its manufacturing unit to India. This must be universally applied to any foreign firms bringing FDI inflows to India. A time-frame may be given. India may also put the general exception clause and may also provide the adjudication mechanism. Like the New Model BIT of 2015, the same ISDS mechanism may have given as an option to settle the dispute between the host State and foreign investor.

It is possible as the Indian government or the concerned Ministries can do it by issuing a public note that foreign investors coming to India in a particular time-frame would be given substantive protections. This public note may annex the detailed standards of treatment and the adjudication mechanism for settlement of disputes. The new Model BIT of 2015 with substantive amendments and after converting this as universally applicable may be annexed in the aforesaid public note. Protection under the domestic laws would not solve the problem as in the current situation the foreign investors would not trust the domestic system.<sup>121</sup>

## 6. Conclusions

If we look to the past, India must act cautiously in its dealings with foreign investors. How the 2G spectrum licenses were cancelled by the Apex Court on the grounds of alleged irregularities and

the government claimed that the above spectrum licenses have been cancelled for national interest purposes. How in Vodafone's case the retrospective application of tax laws was given. Whether it's a case of delayed implications of arbitration awards, or in many others, India shows incautious approach. India needs to settle the dissatisfaction of foreign investors and also, to establish a legal and regulatory mechanism which is absent nowadays after the termination of BITs.

If we look to the future, the legal arrangement would better work instead of any emotional or superfluous promises made by the government. India needs to show leniency in its dealings with foreign investors to compete with China.

The two recent announcements made by the government proved that the government of India lacks clarity on economic footings. The Prime Minister at the Davos meeting of the World Economic Forum 2018 compared the protectionist approach not less dangerous than terrorism and just after two years the Prime Minister has on 13 May 2020, pushes-up for '*Swadeshi movement*'. The PM had asked the nation to go '*vocal for local*' and use the current crisis to make India self-reliant.<sup>122</sup> Second, at the beginning of 2020, India considers replacing the BITs oriented protection of investment with a domestic investment law by speeding up a dispute resolution.<sup>123</sup> The government is thinking that India may not need to sign investment treaties with other nations if the new law, which is modelled on a BIT, can give confidence to investors.<sup>124</sup>

The government has been deviating from the path of trade liberalization on which India embarked in

1991 and working under the populist approach. This contradicts the governments' previous and the current willingness of welcoming foreign investors. If the government of India remains in this confused state of mind about the integration of Indian economy with the world economy, India is certainly going to lose the post-COVID 19 opportunities.