Bilateral Investment Treaty Arbitration and India

With special focus on India Model BIT, 2016

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1. Executive Summary

International investment rule-making takes place at the bilateral, regional, inter-regional and multilateral levels. Policy-makers, negotiators, the civil society and other stakeholders are required to be well informed about foreign direct investment, international investment agreements (**IIAs**) and their impact on the economy of the states involved.

In the last few decades, Bilateral Investment Treaties (**"BITs"**)[1] have become an integral part of international investment relations. Their existence has a great impact in influencing formulation of international public policy.

The 1990's witnessed a surge of BITs between developed and developing nations. Since then, there has been an exponential growth in their number. In 2000, the United Nations Conference on Trade and Development (UNCTAD) noted that BITs are the most important instruments for protection of foreign investment.[2]

While BITs are generally titled as agreements for promotion and protection of investments, and contain provisions on 'protection' of investment, they seldom contain provisions relating to 'promotion' of investment. Even if incorporated, such provisions are effectively non-binding in nature. Nevertheless, it is assumed that a formal offer of protection to foreign investors through a BIT will encourage and promote cross-border investments. While the efficacy of this assumption is debatable, it is predicted that increased foreign investment is crucial for developing countries which aim to use foreign direct investment and BITs as tools to enhance their economic development.

The language of treaty provisions is a key factor in case outcomes - underlining the importance of balanced and careful treaty drafting. Clauses are inserted by parties to stipulate a definite set of obligations towards the other party. Since the terms of agreements are bound to vary, the community of interests is bound to be broader and more diversified.

Nonetheless, most BITs have a recognizable look - starting from titles, such as: *'Treaty between [one contracting party] and [the other contracting party] concerning the encouragement and reciprocal protection of investment.'*. Generally, the content of a BIT follows a pattern. At the outset, a preamble expresses the object and purpose of the BIT. Post the preamble, a BIT generally incorporates a definition clause that outlines the scope and ambit of the BIT by defining an 'investor' and 'investment' – the key qualifiers of protection under the BIT. These definitions give way to standards of protection and treatment of foreign investments - addressing standards such as fair and equitable treatment, full protection and security, national treatment, and most-favored nation treatment.

Provisions dealing with state measures such as nationalization, expropriation or other similar measures, their permissibility under specific circumstances, and compensation for losses incurred by foreign investors form a core part of BITs and usually follow the standards of protection. Most BITs additionally regulate cross-border transfer of funds in connection with foreign investment.

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1. Bilateral Investment Treaties are agreements that protect investments by investors of one state in the territory of another state. These treaties articulate substantive rules governing the host State's treatment of the investment, and establish dispute resolution mechanisms applicable to alleged violations of those rules, *41 Harv. Int. L. J.469, 469-470 (2000)*

2. UNCTAD Bilateral Investment Treaties, 1959-1999 UNCTAD/ITE/IIA/2 UN (2000) available at http://www.unctad.org/en/docs/poiteiiad2.en.pdf

One of the vital provisions in BITs is investor-State dispute resolution clause. Such clauses may envisage a matrix of fora and mechanisms – occasionally involving cooling off periods, negotiation, mediation, exhaustion of local remedies, and fork-in-the road provisions precluding exercise of one remedy over the other. However, majority of BITs involve international arbitration as the long-stop of dispute resolution. International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC) are the common routes for international investment treaty arbitration.

In this regard, an investment treaty arbitration differs from an international commercial arbitration. While the latter involves disputes between private parties, the former envisages disputes between a private individual / legal entity and a State. This adorns investor-State disputes with the color of a private-public international dispute. As a consequence, aspects of private international law and public international law merge to create a separate body of international law, a *lex specialis*, which is now recognized as international investment treaty law.

In the last decade, economies have become far more protectionist and regulation-centric. Sustainable development of the host State has begun to take fore amid capital-gaining activities of foreign direct investors. With rising State regulation in diverse areas such as public health, environment, economic reforms and security amongst others, international investment treaty law is striving to balance investor protection with State interests. Further, the diminishing distinction between traditionally capital-importing and capital-exporting States has called for a re-look at BITs and investment protection standards.

Resultantly, reactions to BITs are now changing, with some countries moving towards denunciation. For instance, South Africa has derecognized all its BITs and has enacted a domestic legislation to govern potential expropriation claims by foreign investors against the South African government. Brazil continues to remain a non-participant in the international investment treaty framework.

India signed her first BIT with United Kingdom in 1994, with the clear objective of attracting and incentivizing foreign investment.[3] India's initial attitude towards IIAs remained unchanged until few years back. India's first BIT was based on a Model created by a developed country - where emphasis lied on protection of foreign investment, rather than internationally recognized regulatory powers of the State.[4] This excessively investor friendly regime remained unchanged for nearly two decades. The India-UK BIT served as the base template for India to negotiate further BITs. In fact, the Indian Model BIT of 2003 contained close semblance with the India-UK BIT.[5] The regime garnered scanty attention and until 2011, only one arbitration was initiated against India internationally. This was ultimately settled and did not result in an international investment arbitration award.[6]

However, India's approach to investment treaties started undergoing a sea-change after the case of *White Industries*[7] in 2011. Several cases were filed against India between 2011 and 2016. As a result of the growing surge of BIT claims, India unilaterally terminated

3. See Rashmi Banga, *Impact of Government Policies and Investment Agreements on FDI Inflows*, Indian Council for Research on International Economic Relations, Working Paper No. 116, 2003

4. *Id* at 9.

5. KRISHAN, DEV. INDIA AND INTERNATIONAL INVESTMENT LAW. IN INDIA AND INTERNATIONAL LAW, ed, Bimal Patel, 277, Martinus Nijhoff, 2008. [hereinafter KRISHAN, DEV. INDIA AND INTERNATIONAL INVESTMENT LAW].

6. *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India* ICC Case No 12913/MS, IIC 43 (2005); Bank of America, Memorandum of Determinations, OPIC, IIC 25 (2003).

7. White Industries Australia Limited v. The Republic of India, Final Award, November 30, 2011 [hereinafter *White Industries*]

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several BITs in 2016. India has also introduced a Model BIT in 2016 to serve as the foundation to re-negotiate treaties, while formulating interpretative statements on the existing ones.

Today, India stands as a Respondent in more than fifteen cases involving investment treaties – the highest number of cases against a host State till date. International waters are turbulent, and therefore, it is critical to understand investment treaty law in India with renewed perspective. This not only applies to future treaties, but also calls for modernizing the existing stock of old-generation treaties.

This paper maps out the landscape of international investment treaty law and it's connect with India. While it studies the India Model BIT 2016 to inform the new era of investment treaty arbitration, it attempts to identify challenges that for India distinct from the global landscape of BITs, and views India through a prism of dispute resolution mechanism.

2. Advent of Bits – World & India

As economies across the globe expanded beyond their domestic markets, the global market evolved to become more organized and regulated. Since the risk of a host State government controlling a foreign investor's investment was substantial, this global expansion necessitated provision of fundamental protections to foreign investors. To alleviate the aforesaid concerns, countries initiated the practice of entering into formal arrangements which granted essential protections to a foreign investors and investments.

Fundamental principles of international investment law have had their origins in the 19th century - through Friendship, Commerce and Navigation (**"FCN"**) treaties. These treaties were used to promote international trade by facilitating *inter alia*, navigation, inter-state trading rights and rights over property by foreign individuals.

The growth of corporations and technology in the mid-nineteenth century led to the advent of foreign investment. Increase in foreign investment also saw an increase in expropriation of foreign projects.[8] Historically, in public international law, foreign investors as "outsiders" did not share equal status with the nationals and were consequently denied legal capacity.[9] 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). The Permanent Court of International Justice (PCIJ) recognized this as a right under public international law.[10]

However, whether a State would exercise such protection would depend on its whim (beyond the merits of the dispute), and political or other reasons which could undermine the investor's claims. In such a situation, the foreign investor was virtually left remediless, 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* case.[11] In this case, an agreement was signed between a company and the German Reich for construction of a factory in Chorzow. This lied in the disputed region of Upper Silesia. Subsequently, the Geneva Convention was signed between Poland and Germany whereby Chorzow region was handed over to Poland. The Convention required reparation damages to be provided by Poland where the property of German government was taken over. Disputes arising from the Convention were to be referred to the PCIJ. The question arose whether the land was private property of the company or the public property of Germany. If it were German property, Poland could have seized the same - subject to the reparation. The PCIJ held that the land was privately owned and that Poland's action amounted to seizure and expropriation of private property. It 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."*[12]

8. R Doak Bishop, James Crawford and W. Michael Reisman, *Foreign Investment Disputes, Cases, Material and Commentary* (Kluwer Law International, 2005)
9. R. Arnold, '*Aliens*', in R. Bernhardt, ed., Encyclopedia of Public International Law, Vol. I (Amsterdam: North-Holland Pub. Co, 1992) [Encyclopedia] as cited in Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009)
10. The Mavrommatis Palestine Concessions (1924) PCIJ Ser. A, No. 2
11. (Germany v. Poland) (1927) P.C.I.J., Ser. A Nos. 7, 9, 17, 19
12. *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

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Towards the 20th century, FCN treaties evolved to grant limited rights to aliens over foreign property, and accord similar status to foreign and domestic investments. Such investment protection standards formed the genesis of modern day investment protection standards enshrined in BITs. Such instruments entered into between two countries for protection and regulation of foreign investment are commonly known as Bilateral Investment Treaties (**"BITs"**) or Bilateral Investment Protection Agreements (**"BIPAs"**). BITs began to include international arbitration as an effective means of resolving disputes between a foreign investor and a host State. Subsequently, the regime evolved to ensure and protect repatriation of foreign funds into the originating country. This is fundamental for the protection and promotion of foreign investment.

The advent of BITs commenced in 1959, with the first BIT between Germany and Pakistan. In 1965, the International Centre for Settlement of Investment Disputes was established by the Washington Convention. This marked the onward journey of BITs. Traditionally, BITs were thought of only in the context of nationalization i.e. unlawful taking of foreign property by the State, or direct expropriation of foreign investor's property in the host State. With time, international jurisprudence began to accept interpretations of BITs where indirect State acts leading to deprivation of foreign investment and breach of the minimum standard of treatment were considered as violations of BITs. Today, these obligations have further evolved into offering substantive protections, including the right against direct and indirect expropriation, national treatment and right to fair and equitable treatment.

3. Principles of Interpretation

At the outset, it is crucial to understand the rules that assist in interpretation of BITs. The Vienna Convention on Law of Treaties (**"VCLT"**) is the primary source of interpretation employed by majority tribunals. Article 31 of the VCLT occupies foremost position in this regard – providing that *"a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."* The object and purpose of a BIT, often reflected in its preamble, is frequently used by tribunals to interpret BITs.

Tribunals have also taken recourse to Article 32 of the VCLT offering supplementary means of interpretation such as *travaux preparatoires.* Some treaties (often multilateral) are also supplemented by Interpretative Statements on certain provisions of BITs – agreed upon jointly by States for clarity and uniformity of understanding. These also act as aids to interpretation. Interpretation also depends on the approach of tribunals – which could be broad or restrictive. A balanced approach finds it genesis in balancing the rights of foreign investors and Host States.

The doctrine of *stare decisis* does not apply in international law. However, arbitral tribunals have held in several cases that although they were not bound by previous case law, they must pay due consideration to earlier decisions of tribunals as an endeavor to contribute to the harmonious development of investment law and meet the expectations towards certainty of the rule of law.[13] Thus, decisions of arbitral tribunals also play a role in the process of treaty interpretation.

13. Saipem v. Bangladesh, Decision on Jurisdiction, 21 March 2007; AES Corp v. Argentina, Decision on Jurisdiction, 26 April 2005; Bayindir v. Pakistan, Decision on Jurisdiction, 14 November 2005.

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4. India : 1994 - 2016

India started participating in the investment treaty regime only in the early 1990s as part of its new-found approach towards economic liberalization in 1991.

Post-independence, India's attitude towards foreign investment was receptive. Investment was sought in mutually advantageous ways. However, India's policy approach focused on import substitution and developing indigenous industries.[14] This receptive attitude to foreign investment started to change in 1970s when there was a conscious shift towards adopting protectionist and inward-looking economic policies. Low economic growth in 1970s led to limited liberalization and de-regulation in 1980s.[15] However, India's approach towards foreign investment not only regained its initial reception but metamorphosed in the 1990s - when a severe balance of payment crisis forced India to alter its approach and interaction with the global economy.[16]

India signed her first BIT with United Kingdom in 1994, with the clear objective of attracting and incentivizing foreign investment.[17] India's first BIT was based on a Model created by a developed country - where emphasis lied on protection of foreign investment, rather than internationally recognized regulatory powers of the State.[18] The India-UK BIT served as the base template for India to negotiate further BITs. In fact, the Indian Model BIT of 2003 contained close semblance with the India-UK BIT.[19]

From 1994 to 2011, India had signed more than 80 BITs and ratified over 70.

The excessive investor-friendly regime remained unchanged for nearly two decades. The regime garnered scanty attention. Until 2011, only one arbitration was initiated against India internationally. This project was related to the Dabhol Power Company in Maharashtra,[20] a state in western India, and constituted the largest foreign direct investment in India in the 1990's.

I. Dabhol Power Project, 1990's

In early 1990's, Dabhol Power Company (**"DPC"**) – a joint venture of Enron Corporation, General Electric Corporation and Bechtel Enterprises – was formed to generate electrical power in Maharashtra. DPC entered into an agreement with the Maharashtra State Electricity Board (MSEB) – an Indian public sector enterprise - as the sole purchaser of power generated by DPC. However, MSEB cancelled the contract due to alleged irregularities, political opposition and high cost of power charged by DPC. DPC no longer had a consumer to sell electrical power to. This adversely affected its investment.[21] DPC initiated arbitration proceedings. However, Indian courts granted anti-arbitration injunctions against it. Thereafter, GE and Bechtel invoked the India-Mauritius BIT through their subsidiaries in Mauritius and challenged measures adopted by India as constituting expropriation. Nine cases were filed in relation to this project. However, the cases were ultimately settled and did not result in an international investment arbitration award.

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14. Prabhash Ranjan, *India and Bilateral Investment Treaties: From Rejection to Embracement to Hesitance?* (December 30, 2015). [hereinafter Ranjan, Prabhash, *India and Bilateral Investment Treaties: From Rejection to Embracement to Hesitance?*

15. A. Panagariya, *Growth and Reforms During 1980s and 1990s*, Economic and Political Weekly 39(25): 2581, 2003.

16. Prabhash Ranjan, *India and Bilateral Investment Treaties: From Rejection to Embracement to Hesitance?* at 5.

17. See Rashmi Banga, *Impact of Government Policies and Investment Agreements on FDI Inflows*, Indian Council for Research on Int'l Econ. Relations, Working Paper No. 116, 2003

18. *Id* at 9.

19. KRISHAN, DEV. INDIA AND INTERNATIONAL INVESTMENT LAW. IN INDIA AND INTERNATIONAL LAW, ed, Bimal Patel, 277, Martinus Nijhoff, 2008. [hereinafter KRISHAN, DEV. INDIA AND INTERNATIONAL INVESTMENT LAW].

20. *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India* ICC Case No 12913/MS, IIC 43 (2005); Bank of America, Memorandum of Determinations, OPIC, IIC 25 (2003).

21. Kundra, P (2008), 'Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons', 41 Vanderbilt Journal of Transnational Law

II. White Industries, 2002 - 2011

White Industries, an Australian mining company, entered into a long-term mining contract with Coal India Limited (Coal India), a State-owned Indian company in 1989. Disputes relating to quality, bonus and penalty payments arose between Coal India and White Industries, prompting the latter to commence arbitration under the ICC Arbitration Rules. In May 2002, the ICC tribunal awarded USD 4.08 million to White Industries.

In September 2002, Coal India applied to the Calcutta High Court to set aside the ICC Award under the Indian Arbitration and Conciliation Act. Simultaneously, White Industries applied to the High Court of New Delhi to enforce the ICC Award in India. Both proceedings experienced significant delays. The enforcement proceedings were eventually stayed pending a decision in the set-aside proceedings. White Industries appealed to the Supreme Court while the High Court of New Delhi stayed the enforcement proceedings. The matter was pending before the Supreme Court for nine years until 2010. White Industries finally invoked arbitration under the India-Australia BIT.

The Tribunal ultimately awarded White USD 4.08 million as compensation as it found that India had violated its obligation to provide to the investor 'effective means' of asserting claims and enforcing rights i.e. a provision borrowed from the India-Korea BIT by way of a most-favored nation clause in the India-Australia BIT.

III. Post White Industries, 2011 - 2016

White Industries was followed by a spate of investor-state proceedings against India, more particularly as a result of regulatory and legislative measures adopted by the Indian government in the subsequent years.[22] The award in White Industries served to be an eye-opener to India and proved to be a turning point in her otherwise indifferent stance towards investor-friendly BITs. After the *White Industries* case in 2011, India's approach to investment treaties began to undergo a sea-change. The Central Government Working Group began a review process in 2012 and aimed at creating an investor-state dispute resolution regime that would balance investor rights with State regulatory obligations[23] – rather than containing broad and vague provisions capable of significant encroachment upon State regulatory powers.[24]

From the period between 2011 and 2015, India signed only one BIT with the UAE, and an IIA with ASEAN. This shift further culminated into introduction of the new Indian Model BIT in 2016. In 2016, only one BIT has been signed by India with Cambodia. India has reportedly terminated 58 of its BITs and is in the process of re-negotiating new BITs. It is also engaging in formulating interpretative statements on the existing BITs and IIAs.

22. See Vodafone v. India, UNCTIRAL, Notice of Arbitration (not public), (Apr. 17, 2014); Cairn Energy PLC v. India (UNCITRAL); Deutsche Telekom v. India, ICSID Additional Facility, Notice of Arbitration (not public) (Sept. 2, 2013).

23. Department of Economic Affairs, Ministry of Finance, Government of India, *Transforming the International Investment Agreement Regime: The Indian Experience*, http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/India_side-event-Wednesday_Model-agreements.pdf.

24. SAURABH GARG ET AL., *The Indian Model Bilateral Investment Treaty: Continuity and Change* RETHINKING BILATERAL INVESTMENT TREATIES – CRITICAL ISSUES AND POLICY CHOICES 69-80, 71 (Kavaljit Singh and Burghard Igle eds., 2016) [hereinafter SAURABH GARG ET AL., Continuity and Change].

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5. India Model BIT, 2016: Overview

The India Model BIT, 2016 (**"2016 India Model BIT"**) is testimony to India's significantly changed outlook towards investment treaty disputes. It contains 38 detailed articles divided into 7 chapters. It is a departure from generally structured BITs.[25] The 2003 India Model BIT contained broad substantive provisions offering precedence to investment protection over the State's right to regulate. On the other hand, the 2016 India Model BIT is drastically different in form, structure and content and accords increased latitude to regulatory powers of the State.

This is being perceived as imbalanced in terms of affording protection to foreign investment. Whilst adopting the perspective of a capital-importing country, India has limited the access to, and protection of, the BIT to investors. The present-day approach of India towards foreign investment under the 2016 India Model BIT may conversely result in depriving Indian investors of protection under the BITs as they invest in a foreign State. This is more so since India's foreign investment has increased from approximately USD 1 billion in 2000-01 to more than USD 21 billion in 2015-16.[26]

This is also coupled with recent BIT claims brought by Indian investors viz. *Flemingo Duty Free Shop*[27] under the India- Poland BIT resulting in an award of USD 17.9 million in favour of the investor; and *Indian Metals & Ferro Alloys Ltd*[28] under the India-Indonesia BIT claiming USD 599 million in damages.

The following chapters study and analyze the 2016 India Model BIT, its goals, the potential challenges on the road to successful investor-State dispute resolution.

25. Model Text for the Indian Bilateral Investment Treaty 2016, http://www.finmin.nic.in/reports/ModelTextIndia_BIT.pdf.

26. See Reserve Bank of India, Data on Overseas Investment, https://www.rbi.org.in/Scripts/Data_Overseas_Investment.aspx.

27. Flemingo DutyFree Shop Private Limited v the Republic of Poland, UNCITRAL, Award (Aug. 12, 2016)

28. Indian Metals & Ferro Alloys Limited (India) v. The Government of the Republic of Indonesia, PCA Case No. 2015-40.

6. Applicability

I. Principles

The principles of law for inter-temporal application of treaties are found under Article 28 of the Vienna Convention of the Law of Treaties ('VCLT')[29] and Article 13 of the International Law Commission's ('ILC') Articles on State Responsibility.[30] Article 28 of the VCLT stipulates that unless expressly provided or otherwise established, a treaty will not be applied retroactively. Article 13 of the ILC Articles of State Responsibility provides that the state will not be responsible for the breach of an obligation that it was not bound by at the time the act occurred. International practice has also followed this norm.[31]

A. Inter-Temporal Rules generally found in Treaties

An express retrospective application of the jurisdiction of the treaty intends to protect existing investment. However, it does not cover acts committed prior to entry into force of the BIT. In the case of *Maffezini v. Spain* [32], the Tribunal held that its' jurisdiction could extend to acts occurring prior to the entry into force of the BIT, if the facts shaped a dispute which arose after the entry into force of the BIT.

This is opposed to the case of *Lucchetti v. Peru*[33] and *Jan de Nul & Dredging International v. Egypt*[34] where the acts were committed prior to entry into force of the BIT and were already pending adjudication in domestic courts. Further, adverse acts based on the same dispute, if committed after the BIT entered into force, would not fall under its jurisdiction.

With regard to continuing breaches (such as the continuing non-payment of consideration under the contract), the Tribunal may decide on the previous acts of the parties as long as it is to determine the nature of a breach that occurred after the treaty came into force.[35] The jurisdiction of composite breaches (occur over a series of acts or omissions spread over a period of time), will be determined by the date of the last act or omission.[36]

B. Date relevant to determine jurisdiction

The date relevant to determine the status of the parties for a question of jurisdiction is held to be the date of institution of the arbitral proceedings. Any change in the nature of the investment after instituting the proceedings does not alter jurisdiction.[37]

C. Dates relevant under the ICSID Convention

The ICSID Convention provides that a State will become a Party to the Convention thirty days after ratification.[38] If it wishes to denounce the Convention, the same will take effect six months from the receipt of a notice from the

29. Article 28, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (January 27, 1980).

30. Article 13, International Law commission, Draft Articles on State Responsibility, 2001.

31. Island of Pamas case, Reports of International Arbitral Awards, vol. II, p. 829 at 845 (1949); Impregilo v Pakistan, Decision on Jurisdiction, 22 April 2005, 12 ICSID Reports 245, ¶ 309.

32. Maffezzini v Spain, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396, at ¶¶ 90-98.

33. Lucchetti v Peru, Award, 7 February 2005, 12 ICSID Reports 219.

34. Jan De Nul & Dredging International v Egypt, Decision on Jurisdiction, 16 June 2006.

35. Mondev v. United States of America, Award, 11 October 2002, 42 ILM 85 (2003), 6 ICSID Reports 912, at ¶¶ 58, 70.

36. Article 15, International Law commission, Draft Articles on State Responsibility, 2001.

37. Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic, Decision on Jurisdiction, 14 November 2005, at ¶60.

38. Article 68, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ('ICSID'), 575 U.N.T.S 159 (March 18, 1965).

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World Bank.[39] Determination of the investor's nationality, as a natural person, is determined by Article 25(2)(a) of ICSID Convention and observes the nationality on the date of consent and date of request for arbitration. On both these dates, the investor must have the nationality of a Party to the Convention but not the nationality of the host state.

For juridical persons under Article 25(2)(b), the nationality requirement only pertains to nationality on the date of consent. Article 25(2)(b) also permits a host state and an investor to consider a locally incorporated company as a foreign investor because of foreign control. Determination of control is done as per the date of the consent and the subsequent changes till proceedings are initiated. Consent to arbitration is irrevocable and is the date from which the parties agree to submit to arbitration.[40] An arbitration agreement will be established if a party includes a consent clause in its offer to another party, who then accepts it. However, if any state ratifies the ICSID Convention after signing a consent agreement, the date of consent will be the entry into force of the Convention for that state.[41]

II. Applicability of the 2016 India Model BIT

Article 2.1 maps out the scope and general provisions of the Model BIT. It states that the 2016 India Model BIT only applies to investments in existence as of the date of entry into force of this Treaty; and investments established, acquired, or expanded thereafter. An additional requirement is that the investments must qualify as being admitted in the host State in accordance with its law, regulations and policies as applicable from time to time.[42]

The protection of the India Model BIT does not extend to pre-investment activities related to establishment, acquisition or expansion of any investment, or any law or measure regulating such activities.[43] It also does not extend to events that occurred before the treaty was entered into force.[44]

The aforesaid second limitation has the potential to place investments in a problematic position. There may be situations where some events giving rise to the BIT claim arose prior to entry into force of the BIT, while certain events occurred after the BIT came into force. This is more dominant in situations involving creeping expropriation - where several actions of the State cumulatively result in erosion of the rights of the investor - leading to expropriation.[45] In such cases, the 2016 India Model BIT is unclear on whether or not the BIT protection can be availed of, leaving it to the discretion of the arbitral tribunal.[46]

Article 2.4 of the India Model BIT specifically excludes from its scope certain regulatory measures including any measures by local governments, taxation measures, compulsory licenses, government procurement, grants and subsidies provided by the government and services supplied in exercise of governmental authority by body or organ of the host State. Three key exclusions are discussed below.

39. Ibid, Article 70.

40. Ibid, Article 25(1).

41. Cable TV v St. Kitts and Nevis, Award, 13 January 1997, 5 ICSID Reports 108, ¶ 2.18, 4.09, 5.24; Autopista v Venezuala, Decision on Jurisdiction, 27 September 2001, 6 ICSID Reports 419 at ¶¶ 90, 91.

42. Indian Model BIT 2016, Article 2.1 provides: This Treaty shall apply to measures adopted or maintained by a Party relating to investments of investors of another Party in its territory, in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter, and which have been admitted by a Party in accordance with its law, regulations and policies as applicable from time to time.

43. Indian Model BIT 2016, Article 2.2 provides: Subject to the provisions of Chapter III of this Treaty, nothing in this Treaty shall extend to any Pre-investment activity related to establishment, acquisition or expansion of any investment, or to any measure related to such Pre-investment activities, including terms and conditions under such measure which continue to apply post-investment to the management, conduct, operation, sale or other disposition of such investments.

44. Indian Model BIT 2016, Article 2.3 provides: This Treaty shall not apply to claims arising out of events which occurred, or claims which have been raised prior to the entry into force of this Treaty.

45. See JESWALD SALACUSE, THE LAW OF INVESTMENT TREATIES (2015) [hereinafter SALACUSE, THE LAW OF INVESTMENT TREATIES].

46. Manu Thadikkaran, *Model Text for Indian BIT* at 35.

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A. Measures by local governments

The 2016 India Model BIT does not include measures by local government in its ambit. Local governments include urban, local and rural bodies.[47] Since India is a country with a quasi-federal structure, provincial governments as well as local bodies (urban and rural) enjoy a substantial level of autonomy.[48] Local governments fall within the purview of 'State' under Indian constitutional practice.[49] Similarly, actions of local governments can be attributed to the State under public international law.[50] Therefore, an exclusion of the actions of local government from the scope of the 2016 India Model BIT provides immunity to local governments from fulfilling obligations undertaken by the host State under the BIT.

This could be potentially harmful to foreign investments in circumstances where local governments adopt measures against the foreign investor or investment. The effect is that these measures, although violative of the BIT, would still not be justiciable in an investment treaty dispute between India and the foreign investor. In a host State where a large portion of public functions or governmental authority is carried out through local governments, exclusion of measures adopted by such local governments from the ambit of the BIT lends undue immunity to the host State to the detriment of the foreign investor.

47. Model BIT 2016, Article 1.7 provides:
"local government" includes: (i) An urban local body, municipal corporation or village level government; or (ii) an enterprise owned or controlled by an urban local body, a municipal corporation or a village level government.

48. M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 7th ed., Nagpur: Wadhwa. Publication; 2014 at 12.

49. Constitution of India, 1950, Article 12, includes local bodies within the definition of State.

50. International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Article 4, attributes actions of local bodies to the sovereign nation.

B. Taxation

Article 2.4 (ii) states that the treaty shall not apply to 'any law or measure regarding taxation, including measures taken to enforce taxation obligations'. This article further provides that host State's decision as to whether a particular regulatory measure is related to taxation (whether made before or after the commencement of arbitral proceedings), shall be non-justiciable. No arbitral tribunal shall be able to review such decision.[51]

The decision to preclude taxation from the purview of India's future BITs is visibly in response to the spate of BIT claims brought by Vodafone and Cairn against India with respect to retrospective application of taxation law. This exclusion provides the state unchecked control over framing and amending taxation laws - to the extent that any potential abuse, whether discriminatory or arbitrary, would be outside the jurisdictional capacity of the international arbitral tribunal.

51. Indian Model BIT 2016, Article 2.4(ii) provides:
Any law or measure regarding taxation, including measures taken to enforce taxation obligations. For greater certainty, it is clarified that where the State in which investment is made decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be non-justiciable and it shall not be open to any arbitration tribunal to review such decision.

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C. Compulsory Licenses

The 2016 India Model BIT does not include compulsory licenses within its purview, provided that they are consistent with the WTO.[52] Therefore, regardless of the specific exemption of compulsory licenses from the purview of the BIT, foreign investors could still challenge its issuance under other violations under Part II of BIT by arguing that they have not been issued in accordance with the TRIPS Agreement.[53] In such a situation, the tribunal would have to determine whether or not the compulsory license was consistent with TRIPS, and whether the BIT will continue to apply.[54]

52. 2016 India Model BIT, Article 2.4(iii) provides:
The issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the international obligations of Parties under the WTO Agreement.

53. See Christopher Gibson, *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation* 25:3 AM. U. INT'L L. REV. 357-422 (2010), 421; Bryan Mercurio, *Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements* 15(3) J. INT'L. ECON. L. 871, 905-906 (2012) in Ranjan, Prabhash and Anand, Pushkar, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction* (April 4, 2017). 38 Northwestern Journal of International Law and Business, 2018 (Forthcoming) [hereinafter Ranjan and Pushkar, *The 2016 Indian Model BIT*] at 38.

54. Bryan Mercurio, *Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements* 15(3) J. INT'L. ECON. L. 871, 905-906 (2012) at 908.

7. Jurisdiction and Admissibility

This part deals with treaty provisions considered by arbitral tribunals at the stage of jurisdiction and admissibility of investor-State disputes. This section also identifies and analyses certain issues surrounding jurisdiction and selective treaty provisions.

The preliminary stage of adjudication before an arbitral tribunal involves determination of jurisdiction over the alleged investor-State dispute. Determination of jurisdiction under a BIT-established arbitral tribunal is primarily based on satisfaction of two conditions - whether the subject activity constitutes an 'investment' under the BIT and whether the private party qualifies as an 'investor' under the BIT. This determination goes hand in hand with consideration of entry level aspects such as establishment and admission of investment - if the activity in question is determined to be an investment.

The 2016 India Model BIT restricts the scope of dispute settlement only to disputes arising out of an alleged breach of an obligation of the Party under Chapter II of the BIT. It excludes from the scope disputes arising due to the breach of the obligations contained in Articles 9 (Entry and Sojourn of Personnel) and 10 (Transparency) of the BIT. In other words, a foreign investor can bring a claim against host State only for alleged violation of 'treatment of investments' under Chapter II of the BIT - which includes treatment of investments including full protection and security, national treatment, expropriation, monetary transfer provisions and compensation for losses.

The following section deals with the provisions of BITs that are relevant for determination of jurisdiction of an arbitral tribunal.

I. Preamble

The preamble outlines the object and purpose of the investment treaty. The Preamble of a BIT often assists in evaluation of merits than lending assistance on jurisdiction issues. Arbitral tribunals have taken aid of preamble to inform interpretation of standards of treatment and non-precluded measures. The VCLT makes special mention of the object and purpose of treaties as primary means to assist in treaty interpretation.

Beyond the general goal of strengthening economic co-operation, BITs traditionally emphasize in their Preambles - the importance of creating favorable conditions for investments and/or investors of both parties, and underline the benefits that may flow from reciprocal promotion and protection of such investments and/or investors. This is an important function since the Preamble not only provides the 'object and purpose' of a BIT but also provides a 'context' for interpreting individual treaty clauses.[55]

While the preamble in majority of BITs provides for promotion and protection of investments, some modifications are visible - such as fostering economic development of Parties as an outcome or impact of investment, or offering regulatory latitude to Parties to regulate investments. Interesting additions or clarifications may be observed in the preambles of recent agreements and treaties.

For example, the UK Model BIT provides for promotion of investment by stating that the States desire "to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State". The 2016 India Model BIT provides the above in addition to "re-affirming the right of Parties to regulate investments in their territory in accordance with their law and policy objectives" – thereby laying equal emphasis on

55. Article 31, Vienna Convention of the Law of the Treaties

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permissibility of state regulation in addition to investment protection.

The Preamble in 2016 India Model BIT is extensive. It significantly departs from the earlier preamble. In addition to promotion of bilateral cooperation, it provides for promotion of sustainable development of the Parties. It specifically lays out that Parties shall have the right to regulate the investments in accordance with the law and policy objectives. This is a crucial Host State-centric inclusion and sets a specific foreword to the ensuing contents of the 2016 Model BIT.

II. Investment

'Investment' constitutes a principal term in a BIT. Despite this fact, BITs do not define an 'Investment' in the true sense of the term. Traditional treaties such as the FCN treaties defined the formula of 'Investment' to be 'properties, rights and interests.' However, current BITs place autonomy with parties to define the outer limits of the term - to outline those aspects or activities that they agree to treat as 'Investments'.

The definition of investment and investor forms the backbone of applicability of BIT and jurisdiction under the BIT. BITs generally envisage one of the two approaches to defining 'investment' - asset-based or enterprise-based.[56] The asset-based approach recognizes every asset with economic value, established or acquired by the foreign investor as an investment. An enterprise-based approach, on the other hand, limits protection only to those investments that have been constituted or operated as a legal entity that has real and substantive business presence in the Host State.[57]

Most BITs contain a general phrase defining 'Investment' – such as "all assets" and several illustrative categories such as moveable assets including shares etc.[58] An example of an asset-based definition can be found in the India-UK BIT (1999), as follows:

> *"Investment" means every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes;*
>
> i. *movable and immovable property as well as other rights such as mortgages, liens or pledges;*
>
> ii. *shares in and stock and debentures of a company and any other similar forms of interest in a company;*
>
> iii. *rightful claims to money or to any performance under contract having a financial value;*
>
> iv. *intellectual property rights, goodwill, technical processes and know-how in accordance with the relevant laws of the respective Contracting Party;*
>
> v. *business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals;*[59]

An example of an enterprise-based definition can be found in the India Model BIT (2015), as follows:

> *"Investment" means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the*

56. Berk Demirkol, *The Notion of 'Investment' in International Investment Law* (February 1, 2015). (2015) I Turkish Commercial Law Review 41.

57. Manu Thadikkaran, *Model Text for Indian BIT* at 36.

58. Dolzer & Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008)

59. India-UK BIT

assumption of risk and a significance for the development of the Party in whose territory the investment is made. An enterprise may possess the following assets:

a. shares, stocks and other forms of equity instruments of the enterprise or in another enterprise;

b. a debt instrument or security of another enterprise;

c. a loan to another enterprise...

i. where the enterprise is an affiliate of the investor, or

ii. where the original maturity of the loan is at least three years;

d. licenses, permits, authorisations or similar rights conferred in accordance with the law of a Party;

e. rights conferred by contracts of a long-term nature such as those to cultivate, extract or exploit natural resources in accordance with the law of a Party, or

f. Copyrights, know-how and intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of a Party; and

g. moveable or immovable property and related rights;

any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value."

Other BITs include characteristics of investment in the definition - such as commitment of capital or other resources, expectation of gain or profit, duration of investment or assumption of risk. For instance, the Free Trade Agreement between USA and Chile defines Investment as follows:

"Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, namely commitment of capital or other resources, expectation of gain or profit, or assumption of risk."

These characteristics, in addition to contribution of investment to economic development of the Host State, are together widely referred to as the *Salini* criteria. Although this test was used to interpret the definition of Investment under the ICSID Convention, it has been frequently used by arbitral tribunals beyond the auspices of the ICSID Convention.[60]

Additionally, the ICSID Convention also contains the term 'Investment' in Article 25. Although this term is not defined, parties to BITs referring disputes to ICSID have been required to fulfil a double-barrel test – to fulfil the definition of Investment under the relevant BIT but also satisfy the objective criteria of investment under the ICSID Convention.[61]

Issues arise when the definition of the term 'Investment' itself includes the term 'investment'. For instance, *'claims to money related to an investment'*; or reference to the investment being *'in accordance with the Host State law'*. Tribunals have held that such situations do not imply that the term 'Investment' will be defined in accordance with Host State law but that the legality of the investment will be tested as per Host State law. Interpretation of these definitions also depends on the approach of the tribunals – whether tribunals adopt a broad or a narrow view.

Although the common trend in BITs is to have a broad, inclusive definition of Investment which may or may not be subject to limitations, we are witnessing a surge of BITs introducing a negative list of exclusions to Investment,

60. *Romak S.A. (Switzerland) v. The Republic of Uzbekistan* (UNCITRAL, PCA Case No. AA280), Award, 26 November 2009, para. 207.

61. CSOB v. Slovakia, Decision on Jurisdiction, 24 May 1999; MHS v. Malaysia, Award on Jurisdiction, 17 May 2007

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thereby tending to support the narrow approach. For instance, a number of BITs exclude portfolio investment from or assets of less than a certain value.

However, parties may adopt a mixture of broad and narrow definitions. Defining the contours of the term "Investment" is essentially the first step towards establishing the scope of the agreement. It is crucial to have a clear conception of Investment.

All previous BITs of India, except the India-Mexico Bilateral Investment Promotion and Protection Agreement (BIPPA), have followed the assets-based approach.[62] However, the 2016 India Model BIT takes an enterprise-based approach - along-with a list of asset inclusions, exclusions and characteristics to determine an investment. This exhaustive definition attempts to place various thresholds on a Party claiming to have an 'investment' to invoke the BIT.

Article 1.3 defines an 'enterprise' as a legal entity constituted, organized and operated in accordance with the law of the Host State. Article 1.4 defines 'investment' as an enterprise constituted, organized and operated in 'good faith' in the Host State and 'in compliance with the law' of the Host State.[63] The criteria of good faith and compliance with the domestic law of the Host State attempt to rule out modes adopted by foreign investors to establish or acquire investment in the Host State to tap into protections under a BIT. The definition also includes a list of assets which an enterprise may possess, such as shares, debt instruments of another enterprise, licenses or similar rights conferred in accordance with the law of the Host State, amongst others.

The list of assets also includes 'any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value'. The use of terms such as "substantial economic activity" and 'significant financial value' with less guidance and content can result in wide, unconstrained interpretations.

A negative list appears to exclude certain assets such as portfolio investments, debt securities issued by government enterprises, claims from sale of goods contracts, goodwill and intangible rights. Important exclusions are pre-operational expenditure upto commencement of substantial business operations of the enterprise; orders or judgments sought in judicial, administrative as well as arbitral proceedings; and any other claims to money that do not involve the kind of interests or operations set out in the definition of investment.

These are contentious assets. An inherent conflict may arise in interpretation. For instance, without defining 'substantial economic activity', it may be difficult to reconcile and determine the assets that will be eligible or ineligible for protection under the BIT.

62. 2003 Indian Model BIT, Article 1(b) provides -
" investment" means every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes: (i) movable and immovable property as well as other rights such as mortgages, liens or pledge (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company; (iii) rights to money or to any performance under contract having a financial value; (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party; (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals;

63. Indian Model BIT 2016, Article 1.4:
"investment" means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made.

Along with the meaning of an enterprise and list of asset inclusions and exclusions, Article 1.4 also provides certain characteristics to be satisfied by an enterprise to prove existence of 'investment'. These include commitment of capital and other resources, certain duration, expectation of gain or profit, assumption of risk and the assumption of risk and a significance for the development of the Party in whose territory the investment is made' i.e. the *Salini* criteria as stated above.[64]

These characteristics add to the existing ambiguity. For instance, there is no guidance to determine the applicable time frame to satisfy the characteristic of 'duration'.[65] Similarly, one may not be able to ascertain what would constitute 'significance for development' of the host State. Tribunals have been divided about the metrics to judge 'development'[66] and the level of contribution that an investment must make towards the development of the country.[67] The criteria raise issues. Would a short term investment resulting in development of the Host State be ousted from coverage owing to 'duration' test? Would small or marginal contributions to the development of the state be covered under the BIT despite having satisfied other requirements of lawful incorporation, and commitment of capital? How would the characteristics sync or collaborate with the other to establish an 'investment' under the BIT? Some authors also question if the characteristics apply only to the enterprise, or their assets as well.[68]

Although enterprise-based definitions are not uncommon, it does not take into account the increased scope of foreign investments in the current globalized era. While the attempt to place high thresholds and ring-fence every investment appears to assure respite to the Host State, the narrowing of the definition is against the tide of the more recent definitions of investment, which follow either a close ended or open-ended asset based definition.[69]

III. Investor

In addition to meeting the qualification of 'Investment', it is quintessential for the claimant to qualify as an 'Investor' in order to seek protection under a BIT. In other words, BITs can only apply to Investments made by a person who qualifies as an 'Investor' under the BIT.

Two fundamental considerations arise with respect to the definition of 'Investor': *(a) types of persons who may be considered as investors; and (b) availability of a link to connect the investor with the contracting party to the BIT.*

The first issue appears to be simple. Two types of persons can qualify as investors - natural persons and artificial / legal persons. Natural persons includes private foreign investors and shareholders. Legal persons can be defined to include or exclude different types of legal entities.

64. *Id*

65. *Id*, at 17

66. R. DOLZER & C. SCHREUER, PRINCIPLES at 75; see Salini v Morocco, Joy Mining v Egypt; some have not some have not considered the criterion important in making such determination – see Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award (July 14, 2010); Victor Pey Casado and President Allende Found. v. Republic of Chile, ICSID Case No. ARB/98/2, Award, 232 (May 8, 2008); LESI SpA et Astaldi SpA v. Algeria ICSID Case No ARB/05/3, Decision on Jurisdiction (French), (12 July 2006); Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, (Sept. 27, 2012); Also see Alex Grabowski, *The Definition of Investment Under the ICSID Convention: A Defense of Salini* 15:1 CHI. J. INT'L L. 287 (2014).

67. Some tribunals have held that the contribution must be significant- Malaysian Historical Salvors v Malaysia, ICSID Case No ARB/05/10, Award on Jurisdiction ¶ 124 (17 May 17, 2007), while some suggest that that it is enough if the investment contributes in one way or another- Mr. Patrick Mitchell v. The Democratic Republic of Congo, ICSID Case No. ARB/99/7, Annulment proceeding ¶ 33 (Feb. 9, 2004).

68. Ranjan and Pushkar, *The 2016 Indian Model BIT.*

69. US Model BIT, Article 1, "investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, Canada Model BIT, Article 1.

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The second issue is crucial and complex. Most BITs define investors as natural or legal persons having a certain degree of connection with the Contracting States to the agreement.[70] Nationality of the natural or legal person establishes this link.

With respect to natural persons, principally, investment protection extends to investors who are nationals of a contracting State other than the Host State in which the investment is made. The nationality of a natural person is usually determined by the domestic law of the State whose nationality is claimed. [71] However, international arbitral tribunals have declared themselves competent to rule on the challenge to nationality of a natural person. [72]

Other useful links used by tribunals are permanent residence, domicile, dominant nationality or combinations thereof, depending on the factual matrix and circumstances. Where a foreign investor claimed nationality of both USA and Peru, the tribunal found that the investor had dual nationality and both nationalities were effective. He was therefore entitled to seek protection under the Peru – Paraguay BIT.[73]

With respect to legal persons, determining corporate nationality is more complex. The most commonly used criteria for determining corporate nationality is place of incorporation or the registered office. Alternately, the place of central administration or effective seat may also be taken into consideration.[74]

However, while this threshold of 'connection' differs in BITs, it is certain that an investor is expected to have control over its investment, in order for it to have an admissible claim before a constituted arbitral tribunal. The variable remains the degree of control. Some BITs cater to this test of effective control, while others focus primarily on the place of incorporation.

In the contemporary world witnessing complex corporate structures, most BITs include the term 'control' to mean both direct and indirect control such that even remote levels of ownership are protected.[75] However, while the effective control test is a crucial test, its application has not significantly qualified the test of formal nationality by incorporation, unless in situations where expressed to the contrary by a treaty.

When the investor is part of a corporate structure spanning multiple jurisdictions, it becomes difficult to cull out a specific 'place of business' or 'place of effective management' in order to determine nationality, qua a BIT. If not carefully interpreted, it may be difficult to avoid a situation of parallel claims where the parent-holding structure of an investor may result in successful invocation of two different BITs against the same Host State. The classic example in this regard is the recent case of Vodafone BV and Vodafone Pte. against Republic of India.

An exceeding range of cases relate to investments made through acquisition of shares in a company bearing a different nationality than that of the shareholder(s). A dominant issue in investment treaty arbitrations therefore relates to potential of a shareholder to proceed on the basis of his nationality and invoke the jurisdiction under a BIT even if the company does not meet the nationality requirement under the relevant treaty.[76] This issue assumes particular significance where investments are made through companies incorporated in the Host State while the local company is the immediate investor.

70. 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

71. 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

72. Soufraki v. UAE, Award, 7 July 2004

73. Olguin v. Paraguay, Award, 26 July 2001

74. Autopista

75. UNCTAD/ITE/IIA/2006/5 - E.06;

76. *Dolzer*

In respect of cases submitted to the ICSID, Article 25 of the ICSID Convention clearly provides that its jurisdiction extends to disputes between a Contracting State and the national of the other Contracting State. Article 25(2)(b) provides that a locally incorporated company might qualify as a foreign investor owing to foreign control. Does this mean that only majority shareholders who have control over the local company can initiate arbitration? These issues are complex and are evaluated on a case-by-case basis.

In the last decade, a number of shell companies have emerged in order to gain protection under a favorable BIT - leading to *'treaty-shopping'*. In such situations, tribunals have been called upon to pierce the corporate veil, or apply the group of companies doctrine to determine control and majority shareholding, amongst other issues such as abuse of process. Such situations have been contemplated and catered to by countries in their BITs by denying benefits of its treaty provisions to third parties.

The definition of investor in the 2016 India Model BIT encompasses the incorporation and effective control test.[77] It provides that an investor means a natural or juridical person of a Party. The nationality of a natural person is determined in accordance with its State laws and regulations. In case of dual nationality, the 2016 India Model BIT states that the nationality shall be that of dominant and effective nationality where the person ordinarily or permanently resides.

With respect to a "juridical person", the 2016 India Model BIT covers legal entity that is (a) constituted, organised and operated under the law of that Party and that has substantial business activities in the territory of that Party; or (b) constituted, organized and operated under the laws of that Party and that is directly or indirectly owned or controlled by a natural person of that Party or by a legal entity mentioned under sub-clause (a). This definition attempts to prevent shell companies, nationals of a third state, and nationals of the host state from accessing protections envisaged in the BIT.

Thus, for juridical persons, it can be seen that both the place of incorporation and the effective control test have been adopted by the 2016 India Model BIT, albeit with the caveat that substantial business activities must be carried out by the entity in place of incorporation. These tests have been used by tribunals variably. Recently, in the case of *Flemingo v. Poland*,[78] the tribunal found no fault in the Indian investor invoking the India – Poland BIT which had a more favourable definition of 'Investor' with a plain 'place of incorporation test', as opposed to the Poland – UAE BIT which had a more substantive requirement of investor control - despite the Indian investor being headquartered in the UAE.

77. Indian Model BIT 2016, Article 1.5

78. Available at https://www.italaw.com/sites/default/files/case-documents/italaw7709_3.pdf

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8. Merits

Once an arbitral tribunal admits jurisdiction under the BIT, the next step is to adjudicate upon the merits of the claim. This part analyses the provisions relevant for determination of merits of an international investment treaty claim.

The key steps in this process involve evaluation of the measures under challenge to constitute a 'taking' or 'expropriation' under the BIT, breaches of other standards of protection afforded to the investors / investments under the BIT such as fair and equitable treatment, full protection and security, access to other beneficial BITs through the most-favored nation clause, and national treatment amongst others.

As will be seen in the following chapters, the 2016 India Model BIT has restricted the scope of protection to investments whilst widening the ambit of 'legal' expropriation. While the 2003 India Model BIT ran in sync with the global BITs in providing broad standards of protection and restrictive definition for legal expropriation, the 2016 India Model BIT does the opposite.

I. Expropriation / Taking of Property

Majority disputes under BITs circle around measures taken by Host State which constitute some form of 'taking' of the investment. These measures are known as expropriation. There is no precise definition for expropriation. A typical expropriation clause in the UK Model BIT, 2005 reads as under:

> *"Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subject to measures having effect equivalent to nationalization or expropriation in the territory of the Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation."*

International law recognizes the sovereign right of a State to take alien property. Under international investment treaty law as well, expropriation of foreign investment is permissible. BITs regulate the conditions and consequences of this right of expropriation.

A. Identifying the expropriated right

The first threshold for establishing expropriation is identifying the property alleged to be taken and proving that it constitutes an 'Investment' under the BIT. This does not merely relate to tangible property. Expropriation can also cover intangible assets such as intellectual property, moveable assets such as shares, rights under contracts, arbitral awards,[79] amongst others.

B. Direct Expropriation

Expropriation can be direct or indirect. Direct expropriation involves forcible taking by Government of tangible / intangible property of investors by administrative or legislative action with a view to transfer ownership of the property to another person i.e. the authority involved in the taking. This includes outright seizure of assets, nationalization of property, or taking away title to the property.

C. Indirect Expropriation

However, direct takings and nationalizations are not prevalent in the contemporary investment age. Indirect takings i.e. discreet takings where the title to the investment remains unaffected, are more widespread. Characteristics of indirect takings include: interference with the use, enjoyment or disposition of investment, loss of control and management over investment, and / or substantial deprivation in the value of the investment.

79. Saipem v. Bangladesh

One of the most exhaustive definitions of indirect expropriation was laid out by the tribunal in *Metalclad v. Mexico: "Expropriation includes not only open, deliberate and acknowledged takings of property such as outright seizure, formal or obligatory transfer of title in favour of the Host State, but also covert or incidental interference with the use of property which has the effect of depriving the owners, in whole or in significant part of the use or reasonably-to-be-expected economic benefit of property even if necessarily to the obvious benefit of the Host State."*

Indirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure.[80] A classic definition for the same was given by the *Starrett Housing* [81] tribunal which stated that measures taken by a state can interfere with the property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[82]

In line with indirect expropriation, BITs now include in the definition of expropriation to include measures that "tantamount to expropriation" or "have the effect of expropriation" – thereby including acts of indirect expropriation.

The identification of direct expropriation is a simple task. However, classifying a taking as indirect expropriation requires greater analysis. Tribunals emphasize the relevance of a multitude of elements. Decisions rely principally on the substantial deprivation of the value of investment, the loss of control of the investment, and/or the investor's reasonable expectations.

The test of substantial deprivation of the value of investment is oft-used to determine indirect expropriation. However, what constitutes substantial deprivation is difficult to ascertain in terms of a formula. In Perenco, the tribunal held that this is *a fact-sensitive exercise to be conducted in the light of the circumstances of each case"* and that *"it would make little sense to state a percentage or a threshold that would have to be met for a deprivation to be 'substantial'.* [83] There appears to be some distinction between "partial deprivation of value", which does not constitute an expropriation, and "complete or near complete deprivation of value", which can constitute an expropriation.[84]

Some tribunals opine that a necessary condition for indirect expropriation is *"the neutralisation of the use of the investment".*[85] *Acts that create impediments to business do not by themselves constitute expropriation. In order to qualify as indirect expropriation, the measure must constitute a deprivation of the economic use and enjoyment, as if the rights related thereto, such as the income or benefits, had ceased to exist."*

D. Legality of Expropriation

While the aforesaid determines the effect of expropriation to characterize it as indirect expropriation, BITs also outline factors which determine the legality or otherwise of an expropriation. Under customary international law, when the State expropriates the investment of an investor, it is bound to pay compensation. This standard has been incorporated into BITs internationally. Payment of compensation is a determinant of legality or otherwise of expropriation. The method for calculating such compensation is often specified within the BIT itself. [86]

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80. *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012, para. 396.

81. Starrett Housing v. Iran, Interlocutory Award No. ITL 32-24-1, 19 December 1983, 4 Iran-United States Claims Tribunal Reports 122, p. 154

82. Ibid.

83. Chemtura

84. Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (ICSID Case No. ARB/08/6), Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 672.

85. El Paso v. Argentina, CMS v. Argentina

86. India-Mauritius BIT (1998), Article 6(1): "*...Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable rate until the date of payment, shall be made without unreasonable delay and shall be*

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However, in addition to prompt and effective compensation as seen in majority cases, legality of expropriation is also regulated by other determinants. Majority treaties envisage four essential criteria to determine legality of expropriation, namely that *the measure must be taken in light of a public purpose, it must be non- discriminatory, must be in accordance with due process of law, and is against the payment of compensation.*

E. Creeping expropriation

Another interesting concept is that of creeping expropriation. This is defined as the incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment, or deprives him or her of control over the investment. A series of separate State acts, usually taken within a limited time span, are then regarded as constituent parts of the unified treatment of the investor or investment.[87]

F. Regulatory takings

While nationalization is almost a bygone phenomenon, and expropriation is fairly common, a new set of takings have emerged in the past decade. These relate to 'regulatory takings', where a host State uses its regulatory powers under the doctrine of 'margin of appreciation' or 'police powers' to expropriate investments in the interest of the public, environment, economy or other public policy objectives.

The margin of appreciation doctrine was first introduced to international law by the European Convention on Human Rights (**"ECHR"**) and was adopted in cases concerning state of emergency pursuant to the ECHR. According to this doctrine, national authorities are granted a "better position rationale"[88] by reason of their direct and continuous contact with the pressing needs of the State to decide both on the presence of such an emergency and on the nature and the scope of derogations necessary to avert it, as opposed to an international tribunal. [89]

Certain international tribunals have held the yardstick to determine the limits of the margin of appreciation on the basis of proportionality, where the regulatory measures are not permitted to go beyond the extent strictly required by the exigencies of the crisis,[90] thereby balancing the nature of the rights affected, considering the background circumstances and the duration of the emergency.[91]

G. Expropriation under the 2016 India Model BIT

The 2016 Indian Model BIT covers both direct[92] and indirect expropriation.[93] Interestingly, it provides a shared understanding of what would constitute direct and indirect expropriation. It provides that direct expropriation would constitute formal transfer of title or outright seizure. Indirect expropriation would occur if measure(s) substantially or permanently deprives the investor of fundamental attributes of the property in its investment such as right to use, enjoy and dispose the investment without formal transfer of title or outright seizure.

effectively realizable and be freely transferable."

87. Expropriation, UNCTAD Series on Issues in International Investment Agreements II- A Sequel (2012) p. 11

88. Greer, p. 8.

89. *Ireland v. U.K.* [207].

90. *Aksoy v. Turkey* [68].

91. Greer, p. 9.

92. Indian Model BIT 2016 Article 5.3 a (i) provides:
The Parties confirm their shared understanding that:
a) Expropriation may be direct or indirect:
(i) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and

93. Indian Model BIT 2016 Article 5.3 a (ii) provides:
(ii) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

Further, it provides that indirect expropriation could be determined by considering economic impact of the measure, duration and character of the measure. In addition to singular measures, indirect expropriation also covers series of measures - thereby encompassing creeping expropriation.

Several tribunals rely on the sole effects of the measures on the investment in order to determine expropriation. In order to circumvent such interpretations, the 2016 India Model BIT provides that the fact that the measure resulted in adverse economic impact on the investment would not establish expropriation. Further, it lays down factors relating to character, object and intent of the measure. Additionally, it states that non-discriminatory regulatory measures or awards by judicial bodies designed to protect legitimate public interest or public purpose objectives shall not constitute expropriation.

Thus, although the requirements of economic impact and duration of a measure still refer to an 'effects' based enquiry of the occurrence of indirect expropriation,[94] the considerations of character of the measure, their object, context and intent, and right to adoption of regulatory measures in public interest tread into the intent-based enquiry into measures of expropriation. They provide excessive deference to the Host State to adopt measures that might tantamount to expropriation.

With respect to provision on regulatory takings, it must be noted that similarly worded provisions are present in other treaties. However, not many are as extensive as the one provided in the 2016 India Model BIT. The 2016 India Model BIT places no caveats on the validity of regulatory measures other than the fact that they must be non-discriminatory. The 2016 India Model BIT provides for a deferential standard of review in favour of the Host State.[95]

It is evident that the provision on expropriation under the 2016 India Model BIT gives immense precedence to the State's regulatory power over the protection of the foreign investment.

On legality of expropriation, the 2016 India Model BIT provides that the Host State may not expropriate investment except for reasons of public purpose, in accordance with due process and on payment of adequate compensation. Interestingly, this definition rules out the global exceptions of non-arbitrariness or non-discrimination from the purview of exceptions. Another interesting addition is that the 2016 India Model BIT provides content and guidance with respect to expropriation of land by India. It states that where India is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in its Law relating to land acquisition and any questions as to "public purpose" and compensation shall be determined in accordance with the procedure specified therein. This provides some clarity with respect to the standards to be relied on in determining expropriation of land and the consequent compensation.

A perusal of the Expropriation provision under the BIT reveals that it is Host State-centric and provides a wide latitude to the host State to adopt indirect regulatory measures, with a sole threshold of non-discrimination. The character, object and intent of the measure, coupled with public purpose objectives appear to trump over the effects of the measures on the investment. Making the situation difficult for the investor, the 2016 India Model BIT mandates that in considering an alleged breach of the provision on expropriation, the investment treaty tribunal shall consider whether the aggrieved investor pursued any local remedies against expropriation, before approaching the tribunal under the BIT. This provision, coupled with the provision for 'Settlement of Disputes' in the 2016 India Model BIT places a road-block in the approach of foreign investors to investment treaty arbitration to challenge measures allegedly constituting expropriation.

94. Ranjan and Pushkar, *The 2016 Indian Model BIT* at 28.

95. Indian Model BIT 2016, Article 23.1 provides:
'This treaty shall be interpreted in the context of the high level of deference that international law accords to States with regard to their high level of development and implementation of domestic policies'.

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II. "Treatment of Investments"

A. Customary International Law: Fair & Equitable Treatment excluded

Majority BITs contain a clause under the chapter "*Standards of Protection*". The first and foremost, and probably the most significant standard of protection thereunder is the fair and equitable treatment standard. The FET standard is a key element in contemporary international investment agreements.[96] Over the years, it has emerged as the most relied upon and successful basis for BIT claims by investors.[97] The standard is aimed at protecting investors against serious instances of arbitrary, discriminatory or abusive conduct by host States.[98] It has thus become an overarching provision that has come to include in its ambit legislative, regulatory and administrative actions of the host State.[99]

At the core of the FET standard is an interpretative conundrum. The standard does not have a consolidated and conventional core meaning. There is only consensus in accepting that the standard constitutes a standard that is independent from national legal order and is not limited to restricting bad faith conduct of host States.[100] Apart from this minimal concept, the exact normative content of the standard is highly contested.[101] To further exacerbate the ambiguity, the FET standard appears in a large number of BITs without guidance as to their qualifying normative content. [102]

The interpretation of FET can be consolidated into two broad views. The first view is that FET is limited to an international minimum standard of treatment (**"MST"**) that must be accorded to foreign entities under customary international law.[103] The second view relies on interpretation of the FET standard as an autonomous standard considering principles such as transparency, legitimate expectations, non-arbitrariness amongst others.

i. Minimum Standard of Treatment

The Minimum Standard of Treatment laid a foundation for guarantee of bare minimum treatment to aliens by host states on a universal platform. The US-Mexico Claims Tribunals recognized existence of such standard in its decisions.[104]

A part of the decision in *Neer v. Mexico* is often cited as laying down the minimum standard. In this case, the Commission held that for the treatment *"to constitute an international delinquency, it should amount to an outrage, bad faith, wilful neglect of duty, or an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."*[105]

96. *FAIR AND EQUITABLE TREATMENT*, UNCTAD Series on Issues in International Investment, 2012 at 20.

97. R. DOLZER & C. SCHREUER, PRINCIPLES.

98. See A. NEWCOMBE & L PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 1-73 (2009) [hereinafter NEWCOMBE AND PARADELL, LAW AND PRACTICE]; SALACUSE, THE LAW OF INVESTMENT TREATIES.

99. SURYA PRASAD SUBEDI, INTERNATIONAL INVESTMENT LAW 172-173 (2008); Mondev International Ltd v. United States, ICSID Case No. ARB (AF)/99/2, Award, (Oct.11 2002); Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award (Mar. 31, 2010); Teco v. Guatemala, ICSID Case No. ARB/10/23, Award ¶ 454 (Dec. 19, 2013); Bilcon v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶¶ 442-444 (Mar. 17, 2015).

100. SCHILL STEPHEN, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW. Cambridge University Press, Cambridge, (2009) [hereinafter SCHILL STEPHEN, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW].

101. Scholars have described FET as wide, tenuous and imprecise – See M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, (2004) at 332; Vaughan Lowe, *Regulation or Expropriation* 55 CURRENT LEGAL PROBS. 447 (2002); Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice* 6 J. WORLD INV. & TRADE 364 (2005); SALACUSE, LAW OF INVESTMENT TREATIES, at 241.

102. NEWCOMBE AND PARADELL, LAW AND PRACTICE, at 254 (2009).

103. R. DOLZER & C. SCHREUER, PRINCIPLES; SALACUSE, LAW OF INVESTMENT TREATIES, at 245.

104. *Neer*(1926)IV RIAA 60;*Faulkner* (1927)21 AJIL 349;*Harry Roberts*(1927)21 AJIL 357;*Hopkins*(1927)21 AJIL 160; *Way* (1929)23 AJIL 466;cited in *Ibid.*,14

105. *Neer*(1926)IV RIAA 60,p61

The basic premise of Minimum Standard of Treatment is that an alien is protected against excessive and unacceptable measures of the host State by established rules and standards of customary international law which are independent of the laws of the host State.[106] The definition and parameters of Minimum Standard of Treatment are precarious and often incomplete, vague and contested.[107] There is no consensus regarding the meaning of this standard, and thus the determination of the actual content of the standard depends on arbitral discretion.

ii. Autonomous standard

The second view is that FET offers an autonomous standard that is additional to general international law.[108] This view has been applied in light of BITs that do not link FET to customary international law or the Minimum Standard of Treatment. It therefore appears as an autonomous standard.[109] The autonomous standard suffers with the same ambiguity as the Minimum Standard of Treatment. There is no guidance as to the content of the standard and the additional protections or treatment to be accorded to an investor over customary international law. [110]

Several arbitral tribunals have engaged in providing content to the FET standard. In recent years, the concept of legitimate expectations has been frequently invoked in investment arbitrations, particularly as a dominant part of the substantive standard of fair and equitable treatment. However, the origin of the doctrine can be traced back to administrative law of various national systems.

The doctrine of legitimate expectations holds that public authorities should be bound by the representations made to parties, and must therefore protect the reasonable expectations they create in the public towards government activities. Subsequent retraction on the representation and decisions inconsistent with such expectations trigger state liability.

The concept of legitimate expectations comes into play in three different ways in international investment law. The first category is state conduct in the form of specific representations or declarations made by state authorities relating to the investment, relied upon by investor to make or expand an investment and later retracted by the State. In this sense, legitimate expectations operates on lines of the private law doctrines of estoppel and good faith, and the public law doctrine of state responsibility for unilateral acts.

The second category deals with the state's existing legal framework in the form of legislations, rules, regulations, contractual undertakings, and executive grants such as licenses. This framework creates expectations of stability and predictability in the legal framework of the State, and is based on the rule of law principles of transparency, legal certainty and legal security.

Expectations created by conduct are entitled to protection only if they are reasonable. The Tribunal in *Saluka* warned against literal interpretation of FET and stability and predictability and stated that such literal interpretation would impose unrealistic and inappropriate obligations on host state. In order to earn protection, the investor's expectations and considerations must rise to a level of "reasonableness and legitimacy" in the light of circumstances.

106. SCHILL STEPHEN, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW.

107. SALACUSE J, THE LAW OF INVESTMENT TREATIES. Oxford University Press. Oxford. (2010) at 75-76.

108. R. DOLZER & C. SCHREUER, PRINCIPLES, at 134; Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice* 6 J. WORLD INV. & TRADE 364 (2005) at 129.

109. For example, 2003 Indian Model BIT, Article 3 (2) provides the FET provision as - 'Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party'.; F.A. Mann, *British Treaties for the Promotion and Protection of Investments* 52 BRIT. Y.B. INT'L. L. 241, 244 (1981)

110. K. Vandevelde, *A unified theory of fair and equitable treatment.* New York University Journal of International Law and Policy, 43–106 (2010) at 43; R. DOLZER & C. SCHREUER, PRINCIPLES, at 135

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The application of principle of legitimate expectations depends upon the expectations fostered by local laws as they stand at the time of the investment.[111] This seems rational because while planning to invest, the foreign investor makes its decisions and shapes its expectations based on the law and circumstances prevailing in the state at the time of the investment.

However, this rule witnesses complication when the investment becomes a complex process involving a series of investment-related actions rather than a single act. This in turn implies taking of series of decisions at several steps, either while establishing an investment or running an already established investment (such as step-by-step acquisition of shares in a local company).

iii. Treatment under 2016 India Model BIT

The 2016 India Model BIT does not contain an FET clause, but rather a "treatment of investments" clause [112] and prohibits a country from subjecting foreign investments to measures that constitute a violation of customary international law. The reference to customary international law highlights India's attempt to restrict the interpretation of the standard to minimum standard treatment without making an express mention of the FET standard. [113] The 2016 India Model BIT however, does substantiate the protections that it will provide to investments as - denial of justice (judicial and administrative), breaches of due process, and targeted discrimination on manifestly unjustified grounds or manifestly abusive treatment, such as coercion, duress and harassment. [114]

The repeated inclusion of the term "manifestly" in the text with regard to targeted discrimination and abusive treatment clearly suggests that India would only assume liability for discrimination and abusive treatment if it meets a very high threshold.[115] This tilts the balance of the BIT regime in the favour of the State's regulatory power. However, since there is no textual guidance in the BIT to interpret "manifestly" it would be open to the discretion of ISDS tribunals.[116]

The clause not only moves away from the traditional FET concept but also avoids the incorporation of other key guarantees like 'legitimate expectations' and 'arbitrariness' of state action. [117] Not including legitimate expectations is India's way of distancing itself from a large body of arbitral decisions that have admittedly interpreted legitimate expectations largely in favour of the foreign investor.[118] However, arbitral tribunals have also interpreted legitimate expectations in a narrower manner, to just specific representations made by the State to the investor, which the investor patently relies on.[119] However, the exclusion of legitimate expectations in its entirety results in tilting the

111. SPP v. Egypt, Award, 20 May 1992, para82,83; *Azurix Corp. v. Argentine Republic*,Award,14 July 2006,para372; *Saluka Investments BV v. The Czech Republic*,Partial Award, 17 March 2006, para329;*Siemens A.G. v. Argentine Republic*,Award, 6 February 2007,para299

112. Indian Model BIT 2016, Article 3.1 provides:
No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through:
(i) Denial of justice in any judicial or administrative proceedings; or
(ii) fundamental breach of due process; or
(iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
(iv) manifestly abusive treatment, such as coercion, duress and harassment.

113. Ranjan and Pushkar, *The 2016 Indian Model BIT* at 23.

114. Indian Model BIT 2016, Article 3.1.

115. See Law Commission Report

116. TARCISIO GAZZINI, INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES, Bloomsbury 2016 at 100.

117. Lim, C. (Ed.). (2016). *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah.* Cambridge: Cambridge University Press. doi:10.1017/CBO9781316488317 at 344; ALEC STONE SWEET, FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY, Oxford University Press, 2017 at 234.

118. CMS v. Argentina; National Grid v. Argentina, UNCITRAL, Award ¶ 176-179 (Nov. 3, 2008) [hereinafter CMS Award].

119. Glamis v Mexico; Michele Potesta, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept* 28 ICSID REVIEW 88, 105-110 (2013).

balance in favour of the State's right to regulate regardless of specific representations made by it to a foreign investor.

The other key exclusion is the ground of 'arbitrariness' to challenge regulatory measures of the host State. Protection against arbitrariness of a regulatory measure has been recognized in the narrower customary international law standard [120] as well as the autonomous FET standard, [121] indicating the importance of this standard of protection even after taking into account the regulatory obligations of the State. Therefore, the omission of something like 'manifest arbitrariness' from the India Model BIT leaves a gap for the protection of foreign investment. The inclusion of 'manifest arbitrariness' would have meant that the host State's regulatory conduct would be judged using a high standard from a narrower customary international law perspective [122] and also provide enough regulatory latitude. Conversely, it would also ensure that foreign investors would have recourse to arbitral tribunals when host States act in bad faith or in an irrational or manifestly unreasonable manner, substantially endangering the investment.[123]

The standards of denial of justice and fundamental breach of due process are open to interpretation. When brought into arbitration, it would extend to the discretion of the arbitral tribunal to interpret these standards. Under customary international law, denial of justice has been interpreted in three senses.[124] The broad interpretation of the concept, which covers a wide ambit of any wrongful conduct of States towards aliens, from any organ of the government. The narrowest interpretation of the concept could be limited to refusing access to justice to an investor or delays in granting such justice. It can also be interpreted using a more balanced approach which would extend to improper administration of justice on the part of the State, including but not limited to, access to courts and adequacy of procedural justice. Considering that denial of justice can be interpreted in all three senses, it belies the possibility that an arbitral tribunal may interpret it narrowly or broadly according to its own subjective understanding and application of the standard and the dispute.

Additionally, since the traditional standard of FET is absent from the BIT by the virtue of the uniqueness of "treatment of investors" clause ISDS tribunals would be free to develop their own interpretation, especially in light of the clause containing several broadly interpretative standards.

B. Full Protection and Security

Most BITs contain provisions granting full protection and security to investments.[125] The host State is under an obligation to take active measures to protect the investment from adverse effects. [126] The adverse effects may stem from private parties such as demonstrators, employees or business partners, or from actions of the host State and its organs.

The FPS standard, in the simplest of terms, relates to the physical protection of the investor and its assets. Tribunals, on numerous occasions, seem to have assumed that this standard applies exclusively or preponderantly to physical security and to the host State's duty to protect the investor against violence directed at persons and property stemming from State organs[127] or private parties.[128] The protection can be of

120. International Thunderbird Gaming Corporation v. United Mexican States, UNCITEAL, Arbitral Award ¶ 147 (Jan. 26, 2006) [hereinafter Thunderbird]; Glamis v Mexico ¶ 621, Bilcon v Mexico, UNCITRAL, (NAFTA), PCA Case No 2009-04, ¶ 455 .

121. Lauder v. Czech Republic, UNCITRAL, Award, 3 September 2001, ¶ 221; Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 184.

122. Thunderbird; Waste Management; Cargill v. Mexico ¶ 298.

123. Ranjan and Pushkar, *The 2016 Indian Model BIT* at 25.

124. OECD, *Fair and Equitable Treatment in International Investment Law* 28 (OECD Working Papers on International Investment, 2004/3, 2004).

125. Christoph Schreuer, Full Protection and Security, Journal of International Dispute Settlement, (2010), pp. 1–17 doi:10.1093/jnlids/idq002

126. R. DOLZER & C. SCHREUER, PRINCIPLES, supra note 1, at 160-61

127. Parkerings v Lithuania, Award, 11 September 2007, para 354.

128. PSEG v Turkey, Award, 19 January 2007, at paras 257–9;

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different kinds as stipulated, nonetheless, is essentially against any form of physical violence. For instance, the forcible seizure of hotels by employees of state entities with whom the investor had contractual relations also amounted to a violation of the FPS standard.[129] Even though the government officials did not participate in the seizure but the police and other authorities took no effective measures to prevent or redress the seizure. The Tribunal found the state of Egypt liable since it was aware of the intentions to seize the hotels yet the competent ministry took no action to safeguard the investor's interests. In fact, no substantial sanctions had been imposed on the perpetrators either.

Social demonstrations and disturbances at the site of the work can also be challenged when supported by requisite evidence of the government's lack of diligence or duty to care.[130] Further, when the government failed to take adequate precautionary steps to protect the investor against riots and looting, the same was found to be in violation of the FPS standard of treatment.[131] These are all examples of adverse actions by private persons or groups.

In other cases, the State organs themselves directly perpetrated adverse action. It is important to understand that FPS standard is not just limited to State's failure to prevent actions of third parties, but it also extends to actions by organs/ representatives of the State itself.[132]

In AAPL v. Sri Lanka [133], the Sri Lankan Security Forces had destroyed the investment in the course of a counter insurgency operation. The Tribunal found the Respondent liable since the measure taken was unwarranted and excessive in nature. In addition, the FPS principle not only attempts to secure investors from any form of violence, but also requires legal protection for the investors.[134]

However, like has been the case with ambiguity in the content of the FET clause, the FPS provision suffers the same fate. There is no specified criterion that categorically defines the nature and content of the protection and security that a host State is liable to provide to the investment and what is the due diligence that the State would have to undertake, for the protection to be 'full'.[135]

This has in turn given rise to the debate of the contents and limitations of the clause and has led to various tribunals interpreting the clause in different manners.[136] The standard by consensus extends to physical security[137] of the foreign investment, however, its interpretation has been expanded to include regulatory and legal security as well.[138] For example in *Siag v Egypt*,[139] the claim based on the guarantee of 'full protection in the territory of the other Contracting Party' concerned legal as well as

Enron v Argentina, Award, 22 May 2007, paras 284–7; BG Group v Argentina, Award, 24 December 2007, paras 323–8; Sempra v Argentina, Award, 28 September 2007, paras 321–4; Plama v Bulgaria, Award, 27 August 2008, para 180

129. Wena Hotels v Egypt, Award, 8 December 2000 (2002) 41 ILM 896

130. Tecnicas Medioambientales Tecmed S. A. v The United Mexican States, Award, 29 May 2003 (2004) 43 ILM 133

131. Pantechniki v Albania, Award, 30 July 2009, paras 71–84.

132. Biwater Gauff v Tanzania, Award, 24 July 2008, para 730.

133. AAPL v Sri Lanka, Award, 21 June 1990, 4 ICSID Rep 246.

134. Saluka Investments BV (The Netherlands) v The Czech Republic, Partial Award, 17 March 2006, paras 483, 484.

135. See A NEWCOMBE AND L PARADELL, LAW AND PRACTICE; JD SALACUSE, THE LAW OF INVESTMENT TREATIES 208–10 (OUP, Oxford 2010).

136. For a discussion see HE Zeitler, *'The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors'* (2005) 3 Stockholm Intl Arbitration Rev 1; R Dolzer and M Stevens, Bilateral Investment Treaties (Nijhoff, The Hague 1995) 60.

137. PSEG v Turkey, Award, 19 January 2007, at ¶¶ 257–9; Enron Corporation and Ponderossa Assents, L.P. v. The Argentine Republic, ICSID Case No ARB/01/3, Award, (May 22, 2007) [hereinafter Enron Award], 22 May 2007, ¶¶ 284–7; BG Group v Argentina, Award, 24 December 2007, ¶¶ 323–8; Sempra v Argentina, Award, 28 September 2007, ¶¶ 321–4; Plama v Bulgaria, Award, 27 August 2008, ¶ 180, American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No ARB/93/1, Award (Feb. 21, 1997).

138. NEWCOMBE AND PARADELL, LAW AND PRACTICE, at 310.

139. Siag v Egypt, Award, 1 June 2009, ¶¶ 445–8.

police protection. The Claimant's investment had been expropriated by force on the basis of executive resolutions that were contrary to several court decisions. The claimants had made several unsuccessful requests to the police that their investment be protected.

The Tribunal stated that "the conduct of Egypt fell well below the standard of protection that the Claimants could reasonably have expected, both in allowing the expropriation to occur and in subsequently failing to take steps to return the investment to Claimants - following repeated rulings of Egypt's own courts that the expropriation was illegal."[140]

These authorities suggest that the duty of protection and security extends to providing a legal framework that offers legal protection to investors. This includes substantive provisions protecting investments but also appropriate procedures that enable investors to vindicate their rights.[141] However, there are some tribunals that have held that FPS only provides for protection to foreign investment from physical injury and does not encompass other kinds of regulatory protection such as maintenance of stable and legal commercial or business environment.[142]

Interestingly, the 2015 Draft India Model BIT did not contain an FPS clause and was such a glaring omission that when the Draft India Model BIT was made public for comments,[143] the lack of it was pointed out. The lack of a protection as basic as FPS from the host State was likely to make the investment vulnerable to any number of harms physical or otherwise. Thus, in a positive response to the suggestions the 2016 India Model BIT now does contain an FPS clause. The India Model BIT provides that foreign investment and investors shall be accorded full protection and security.[144] Further, the Model provides that FPS is restricted to physical security for foreign investment and investors and does not extend to 'any other obligation whatsoever'.[145]

Considering the plethora of varying interpretations of FPS the clear limiting of the scope in the India Model BIT will help curb arbitral discretion. It also reconciles investment protection with host State's regulatory power. On the one hand, it puts the host State under an obligation to provide physical security to foreign investment, and at the same time, ensures that adoption of host State's regulatory measures that might impact the business or legal environment cannot be challenged as violation of FPS though such regulatory measures may be challengeable under other BIT provisions.

C. National Treatment

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. A National Treatment obligation arises out of a treaty obligation. As observed in the Methanex case:

140. Id para 448

141. CME Czech Republic v. The Czech Republic, UNCITRAL, Partial Award, ¶ 613 (Sept. 13, 2001); See also Azurix supra note 187, at ¶ 406-408; Siemens v Argentina, ICSID Case No. ARB/02/8, Award, ¶ 303 (Feb. 6, 2007); National Grid supra note 165, at ¶ 187-90; Total S.A. v Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 343, (Dec. 27, 2010).

142. AWG Group v The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶179 (Jul. 30, 2010); Also, see Saluka, at ¶ 484, (Mar. 17, 2006); BG Group Plc. v The Republic of Argentina, UNCITRAL, Final Award, ¶323-326 (Dec. 24, 2007); Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 632, (Mar. 10, 2016).

143. Ashutosh Ray, *'Unveiled: Indian Model BIT'*, *Kluwer Arbitration Blog*, January 18 2016, http://kluwerarbitrationblog.com/2016/01/18/unveiled-indian-model-bit/

144. Indian Model BIT 2016, Article 3.2 provides:
For greater certainty, 'full protection and security' only refers to a Party's obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever.

145. *Id.*, Article 3.2.

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"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." [146]

Therefore, any discernible national treatment rule in international law cannot override a specifically drafted national treatment clause in a BIT. Such clauses, usually state that the foreign investor will be accorded treatment no less favourable than that which the host State accords to its own investors. For instance, India-Mauritius BIT (1998) has the following clause:

Article 4(2): "Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State."

It is important to note that the national treatment standard is always comparative in nature i.e. at best, this protection only mandates a host State to treat foreign investment at par with how it would treat investments made by its own investors. It is also important to understand that this protection is granted qua an investor's investment, and not an investor per se.

In *Al Tamimi v. The State of Oman* [147], the Tribunal determined that the treatment accorded to foreign investment and a State's control over the investment made by its own investors ought to be *"materially different"*, in order to attract a violation of the national treatment protection. This national treatment claim was ultimately rejected by the Tribunal, since the investor had failed to produce an appropriate domestic comparator in order to prove that the host State had acted in a discriminatory manner. However, the investor was successful in its expropriation claim under the US-Oman BIT, due to the host State's unlawful termination of leases provided to the investor for the conduct of its business.

The 2016 India Model BIT provides for national treatment. It provides that a Party shall not apply measures that accord less favourable treatment than that it accords, in like circumstances, to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory. The caveat here is that of like circumstances.

Further, the 2016 India Model BIT also provides guidance on what would constitute like circumstances. It provides that assessing whether the treatment is accorded in like circumstances would depend on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives. These circumstances include, but are not limited to the goods or services consumed or produced by the investment; the actual and potential impact of the investment on third persons, the local community, or the environment; whether the investment is public, private, or state-owned or controlled; and the practical challenges of regulating the investment.

146. 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

147. ICSID Case No. ARB/11/33

D. Monetary Transfer Provisions

The transfer or repatriation of funds provision in BITs is at the heart of the object and purpose of an investment treaty. Reducing barriers to trade in financial services is a necessary part of meaningful economic integration. Basically, MTPs in BITs regulate the transfer of funds related to investment in and out of the country. MTPs in BITs cover transfers related to investments that have already been made, i.e. after the admission stage and into the establishment stage.[148] A typical MTP in a BIT identifies the 'transfer' or 'payment' to which the provision applies and also provides the conditions governing such transfers, such as whether the transfer is to be made in foreign currency or made promptly. In most BITs, MTPs cover all 'transfers' or 'payments' related to investment.[149] Further, depending on the treaty language, MTPs cover both inflows and outflows of funds.[150] These 'transfers' include both current transfers and capital transfers.

MTPs are important for foreign investors because they provide the freedom to transfer all funds related to investment several business-related needs.[151] Therefore, restrictions on the transfer of funds related to an investment may be responsible for deterring investments from being made at all, because foreign investors will be deprived of the benefits accruing from the investment (such as repatriating profits) and will also not have the freedom to develop their investment (like bringing in additional capital to support the existing investment).[152] Thus, as general practice BITs contain MTPs that ensure that foreign investors are free to transfer funds in and out of the host State.

However, this right is not always absolute, and is subject to certain restriction taking into consideration the finite foreign exchange reserves of the host country, that the investor shall have to rely on while transferring funds.[153] As well the impact the infusion and/or repatriations of funds can have macro-economically.[154] Thus, these possible impacts compel the host State to impose restrictions on inflows, which could impact the rights of foreign investors. This brings the imposition of certain regulatory measures such as capital controls in a direct potential confrontation with the MTPs in BITs.

The India Model BIT recognizes the investor's right to transfer all funds related to investment such as contributions to capital, profits, dividends, interest payments etc.[155] However, the investor's right to transfer funds is subject to three restrictions. The Indian law on foreign exchange is called Foreign Exchange Management Act (FEMA)[156] which in Section 6(1), allows for capital account transactions; however, this is subject to section 6(2), which gives the power to the Reserve Bank of India (RBI) to specify, in consultation with the central government – any class or classes of capital account transactions which are permissible and the limit up to which foreign exchange shall be admissible for such transactions.[157] Also, section 6(3) gives power to the RBI to prohibit, restrict or regulate a number of capital account transactions.[158]

148. UNCTAD, TRANSFER OF FUNDS 32 (2000), http://unctad.org/en/docs/psiteiitd20.en.pdf.

149. KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 203 (2010) [hereinafter VANDEVELDE, BITS – HISTORY, POLICY AND INTERPRETATION]

150. *Id.*, at 319.

151. R. DOLZER & C. SCHREUER, PRINCIPLES, at 212.

152. Thomas Wälde & Abba Kolo, *Investor-State Disputes: The Interface between Treaty-Based International Investment Protection and Fiscal Sovereignty. 35 Intertax* (2007) 424-449, at 434.

153. VANDEVELDE, BITS – HISTORY, POLICY AND INTERPRETATION, at 316.

154. SALACUSE, LAW OF INVESTMENT TREATIES, at 256.

155. Indian Model BIT 2016, Article 6.1 provides:
Subject to its law, each Party shall permit all funds of an investor of the other Party related to an investment in its territory to be freely transferred and on a non-discriminatory basis.

156. Section 6(1) of the Foreign Exchange Management Act 1999, No. 42 of 1999 (29th December 1999).

157. Section 6(2) (b) of the Foreign Exchange Management Act 1999, No. 42 of 1999 (29th December 1999).

158. Id., sections 6(3), (a) - (j)

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Further, Article 6.3 of the India Model BIT provides that 'nothing in this treaty shall prevent' the host State the good faith application of its laws, including actions relating to bankruptcy, insolvency, compliance with judicial decisions, labour obligations and laws on taxation, etc.[159] Also, Article 6.4[160] of the India Model BIT provides that the host State may temporarily restrict the investor's right to transfer funds in the event of serious Balance of Payment difficulties or in situations where movement of capital could cause or threaten to cause 'serious difficulties for macroeconomic management'. While this formulation provides a textual basis to balance the investor's right to transfer funds and host State's regulatory power, it is still not clear which situations would qualify as a serious balance of payment difficulty.[161] Overall, the MTPs in the India Model BIT protects the interest of foreign investors by allowing free transfer of funds. At the same time, by subjecting these transfers to certain conditions it allows host State to exercise its right to regulate.[162]

E. Most Favored Nation (excluded)

An MFN clause in a BIT ensures that the Host State must extend to investors from one foreign country the same or no less favorable treatment than it accords to investors from another foreign country. The goal of an MFN clause is to ensure that the relevant parties treat each other in a manner at-least as favorable as they treat third parties. The principle was aptly described in the Loewen case:

"What Article 1102(3) (of NAFTA) 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."[163]

The applicability of MFN treatment to extend to procedural and substantive provisions in BITs has always been a hotly debated topic. The tribunals in Maffezini [164] have clarified that it extends to procedural provisions relating to more favourable dispute resolution clauses as well. The Court found that dispute resolution mechanisms within a BIT were inextricably linked to the protection of foreign investments.

The tribunals in *Hochtief* and *Impregilo* have relied on the MFN clause to extend procedural benefits in a similar manner. In Hochtief, the Tribunal allowed the investor to circumvent the Argentina-Germany BIT, since it was incompatible with a provision of the Argentina-Chile BIT which allowed an investor to initiate arbitration even before the cooling off period had lapsed. On similar lines, the tribunal in Impregilo waived a longer cooling off period and permitted the investor to initiate arbitration.

The opposing view has been taken by the tribunals in *Salini v. Morocco*, where the investor tried to import arbitration as a dispute settlement mechanism from the Jordan-UK BIT - through the MFN clause in the Jordan – USA BIT. The tribunal rejected the same, restricting the scope of the MFN clause to only limited benefits. This view was reaffirmed by the tribunal in *Plama*.

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159. Law Commission Report

160. Model BIT 2016, Article 6.4 provides:
Notwithstanding anything in Article 6.1 and 6.2 to the contrary, the Parties may temporarily restrict transfers in the event of serious balance-of-payments difficulties or threat thereof, or in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

161. Ranjan and Pushkar, *The 2016 Indian Model BIT*.

162. *Id* at 34.

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

164. 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

The same was held in *Sanum v. Laos*, wherein the tribunal rejected the claimant's argument to employ a narrowly worded MFN clause in the BIT to extend access to international arbitration. The tribunal noted that, *"To read into the MFN clause a dispute settlement provision to cover all protection under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties' consent to arbitration beyond what may be assumed to have been their intention."*

Another issue that arises with respect to MFN clauses is that different investors are treated differently by States in pursuance of differing development policies. If open-door policies are implemented, there would be no restrictions on or discrimination between foreign investors. In fact, countries are often less willing to grant national treatment than MFN treatment to foreign investors for developmental reasons. In other words, they often reserve the right to discriminate in favor of domestic investors without reserving the right to discriminate in favor of only certain foreign investors.

At the same, it can be argued that an exception to MFN based on the nationality of foreign investor is in line with the strategy of a host country that believes that the best way to achieve economic growth is to establish special economic relations with one or more specific states that qualify as its strategic partners. The countries concerned thus grant market access or other special privileges only to investors from these countries. Such a strategy assumes that one or several countries with strategic advantages over other potential partners can be identified. Thereby, there is a form of distinction (and not necessarily discrimination) of treatment that exists among foreign investors, rather than that between a foreign investor and a domestic investor.

In the recent times, the ICSID Tribunal was faced with a rather peculiar instance wherein the Claimant, incorporated in Luxembourg, had argued that in the absence of a BIT between Senegal and Luxembourg, it was entitled to benefit from the Netherlands- Senegal BIT. According to the Claimant, it had qualified as a "service supplier" under the WTO GATS, and the MFN clause within the WTO GATS gave the Claimant the access to investor- State arbitration under any BIT signed by Senegal - since Senegal did not exempt investor state dispute systems or BITs from the GATS MFN clause - as some other WTO members had done.

In other words, the claimant did not allege any breaches of the GATS itself, but used the GATS as a 'bridge' to BIT protections otherwise unavailable to it. The tribunal rejected the Claimant's arguments and held that it could not be established that Senegal had clearly and unequivocally consented to arbitration with respect to investors from Luxembourg. According to the Tribunal, the signing of BITs by WTO members with an arbitration option is indicative of their intention to not provide such an option through the GATS.

Lastly, MFN clauses in most IIAs stipulate exceptions for applicability, whether or not associated with economic growth considerations. Specifically, certain reciprocal subject-specific exceptions are widely accepted amongst states. For example, when a country develops a network of bilateral double taxation agreements, it may find it appropriate not to grant MFN treatment to third countries in this respect. Mutual recognition arrangements are another area that could be undermined by a unilateral extension of benefits of an arrangement to third countries. Finally, countries may increasingly seek recourse to MFN exceptions through regional economic integration organization (REIO) clauses. Other exceptions may be in the form of general exceptions such as public policy, national security and the like which are not directed at MFN particularly but do limit its scope.[165]

Interestingly, the 2016 India Model BIT does not contain an MFN clause. This exclusion is widely speculated to be in response to India's first experience with an ISDS tribunal and a similar

165. Germany's Model BIT, Article XIV of GATS, OECD Code of Liberalisation of Capital Movements (articles 2 and 3), the Energy Charter Treaty (article 24 (c), 24 (2) (b) (1) and 24 (3), and NAFTA, article 2102

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usage of the MFN clause.[166] The tribunal in *White Industries v. India* ultimately awarded White USD 4.08 million as compensation as it found that India had violated its obligation to provide to the investor 'effective means' of asserting claims and enforcing rights i.e. the effective means standard.

The effective means standard was not organically applicable to White, as it was not present in the India- Australia BIT, however, the Tribunal applied this standard by importing it from the India- Kuwait BIT which states that:

> *"Each Contracting State shall maintain a favorable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall, in accordance with its applicable laws and regulations, provide effective means of asserting claims and enforcing rights with respect to investments."*[167]

This standard was imported through the MFN clause contained in both the BITs. At the outset of this contention, India argued that such borrowing would subvert the negotiated balance of the BIT [between India and Australia][168] as the BIT in and of itself did not contain the 'effective standard', and borrowing it from a third-party treaty would be contrary to the intention of the parties while negotiating the BIT. However, the Tribunal held that the borrowing "achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause."[169]

The tribunal in turn found that the undue and long delay by the Indian judiciary constitutes a breach of India's voluntarily assumed obligation of providing White with 'effective means' of asserting claims and enforcing rights,[170] accepting the applicability of the MFN clause and the borrowed substantive remedy.

It is therefore evident that MFN clauses, if not carefully drafted, can cost a Host State to extend benefits under a treaty with one country to third parties with whom it has treaties containing the MFN clause. The host State may never have intended to offer these benefits to third parties, on account of developmental goals or party autonomy or for any other reason. The 2016 India Model BIT has attempted to circumvent this very potential challenge and barrier in future.

However, not having an MFN provision can expose the foreign investment to risk of discriminatory treatment.[171] The host State could offer higher level of protection under one BIT without doing so in another, and, it could also extend differential treatment to foreign investors regarding application of domestic measures or regulations.

166. Statement by India at the World Investment Forum 2014, UNCTAD, http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Mayaram.pdf, SAURABH GARG ET AL., Continuity and Change, at 75-76.

167. Article 4 (5) India-Kuwait BIT.

168. White Industries, ¶ 11.2.4

169. *Id*, ¶ 11.2.4

170. *Id*, ¶ 11.4.19

171. Ranjan and Pushkar, *The 2016 Indian Model BIT.*

9. Treaty Exceptions

The right to expropriate investment is recognized in international investment treaty law. This right is also informed by public purpose in majority cases to render it lawful. In addition to or in continuation of this intent, the Contracting States may agree to provisions in a BIT that permit the States to adopt measures that are necessary or which it considers necessary to protect its essential security interests – even if the same result in expropriation of investment or violation of standards of protection under the BIT.

In order to deal with such issues, most BITs incorporate clauses that preclude Host States from liability arising out of actions taken in exceptional circumstances to protect essential security interests of the States. These are referred to as non- precluded measures (**NPM**) clauses. Such clauses effectively transfer the risk of and costs associated with the state action in exceptional circumstances from the host- states of international investments to the investors. Essential security interests include economic survival, survival of sector of population, preservation of territory or part thereof.

The use of general exceptions clauses in IIAs is not common. The majority of states do not have general exceptions to investment obligations.[172] NPM provisions allow the host State to in certain circumstances prioritize the states non-investment policy goals above the substantive obligations, without incurring any liability.[173] General exceptions refer to the adoption or maintenance of measures to meet policy goals such as the protection of human life, the conservation of exhaustible resources, national security, and prudential measures for the financial sector etc. .[174]

NPM clauses have been invoked by Argentina as a defense to drastic government action following its response to the economic crisis in 2001.[175] Several foreign investors in Argentina raised a multitude of BIT claims against the Argentinian government for violating provisions of their respective BITs; whereas Argentina relied on the NPM provision given in Article XI of the BIT as a defence for these claims.[176] When such provisions are included in BITs, their language is often drawn from standard general clauses such as those of Article XX of GATT, Articles XIV and XIV *bis* of the GATS, and the GATS Annex on Financial Services.[177]

An NPM provision has two main elements – first, the permissible objectives; and second, the nexus requirement. Permissible objectives mean those objectives mentioned in the NPM provision for which the host state can deviate from its treaty obligations.[178] Nexus requirement is the link between the policy measures enacted and the permissible objective to be achieved through it. The addition

172. Andrew Newcombe, *General Exceptions in International Investment Agreements*, BIICL Eighth Annual WTO Conference.

173. ANDREW NEWCOMBE, *General Exceptions in International Investment Agreements* in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 356–357 (Marie-Claire C. Segger et. al. eds. 2011)

174. Marie-France Houde, *Novel Features in Recent OECD Bilateral Investment Treaties*, International Investment Perspectives, 2006 Edition.

175. JOSE E. ALVAREZ & K. KHAMSI, The Argentine Crisis and Foreign Investors in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008-09 379, 472-478 (Karl P. Sauvant ed. 2009)

176. Cases initiated against Argentina in response to economic measures in 2001-
CMS Award; CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No ARB/01/8, Decision on the Argentine Republic's Application for Annulment of the Award, (Sept. 25, 2007); Enron Creditors Recovery Corp v Argentina ICSID Case No ARB/01/3, Decision on the Argentine Republic's Application for Annulment of the Award, (Jul. 30, 2010); Sempra Energy International v. The Argentine Republic, ICSID Case No ARB/02/16, Award, (Sept. 28, 2007; Sempra Energy International v. The Argentine Republic, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (Jun. 29, 2010); LG&E Award; Continental Casualty Company v. The Argentine Republic, ICSID Case No ARB/03/9, Award, (Sept. 5, 2008).

177. W. W. Burke-White & A. von Standen, *"Investment Protection in Extraordinary Times: The Interpretation of Non-Precluded Measure Provisions in Bilateral Investment Treaties"* (2008) 48(2) Virginia Journal of International Law 307.

178. Prabhash Ranjan, *Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation* 2 ASIAN J. INT. L. 29 (2012); Amit Kumar Sinha, *Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries*, ASIAN J. INT. L. (2016), doi:10.1017/ S2044251316000023.

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of the term 'necessary' requires a stronger connection between the regulatory measure and permissible objective compared to words like 'related to'.[179]

Some tribunals rely on the customary international law defence of necessity, enshrined in Article 25 of the ILC Draft Articles, to evaluate preclusion of liability of the Host State. Under Art. 25, the host State needs to establish that the State was under imminent danger, the measures taken were the only way to address the peril, no other alternate measures were available, and that the investor contributed to the state of necessity.

The concept of necessity is used in many legal systems to delimit permissible measures from prohibited measures. An analysis of a measure's necessity requires determining whether alternative measures to address the same issue are available, that would achieve the same objective causing a lesser impact on the protected investor's rights.

Unfortunately, investment tribunals have not paid adequate attention to the institutional limitations and lack of expertise in relation to a certain policy area, and rather adopted a relatively strict approach to the standard of review, such as devising alternatives measures without proper consideration of their feasibility or effectiveness.[180] Nonetheless, there was an indication of a structured approached emerging, when the tribunal in *Continental Casualty v. Argentina* [181] adopted the WTO's approach to necessity analysis.

The NPM clauses form an essential part of BITs as they provide a defense to States to preclude their liability for violation of standards of protection promised to the investors.

Issues have arisen as to the language of the NPM clauses. These could be self-judging or otherwise. Without an exhaustive list in a BIT to define particular "essential security interests", a wide variety of interests, including the safeguarding of environment, have been acknowledged under customary international law.[182]

The India Model BIT contains a separate chapter on exceptions covering both general and security exceptions. Article 32 contains general exceptions with a long list of permissible objectives.[183] The NPM contains 'necessary' as the only nexus requirement for all the above-mentioned permissible objectives. Furthermore, the 2016 India Model BIT, in footnote 6, provides guidance to the arbitral tribunal in how to determine whether a measure is 'necessary'.[184] Footnote 6 provides that in considering whether a measure is necessary, the tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to the country or not.[185] By specifying the meaning of necessary, the India Model BIT has reduced arbitral discretion, and at the same time, by requiring that only least investment restrictive measure, which is reasonably available to the host country be adopted, it ensures that foreign investment will get adequate protection.

However, the absence of a chapeau in the provision, the inclusion of which would have ensured that the host State's regulatory

179. Ranjan and Pushkar, *The 2016 Indian Model BIT* at 35.

180. Andrew Mitchell and Caroline Henckels, "Variations on a Theme: Comparing the Concept of 'Necessity' In International Investment Law and WTO Law", Chicago Journal of International Law (2013).

181. ICSID Case No. ARB/03/9

182. Bishop et al., p. 1210.

183. Indian Model BIT 2016, Article 32.1 provides:
Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a nondiscriminatory basis that are necessary to: (i) protect public morals or maintaining public order; (ii) protect human, animal or plant life or health; (iii) ensure compliance with law and regulations that are not inconsistent with the provisions of this Agreement; (iv) protect and conserve the environment, including all living and nonliving natural resources; (v) protect national treasures or monuments of artistic, cultural, historic or archaeological value.

184. *Id.*, footnote 6, to Article 32.1 provides:
In considering whether a measure is "necessary", the Tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to a Party.

185. Prabhash Ranjan, Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation 2 ASIAN J. INT. L. 29 (2012).

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measures be enacted in a manner that would not lead to a misuse or abuse of the NPM provisions. The only requirement is that measures should be applied on a 'non-discriminatory' basis.[186]

Initially, the 'general exceptions' clause was self-judging and specified that the state would not be precluded from taking actions or measures 'which it considered necessary'.[187] Self-judging clauses allow the state to deviate from its international obligations by unilaterally declaring its obligations to be non-binding when the state believes that its essential interests are at stake. [188] Now, the self-judging clause can only be found in the provision pertaining to security exceptions. Article 33.1(ii) provides that any Party will not be prevented from taking any action which 'it considers necessary' for the protection of its essential security interests. The article only provides an indicative list of what constitutes essential security interests, which would enable the host state to widely interpret the article in its favor.[189]

186. Ranjan and Pushkar, *The 2016 Indian Model BIT* at 37.

187. Revised Version of India's New Model Bilateral Investment Treaty, Andrew Cornford, page 4.

188. Stephan Schill and Robyn Briese, 'If the State Considers: Self-Judging Clauses in International Dispute Settlement', Max Planck Yearbook of United Nations Law, 2009, volume 13, p 64.

189. Indian Model BIT 2016, Article 33.1(ii) provides:
Nothing in this Treaty shall be construed to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to: (a) action relating to fissionable and fusionable materials or the materials from which they are derived; (b) action taken in time of war or other emergency in domestic or international relations; (c) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (d) action taken so as to protect critical public infrastructure including communication, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructure; (e) any policy, requirement or measure including, without limitation, a requirement obtaining (or denying) any security clearance to any company, personnel or equipment.

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10. Other Important Clauses/Issues

I. Attribution of acts of state entities to states

Attribution is defined as the operation or process of identifying and circumscribing the conduct of individuals to be treated as constituting that of the State. Attribution is in the field of State responsibility where its function is to identify conduct which may, if it constitutes a breach of an international obligation of a State, result in international responsibility of the State. Matters of State Responsibility, including the issues on attribution, are regulated by customary international law. Customary international law concerning attribution is reflected in the ILC Articles on Responsibility of State for Internationally Wrongful Acts (ILC Articles).

The 2016 Model BIT bears some reference to the issue of attribution in Article 5 on Expropriation. It provides that an action taken by a Party in its commercial capacity shall not constitute expropriation or any other measure having similar effect. This implies that measures taken by the host State organs in their sovereign capacity or in exercise of governmental function or direction may amount to expropriation. However, this provision may fall in jeopardy in light of Article 2.4 which excludes measures taken by local government (i.e. urban local body, municipal corporation or village level government, or enterprise owned or controlled by any of the above) from the application of the Treaty. Since majority of measures are adopted by local governments or public sector enterprises controlled by the local government, it may be difficult for investors to bring claims against local government measures under the Treaty.

II. Treaty versus Contract Claims

An investment is governed both by a treaty and the contract in particular. In the event of a dispute, it is logical that both claims can arise out of the same factual matrix. In such cases, Tribunals have encountered difficulty in distinguishing breaches of treaty from breaches of contract. Nevertheless, they have emphasized upon the importance of drawing a line between the two.

The most comprehensive case dealing with this rift between treaty and contract claims and the manner of adjudication in such circumstances is that of Compania De Aguas Del Aconquija S.A. and Vivendi Universal versus Argentine Republic. The *Adhoc* Committee held that, "*where the fundamental basis of the claim is a treaty laying down an independent standard by which the conduct of the parties has to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the state or its subdivisions cannot operate as a bar to the application of the treaty standard.*" Referring to importance of assessing contractual issues, the Ad hoc committee held that the terms of the contract in municipal law were relevant to assess whether there has been a treaty breach. It distinguished between exercising contractual jurisdiction (in this case, in the Tucuman courts) and between "taking into account the terms of a contract" to determine whether it results in breach of an independent treaty standard.

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Thus, the Vivendi Ad hoc Committee found that the fundamental basis of the Claim lay in the BIT. However, it left open questions where fundamental basis of the claim lied in the contract. This implied that post Vivendi, investor claims would be scrutinized to assess whether the fundamental basis of their claim lies in the treaty or contract. If it is a treaty breach, the tribunal will exercise jurisdiction over the claim notwithstanding the separate forum selection clause in the contract. However, if it is breach of contract, the contractual forum selection clause would apply.

As stated above, the 2016 Model BIT rules out adjudication of claims arising out of breaches of contracts. It further provides that disputes under such contracts between the investor and the Host State shall be adjudicated upon by the domestic courts or the dispute resolution mechanism prescribed under the particular contract. The 2016 Model BIT therefore appears to rule out any confusion with respect to treaty contract claims. However, the ever looming uncertainty with respect to the normative basis of the claim or the essential basis of the claim lying in the treaty or the contract remains unresolved.

III. Umbrella Clauses

Some BITs contain the following clause: *'Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.'* Other examples include that a contracting party shall *"observe any obligation it has assumed or entered into"*; or *"constantly guarantee the observance of the commitments it has entered into"*, with respect to investments.

Breach by a State to observe its obligations under contract can amount to a treaty breach by virtue of the aforementioned "observance of obligations clause" in the BIT. As these clauses transform contract claims into treaty claims, they are known as umbrella clauses. These clauses serve as a mechanism to enforce obligations undertaken by the Host State and are often construed as catch- all provisions that arguably enable investors to bring a pure investment contract claim under the breach of a BIT.[190] This is a significant provision since BITs are entered into by two sovereign states while investment contracts are made between an investor and a sovereign state.

With respect to umbrella clauses, the trend of arbitral tribunals stipulates two general approaches to interpretation - the broad approach and the strict approach. These two approaches were applied in the cases of *SGS v. Philippines* [191] and *SGS v. Pakistan* [192] respectively.

The case of SGS v. Pakistan was the first to rule on the effect of umbrella clauses. In this case, SGS claimed that the breach of its pre-inspection shipping agreement by Pakistan amounted to violation of the umbrella clause in the Swiss-Pakistan BIT in addition to breach of other treaty standards. SGS also argued that if the breaches of its agreement with Pakistan were not 'elevated' to the level of treaty breaches due to the operation of the umbrella clause, and remained contract breaches, the tribunal could claim jurisdiction under the broadly drafted investor state arbitration clause in the BIT.

190. Schill, Stephen W., "Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties." 18 Minn. J. Int'l L.1 (2009), p. 35.

191. SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6.

192. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13

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The Tribunal ruled that the umbrella clause did not provide it with jurisdiction to hear contract claims and emphasised the distinction between the two types of claims, i.e. contract and treaty. It held that a broad interpretation of the umbrella clause would have the effect of elevating every contractual claim into a treaty claim, thereby rendering contractual forum clauses superfluous.

The SGS v. Philippines case, immediately following the SGS v. Pakistan case, involved a similar umbrella clause in the Swiss – Philippines BIT. The Tribunal in this case held contrary to the ruling of SGS v. Pakistan. It elevated the contractual claim to a treaty claim. However, it held that the claim was "inadmissible as the contract contained an exclusive forum selection clause which should be respected unless over-ridden by valid provisions".

Such non- uniformity in interpretation is often criticized by practitioners and experts, who advocate for reaching a middle ground and establishing a set of principles for guidance. However, others argue that each case regarding umbrella clauses must be looked into in terms of its own set of facts and circumstances in order to ensure that the principle of *kompetenz-kompetenz* is not corroded.

This shows that apart from considering the factual matrix of a case to determine the essential basis of a claim, the presence of an umbrella clause in a BIT can have significant effects on amalgamating treaty and contract claims to define the scope of tribunal's jurisdiction. In essence, umbrella clauses in BITs cover obligations of any nature, regardless of their source, i.e., they cater to both contractual and non-contractual obligations, provided requisite evidence in this regard is put forth before the tribunal.[193]

The 2016 Model BIT does not contain an umbrella clause. It therefore rules out a ground for elevating contract claims to the level of treaty claims.

IV. Denial of Benefits clause

A treaty mechanism that has the ability to either limit or expand investors' access to investor-State dispute provisions is that of denial of benefits. In addition to restricting the definitions of investments and investors in investment treaties, denial of benefits clauses constitute another possible way of containing investors' access to investor-State dispute provisions. Denial of benefits clauses authorize States to deny treaty protection to investors who do not have substantial business activities in their alleged home State and who are owned and/or controlled by nationals or entities of the denying State or of a State who is not a party to the treaty .[194]

The 2016 Model BIT contains a denial of benefits clause. It provides that a Party may at any time, including after the institution of arbitration proceedings in accordance with Chapter IV of this Treaty, deny the benefits of this Treaty to: (i) an investment or investor owned or controlled, directly or indirectly, by persons of a non-Party or of the denying Party; or (ii) an investment or investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty.

193. Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (ICSID Case No. ARB/05/20), Final Award, 11 December 2013, para. 415

194. Liang-Ying Tan - Amal Bouchenaki, Limiting Investor Access to Investment Arbitration – A Solution without a Problem? (2014), Transnational Dispute Management

V. Survival clauses

A vast majority of investment treaties have clauses that extend some or all effects of the treaty beyond termination by a fixed period during which treaty protections still hold for investments that have been made – or approved or committed – prior to termination of the treaty. These clauses are referred to as survival clauses or sunset clauses. The shortest fixed survival period is, for instance, 5 years and the longest is 25 years. The average length of treaty effects beyond termination is 12.5 years and has been stable for many years .[195]

Given the expansive interpretation of key issues in international investment law in the recent times, a number of states have been prompted to exit the system. This can be achieved in many ways ranging from denouncing ICSID to denouncing the BITs entered into. The objective behind such initiatives is to reduce the legal exposure of these countries before arbitral tribunals. This however, is not such an easy task to accomplish on account of the existence of renewal clauses that may make denunciation unachievable until a number of years into the future and, "survival clauses" pose an even bigger problem.

Countries seeking to reduce their exposure can renegotiate their BITs, which does not require termination, nor does it trigger the applicability of these survival clauses. The 2016 Model BIT contains a sunset clause that runs for a period of five years, as opposed to the norm of ten or fifteen years in majority treaties.

195. Pohl, J. (2013), *Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions*, OECD Working Papers on International Investment, 2013/04.

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11. Investor-State Dispute Resolution

I. Overview

Dispute resolution clauses in BITs provide mechanism for resolution of disputes between the foreign investor and the Host State, arising either under the BIT or under any investment agreement between the investor and Host State – the breach of which rises to the level of treaty violation. The protection offered by dispute resolution provisions in treaties is sufficiently important and rises to the level of a substantive principle in its own right.[196]

Dispute resolution clauses in BITs play a crucial role in an investment activity. While some clauses provide for exhaustion of local remedies, these clauses now appear with various combinations of fora and mechanisms, thereby removing the default dispute resolution mechanism of approaching domestic courts for disputes relating to international investment. By 2012, 93% of the treaties contained language on investor-State dispute resolution.[197] In addition to major differences among treaties and country practice in terms of major investor-State dispute issues (e.g. remedies, cost allocation, coordination of domestic court proceedings and international arbitration), fine variations in details of language are also a feature of treaty language.

International arbitration is the most sought after remedy in BITs. 56% of the treaties offer investors the possibility to choose from among at least two arbitration fora. The number of fora that treaties offer investors to choose from has increased over time; ICSID and ad hoc arbitral tribunals established under UNICTRAL rules are by far the most frequently proposed fora.[198]

Dispute resolution clauses providing for international arbitration gives a private investor the right to initiate arbitration against the Host State. The BIT signifies an understanding between signatory States that investors of one contracting state will have the right to initiate arbitration against the Host State for breaches committed by the Host State under the BIT. This makes an investment treaty arbitration differ from an international commercial arbitration.

However, in the wake of an investor-State dispute, the internal procedure for arbitration remains the same as in any international commercial arbitration. An investment treaty arbitration can be undertaken under an institutional format or an ad-hoc format. In an institutional format, rules of the institution apply, and the institution facilitates appointment of arbitrators and conduct of the arbitration. The International Centre for Settlement of Disputes (**"ICSID"**) is at the forefront of BIT institutional arbitration.[199]

ICSID arbitrations are governed by the rules and regulations set forth in the Washington Convention, commonly referred to as the ICSID Convention. The primary reason for the same is that signatories to the ICSID Convention undertake to be bound directly by the award issued by an ICSID Tribunal - subject to annulment and rectification measures. It is also pertinent to note that since ICSID is a creature of international law, it imposes certain qualifications to the definitions of 'Investment' and 'nationality', in addition to retaining sufficient control over the dispute resolution process. The ICSID Convention has helped institutionalize the process of investment arbitration. Currently, there are 159 signatory States to the ICSID Convention.[200]

196. McLachlan, Shore & Weiniger, *International Investment Arbitration* (Oxford International Arbitration Series, 2010)

197. OECD Investment Division Sample Survey, Paris 2012

198. OECD Investment Division Sample Survey, Paris 2012

199. ICSID Member States, available at https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx?tab=FtoJ&rdo=BOTH

200. 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

Of these, 150 States have ratified the Convention.[201]

Alternatively, countries like India, who are not signatories to the ICSID Convention, follow an ad-hoc arbitration format - relying typically on the UNCITRAL (United Nations Commission on International Trade Law) Rules. Arbitrator appointment is made pursuant to the relevant BIT. Arbitrator appointment may also be made by an institution such as the Permanent Court of Arbitration.[202] In contrast, the ICSID has its own panel of arbitrators who are appointed in the manner specified under the ICSID Convention.

In terms of procedure of adjudication, an arbitral tribunal adopts a two-step approach to adjudication of investment-related disputes. The preliminary step involves assessment of factors to determine admissibility of claims and jurisdiction of the tribunal. Consideration of admissibility of claims in the preliminary stage is an added feature in international investment treaty arbitration. Once the claims are adjudged as admissible, and jurisdiction is determined, the next step is evaluation of merits of the claim. This involves examination of State measures, substantive protections available to foreign investors under the BIT, and the extent of violation by, or exemption of liability of, the Host State.

II. Settlement of Disputes under the 2016 India Model BIT

Chapter IV of the 2016 India Model BIT deals with Settlement of Disputes between an Investor and a Party'. This is the longest chapter on settlement of disputes in any BIT so far and contains eighteen (18) articles. Evidently, this chapter was drafted to safeguard India as a host State from the large number of investment treaty claims it has been facing since *White Industries.*

Chapter IV covers the following provisions: scope and definitions (Article 13), proceedings under different international agreements (Article 14), conditions precedent for submission of a claim to arbitration (Article 15), submission of claim to arbitration (Article 16), consent to arbitration (Article 17), arbitrator related provisions (Article 18 & 19), conduct of arbitral proceedings (Article 20), dismissal of frivolous claims (Article 21), transparency in arbitral proceedings (Article 22), burden of proof and governing law (Article 23), joint interpretation and expert reports (Articles 24 and 25), Award and finality and enforcement (Articles 26 and 27), costs (Article 28), appeals facility (Article 29) and diplomatic exchanges between Parties (Article 30).

The provisions under this Chapter, more particularly Article 15 prescribing conditions precedent for submission of claim under the BIT have been heavily criticized. The present paper will deal with two key provisions in detail viz. scope and conditions precedent for submission of claim to arbitration.

III. Scope

Firstly, Chapter IV applies only to disputes relating to investment and arising out of alleged breach(es) of obligation of a Party under Chapter II of the 2016 India Model BIT, barring Articles 9 and 10. Chapter II deals with obligations of Parties and covers treatment of investments (including treatment not in violation of customary international law through denial of justice, fundamental breach of due process, targeted discrimination and manifestly abusive treatment), full protection and security and national treatment. Articles 9 and 10 deal with entry and sojourn of personnel and obligations of transparency upon the Parties. Disputes relating to the aforesaid two provisions are excluded from the ambit of dispute resolution under the 2016 India Model BIT.

201. 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

202. Articles 6, 7 and 8 of the UNCITRAL Arbitration Rules available at http://www.uncitral.org/pdf/english/texts/ arbitration/arb-rules-revised/pre-arbrules-revised.pdf

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Secondly, contract claims are outside the purview of dispute resolution under the 2016 India Model BIT. An arbitral tribunal constituted under the BIT can only adjudicate upon disputes relating to breaches of the treaty under Chapter II. Disputes arising between the investor and the host State under a separate contract shall be adjudicated upon by the domestic courts or the dispute resolution mechanism under the specific contract. In other words, the India Model BIT does not contain an umbrella clause, an additional protection accorded to investors that bridges a breach of a contract to a breach of the BIT by containing a clause worded along the lines of jurisdiction extending to "any dispute relating to the investment".[203] In the context of "any dispute relating to investment" it would be possible to also include breaches of contract as well,[204] therefore, by excluding such language, the India Model BIT is careful about only providing protection to claims that arise purely out of the BIT and do not extend it to contractual claims that would also breach the applicable BIT,[205] limiting the discretion of the ISDS tribunals to only BIT claims.

Thirdly, certain disputes would be non-arbitrable eg. if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms.The explicit placing of a jurisdictional prerequisite that highlights the disqualification of a claim if the investor has made his or her investment in violation of the host States laws amounts to an explicit inclusion of the clean hands doctrine, also taking into account the inclusion of the term 'in accordance with the law of a Party'. However, this provision is problematic. It provides that an investor may not submit a claim to arbitration in the aforesaid cases. If so, which judicial authority or tribunal will ascertain whether any of the aforesaid ingredients exist to bar an investment treaty claim? Would it be the national courts of the host State or the arbitral tribunal in its preliminary stage of determining jurisdiction? These questions find no answers in the 2016 India Model BIT.

The BIT also places two additional limitations on the ISDS tribunal,[206] first that it shall not have the jurisdiction to review decisions made by judicial authorities of a Party. This means that tribunals do not have the power to sit on appeal on decisions made by Indian Courts.[207] However, since the next provision on 'Conditions precedent for submission of claim' mandate exhaustion of local remedies, would the tribunals facing an investment treaty claim after such exhaustion have no power to review the decision of the courts? Second, the tribunals cannot entertain disputes over any claim that is or has been subject to arbitration under Chapter V of the India Model BIT - providing for state-state investor settlement.

Existence of any of the aforesaid situations can result in failure of the investor to initiate or continue with a claim against the Host State under the BIT. The most significant impact can be seen on taxation measures adopted by the Host State. The 2016 India Model BIT exempts taxation measures from the scope of the BIT. Further, dispute settlement provisions apply only to Chapter II on obligations of investors,

203. Article 10 Swiss Model BIT, Article 3(4) Netherlands Model BIT, Article 2(2) UK Model BIT and Article 8 Germany Model BIT 1991(2), See, Christoph Schreuer, Travelling the BIT Route: of Umbrella Clauses, and Forks in the Road, 5:2 J. WORLD INV. & TRADE (2004); Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20:4 ARBITR. INT'L. (2004) 411-434; Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18:1 MINNESOTA J. INT'L. L. (2009), 32; Jonathan B. Potts, *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance and Internationalization*, 51:4 VA. J. INT'L. L. (2011) 1005.

204. Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20:4 ARBITR. INT'L. (2004) 411-434; *Jonathan B. Potts, Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance and Internationalization*, 51:4 VA. J. INT'L. L. (2011) 1005;

205. Also see Aniruddha Rajput, *India's shifting treaty practice: a comparative analysis of the 2003 and 2015 India Model BITs*, 7:2 JINDAL GLOB. L. REV. 201-226 (2016) in Ranjan and Pushkar, *The 2016 Indian Model BIT* at 40.

206. Indian Model BIT Article 13.5 provides: In addition to other limits on its jurisdiction, a Tribunal constituted under this Chapter shall not have the jurisdiction to: (i) review the merits of a decision made by a judicial authority of the Parties; or (ii) accept jurisdiction over any claim that is or has been subject of an arbitration under Chapter V.

207. Law Commission Report

barring Articles 9 and 10. Further, an arbitral tribunal has been precluded from reviewing the merits of a decision made by a judicial authority. These implies that taxation measures adopted by the Host State and adjudicated upon by courts will fall outside the purview of the BIT. These provisions have the potential to offer unbridled power to the host State to adopt non-arbitrable and arbitrary tax measures.

IV. Conditions precedent for submission of claim to arbitration

The road to investment treaty arbitration under the 2016 India Model BIT can be extremely long and exhausting for the foreign investor, in as much as the investor may not be in a position to initiate arbitration until atleast six years have passed since he acquired or ought to have acquired knowledge of the measure under challenge, and knowledge of the loss or damage caused consequently to his investment.

V. Exhaustion of Local Remedies

Firstly, the aggrieved investor is required to first submit its claim to domestic courts or administrative bodies of the Host State. This customary international law rule of exhaustion of local remedies aims at safeguarding state sovereignty by requiring individuals to seek redress for any harm allegedly caused by a state within its domestic legal system - before pursuing international proceedings against the host State.[208]

Several BITs stipulate that *"recourse to arbitration for disputes arising out of a BIT is subject to exhaustion of local remedies"*[209] (**ELR** clauses). The terms of the ELR clause usually incorporate the mandate to *pursue or exhaust local remedies* (whether administrative, judicial or both) *for a specified period*—ranging from months to years—before a foreign investor can initiate international proceedings against the host state.[210]

The requirement to exhaust local remedies exists in varying manners in BITs.[211] This includes 'express requirement of exhaustion of local remedies', to 'making no reference to exhaustion of local remedies', to 'express rejection of the exhaustion principle in certain BITs,[212] meaning that States accord differing degrees of importance to the exhaustion of local remedies and the subsequent approach to ISDS tribunals.

The tribunal in *ICS Inspection v. Argentina*[213] found that it lacked jurisdiction due to the claimant's failure to comply with the mandatory 18-month recourse-to-local courts requirement set forth in Article 8 of the Argentina-UK BIT. The tribunal in *Daimler v. Argentina*[214] took a similar view and held, *"since the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere 'procedural' or 'admissibility-related' matter".*

India's consent to arbitration under the BIT is qualified only after the foreign investor exhausts local remedies at least for a period of five years before commencing arbitration.[215] The five years are to be counted from the date when the

208. Exhaustion of Local Remedies in International Investment Law, IISD Best Practices Series, 2012.

209. Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, para. 104

210. Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan (ICSID Case No. ARB/10/1), Award, 2 July 2013, para. 8.1.21.

211. Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 THE L. & PRAC. INT'L. CTS. & TRIBUNALS 1 (2005); URSULA KRIEBAUM, *Local Remedies and the Standards for the Protection of Foreign Investment* in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (2009); Mavluda Sattorova, *Return to Local Remedies Rule in European BITs? Power (Inequalities), Dispute Settlement, and Change in Investment Treaty Law*, 39:2 LEGAL ISSUES ECON. INTEGRATION 223-248 (2012).

212. Croatia-Cambodia BIT, Article 10.2(b).

213. ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina (UNCITRAL, PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012, para. 250

214. Daimler Financial Services AG v. Argentine Republic (ICSID Case No. ARB/05/1), Award, 22 August 2012, para 194.

215. Indian Model BIT 2016, Article 15.1 and 15.2.

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foreign investor first acquired 'knowledge of the measure in question and the resulting loss or damage to the investment' or when the investor 'should' have first acquired such knowledge.[216]

However, the requirement to exhaust local remedies shall not be applicable if there are no available local remedies that can provide relief with respect to the relevant measure.[217] This exemption to the exhaustion of local remedies gives effect to the "futility exception".[218] Accordingly, the onus to demonstrate the non-existence of an appropriate domestic remedy lies on the foreign investor.

The Model BIT has another clarification attached to Article 15.1, which encumbers the investors from claiming that they have complied with the exhaustion requirement on the basis that the claim under this treaty is by a different party or in respect of different cause of action. This should ensure that an investor does not escape the requirement to exhaust local remedies if, for example, another corporate entity within the same group is making use of local remedies or by citing a different cause of action, as the cause of action in domestic forum is formulated in domestic law terms which would be different from the cause of action formulated in treaty terms.[219]

VI. Submission within a year of acquiring knowledge of measure and loss

Secondly, the investor is required to submit its claim before the domestic courts or administrative bodies within one year from the date when the investor acquired or ought to have acquired knowledge of the measure, and knowledge of the loss or damage suffered consequent to the measure.

It is pertinent to note that the aforesaid conditions are cumulative. This can cause significant confusion, in as much as the measures may have been acquired a year in advance but the loss may have been incurred only at a later point in time. In such a scenario, would the clock begin to tick on the date the investor acquired knowledge of the measure (for eg. 2016) or suffered loss (in 2017)? Confusion in answering this question is detrimental since it affects the way forward to arbitration – which is tightly-packed with several timelines.

VII. Dispute before National Courts or Judicial Authorities

The investor is precluded from going to the next step of the dispute settlement provision unless it has exhausted its local remedies for atleast five years before the domestic courts or judicial authorities. This period of five years runs from the date the investor acquired knowledge or ought to have acquired knowledge of the measure. Interestingly, this provision skips mentioning the additional condition on "acquiring knowledge of the loss or damage incurred due to the measure."

216. Id, Article 15.2

217. Indian Model BIT 2016, Article 15.1 provides: Provided, however, that the requirement to exhaust local remedies shall not be applicable if the investor or the locally established enterprise can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed by the investor.

218. The 'futility exception' to the doctrine of exhaustion of local remedies requires that the local remedies not be exhausted when 'there are *no reasonably available local remedies* to provide effective redress, or the local remedies *provide no reasonable possibility* of such redress' - see *Draft Articles on Diplomatic Protection with Commentaries*, [2006] II:2 Y.B. Int'l. L. Comm'n pt.2, at 26, UN Doc A/61/10 (2006), Grant Hanessian & Kabir Duggal, *The 2015 Indian Model BIT: Is This Change the World Wishes to See* 30:3 ICSID Rev. — Foreign Inv. L.J. 729 (2015).

219. Ranjan, Prabhash and Anand, Pushkar, *Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does It Go Too Far?* (May 18, 2017) at 11.

VIII. Notice of Dispute & Amicable Means of Resolution

After exhausting its local remedies for a period of five years, the investor still has a long way to reach arbitration under the treaty. If the investor does not reach satisfactory resolution of the dispute, it may send a notice of dispute to the Host State. This notice must contain the factual basis of dispute, measures under challenge and other details.

After receipt of the Notice of Dispute, the disputing parties are required to attempt amicable resolution through consultation, negotiation or other third party procedures for a period of six months.

IX. Notice of Arbitration

In the event the aforesaid procedures fail, the investor may initiate arbitration through a notice of arbitration. However, the arbitration can commence only after three months have passed after issuance of the notice of arbitration. This requirement has been incorporated to give time to the Host State after receiving the notice of arbitration.

The notice to arbitration contains further qualifications. These are: (i) not more than six years should have elapsed from the date on which the investor first acquired or should have acquired knowledge of the measure in question;[220] (ii) not more than 12 months should have elapsed from the conclusion of the proceedings of the domestic courts;[221] (iii) as aforesaid, before submitting the claim to arbitration, a minimum of 90 days' notice has to be given to host state;[222] (iv) the invest or must waive the 'right to initiate or continue any proceedings' under the domestic laws of the host state.[223] Additionally, in cases where the claim is submitted by a foreign investor in respect of loss or damage to a juridical person owned or controlled by the foreign investor, the juridical person shall have to waive its right to initiate or continue any proceedings under the laws of the host state.[224]

It is evident from the aforesaid procedures that solely the exhaustion of local remedies by the foreign investor does not immediately pave the way for treaty arbitration. Further nine months are required to pass before submitting the claim to investment treaty arbitration. This computes to a time-frame of 5 years and 9 months, if every step is diligently taken as per the provision. However, the hard-stop date is six years from the date when the investor acquired knowledge of the measure and knowledge of the loss. Post expiry of this period, the investor cannot submit a claim to arbitration. On bare perusal, the investor has been granted a mere margin of three months to successfully submit its claim to arbitration.

The convoluted ISDS clause seems like a reaction to the spate of arbitration notices served upon India. India's intent of warding itself off from potential BIT claims can also be seen through the BIT it has recently entered into with Brazil, which does not contain an dispute settlement clause at all.[225] The aforesaid provisions are draconian and make international arbitration extremely difficult for the foreign investor. The five year requirement can be looked at as almost excessive, particularly in situations where the investor requires immediate or timely relief to protect the value of the investment or his or her rights arising from it.[226] In sum, there are far too many hurdles that the foreign investor will need to cross in order to have access to international arbitration. In a country where the rate of filing of cases is far greater and faster

220. *Id.*, Article 15.5(i)

221. *Id.*, Article 15.5(ii)

222. *Id.*, Article 15.5 (v)

223. *Id.*, Article 15.5(iii)

224. *Id.*, Article 15.5(iv)

225. Tejas Shiroor, *'The Year 2016 for India – Of New Beginnings and Not-So-Happy Endings?'*, Kluwer Arbitration Blog, December 28 2016, http://kluwerarbitrationblog.com/2016/12/28/the-year-2016-for-india-of-new-beginnings-and-not-so-happy-endings/.

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than the rate of disposal and where backlog of cases runs for decades, it is all the more prudent to remove the provision for exhaustion of local remedies before domestic courts and judicial or administrative bodies – and submit the claim directly to international arbitration.

However, in the event there is hesitation to remove the provision on exhaustion of local remedies, it is suggested that the widely used period of eighteen months be adopted for exhaustion of local remedies. This would be less draconian and fairly acceptable to the international investment community.

12. Conclusion

India's BIT policy has undergone a substantial change in the last few years as a result of her interactions and altercations under various BITs. Although there have been only two investment arbitration awards against India,[227] a lot of BIT proceedings have been initiated against India since 2011.[228] It is because of this renewed scrutiny on India's investment treaty regime that the 2003 Model BIT has been greatly revised to place more emphasis on the State's right to regulate.

India wishes to replace the pre-existing BITs of 47 notified countries - with the 2016 India Model BIT. The revised model BIT will be used not just for the renegotiation of existing BITs and negotiation of future BITs but also investment chapters in Comprehensive Economic Cooperation Agreements, Comprehensive Economic Partnership Agreements and Free Trade Agreements.

This Model BIT is an improvement from India's previous stance on two counts. First, the model BIT departs from the existing trend of drafting vague provisions. Second, the drafters have attempted to introduce a BIT that would be specific to India's capital importing nature. The drafters of the 2003 Model BIT had failed to consider the (then) recent investment law precedents which arose from clashes between investor protection and regulatory regimes. Cases such as Metalclad Corp v. Mexico (municipal authority refused to issue waste disposal permit) [229], S.D. Myers Inc. v. Canada[230] (government restricted exports of hazardous waste) coupled with India's experience with the Dabhol Power Project had already raised concerns over the nature of India's BITs. The 2016 India Model BIT therefore introduces a State-centric investment treaty regime and affords extensive regulatory power to India.

However, instead of achieving the critical balance between protection of investor rights and legality of regulatory powers, the 2016 India Model BIT appears as a knee-jerk reaction from India to the spate of proceedings being initiated against it under several BITs. It is crystal clear that the 2016 India Model BIT has been understood to house several provisions that tilt the balance in favour of the host State and give rise to a protectionist model. Such a protectionist approach entails three major difficulties. First, the pro-State stance taken by the 2016 India Model BIT grants near-unbridled power to the host State - simultaneously eroding protection to investors. Secondly, the current Model BIT does not instill confidence in foreign investors to perceive India as a favorable destination for foreign investors. This could potentially deter foreign investment.

Thirdly, the 2016 India Model BIT has a myopic vision in terms of granting rights and powers to India as a host State. What it fails to consider is that the 2016 India Model BIT would be a bilateral arrangement between India and another State. In this context, an Indian investor in the other State would also be governed by the stringent terms of the 2016 India Model BIT, if adopted. This would entail that the foreign investor stands at the behest of unfettered regulatory powers by the foreign host-State, has limited entitlement to standards of treatment from the foreign host-State, and most importantly, and disturbingly, would be compelled to undergo the rigorous and long route to exhaustion of local remedies in the courts or judicial bodies of the foreign host-State before espousing its claim before an international arbitral tribunal under the BIT. In other words, the 2016 India Model BIT, if adopted, would endanger Indian investors and their investments in foreign countries - with whom India will now negotiate BITs as per the new Model BIT.

227. White Industries; CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, PCA, Award (not public).

228. See *supra* note 16.

229. Metalclad Corp. v. Mexico, ICSID Case n. ARB (AF) 97/1, Award (Aug. 30, 2000).

230. S. D. Myers Inc. v. Canada, Merits, 8 ICSID Report 4 (Nov. 13, 2000).

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Countries world over have expressed concerns with the 2016 India Model BIT. Recently, the United States Ambassador to India noted that the 2016 India Model BIT contained "departures from the high standards that we had seen in other treaties India had negotiated, for example, with South Korea and Japan". There has been particular criticism of the reduced investment protections, protectionist measures and requirement to fully exhaust all local remedies in the 2016 India Model BIT.[231]

News reports suggest that the Government of India has sent letters to various European nations seeking to renegotiate the BITs with them on the basis of the Model BIT. In response, the European Union (**"EU"**) Trade Commissioner has reportedly commented that individual members of the EU are not supposed to negotiate BITs and that any negotiation must be with the European Commission.

Further, the outcome of the recent referendum by United Kingdom on leaving the EU might cause the Government of India to consider that it has greater scope to agree a bespoke bilateral arrangement with the British government (which, given the extent of trade and investment flows in both directions between the UK and India, would be significant). On the date of publication of this paper, it is unclear whether the Government of India has made its request to negotiate against the backdrop of an actual or potential termination of its existing BITs, and it is not yet known whether India would be prepared to follow in the footsteps of Indonesia and actually terminate its existing BITs. To the extent any existing BITs are terminated, their survival provisions would need to be scrutinized.

As India strives to become the fastest-growing economy and ventures into a higher band for ease of doing business, it is quintessential that it provides a robust framework for protection of investors and investments, and an effective means for adjudication of disputes between the foreign investors and Republic of India. It is crucial to understand that foreign investment holds tremendous potential to boost economic growth and that regulation within its permissible limits is adequate to govern and control foreign investment. What India awaits is a legal and regulatory framework that is not adversarial or difficult for the foreign investor but instills confidence and faith in order to nurture smooth and beneficial economic relationships towards effective and sustainable development of both - the foreign investor and the Republic of India.

231. http://www.thehindubusinessline.com/economy/us-expresses-concern-over-difficulty-in-bit-talks/article8780181.ece

Appendix - Cases relating to International Investment Arbitration in India

S. No	Case	Year of Initiation of Arbitration/ Award	Status
1	Bechtell v. India	2004	Settled
2	Offshore Power v. India	2004	Settled
3	Standard Chartered Bank v. India	2004	Settled
4	Erste Bank v. India	2004	Settled
5	Credit Suisse v. India	2004	Settled
6	Credit Lyonnais v. India	2004	Settled
7	BNP Paribas v. India	2004	Settled
8	ANZEF v. India	2004	Settled
9	ABN AMRO N.V. v. India	2004	Settled
10	Capital India Power Mauritius I v. Maharastra Power Dev. Corp	2004	Settled
11	White Industries v. India (Final Award, November 30th, 2011)	2011	Award in favor of Claimant
12	Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v. India	2012	Pending
13	Axiata Group v. India	2012	Pending
14	CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India	2012	Award in favor of claimant (not public)
15	Khaitan Holdings Mauritius Limited v. India	2013	Pending
16	Deutsche Telekom v. India	2013	Pending
17	Capital Global and Kaif Investment v. India	2013	Pending
18	Nokia v. India	2014	Pending
19	Vodafone v. India	2014	Pending
20	Louis Dreyfus Armatures v. India	2014	Pending

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21	Cairn Energy v. Government of India	2015	Pending
22	Ras al-Khaimah Investment Authority v. India	2016	Pending
23	Strategic Infrasol Foodstuff LLC and The Joint Venture of Thakur Family Trust UAE with Ace Hospitality Management DMCC UAE v. India	2016	Pending
24	Vedanta Resources v. Government of India	2016	Pending
25	Astro and South Asia Entertainment v. India	2016	Pending
26	Nissan Motors v. India	2017	Pending

About NDA

At Nishith Desai Associates, we have earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium *Aligunjan*, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bangalore, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

As an active participant in shaping India's regulatory environment, we at NDA, have the expertise and more importantly – the VISION – to navigate its complexities. Our ongoing endeavors in conducting and facilitating original research in emerging areas of law has helped us develop unparalleled proficiency to anticipate legal obstacles, mitigate potential risks and identify new opportunities for our clients on a global scale. Simply put, for conglomerates looking to conduct business in the subcontinent, NDA takes the uncertainty out of new frontiers.

As a firm of doyens, we pride ourselves in working with select clients within select verticals on complex matters. Our forte lies in providing innovative and strategic advice in futuristic areas of law such as those relating to Blockchain and virtual currencies, Internet of Things (IOT), Aviation, Artificial Intelligence, Privatization of Outer Space, Drones, Robotics, Virtual Reality, Ed-Tech, Med-Tech & Medical Devices and Nanotechnology with our key clientele comprising of marquee Fortune 500 corporations.

The firm has been consistently ranked as one of the Most Innovative Law Firms, across the globe. In fact, NDA has been the proud recipient of the Financial Times – RSG award 4 times in a row, (2014-2017) as the **Most Innovative Indian Law Firm.**

We are a trust based, non-hierarchical, democratic organization that leverages research and knowledge to deliver extraordinary value to our clients. Datum, our unique employer proposition has been developed into a global case study, aptly titled 'Management by Trust in a Democratic Enterprise,' published by John Wiley & Sons, USA.

A brief chronicle our firm's global acclaim for its achievements and prowess through the years -

- **AsiaLaw 2019:** Ranked 'Outstanding' for Technology, Labour & Employment, Private Equity, Regulatory and Tax
- **RSG-Financial Times:** India's Most Innovative Law Firm (2014-2017)
- **Merger Market 2018:** Fastest growing M&A Law Firm
- **IFLR 1000 (International Financial Review - a Euromoney Publication):** Tier 1 for TMT, Private Equity
- **IFLR:** Indian Firm of the Year (2010-2013)
- **Legal 500 2018:** Tier 1 for Disputes, International Taxation, Investment Funds, Labour & Employment, TMT
- **Legal 500 (2011, 2012, 2013, 2014):** No. 1 for International Tax, Investment Funds and TMT

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- **Chambers and Partners Asia Pacific (2017 – 2018):** Tier 1 for Labour & Employment, Tax, TMT
- **IDEX Legal Awards 2015:** Nishith Desai Associates won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm"

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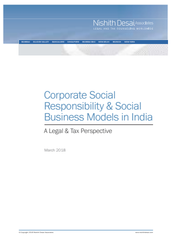

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ING Vysya - Kotak Bank : Rising M&As in Banking Sector	M&A Lab	January 2016
Cairn – Vedanta : 'Fair' or Socializing Vedanta's Debt?	M&A Lab	January 2016
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Public M&A's in India: Takeover Code Dissected	M&A Lab	August 2013
File Foreign Application Prosecution History With Indian Patent Office	IP Lab	April 2013
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Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparallel mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical ecosystem that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at

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