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INDIA'S MODEL BILATERAL INVESTMENT TREATY

IS INDIA TOO RISK AVERSE?

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By
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1 INTRODUCTION

Conventionally, bilateral investment treaties (BITs) are treaties between two countries aimed at protecting investments made by investors of both countries.[1] There has been a steady increase in the number of BITs across the world – from 500 in 1990s to more than 3,324 by the end of 2016.[2] These treaties impose conditions on the regulatory behaviour of the host state and thus, limit interference with the rights of the foreign investor.[3] These conditions include restricting host state from expropriating investments, barring for public interest with adequate compensation; imposing obligations on host states to accord fair and equitable treatment (FET) to foreign investment; allowing for transfer of funds subject to conditions given in the treaty; and most importantly, allowing individual investors to bring cases against host states if the latter's sovereign regulatory measures are not consistent with the BIT. If the foreign investor is successful in such claims, arbitral tribunals under the investor-state dispute settlement (ISDS) process could order host states to pay monetary damages to foreign investors.[4]

A variety of institutions are involved in ISDS such as the International Centre for Settlement of Disputes (ICSID), which is world's leading institution devoted to international investment dispute settlement.[5] ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States or the ICSID Convention.[6] The ICSID convention is a multilateral treaty ratified by 153 countries.[7] The treaty provides for settlement of disputes between foreign investors and nation states by using means such as conciliation and arbitration.[8] India is not a party to the ICSID convention.

1.1 Global backlash against BITs and ISDS

Globally, there has been a steady increase in the number of ISDS cases - from a negligible number in early 1990s, the total number of known ISDS cases rose to 767 as of January 1, 2017.[9] These disputes have covered a wide wide array of sovereign regulatory measures challenged by foreign investors as potential breaches of BITs, such as environmental policy;[10] regulatory issues related

1 *For a general discussion on BITs see R. Dolzer & C. Schreuer, Principles of International Investment Law (2012) [hereinafter Dolzer & Schreuer, Principles]; Jeswald Salacuse, The Law of Investment Treaties (2015) [hereinafter Salacuse, Law of Investment Treaties].*

2 *This includes 2957 stand-alone investment treaties and 367 Treaties with Investment Provisions (TIPs) or investment chapters in FTAs. See UNCTAD, World Investment Report – Investor Nationality: Policy Challenges 101 (2017) [hereinafter UNCTAD, World Investment Report 2017].*

3 *Dolzer & Schreuer, Principles, at 13*

4 *In this paper, ISDS and ISDS system are used interchangeably. While ISDS refers to just the dispute settlement system between the investor and the State, 'ISDS system' means not just the dispute settlement system but the entire universe of BITs and investment treaty arbitration.*

5 *About ICSID https://icsid.worldbank.org/en/Pages/about/default.aspx*

6 *Id.*

7 *ICSID Convention, https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx*

8 *About ICSID https://icsid.worldbank.org/en/Pages/about/default.aspx*

9 *See UNCTAD, Investment Dispute Settlement Navigator, http://investmentpolicyhub.unctad.org/ISDS.*

10 *Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000); Methanex Corporation v. United States of America, NAFTA-UNCITRAL, Award, (Aug. 3, 2005).*

to supply of drinking water;[11] monetary policy;[12] laws and policies related to taxation;[13] and regulations related to health.[14] There is backlash against international investment law due to the adjudication of such a gamut of sovereign regulatory measures by ISDS tribunals which count as potential breaches of BITs, and involve the award of substantive damages to foreign investors,[15] thus resulting in the diversion of taxpayer's money to foreign investors. This has given rise to concerns regarding the interface between BITs and investment protection on the one hand, and public policy concerns of the state on the other hand. One of the chief reasons for a wide range of sovereign decisions of host states being caught in the broad net of investor-state dispute settlement has been the vague and broad language of BITs.[16] For example, imprecise and broad provisions like Fair and Equitable Treatment (FET) become suitable candidates for broad and inconsistent treaty interpretations. In fact, the textual indeterminacy of BITs has resulted in divergent and inconsistent legal conclusions.[17]

Another major issue of concern has been the independence and impartiality of the ISDS mechanism in BITs.[18] For example, some argue that foreign investors and states nominate arbitrators to ISDS tribunals based on the positions taken by them in other arbitrations and/or in academic writings.[19] Thus, a foreign investor is more likely to nominate someone who is perceived to be more investor-friendly. Likewise, a state might nominate someone who is perceived to be more state-friendly. Appointments on such considerations raise doubts about the impartiality and independence of the system.

There are also issues related to conflicts of interest such as concerns with 'issue conflicts'. This has been defined as a conflict that stems from the arbitrator's relationship with the subject

[11] *Biwater Gauff Ltd v United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, (Jul. 24, 2008).*

[12] *CMS Gas Transmission Co v. Argentina, ICISD Case No ARB/01/8, Award, (May 12, 2005), [hereinafter CMS Award]; CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No ARB/01/8, Decision on the Argentine Republic's Application for Annulment of the Award, (Sept. 25, 2007) [hereinafter CMS Annulment]; Enron Corporation and Ponderossa Assents, L.P. v. The Argentine Republic, ICSID Case No ARB/01/3, Award, (May 22, 2007) [hereinafter Enron Award]; Enron Creditors Recovery Corp v Argentina ICSID Case No ARB/01/3, Decision on the Argentine Republic's Application for Annulment of the Award, (Jul. 30, 2010), [hereinafter Enron Annulment].*

[13] *Occidental Exploration & Production Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, (Jul. 1, 2004).*

[14] *Philip Morris Asia Ltd. v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, (Dec. 17, 2015); Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (Jul. 8, 2016).*

[15] *See Hulley Enterprises Limited (Cyprus) v. The Russian Federation (PCA Case No. AA 226), Final Award (Jul. 18, 2014); Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, (Jul. 18, 2014); Veteran Petroleum Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 228, (Jul. 18, 2014); See also, Martine Dietrich Brauch, Yukos v. Russia: Issues and legal reasoning behind US$50 billion awards, Inv. Treaty News (Sept. 4, 2014), https://www.iisd.org/itn/2014/09/04/yukos-v-russia-issues-and-legal-reasoning-behind-us50-billion-awards/.*

[16] *J E Alvarez and K Khamsi, The Argentine Crisis and Foriegn Investors in K Sauvant (Ed) Yearbook on International Investment Law and Policy (2008-09), 379 at 472-478; M A Clodfelter, 'The Adaptation of States to the Changing World of Investment Protection through Model BITs' (2009), 24 ICSID Review: Foreign Investment Law Journal, 165*

[17] *See A Reinisch 'The Future of Investment Arbitration' in C Binder et al eds., International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, 894, 905-908.*

[18] *Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' (n 35).*

[19] *B Pirker, 'Seeing the Forest Without the Trees – The Doubtful Case for Proportionality Analysis in International Investment Arbitration' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926166*

matter of the dispute, rather than the arbitrator's relationship with the parties to the dispute.[20] A notable way in which 'issue conflicts' arises is when an arbitrator concomitantly acts as a counsel in another case relating to similar issues.[21] In such situations there is an apprehension that the arbitrator can shape the interpretation of a legal principle in a manner that may benefit them in the case where they are appearing as the counsel.[22]

In this context, there is a backlash against BITs and ISDS due to their alleged failure to allow countries to address public policy concerns as evident in state practice.[23] The reactions against BITs and ISDS have ranged from terminating BITs, to giving up the ISDS mechanism, to altering the language of BITs to suitably incorporate public policy concerns. For example, countries such as Bolivia, Ecuador, and Venezuela have denounced the ICSID convention (that provides for ISDS mechanism) in 2007, 2009 and 2012, respectively,[24] and also terminated their respective BITs. Similarly, South Africa has terminated BITs, and has also repudiated the ISDS mechanism.[25] A more nuanced approach in this category is of countries like Australia in 2011, Australia stated that it would not have the ISDS provision in its treaties,[26] but changed this position in 2013 by stating it would negotiate for ISDS on a case-by-case basis.[27] Some countries have started contesting the ISDS system, not by taking the extreme step of denouncing BITs, but by developing a new BIT practice aimed at balancing investment protection and host state's right to regulate through precise drafting of the substantive provisions of these treaties[28] or by reasserting their right to regulate within these treaties.[29] Similarly, countries wish to amend the existing ISDS system by either making it more transparent[30] or by bringing about other kinds of reforms such

[20] *Nassib G. Ziadé, How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert? (2009) ICSID Review - Foreign Investment Law Journal, Volume 24, Issue 1, 2009, Pages 49–64, 49;*

[21] *Sundaresh Menon 'The Transnational Protection of Private Rights' in David D Carron et al (eds) Practising Virtue: Inside International Arbitration (OUP: Oxford: 2015), 17.*

[22] *Id.*

[23] *O.E. Garcia-Bolivar, Sovereignty vs. Investment Protection: Back to Calvo? 24 ICSID Rev - Foreign Inv. L. J. 470-47 (2009); See also Prabhash Ranjan, National Contestation of International Investment Law and International Rule of Law in Rule of Law at National and International Levels: Contestations and Deference 115-142 (M. Kanetake & A. Nollkaemper eds. 2016)*

[24] *See, Tania Voon & Andrew D. Mitchell, Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law 31:2 ICSID Rev – Foreign Inv. L. J. 413-433 (2016).*

[25] *For more on South Africa's BIT practice see Engela C. Schlemmer, An Overview of South Africa's Bilateral Investment Treaties and Investment Policy 31:1 ICSID Rev—Foreign Inv. L.J. 167 (2016). Also see Michael Webb, New Treatment of Foreign Investors in South Africa, http://isds.bilaterals.org/?new-treatment-of-foreign-investors&lang=en (last visited, Mar. 26, 2016). Some scholars support countries denouncing the ISDS system, see M. Sornarajah, Resistance and Change in International Law on Foreign Investment (2015).*

[26] *Australian Government, Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity (April 2011) http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf*

[27] *Leon Trakman & David Musayelyan, The Repudiation of Investor–State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor–State Arbitration, 31:1 ICSID Rev – Foreign Inv. L.J. 194-218, 200 (2016)*

[28] *The U.S. and Canadian Model BITs are examples of countries trying to define substantive provisions. See 2012 U.S. Model BIT, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [hereinafter 2012 U.S. Model BIT]; 2004 Canadian Model BIT, http://www.italaw.com/documents/Canadian2004-FIPA-Model-en.pdf [hereinafter, 2004 Canadian Model BIT].*

[29] *See Comprehensive Economic and Trade Agreement Between Canada, of the one Part, and the European Union, Oct. 30, 2016, Ch. 8 (Investment) [hereinafter Canada-E.U. CETA]*

[30] *On the issue of reforms to the ISDS system, see J.E. Kalicki & A. Joubin-Bret, Introduction - TDM Special Issue on 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap' 11 Transnat'l Disp. Mgmt. (TDM) (2014); and other contributions in the special issue.*

as introducing an appellate mechanism[31] or even developing a world investment court system.[32] Inter-governmental organisations like the United Nations Conference on Trade and Development (UNCTAD) have been at the forefront in analysing and demystifying various aspects of investment treaties for the benefit of member states. UNCTAD through its various publications also presents a bouquet of measures that countries can adopt to amend the BIT and the ISDS regime in ways that helps them reconcile their public policy concerns with the goals of investment promotion and protection. Likewise, the United Nations Commission on International Trade Law (UNCITRAL) has launched work aimed at addressing the challenges that countries face under the ISDS system.[33]

1.2 India's backlash against BITs and ISDS

India has also joined those countries contesting BITs and ISDS, particularly after its loss in the case, White Industries v India[34], in 2011, where an ISDS tribunal found that India violated its obligations under the India-Australia BIT.[35] This case arose when White Industries, an Australian investor, filed a case against India under the India-Australia BIT due to inordinate judicial delays in enforcing a commercial arbitration award against Coal India Limited in India. Among other things, White Industries argued that because of the judicial delays India had failed to provide "effective means of asserting claims and enforcing rights" (the 'effective means' standard) to White Industries. The tribunal agreed with White Industries and held India responsible for violating the 'effective means' standard. Although this requirement is not given in the India-Australia BIT, the tribunal held that by virtue of the Most Favoured Nation (MFN) clause in the India-Australia BIT,[36] White industries could invoke the 'effective means' standard accepted by India under the India-Kuwait BIT.[37] Article 4(5) of the India-Kuwait BIT gives the 'effective means' standard as follows:

> *Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority...*

[31] *Eun Young Park, Appellate Review in Investor State Arbitration in Reshaping the Investor-State Dispute Settlement 443-454 (Jean E Kalicki et al. eds., 2015),*

[32] *See Free Trade Agreement Between the European Union and The Socialist Republic of Vietnam, Chapter II (Investment), section 3, art. 15 (Agreed text as of January 2016); Also, see, Piero Bernardini, Reforming Investor State Dispute Settlement: The Need to Balance Both Party's Interest 32:1 ICSID Rev. – Foreign Inv. L.J., 38-57 (2017).*

[33] *United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-fourth session, Vienna, 27 November-1 December 2017 https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/067/48/PDF/V1706748.pdf?OpenElement*

[34] *White Industries Australia Limited v. Republic of India, UNCITRAL, Final Award (Nov. 30, 2011). [hereinafter, White Industries].*

[35] *Id., 16.1.1 (a).*

[36] *Article 4(2) of the India-Australia BIT provides the MFN provision according to which, 'a contracting party shall at all times treat investments in its territory on a basis no less favourable than that accorded to investments or investors of any third country'.*

[37] *Id paras11.2.2 - 11.2.8. Also see discussions in chapter 4.*

After this award, a number of foreign corporations slapped ISDS notices against India challenging a wide array of regulatory measures such as the imposition of retrospective taxes,[38] cancellation of spectrum licences,[39] and revocation of telecom licenses.[40] Recently, Japanese automaker Nissan sued India under the India-Japan Comprehensive Economic Partnership Agreement (CEPA).[41] According to UNCTAD, a total of 22 ISDS claims have been brought against India so far, out of which a large number of cases are pending.[42] It is also worth mentioning that some Indian investors have also initiated ISDS claims against other countries though such instances are few in comparison to the cases brought against India.[43]

These ISDS cases against India led to a fundamental rethink and review of BITs in India.[44] As an outcome of this review India adopted a Model BIT in early 2016[45] to provide "appropriate protection to foreign investors in India" "while maintaining a balance between investor's rights and the government's obligations".[46] The Indian government told the Parliament that the "new Indian Model Bilateral Investment Treaty text is aimed at providing appropriate protection to foreign investors in India and Indian investors in the foreign country, in the light of relevant international

[38] *Vodafone issued an arbitral notice to India under the India-Netherlands BIT for a retrospective taxation measure—see Vodafone v. India, UNCTIRAL, Notice of Arbitration (not public) (Apr. 17, 2014); Cairn Energy also dragged India to arbitration under the India-UK BIT for a retrospective taxation measure. In this case, the arbitration tribunal has been constituted—see, Cairn Energy PLC v. India (UNCITRAL), http://investmentpolicyhub.unctad.org/ISDS/Details/691.*

[39] *Germany's Deutsche Telekom issued notice of arbitration to India under the India-Germany BIT over a cancelation of a satellite venture—see Deutsche Telekom v. India, ICSID Additional Facility, Notice of Arbitration (not public) (Sept. 2, 2013). This cancellation of spectrum licenses also led Mauritian investors of Devas Multimedia, an Indian company, to challenge India's regulatory actions under the India-Mauritius BIT at the Permanent Court of Arbitration. CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v. Republic of India, PCA Case No 2013-09. Although the ISDS award has not been made public, reportedly, the tribunal has found India guilty of violating the expropriation and FET provisions of the India-Mauritius BIT [Antrix-Devas Deal: Permanent Court of Arbitration rules against Indian government, The Indian Express (Jul. 27, 2016), http://indianexpress.com/article/business/business-others/antrix-devas-deal-hague-international-tribunal-rules-against-indian-govt/.*

[40] *Tenoch Holdings issued an arbitral notice against India under the India Russia and India-Cyprus BIT for withdrawal of approval to grant telecom licenses, see Tenoch Holdings Limited, Mr Maxim Naumchenko & Mr. Andre Poluektov v. The Republic of India, PCA Case No. 2013-23.*

[41] *Nissan sues India over outstanding dues; seeks over $770 million, Reuters, available at:*

[42] *http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2*

[43] *http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=1*

[44] *Saurabh Garg et al., The Indian Model Bilateral Investment Treaty: Continuity and Change Rethinking Bilateral Investment Treaties – Critical Issues and Policy Choices 69-80, 71 (Kavaljit Singh and Burghard Igle eds., 2016); Department of Economic Affairs, GoI, The Indian Experience, supra note 39; See also, Statement by India at the World Investment Forum 2014, UNCTAD, http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Mayaram.pdf [hereinafter, India 2014 Statement]*

[45] *Model Text for the Indian Bilateral Investment Treaty 2016, http://www.dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf [hereinafter 2016 Indian Model BIT] Important to keep in mind that the Indian Model BIT contains two dates – 28 December 2015 given in the letter accompanying the text http://www.dea.gov.in/sites/default/files/OM_BIT_0.pdf; and 14 January 2016 on the website of the Ministry of Finance, Government of India (http://mof.gov.in/) as the date of adoption of the Model BIT. In this paper, we use the 14 January 2016 date, and thus call the Model BIT as 2016 Indian Model BIT and not 2015 Indian Model BIT. For a detailed commentary on the Indian Model BIT see Prabhash Ranjan and Pushkar Anand, 'The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction 38 Northwestern Journal of International Law and Business, 1.*

[46] *Saurabh Garg et al., The Indian Model Bilateral Investment Treaty: Continuity and Change Rethinking Bilateral Investment Treaties – Critical Issues and Policy Choices 69-80, 71 (Kavaljit Singh and Burghard Igle eds., 2016) [hereinafter Saurabh Garg et al., Continuity and Change]; Department of Economic Affairs, Ministry of Finance, Government of India, Transforming the International Investment Agreement Regime: The Indian Experience, http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/India_side-event-Wednesday_Model-agreements.pdf. (India's presentation in a Side Event at World Investment Forum 2016) [hereinafter Department of Economic Affairs, GoI, The Indian Experience].*

precedents and practices, while maintaining a balance between the rights of the investors' rights and the obligations of the government."[47]

It is interesting to note that the Indian Model BIT retains the ISDS mechanism to settle disputes with foreign investors though it adds a number of conditions that an investor needs to meet before accessing ISDS. The adoption of the Model BIT with the ISDS mechanism shows that India has rejected the extreme option exercised by countries like South Africa to walk out of the system. India wants to be a part of the system although with different terms of engagement. Consequently, India has changed the scope and content of certain key provisions in the Model BIT to limit challenges to its actions.

India has adopted a two-pronged approach with respect to its existing BITs. Firstly, the government has served notices to 58 countries (inter alia, United Kingdom, France, Germany and Sweden) with whom existing BITs have either expired or will expire soon.[48] India wants to renegotiate a new BIT with these countries based on the Model BIT.[49] Second, for the remaining 25 countries (inter alia, China, Finland, Bangladesh and Mexico), India has asked for joint interpretive statements (JIS) to clarify ambiguities in treaty texts so as to avoid expansive interpretations by arbitration tribunals.[50] India also aims to use the revised BIT framework to negotiate future Investment Chapters in Free Trade Agreements (FTAs) such as Comprehensive Economic Cooperation Agreements (CECAs) and Comprehensive Economic Partnership Agreements (CEPAs) or Free Trade Agreements (FTAs).[51] Barring Bangladesh,[52] it is not known if any other country has accepted India's proposed JIS note.

[47] *See, Government of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion, Lok Sabha Unstarred Question No. 1290 (July 25, 2016), http://164.100.47.190/loksabhaquestions/annex/9/AU1290.pdf (last visited, Aug. 8, 2017).*

[48] *See, Government of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion, Lok Sabha Unstarred Question No. 1290 (July 25, 2016), http://164.100.47.190/loksabhaquestions/annex/9/AU1290.pdf. However, despite this termination, the treaty provisions shall continue to remain effective for investments made before the date of termination for a further period of 15 years – see Article 16(1) of the India-Netherlands BIT.*

[49] *Press Information Bureau, Government of India, Ministry of Finance, http://pib.nic.in/newsite/PrintRelease.aspx?relid=133412*

[50] *Government of India, Ministry of Finance, Department of Economic Affairs, Office Memorandum - Regarding Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties, (Feb. 8, 2016), http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf. [hereinafter, Consolidated Interpretative Statement]*

[51] *Press Information Bureau, Government of India, Ministry of Finance, http://pib.nic.in/newsite/PrintRelease.aspx?relid=133412*

[52] *Press Information Bureau, Government of India, Cabinet approves Joint Interpretative Notes on the Agreement between India and Bangladesh for Promotion and Protection of Investments, 12 July 2017, http://pib.nic.in/newsite/PrintRelease.aspx?relid=167345; Signing of Joint Interpretative Note (JIN) to Bilateral Investment Agreement Between India and Bangladesh http://dea.gov.in/sites/default/files/Signed%20Copy%20of%20JIN.pdf*

1.3 The purpose of this paper

Against the above background, this paper has the following objectives:

a) It discusses some of the key provisions of the Indian Model BIT and examines to what extent they reconcile investment protection with the host state's public policy concerns;
b) It examines whether the Indian Model BIT's objectives can be achieved using less exclusionary criteria to address India's public policy concern;
c) If this is so, the paper will first examine the possibility of addressing India's concerns, without taking any extreme positions. It also draws upon practices followed by other countries or in other treaties (also see Annexure I). Since BIT is a bilateral treaty signed between two countries based on mutually beneficial terms, it is only imperative that the Indian Model BIT is compared with the practice followed by other countries or those followed in other BITs and FTA investment chapters.
d) Additionally, the paper assesses a few instances where the text remains open to "arbitrary" determination under ISDS, thus undermining the purpose behind adopting the Model BIT.

The paper is divided in following parts: Section II gives a brief overview of India's BIT programme thus far. Section III discusses some of the key provisions of the Indian Model BIT: definition of investment; MFN, FET; ISDS; general and other exceptions. For each part, the paper discusses the current formulation for these provisions in the Model BIT to examine how they address India's public policy concerns and then examines whether these concerns could be addressed with a different balance between the state's need for policy flexibility and not undermining the protection for foreign investment. In this section we also compare the relevant provisions in the Indian Model BIT with the provisions given in other important investment treaties such as the U.S.-Korea BIT 2012, Canada-EU Comprehensive Economic and Trade Agreement (CETA) 2016, India-Korea Comprehensive Economic Partnership Agreement (CEPA) 2009, and the Trans-Pacific Partnership (TPP)[53]- see Appendix 1. Section IV offers the conclusion by outlining the challenges and way forward for India's BIT framework, including some suggestions on how the objectives of public policy may be balanced with protection of foreign investment. This would suggest a basis for further reconsideration of the Model BIT.

[53] *Now being renegotiated by the 11 remaining TPP members after the exit of the U.S. from that agreement.*

2 The Indian BIT programme

India started signing BITs in the early 1990s as a part of its overall strategy of economic liberalisation adopted in 1991 and had the clear objective of attracting foreign investment.[54] The Ministry of Finance, the nodal body in India that deals with BIT policy and negotiations, states: *"As part of the Economic Reforms Programme initiated in 1991, the foreign investment policy of the Government of India was liberalised and negotiations undertaken with a number of countries to enter into Bilateral Investment Promotion and Protection Agreement (BIPAs) in order to promote and protect on reciprocal basis investment of the investors."* [55]

This policy objective is also clearly reflected in the statements of different Indian finance ministers from 1994 to 2011 in 'compendiums' of Indian BITs. In the first volume (published in 1996-97) Finance Minister P Chidambaram, wrote that after the adoption of liberal economic policies in 1991, India initiated the process of entering into BITs with a view to provide enhanced confidence to foreign investors[56] to attract foreign investment. This view has been repeated in all subsequent volumes by different finance ministers belonging to different governments.[57] The press releases issued by India after entering into BITs with different countries also reveal that BITs are primarily about providing protection to foreign investment with the hope of increasing them. For example, the press release on India-China BIT states that *"the agreement will increase investment between India and China"*.[58] The same view is echoed in the press release issued on the occasion of signing of the India-Brunei BIT. The press release states, *"the Agreement, which seeks to promote and protect investments from either country in the territory of the other country with the ultimate objective of increasing bilateral investment flow"...*[59]

[54] *For a full discussion of India's BIT programme, including its origin and evolution, see Prabhash Ranjan, India and Bilateral Investment Treaties – A Changing Landscape 29 ICSID Rev. Foreign Inv. L.J. 419 (2014) [hereinafter Ranjan, Changing Landscape]; Prabhash Ranjan, India's International Investment Agreements and India's Regulatory Power as a Host Nation (PhD thesis, King's College London 2012), https://kclpure.kcl.ac.uk/portal/files/13524464/Studentthesis-Prabhash_Ranjan_2013.pdf [hereinafter Ranjan, PhD Thesis]. A recent study claims that BITs signed by India have contributed to rising FDI inflows 'by providing protection and commitment to foreign investors contemplating investment in India' – see Niti Bhasin & Rinku Manocha, Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India, 41(4) VIKALPA: J. Decision Makers 275-287 (2016). Luke Nottage & Jaivir Singh, Does ISDS Promote FDI? Asia-Pacific Insights from and for Australia and India, Asia Pacific Forum for International Arbitration (AFIA) (Nov. 17, 2016), http://afia.asia/2016/11/does-isds-promote-fdi-asia-pacific-insights-from-and-for-australia-and-india/. (last visited, Aug. 8, 2017)*

[55] *Ministry of Finance (2011). Also see the 'Forewords' written by various Indian Finance Ministers on the BIT programme available in Ministry of Finance, Government of India Compendiums on BIPAs (Finance Ministry 1996-2011).*

[56] *P Chidambaram, 'Foreword' in Government of India (ed), India's Bilateral Investment Promotion and Protection Agreements, (New Delhi: Ministry of Finance, India: Volume I: 1997).*

[57] *See Y Sinha, Foreword, in Government of India (ed) India's Bilateral Investment Promotion and Protection Agreements (New Delhi: Ministry of Finance, India: New Delhi, Volume III: 1999); P Mukherjee, Foreword in India's Bilateral Investment Promotion and Protection Agreements (New Delhi: Ministry of Finance, India: Volume VII: 2009).*

[58] *Press Information Bureau Press Release, 'Bilateral Investment Promotion Agreement with China' (16 November 2006) <http://pib.nic.in/newsite/erelease.aspx?relid=22062>*

[59] *Ministry of Finance Press Release, 'A Bilateral Investment Promotion and Protection Agreement between the Government of the Republic of India and the Government of His Majesty The Sultan and Yang Di-Pertuan of Brunei Darussalam' (May 2008) http://dea.gov.in/pressrelease/bilateral-investment-promotion-and-protection-agreement-bipa-between-government*

2.1 India's BITs

India signed the first BIT with the United Kingdom (UK) in 1994. Since 1994 India has signed BITs with 84 countries.[60] Additionally, it has also signed investment agreements with ASEAN countries;[61] and FTAs with investment chapters with the following Asian countries: Singapore, Japan, Malaysia and Korea. India's BITs with these 84 countries, by and large, contain broad substantive provisions that could be interpreted in a manner that gives precedence to investment protection over the host state's right to regulate.[62] Most Indian BITs resemble the lean European style BITs developed by capital-exporting countries of western Europe to protect their investment in developing countries.[63]

Despite India's mammoth BIT programme, BITs in India didn't attract much critical attention from 1994 to the end of 2011.[64] This was mainly because of India's marginal involvement with ISDS.[65] In this period, although nine BIT cases were brought against India,[66] they all pertained to just one project – the Dabhol power project.[67] And none of these challenges resulted in an ISDS award though there were a couple of other arbitral awards.[68] This lack of attention on BITs, as mentioned above, started to change from 2011 onwards owing to India's increased involvement with ISDS from that year on.

The total FDI flows to India has increased from $4,029 million in 2000-2001 to $43,478 in 2016-17.[69] However, the key question is what role have BITs played in this? Some studies show

[60] *UNCTAD, International Investment Agreements Navigator, India, http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu. However, despite this termination, the treaty provisions shall continue to remain effective for investments made before the date of termination for a further period of 15 years – see Article 16(1) of the India-Netherlands BIT.*

[61] *Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India, Nov. 12, 2014 (yet to come into force). [ASEAN-India FTA]*

[62] *See Ranjan, PhD Thesis, supra note 5; see Government of India, Ministry of Commerce and Industry, Rajya Sabha, Question No. 1122, Answered on Jul. 26, 2017, http://164.100.47.4/newrsquestion/ShowQn.aspx (last visited, Aug. 8, 2017).*

[63] *Prabhash Ranjan, 'Comparing Investment Provisions in India's FTAs with India's Stand Alone BIT: Contributing to the Evolution of the New Indian BIT Practice' (2015) 16 (5-6) JWIT 899, 901. See also Lauge Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Bilateral Investment Treaties in Developing Countries (CUP 2015) 17-26.*

[64] *Ranjan, Changing Landscape, supra note 57, at 436-438.*

[65] *Ranjan, Changing Landscape, supra note 57. This is confirmed by three Indian government officials who recently wrote that 'until the White Industries award, there had been little debate about the investment regime' in India – Saurabh Garg et al., Continuity and Change, supra note 39, at 71. It has been found that till countries are hit by BIT claims, it may be difficult for the country concerned to fully appreciate the cost of the BIT – Lauge N. Skovgaard Poulsen & Emma Aisbett, When Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning 65:2 World Pol. (2013).*

[66] *India – as Respondent State, Investment Policy Hub, UNCTAD http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2*

[67] *For detailed facts of the case, see P. Kundra, Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons 41 Vand. J. Transnat'l L. 908 (2008). Also see GE settles Dabhol Issue, The Indian Express (Mumbai, July 3, 2005), http://www.indianexpress.com/oldStory/73760/.*

[68] *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India, ICC Case No. 12913/MS, Award, (Apr. 27, 2005); Bank of America, Memorandum of Determinations, OPIC, IIC 25 (2003), https://www.opic.gov/sites/default/files/docs/BankofAmerica-September30-2003.pdf.*

[69] *Quarterly Fact Sheet, Fact Sheet on Foreign Direct Investment from April 2000 to March 2017, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, http://dipp.nic.in/sites/default/files/FDI_FactSheet_January_March2017.pdf (last visited, Aug. 8, 2017). According to the Indian government, FDI inflows include equity inflows plus reinvested earnings plus other capital.*

that BITs could have a positive impact on FDI inflows. For instance, a study by Rashmi Banga that examines the impact of BITs on FDI inflows in 15 Asian developing countries including India from 1980-81 to 1999-2000, shows that BITs signed by these 15 countries with developed countries had a relatively stronger and significant impact on their FDI inflows.[70] However, the same was not true for when BITs were signed by these 15 countries with developing countries.[71] Till the year 2000, out of the 14 BITs India signed, nine were with developed countries.[72] Another study, a very recent one by Niti Bhasin and Rinku Manocha, considers the impact of BITs on FDI inflows in India from 2001-2012.[73] This study shows that "BITs have contributed to rising FDI inflows by providing protection and commitment to foreign investors contemplating investment in India".[74] Similarly, the preliminary results of another study finds that "although the signing of individual BITs had an insignificant impact on FDI inflows into India, the cumulative effect of signing BITs is significant and so is the coefficient associated with the signing of FTAs. Since almost all of India's investment treaties provide for full ISDS protections, these preliminary results suggest that ISDS could have a positive influence on overall foreign investment, albeit in a non-obvious compound manner."[75]

Significantly, UNCTAD (2014) has reviewed the literature on the impact of international investment agreements (IIAs) on FDI from 1998 to 2014 and finds that *"the majority of studies find a positive impact of IIAs on FDI, with some studies establishing a causal relationship between the two. More nuanced research finds that the content of IIAs matters: IIAs positively influence FDI flows, provided that they include certain substantive provisions and guarantees."* [76] The UNCTAD paper also observes that from the perspective of investors, BITs and other IIAs provide stability, protect investors and, more generally, contribute to a better investment climate.[77]

Summarising the insights from the literature, we can see that BITs alone are not sufficient to attract FDI but they do play a useful role towards creating an overall positive environment for attracting foreign investment.

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[70] *Rashmi Banga, 'Impact of Government Policies and Investment Agreements on FDI Inflows' ICRIER Working Paper No 116 <http://www.icrier.org/pdf/WP116.pdf>*

[71] *Id*

[72] *Accordingly, one argument could be that BITs had a positive impact on FDI inflows in India in this period that rose from $393 million in 1992-93 to $4029 million in 2000-01.*

[73] *Niti Bhasin and Rinku Manocha, 'Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India' (2016) 41(4) Vikalpa: The Journal for Decision Makers 275.*

[74] *Id, 285.*

[75] *Luke Nottage and Jaivir Singh, 'Does ISDS Promote FDI? Asia-Pacific Insights from and for Australia and India' (AFIA, 17 November 2016) <http://afia.asia/2016/11/does-isds-promote-fdi-asia-pacific-insights-from-and-for-australia-and-india/>*

[76] *UNCTAD (2014), The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998-2014, http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2024.pdf*

[77] *Id. Also see other studies that show a positive relationship between BITs and FDI inflows - Neumayer, E. and L. Spess (2005). "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?", World Development, Vol. 33, No. 10, pp. 1567–1585; Berger, A., M. Busse, P. Nunnenkamp and M. Roy (2011). "More Stringent BITs, Less Ambiguous Effects on FDI? Not a BIT!", Economics Letter, Vol. 112, No. 3, pp. 270-272*

3 Analysing key provisions in India's Model BIT

The Indian BIT model was approved by the Cabinet in December 2015. This adoption was preceded by the circulation of the draft version of the Model BIT in March 2015,[78] for comments. The draft Model BIT attracted considerable attention, including a full report from the Law Commission of India.[79] The 2015 Model BIT, unlike India's 2003 Model BIT,[80] is very detailed, containing 38 Articles divided into seven chapters.[81]

India's new Model BIT is a major departure from its earlier framework as it incorporates significant changes in its attempt to safeguard the interests of the host states. Our analysis addresses some key concepts of the Indian model BIT. We also compare India's BIT with some other notable international investment agreements. A more detailed breakdown of provisions relating to these issues discussed can be found in Appendix I.

3.1 Definition of Investment

The definition of investment in the Model BIT has moved away from a broad asset-based definition of investment to an enterprise-based definition where an enterprise is taken together with its assets. Art 1.4 of the Indian Model BIT provides:

'Investment' means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the party in whose territory the investment is made. An enterprise may possess the following assets:

(a) shares, stocks and other forms of equity instruments of the enterprise or in another enterprise;
(b) a debt instrument or security of another enterprise;
(c) a loan to another enterprise
(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the loan is at least three years;

[78] *Draft Model Text for the Indian Bilateral Investment Treaty, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf. [hereinafter, 2015 Draft Indian Model BIT]*
[79] *Government of India, Law Commission of India, Report No 260, Analysis of the Draft Model Indian Bilateral Investment (August 2015), http://lawcommissionofindia.nic.in/reports/Report260.pdf.*
[80] *Indian Model Text of Bilateral Investment Promotion and Protection Agreement, http://www.italaw.com/sites/default/files/archive/ita1026.pdf. [hereinafter, 2003 Indian Model BIT]*
[81] *For detailed comments on the 2016 Indian Model BIT see Prabhash Ranjan and Pushkar Anand, 'The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction', 38 Northwestern Journal of International Law and Business (2018) (Forthcoming); ' Grant Hanessian & Kabir Duggal, The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See, ICSID Rev. – Foreign Inv. L. J. (2017), doi:10.1093/icsidreview/siw020 [hereinafter Hanessian & Duggal, Is this the Change the World wishes to See (2017)].*

(d) licences, permits, authorisations or similar rights conferred in accordance with the law of a party;
(e) rights conferred by contracts of a long-term nature such as those to cultivate, extract or exploit natural resources in accordance with the law of a party, or
(f) Copyrights, know-how and intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognised under the law of a party; and
(g) moveable or immovable property and related rights;
(h) any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value.

Therefore, only an enterprise that is legally constituted in India can bring a BIT claim.[82] Moving away from an asset-based approach to an enterprise-based approach aims at narrowing the scope of investments to be protected and thus seeks to reduce the number of BIT claims that can be brought against India.[83]

In the 2016 Model BIT, investment means an enterprise that has been constituted, organised, and operated in good faith by an investor in accordance with the domestic laws of the country.[84] Article 1.4 also provides a non-exhaustive list of assets that an enterprise may possess. It further provides that the enterprise must satisfy certain characteristics of investment such as commitment of capital and other resources, certain duration, the expectation of gain or profit, and the assumption of risk and significance for the development of the country where the investment is made.[85]

This definition of investment is not clear on the actual meaning of the relevant characteristics that an enterprise or asset is expected to possess, which will create uncertainty for foreign investors and states. We discuss two aspects of the definition of investment to substantiate this point.

First, the definition of investment requires that an enterprise must meet the requirement of 'certain duration' to qualify as foreign investment. In other words, if an enterprise has not been in existence in the host State for 'certain duration' of time, it will not qualify as investment. However, the definition does not specify how long the enterprise should be in existence to be part of the definition of investment. Consequently, it will be incumbent on the ISDS tribunal to answer this question, which will not only bring in an element of arbitrariness but also uncertainty for both

[82] *Art. 1.3 provides: enterprise means: (i) any legal entity constituted, organized and operated in compliance with the law of a party, including any company, corporation, limited liability partnership or a joint venture; and (ii) a branch of any such entity established in the territory of a party in accordance with its law and carrying out business activities there.*
[83] *Mysore, Srikar & Aditya Vora. 2016. 'Tussle for Policy Space in International Investment Norm Setting: The Search for a Middle Path?', Jindal Global Law Review, 7(2): 135, 143.*
[84] *2016 Indian Model BIT, Art 1.4.*
[85] *Ibid, Art. 1.4 (a) to (h).*

the investor and the state. Important to note, as presented in the Annexure, barring the EU-Canada CETA, no other BIT or FTA investment chapters of the two FTAs the paper has studied (CPTPP Agreement and the India-Korea FTA investment chapter) lists 'duration' as one of the criteria to define investment. Moreover, in the EU-Canada CETA, 'certain duration' has a different context because the EU-Canada CETA follows an asset-based definition of investment and not an enterprise-based one. In the EU-Canada CETA, 'an enterprise' is one of the many forms that an investment can take.

Second, while the definition of investment mentions 'significance for the development' of the host state as one of the criteria to qualify as foreign investment, it does not provide any indications in the text as to how to determine whether an enterprise has been significant for the development of the host state. It has been argued that this requirement was inserted in the Model BIT to ensure that assets that do not contribute to the development of the host country do not enjoy treaty protection.[86]

As the tribunal in LESI SpA v Algeria held, it is difficult to ascertain whether an investment has contributed to the development of the host state.[87] For instance, it is not clear how sizeable or successful the investment should be to conclude that it has contributed to the development of the host state.[88] While some tribunals suggest that it is enough if the investment contributes in one way or another,[89] other ISDS tribunals have held that this contribution should be 'significant'.[90] What are the benchmarks against which the 'significance' of contribution will be measured? Leaving such difficult questions for an ISDS tribunal to decide is the exact opposite of reducing arbitral discretion, which India claims is one of the objectives of the Model BIT. This makes the law vague and creates ambiguity for both the foreign investor and the state.

Therefore, the definition of investment in the Indian Model BIT tilts the balance in favour of arbitrariness, or alternatively towards the host state. Treaty protection could be denied to foreign investments despite being lawful and despite making a commitment of capital or other resources on the subjective ground that it is not significant for the development of the host state.

[86] *Garg and others, Continuity and Change (n 3) 84. On broad asset based definitions of foreign investment allowing for a large range of transactions to enjoy protection under the BIT see UNCTAD (2011), 9.*
[87] *LESI SpA et Astaldi SpA v. Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction (French) (12 July 2006), para 72(iv).*
[88] *See Mr. Patrick Mitchell v. The Democratic Republic of Congo, ICSID Case No. ARB/99/7, Annulment proceeding (9 February 2004) para 33.*
[89] *Ibid.*
[90] *Malaysian Historical Salvors v Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (17 May 2007) para 124.*

3.1.1 Alternative formulation

It is quite evident that India has adopted an enterprise-based definition of investment in order to narrow down the scope of treaty protection. India is keen to provide treaty protection only to assets owned by an enterprise that have a certain degree of economic utility such as making commitment of capital or resources. Nonetheless, for the reasons mentioned above, there is a need to relook at the definition of investment so as to reduce arbitral discretion and uncertainty in interpretation.

India should have a closer look at other major investment treaties, including the U.S.-Korea BIT (2012), Canada-EU CETA (2016), India-Korea CEPTA (2009), and CPTPP Agreement that adopt an asset-based definition of investment. In these treaties, though definition of investment is a broad asset-based definition, it is restricted by limiting it only to those assets that possess certain characteristics of investment, like commitment of capital or other resources, the expectation of gains or profits or the assumption of risk.[91] In other words, if an asset satisfies the basic economic requirements of investment, it would qualify as worthy of protection under the BIT. This asset-based definition of investment is broad enough to cover all assets, and thus, takes care of the concerns of foreign investors. At the same time, by limiting the protection to only those assets that meet certain basic economic characteristics of investment, it takes care of concern of the state to provide protection to only those assets that are economically useful.

3.2 Most Favoured Nation (MFN)

The Most Favoured Nation (MFN) provision in BIT aims to create a level-playing field for all foreign investors by prohibiting the host state from discriminating against investors from different countries.[92] In ISDS claims, foreign investors have often used the MFN provision of the primary BIT (under which the dispute between investor and state arises) successfully to borrow a favourable substantive provision granted by the host state under another BIT (secondary BIT).[93] Foreign investors have also relied upon the MFN provision in the primary BIT to borrow beneficial ISDS

[91] *See India Malaysia FTA art 10.2 (d); India-Korea FTA art 10.1; India-ASEAN Investment Agreement, art 2(e); India-Japan FTA, art 3(i) Note 2*

[92] *OECD, Most-Favoured-Nation Treatment in International Investment Law, OECD Working Papers on International Investment 2004/02, http://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf*

[93] *See, Vladimir Berschader and Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004, Award, 179 (Apr. 21, 2006); Asian Agricultural Products v Sri Lanka, ICSID Case No. ARB/87/3, Final Award, 54 (June 27, 1990) [hereinafter, AAPL]. Although in this case, the investor could not succeed because of being unable to show that Sri Lanka's BIT with Switzerland contained a more beneficial provision. See 54; MTD Equity v. Republic of Chile, ICSID Case No ARB/01/7, Award, (May 25, 2004); Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş v. Islamic Republic of Pakistan, ICSID Case No ARB/03/29, Decision on Jurisdiction, (Nov. 14, 2005); Also see Rumeli Telekom v Republic of Kazakhstan, ICSID Case No ARB/05/16, Award, 572, 575 (July 29, 2008); Pope and Talbot Inc. v. The Government of Canada, UNCITRAL, Award on the Merits of Phase 2, (Apr. 10, 2001) [hereinafter, Pope and Talbot, Award on Merits]; Also see Schill, Multilateralization, supra note 128.*

provisions from secondary BITs[94] with varying degrees of success.[95]

It is noteworthy that India's model BIT completely excludes the MFN clause. This can be seen as a direct reaction to the ruling against the government in White Industries v. Republic of India. In that case, White Industries Australia Limited invoked the MFN clause from the India-Australia BIT to benefit from the more favourable rights of investors provided for in the India-Kuwait BIT so that it could invoke the right to be provided an effective means of asserting claims and enforcing rights. The exclusion of MFN is to prevent such cases of 'treaty shopping', whereby foreign investors take advantage of provisions in other BITs by 'borrowing' them through the MFN clause.[96]

Post the White Industries setback,[97] India took the stand that use of the MFN provision by foreign investors to borrow beneficial substantive and procedural provisions from third country BITs, in order to replace or supplement the provisions of the primary BIT, disturbs the various strategic, diplomatic, and political reasons behind negotiating bilateral treaties.[98] Therefore, in order to ensure that there is no repeat of a White Industries situation, the Indian Model BIT does not include an MFN provision.[99]

However, not having an MFN provision in the BIT means exposing foreign investment to the risk of discriminatory treatment by the host state, which could offer preferential treatment to the foreign investor under one BIT without providing the same treatment to another foreign investor under another similar treaty. While not providing the MFN provision addresses India's concerns, it undermines protection for foreign investors and exposes them to uncertainty. The absence of an MFN provision strongly tilts the scale towards host state's interests, undermining those of foreign investors.

MFN benefits could apply in two different ways. One, the usual MFN consideration, where domestic regulations are applied in the same manner to all MFN countries with whom a similar agreement is signed. Another is the wider interpretation of MFN to include the provisions in all agreements

[94] *See Rudolf Dolzer & Terry Myers, After Tecmed: Most Favoured Nation Clauses in International Investment Protection Agreements, 19 ICSID Rev. Foreign Inv. L. J. 49 (2004); Stephen Fietta, Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point? 8 Int'l. Arb. L. Rev. 131 (2005); Martins Paparinskis, MFN Clauses and International Dispute Settlement: Moving beyond Mafezzini and Plama?, 26 ICSID Rev. Foreign Inv. L. J. 14 (2011).*

[95] *See, Emilio Augustine Mafezzini v. Spain, ICSID Case No ARB/97/7, Award, (Nov. 13, 2000); Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 108 (Aug. 3, 2004); Gas Natural v. Argentina, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 49 (Jun. 17, 2005).*

[96] *It is interesting that some of the recent trade agreements, such as TPP, have included this kind of provision in the regulatory agreement specified for trade in services.*

[97] *White Industries Australia Limited v. Republic of India, UNCITRAL, Final Award (30 November 2011), discussed in chapter 4.*

[98] *Statement by India at the World Investment Forum 2014, UNCTAD, http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Mayaram.pdf (hereinafter 'India's 2014 Statement') accessed 9 January 2018; Garg and others, Continuity and Change (n 3) 75-76.*

[99] *Garg and others, Continuity and Change (n 3) 76.*

with other economies, past or future, however different be the nature of provisions covered in those agreements. Arguably, the latter interpretation of MFN in effect changes the content of any agreement and allows parties to pick and choose beneficial substantive, and in some cases procedural, treaty provisions from different agreements. It is the latter that is a matter of concern for India after the White Industries case, and this is the aspect of MFN that we address below.

3.2.1 Alternative formulation

India's concern that foreign investors should not be allowed to use the MFN provision to borrow beneficial procedural and substantive provisions from third-country BITs could have been addressed by limiting the scope of the MFN treatment in the BIT. The EU-Canada Comprehensive Economic and Trade Agreement (CETA)[100] shows how this can be done (Also see Annexure I that provides MFN formulation in other important treaties).

Article 8.7(1) of the EU-Canada CETA contains the MFN provision that puts both sides under an obligation not to accord treatment less favourable to a foreign investor than that accorded in like situations to investors of a third country with respect to the establishment, acquisition, expansion, conduct etc. In order to limit the scope of the MFN provision so as to exclude the situation of beneficial treaty shopping, Article 8.7(4) states that 'treatment' referred to in Article 8.4(1) does not include "procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties" and that "substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment' and thus cannot give rise to a breach of this Article [MFN]" unless a host state has adopted or maintained measures pursuant to those obligations.[101] This clarification makes it very clear that investors cannot use the MFN provision to borrow beneficial procedural provisions or beneficial substantive provisions from a third country BIT unless it can be shown that the host state has adopted or is maintaining a domestic measure in accordance with some substantive provision given in the BIT. This formulation would serve the public policy concerns without undermining adequate protection to foreign investors. India should follow this approach,[102] which was also recommended by the Law Commission of India,[103] and not do away with the MFN provision completely, which exposes foreign investors to discriminatory treatment and substantially tilts the balance in favour of host state's regulatory power.

[100] *Comprehensive Economic and Trade Agreement Between Canada, of the one Part, and the European Union and its Member States, of the Other Part, Oct. 30, 2016, 2016/0206 (NLE), Ch. 8 (Investment). (hereinafter 'EU-Canada CETA'), (http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng) accessed 9 January 2018.*

[101] *Ibid, art. 8.7(4).*

[102] *Ranjan, Prabhash. 2015. 'MFN Provision in Indian Bilateral Investment Treaties – A Case for Reform', Indian Journal of International Law, 55: 39-64. See also UNCTAD. 2010. 'Most Favoured Nation Treatment', UNCTAD Series on Issues in International Investment Agreements, II: 107.*

[103] *Law Commission of India (August 2015). Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, Report No. 260 p. 24 (http://lawcommissionofindia.nic.in/reports/Report260.pdf)*

3.3 Fair and Equitable Treatment

Fair and Equitable Treatment (FET) has emerged as the most important standard of treatment in BITs[104] and has attracted considerable scholarly attention.[105] Numerous ISDS claims show that FET has become a catchall provision capable of sanctioning many legislative, regulatory, and administrative actions of the host state.[106] One major reason for this is because FET often occurs in a large number of BITs[107] without much guidance about its normative content.[108] This has given rise to a debate regarding the meaning of the FET provision.[109] According to one view, FET merely refers to the customary international law minimum standard of treatment of aliens (hereinafter IMS).[110] The basic premise of IMS is that "an alien is protected against unacceptable measures of the host state by rules of international law which are independent of those of the host state."[111] The argument that FET refers to IMS is strong in those BITs that link FET to customary international law.[112] However, even in such BITs, the debate regarding the content of IMS persists. One view is that this content should be determined by reference to the 1926 case, Neer v Mexico[113], a case not about investment but the murder of a U.S. citizen in Mexico. In this case, the U.S.-Mexico General Claims Commission said that for treatment of an alien to constitute an international delinquency, it "should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency" (hereinafter Neer standard).[114] Some ISDS tribunals, like the tribunal in Glamis Gold v United States,[115] held that the Neer standard of 1926 continues to reflect the IMS.[116]

[104] *Newcombe & Paradell, Law and Practice, supra note 1, at 254; Salacuse, Law of Investment Treaties, supra note 1, at 219 (describing FET as the grundnorm or basic norm of the investment treaty system).*
[105] *Salacuse, Law of Investment Treaties, supra note 1; Vandevelde, BITs – History, Policy and Interpretation, supra note 16, at 43.*
[106] *Surya Prasad Subedi, International Investment Law 172-73 (2008); See Pope and Talbot, Award on Merits, supra note 130, at 110; Mondev International Ltd. v. United States, ICSID Case No. ARB (AF)/99/2, Award (Oct.11, 2002); Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award (Mar. 31, 2010); Teco v. Guatemala, ICSID Case No. ARB/10/23, Award, at 454 (Dec. 19, 2013); Bilcon v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, at 442-44 (Mar. 17, 2015).*
[107] *Newcombe & Paradell, Law and Practice, supra note 1, at 254 (2009). See also M.C. Porterfield, An International Common Law of Investors Rights, 27 U. Penn. J. Int'l. L. 99 (2014).*
[108] *Scholars have described FET as wide, tenuous and imprecise – See M. Sornarajah, The International Law on Foreign Investment 332(2004);*
[109] *Salacuse, Law of Investment Treaties, supra note 1, at 245.*
[110] *Id.*
[111] *Dolzer & Schreuer, Principles, supra note 1, at 3*
[112] *See Alex Genin, Eastern Credit Limited, Inc and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2 Award (Jun. 25, 2011); Occidental, supra note 9; Interpretative Note to the Art. 1105 NAFTA –*
Minimum Standard of Treatment in Accordance with International Law (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party. (2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).
[113] *LFH Neer and Pauline Neer (USA) v. United Mexican States, 4 UNRIAA 60.*
[114] *Id.; See also Elettronica Sicula SpA (ELSI) (U.S. v. Italy), 1989 ICJ Rep. 15.*
[115] *Glamis Gold v. The United States of America, UNCITRAL, Award, at 614 (Jun. 8, 2009).*
[116] *Id. at 598-627*

On the other hand, some ISDS tribunals have held that the IMS is not frozen in time and is "constantly in a process of development"[117] and thus, barring for cases pertaining to safety and due process, "today's minimum standard is broader than that defined in the Neer case and its progeny"[118] For instance, the tribunal in Mondev v USA[119] held that the "content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s".[120] This clearly shows that even in BITs where FET is linked to the customary international law standard, there is no consensus regarding the meaning of this standard, especially in the context of judging a host state's regulatory behaviour,[121] and thus the determination of the actual content of the standard depends on arbitral discretion.

The other view on FET is that its meaning is not restricted to the IMS, but is broader and autonomous.[112] This view is particularly strong in those BITs where the FET provision appears as an autonomous standard i.e. without it being linked to the customary international law standard.[123]

The 2016 Model BIT does not contain an FET provision.[124] India decided not to include a provision on FET because ISDS tribunals often interpret this provision too broadly. Instead, the Model BIT contains a provision entitled 'Treatment of Investments'.[125] As part of this, Article 3.1 prohibits a country from subjecting foreign investments to measures that constitute a violation of customary international law 'through':

1) denial of justice, which covers both judicial and administrative proceedings; or
2) fundamental breach of due process; or
3) targeted discrimination on manifestly unjustified grounds such as gender, race or religious belief or
4) manifestly abusive treatment such as coercion, duress, and harassment.[126]

[117] *ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, at 179 (Jan. 9), 2003); See also Merrill and Ring Forestry L.P. v. Canada, supra note 147, at 205-11; See also Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/09/1, Award, at 567 (Sept. 22, 2014).*

[118] *See ADF, at 113; Merrill and Ring supra note 147, at 213; See also Int'l Thunderbird Gaming Corp. v. United Mexican States, UNCITEAL, Arbitral Award, at 193 (Jan. 26, 2006); Roland Klager, Fair and Equitable Treatment in International Investment Law 48-61 (2011).*

[119] *Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002)*

[120] *Ibid para 123. Many other ISDS tribunals have expressed the same view – see Gami Investments, Inc. v. The Government of the United Mexican States, UNCITRAL Final Award (15 November 2004) para 95; Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award (31 March 2010) paras 205-13.*

[121] *Henckels, Protecting Regulatory Autonomy, supra note 30, at 36; W. Michael Reisman, Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law, 30 ICSID Review – Foreign Inv. L. J. 616 (2015).*

[122] *Dolzer & Schreuer, Principles, supra note 1, at 134.*

[123] *For example, 2003 Indian Model BIT, supra note 37, art. 3 (2) provides the FET provision as – "Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party." There is no reference to customary international law. See generally the discussion on this in Salacuse, Law of Investment Treaties, supra note 1, at 249-51; F.A. Mann, British Treaties for the Promotion and Protection of Investments 52 Brit. Y.B. Int'l. L. 241, 244 (1981).*

[124] *See Rajput, India's Shifting Treaty Practice (n 2)*

[125] *See 2015 Model BIT (n 4) art 3. Comments on the 2015 Draft Indian Model BIT, (https://www.mygov.in/group-issue/draft-indian-Model-bilateral-investment-treaty-text/) accessed 9 January 2018.*

[126] *Ibid, Art. 3.1.*

Article 3.1(1) allows a foreign investor to bring an ISDS claim for denial of justice covering both judicial and administrative proceedings. This feature is welcome because denial of justice is widely regarded as an important part of the customary international law. However, Articles 3.1(2)-(3) point to a very high threshold that the foreign investor will have to satisfy if they decide to bring an ISDS claim. For example, foreign investors can bring an ISDS claim against India only if there is 'fundamental' breach of due process. However, the ambiguity is regarding how will it be determined which breaches of due process are 'fundamental'. Similarly, a foreign investor cannot challenge discrimination unless it is 'targeted' discrimination on 'manifestly unjustified' grounds. These 'manifestly unjustified' grounds are 'gender', 'race' or 'religion'. Other kinds of discriminatory treatment by the state that do not meet such high threshold cannot be challenged under Article 3.

Article 3.1 is clearly an attempt to provide normative content to the international minimum standard (IMS)[127] without making any reference to the FET provision. This content, distinct even from the standard formulated under the 1926 Neer award,[128] is also an attempt to reject the evolution of the IMS as regards treatment of foreign investors is concerned, which many tribunals at the North American Free Trade Agreement (NAFTA) have pointed out.

Another dimension of the Indian Model BIT not having the FET provision is that India wants to distance itself from the controversial concept of legitimate expectations, which many tribunals have held to be part of the FET provision. While some tribunals have interpreted the notion of legitimate expectations broadly,[129] some ISDS tribunals like the one in Glamis Gold v USA have narrowed it down to situations where a host state's conduct "creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct".[130] Not including the notion of legitimate expectations in the Model BIT means that even when India creates reasonable and justifiable expectations through its conduct or by giving assurances, which an investor then relies upon to invest, and if India goes back on these assurances, the foreign investor shall have no remedy.

[127] *For a discussion on IMS in context of the FET provision, see Section 4.2 of chapter 4.*

[128] *LFH Neer and PE Neer v. United Mexican States (Docket No 136), General Claims Commission – United States and Mexico, 4 UNRIAA 60 (15 October 1926), see Section 4.2 of chapter 4; Hanessian, Grant & Kabir Duggal. 2015. 'The 2015 Indian Model BIT: Is This Change the World Wishes to See', ICSID Review – Foreign Investment Law Journal, 30(3): 729.*

[129] *See Técnicas Medioambientales Tecmed, S.A v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003); PSEG Global et al. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (19 January 2007) paras 252-253; Duke Energy v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award (18 August 2008) para 340. Also see the discussion in section 4.2 of chapter 4.*

[130] *Glamis Gold v. The United States of America, UNCITRAL, Award (8 June 2009) para 621; Int'l Thunderbird Gaming Corp. v. United Mexican States, UNCITEAL, Arbitral Award (26 January 2006) para 147.*

Another key omission in Article 3.1 of the Indian Model BIT is the ground of arbitrariness to challenge host state's regulatory measure. Many ISDS tribunals,[131] including NAFTA tribunals, have held that if a state acts in a manifestly arbitrary manner, it breaches the IMS.[132] The International Court of Justice (ICJ), in the ELSI case,[133] gave some guidance regarding the meaning of arbitrary action. It said arbitrariness "is not so much something opposed to a rule of law, as something opposed to the rule of law ... It is a wilful disregard of due process of law, an act which shocks, at least surprises, a sense of juridical propriety".[134] Non-inclusion of something like 'manifest arbitrariness' in the Indian Model BIT as one of the grounds to challenge the host state's regulatory conduct leaves a gap in the protection of foreign investment.

Thus, from the above, it can be concluded that India's purpose not to have the FET provision is to considerably narrow down the scope of protection available to foreign investors. India wishes to do this so that measures adopted for public policy concerns are not challenged as violation of BIT's FET provision. However, in order to firewall India's regulatory measures from FET violation claims, India has considerably reduced the scope of protection to foreign investment.

3.3.1 Alternative formulation

India's objective of ensuring that foreign investors do not abuse the FET provision to bring ISDS claims challenging public policy regulations or that ISDS arbitral tribunals do not give expansive interpretation to the FET provisions could have been met by providing a FET provision and defining its content. For example, Article 8.10 (1) of the EU Canada CETA provides that:

1. *Each party shall accord in its territory to covered investments of the other party and to investors with respect to their covered investments fair and equitable treatment... in accordance with paragraphs 2 through 7.*
2. *A party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:*
   (a) denial of justice in criminal, civil or administrative proceedings;
   (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
   (c) manifest arbitrariness;

[131] *Saluka Investments BV v The Czech Republic, UNCITRAL, Partial Award (17 March 2006) para 284; Metaplar v. The Argentine Republic, ICSID Case No. ARB/03/5, Award (6 January 2008) para 187; AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Award (23 September 2010) para 9.3.40.*

[132] *Int'l Thunderbird (n 35) para 197; See also Glamis Gold (n 35) para 625; Cargill v Mexico, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) para 298.*

[133] *Elettronica Sicula SpA (ELSI) (U.S. v. Italy), [1989] ICJ Rep. 15 (20 July 1989) [128].*

[134] *Ibid.*

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
(e) abusive treatment of investors, such as coercion, duress and harassment; or
(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

While some of the provisions mentioned in Article 8.10(2) of the EU-Canada CETA are also present in Article 3.1 of the Indian model BIT, the critical difference is that in the latter these elements are present as part of the IMS and FET. Given the ambiguity surrounding the meaning of the IMS, it is better to have these elements as part of the FET provision without mentioning anything about IMS.

Article 8.10(3) of the EU-Canda CETA provides that the parties shall regularly, or upon request of a party, review the content of the obligation to provide fair and equitable treatment.

Furthermore, Article 8.10(4) of the EU-Canada CETA provides that:

When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the party subsequently frustrated.

A provision of this kind has a number of advantages: First, it provides the FET provision, which foreign investors consider very important. This inspires confidence in foreign investors. Second, it defines the content of the FET provision and thus significantly reduces the scope of ISDS arbitral tribunals to interpret the FET provision in an expansive fashion. In turn, this reduces the scope of foreign investors using the FET provision to challenge a wide array of public policy related regulatory measures. Third, Article 8.10(4) by defining legitimate expectations ensures that while foreign investors can still rely on legitimate expectations, they will be able to do so only if the state frustrated their legitimate expectations by first inducing investors to invest based on certain assurances and then rolled back these assurances. Such a tight definition ensures that host states can held accountable only if they abuse their regulatory power and not for exercise of genuine public policy measures. Fourth, by not making any reference to customary international law or the IMS standard, it significantly reduces the scope for arbitral discretion. For all the four reasons, the FET formulation in the EU-Canada CETA also adds certainty for both foreign investors and the host states.

Furthermore, the inclusion of 'manifest arbitrariness' as a ground to challenge state actions, which is missing in the Indian Model BIT, means that while the host state's regulatory conduct

would be judged using a high standard, and thus provide enough regulatory latitude, it would also ensure that foreign investors have a recourse when host states acts in bad faith or in an irrational or manifestly unreasonable manner.

It is important to note that for the reasons mentioned before the FET formulation in the EU-Canada CETA is clearer in comparison to the FET formulation in other treaties such as the U.S.-Model BIT (2012), India-Korea CEPA (2009), and the CPTPP Agreement (see Annexure I). These treaties include an explicit reference to FET under their respective Article on 'minimum standard of treatment'. The concept of FET is linked to the minimum standard of treatment guaranteed under customary international law, which, in turn, opens up the question of what is customary international law on IMS, bringing in ambiguity and lack of clarity in the law.

3.4 ISDS Mechanism[135]

In the 2016 Model BIT, India has qualified its consent to ISDS by requiring that a foreign investor should first exhaust local remedies at least for a period of five years before commencing international arbitration.[136] The rule related to 'exhaustion of local remedies' is a longstanding rule of customary international law.[137] However, countries in their BITs do not refer to it in a uniform manner. While some BITs expressly require exhaustion of local remedies,[138] other BITs do not make any reference to it.[139] Some expressly reject this requirement.[140]

The five years under the Model BIT are to be counted from the date when the foreign investor first acquired "knowledge of the measure in question and the resulting loss or damage to the

[135] *For a detailed commentary on the ISDS Chapter in the Indian Model BIT see Prabhash Ranjan and Pushkar Anand, 'Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it Go Too Far?' (with Pushkar Anand as the second author) in Luke Nottage et al (Eds) International Investment Treaties and Arbitration Across Asia (Brill/Nijhoff: Leiden: 2018), 579-611*

[136] *2016 Indian Model BIT, art 15.1 & 15.2*

[137] *Case Concerning Electronica Sicula SpA (ELSI) (USA v Italy), (Judgement) [1989] ICJ Rep 15 [31]; Interhandel Case, Judgment of March 21st1959, [1959] ICJ Rep 6.*

[138] *For example, Agreement on Economic Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore (signed 16 May 1972, entered into force 7 September 1973) ['Netherlands-Singapore BIT'], art. XI –'The Contracting Party in the territory of which nationals of the other Contracting Party make or intend to make investments, [shall after the exhaustion of all local administrative and judicial remedies], agree to any demand on the part of such nationals to submit, for arbitration or conciliation, to the Centre established by the Convention of Washington of 18 March 1965 on the settlement of investment disputes between States and nationals of other States, any disputes that may arise in connection with the investments.'*

[139] *Most of the BITs fall in this category. For example, see India-UK BIT, art. 10, which makes no reference whatsoever to the 'exhaustion principle'. Such absence is generally interpreted as the waiver of the requirement of exhaustion of local remedies: Matthew C Potterfield, 'Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?' (2015) 41 Yale J Intl L Online <https://ssrn.com/abstract=2735036> accessed 14 May 2017.*

[140] *For example, see Agreement Between the Government of the Republic of Croatia and the Government of The Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments (signed 18 May 2001, entered into force 15 June 2002) ['Croatia-Cambodia BIT'], art. 10.2(b) – In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre.' This consent implies the renunciation of the requirement that the internal administrative or judicial remedies should be exhausted.*

investment" or when the investor should have first acquired such knowledge.[141] The other critical element related to exhaustion of local remedies is that the foreign investor should submit the dispute to the local court within one year from the date on which the investor acquired the knowledge or should have acquired the knowledge about the measure.[142]

The requirement to exhaust local remedies shall not be applicable "if the investor can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure".[143] Thus, the burden to show that there is no reasonably available relief falls on the foreign investor.[144]

The Model BIT has another clarification attached to Article 15.1, which precludes the investors from claiming that they have complied with the exhaustion requirement on the basis that the claim under this treaty is by a different party or in respect of different cause of action. This is an important clarification as it is often found that different companies that are controlled by the same corporate group launch multiple proceedings against the state at multiple forums. This clarification will prohibit companies from abusing their rights. Moreover, since cause of action in domestic forum is formulated in domestic law terms, which would be different from the cause of action formulated in treaty terms, it is relatively easier to show that the requirement of exhaustion has been complied with. This clarification will ensure that foreign investors are not able to abuse the process by indulging into legal jugglery.[145]

The requirement to exhaust local remedies has the advantage of reducing the scope of an ISDS claim being brought against India. Nonetheless, timely and effective settlement of disputes is one of the major concerns for foreign investors in India. This is especially so given the slow pace of the judicial process in India, which was recently documented in the latest Economic Survey.[165] To restore investor confidence, some steps have been taken, such as the enactment of the Commercial Courts Act, 2015. However, it is critical that domestic reforms should not be taken by diluting the promise of ISDS under the BIT. Moreover, conceptually, it is critical to keep in mind that ISDS serves a very important function of allowing an independent international tribunal to hold states

[141] *Ibid, art 15.2.*
[142] *Ibid, art 15.1.*
[143] *Ibid, art 15.4.*
[144] *The burden of proof imposed by the formulation of 'futility exception' used in the Model BIT is lower than that imposed by the 'obvious futility' rule but greater than 'absence of reasonable prospects of success' rule. For further details see, the commentary to art 15(a) of Draft Articles on Diplomatic Protection with Commentaries, II:2, Y.B. Int'l. L. Comm'n, pt.3, at 76, UN Doc A/61/10 (2006).*
[145] *See comments of Gus van Harten on the text of 2015 Draft India Model Bilateral Investment Treaty Text (https://www.mygov.in/group-issue/draft-indian-Model-bilateral-investment-treaty-text/), accessed 9 January 2018. See also Hanessian & Duggal, Is this the Change the World wishes to See (n 2); Occidental Exploration & Production Co (n 85).*
[146] *Economic Survey (2017-18), Ease of Doing Business's Next Frontier: Timely Justice http://mofapp.nic.in:8080/economicsurvey/pdf/131-144_Chapter_09_ENGLISH_Vol%2001_2017-18.pdf*

accountable under international law. Thus, its basic characteristic is different from a domestic judicial system. The ISDS system inspires more confidence in foreign investors than domestic reforms because international law cannot be changed unilaterally, whereas domestic law can be changed at any time.

3.4.1 Alternative formulation

Instead of having a mandatory 'exhaustion of local remedies' rule for five years, India could consider the following options: First, it could consider reducing the exhaustion of local remedies to three years. This would have the advantage of ensuring that the foreign investor first goes to domestic courts and not to international arbitration. At the same time, since the exhaustion period is not to stringent, it would also inspire confidence in the foreign investor. Second, it could consider having a choice of forum and a fork in the road provision in the BIT. For example, the ASEAN-India agreement does not have a mandatory exhaustion of local remedies for a specified period. It contains a choice of forum clause in Article 20.7.[147] If a treaty dispute between an investor and state has not been resolved within 180 days from the date of the written request made by the investor, through consultations and negotiations, then the investor will have the choice of submitting the dispute either to courts or administrative tribunals of the disputing party,[148] or to international arbitration under ICSID,[149] UNCITRAL Arbitration Rules[150] or any other arbitral institution.[151] Along with the choice of forum clause, the Indian-ASEAN investment agreement provides a 'fork in the road' provision by making it clear that an investor submitting a dispute to any court, administrative tribunal or to any arbitration tribunal shall exclude resort to other procedures.[152]

Such formulation would not impose undue burden on the foreign investor, and, at the same time, compel them to choose between domestic remedies and international arbitration. It is often found that foreign investors simultaneously pursue both, which leads to the state spending its time and resources responding to multiple claims at multiple forums. A 'fork in the road' provision would ensure that foreign investors are not able to benefit from multiple judicial forums.

3.4.2 Additional Qualifications

The Model BIT provides that the foreign investor, after exhausting all local remedies for five years, without reaching a satisfactory resolution, can commence the arbitral process by transmission

[147] *ASEAN-India Investment Agreement (n 7) art 20.7.*
[148] *ASEAN-India Investment Agreement (n 7) art 20.7(a).*
[149] *ASEAN-India Investment Agreement (n 7) art 20.7 (b) and (c).*
[150] *ASEAN-India Investment Agreement (n 7) art 20.7 (d).*
[151] *For instance, London Centre for International Arbitration (LCIA) Arbitration Rules (2014); Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016.*
[152] *Article 20(7) ASEAN-India Investment Agreement (n 7).*

of a notice of dispute to the host state.[153] This 'notice of dispute' will be accompanied by another six months of attempts by the investor and the state to resolve the dispute through meaningful negotiation, consultation or other third party procedures.[154] In the event that there is no amicable settlement of the dispute, the investor can submit a claim to arbitration,[155] subject to the following additional conditions:

- first, not more than six years have elapsed from the date on which the investor first acquired or should have acquired knowledge of the measure in question;[156] and/or,
- second, not more than 12 months have elapsed from the conclusion of domestic proceedings;[157]
- third, before submitting the claim to arbitration, a minimum of 90 days' notice has to be given to host state;[158]
- fourth, the investor must waive the 'right to initiate or continue any proceedings' under the domestic laws of the host state.[159]

The various limitations on the timeframe effectively reduce the window for submission of claim for arbitration to a meagre three-month time period. Let us understand this with the help of an example.

Assuming that a measure alleged to violate the BIT came to the knowledge of a foreign investor on May 1, 2017, the foreign investor must first submit the dispute in the local courts within one year of such knowledge. Assuming that the investor submits the dispute on May 1, 2017, itself, domestic legal remedies should be exhausted at least for a period of five years i.e. until April 30, 2022, unless it can be demonstrated that the available domestic legal remedies cannot reasonably provide any relief. If not satisfied with the outcome of the domestic legal proceedings, the investor can submit a notice of dispute. Assuming that the 'notice of dispute' is filed without delay on May 1, 2022, itself, a further period of six months has to be spent by the investor trying to 'amicably settle the dispute with the host state', i.e. until October 31, 2022. After this, the foreign investor can submit a 'notice of arbitration' to the host state giving 90 days' notice. Only at the end of these further 90 days, i.e. on January 31, 2023, can the foreign investor actually submit a proper 'claim to arbitration'. However, this claim must be submitted by April 2023, as it has to be submitted within 12 months from the conclusion of domestic proceedings, which in our example is April 30, 2022.

[153] *2016 Indian Model BIT, art. 15.2.*
[154] *Ibid, art 15.4.*
[155] *Ibid, art 16.*
[156] *Ibid, art 15.5(i).*
[157] *Ibid, art 15.5(ii); also see Hanessian & Duggal, Is this the Change the World wishes to See (n 2) 7.*
[158] *Ibid, art. 15.5(v).*
[159] *Ibid, art 15.5(iii).*

Thus, even when the foreign investor is extremely prompt, the maximum time period that it gets for the submission of 'claim for arbitration' to an ISDS tribunal is about three months only. The 2016 Model BIT has drastically curtailed the window for submitting a claim for arbitration by erecting a number of procedural barricades in the form of stringent time limits that are to be adhered to.

3.4.3 Additional Qualifications

Instead of having such strict limitation periods that would make it extremely difficult for the foreign investor to make use of the ISDS mechanism, the Indian Model BIT could provide a provision of the kind given in the ASEAN-India Investment Agreement. This agreement provides that if the investor decides to submit the dispute to conciliation or arbitration either to ICSID, UNCITRAL or any other international arbitral institution, then the following two conditions apply:

- first, the investor should submit the dispute within three years from the "time at which the disputing investor became aware, or should reasonably have become aware of an alleged breach";
- second, the foreign investor should provide a written notice of intent at least 90 days before submitting the claim.

Thus, the limitation period given in the ASEAN-India Investment Agreement is only for international arbitration and not for pursuing domestic legal remedies. Also, the limitation period in the ASEAN-India Investment Agreement is longer than in the Indian Model BIT. While this would have the advantage of compelling the foreign investors to make up their mind on whether to pursue an ISDS claim or not, it is not too stringent and thus not unworkable.

3.5 General Exceptions

The 2015 Model BIT contains a separate chapter covering both general and security exceptions.[160] Article 32 contains general exceptions with a long list of permissible objectives, which includes protection of public morals;[161] maintenance of public order;[162] protection of human, animal, or plant life or health;[163] protection and conservation of the environment;[164] ensuring compliance with domestic laws that are not inconsistent with the provisions of the treaty.[165] The inclusion of these permissible objectives will provide opportunities to reconcile investment protection with the host state's right to regulate.

[160] *See chapter 5 for a discussion on NPMs or General Exceptions in BITs.*
[161] *2016 Indian Model BIT, art 32.1 (i).*
[162] *Ibid.*
[163] *Ibid, art. 32.1 (ii).*
[164] *Ibid, art. 32.1 (iv).*
[165] *Ibid, art. 32.1 (iii).*

Another interesting aspect of the general exception provision is that it contains 'necessary' as the only nexus requirement for all the above-mentioned permissible objectives. Furthermore, the 2016 Model BIT, in footnote 6, provides guidance to the arbitral tribunal in how to determine whether a measure is "necessary".[166] Footnote 6 provides that in considering whether a measure is necessary, the tribunal shall take into account whether there was less restrictive alternative measure reasonably available to the country or not.

This meaning of necessary is partly inspired from the World Trade Organization (WTO) jurisprudence, which has developed a two-tier test to determine the meaning of necessary in Article XX of General Agreement on Tariffs and Trade (GATT).[167] The test involves, first, the proportionality or the weighing and balancing test, which will weigh and balance different factors like the significance of the regulatory value pursued, the contribution made by the challenged measure to the regulatory value and the restrictive effect of the measure on international trade. Second, if the first step yields a preliminary conclusion of the measure being necessary, then the second step should compare this measure with other least trade restrictive measures, which are reasonably available to the importing country.[168] If such measures are available then the impugned measure is not necessary.

The Indian Model BIT has adopted the second part of the two-tier test mentioned above. Consequently, this will not allow for any weighing and balancing review, or, in other words, for subjective assessment to be made by an ISDS tribunal regarding whether a regulatory measure is significant vis-à-vis the cost imposed on foreign investment. By defining 'necessary' in this way, India has clarified its scope and meaning and thus curtailed arbitral discretion. An ISDS tribunal will take the regulatory or the public policy objective of the state as given and only assess whether the same public policy goal can be achieved using an alternative less investment-restrictive regulatory measure that is reasonably available to the state.

However, a gap in Article 32 is the absence of a chapeau of the kind given in Article XX of GATT, which would have ensured that host state's measures are applied in a manner that do not constitute a misuse or abuse of the general exception provisions. The only requirement is that measures should be applied on a 'non-discriminatory' basis.[169] In other words, there should not be

[166] *Ibid, art. 32.1.*
[167] *See Bown, Chad P. & Joel P. Trachtman. 2009. 'Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act', World Trade Review, 8 (1): 85, 87. For WTO jurisprudence on 'necessary' in Article XX of GATT see Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WTO Doc. WT/DS 161 and 169/AB/R (adopted Dec. 11, 2000); Appellate Body Report, Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes, WTO Doc. WT/DS302/AB/R (adopted Apr. 25, 2005); Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007).*
[168] *Mitchell, Andrew D. & Caroline Henckels. 2013. 'Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law', Chicago Journal of International Law, 14: 93, 98.*
[169] *See 2016 Indian Model BIT, art. 32.1.*

any discrimination in application of these measures between foreign investors in India who are in like situations.

To make sure that host state's don't abuse their regulatory power, the general exception provisions should contain a chapeau specifying that there shall be no unjustifiable discrimination or that there shall be no disguised restriction, as is the case with Article XX of GATT.[170] From a good governance and rule of law point of view, an assurance through treaty drafting that regulatory measures shall not be abused would inspire confidence amongst foreign investors. For example, Article 10.18 of the India-Korea CEPA's general exception clause that is also inspired from GATT Article XX clause contains a GATT Article XX chapeau: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between states where like conditions prevail, or a disguised restriction on investors and investments, nothing in this chapter shall be construed to prevent the adoption or enforcement by any party of measures."

In sum, the general exception clause needs to be more precisely drafted and include some constraints on the exercise of arbitral discretion. However, the absence of a full-fledged chapeau of the kind found in Article XX of GATT opens the possibility of a regulatory abuse by host states.

3.6 Other Exceptions

Apart from the general exception clauses, Article 2 of the 2015 Model BIT, while describing the scope and coverage of the treaty, specifically excludes certain regulatory measures from the purview of the treaty. We discuss two important regulatory measures here.

3.6.1 Taxation

Article 2.4 (ii) of the Model BIT states that the treaty shall not apply to "any law or measure regarding taxation, including measures taken to enforce taxation obligations." This article further provides that host state's decision that a particular regulatory measure is related to taxation, whether made before or after the commencement of arbitral proceedings, shall be non-justiciable.[171] No arbitral tribunal shall be able to review such decision.[172]

[170] *The significance of the chapeau in context of Article XX of GATT has been repeatedly asserted by the WTO Appellate Body. See Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996); Appellate Body Report, United States: Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); See also EU-Canada CETA, art. 28.3.*

[171] *2016 Indian Model BIT, art 2.4(ii).*

[172] *Ibid.*

It is evident that India has decided to keep taxation measures outside the purview of the BIT in response to Vodafone and Cairn challenging India's retrospective application of taxation law under different BITs.[173] Excluding taxation measures completely means that foreign investors shall not be able to challenge such measures under BITs under any circumstance. Moreover, allowing host states to have the last word on whether a regulatory matter pertains to taxation or not might lead to regulatory abuse. As the tribunal in EnCana v Ecuador clearly recognised that states can abuse their power to tax by designing tax laws that are 'extraordinary, punitive in amount or arbitrary' which, in turn, could trigger a claim of indirect expropriation.[174] Similarly, the tribunal in Burlington v Ecuador recognised that taxation can be confiscatory, leading to indirect expropriation.[175]

Therefore, excluding taxation measures altogether from the purview of the BIT is a disproportionate reaction, especially when it has been argued that taxation is part of a state's police power and thus it justifies non-compensation even in cases of deprivation of foreign investment.[176] Excluding taxation measures altogether tilts the scale in favour of the host state because it limits the protection to foreign investment even when there is an alleged abuse of taxation powers. For instance, a foreign investor will not be able to challenge even confiscatory taxation. The U.S. Model BIT, for example, recognises that in certain situations taxation can amount to expropriation.[177] There is no need to specifically exclude taxation from the purview of the BIT. Given the fact that taxation is recognised as part of the state's police powers, even if a foreign investor challenges it, the ISDS tribunal will show deference towards the state unless or until tax imposed is confiscatory or an abuse of host state's public power.

[173] *See chapter 6.*
[174] *EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, Award (3 February 2006) para 177.*
[175] *Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2014) para 395; See also Occidental Exploration & Production Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award (1 July 2004) para 85 ("Taxes can result in expropriation as can other types of regulatory measures"); Link-Trading Joint Stock Co. v. Dep't for Customs Control of the Republic of Moldova, Ad Hoc/UNCITRAL, Final Award (18 April 2002) para 64 ("As a general matter, fiscal measures only become expropriatory when they are found to be an abusive taking. Abuse arises where it is demonstrated that the State has acted unfairly or inequitably towards the investment, where it has adopted measures that are arbitrary or discriminatory in character or in their manner of implementation, or where the measures taken violate an obligation undertaken by the State in regard to the investment.")*
[176] *Newcombe, Andrew, Lluis Paradell. 2009. Law and Practice of Investment Treaties, 358. Place of Publication(Zuidpoolsingel, Netherlands): Kluwer Law International. See also Brownlie, Ian. 2008. Principles of Public International Law. 532. Oxford, New York: OUP; Sohn, Louis B. & R. R. Baxter. 1961. 'International Responsibility of States for Injuries to Aliens', American Journal of International Law, 55: 545.*
[177] *Article 21, U.S. Model BIT*

3.6.2 Compulsory Licence

The Model BIT also excludes the issuance of compulsory licences ("CLs") from the purview of the BIT provided that such issuance is consistent with the WTO treaty.[178] In other words, notwithstanding the specific exemption of CL from the scope of the BIT, foreign investors can still challenge the issuance of CLs as a violation of some BIT provision arguing that CLs have not been issued in accordance with the TRIPS Agreement.[179] In this situation, an ISDS tribunal, which may not have expertise in WTO law,[180] would have to make a substantive determination as to whether the issuance of CL is consistent with TRIPS, if not, then the BIT would continue to apply.[181] This would expose India's issuance of CL to be scrutinised by an ISDS tribunal. In view of this, this provision could be amended to say that CLs issued in accordance with India's domestic law will be outside the scope of the BIT. India's domestic intellectual property (IP) laws are consistent with its obligations under the WTO.

[178] *2016 Indian Model BIT, art. 2.4(iii) (providing that the treaty shall not apply to "the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the international obligations of Parties under the WTO Agreement.")*

[179] *See Gibson, Christopher. 2010. 'A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation', American University International Law Review, 25(3): 357, 421; Mercurio, Bryan. 2012. 'Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements', Journal of International Economic Law, 15(3): 871, 905–906 (hereinafter Mercurio, Awakening the Sleeping Giant)*

[180] *Mercurio, Awakening the Sleeping Giant (n 88) 905.*

[181] *Ibid.*

4 Challenges to the New BIT and Way Forward

India's decision to adopt a new Model BIT especially in light of the growing debate on how to reconcile investment protection with host state's right to regulate should be welcomed. After foreign investors sued India under different BITs, India realised that broad and vague investment protection standards can be interpreted in manners that give precedence to investment protection over the host state's right to regulate. The fact that India has adopted a new Model BIT that continues to give the right to foreign investors to challenge India's regulatory measures under BIT shows India's continuous engagement with the ISDS system unlike countries like South Africa and other Latin American countries. However, India has significantly altered the terms of this engagement.

India claims that the change in the terms of this engagement is to strike a balance between investment protections with host state's right to regulate. However, as the discussion in the paper shows, barring the Model BIT has not been able to reconcile the interests of foreign investors with host state's right to regulate. The Model BIT contains a narrow definition of investment, an extremely narrow FET-type provision, excludes MFN clause and taxation measures from the purview of the BIT. Furthermore, it provides for a general exception provision without a chapeau and contains a complicated and sequential ISDS. The presence of these provisions makes the Model BIT pro-state with limited rights to foreign investors. Furthermore, although the attempt of the Model BIT is to reduce arbitral discretion, as the discussion shows, many provisions still remain undefined and vague; thus, continue to grant significant discretion to ISDS arbitral tribunals. Therefore, our analysis shows that India has not been quite successful in developing a model that balances investment protection with the state's right to regulate nor in reducing arbitral discretion. In view of this, the paper has suggested how these goals could be achieved by providing alternative formulations.

Indian BIT practice needs to evolve keeping the following in mind. First, India's desire to increase foreign investment inflows, especially under projects like Make in India.[182] As the paper has discussed, there is evidence to show that BIT regime in India has played an important role in attracting foreign investment. Further, even globally, many studies show the positive relationship between BITs and FDI inflows. Second, the significance of BITs for foreign investors in India also assumes importance due to larger goals of good governance and pursuit and strengthening of rule of law. Having a balanced BIT regime would also help in improving the perception of foreign investors that it is easier to do business in India and that in case of undue regulatory interventions, they could rely on promises made under international law to safeguard their investment.

[182] *This is a recent and major initiative of the Government of India, launched in September 2014 to make India a manufacturing hub by attracting foreign investment. See for details, Make in India, http://www.makeinindia.com/about.*

Third, India is not just an importer but also an exporter of capital. India's overseas FDI has increased from less than $1 billion in 2000-01 to more than $21 billion in 2015-16.[183] A BIT that tilts towards host state's regulatory power will reduce protection for Indian companies abroad. The significance of BITs for Indian companies can be gauged from three recent instances. First, a few months back, an Indian investor, Flemingo Duty-free Shop Private Limited (FDF) successfully sued Poland under the India-Poland BIT, winning damages of €17.9 million.[184] The tribunal found that Poland, by illegally terminating a series of lease agreements enjoyed by FDF's indirect Polish subsidiary, had expropriated FDF's investment and denied fair and equitable treatment to it under the India-Poland BIT. Second, an Indian mining company, Indian Metals & Ferro Alloys Ltd. (IMFA), has sued Indonesia under the India-Indonesia BIT at the Permanent Court of Arbitration, The Hague, claiming $599 million in damages, for regulatory problems pertaining to the claimant's coal mining permits.[185] Third, in a newly surfaced challenge, an Indian investor has sued Macedonia under the India-Macedonia BIT for the alleged expropriation of mining concessions awarded to the Indian investor.[186]

[183] *Reserve Bank of India, Data on Overseas Investment, https://www.rbi.org.in/Scripts/Data_Overseas_Investment.aspx.*
[184] *Flemingo DutyFree Shop Private Limited v. the Republic of Poland, UNCITRAL, Award, at 942 (Aug. 12, 2016).*
[185] *Indian Metals & Ferro Alloys Limited (India) v. the Government of the Republic of Indonesia, PCA Case No. 2015-40.*
[186] *Allison Ross, Indian Couple Threatens Claim Against Macedonia, Global Arb. Rev. (Nov. 11, 2016), http://globalarbitrationreview.com/article/1073304/indian-couple-threatens-claim-against-macedonia.*

Appendix I: Benchmarking India's Model BIT

Clauses	India Model BIT 2015	U.S. Model BIT 2012
1. Investment definition	1. Enterprise -based definition[187] 2. Includes (inter alia): • Enterprise in the host state • Constituted, organised and operated in good faith by an investor compliance with the law of the host state • The char-acteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the party in whose territory the investment is made • A loan to another enterprise provided that: (i) the enterprise is an affiliate of the investor, or (ii) the original maturity of the loan is at least three years 3. Excludes (inter alia): • Portfolio investments of the enterprise or in another enterprise • Debt securities issued by a government or government-owned or controlled enterprise, or loans to a government or government-owned or controlled enterprise	1. Asset-based definition[188] 2. Includes: • Every asset that an investor owns or controls, directly or indirectly • The characteristics of an investment such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk • An enterprise • Shares, stock, and other forms of equity participation • Bonds, debentures, other debt instruments, and loans • Futures, options, and other derivatives • Turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts • Intellectual property rights • Licences, authorisations, permits, and similar rights conferred pursuant to domestic law • Other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges

[187] *Article 1.4, India Model BIT 2015*
[188] *Article 1, U.S. Model BIT 2012*

EU-Canada CETA 2016	India-Korea CEPA 2009	TPP Agreement
1. Asset-based definition[189] 2. Includes: • Every asset that an investor owns or controls, directly or indirectly • The characteristics of an investment, which includes a certain duration, and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk • An enterprise • Shares, stocks and other forms of equity participation in an enterprise • Bonds, debentures and other debt instruments of an enterprise • A loan to an enterprise • Any other kind of interest in an enterprise • An interest arising from: 1. A concession conferred pursuant to law of a party or under a contract 2. A turnkey, construction, production or revenue-	1. Asset-based definition[190] 2. Includes: • Every asset that an investor owns or controls, directly or indirectly • The characteristics of an investment such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk • An enterprise • Shares, stocks and other forms of equity participation of an enterprise • Bonds, debentures loans, and other debt instruments of an enterprise • Rights under contracts, including turnkey, construction, management, production, concession or revenue sharing contracts • Claims to money established and maintained in connection with the conduct of commercial activities • Intellectual property rights • Rights conferred pursuant	1. Asset-based definition[191] 2. Includes: • Every asset that an investor owns or controls, directly or indirectly • The characteristics of an investment such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk • An enterprise • Shares, stock and other forms of equity participation in an enterprise • Bonds, debentures, other debt instruments and loans • Futures, options and other derivatives • Turnkey, construction, management, production, concession, revenue-sharing and other similar contracts • Intellectual property rights • Licences, authorisations, permits and similar rights conferred pursuant to the party's law • Other tangible or intangible,

[189] *Article 8.1, EU-Canada CETA 2016*
[190] *Article 10.1, India-Korea CEPA 2009*
[191] *Article 9.1, TPP Agreement*

Clauses	India Model BIT 2015	U.S. Model BIT 2012
	• any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the enterprise incurred before the commencement of substantial business operations of the enterprise in the territory of the party where the investment is made	
2. Scope and general provisions	1. Treaty shall not apply to:[192] • Any measure by a local government • Any law or measure regarding taxation, including measures taken to enforce taxation obligations • The issuance of compulsory licences granted in relation to intellectual property rights • Government procurement by a party • Subsidies or grants provided by a party • Services supplied in the exercise of governmental authority by the relevant body or authority of a party	1. Except as provided in this Article (Article 21), nothing in Section A shall impose obligations with respect to taxation measures[193] 2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if: (a) the claimant has first referred to the competent tax authorities[21] of both parties in writing the issue of whether that taxation measure involves an expropriation; and (b) within 180 days after the date of such referral, the competent tax authorities of both Parties

[192] *Article 2.4, India Model BIT 2015*
[193] *Except as provided in Article 21, U.S. Model BIT 2012*

EU-Canada CETA 2016	India-Korea CEPA 2009	TPP Agreement
sharing contract 3. Other similar contracts • Intellectual property rights • Other movable property, tangible or intangible, or immovable property • Claims to money or claims to performance under a contract	to domestic law or contract, such as licenses, authorisations and permits, except for those that do not create any rights protected by domestic law • Other tangible or intangible, movable or immovable property, and other related property rights	movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges
1. With respect to the establishment of acquisition of a covered investment, Sections B and C do not apply to a measure relating to: • Air services, or related services in support of air services and other services supplied by means of air transport, other than a specified list • Activities carried out in the exercise of governmental authority[194] 2. For the EU, Sections B and C do not apply to a measure with respect to audio-visual services. For Canada, Sections B and C do not apply to a measure with respect to cultural industries	1. This chapter shall not apply to: • Subsidies or grants provided by a party or to any conditions attached to the receipt or continued receipt of such subsidies or grants[195] • Measures adopted or maintained by a party with respect to financial services • Any taxation measures	1. No measures that are out of coverage[196]

[194] *Except as provided in Article 8.2, Canada-EU CETA 2016*
[195] *Except for Articles 10.5 and 10.21, India-Korea CEPA 2009*
[196] *Article 9.2, TPP Agreement*

Clauses	India Model BIT 2015	U.S. Model BIT 2012
		fail to agree that the taxation measure is not an expropriation. 3. Article 14 [Non-Conforming Measures] considerably restricts the scope of the Treaty since it exempts certain cases (such as those involving local governments) from falling under the purview of provisions such as, inter alia, National Treatment (Article 3), the Most Favoured Nation clause (Article
3. National treatment	1. Each party shall not apply to investors or to investments made by investors of the other party, measures that accord less favourable treatment than that it accords, in 'like circumstances' to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory[197] 2. Extends to treatment by sub-national government 3. Includes only de jure discrimination	1. Each party shall accord to investors and to a covered investment of the other party, treatment no less favourable than that it accords, in 'like circumstances' to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments[198] 2. Extends to treatment by regional level of government 3. Includes both de jure and de facto discrimination[199] 4. National treatment does not apply to:[200]

[197] *Article 4, India Model BIT 2015*
[198] *Article 3, U.S. Model BIT 2012*
[199] *Article 3, U.S. Model BIT 2012 mentions that the investor should not be accorded less favourable treatment, which in WTO law jurisprudence includes both de jure and de facto discrimination as mentioned in the case of Korea - Beef*
[200] *Article 14, U.S. Model BIT 2012*

EU-Canada CETA 2016	India-Korea CEPA 2009	TPP Agreement
1. Each party shall accord to an investor of the other party and to a covered investment, treatment no less favourable treatment than the treatment it accords, in 'like situations' to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment, and sale or disposal of their investments in its territory[201] 2 Extends to treatment by government in Canada other	1. Each party shall accord to investors and to investments of investors of the other party, treatment no less favourable than that it accords, in 'like circumstances' to its own investors or to investments by such investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of their investments in its territory[203] 2. Extends to treatment by a regional or local government	1. Each party shall accord to investors and to covered investments of another party, treatment no less favourable than that it accords, in 'like circumstances', to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments or other disposition of investments[205] 2. Extends to treatment by a regional level of government 3. Includes both de jure and de

[201] *Article 8.6, EU-Canada CETA 2016*
[203] *Article 10.3, India-Korea CEPA 2009*
[205] *Article 9.4, TPP Agreement*

Clauses	India Model BIT 2015	U.S. Model BIT 2012
		• Existing non-conforming measures • Any measure that a party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II • Any measure covered by an exception to, or derogation from, the obligations under the TRIPS Agreement • Government procurement • Subsidies or grants provided by a party, including government-supported loans, guarantees, and insurance

EU-Canada CETA 2016	India-Korea CEPA 2009	TPP Agreement
than at the federal level, and by government of or in a member state of the European Union 3. Includes both de jure and de facto discrimination 4. National treatment does not apply to:[202] • Existing non-conforming measures • Any measure that a party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II • Any measure covered by an exception to, or derogation from, the obligations under the TRIPS Agreement • Procurement by a party of a good or services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of a good or services for commercial sale • Subsidies, or government support relating to trade in services, provided by a party	3. Includes both de jure and de facto discrimination 4. National treatment does not apply to:[204] • Existing non-conforming measures • Any measure that a party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II • Any measure covered by the TRIPS Agreement and other treaties concluded under the auspices of the World Intellectual Property Organisation • Government procurement	facto discrimination 4. National treatment does not apply to:[206] • Existing non-conforming measures • Any measure that a party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II • Any measure covered by an exception to, or derogation from, the obligations under the TRIPS Agreement • Government procurement • Subsidies or grants provided by a party, including government-supported loans, guarantees, and insurance

[202] *Article 8.15, Canada-EU CETA 2016*
[204] *Article 10.8, India-Korea CEPA 2009*
[206] *Article 9.12, TPP Agreement*

Clauses	India Model BIT 2015	U.S. Model BIT 2012
4. Fair and Equitable Treatment	Clause is absent[207]	Embedded in minimum standard of treatment[208]

[207] *However, Article 3 introduces a section on standard of treatment which prohibits parties to take measures which constitute a denial of justice under customary international law, un-remedied and egregious violations of due process, or manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment.*

[208] *Article 5, U.S. Model BIT 2012 states that fair and equitable treatment are not required to be in addition to or go beyond the minimum standard of treatment as founded in Customary International Law.*

EU-Canada CETA 2016	India-Korea CEPA 2009	TPP Agreement
1. Includes certain specific grounds to be fulfilled to accord Fair and Equitable Treatment[209] 2. The tribunal may consider the creation of legitimate expectations while determining whether this obligation was breached[210] 3. Parties are bound to regularly review whether fair and equitable treatment is being accorded[211] 4. Regulatory measures enacted to achieve legitimate policy objectives will not be considered as a breach of this obligation[212]	Embedded in minimum standard of treatment[213]	1. Embedded in minimum standard of treatment[214] 2. Measures ensuring that investment activity is undertaken in a manner sensitive to environmental, health or other regulatory objectives are exempted[215]

[209] *Paragraph 2, Article 8.10, EU-Canada CETA 2016 states that if a measure or a series of measures constitutes "denial of justice in criminal civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; abusive treatment of investors, such as coercion, duress and harassment; or a breach of any further elements of the fair and equitable treatment obligation adopted by the parties", then the party would have reached the obligation of fair and equitable treatment.*

[210] *Paragraph 4, Article 8.10*

[211] *Paragraph 3, Article 8.10, EU-Canada CETA 2016 further adds that the Committee on Services and Investment may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.*

[212] *Paragraph 1, Article 8.9, EU-Canada CETA 2016 about investment and regulatory measures explains legitimate policy objectives to include protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. Paragraph 2 adds that even if these measures negatively affect or interfere with an investor's expectations, they do not amount to a breach of any obligation 'under this section'. Subsidies are included in these exempted measures, as explained in Paragraph 3 and 4, Article 8.9.*

[213] *Paragraph 1, Article 10.4, India-Korea CEPA 2009 states that fair and equitable treatment are not required to be in addition to or go beyond the minimum standard of treatment as founded in Customary International Law. Prohibition of denial of justice in civil, criminal and administrative proceedings also included in fair and equitable treatment.*

[214] *Paragraph 2, Article 9.6, TPP Agreement states that fair and equitable treatment are not required to be in addition to or go beyond the minimum standard of treatment as founded in Customary International Law. Prohibition of denial of justice in civil, criminal and administrative proceedings also included in fair and equitable treatment. Full Protection and Security requires each party to provide the level of police protection required under customary international law.*

[215] *Article 9.16, TPP Agreement*

Clauses	India Model BIT 2015	U.S. Model BIT 2012
5. Most Favoured Nation	Clause is absent	1. Includes the phrase 'like circumstances'[216] 2. Treats existing non-conforming measures as exceptions[217]

[216] *Article 4.1, U.S. Model BIT 2012*

[217] *Article 14, U.S. Model BIT 2012 states that the clause on Most Favoured Nation Treatment does not apply to any existing non-conforming measure maintained at the central level of government, or regional level of government, or local level of government. Government procurements and subsidies and grants are also exempted, as stated in Paragraph 5, Article 14.*

EU-Canada CETA 2016	India-Korea CEPA 2009	TPP Agreement
1. Includes the phrase 'like situations'[218] 2. Explicitly states that substantive obligations, particularly dispute resolution mechanisms, in other international investment treaties cannot be construed as 'treatment'[219] 3. Regulatory measures enacted to achieve legitimate policy objectives will not be considered as a breach of this obligation[220]	Clause is absent	1. Includes the phrase 'like circumstances'[221] 2. The treatment referred to does not encompass international dispute resolution procedures or mechanisms[222] 3. Treats existing non-conforming measures as exceptions[223] 4. Measures ensuring that investment activity is undertaken in a manner sensitive to environmental, health or other regulatory objectives are exempted[224]

[218] *Paragraph 1, Article 8.7, Canada-EU CETA 2016*

[219] *Paragraph 4, Article 8.7, EU-Canada CETA 2016 states "For greater certainty, the "treatment" referred to in Paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a party pursuant to those obligations.*

[220] *Paragraph 1, Article 8.9, EU-Canada CETA 2016 about investment and regulatory measures explains legitimate policy objectives to include protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. Paragraph 2 adds that even if these measures negatively affect or interfere with an investor's expectations, they do not amount to a breach of any obligation 'under this section'. Subsidies are included in these exempted measures, as explained in Paragraph 3 and 4, Article 8.9.*

[221] *Paragraph 1, Article 9.5, TPP Agreement*

[222] *Paragraph 3, Article 9.5, TPP Agreement*

[223] *Paragraph 1 and Paragraph 2, Article 9.12, TPP Agreement*

[224] *Article 9.16, TPP Agreement*

Clauses	India Model BIT 2015	U.S. Model BIT 2012
6. Expropriation	1. Measures enacted for reasons of public purpose exempted[225] 2. Non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives exempted[226] 3. In considering an alleged breach of this Article (Article 5), a Tribunal shall take account of whether the investor or, as appropriate, the locally-established enterprise, pursued action for remedies before domestic courts or tribunals prior to initiating a claim under this Treaty.[227]	Certain measures by the state exempted[228]

[225] *Article 5.1, India Model BIT 2015*

[226] *Article 5.4, India Model BIT 2015 states that legitimate public welfare objectives include public health, safety and the environment, amongst others.*

[227] *Article 5.6, India Model BIT 2015*

[228] *Article 6, U.S. Model BIT 2012 states that measures enacted for a public purpose, in a non-discriminatory manner, on payment of prompt, adequate and effective compensation, and in accordance with due process of law and minimum standard of treatment are exceptions to this clause. (doubt w.r.t. the usage of the 'and' operator only between two clauses, and no use of the 'or' operator)*

EU-Canada CETA 2016	India-Korea CEPA 2009	TPP Agreement
1. Certain measures by the state exempted in cases where they are/relate to: • For a public purpose; • Under due process of law; • In a non-discriminatory manner; and • On payment of prompt, adequate and effective compensation[229] 2. Regulatory measures enacted to achieve legitimate policy objectives will not be considered as a breach of this obligation[230]	Certain measures exempted: • For a public purpose; • On a non-discriminatory basis; • In accordance with due process of law and minimum standard of treatment • On payment of compensation[231]	1. Certain measures exempted: • For a public purpose; • On a non-discriminatory basis; • In accordance with due process of law and minimum standard of treatment • On payment of prompt, adequate and effective compensation[232] 2. Measures ensuring that investment activity is undertaken in a manner sensitive to environmental, health or other regulatory objectives are exempted[233]

[229] *Paragraph 1, Article 8.12, EU-Canada CETA 2016*

[230] *Paragraph 1, Article 8.9, EU-Canada CETA 2016 about investment and regulatory measures explains legitimate policy objectives to include protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. Paragraph 2 adds that even if these measures negatively affect or interfere with an investor's expectations, they do not amount to a breach of any obligation 'under this section'. Subsidies are included in these exempted measures, as explained in Paragraph 3 and 4, Article 8.9.*

[231] *Paragraph 1, Article 10.1, India-Korea CEPA 2009; Paragraph 2, Article 10.12, India-Korea CEPA 2009 states that the compensation should be without delay and fully realizable; equivalent to the fair market value of the expropriated investment before the expropriation took place; and should not get affected in case the intended expropriation became known earlier.*

[232] *Paragraph 1, Article 9.8, TPP Agreement. Paragraph 2, Article 9.8, TPP Agreement states that the compensation should be without delay; fully transferable and fully realisable; equivalent to the fair market value of the expropriated investment before the expropriation took place; and should not get affected in case the intended expropriation became known earlier.*

[233] *Article 9.16, TPP Agreement*

Clauses	India Model BIT 2015	U.S. Model BIT 2012
7. Remedies	Option to choose between ICSID and UNCITRAL Rules as mode of arbitration[234] 2. Option to arbitrate only after exhausting all local remedies[235] for at least 5 years, and other additional conditions laid down in Article 14.4, India Model BIT 2015	1. Resorts to the ISDS mechanism at the ICSID, ideally after consultation and negotiation[236] 2. Mandates the arbitral proceedings to be transparent[237] 3. State-state Dispute Settlement is available for disputes concerning interpretation or application of this treaty[238]
8. Exceptions	1. Separate clauses for extensive general and security exceptions[243] 2. A wide-ranging but non-exhaustive list of specific cases of security exceptions laid out as follows, including cases, inter alia: (a) action relating to fissionable and fusionable materials or the materials from which they are derived; (b) action taken in time of war or other emergency in domestic or international relations[244]	1. Separate generalised clause for security exceptions referring to 'essential security interests' and 'maintenance or restoration international peace and security' without furnishing any specific examples of the same.[245]

[234] *Article 21, India Model BIT 2015*
[235] *Article 14.3, India Model BIT 2015*
[236] *Article 23 and Article 24, U.S. Model BIT 2012*
[237] *According to Article 29, U.S. Model BIT 2012, the notice of intent, the notice of arbitration, pleadings, memorials, and briefs, minutes or transcripts of hearings of the tribunal, and orders, awards, and decisions of the tribunal need to be made available to the public.*
[238] *Article 37, U.S. Model BIT 2012*
[243] *Chapter V, India Model BIT 2015 lays down exceptions. Article 16 is concerned with general exceptions, and Article 17 is concerned with security exceptions.*
[244] *Article 33.1, India model BIT 2015*
[245] *Article 18, U.S. Model BIT 2012*

EU-Canada CETA 2016	India-Korea CEPA 2009	TPP Agreement
Resorts to the ISDS mechanism at the ICSID, ideally after consultation. Mediation is also available[239]	Resorts to the ISDS mechanism at the ICSID[240]	1. Resorts to the ISDS mechanism at the ICSID, ideally after consultation and negotiation[241] 2. Mandates the arbitral proceedings to be transparent[242]
1. Existing non-conforming measures are exempted, when enacted at the level of the European Union[246]	1. Separate clause for exceptions covering protection of public morals, maintaining public order, protection of human or animal or plant life or health, or the environment, etc.[247] 2. Separate, more generalised, list for security exceptions detailing 'essential security interests' as a general concern[248]	Separate chapter for security exceptions[249]

[239] *Articles 8.18, 8.19 and 8.20, EU-Canada CETA 2016*
[240] *Article 10.21, India-Korea CEPA 2009*
[241] *Article 9.18 and 9.19, TPP Agreement*
[242] *According to Paragraph 1, Article 9.24 TPP Agreement, the notice of intent, the notice of arbitration, pleadings, memorials, and briefs, minutes or transcripts of hearings of the tribunal, and orders, awards, and decisions of the tribunal need to be made available to the public.*
[246] *Paragraph 1, Article 8.15, EU-Canada CETA 2016*
[247] *Article 10.18, India-Korea CEPA 2009*
[248] *Annex 10B, India-Korea CEPA 2009*
[249] *Article 29.2, TPP Agreement*

Clauses	India Model BIT 2015	U.S. Model BIT 2012
9. Sharing of the Costs of Arbitration	The disputing parties are to share the costs of arbitration equally. However, the Tribunal has the discretion to direct that the entire costs or a higher proportion of costs shall be borne by one of the two parties, and both parties are bound by such a direction from the tribunal.[250]	Expenses incurred by the arbitrators, along with other costs of the proceedings, are shared equally by the parties. However, the tribunal has the discretion to direct one of the two parties to pay a higher proportion of the costs incurred.[251]

[250] *Article 28, India model BIT 2015*
[251] *Clause 2, Article 37, Section C, U.S. Model BIT 2012*

EU-Canada CETA 2016	India-Korea CEPA 2009	TPP Agreement
The tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party, and in exceptional circumstances, the Tribunal may apportion costs between the disputing parties if it determines that such an arrangement would be appropriate. Other legal costs would also be borne by the unsuccessful party unless the tribunal deems such apportionment unreasonable, and if only parts of the claim have been successful, the costs would be adjusted in proportion to the successful parts of the claim.[252]	Unless otherwise agreed by the parties, the expenses incurred by the arbitral panel and the other costs associated with the proceedings are to be borne equally by both parties.[253]	The tribunal has significant discretion in determining the manner of sharing amongst the disputing parties in which the costs of the proceedings and the attorney's fees incurred will be paid.[254]

[252] *Clause 5, Article 8.39, Canada-EU CETA*
[253] *Article 14.16, India-Korea CEPA 2009*
[254] *Clause 3, Article 9.29, Chapter 9, TPP Agreement*

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