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Bite of the BIT-

The Steady Rise of Bilateral Investment Treaties and a Pro-Investor Regime in the Global Economy©

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1. Introduction

Bilateral Investment Treaties (BITs) have gained significant prominence in an ever increasing globalized world and rising importance of foreign investment for both developed and developing countries. BITs have been defined as agreements that "*protect investments by investors of one state in the territory of another state by articulating substantive rules governing the host state's treatment of the investment and by establishing dispute resolution mechanisms applicable to alleged violations of those rules.*"[1]

Earlier BITs were thought of only in the context of nationalization/expropriation by the State. Today however, the protection of BITs is sought even when there are any indirect State acts that have led to a dilution / creeping expropriation of the investment. In the last few years India has seen a sudden spurt of BIT arbitration notices from foreign investors. As a byproduct of various State actions such as the cancellation of 2G licenses and retrospective tax amendments, India received nearly 17 BIT notices.[2] In April 2012 Vodafone filed a notice claiming "denial of justice" under the India-Netherlands BIT arising out of India's proposed retrospective tax legislation.[3] Nokia has also initiated arbitration against India with respect to retrospective tax legislation under the India-Finland BIT.[4] In early 2012, Telenor and Sistema had invoked similar protection under the India - Singapore Comprehensive Economic Co-operation Agreement and the India-Russia BIT respectively arising from the revocation of 2G licenses.[5] In 2013, Loop Telecom's investors (KHML and ByCell) also served notices upon the Indian government under the India-Mauritius BIT and the India-Russia BIT respectively.[6] The Children's Investment Fund Management (TCI), a hedge fund, has also invoked BIT arbitration against India over its investment in Coal India.[7]

In November 2011, India was found (by an ad-hoc tribunal constituted under a BIT governed by the UNCITRAL) to have violated its obligations under the Australia-India BIT and White Industries was awarded a sum of $ 4.08 million, plus interest.[8] Currently India has concluded 84 BITs out of which 73 have come into force.[9] A table of India's current BITs reproduced from Kluwer Arbitration (with suitable additions) is provided below [10]:

1. Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 Harv. Int. L. J.469, 469-470, (2000)
2. Deepshikha Sikarwar, *India Ropes in Brigitte Sternto take on Swiss telco ByCell*, The Economic Times, available at: http://articles.economictimes.indiatimes.com/2013-05-27/news/39557215_1_arbitration-case-white-industries-ByCell
3. Kavaljit Singh, *India's "Bilateral Investment Treaties": A New Form of Colonialism?* available at http://www.globalresearch.ca/economic-analysis-india-s-bilateral-investment-treaties-a-new-form-of-colonialism/30606
4. R. Jai Krishna, *Nokia Seeks International Arbitration in India Tax Dispute,* The Wall Street Journal, available at http://www.wsj.com/articles/SB10001424052702304908304579561554186804812
5. Id. Supra n 3
6. Gulveen Aulakh, ET Bureau, *Loop investor plans international arbitration against govt*, The Economic Times, available at http://articles.economictimes.indiatimes.com/2013-09-27/news/42463772_1_loop-telecom-international-arbitration-capital-global . See also Deepshikha Sikarwar, *India Ropes in Brigitte Sternto take on Swiss telco ByCell,* The Economic Times, available at: http://articles.economictimes.indiatimes.com/2013-05-27/news/39557215_1_arbitration-case-white-industries-ByCell
7. Vidya Ram, *Coal India dispute has wider corporate governance issues: TCI, The Hindu Business Line,* available at http://www.thehindubusinessline.com/industry-and-economy/article3255252.ece
8. Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, April 13, 2012, Invest Treaty News available at http://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/
9. See Bilateral Investment Promotion and Protection Agreements, Ministry of Finance, Government of India, available at http://finmin.nic.in/bipa/bipa_index.asp?pageid=1
10. Bilateral Investment Treaties concluded by India, Kluwerarbitration.com available at http://www.kluwerarbitration.com/BITs.aspx?country=India

Jurisdiction	Date of Signature	Entry Into Force	Jurisdiction	Date of Signature	Entry Into Force
Argentina	20.08.99	12.08.02	Kyrgyzstan	16.05.97	12.05.00
Armenia	23.05.03	30.05.06	Laos	09.11.00	05.01.03
Australia	26.02.99	04.05.00	Latvia	18.02.10	27.11.10
Austria	08.11.99	01.03.01	Libya	26.05.07	25.03.09
Bahrain	13.01.04	05.12.07	Lithuania	31.03.11	01.12.11
Bangladesh	09.02.09	07.07.11	Luxembourg	31.10.97	08.01.01
Belarus	27.11.02	23.11.03	Macedonia	17.03.08	17.10.08
Belgium	31.10.97	08.01.01	Malaysia	03.08.95	12.04.97
Bosnia and Herzegovina	12.09.06	14.02.08	Mauritius	04.09.98	20.06.00
Brunei	22.05.08	15.02.09	Mexico	21.05.07	23.02.08
Bulgaria	26.10.98	23.09.99	Mongolia	03.01.01	29.04.02
Burma	24.06.08	08.02.09	Morocco	13.02.99	22.02.01
China	21.11.06	01.08.07	Mozambique	19.02.09	23.09.09
Colombia	10.11.09		Nepal	21.10.11	
Croatia	04.05.01	19.01.02	Netherlands	06.11.1995	01.12.1996
Cyprus	09.04.02	12.01.04	Oman	02.04.97	13.10.00
Czech Republic	11.10.96	06.02.98	Philippines	28.01.00	29.01.01
Democratic Republic of the Congo	13.04.10		Poland	07.10.96	31.12.97
Denmark	06.09.95	28.08.96	Portugal	28.06.00	19.07.02
Djibouti	19.05.03		Qatar	07.04.99	15.12.99
Egypt	09.04.97	22.11.00	Romania	17.11.97	09.12.99
Ethiopia	05.07.07		Russian Federation	23.12.94	05.08.96
Finland	07.11.02	09.04.03	Saudi Arabia	25.01.06	20.05.08
France	02.09.97	17.05.00	Senegal	03.07.08	17.10.09
Germany	10.07.95	13.07.98	Serbia	31.01.03	24.02.09
Ghana	05.08.02		Seychelles	02.06.10	
Greece	26.04.07	12.04.08	Slovakia	25.09.06	16.06.07
Hungary	03.11.03	02.01.06	Slovenia	14.06.11	
Iceland	29.06.07	16.12.08	South Korea	26.02.96	07.05.96
Indonesia	10.02.99	22.01.04	Spain	30.09.97	15.12.98
Israel	29.01.96	18.02.97	Sri Lanka	22.01.97	13.02.98
Italy	23.11.95	26.03.98	Sudan	22.10.03	18.10.10
Jordan	01.12.06	22.01.09	Sweden	04.07.00	01.04.01
Kazakhstan	09.12.96	26.07.01	Switzerland	04.04.97	16.02.00

Kuwait	27.11.01	28.06.03	Syria	18.06.08	22.01.09
Taiwan	17.10.02	25.02.05	United Kingdom of Great Britain and Northern Ireland	14.03.94	06.01.95
Tajikistan	12.12.95	23.11.03	Uruguay	11.02.08	
			United Arab Emirates	12.12.2013	
Trinidad and Tobago	12.03.07	07.09.07	Uzbekistan	18.05.99	28.07.00
Turkey	17.09.98	18.10.07	Vietnam	08.03.97	01.12.99
Turkmenistan	20.09.95	27.02.06	Yemen	30.10.02	10.02.04
Ukraine	01.12.01	12.08.03	Zimbabwe	10.2.1999	

With this background, it is important to understand the history and jurisprudence of BITs, how and when they can be enforced and key grounds that investors can raise for invoking a BIT.

I. BITs Dispute Resolution – Introduction

BITs typically provide for a dispute resolution clause. Parties agree to submit any dispute arising out of their investment to arbitration. Such arbitration can be undertaken under an institutional format or an ad-hoc format. In an institutional format the rules of the institution apply and the institution facilitates the process of appointment of the arbitrators and the conduct of the arbitration. The International Centre for Settlement of Disputes ("**ICSID**") is at the forefront of BIT institutional arbitration with more than 140 member countries.[11] Currently ICSID is the preferred institution around the world for the resolution of investment disputes. ICSID arbitrations are governed by the rules and regulations set forth in the ICSID Convention.

On the other hand, some countries like India are not members of ICSID. India follows an ad-hoc arbitration format in most of its BIT dispute resolution clauses with UNCITRAL rules (United Nations Commission on International Trade Law) applicable. The tribunal is constituted through consensus of the parties or upon failure to agree by the appointing authority (which may be nominated by the parties or may be the Permanent Court of Arbitration).[12] There is an appeal process when UNCITRAL Rules are used but the ICSID does not provide for such a direct and clear appeal option. There is therefore less institutional control and a perceived sense among parties that they have more control over the arbitration process, choice of arbitrators etc.

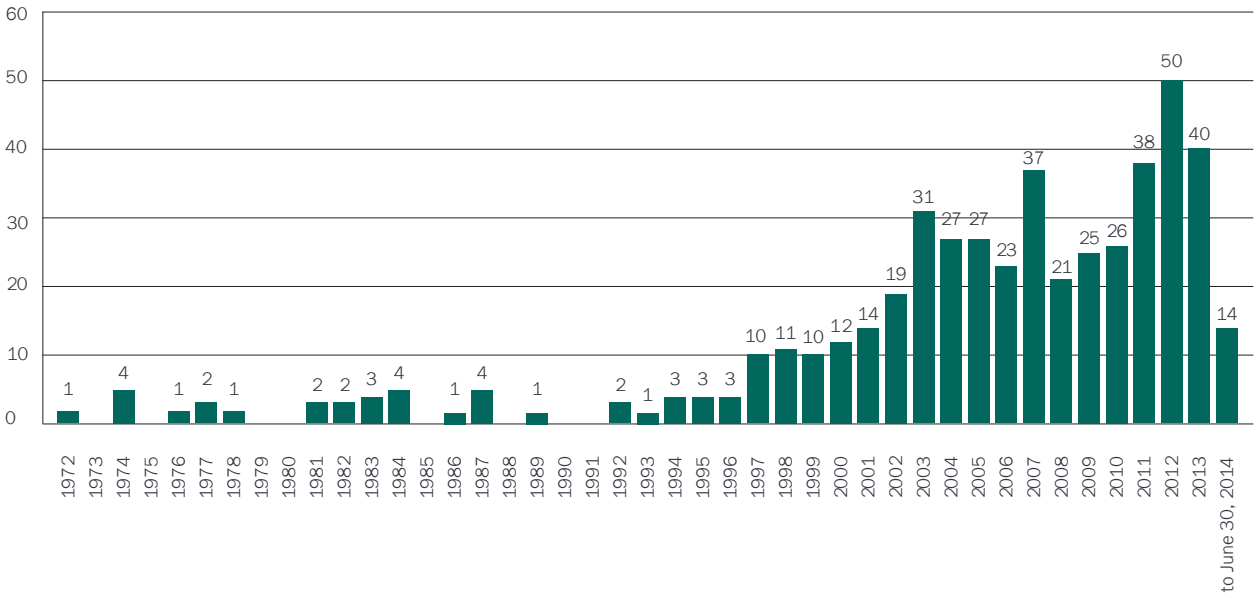
The ICSID Convention has helped institutionalize the process of investment arbitration. Currently, there are 159 signatory States to the ICSID Convention.[13] Of these, 150 States have ratified the Convention.[14] The table below is reproduced from ICSID's data of the cases filed before it.[15]

II. BITs-the Growth Story

United Nations Conference on Trade and Development (UNCTAD) in its report has noted that BITs are the most important instrument for the protection of foreign investment.[16] There has been an exponential growth in the number of BITs as they provide for institutional remedies that can be claimed against expropriation. Prior to BITs

11. ICSID Member States, available at https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx?tab=FtoJ&rdo=BOTH
12. Articles 6, 7 and 8 of the UNCITRAL Arbitration Rules available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf
13. Data available from International Centre for Settlement of Investment Disputes, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home
14. International Centre for Settlement of Investment Disputes, The ICSID Caseload – Statistics (Issue 2014-2), available at wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/01/12/000442464_20150112143506/Rendered/PDF/936220NWP0Box30ats020140200English0.pdf
15. ICSID Caseload – Statistics (Issue 2014-2), International Centre for Settlement of Investment Disputes, p. 7 available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/01/12/000442464_20150112143506/Rendered/PDF/936220NWP0Box30ats020140200English0.pdf
16. UNCTAD Bilateral Investment Treaties, 1959-1999 UNCTAD/ITE/IIA/2 UN (2000) available at http://www.unctad.org/en/docs/poiteiiad2.en.pdf

Chart: Cases Registered under the ICSID Convention



coming into force, most foreign investors had a minimal degree of protection in developing countries against nationalization. A standard of protection was granted under the 'Hull rule' which stipulated that expropriation without 'prompt, adequate and effective' compensation was illegal.[17] Majority of the developing countries were opposed to this rule and yet at the time of entering into BITs they incorporated this rule (in even more severe terms) in order to sustain their position in the international markets for attracting foreign investors.[18]

In the 1990s, there was a sudden rise in the number of BITs concluded (especially in Asia). This was also the era when India made its gateway to liberalization. These treaties were viewed as a way for developing countries to get a foot in the door by increasing their investment potential and promoting an "open door policy". The UNCTAD report notes that during this time the number of BITs concluded between developing countries (South-South BITs) and those in Central and Eastern Europe increased from 63 to 833.[19]

The growth of South-South BITs also revealed that there was an essential difference between them and the North-South BITs. Since South-South BITs were between developing countries they covered common factors that were mutually important to the developing countries and were found to be far more restrictive than North-South BITs, specifically with respect to repatriation of foreign funds and National Treatment (NT) clauses.[20] The reasons for this are obvious. Developing countries were more concerned with tackling their balance of payments problem as also with promoting indigenous production in some industries. Poulsen argues however that despite this, many of the South-South BITs covered standard model North-South clauses and issues so as to attract non-BIT countries to invest, set precedents for foreign investors and appear as a competitive market among neighbouring countries as also to factor in future developments in investment.[21] It may be noted that while BITs are supposed to be reciprocal in nature they are generally far more unfavourable to developing countries than to developed countries. This is evident from the fact that only 2 cases out of 120 before the ICSID had the Plaintiff as a developing country and the defendant a developed country.[22]

The 2008 World Investment Report noted that over 40% of the BITs concluded were between developing

17. Statement of US Secretary of State Cordell Hull which stated that 'no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore', A. Guzman, Virginia Journal of International Law, 641, 639-688.
18. Eric Neumayer and Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?* World Development, Vol. 3, No. 1, 31-49 (2005) available a thttp://papers.ssrn.com/sol3/papers.cfm?abstract_id=616242
19. UNCTAD Bilateral Investment Treaties, 1959-1999 UNCTAD/ITE/IIA/2 UN (2000) available at http://www.unctad.org/en/docs/poiteiiad2.en.pdf at iii.
20. Lauge Skovgaard Poulsen, *Are South-South BITs any different?- a logistic regression analysis of two substantive BIT provisions, ASIL, International Economic Law Conference Paper*, available at http://www.asil.org/files/ielconferencepapers/poulsen.pdf
21. Id at 6.
22. Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite, World Bank, DECRG, June 2003

countries.[23] India was at the forefront of this drive. Today, however, a large number of BITs are being reviewed or renegotiated in a manner suited to country's economic goals, improving investor-state arbitration standards and taking into account any subsequent changes in interpretation of treaty terms provided by investment tribunals.[24]

23. UNCTAD World Investment Report 2008 (New York, UNCTAD, 2008), I.12

24. UNCTAD World Investment Report 2010, 85-86 available at http://www.unctad.org/en/docs/wir2010_en.pdf

2. History of BITs

I. General Background

The growth of corporations and technology in the mid-nineteenth century led to the advent of foreign investment.[25] Increase in foreign investment also saw an increase in expropriation of foreign projects.

Historically, in public international law, foreign nationals as "outsiders" did not share an equal status with the nationals and were consequently denied legal capacity.[26] Since national courts of the host State did not entertain denial of justice claims from foreign investors, they were left with little remedy but to resort to their own domestic courts to seek compensation for expropriation. Thus, the home State would have to exercise the right for diplomatic protection of its injured national against the host State (for unequal treatment and expropriation) and the Permanent Court of International Justice (PCIJ) recognized this as a right under public international law.[27] This led to the creation of ad-hoc arbitral tribunals which had the jurisdiction to try such disputes.

The exercise of diplomatic protection for its nationals and against the host state was viewed as the State exercising its right against the wrongful act or the injury caused by the host State to its own nationals.[28] Whether a State would exercise such protection would often depend on its caprices (beyond the merits of the dispute) and political or other reasons which could undermine the investor's claims.[29] In such a situation the foreign investor was virtually left remedy-less, especially when local courts refused to admit claims and declined jurisdiction. Against this background the need for an independent, treaty based right to protection seemed eminent.

One of the early and prominent cases of the PCIJ which dealt with an investment dispute is the *Chorzow Factory*[30] case. In this case there was an agreement between a company and the German Reich for the construction of a factory in Chorzow which was in the disputed region of Upper Silesia. Subsequently the Geneva Convention was signed between Poland and Germany wherein the Chorzow region was handed over to Poland. The Convention required reparation damages to be provided by Poland where the German government's property was taken over. The disputes arising from the Convention were to be referred to the PCIJ. The question was as to whether the land was the company's private property or Germany's property. If it were German property Poland could have seized it subject to payment of reparation. When the dispute reached the PCIJ, it held that the land was privately owned and Poland's action amounted to the seizure and expropriation of private property[31] and held that *"there can be no doubt that the expropriation . . . is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights."* [32]

II. The Calvo Clause Doctrine and the Hull Rule

In the late nineteenth century an Argentinian lawyer Carlos Calvo formulated the Calvo doctrine in the context of equality of treatment to foreign investments. Simply stated, the Calvo clause provides that nationals of the investing State will be treated no differently than nationals of the host State where the investment is being carried out.[33] Under the Calvo doctrine (which has, in modern times been

25. R Doak Bishop, James Crawford and W. Michael Reisman, Foreign Investment Disputes, Cases, Material and Commentary (Kluwer Law International, 2005), p. 2
26. R. Arnold, 'Aliens', in R. Bernhardt, ed., Encyclopedia of Public International Law, Vol. I (Amsterdam: North-Holland Pub. Co, 1992) [Encyclopedia] at 102 as cited in Andrew Newcombe and LluísParadell, Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law International 2009) p. 2.
27. The Mavrommatis Palestine Concessions (1924) PCIJ Ser. A, No. 2
28. Id. at 12
29. Andrew Newcombe and Lluís Paradell , Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law International 2009) p. 5; See also Barcelona Traction, Light and Power Company Limited (Belgium v. Spain) [1970] ICJ Rep 4 at para. 79.
30. (Germany v. Poland) (1927) P.C.I.J., Ser. A Nos. 7, 9, 17, 19
31. The Hull Rule' in Andrew T. Guzmán, Explaining The Popularity of Bilateral Investment Treaties:Why LDCs Sign Treaties That Hurt Them, available at http://centers.law.nyu.edu/jeanmonnet/archive/papers/97/97-12-III.html#fnB14
32. The Chorzow Factory Case, 1928 P.C.I.J., Ser. A, Nos. 7, 9, 17, 19, reprinted in in Henry J. Steiner, Detlev F. Vagts, & Harold H. Koh, Transnational Legal Problems,, p 452
33. See generally, Santiago Montt, *What International Investment Law and Latin America Can and Should Demand from Each Other. Updating the Bello / Calvo Doctrine in the BIT Generation,* 3 Revista Argentina Del Regimen De La AdminintracionPublica (2007), pp. 6-8 available at http://iilj.org/GAL/documents/SantiagoMontt.GAL.pdf

abandoned in most current BITs given the heavy reliance placed on host State courts) the foreign investors could seek recourse in the national courts of the host State but were not allowed recourse to diplomatic protection through their national governments or international arbitral tribunals.[34]

The era of the use of national diplomacy measures has been often termed as an era where "gun-boat" diplomacy was resorted to.[35] The US and European powers consistently backed their claims with a show and use of force just to ensure their diplomatic protection measures were enforced.[36] Since there was such a frequent use of gun-boat diplomacy and a threatened misuse of diplomatic measure, some Latin American States such as Venezuela resisted such measures.[37]

The problems arising out of the use of national government diplomatic measures in resolving investor-state disputes and the changing dynamics of world politics heightened the need for a centralized process of resolving investment disputes. The process of nationalization such as the movement of the Soviet union toward socialism and Mexico's oil expropriation amongst other forms of international upheaval supported this move.[38] In 1938 Mexico nationalized and thereby expropriated all the oil reserves within its territory. US companies demanded compensation for expropriation and there was disagreement over the minimum standard to be adopted for the amount of compensation.[39]

This was the background against which the "Hull Rule" developed (seen largely as the initiative of developed European countries and the United States so as to protect their investment abroad), which provided that in the event of expropriation there would be "prompt and adequate" compensation.[40]

As pointed out above, the evolution of the Hull Rule was linked with the expropriation of a number of properties from 1915 onwards that affected foreign nationals including American nationals. On the issue of compensation for expropriation, Mexico contended that it was only entitled to pay only in accordance with its national laws. Mexico stated that there was a category of general expropriation for redistribution affecting Mexican nationals and foreign nationals both for which Mexico would pay per its national laws. Such a general expropriation, under International law (according to Mexico) was different from an expropriation in specific cases where "interests known in advance and individually determined were affected."[41] On the other hand, United States contended that its aggrieved citizens were entitled to prompt, adequate and effective compensation in all circumstances from the Mexican government under the Hull rule (named after US Secretary of State Cordell Hull).[42]

III. Developments after World War II

After World War II, compensation for expropriation became a universally accepted principle of International law and was incorporated in various international conventions such as the Universal Declaration of Human Rights as well as national legislations.[43] Unsuccessful attempts were made thereafter through regional conventions for the protection of foreign investments.[44] The ICC also suggested measures for the protection of foreign investments through the International Code of Fair Treatment for Foreign Investment and it included provisions such as Most Favoured Nation and fair

34. Norbert Horn, Arbitration and the Protection of Foreign Investment: Concepts and Means in Norbert Horn and Stefan Michael Kröll (eds), Arbitrating Foreign Investment Disputes, (Kluwer Law International 2004) p. 24
35. James Cable, *Gunboat Diplomacy 1919-1991: Political Applications of Limited Naval Force,* (St. Martin's Press, 1994)
36. Joseph Smith, *The United States and Latin America, A History of American Diplomacy, 1776-2000,* (Taylor & Francis, 2005); Robert Mandel, The Effectiveness of Gunboat Diplomacy, International Studies Quarterly (1986) 30, 59-76
37. Chapter 1 - Historical Development of Investment Treaty Law in Andrew Newcombe and Lluís Paradell , *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer Law International 2009) p 8.
38. R Doak Bishop, James Crawford and W. Michael Reisman, *Foreign Investment Disputes, Cases, Material and Commentary* (Kluwer Law International, 2005), p. 3.
39. Mexican Expropriation of Foreign Oil, 1938 in Milestones 1937-1945, US Department of State, Office of the Historian, available at http://history.state.gov/milestones/1937-1945/MexicanOil
40. 'The Hull Rule' in Andrew T. Guzmán, Explaining The Popularity of Bilateral Investment Treaties:Why LDCs Sign Treaties That Hurt Them, available at http://centers.law.nyu.edu/jeanmonnet/archive/papers/97/97-12-III.html#fnB14
41. US Secretary of State to Mexican Ambassador, 22 Aug. 1938, reproduced in 'Mexico-United States: Expropriation by Mexico of Agrarian Properties Owned by American Citizens' (1938) 33 AJIL Supp, pp. 201-207 as cited in Chapter 1 - Historical Development of Investment Treaty Law in Andrew Newcombe and Lluís Paradell , Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law International 2009) p 17
42. This case helped in understanding the specific standards of the Hull Rule that must be followed by the countries in foreign investment cases. J.L. Kunz, 'The Mexican Expropriations' (1940) 17 NYULQR 327
43. Supra n. 38
44. For example the Havana Charter for an International Trade Organization, 24 Mar. 1948, UN Conference on Trade and Employment, U.N. Doc. E/CONF.2/78, Sales No. 1948.II.D.4.Havana Charter of 1948.

compensation.[45] Unfortunately neither this Code nor the subsequent attempt at providing a centralized forum through the International Law Association ever came into force. As Newcombe and Paradell point out, while neither of these drafts saw the light of day, they played a crucial function, in changing the international vocabulary from protection of property to protection of investment.[46]

Soon after Louis Stone and Richard Baxter of Harvard prepared a draft (called the 1961 Harvard Draft) which was the Draft Convention on the International Responsibility of States for Injuries to Aliens.[47] There was also a rise in 'Friendship and Commerce Treaties' between States which increasingly sought to include investment protection as one of their clauses.[48] The OECD also attempted to draft a convention thereafter which did not come into force.[49]

At long last, in 1966 the International Bank for Reconstruction and Development's Convention on the Settlement of Investment Disputes between States and Nationals of other States came into effect (the ICSID Convention). The International Centre for the Settlement of Investment Disputes (ICSID Centre) was established to arbitrate investment disputes as a centralized forum.[50]

The nationalization situation in Chile, Jamaica, Libya etc. in the late sixties led to the acceleration of the Bilateral Investment Treaty (BIT) process and the US came up with a Model BIT in 1970.[51] From the 1960s onwards a number of countries continued to negotiate and conclude BITs and this brought in the dawn of an important era in investment arbitration. However, India is not a signatory to the ICSID Convention.

45. International Chamber of Commerce, International Code of Fair Treatment of Foreign Investment, ICC Pub. No. 129 (Paris: Lecraw Press, 1948), reprinted in UNCTAD, International Investment Instruments: A Compendium, Vol. 3 (New York: United Nations, 1996) [IIA Compendium] at 273.
46. Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law International 2009) p. 20.
47. (1961) 55 AJIL 545.
48. The US entered into a number of FCN treaties such as U.S.-China (Taiwan), U.S.-Italy, U.S.-Ireland, U.S.-Greece, U.S.-Israel, U.S.-Ethiopia, U.S.-Denmark, U.S.-F.R. Germany, U.S.-Iran, U.S.-Nicaragua, U.S.-Netherlands, U.S.-Korea, U.S.-Japan, U.S.-Muscat and Oman, U.S.-Pakistan, U.S.-France, U.S.-Belgium, U.S.-S. Vietnam, U.S.-Luxemburg, U.S.-Togo, and U.S.-Thailand as cited in Ricki E. Roer and Scott R. Abraham, *FCN Treaties – An Important Tool in National Origin Discrimination Claims*, January 2011, available at http://www.wilsonelser.com/writable/files/Newsletters/employment_newslette
49. The Draft Convention on the Protection of Foreign Property available at http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf
50. The ICSID Convention, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf The ICSID Convention had been preceded just a few years back by the New York Convention, 1958 on Recognition and Enforcement of Foreign Awards. This convention provided rules for enforcing foreign awards in national courts and limited grounds for the challenge of such awards.
51. Supra n 25

3. BIT Jurisprudence

The above mentioned historic developments led to the first phase of development of investment arbitration jurisprudence. Mentioned below are some of the standard clauses that get negotiated into BITs between countries.

I. Definition of "Investment"

Developed countries want to ensure that the definition of 'investment' is wide enough to encompass pre-establishment claim protection.[52] Treaties with a pre-establishment protection clause adopt a language in which even during the establishment and acquisition phase of the investment, all the protections afforded by the treaty are provided. For instance, the US-Azerbaijan treaty grants the protection of National treatment and Most Favoured Nation even to the setting up of the investment:

> ***"With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments,*** *each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies."*[53] (emphasis supplied)

The definitions of 'investment' are typically divided into three types, viz the 'asset based definition' (which includes various kinds of assets and interests such as shares, moveable and immoveable property, bonds etc.), the 'tautological or circular definition' (which attempts to encompass both present and future investments) and the 'list based definition' (which gives finite examples of assets covered by the treaty).[54] The contents of such definition determine the boundaries of a State's involvement within a jurisdiction and are thus a crucial determinant for ascertaining the competency of such jurisdiction for making an investment in that State.

Another aspect regarding the definition of investment is whether existing investments would be covered in it. It has been observed that developing countries prefer to include only future investments in the definition as it corresponds with the underlying purpose of a BIT.[55]

Since investments are carried out by 'investors', most BITs define investors as natural or legal persons having a certain degree of connection with the Contracting States to the agreement.[56] While natural persons include nationals, citizens and in some cases even permanent residents legal persons generally include only those individuals whose principal place of incorporation or business is the investor state.[57] This raises a pertinent question - what is the level of control wielded by an investor over the investment in the host country?

In accordance with the UNCTAD report, in order to circumvent the effect of the *Barcelona Tractions* decision[58] (which provided that non-national shareholders of a company could not receive diplomatic protection), most modern BITs include the term 'control' to mean both direct and indirect control so that even remote levels of ownership are protected.[59]

52. UNCTAD/ITE/IIA/2006/5 - E.06.II.D.16, 01/02/07 Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking, available at http://www.unctad.org/en/docs/iteiia20065_en.pdf
53. Article II of the US-Azerbaijan Investment Treaty.
54. UNCTAD/ITE/IIA/2006/5 - E.06.II.D.16, 01/02/07 Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking, available at http://www.unctad.org/en/docs/iteiia20065_en.pdf at 7-11.
55. Jeswald W. Salacuse *BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Investment in Developing Countries*, 24 Int'l L. 655 1990, 664-665
56. UNCTAD/ITE/IIA/2006/5 - E.06;

    Definition of Investor and Investment in International Investment Agreements International Investment Law: Understanding Concepts and Tracking Innovations (OECD 2008), available at http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf
57. Id.
58. Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain) (1962–1970), Preliminary Objections, available at http://www.icj-cij.org/icjwww/idecisions.htm of 24 July 1964; and second phase — judgment of 5 February 1970 (http://www.icj-cij.org/icjwww/idecisions.htm).
59. UNCTAD/ITE/IIA/2006/5 - E.06;

The specification of an investor becomes important also in terms of dispute resolution. Since disputes may not merely be between contracting parties but in fact between a national on one side and a contracting party on the other, with a separate provision in the BIT providing for such a dispute.[60]

Since an investor may be either a natural person or a legal person, the nationality of a natural person is determined by the domestic law of the State whose nationality is claimed.[61] For legal persons Tribunals have tended to consider the place of incorporation since getting into the substantive nature of multinationals can be extremely complicated.[62] It is important to note that investment disputes are between a natural or legal person on one side and a State on the other. Article 25 of the ICSID convention clearly provides that ICSID's jurisdiction extends to disputes between a Contracting State and the national of the other Contracting State. A crucial element of this arrangement of nationality is that the treaty applies only to this narrow and specific category of persons. Therefore a State may deny the benefits of its treaty provisions to any third party. For example, with respect to a company controlled in a third State but claiming as a national of a State in which it is incorporated, the Australian-Libyan BIT states:

"A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to its investments, if investors of a Non-Contracting Party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting Party under whose law it is constituted or organised."[63]

II. Expropriation

When the State takes over the investment of an investor it is bound to pay compensation to the Investor for such an act of expropriation under customary international law. This standard has been incorporated into BITs internationally. Expropriation has been defined as the "formal withdrawal of property rights for the benefit of the State or for private persons designated by the State."[64] The expropriation may be direct where the State deliberately seizes the foreign investor's property, or creeping / indirect where several administrative and governmental measures would together deny the investor of its right to enjoy its investment.[65] In a direct expropriation there is a need to show the positive intent to expropriate as a causal link between the expropriation action and change of title of property.[66] On the other hand an indirect or creeping expropriation is much more complex. There is a need to show substantial deprivation.

The standard set out in the Pope and Talbot case is often quoted in investment cases:

"Substantial deprivation results under this list from depriving the investor of control over the investment, managing the day to day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in whole or in part."[67]

60. Rudolf Dolzer, Margrete Stevens, *Bilateral Investment Treaties*, 119 (1995)
61. Definition of Investor and Investment in International Investment Agreements International Investment Law: Understanding Concepts and Tracking Innovations (OECD 2008), available at http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf
62. Id. at 18.
63. Christoph Schreur, *Nationality of Investor: Legitimate Restrictions v. Business Interests* ICSID Review Foreign Investment Law Journal, 521, available at http://www.univie.ac.at/intlaw/wordpress/pdf/nationality_investors.pdf
64. Suzie H. Nikiema, Best Practices Indirect Expropriation, available at http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf
65. Chapter 7 - Expropriation in Andrew Newcombe and Lluís Paradell , Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law International 2009) p. 322
66. Sempra Energy International v. Argentina (ARB/02/13) award of September 28, 2007, para. 283 p. 83;
67. *Pope & Talbot Inc. v. Government of Canada*, Interim Award of June 26, 2000, para. 100

There are many forms of contractual expropriation. These are examples of cases cited in the Azurix decision [68]:

"i. Contractual breach forming a part of a series of acts that amounts to expropriation. (*Waste Management*)

ii. A fundamental breach of contract, affecting the heart of performance of the contract and has an adverse impact on the subject of the contract. (*BP v. Libyan Arab Republic*)

iii. Any regulatory action that modifies, denies or alters contractual rights (*CME v. Czech Republic*)

iv. A repudiatory breach of specific contractual rights or the contract as a whole. (*Phillips Petroleum v. Iran*)

v. Breach of a contract's stabilization clause. (*Agip v. Congo*)"

The result of proving expropriation in any form gives a direct right to compensation for the loss of investment.

III. National Treatment and Most Favoured Nation

The clause ensures that there is no discrimination based on nationality for the purposes of trade. This provision has often been a cause of concern for developing countries especially if they are seeking to protect their own domestic industries. In order to safeguard their rights, they may adopt exceptions to this clause.

A National Treatment obligation arises out of a treaty obligation and does not arrive from customary international law, although it has its roots there. As observed in the *Methanex* case:

"As to the question of whether a rule of customary international law prohibits a State, in the absence of a treaty obligation, from differentiating in its treatment of nationals and aliens, international law is clear. In the absence of a contrary rule of international law binding on the States parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens." [69]

India is of the view that National Treatment ought to be provided only at the post-establishment stage and that it may be general practice that 'investment' is provided National Treatment, while 'Investors' get Most Favoured Nation treatment.[70]

The Most Favoured Nation clause read along with the National Treatment clause ensure that the investor gets the same advantages as the "most favored nation" by the country granting such treatment. It was aptly described in the Loewen case:

"What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant.' In the context of Loewen this meant that 'a Mississippi court shall not conduct itself less favourably to Loewen, by reason of its Canadian nationality, than it would to an investor involved in similar activities and in a similar lawsuit from another state in the United States or from another location in Mississippi itself..." [71]

While MFN treatment applies to substantive provisions of a BIT the *Maffezini* [72] case has clarified that it extends to procedural provisions relating to more favourable "dispute resolution" clauses as well. The Court found that dispute resolution

68. Infra at 3 VII B (i); a detailed analysis of expropriation and creeping expropriation follows later in the paper where the Azurix decision has been discussed.

69. Methanex Corporation v. United States (Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug. 2005) [Methanex] at Part IV – Chapter C, para. 25.

70. Views on Modalities for Pre-Establishment Commitments Based On a GATS-Type Positive List Approach, WT/WGTI/W/150, Octtober 7, 2000 available at http://commerce.nic.in/wto_sub/Invest/sub_invest-W150.htm

71. *Raymond L. Loewen v. United States* (Award, 26 Jun. 2003), at para 139

72. Emilio Agustín Maffezini v. Kingdom of Spain CASE NO. ARB/97/7 available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC566_En&caseId=C163

mechanisms within a BIT were inextricably linked to the protection of foreign investments.

IV. Fair and Equitable Treatment

This standard has not been uniformly interpreted over the years and it has evolved since its inception in the Havana Charter of 1948 and then the Friendship Commerce and Navigation (FCN) treaties concluded by the United States.[73] The Fair and Equitable treatment has been linked with other substantive standards such as non-discrimination (for example the India –Korea BIT) or the fair and equitable standard as understood in public international law (for example the Argentina-France BIT).[74] There is thus often a question as to whether this standard is linked to customary international law, derived from it or whether it is an autonomous standard under investment arbitration.[75] Kenneth Vandevelde asserts that tribunals through their decisions have (unintentionally) set out a uniform standard for fair and equitable treatment. He points out that the standard entails certain precepts of international law such as *due process* before local courts (which includes the right to be heard impartially and a right to legal representation, prevention of abuse and harassment of the investor, a grant of legitimate expectations) and *reasonableness* of laws, *consistency* (where one treats like cases alike), *nondiscrimination* (on the grounds of identity) and *transparency*.[76] All these factors are taken into account when balancing interests in determining the compensation due for a breach of this standard. In practice the standard has deviated from an unqualified obligation for according such a treatment to an obligation connected with international law and lesser still a minimum standard of treatment applicable to aliens under customary international law.[77] Tribunals apply the latter two degrees of variation more frequently. For understanding of what amounts to a minimum standard of treatment accorded to aliens, the seminal *Neer claim* decision is relevant.

The case observed- *"the propriety of governmental acts should be put to the test of international standards...the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial"*[78]

The UNCTAD report on the Fair and Equitable standard points out that while the general principles discussed have been applied by Tribunals more or less consistently, the Investor's own conduct (such as fraud or misrepresentation) also becomes relevant in informing the standard.[79] Although in terms of application some general precepts have been followed, some decisions have interpreted this standard very broadly where a fairness element was considered to be in addition to the international law minimum requirement (the Pope & Talbot case [80]). In arriving at the conclusion in the *Pope & Talbot* case the Tribunal looked at BITs signed by NAFTA parties and noticed that many of them included this "additive" approach.

On the other hand, depending on the language of the BIT some decisions have read it within the understanding of arbitrariness in customary international law. A number of decisions were analyzed and the evolving pattern was summarized in *Waste Management II* as follows:

"Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading

73. Havana Charter for an International Trade Organization, Mar. 24, 1948, 62 U.N.T.S. 26 available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf
74. See Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment,* 43 N.Y.U. J. Int'l L. & Pol. 43 (2010), at 46.
75. Fair and Equitable Treatment Unctad Series on Issues in International Investment Agreements II available at http://unctad.org/en/docs/unctaddiaeia2011d5_en.pdf
76. Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment,* 43 N.Y.U. J. Int'l L. & Pol. 43 (2010), 49-53.
77. Fair and Equitable Treatment Unctad Series on Issues in International Investment Agreements II available at http://unctad.org/en/docs/unctaddiaeia2011d5_en.pdf
78. United Nations, Reports of International Arbitral Awards, 1926, IV, pp. 60ff.
79. Id.
80. *Pope & Talbot Inc. v. Government of Canada*, Interim Award of June 26, 2000,

to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[81]

Apart from standard clauses, international investment arbitration jurisprudence has developed keeping in mind the following doctrine:

V. Legitimate Expectation

This is a standard rather than a separate clause itself in the BIT. This standard doctrine is the backbone that makes up the "fair and equitable treatment" clause. It has been argued that the legitimate expectation standard is much too Investor centric and that there ought to be a balance between protecting the Investor and protecting the policy interests of the Host state.

"While in principle the concept of legitimate expectations may well have a place within fair and equitable treatment, its thoughtless application, looking at the issues at hand from the perspective of the investor only, runs the risk that the true purpose of the FET provision in IIAs will be lost under the weight of investor concerns alone. In this context, it is crucial to understand what kind of investor expectations can be seen as legitimate and in what circumstances they may reasonably arise."[82]

The *Tecmed*[83] case applied the fair and equitable principle in the context of good faith and legitimate expectations. The Claimant in this case ran a landfill and the Mexican Waste Management Institute denied the renewal of the license and recommended its closure. The Claimant sought relief under the Spain-Mexico BIT and contended expropriation, denial of a legitimate expectation of revenue from an on-going business as also (indirectly) denial of the expectation of revenue spent in acquisition of the investment. The Tribunal found in favour of the Claimant and held that in according fair and equitable treatment a State ought not to deny the basic expectation of the Investor. Any action ought to be unambiguous, consistent, and transparent.[84] The Tribunal thus held that the Claimant's legitimate expectation had been denied since it had not even been granted an alternative to consider other ways of maintaining its license.[85]

VI. Denial of Benefits

While the denial of benefits began as a doctrine it is often incorporated as a separate clause in BITs these days. The idea of this clause is to ensure that the protection of BITs is provided only to those investors that are nationals of the country which is the signatory to the BIT. Therefore when a party through the use of the corporate structure attempts to seek BIT protection this clause comes to the rescue. For example an entity which is incorporated in State A but controlled completely from State B will not be able to seek the benefit of the BIT that State A may have concluded with another country even if theoretically it is a "national" of State A. This is a rule of substance over form. It looks at who holds the actual control.[86]

Some treaties have a denial of benefits clause based on the lack of a substantial business in the investor country. Here the Tribunal would look at the business activity of the claimant. For example in *Pac Rim Cayman LLC v Republic of El Salvador*[87] this exact question of whether the investor could claim benefits under the US-Dominican Republic-Central America Free Trade Agreement was raised and it was held that the denial of benefits clause in the

81. *Waste Management, Inc. v. United Mexican States*, Case No ARB(AF)/00/3 at para 98. Available at http://www.state.gov/documents/organization/34643.pdf
82. Fair and Equitable Treatment Unctad Series on Issues in International Investment Agreements at p. 9 II available at http://unctad.org/en/docs/unctaddiaeia2011d5_en.pdf
83. *Tecnicas Medioambientales Tecmed S.A. v.The United Mexican States* CASE No. ARB (AF)/00/2
84. See Marcela Klein Bronfman, *Fair and Equitable Treatment: An Evolving Standard* Max Planck UNYB 10 (2006) at 637-638, available at http://www.mpil.de/shared/data/pdf/pdfmpunyb/15_marcela_iii.pdf
85. Id.
86. M. Somarajah, *The International Law on Foreign Investment*, at p. 329 (Cambridge University Press, 2010)
87. *ICSID Case No. ARB/09/12*

Agreement precluded ICSID's jurisdiction since the claimant did not carry on a substantial business in the investor country.

VII. Case Law

Below we elucidates in detail some illustrative cases in the BIT regime which aid in understanding the scope of protection that clauses stipulated in the BIT offer and the changing nature of the investment treaty remedy regime. While there are numerous important decisions in BIT jurisprudence, these particular decisions help to analyze some of the doctrines discussed above.

A. American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo [88]

In this case a US company set up a business in Congo (formerly Zaire) and set up a plant for this purpose. During the civil war in Congo, the plant was destroyed and the US Company had no contractual relationship with the government to sue for such damage. In the absence of a BIT, the US Company would have been left with no remedies. Since the US-Zaire Bilateral Investment Treaty existed, the US Company successfully claimed significant damages for the loss of its investment through an ICSID award. The American company was able to receive significant damages for its losses.

The Tribunal found that the BIT envisaged that Zaire was under an obligation (Article II of the US-Zaire BIT - duty of fair and equitable treatment, security of investments in accordance with national law which will not be less than that recognized by international law.) to afford AMT a protection for its investment. The Tribunal recognized that Zaire would have to show that it had fulfilled its obligation to protect AMT's investment in its territory. Merely saying that Zaire's own national legislation exonerated it from all its reparation obligations was not enough. The standard of national level compliance could not be lesser than the standard under international law. The Tribunal found that it was an objective obligation which provided a minimum standard of international law which Zaire had failed to comply with.

B. Azurix Corp. v. Argentine Republic, ICSID [89]

In this case there was a concession agreement by way of which a US investor (Azurix through its subsidiary in Argentina ABA) won a tender bid (a 30 year concession agreement) for an amount of over $400 million for the provision of drinking water services and the disposal and treatment of sewage water in Buenos Aires.

The Argentinian provincial authorities allowed political interests to interfere with the tariff regime that ABA used to charge its customers for these water services. The provincial authorities attempted to stop the ABA from increasing revenues. The Province also failed to comply with its contractual obligations under the Concession Agreement for repair work.

In addition to this, consumers were encouraged to deny payment for the water services. Azurix subsequently terminated the Concessions Agreement (which the Province rejected). ABA subsequently filed for bankruptcy and the Argentinian province terminated the Concessions Agreement. Thereafter, Azurix initiated arbitration before ICSID under the 1991 Argentina-US BIT for expropriation, denial of fair and equitable treatment, lack of non-discrimination, lack of full protection and security. Azurix made a claim for US$ 665 million in damages along with interest.

The Tribunal gave a ruling in favour of Azurix holding that the actions of Argentina were arbitrary, constituted violation of the fair and equitable treatment and full protection and security requirements of the BIT. The Tribunal rejected the claim of expropriation and other claims. The Tribunal however awarded "fair market value" of the investment.

The main contentions of the US Investor (Azurix) were:

i. The expropriation of Azurix' investments in Argentina which amounted to expropriation without prompt, adequate and effective compensation; (Article IV (1)).

ii. Failure to meet legitimate expectations of the Investor.

iii. Failure to accord fair and equitable treatment, full protection and security and meeting international

88. (ICSID Case No. ARB/93/1)

89. Case No. ARB/01/12

law standards. (Article II (2)(a)).

iv. The employment of arbitrary means that interfered with Azurix use and enjoyment of its investment. (Article II (2)(b)).

v. Argentina's failure to meet its obligations toward Azurix's investments (Article II (2 (c)).

vi. Lack of transparency in Argentina's practices and procedures (administrative and adjudicatory).

i. Expropriation

Azurix contended "creeping expropriation" where it argued that by a series of acts the contract rights of Azurix under the concessions agreement (contract rights form a part of "investment" under the BIT) were taken away. While each act by itself did not amount to expropriation, a series of acts taken together amounted to "creeping expropriation". Azurix argued that due to the restrictive tariff regime, the company would be unable to meet its own "sunk costs" thus amounting effectively to expropriation. Further, it was argued that since the company had already set up plants and pipes it was convenient for the government to create hurdles at this point since the company would not at this point be able to suspend operations.

The Tribunal observed that a breach of contract by a State or its instrumentality would not ordinarily amount to expropriation. Whether a series of such acts would amount to a breach depends on whether the State was a party to the contract or whether the State acted in exercise of its sovereign authority. If a State merely performs a contract inadequately that would not amount to an expropriation claim unless the State has acted beyond the scope of being a party to the contract and exercised specific sovereign functions. Thus, the Court went on to analyze specific instances of breach that led to expropriation and as to whether in each of those instances the State had acted as a sovereign.

ii. Legitimate Expectations [90]

It was contended that any conduct that thwarted the investor's legitimate expectations when one makes the investment would amount to an expropriation.

The Tribunal, relying on the *Tecmed decision* [91] observed that a severance of legitimate expectation may occur not just when there is a contractual breach but also when explicit or implicit assurances or representations which the State made and which were relied upon by the Investor.[92] The Tribunal found that the action of the State officials such as public threats, the lack of any co-operation from the authorities for completion of privatization of the project, all showed politicization of the process and a failure to meet legitimate expectations.[93] The Tribunal found that the percentage of work completed and the dates of completion prescribed in the contract created a legitimate expectation that work would be completed.[94]

However, the Tribunal found that despite these impediments in the functioning of the canon, the canon project would of itself be unable to generate revenue which would be sufficient for ABA to recover its investment or make profits. This seemed to have been the reason why OPIC also refused to finance ABA. The Tribunal therefore found that there was no expropriation. The Court determined this on the "degree of impact" the Province's actions had on the ABA.

The Tribunal therefore denied Azurix's claim of expropriation and held:

> *"the Tribunal finds that the impact on the investment attributable to the Province's actions was not to the extent required to find that, in the aggregate, these actions amounted to an expropriation; Azurix did not lose the attributes of ownership, at all times continued to control ABA and its ownership of 90% of the shares was unaffected. No doubt the management of ABA was affected by the Province's actions, but not sufficiently for the Tribunal to find that Azurix's investment was expropriated."*[95]

iii. "Fair and Equitable" Treatment

Further, the Tribunal went on to consider whether there was a denial of fair and equitable treatment

90. It may be noted that the Tribunal's view, which is in line with the established view, was that if a denial of legitimate expectation to the degree required could be shown several such acts taken together could amount to expropriation. The Tribunal however found that Azurix had failed to prove such a standard.

91. Tecnicas Medioambientales Tecmed S.A. v.The United Mexican States CASE No. ARB (AF)/00/2

92. Azurix Corp. v. Argentine Republic, ICSID, Case No. ARB/01/12 at p. 114

93. Id. at p. 115

94. Azurix Corp. v. Argentine Republic, ICSID, Case No. ARB/01/12 at p.116 para 322.

95. Azurix Corp. v. Argentine Republic, ICSID, Case No. ARB/01/12 at p.116 para 322.

standard under the BIT. The "fair and equitable treatment" provision under this BIT was a standard clause and provided that the Investor would be provided fair and equitable treatment in keeping with international law.

Azurix claimed that "compliance with the fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law"[96] Moreover, it contended that every hindrance that the Province caused was due to political reasons. Since there was a budget deficit, the Province required finances and the Government felt that it could not afford the increase in the price of the water project. Argentina on the other hand, argued that the fair and equitable standard was inextricably linked to the international minimum standard and that this standard needed showing that the State had a "pre-mediated intent to not comply with an obligation insufficient action falling below international standards or even subjective bad faith."[97]

The Tribunal at first observed that the standard of fair and equitable treatment consists of three elements: 1. Fair and equitable, 2. Full protection and security and 3. Not less than the international law standard. The Tribunal agreed with Azurix in treating the international law standard as a floor but stated that much did not turn on such a textual interpretation. The Tribunal found that bad faith and malicious intention were not necessary elements. The standard thus identified by the Tribunal was described in the following words:

"The standards of conduct agreed by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious."[98]

Examining the acts of Argentina the Tribunal found that they were arbitrary, there was a violation of the fair and equitable standard and there was denial of full protection and security. The Tribunal found that the decision of the Province to reject ABA's termination notice for the Concessions Agreement arbitrary and a denial of fair and equitable treatment. Given the manner in which province officials behaved and restricted ABA / Azurix's commercial performance, a notice terminating the Agreement was quite valid and Argentina's rejection of the same and future termination based on the ground of abandonment (when in fact there was no abandonment on part of ABA) was a clear case of denial of the fair and equitable standard.[99] The politicization of the tariff regime and urging customers to not pay their bills to ABA amounted to a denial of fair and equitable treatment.

The Tribunal also found that these actions of Argentina were arbitrary and in disregard to the provisions of law. The Tribunal also found that since there was an inter-relationship between denial of fair and equitable treatment and denial of full protection and security, the actions of Argentina also amounted to a breach of its full protection and security obligation.

The Tribunal therefore determined that damages at "fair market value" [100] would be awarded to Azurix for a time period commencing from the date of termination of Concessions Agreement by the Province (March 12, 2002).[101] Interestingly, the Tribunal held that Azurix would be entitled only to an amount equivalent to its actual investment and it has to be calculated at a rate at which a prudent investor would have paid for investing in Argentina. The Tribunal found that Azurix had grossly overpaid

96. Azurix Corp. v. Argentine Republic, ICSID, Case No. ARB/01/12 at p.118
97. Azurix Corp. v. Argentine Republic, ICSID, Case No. ARB/01/12 at p.119
98. Azurix Corp. v. Argentine Republic, ICSID, Case No. ARB/01/12 Para 372, p. 135
99. Azurix Corp. v. Argentine Republic, ICSID, Case No. ARB/01/12 Para 373, p. 135
100. "the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."International Glossary of Business Valuation Terms, American Society of Appraisers, ASA website, June 6, 2001, p. 4. (at para 424 of the Award)
101. For the determination of this date the Tribunal applied the *Iran-US Claims Tribunal* case standard where in a case of creeping expropriation the commencement date is counted as the day from which a situation becomes irreversible.

(having paid ten times over the amount other bidders had paid) and awarded an amount that was equal to the average of the amount a prudent investor would have paid in place of Azurix. The Tribunal also awarded an amount for additional investment made by Azurix.

The next case outlines a new development in investment arbitration. It is usual practice that investment arbitration decisions are between a State and a foreign investor (whether company or foreign national). In the first of its kind *Abaclat* in determining the jurisdiction question held that class actions could in fact be admissible under the Italy-Argentina BIT.

C. Abaclat and Others v. The Argentine Republic [102]

The possibility of class actions in investment arbitrations has completely changed the dimension of this area of law as it will have implications on the magnitude of people who can be affected and the willingness of States to partake in entering into BITs. *Abaclat* was the first ever mass claim brought before the ICSID where eight major Italian banks created a "Task Force Argentina" (TFA) to represent all the Italian bondholders against Argentina's default of its sovereign bonds.[103]

While the Tribunal deferred decision regarding jurisdiction on each individual claimant, it decided regarding general issues of jurisdiction and admissibility. An interesting question in the context of multiple claimants was whether Argentina's consent to ICSID's jurisdiction included a claim presented by multiple Claimants / mass claimants in a single proceeding and if so were the claims admissible? With respect to general jurisdiction the Tribunal found that it would have jurisdiction over any claimants who were natural persons with Italian nationality on specific dates (date of filing the request for arbitration and date of registration of the request) and who on those dates were not nationals of Argentina and domiciled in Argentina for more than 2 years prior to making the investment.[104]

The Tribunal recognized two types of mass claims [105]:

i. Representative (a high number of claims arising out of a single action brought by an individual on behalf of a large group.) and

ii. Aggregate (where each claim is independent but procedurally managed as a group).

The Tribunal construed Abaclat claim as a "hybrid" one stating that while it started as an aggregate proceeding it went on to have features of a representative proceeding due to the high number of claimants involved. The Tribunal found that since there was an "individual and conscious choice" of participation it was partly aggregate and since there were a large number of claimants who had a passive role (since they were represented by the TFA) it was representative.[106] Hence the Tribunal fashioned it as hybrid.

The Tribunal found that the ICSID framework had no reference to collective proceedings and the question was whether this was intentional (if so the Tribunal would have no jurisdiction) or was it a gap (in which case under Article 44 the Tribunal could fill a gap and provide for mass proceedings). The Tribunal found that if it was interpreted as a qualified silence as opposed to a gap it would be "*contrary to the purpose of the BIT and to the spirit of ICSID...categorically prohibiting collective proceedings just because it was not mentioned in the ICSID Convention.*"[107]

The dissent took particular umbrage to characterization of the mass claim as an admissibility issue and the Tribunal's "hybridization process". Ultimately the policy intent of the Tribunal seems to be to ensure an effective remedy to such a large number of claimants.

Some authors like Deborah Hensler, Rachel Mulheron and SI Strong have suggested that efficiency, compensation and deterrence justify class actions.[108] Also, one may add that since there is no international agency as a means of remedy to multiple affected victims, the introduction of class action into investment arbitration may be a welcome "ends justify means" scenario. In any event, the nature of investment arbitration is

102. ICSID CASE NO. ARB/07/5 available at http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf

103. Abaclat and Others v. The Argentine Republic, ICSID CASE NO. ARB/07/5, para 65, p. 29

104. This criterion is based on Article 25 of the ICSID Convention read with Article 8 of the Italy-Argentina BIT, Abaclat and Others v. The Argentine Republic, ICSID CASE NO. ARB/07/5, para 407, p.159

105. Abaclat and Others v. The Argentine Republic, ICSID CASE NO. ARB/07/5, para 483, p.189

106. Id. Para 487 p. 191

107. Abaclat and Others v. The Argentine Republic, ICSID CASE NO. ARB/07/5, para 519, p. 206

108. See S. I. Strong, Mass Procedures in Abaclat v. Argentine Republic: Are They Consistent with the International Investment Regime? 3 Yearbook on International Arbitration (Forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083219##

different from private forms of arbitration and this is an appropriate forum that lends itself to effective remedies for a common class of claimants who would otherwise be subjected to the vagaries of the national courts (which may or may not have the option of class action, depending on the country). Even if each individual claim were to be brought separately the multiplicity of proceedings would completely destroy the objective of efficiency in investment arbitration. An argument made for class action litigation can apply to class action investment arbitrations too, in that even smaller claims (which would be otherwise expensive to individually pursue) could be pursued through a class arbitration more cost-effectively.

Some authors (McLachlan, for example) have opined that many BITs mention the right to compensation as only arising out of expropriation.[109] This makes it difficult to claim compensation in class-actions in non-expropriatory disputes. The realm of investment arbitration treaties may also be said to remedy wrongs arising out of the contracting State's exercise of its public authority and if viewed within this prism, class actions appear to be entirely justified. In traditional class action litigation, the procedural law (the civil code) provides for such a mechanism and extending this provision to class action investment claims was perhaps a judicial overreach by the Tribunal.[110] One can construe that Abaclat case was decided on matters of practicality. The Tribunal was clear in stating that it would be impossible to conduct 60,000 separate arbitrations and that it would be "cost-prohibitive" for individual claimants.[111]

109. Campbell MCLachlan et al., International Imvestment Arbitration: Substantive Principles, 315-49 (2008) as cited in S. I. Strong, Mass Procedures in Abaclat v. Argentine Republic: Are They Consistent with the International Investment Regime? 3 Yearbook on International Arbitration (Forthcoming), at p. 17 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083219##

110. S. I. Strong, Mass Procedures in Abaclat v. Argentine Republic: Are They Consistent with the International Investment Regime? 3 Yearbook on International Arbitration (Forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083219## at p. 28

111. Abaclat and Others v. The Argentine Republic, ICSID CASE NO. ARB/07/5, para 537, p. 212

4. India and BITs

I. India's role in the Investment Treaty Domain

Some would say that India has been at the forefront of the South-South BIT movement.

As shown earlier, India has concluded 84 BITs till date. [112] While India has been actively negotiating a BIT with the United States, such a BIT is yet to be concluded. The India-US BIT has been an important agenda item for both governments over the last two years. [113] US was the second largest trading partner of India in 2011, with the value of trade between the two countries being 86 Billion and likely to increase to a 100 Billion in the coming years.[114] In recent times the US and India have had large scale trade between them. India is as of 2013 the 11th largest trading partner with the US with goods worth $ 63.7 billion traded between the two according to the latest data available.[115] One of the major hurdles in the conclusion of this BIT is that US wishes for a pre-establishment protection, which means the US would expect that the Investor is protected (and can seek protection of the arbitration clause) even before the investment has been made. Other differences include the fact that US stresses on the importance of enforceability of labour and environmental regulations. The finalization of this treaty is an important action item that both countries are now targeting but given the difference in the approach of both parties it remains to be seen whether the BIT will actually fructify in the near future.

After liberalization and with recession, hedging investor risk through investment in emerging economies was seen as an important tool.[116] As a result of this India has emerged as one of the important destinations for foreign investment. India's Model BIT has standard clauses for Most Favoured Nation, post-establishment national treatment, fair and equitable treatment and a UNCITRAL Model arbitration.[117] An important provision of the Model BIT is that it covers only investments made according to laws and regulations of the contracting state.[118] Notably, India is not a member of ICSID or the ICSID Convention.

While the Model Indian BIT is all encompassing and somewhat aspirational, the treaties India enters into with other countries do not conform to its form and in fact have been heavily negotiated.

Biplove Choudhary and Parashar Kulkarni compare the text of the Model Indian BIT with the Indo-Netherland BIT and observe various differences.[119] They observe that the definition of 'investment' in the model BIT excludes non-significant investments and also has a denial of benefits clause while the Indo-Netherlands BIT defines investments very broadly and lacks a denial of benefits clause.[120] They further observe that the Model BIT includes provisions which state that National Treatment will be provided subject to environmental and other concerns but this provision has been excluded from the Indo-Netherlands BIT.[121] Further, a number of safety and regulatory provisions of the Model

112. Bilateral Investment Promotion and Protection Agreements, Ministry of Finance, Government of India, available at http://www.finmin.nic.in/bipa/bipa_index.asp http://finmin.nic.in/bipa/bipa_index.asp?pageid=1

113. See Nayanima Basu, *'Investment treaty tops Obama's agenda Prime minister US president to address closed-door meeting between chief executives from India, US'*, Jan 20, 2015, Business Standard, available at http://www.business-standard.com/article/economy-policy/investment-treaty-tops-obama-s-agenda-115012000026_1.html

114. US-India Bilateral Trade Investment, available at http://www.ustr.gov/countries-regions/south-central-asia/india; *India-US trade likely to touch $100 billion in coming years*: Official, October 20, 2012, The Economic Times, available at http://articles.economictimes.indiatimes.com/2012-10-20/news/34606554_1_defence-cooperation-india-us-trade-bilateral-investment-treaty

115. US-India Biliateral Trade and Investment (India), Office of the United States Trade Representative, available at https://ustr.gov/countries-regions/south-central-asia/india

116. Kishan Khoday and Jonathan Bonnitcha, Chapter 20: Globalization and Inclusive Governance in China and India: Foreign Investment, Land Rights and Legal Empowerment of the Poor in Marie-Claire Cordonier Segger , Markus W. Gehring , et al. (eds), Sustainable Development in World Investment Law, Global Trade Law Series, Volume 30 (Kluwer Law International 2011) pp. 485 - 486

117. Indian Model BIT, available at http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp

118. Kishan Khoday and Jonathan Bonnitcha, Chapter 20: *Globalization and Inclusive Governance in China and India: Foreign Investment, Land Rights and Legal Empowerment of the Poor* in Marie-Claire Cordonier Segger , Markus W. Gehring , et al. (eds), Sustainable Development in World Investment Law, Global Trade Law Series, Volume 30 (Kluwer Law International 2011) at p 492.

119. B. Choudhary & P. Kulkarni, 'Bilateral Investment Treaties: Understanding New Threats to Development in a Comparative Regional Perspective' (2006), online: Policy Innovations, <www.policyinnovations.org/ideas/policy_library/dat...>.

120. Id 19, 20

121. B. Choudhary & P. Kulkarni, 'Bilateral Investment Treaties: Understanding New Threats to Development in a Comparative Regional Perspective' (2006), online: Policy Innovations, <www.policyinnovations.org/ideas/policy_library/dat...>.

agreement such as anti-corruption, post and pre-establishment impact, have also been excluded.[122]

Developing countries have to often modify, even compromise provisions in favour of a pro-investment stance and those compromises are so as to keep the agreement in line with the pre-establishment protection pitch of countries such as the US, Canada and Japan.

India's official position has been that pre-establishment National Treatment will not be given generally to foreign investors, expropriation for a 'public purpose' will be with compensation, judicial review will be available, there would be free, unrestricted and easy repatriation, for disputes between investors and contracting parties and that there would be a choice between domestic forums and international arbitration. [123]

II. The Aftermath of BIT Disputes with India

The BIT jurisprudence involving India is very limited and an oft cited case is that of *White Industries Australia Ltd. v. Republic of India* [124] which dealt with a number of pertinent issues in the jurisprudence. India's stand during the arbitration was that White industries was not an 'investor' and did not have an 'investment' within the meaning of the BIT, in order to enable it BIT protection. India argued that the relationship between Coal India and White Industries was merely contractual. The Tribunal held otherwise and observed, *"BIT expressly includes in its definition of an 'investment' the right to money or to any performance having a financial value, contractual or otherwise."*[125] *..."[T]he definition of 'investment' in the BIT, which clearly includes White's rights under the Contract, and the decisions of other tribunals that rights arising from contracts may amount to investments* [126]*, White's rights under the Contract does not exclude the contract from qualifying as an investment* [127]*"*

The *White Industries* experience made the Indian government wary of the latitude that investment arbitrations offered to investors in their ability to seek relief from a Tribunal. In the wake of several notices to invoke arbitration that India received, the Indian government decided to rethink the arbitration clause in BITs and to renegotiate them.

It is relevant here to note that various clauses offer a different degree of protection in India related BITs. For example the Fair and Equitable Treatment (**"FET"**) clause in some later negotiated BITs uses the language of "full protection and security" whilst in others this language in absent.[128] Many authors have observed that while India has used broad language in the FET clause it has failed to define its scope and this leaves it open to arbitral tribunals to interpret the language in the broadest possible manner in favour of investors.[129] But this is a problem that the FET standard and in fact the Most Favoured Nation standard faces generally even in other BITs.

III. Rise of BIT Disputes against India

Over the years India has become one of the more attractive destinations for FDI and the inflow of FDI from 2013 to 2014 was US$ 36,396 million (until March 2014).[130] Although India is relaxing FDI norms in various sectors it continues to remain a difficult jurisdiction to do business in and investor-state disputes are then inevitable.[131]

122. Id at 20.

123. *Stocktaking of India Bilateral Agreements for the Promotion and Protection of Investments Communication from India, World Trade Organization (1999), WT/WGTI/W/71 13 April 1999, available at http://commerce.nic.in/trade/international_trade_papers_nextDetail.asp?id=111*

124. UNCITRAL, Award of Nov. 30, 2011, Final Award, available at http://italaw.com/documents/WhiteIndustriesv.IndiaAward.pdf.

125. Id at p 48.

126. Id. at p 72

127. Id at p 96

128. See a detailed discussion on India and FET clauses in Prabhash Ranjan, Fair and Equitable Treatment in Indian International Investment Agreements: An overview, IV Annual Forum for Developing Country Investment Negotiators

Background Papers, New Delhi, October 27-29, 2010, available at http://www.iisd.org/pdf/2011/dci_2010_fair_equitable_treatment.pdf

129. Id. See also Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, 2012, available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf at pp 2, 3.

130. India an Attractive FDI Destination, Ministry of External Affairs, Government of India, Investment and Technology Promotion Division, available at http://indiainbusiness.nic.in/newdesign/index.php?param=advantage/171; Fact Sheet on Foreign Direct Investment, DIPP available at http://dipp.nic.in/English/Publications/FDI_Statistics/2014/india_FDI_March2014.pdf

131. Ease of Doing Business in India, 2015, World Bank Group, available at http://www.doingbusiness.org/data/exploreeconomies/india

From 2011 onward as a result of the decisions against India such as the one in *White Industries* and India's regulatory and tax policies India received about 17 BIT dispute notices until 2013.[132]

The 2G licenses scam was a result of the Indian government's adopting a first come first serve policy instead of an auction process in the granting of 2G licenses to telecom companies. This policy was challenged before the Hon'ble Supreme Court in a writ which was allowed. The Hon'ble Supreme Court, in a detailed decision found the grant of licenses arbitrary and illegal and quashed all 122 2G licenses. The Supreme Court observed:

> *The exercise undertaken by the officers of the DoT between September, 2007 and March 2008, under the leadership of the then Minister of C&IT was wholly arbitrary, capricious and contrary to public interest apart from being violative of the doctrine of equality. The material produced before the Court shows that the Minister of C&IT wanted to favour some companies at the cost of the Public Exchequer...* [133]

The result of the cancellation of these telecom licenses was that a number of BIT notices were filed against India. Telenor issued a notice to India under the India-Singapore Comprehensive Economic Co-operation Agreement terming the cancellation a deprivation of its investment in India but soon after decided not to pursue the same.[134] Sistema was another firm to serve India with a notice under the India-Russia BIT for cancellation of its 2G license.[135] Similarly, Loop Telecom's investor, followed suit in connection with its 21 lost licenses.[136] India's retrospective tax legislation in 2012 also invited the ire of several foreign investors (including Vodafone). In 2012, Vodafone UK sent an arbitration notice to India through its Dutch subsidiary Vodafone International Holdings B.V. invoking the India-Netherlands BIT. This BIT notice was for the retrospective application of the capital gains tax in terms of the Indian Finance Bill 2012 which would make Vodafone liable for a capital gains tax of nearly Rs. 20,000 crores for its Hutchison Essar acquisition of 2007 which took place in the Cayman Islands.[137] It is noteworthy that the ten Indian government had initiated a retrospective tax amendment after the Supreme Court had in 2012 held that Vodafone would not be liable for paying the said capital gains tax.[138] The matter is currently in arbitration. Similarly Nokia had also initiated an arbitration notice against India under the India-Finland BIT for the retrospective tax amendment.[139]

In 2012 the Children's Investment Fund also filed a notice of dispute under the India-UK BIT and the India-Cyprus BIT in relation to the depreciation of their investment in Coal India as a result of the non-competitive pricing in coal and fuel supply agreements causing heavy losses to Coal India's share value.[140]

132. Deepshikha Sikarwar, *India Ropes in Brigitte Sternto take on Swiss telco ByCell,* The Economic Times, May 27, 2013, available at: http://articles.economictimes.indiatimes.com/2013-05-27/news/39557215_1_arbitration-case-white-industries-ByCell

133. *Centre for Public Interest litigation & others v. Union of India*, Writ Petition (Civil) No. 423/2010, at para 77

134. See Pankaj Doval, *Telenor drops arbitration notice against Centre,* The Times of India, May 13, 2013, available at http://timesofindia.indiatimes.com/tech/tech-news/Telenor-drops-arbitration-notice-against-Centre/articleshow/35043880.cms.

135. *Sistema threatens arbitration in 2G case*, The Times of India, Feb 28, 2012, available at http://timesofindia.indiatimes.com/business/india-business/Sistema-threatens-arbitration-in-2G-case/articleshow/12070637.cms

136. Press Trust of India, *2G scam: Loop investor files intl arbitration against Centre,* The Hindu, October 1, 2013, available at http://www.thehindu.com/business/Industry/2g-scam-loop-investor-files-intl-arbitration-against-centre/article5189682.ece For a detailed discussion of the repercussions of the Supreme Court's decision in the 2G licenses case to investment arbitration see Prabhash Ranjan and Deepak Raju, *Bilateral Investment Treaties and the Indian Judiciary,* 2014, The Geo. Wash. Int'l L. Rev., Vol 46, p 809-847.

137. Remya Nair, Vodafone Initiates Investment Arbitration against india, Live Mint, May 7, 2014, available at http://www.livemint.com/Industry/TwgSr8xoHzU3EcbIjqyIzH/Vodafone-begins-arbitration-in-India-tax-dispute.html

138. ET Bureau, *Tax dispute: Vodafone serves arbitration notice; govt to drop peace offer*, available at: http://articles.economictimes.indiatimes.com/2014-05-07/news/49689627_1_conciliation-offer-vihbv-vodafone-tax-case

139. R. Jai Krishna, *Nokia Seeks International Arbitration in India Tax Dispute,* The Wall Street Journal, available at http://www.wsj.com/articles/SB10001424052702304908304579561554186804812

140. Vidya Ram, Siddhartha P, Saikia *Coal India issue: Investment fund TCI firm on action; Ministry sees no need for arbitration* available at http://www.thehindubusinessline.com/industry-and-economy/coal-india-issue-investment-fund-tci-firm-on-action-ministry-sees-no-need-for-arbitration/article3470145.ece; ET Bureau, CIL board still undecided on fuel supply agreements, The Economic Times, March 29, 2012 available at http://articles.economictimes.indiatimes.com/2012-03-29/news/31254765_1_cil-board-tci-coal-india

IV. Proposed Amendments to India's BITs

In the backdrop of the recent BIT notices and ongoing arbitrations, India has been reconsidering its model BIT and is proposing to amend it.[141] In March, 2013, the Indian Government had announced that India was reviewing all its existing BITs and had put all ongoing BIT negotiations on hold until the review process was over. Reports suggested that it had also internally circulated its new proposed model BIT[142] Discussed below in brief are some of the proposed changes to India's model BIT.

The first thing that the changes to the model BIT will endeavor to do will be a change in the definition of "investment" so as to make it narrower and restrict it only to financial investments in the form of "real and substantial business operations" as opposed to paper companies.[143] The proposal is also to avoid indirect investors such as holding companies seeking benefits of the BIT in line with international investment jurisprudence of the test of "control" in this regard.[144]

It is also likely that the Most Favoured Nation clause may be entirely removed from the model-BIT in light of India having burnt its fingers with the *White Industries* case.[145]

The new model BIT also proposes an exhaustion of local remedies provision and also suggests that should a dispute have been disposed by a local judicial authority, the same would not be open to a BIT arbitration.[146] There is also a proposal to exclude tax and IP disputes from the ambit of BITs.

The definition of expropriation has also been narrowed to exclude from it actions of the government taken to meet public welfare, health, environment and safety objectives.[147] Also, compensation will be made available only with respect to cases of indirect expropriation and not situations where there is only a marginal effect over the investment. Most notably, the proposed model also contains anti-graft obligations for foreign investors in line with India's crusade against corruption.[148]

These proposed changes are with respect to new BITs that India signs such as with the US or other countries and if it is able to negotiate such clauses, it will certainly change the face of India's BIT regime.

V. Proposed India-US BIT [149]

As pointed out above, India and the United States are important trading partners and both countries are eager to conclude a BIT.

The India-US BIT negotiations are significant for a number of reasons. Chief among them is the fact that India is one of the largest trading partners of the US. Parties often complained that since there are no investment treaty benefits between US and India there is hesitance in relation to investment. Therefore a US-India BIT will be a welcome step in paving the way towards protecting investments. The major hurdles in the negotiation are as below:

A. Pre-establishment clause (in MFN and NT)

This was a cause of contention even with India's BIT negotiation with Canada. India's stand right from the GATT negotiations has been that it prefers to protect only post-establishment investments.[150] India suggested that in most International Investment Agreements (IIAs) National Treatment

141. Press Trust of India, *"India to replace BIPA with a new pact to protect investments"*, Business Standard, available at: http://www.business-standard.com/article/pti-stories/india-to-replace-bipa-with-a-new-pact-to-protect-investments-114111900873_1.html

142. PTI, *"All BIPA negotiations put on hold: Govt"*, The Economic Times, March 22, 2013 available at: http://articles.economictimes.indiatimes.com/2013-03-22/news/37936575_1_territory-of-other-nation-bipas-bilateral-investment

143. Kavaljit Singh, India and Bilateral Investment Treaties – Are they Worth it?, Jan 21, 2015, available at http://blogs.ft.com/beyond-brics/2015/01/21/guest-post-india-and-bilateral-investment-treaties-are-they-worth-it/

144. See Deepshikha Sikarwar, *New bilateral investment treaties will help India avoid arbitration*, The Economics Times, December 16, 2014, available at http://articles.economictimes.indiatimes.com/2014-12-16/news/57112387_1_investment-treaty-coal-india-tci-cyprus-holdings

145. Surajeet Dasgupta, *FinMin proposes new model to replace BIPA*, Business Standard, December 15, 2014, available at http://www.business-standard.com/article/economy-policy/finmin-proposes-new-model-to-replace-bipa-114121500906_1.html

146. Arun S, *New BIT text introduces 'obligation against graft'*, the Financial Express, December 16, 2014, available at http://www.financialexpress.com/article/economy/new-bit-text-introduces-obligation-against-graft/19554/

147. Arun S., *New BIT text introduces 'obligation against graft'*, available at http://www.financialexpress.com/article/economy/new-bit-text-introduces-obligation-against-graft/19554/

148. Id.

149. This portion (4 V) of the paper had been sent by the authors as recommendations to the USIBC on the India-US BIT negotiations.

150. India and World Trade Organization (WTO), India's Submissions in WTO Investment, available at http://commerce.nic.in/trade/international_trade_papers_nextDetail.asp?id=108

clauses were in the premise of post-establishment treatment and that *"there are only two countries (the US and Canada) that are known to insist on "pre-establishment national treatment" provisions in their bilateral investment treaties (BITs)."*[151] If a balanced breakthrough is to be considered, India could perhaps allow pre-establishment national treatment / MFN but include a reservation list of items (pertaining to security or other national industries). This appears to be a standard practice for BITs that consider pre-establishment protection.[152] The question of what sectors are to be included in this list is likely to be extremely contentious given India's reluctance in the past to open its economy in some sectors and the fierce political opposition in this regard. One aspect that inclusion of the pre-establishment clause will help with is eliminating or at least minimizing preferential choice of bids between the Government and investors. In any case pre-establishment reluctance is not isolated to India alone. Several countries have and continue to object to pre-establishment investment protection. The move from pre to post establishment for most countries has been termed as a "revolution".[153]

Some have suggested that in return for India allowing pre-establishment investment protection the US could consider sweetening the deal by offering perks like relaxing US visa caps so Indians could work there more freely or committing *"to establishing a Social Security agreement, like those the U.S. has in place with nearly 25 countries, which would significantly reduce the dual tax burden on 300,000 Indian nationals employed here."*[154]

B. Prohibitions on Performance Requirements

India's recent insistence on a performance requirement was when 100% FDI in single-brand retail was allowed with a prerequisite of 30% local sourcing. This 30% requirement was subsequently relaxed. It is very common for countries to include performance requirements. Naturally, the model Indian BIT does not even have a prohibition of performance requirements clause. For India which has traditionally dealt with local opposition for completely liberalizing, the fear of ignoring the needs of the small and cottage industry and promoting of small local investors remains imminent. A corollary of this is that for India there may be a need to continue performance requirements. Here there is usually the question of balancing competing interests. Some point out that the same arguments that were raised against liberalization in 1991 (and were proved incorrect) are being rehashed against completely opening FDI today. While performance requirements have been viewed as prohibitive and inefficient, developing countries emphasize on their need to boost local manufacturing and social / developmental needs. This is perhaps why very few countries prohibit performance requirements completely.[155] For India, at this stage, continuing with performance requirements may be necessary. However they ought not to be made extremely onerous since that would render the exercise futile. It appears that the US has also accepted in its model 2012 BIT that the prohibitions on performance requirements ought to be diluted. Thus the new model states that preference could be given to host state technology. Similarly the US could consider providing exceptions for other indigenous requirements for India.

C. Labor and Environment terms

There has been a movement in the US for ensuring staunch obedience of environmental and labour norms and that these laws should be used as a sword rather than a shield in investment treaties.[156] There have also been suggestions that when the US BIT Model is applied, the dispute resolution mechanism within the BIT should be used for labor and environmental violations.[157] The standard of environmental and labor protection is significantly different between the two countries. The US Model

151. Id.

152. Chapter 3 - Promotion, Admission and Establishment Obligations in Andrew Newcombe and Lluís Paradell , Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law International 2009) p. 137.

153. Patrick Juillard, at a lecture on "Measures relating to the entry and establishment of investments", UNCTAD/WTO, Third Seminar on Investment, Trade and Economic Development, Evian-les-Bains, 21-22 April 1999 as cited in United Nations Conference on Trade and Development, National Treatment Patrick Juillard, at a lecture on "Measures relating to the entry and establishment of investments", UNCTAD/WTO, Third Seminar on Investment, Trade and Economic Development, Evian-les-Bains, 21-22 April 1999.

154. Manik Suir *Why We Need US- India Bilateral Investment Treaty Now*, Real Clear Markets, available at http://www.realclearmarkets.com/articles/2012/08/30/why_we_need_a_us-india_free_trade_agreement_now_99851.html

155. WTO and UNCTAD Joint Study, 'Trade-Related Investment Measures and Performance Requirements,' Part I (WTO Doc. G/C/W/307 (1 Oct. 2001)).

156. Meredith Broadbent Robbins Pancake Reinvigorating the US Bilateral Investment Treaty Program June 2012, Centre for Strategic and International Studies available at http://csis.org/files/publication/120629_Broadbent_ReinvigoratingBIT_Web.pdf

157. April 20, 2012 US Resolves 3 year debate on Investment Treaty Terms, Reuters available at http://www.reuters.com/article/2012/04/20/usa-investment-treaties-idUSL2E8FK7GZ20120420

mentions regulations relating to health and safety, discrimination in employment and occupation, conditions relating to minimum wages, hours of work, collective bargaining rights all of which have a varying standard and degree in both countries. The US Model BIT does not have any enforcement mechanism for the labor and environmental clause (except ensuring local enforcement measures) nor is there any mandate to adopt laws that comply with international environmental treaties.

The beneficial portion of the Model US BIT (Article 13) involves a consultation clause where contracting parties can consult with each other and involve public participation on any differences arising out of the Labor and Environmental clauses. This may be beneficially used in the context of US-India.

The India-US BIT discussions gained momentum with the visit of President Obama and it remains to be seen how far this momentum carries in concluding a BIT between the two countries.

VI. Important Indian BIT Decisions

A. The Dabhol Case

In this case, Enron had made an investment in India through its Dutch subsidiary to build, own and operate a power plant in India in order to sell power in India thereafter.[158] The Government of Maharashtra thereafter tried to terminate the project claiming that non-competitive bidding procedure was used and Enron invoked arbitration under the India-Dutch BIT. India. While India paid a significant sum and settled this dispute one investor successfully received an award by invoking the BIT arbitration clause against the Maharashtra State Electricity Board. [159]

B. White Industries Australia Ltd. Republic of India [160]

This award (a first of its kind for India) ad discussed briefly above was made against India for denying effective means to its Australian Investor and thereby failing its obligations under the India-Australia BIT. This case is landmark for a number of reasons. One of them is that it developed a new standard in BIT jurisprudence since it introduced an "effective means" standard the denial of which would allow an investor to seek protection under a BIT. This decision is also significant for India since the BIT as an instrument of redressal was successfully used by an investor for the first time against India.

In this case White Industries had attempted and failed to enforce an ICC award rendered in its favour in 2002 for nearly ten years due to long delays in the India judicial system. The Tribunal found that such long delays amounted to the denial of effective means and thereby a denial of the 'fair and equitable' treatment / denial of justice under the India-Australia BIT.

This effective means standard has opened a pandora's box of sorts in terms of lowering the threshold from the standard of "denial of justice" in investment arbitrations. In *Waste Management II*[161] it was held that fair and equitable treatment is denied (denial of fair and equitable treatment amounts to a denial of justice) if the conduct attributable to the State and harmful to the Claimant is *"arbitrary, grossly unfair, idiosyncratic, is discriminatory...as might be the case with manifest failure of natural justice in judicial proceedings or complete lack of transparency and candour in an administrative process."* The high "denial of justice" standard states (as provided in the *Mondev case*) *"In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair*

158. B. Choudhary & P. Kulkarni, 'Bilateral Investment Treaties: Understanding New Threats to Development in a Comparative Regional Perspective' (2006) at 12, online: Policy Innovations, <www.policyinnovations.org/ideas/policy_library/dat...>.

159. *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India* (Award, 27 Apr. 2005).as cited in Supra n 116.

160. UNCITRAL, Award of Nov. 30, 2011, Final Award, available at http://italaw.com/documents/WhiteIndustriesv.IndiaAward.pdf.

161. Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC604_En&caseId=C187

and inequitable treatment".[162] Similarly in *Chevron Corporation* [163] also the test for fair and equitable treatment was held to be a "high threshold" and while the standard is objective it did not require an overt bad faith showing it required a *"particularly serious shortcoming and an egregious conduct, that shocks or at least surprises, a sense of judicial propriety."*[164]

The effective means standard on the other hand, is easier to prove. In White Industries Award, the Tribunal incorporated the effective means standard into the India-Australia BIT from India-Kuwait BIT through the Most Favoured Nation clause. The Tribunal found that while a delay in the *enforcement* of White's award could not be said to be a denial of effective means (the Tribunal observed that given India's overworked judiciary and history with the New York convention, White Industries should have known and should not have had any legitimate expectation of earlier enforcement), the 9 year delay in the *set-aside process* did amount to a denial of effective means. This was because White had done all that it could for an expedited hearing, to no avail.

With regard to the "effective means", as surmised from Chevron and Saipem [165], the Tribunal observed that proving denial of 'effective means' is easier because a. it is a lexspecialis and therefore less demanding than denial of justice; b. the standard requires that a host State establish a proper system of law and that the system work effectively in the given case (this is clearly lower than having to show egregious conduct that shocks a sense of judicial propriety); c. there is no need to show an interference by host State to establish breach and an indefinite delay by the host State's court system will amount to breach, such delay will be measured based on facts of each case; d. the standard is an objective international standard; e. while there is no need to show exhaustion of local remedies by the claimant the claimant needs to show that it adequately utilized available means (again, this lowers the bar significantly).

What is of interest from this carving out of a lower standard is that it gives parties that have been unable to enforce a foreign award a chance to recover money through investment arbitration. A baffling aspect of White's precedent is that on the one hand it held that delay in enforcement was not a denial of a legitimate expectation but the delay in setting aside was. The line drawn is subjective, based on facts of each case and very fine since it could go either way depending on a particular country's judicial system. The lowering of the standard also allows States to attempt to renege from its obligations by excluding investor-state arbitration clauses in future BITs. Thus, one would have to tread cautiously while using this precedent.

That said, the White Industries decision is significant in many ways. The BIT regime would have to be taken seriously. This decision sends out a clear signal that if there is any form of expropriation of an investment, or denial of justice under a BIT to which India is a party, the Investor would have arbitral recourse. India can no longer remain lax about its administrative, bureaucratic and judicial systems when dealing with investments. This is likely to provide much relief and a sense of security to foreign investors who have to grapple with the Indian political and judicial system at every level.

162. Mondev International v. USA Case No. ARB(AF)/99/2 at para 127 p. 45

163. Chevron Corporation v. Ecuador, Partial Award on Merits, March 30, 2010, available at http://italaw.com/documents/ChevronTexacoEcuadorPartialAward.PDF

164. Id. at para 244 p. 122

165. Saipem v. The People's Republic of Bangladesh ICSID Case No. ARB/05/07 available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC529_En&caseId=C52

5. Conclusion

As mentioned earlier, currently India has a number of other pending disputes (most recently disputes arising out of the cancellation of 2G licenses) where arbitration has been invoked and India has been reported to considering removing the arbitration clause from its future BITs.[166] This decision can have a damaging impact on foreign investment into the country. Instead of adopting such extreme measures, India should consider negotiating stricter clauses and settling existing disputes amicably. India's proposed changes to the model-BIT will be far reaching and is likely to invite negative press if it is perceived as investor unfriendly. India ought to adopt a long term view keeping in mind its interest in attracting investors while ensuring that India's interests are protected and the limitations of its systems are accounted for when negotiating any new BIT. Some developed countries have come together to provide for dispute resolution mechanism, such as the European Union.[167] While the desirability of the Model EU BIT is questionable, India along with China and other Asian countries which have had similar concerns when negotiating BITs with Western countries could consider negotiating as a group for a more South-South friendly version of a BIT. The fact remains that a rise of investment in India is going to see a rise in the BIT disputes and protection under the arbitration clause therein. India will have to walk a fine line in negotiating BITs to protect its interest and yet ensure that foreign investors do not look at India as an unsafe jurisdiction for investment due to lack of BIT protection. The onus is on India to achieve this fine balance.

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166. Sanjeet Malik BIT of Legal Bother, Business Today, May 27, 2012 available at http://businesstoday.intoday.in/story/india-planning-to-exclude-arbitration-clauses-from-bits/1/24684.html

167. Armand De Mestral, *Is a Model EU BIT Possible or Even Desirable Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment*, available at http://www.vcc.columbia.edu/content/model-eu-bit-possible-or-even-desirable

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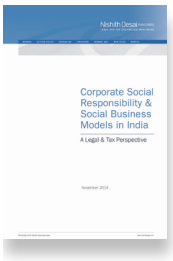

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