



BITs and Tribal Rights

What is the issue?

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- Recently, RAKIA, an Emirati investor, has initiated an investment treaty arbitration (ITA) claim against India under the India-UAE Bilateral Investment Treaty (BIT), seeking ~45 million compensation.

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- The claim arose after a MoU between Andhra Pradesh (A.P.) and RAKIA to supply bauxite to RAKIA, was allegedly canceled due to the concerns of the tribal people of that area.

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What protection do the Tribals have?

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- The United Nations Declaration on the Rights of Indigenous People (**UNDRIP**), 2007, for which India was a party, recognises indigenous peoples' rights to self-determination, self-governance, and their right against forcible displacement without prior and informed consent.

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- **ILO** Convention concerning Indigenous and Tribal Peoples, 1989, also recognizes recognises their right to land and natural resources and to define their own priorities for development.

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- Indian constitution provides autonomy to tribal areas in matters of governance under the **Fifth and Sixth Schedules**.

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- Rights are fortified by the *Samatha v. State of A.P. & Ors* judgment where the SC declared that the **transfer of tribal land to private mining was null and void** under the Fifth Schedule.

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- It is further strengthened by the **Recognition of Forest Rights Act, 2006** which protects their right to free and prior informed consent in event of their displacement and resettlement.

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What affects the Tribal rights?

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- A recent report of the **UN Special Rapporteur on the Rights of Indigenous Peoples** recognises three main reasons that foreign investments have on the rights of indigenous people:\n\n

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1. failure to adequately address human rights issues of tribal people in BITs;

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2. the perceived threat of ITA for enforcement of investor protection; and

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3. exclusion of indigenous people from the policymaking process.

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- Also, as the **Xaxa Committee report** highlighted, the legislations guaranteeing the rights of tribal people are regularly getting flouted.

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- Instead of ensuring the tribal rights, states are concerned about fulfilling contractual obligations towards the private investor.

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- This can be evidenced from Chhattisgarh and Jharkhand whom have reportedly entered into 121 and 74 MoUs, respectively, with various private players as of 2014.

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- All this alters the role of the state vis-à-vis the tribal people as the state prefers economic expediency at the cost of the tribal rights.

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How BITs come into play?

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 - For economic development, states invite foreign players whose interests are protected under the BITs.
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 - The purpose of BITs is to give **protection to foreign investors while imposing certain obligations on the host state.**
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 - If the foreign acquisition of tribal land is met with protest, two possible scenarios will happen.\n
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 - 1. the state govt due to pressures may yield to the demand of the tribal people to the detriment of the foreign investor, which is what has happened in the case of RAKIA.
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 - 2. the government continues with the project, the judiciary may order the cancellation of permits given to the foreign investor, which was happened in the **case of Vedanta, 2013.**
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 - In both the cases, foreign investors can drag India to ITA claiming violation of obligations under the BIT.
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What are the options available to India?

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 - None of the 80-plus BITs signed by India contains even a single provision on the rights of tribals.
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 - Therefore, to avoid ITA cases by foreign investors, **the govt should include special provisions** relating to the protection of indigenous people in BITs.
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 - Also, the strengthening of BITs must go hand in hand with the implementation of domestic legislations for the protection of tribal rights.
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 - Lastly, the tribal people should be given representation in the investment

policymaking.

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Source: The Indian Express

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