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# The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction

*Prabhash Ranjan\* and Pushkar Anand\*\**

*Abstract: In the global backdrop of backlash against bilateral investment treaties (BITs) and the investor-state dispute settlement (ISDS), this paper critically studies India's new Model BIT, adopted in 2016 as a response to increasing number of ISDS claims brought against India. This paper studies the Indian Model BIT, which heralds a new era of India's BIT practice, from the standpoint of two key objectives that the Indian government claims the Model BIT achieves. First, the claim that the purpose of the Model BIT is to balance investment protection with host state's right to regulate. Second, the claim that the Model BIT aims to make the treaty provisions more precise so as to minimize arbitral discretion. This paper shows that for most of the key provisions given in the Model BIT, contrary to the Indian government's claim, India has not been able to strike a balance between investment protection and host State's right to regulate. For most of the provisions, the scale tilts in favor of the host state. This paper also shows that many provisions in the Indian Model BIT, contrary to the government's claim, are vague and imprecise and thus, continue to grant significant discretion to ISDS arbitral tribunals to determine the actual import of these provisions.*

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## I. INTRODUCTION

Bilateral Investment Treaties (BITs) are treaties between two countries aimed at protecting investments made by investors of both countries.<sup>1</sup> BITs protect investments by imposing conditions on the regulatory behavior of the host state and thus, prevent undue interference with the rights of the foreign investor.<sup>2</sup> These conditions include restricting the host state from expropriating investments, barring for public interest with adequate compensation; imposing obligations on host states to accord fair and equitable treatment (FET) to foreign investment and not to discriminate against foreign investment; allowing for repatriation of profits subject to conditions agreed to between the two countries; and most importantly, allowing individual investors to bring cases against host states if the latter’s sovereign regulatory measures are not consistent with the BIT, for monetary compensation. This is known as investor-state dispute settlement (ISDS).<sup>3</sup>

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<sup>1</sup> For a general discussion on BITs see R. DOLZER & C. SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2012); A. NEWCOMBE & L. PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES 1-73* (2009); JESWALD SALACUSE, *THE LAW OF INVESTMENT TREATIES* (2015).

<sup>2</sup> DOLZER & SCHREUER, *supra* note 1, at 13.

<sup>3</sup> In this paper, ISDS and ISDS system are used interchangeably. While ISDS refers to just the dispute settlement system between the investor and the State, ‘ISDS system’ means not just the dispute settlement system but the entire universe of BITs and investment treaty

There has been a steady increase in the number of BITs across the world—from 500 in 1990s to more than 3,324 by the end of 2016.<sup>4</sup> This increasing mass of BITs has led to a significant increase in investor-state disputes in international investment law<sup>5</sup> where a wide array of sovereign regulatory measures, such as environmental policy,<sup>6</sup> regulatory issues related to supply of drinking water,<sup>7</sup> monetary policy,<sup>8</sup> laws and policies related to taxation,<sup>9</sup> and regulations related to health<sup>10</sup> have been challenged by foreign investors as potential breaches of BITs. Foreign investors challenging sovereign regulatory measures of host states under BITs should not come as a surprise because that is what BITs are meant to do—to hold

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arbitration.

<sup>4</sup> This includes 2957 stand-alone investment treaties and 367 Treaties with Investment Provisions (TIPs) or investment chapters in FTAs. See UNCTAD, WORLD INVESTMENT REPORT – INVESTOR NATIONALITY: POLICY CHALLENGES 101 (2017) [hereinafter, UNCTAD, WORLD INVESTMENT REPORT 2017].

<sup>5</sup> From a negligible number in early 1990s, the total number of known treaty-based ISDS cases rose to 767 as of 1<sup>st</sup> January 2017; see UNCTAD, Investment Dispute Settlement Navigator, <http://investmentpolicyhub.unctad.org/ISDS>.

<sup>6</sup> *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000); *Methanex Corporation v. United States of America*, NAFTA-UNCITRAL, Award, (Aug. 3, 2005).

<sup>7</sup> *Biwater Gauff Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, (Jul. 24, 2008).

<sup>8</sup> *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, (May 12, 2005), [hereinafter *CMS Award*]; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No ARB/01/8, *Decision on the Argentine Republic's Application for Annulment of the Award*, (Sept. 25, 2007) [hereinafter *CMS Annulment*]; *Enron Corporation and Ponderosa Assents, L.P. v. The Argentine Republic*, ICSID Case No ARB/01/3, Award, (May 22, 2007) [hereinafter *Enron Award*]; *Enron Creditors Recovery Corp v. Argentina*, ICSID Case No ARB/01/3, *Decision on the Argentine Republic's Application for Annulment of the Award*, (Jul. 30, 2010), [hereinafter *Enron Annulment*]; *Sempra Energy International v. The Argentine Republic*, ICSID Case No ARB/02/16, Award, (Sept. 28, 2007) [hereinafter *Sempra Award*]; *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) [hereinafter *Sempra Annulment*]; *LG&E Energy Corporation v. The Argentine Republic*, ICISD Case No ARB/02/1, Award, (Jul. 25, 2007) [hereinafter *LG&E*]; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No ARB/03/9, Award, (Sept. 5, 2008) [hereinafter, *Continental Casualty Award*].

<sup>9</sup> *Occidental Exploration & Production Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, (Jul. 1, 2004); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, (Feb.3, 2006); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002) [hereinafter *Feldman*]; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, *Decision on Liability*, (Dec. 14, 2014)

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

states accountable for the exercise of public power while dealing with foreign investment. However, adjudication of such a wide gamut of sovereign regulatory measures by ISDS tribunals as potential breaches of BITs, involving award of substantive damages to foreign investors,<sup>11</sup> thus resulting in the diversion of taxpayer's money to foreign investors, have generated a backlash against international investment law, which has been well documented.<sup>12</sup> This backlash has been further fueled by instances where a similar set of facts,<sup>13</sup> or the same provision of a BIT,<sup>14</sup> has been interpreted differently by tribunals. One of the chief reasons for the wide range of sovereign decisions of host states being caught in the broad net of ISDS is the vague language of BITs.<sup>15</sup> For example, imprecise and broad

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<sup>11</sup> See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, (PCA Case No. AA 226), Final Award, (Jul. 18, 2014); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, (Jul. 18, 2014); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, (Jul. 18, 2014); see also Martine Dietrich Brauch, *Yukos v. Russia: Issues and legal reasoning behind US\$50 billion awards*, INV. TREATY NEWS (Sept. 4, 2014), <https://www.iisd.org/itn/2014/09/04/yukos-v-russia-issues-and-legal-reasoning-behind-us50-billion-awards/>.

<sup>12</sup> L.T. WELLS, *Backlash to Investment Arbitration: Three Causes in THE BACKLASH AGAINST INVESTMENT ARBITRATION*, 341 (M. Waibel et al. eds., 2010); see also Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 69 (2011) who states: "the extent to which investment treaties limit a state's regulatory powers and subject the exercise of such powers to liability claims by foreign investors may become the litmus test for the future viability of the system"; see also Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007); A. Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L. L.J. 491 (2009); R. HOWSE, *Sovereignty, Lost and Found* in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW, 72-73 (W. Shan et al. eds., 2008); B. Choudhary, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit*, 41 VAND. J. TRANSNAT'L L. 775 (2008).

<sup>13</sup> The most commonly stated example of this is the *Lauders* case where two arbitration tribunals gave different decisions to essentially the same set of facts for disputes brought under two different BITs. The cases are: *CME Czech Republic BV v. The Czech Republic*, UNCITRAL, Final Award (Mar. 14, 2003) and *Lauder v. The Czech Republic*, UNCITRAL, Final Award (Sept. 3, 2001).

<sup>14</sup> The Argentine cases on Article XI of the Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (signed Nov. 14, 1991, entered into force Oct. 20, 1994) [hereinafter US-Argentina BIT], are a good example of such inconsistency. See *supra* note 8.

<sup>15</sup> See Schill, *supra* note 12, at 67-68; WELLS, *supra* note 12, at 342; Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT. ECON. L. 1037, 1040 (2010); 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); M.A. Clodfelter, *The Adaptation of States to the Changing World of Investment Protection through Model BITs*, 24 ICSID REV -

provisions like FET become suitable candidates for broad and inconsistent treaty interpretations.<sup>16</sup> The textual indeterminacy of BITs has resulted in divergent and inconsistent legal conclusions.<sup>17</sup> Such indeterminacy in treaty drafting gives a fair degree of discretion to ISDS tribunals to interpret the terms occurring in BITs and hence indulge in ‘law-making’ activity.<sup>18</sup> Such law-making by ISDS tribunals is problematic because states create international law while international tribunals are only supposed to interpret and apply it.<sup>19</sup> However, since treaty parties delegate interpretative power to ISDS tribunals, some level of law creation through interpretation is inherent in the adjudication process.<sup>20</sup>

The backlash or contestation against BITs, due to increased exposure to ISDS claims, is evident in state practice.<sup>21</sup> This state practice can be classified into two categories.<sup>22</sup> The first category is states that have completely denounced the ISDS system. For example, countries such as Bolivia, Ecuador, and Venezuela have denounced the ICSID convention (that provides for ISDS mechanism) in 2007, 2009, and 2012 respectively,<sup>23</sup>

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FOREIGN INV. L.J. 165 (2009).

<sup>16</sup> For example, VanDevelde, writing on the FET provision, states: “because the language by its terms can apply to virtually any instance of host-state conduct, it is potentially a basis for recovery in any situation”. KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 203 (2010).

<sup>17</sup> For a detailed discussion on such inconsistent decisions, see Franck, *supra* note 12, at 1558-1582; *see also* AUGUST REINISCH, *The Future of Investment Arbitration* in *INTERNATIONAL INVESTMENT LAW FOR THE 21<sup>ST</sup> CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 905-908 (Christina Binder et al. eds., 2009).

<sup>18</sup> Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 *GERMAN LAW JOURNAL* 1083, 1092-1093 (2011).

<sup>19</sup> Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation*, 104 *AM. J. INT’L. L.* 179, 188-89 (2010).

<sup>20</sup> *Id.* at 189; MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* 90-135 (2002); David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 *BERKELEY J. INT’L. L.* 401, 406, 408 (2006).

<sup>21</sup> O.E. Garcia-Bolivar, *Sovereignty vs. Investment Protection: Back to Calvo?* 24 *ICSID REV - FOREIGN INV. L. J.* 470-47 (2009); *see also* PRABHASH RANJAN, *National Contestation of International Investment Law and International Rule of Law* in *RULE OF LAW AT NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE* 115-142 (M. Kanetake & A. Nollkaemper eds. 2016)

<sup>22</sup> Anthea Roberts has classified the reaction of countries to ISDS in four different categories: loyalists, reformists, revolutionaries and undecideds – see Anthea Roberts, *The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds*, *EJIL Talk* (June 15, 2017), <https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/> (last visited, Aug. 2, 2017)

<sup>23</sup> *See* Tania Voon & Andrew D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law* 31:2 *ICSID REV – FOREIGN INV. L. J.* 413-433 (2016).

and also terminated their respective BITs.<sup>24</sup> Similarly, South Africa has terminated BITs,<sup>25</sup> and has also repudiated the ISDS mechanism.<sup>26</sup> A more nuanced approach in this category is of countries like Australia that, as a response to the Philip Morris dispute,<sup>27</sup> initially stated in 2011 that it would not have the ISDS provision in its treaties,<sup>28</sup> however, changed their position in 2013 by stating that it would negotiate for ISDS on a case-by-case basis.<sup>29</sup> The second category is states who are contesting the ISDS system, not by taking the extreme step of denouncing BITs, but by developing a new BIT practice aimed at balancing investment protection and host state's right to regulate through precise drafting of the substantive provisions of these treaties,<sup>30</sup> or by reasserting their right to regulate within

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<sup>24</sup> Bolivia has terminated its 10 BITs (with Argentina, Austria, BLEU, France, Germany, Netherlands, Spain, Sweden and United States) out of total 23 BITs; Venezuela has terminated its BIT with Netherlands; Ecuador has terminated its 11 BITs (with Cuba, Dominican Republic, El Salvador, Finland, Germany, Guatemala, Honduras, Nicaragua, Paraguay, Romania, and Uruguay) out of total 29 BITs; Indonesia has terminated 26 BITs (with Argentina, Bulgaria, Cambodia, China, Egypt, Finland, France, Germany, Hungary, India, Italy, Lao PDR, Malaysia, Netherlands, Norway, Pakistan, Romania, Singapore, Slovakia, Spain, Switzerland, Turkey, Viet Nam) out of total 71 BITs. See Anthony Crockett, *Indonesia's Bilateral Investment Treaties: Between Generations?* 30:2 ICSID REVIEW – FOREIGN INV. L.J. 437-448 (2015)

<sup>25</sup> South Africa has terminated its 9 BIT (with Austria, BLEU, Denmark, France, Germany, Netherlands, Switzerland, Spain, United Kingdom) out of total 49 BITs most of which are not yet in force.

<sup>26</sup> For more on South Africa's BIT practice see Engela C. Schlemmer, *An Overview of South Africa's Bilateral Investment Treaties and Investment Policy* 31 ICSID REV—FOREIGN INV. L.J. 167 (2016). See also Michael Webb, *New Treatment of Foreign Investors in South Africa*, <http://isds.bilaterals.org/?new-treatment-of-foreign-investors&lang=en> (last visited, Mar. 26, 2016). Some scholars support countries denouncing the ISDS system. See M. SORNARAJAH, *RESISTANCE AND CHANGE IN INTERNATIONAL LAW ON FOREIGN INVESTMENT* (2015).

<sup>27</sup> *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, (Dec. 17, 2015). The tobacco manufacturing MNC Philip Morris had challenged the plain packaging measures adopted by the Australian government alleging that such measures amount to indirect expropriation of their trademarks – an investment under the Hong Kong – Australia BIT. The ISDS tribunal however declined to exercise jurisdiction in the matter.

<sup>28</sup> Australian Government, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (April 2011), [http://blogs.usyd.edu.au/japaneselaw/2011\\_Gillard%20Govt%20Trade%20Policy%20Statement.pdf](http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf); Luke Nottage, *Throwing the Baby out with the Bathwater: Australia's New Policy on Treaty Based Investor State Arbitration and its impact on Asia*, 37 ASIAN STUD. REV. 253-72 (2013); Jürgen Kurtz, *Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication*, 27 ICSID REV - FOREIGN INV. L.J. 65 (2012).

<sup>29</sup> Leon Trakman & David Musayelyan, *The Repudiation of Investor–State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor–State Arbitration*, 31 ICSID REV – FOREIGN INV. L.J. 194-218, 200 (2016).

<sup>30</sup> The US and Canadian Model BITs are examples of countries trying to define

these treaties. A good example of this is the investment chapter in the recently signed European Union-Canada Comprehensive Economic and Trade Agreement (EU-Canada CETA),<sup>31</sup> where Article 8.9 specifically mentions that the countries reaffirm “their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment, or public morals.”<sup>32</sup> Similarly, countries wish to amend the existing ISDS system by either making it more transparent,<sup>33</sup> or by bringing about other kinds of reforms such as introducing an appellate mechanism,<sup>34</sup> or even developing a world investment court system.<sup>35</sup>

Against this global backdrop, the purpose of this paper is to examine India’s new 2016 Model BIT,<sup>36</sup> which is an outcome of India’s review of its BITs and the ISDS mechanism. The 2016 Model BIT, unlike the 2003 Model BIT,<sup>37</sup> is very detailed and contains thirty-eight Articles divided into

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substantive provisions. *See* 2012 U.S. Model BIT, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [hereinafter 2012 US Model BIT]; 2004 Canadian Model BIT, <http://www.italaw.com/documents/Canadian2004-FIPA-Model-en.pdf> [hereinafter 2004 Canadian Model BIT]; *see also* Caroline Henckels, *Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP*, 19 J. INT’L ECON. L 27-50 (2016); *see also* Peter Muchlinski, *Towards a Coherent International Investment System: Key Issues in the Reform of International Investment Law* in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 411 (Robert Echandi et al., eds., 2012); KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW* 351–72 (2013).

<sup>31</sup> Comprehensive Economic and Trade Agreement Between Canada, of the one Part, and the European Union and its Member States, of the Other Part, Oct. 30, 2016, Ch. 8 (Investment) [hereinafter Canada-E.U. CETA].

<sup>32</sup> *Id.* art. 8.9.

<sup>33</sup> On the issue of reforms to the ISDS system, see Jean E. Kalicki & Anna Joubin-Bret, *Introduction - TDM Special Issue on ‘Reform of Investor-State Dispute Settlement: In Search of a Roadmap’* 11 TRANSNAT’L DISP. MGMT. (TDM) (2014), and other contributions in the special issue.

<sup>34</sup> EUN YOUNG PARK, *Appellate Review in Investor State Arbitration* in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT* 443-454 (Jean E. Kalicki et al. eds., 2015),

<sup>35</sup> *See* Free Trade Agreement Between the European Union and The Socialist Republic of Vietnam, Chapter II (Investment), section 3, art. 15 (Agreed text as of January 2016); *see also* Piero Bernardini, *Reforming Investor State Dispute Settlement: The Need to Balance Both Party’s Interest* 32:1 ICSID REV. – FOREIGN INV. L.J., 38-57 (2017).

<sup>36</sup> Model Text for the Indian Bilateral Investment Treaty 2016, [http://mof.gov.in/reports/ModelTextIndia\\_BIT.pdf](http://mof.gov.in/reports/ModelTextIndia_BIT.pdf) [hereinafter, 2016 Indian Model BIT] Important to keep in mind that the Indian Model BIT contains two dates – 28 December 2015 given in the letter accompanying the text; and 14 January 2016 on the website of the Ministry of Finance, Government of India (<http://mof.gov.in/>) as the date of adoption of the Model BIT. In this paper, we use the 14 January 2016 date, and thus call the Model BIT as 2016 Indian Model BIT and *not* 2015 Indian Model BIT.

<sup>37</sup> Indian Model Text of Bilateral Investment Promotion and Protection Agreement, <http://www.italaw.com/sites/default/files/archive/ita1026.pdf>. [hereinafter, 2003 Indian Model BIT].

seven chapters. While the 2016 Model BIT has been commented upon,<sup>38</sup> this paper adds value to the existing literature by carrying out a comprehensive and detailed analysis of the Model BIT, especially from the standpoint of two key objectives that the government claims the Model BIT achieves. First, the Indian government claims that the purpose of the Model BIT is to provide “appropriate protection to foreign investors in India . . . while maintaining a balance between investor’s rights and the government’s obligations.”<sup>39</sup> The Indian government told the parliament the “new Indian Model Bilateral Investment Treaty text is aimed at providing appropriate protection to foreign investors in India and Indian investors in the foreign country, in the light of relevant international precedents and practices, while maintaining a balance between the rights of the investors and the obligations of the Government.”<sup>40</sup> Second, it is claimed that the Model BIT aims to make the treaty provisions more precise so as to minimise arbitral discretion.<sup>41</sup>

A critical discussion of the Indian Model BIT is essential because the

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<sup>38</sup> See also Grant Hanessian & Kabir Duggal, *The 2015 Indian Model BIT: Is This Change the World Wishes to See* 30 ICSID Rev. — Foreign Inv. L.J. 729 (2015) [hereinafter Hanessian & Duggal, *Is this the Change the World wishes to See* (2015)]; Grant Hanessian & Kabir Duggal, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See*, ICSID REV. — FOREIGN INV. L. J. (2017), doi:10.1093/icsidreview/siw020 [hereinafter, Hanessian & Duggal, *Is this the Change the World wishes to See* (2017)]; Aniruddha Rajput, *India’s shifting treaty practice: a comparative analysis of the 2003 and 2015 Model BITs*, 7 JINDAL GLOB. L. REV. 201-226 (2016); KAVALJIT SINGH, *An Analysis of India’s New Model Bilateral Investment Treaty* in RETHINKING BILATERAL INVESTMENT TREATIES – CRITICAL ISSUES AND POLICY CHOICES 81-100 (Kavaljit Singh and Burghard Igle eds., 2016); Ashutosh Ray, *Unveiled: Indian Model BIT*, Kluwer Arbitration Blog (Jan. 18 2016), <http://kluwerarbitrationblog.com/2016/01/18/unveiled-indian-Model-bit/> (last visited, Feb, 1, 2017); Amokura Kawharu & Luke R Nottage, *Models for Investment Treaties in the Asian Region: An Underview*, Arizona J. Intl. & Comp. L. (2017) (forthcoming); Ajay K. Sharma, *A Good Offence Is Not Always the Best Defence: Critiquing the Standards of Protection under the 2015 Indian Model BIT* 36 BUS. L. REV 203 (2015).

<sup>39</sup> SAURABH GARG ET AL., *The Indian Model Bilateral Investment Treaty: Continuity and Change* RETHINKING BILATERAL INVESTMENT TREATIES – CRITICAL ISSUES AND POLICY CHOICES 69-80, 71 (Kavaljit Singh and Burghard Igle eds., 2016); Department of Economic Affairs, 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](http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/India_side-event-Wednesday_Model-agreements.pdf). (India’s presentation in a Side Event at World Investment Forum 2016) [hereinafter, *The Indian Experience*].

<sup>40</sup> See Government of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion, Lok Sabha Unstarred Question No. 1290 (July 25, 2016), <http://164.100.47.190/loksabhaquestions/annex/9/AU1290.pdf> (last visited, Aug. 8, 2017).

<sup>41</sup> SAURABH GARG ET AL., *supra* note 39, at 76-77. For more on these reasons and justifications see Part II of the paper. The effort by India to minimize arbitral discretion can also be seen as an attempt to assert greater control over the investment treaty regime. On this, see generally—ANDREAS KULICK ed., REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME (2017).

new Model BIT “will be used for re-negotiation of existing BITs and negotiation of future BITs.”<sup>42</sup> India’s *modus operandi* to renegotiate its existing BITs seems to be to first terminate the existing BITs, and then launch negotiation for new BITs based on the 2016 Model BIT.<sup>43</sup> Both termination of BITs and launching negotiation for new BITs will impact as many as eighty-four countries with whom India has signed a BIT.<sup>44</sup> India’s new Model BIT needs to be studied carefully because it will also impact ASEAN countries with whom India has recently signed an investment agreement;<sup>45</sup> India’s Free Trade Agreement (FTA) partner countries, namely Singapore,<sup>46</sup> Japan,<sup>47</sup> Malaysia,<sup>48</sup> and Korea,<sup>49</sup> and also countries with whom India is currently negotiating a BIT such as Canada,<sup>50</sup> and the United States (U.S.).<sup>51</sup> India’s new Model BIT will also impact India’s

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<sup>42</sup> Press Information Bureau, Government of India, Ministry of Finance, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=133412> (last visited Jan 21, 2017).

<sup>43</sup> Pramit Pal Chaudhary, *India’s Bilateral Investment Treaties: Once BIT ten 57 times More Shy*, <http://www.hindustantimes.com/analysis/india-s-bilateral-investment-treaties-once-bitten-57-times-more-shy/story-2d0VyByBuCC55TYz0zDzNK.html> (last visited Mar. 20, 2017).

<sup>44</sup> UNCTAD, International Investment Agreements Navigator, India, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu>. Out of the 83 BITs signed by India, as of today, 57 are in force, 9 have not been enforced, and seventeen have been terminated. However, despite this termination, the treaty provisions shall continue to remain effective for investments made before the date of termination for a further period of 15 years - *see* India-Netherlands BIT, art 16.1.

<sup>45</sup> Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India, Nov. 12, 2014 (yet to come into force). [hereinafter, ASEAN-India FTA].

<sup>46</sup> Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, Jun. 29, 2005, entered into force Aug. 1, 2005. [hereinafter, India-Singapore CECA].

<sup>47</sup> Comprehensive Economic Partnership Agreement between Japan and the Republic of India, Feb. 16, 2011, entered into force Aug. 1, 2011. [hereinafter, India-Japan CEPA].

<sup>48</sup> Comprehensive Economic Cooperation Agreement between the Government of Malaysia and The Government of The Republic of India, Feb. 18, 2011, entered into force July 1, 2011. [hereinafter, India-Malaysia CECA].

<sup>49</sup> Comprehensive Economic Partnership Agreement between the Republic of Korea and the Republic of India, Aug. 7, 2009, entered into force Jan. 1, 2010. [hereinafter, India-Korea CECA].

<sup>50</sup> Government of Canada, Canada-India Foreign Investment Promotion and Protection Agreement Negotiations, <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/india-inde/fipa-apie/background-contexte.aspx?lang=eng> (last visited Jan. 20, 2016).

<sup>51</sup> The U.S. and India have been negotiating a BIT since 2009. During President Barack Obama’s visit to India in 2015 with Prime Minister Narendra Modi, and building further on past U.S.-India discussions, both presidents issued a Joint Statement ‘instruct[ing] their officials to assess the prospects for moving forward with high-standard bilateral investment treaty discussions given their respective approaches’ – *see* The White House, Office of the Press Secretary (Jan. 25 2015), <https://obamawhitehouse.archives.gov/the->

negotiations on a Regional Comprehensive Economic Partnership Agreement (RCEP) involving the ASEAN countries, Australia, China, Japan, Korea and New Zealand and cover trade and investment promotion and protection.<sup>52</sup>

Furthermore, India is one of the fastest growing economies in the world,<sup>53</sup> and the third most attractive destination for FDI, after China and the United States,<sup>54</sup> which shows that a large number of foreign investors are interested in investing in India. In fact, total FDI flows to India, which increased from \$4,029 million in 2000-2001 to \$43,478 million in 2016-17,<sup>55</sup> show that large numbers of foreign investors are already present in India. Consequently, any change in India's BIT practice is bound to impact a large number of foreign investors and their home states.<sup>56</sup>

Given the significance of India's approach to investment treaties, this paper will study the following key jurisdictional, substantive and dispute resolution provisions in the 2016 Model BIT: definition of investment (Part III); most favored nation (Part IV); fair and equitable treatment (Part V); full protection and security (Part VII); monetary transfer provisions (Part VIII); general exception clause (Part IX); other exceptions (Part X); and an ISDS provision (Part XI), from the standpoints of whether the Model BIT balances investment protection with state's right to regulate and whether the

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press-office/2015/01/25/us-india-joint-statement-shared-effort-progress-all (last visited Jan 20, 2017) (hereinafter India-US Joint Statement 2015). On difficulties between US and India BIT negotiations see Prabhash Ranjan, *BIT of a Bumpy Ride*, THE HINDU (June 2, 2016), <http://www.thehindu.com/opinion/op-ed/Bit-of-a-bumpy-ride/article14378406.ece>.

<sup>52</sup> See Guiding Principles and Objectives for Negotiating a Comprehensive Economic Partnership Agreement, <http://dfat.gov.au/trade/agreements/rcep/Documents/guiding-principles-rcep.pdf>.

<sup>53</sup> According to the International Monetary Fund (IMF), India's Gross Domestic Product (GDP) at market prices grew by 6.6 percent in 2016 only next to China where this number stands at 6.7 percent. Further, according to the IMF, India's GDP in 2017 and 2018 is estimated to grow at 7.2 and 7.7 percent respectively, which is higher than China's projected growth where these numbers stand at 6.5 and 6 percent respectively. See International Monetary Fund (IMF), *A Shifting Global Economic Landscape* World Economic Outlook Update (January 2017), <https://www.imf.org/external/pubs/ft/weo/2017/update/01/pdf/0117.pdf>.

<sup>54</sup> UNCTAD, WORLD INVESTMENT REPORT 2017, *supra* note 4.

<sup>55</sup> Quarterly Fact Sheet, Fact Sheet on Foreign Direct Investment from April 2000 to March 2017, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, [http://dipp.nic.in/sites/default/files/FDI\\_FactSheet\\_January\\_March2017.pdf](http://dipp.nic.in/sites/default/files/FDI_FactSheet_January_March2017.pdf) (last visited, Aug. 8, 2017). According to the Indian government, FDI inflows include equity inflows plus reinvested earnings plus other capital.

<sup>56</sup> For instance, see Nayanima Basu & Amity Sen, *Absence of BIT may bite Swedish investments to India: Ann Linde*, THE HINDU (May 18, 2017), <http://www.thehindubusinessline.com/economy/absence-of-bit-may-bite-swedish-investments-to-india-ann-linde/article9707250.ece>; Prabhash Ranjan, *Turning the Clock Back*, THE HINDU (Mar. 28, 2017), <http://www.thehindu.com/opinion/op-ed/turning-the-clock-back/article17684494.ece>.

Model BIT is drafted in a manner that reduces arbitral discretion as claimed by the Indian government. Part XII concludes by noting that many provisions in the Indian Model BIT 2016 are tilted in favour of a host state's right to regulate at the expense of investment protection. Also, many provisions are not precisely drafted and thus continue to grant a significant amount of discretion in the hands of arbitrators. As a subsidiary objective, the paper also contributes to the larger global debate on backlash against BITs and ISDS by showing that India, unlike the Latin American countries and South Africa, has not denounced the BIT and the ISDS system, but has diluted the system so as to greatly minimize the possibility of BIT claims to be brought against it. However, before we study the key features of the 2016 Model BIT outlined above, understanding the background to the adoption of the new Model BIT is critical.

## II. BACKGROUND TO INDIA'S 2016 MODEL BIT

India started signing BITs in the early 1990s as a part of its overall strategy of economic liberalization adopted in 1991, and had the clear objective of attracting foreign investments.<sup>57</sup> India signed the first BIT with the United Kingdom in 1994.<sup>58</sup> This BIT served as the template for India to negotiate further BITs.<sup>59</sup> In fact, the Indian Model BIT of 2003<sup>60</sup> is very similar to the India-UK BIT. India's BITs with these 84 countries, by and large, contain broad substantive provisions that could be interpreted in a manner that gives precedence to investment protection over a host state's right to regulate.<sup>61</sup>

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<sup>57</sup> See Prabhash Ranjan, *India and Bilateral Investment Treaties – A Changing Landscape* 29 ICSID REV.- FOREIGN INV. L.J. 419 (2014) [hereinafter Ranjan, *Changing Landscape*]; Prabhash Ranjan, *India's International Investment Agreements and India's Regulatory Power as a Host Nation* (PhD thesis, King's College London 2012), [https://kclpure.kcl.ac.uk/portal/files/13524464/Studentthesis-Prabhash\\_Ranjan\\_2013.pdf](https://kclpure.kcl.ac.uk/portal/files/13524464/Studentthesis-Prabhash_Ranjan_2013.pdf) [hereinafter, Ranjan, PhD Thesis], for a full discussion of India's BIT program, including its origin and evolution; See also Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India*, 41(4) VIKALPA: J. DECISION MAKERS 275-287 (2016), (claiming that BITs signed by India have contributed to rising FDI inflows 'by providing protection and commitment to foreign investors contemplating investment in India); Luke Nottage & Jaivir Singh, *Does ISDS Promote FDI? Asia-Pacific Insights from and for Australia and India*, Asia Pacific Forum for International Arbitration (AFIA) (Nov. 17, 2016), <http://afia.asia/2016/11/does-ids-promote-fdi-asia-pacific-insights-from-and-for-australia-and-india/>. (last visited, Aug. 8, 2017).

<sup>58</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, Mar. 14, 1994, entered into force Jan. 6, 1995. [India-UK BIT].

<sup>59</sup> DEV KRISHAN, *India and International Investment Law*, INDIA AND INTERNATIONAL LAW 277 (Bimal Patel ed., 2008).

<sup>60</sup> 2003 Indian Model BIT, *supra* note 37.

<sup>61</sup> See Ranjan, PhD Thesis, *supra* note 57; Government of India, Ministry of Commerce and Industry, Rajya Sabha, Question No. 1122, Answered on Jul. 26, 2017,

Despite India's mammoth BIT program, BITs in India did not attract much critical attention from 1994 to the end of 2011.<sup>62</sup> This was mainly because of India's marginal involvement with ISDS.<sup>63</sup> In this period, although nine BIT cases were brought against India,<sup>64</sup> they all pertained to just one project, the Dabhol power project,<sup>65</sup> and none of these challenges resulted in an ISDS award though there were a couple of other arbitral awards.<sup>66</sup> Thus, foreign investors did not challenge India's regulatory measures as BIT violations, during the period from 1994 until 2010. This created the impression in the minds of policy makers in India that there is no need to study the close interface between BIT and India's right to regulate.

The lack of critical attention to BITs is evident from the following

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<http://164.100.47.4/newsquestion/ShowQn.aspx> (last visited, Aug. 8, 2017).

<sup>62</sup> Ranjan, *Changing Landscape*, *supra* note 57, at 436-38.

<sup>63</sup> Ranjan, *Changing Landscape*, *supra* note 57. This is confirmed by three Indian government officials who recently wrote that "until the *White Industries* award, there had been little debate about the investment regime" in India. SAURABH GARG ET AL., *supra* note 39, at 71. It has been found that until countries are hit by BIT claims, it may be difficult for the country concerned to fully appreciate the cost of the BIT – Lauge N. Skovgaard Poulsen & Emma Aisbett, *When Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning* 65:2 WORLD POL. (2013).

<sup>64</sup> India – as Respondent State, Investment Policy Hub, UNCTAD <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2>.

<sup>65</sup> The Dabhol Power Project was a foreign direct investment (FDI) project related to building an electrical power plant in India in early 1990s soon after the adoption of the liberalization program by India in 1991. Enron Corporation along with General Electric (GE) Corporation and Bechtel Enterprises formed a company called Dabhol Power Company (DPC) in Maharashtra (a western Indian state) to generate electrical power. DPC entered into an agreement with the Maharashtra State Electricity Board (MSEB) a public-sector enterprise as the sole purchaser of the power generated by DPC. Subsequently, due to political opposition to the project on grounds of alleged irregularities and the high cost of power charged by DPC, MSEB cancelled the contract to purchase power leaving DPC without a consumer to sell electrical power and thus having a huge adverse impact on DPC's business. Further, the central government of India, which acted as a counter guarantor, after making some payments, also declined to pay DPC for different reasons. DPC was restrained from starting an international arbitration by anti-arbitration injunctions issued by Indian courts.<sup>65</sup> The Mauritius based subsidiaries of GE and Bechtel, relying on the India-Mauritius BIT, challenged India's measures including the judicial action of issuing anti-arbitration injunctions by courts as violation of the India Mauritius BIT. However, before an ISDS award could be issued a mutual settlement was reached. *See*, for detailed facts of the case, P. Kundra, *Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons* 41 VAND. J. TRANSNAT'L L. 908 (2008). Also see *GE settles Dabhol Issue*, THE INDIAN EXPRESS (Mumbai, July 3, 2005), <http://www.indianexpress.com/oldStory/73760/>.

<sup>66</sup> *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India*, ICC Case No. 12913/MS, Award, (Apr. 27, 2005); Bank of America, Memorandum of Determinations, OPIC, IIC 25 (2003), <https://www.opic.gov/sites/default/files/docs/BankofAmerica-September30-2003.pdf>.

facts: barring some occasions, Indian Parliament rarely debated BITs;<sup>67</sup> there was dearth of academic literature on Indian BITs during this period;<sup>68</sup> and Indian BITs during this period were hardly debated in academic and policy circles within India.<sup>69</sup>

### *Mapping India's Backlash Against ISDS*

This lack of attention on BITs started to change from 2012 onwards due to three developments. The first development relates to India's increased involvement with ISDS that came to light in 2011 and afterwards, in complete contrast to the period from 1994 to 2010. Towards the end of 2011, the first publicly known BIT arbitral award was issued against India in a case known as *White Industries v. India*<sup>70</sup> where an ISDS tribunal found that India violated its obligations under the India-Australia BIT<sup>71</sup> (see Part III for more details on this case). After this award, a number of foreign corporations slapped ISDS notices against India, challenging a wide array of regulatory measures such as the imposition of retrospective taxes,<sup>72</sup> cancellation of spectrum licenses,<sup>73</sup> revocation of telecom licenses,<sup>74</sup> and

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<sup>67</sup> One such occasion was when P.K. Javadekar, Member of Parliament in Rajya Sabha (Upper House of the Parliament in India), asked the government to explain why India has entered into BITs. See Rajya Sabha, List of Questions for written answers to be asked at a sitting of the Rajya Sabha to be held on Tuesday, April 20, 2010, Unstarred Question No. 2615 (asked by Shri. Prakash Javadekar), <http://164.100.47.5/EDAILYQUESTIONS/sessionno/219/1552RS.pdf>.

<sup>68</sup> Some notable exceptions to this are: Sreenivasa Rao, *Bilateral Investment Promotion Agreements: A Legal Framework for the Protection of Foreign Investments* 26 COMMONWEALTH L. BULL. 623 (2000); KRISHAN, *supra* note 59; Prabhash Ranjan, *International Investment Agreements and Regulatory Discretion: Case Study of India*, 9 J. WORLD INV. & TRADE 209 (2008).

<sup>69</sup> Ranjan, PhD Thesis, *supra* note 57. Similar arguments have also been made in context of China. It has been argued that while China has changed many of its laws due to WTO obligations, the Chinese BITs have not received equal attention. G. Wang, *China's Practice in International Investment Law: From Participation to Leadership in World Economy*, 34 YALE J. INT'L L. 575, 585-86 (2009).

<sup>70</sup> *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (Nov. 30, 2011).

<sup>71</sup> *Id.* ¶ 16.1.1 (a).

<sup>72</sup> *Vodafone* issued an arbitral notice to India under the India-Netherlands BIT for a retrospective taxation measure. See *Vodafone v. India*, UNCITRAL, Notice of Arbitration (not public) (Apr. 17, 2014); Cairn Energy also dragged India to arbitration under the India-UK BIT for a retrospective taxation measure. In this case, the arbitration tribunal has been constituted. See, *Cairn Energy PLC v. India* (UNCITRAL), <http://investmentpolicyhub.unctad.org/ISDS/Details/691>.

<sup>73</sup> Germany's *Deutsche Telekom* issued notice of arbitration to India under the India-Germany BIT over a cancellation of a satellite venture. See *Deutsche Telekom v. India*, ICSID Additional Facility, Notice of Arbitration (not public) (Sept. 2, 2013). This cancellation of spectrum licenses also led Mauritian investors of Devas Multimedia, an Indian company, to challenge India's regulatory actions under the India-Mauritius BIT at the

others.<sup>75</sup>

The second development relates to demands in India to revisit BITs by different actors, such as academics, parliamentarians, and civil society organisations.<sup>76</sup> In academia, few commentators demanded a critical assessment of India's BITs much before the *White Industries* case.<sup>77</sup> These demands became much stronger after that case and after issuance of ISDS notices against India as mentioned above.<sup>78</sup> The biggest indicator of this is the swelling of the academic literature and writings on BITs in India post-2011.<sup>79</sup> Another indicator of greater attention that BITs have been receiving

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Permanent Court of Arbitration.

*CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v. Republic of India*, PCA Case No 2013-09. Although the ISDS award has not been made public, reportedly, the tribunal has found India guilty of violating the expropriation and FET provisions of the India-Mauritius BIT [*Antrix-Devas Deal: Permanent Court of Arbitration rules against Indian government*, THE INDIAN EXPRESS (Jul. 27, 2016), <http://indianexpress.com/article/business/business-others/antrix-devas-deal-hague-international-tribunal-rules-against-indian-govt/>].

<sup>74</sup> *Tenoch Holdings* issued an arbitral notice against India under the India Russia and India-Cyprus BIT for withdrawal of approval to grant telecom licenses. See *Tenoch Holdings Limited, Mr. Maxim Naumchenko & Mr. Andre Poluektov v. The Republic of India*, PCA Case No. 2013-23.

<sup>75</sup> Some other notices of arbitration include France's *Louis Dreyfus Armateurs'* (LDA's) case against India under the India-France BIT challenging a series of measures adopted by the Indian government that allegedly prevented the implementation of a joint venture project to modernise the port in Haldia in Kolkata, India. See *Louis Dreyfus Armateurs SAS v. The Republic of India*, PCA Case No. 2014-26. An arbitration tribunal has also been constituted in this case. See also *Strategic Infrasoil Foodstuff LLC & The Joint Venture of Thakur Family Trust UAE with Ace Hospitality Management D.M.C.C. U.A.E. v. Republic of India*, UNCITRAL, Notice of Arbitration (Oct. 8, 2015).

<sup>76</sup> Prabhash Ranjan, *Most Favoured Nation Principle in Indian Bilateral Investment Treaties: A Case for Reform*, 55:1 INDIAN J. INT'L L. 39-64 (2015)

<sup>77</sup> See, e.g., Ranjan, *supra* note 68; Jayati Ghosh, *Treacherous Treaties* 27(24) FRONTLINE (2010).

<sup>78</sup> See Prabhash Ranjan, *Comparing Investment Provisions in India's FTAs with India's Stand Alone BITs: Contributing to the Evolution of New Indian BIT Practice*, 16 J. WORLD INV. TRADE 899 (2015); Biswajit Dhar, Reji Joseph & James T.C., *India's Bilateral Investment Agreements: Time to Review* 47:52 ECON. & POL. WKLY. 113 (2012); Smitha Francis & Murli Kallummal, *India's Comprehensive Trade Agreements: Implications for Development Trajectory* 48:31 ECON. & POL. WKLY. 109 (2013).

<sup>79</sup> See Ranjan, *Changing Landscape*, *supra* note 57; Ranjan, *supra* note 78; Ranjan, *supra* note 76; Dhar et al, *supra* note 78; Francis and Kallummal *supra* note 78; Rajput, *supra* note 38; Hanessian & Duggal, *Is this the Change the World wishes to See* (2015), *supra* note 38; Hanessian & Duggal, *Is this the Change the World wishes to See* (2017), *supra* note 38; SAURABH GARG ET AL., *supra* note 39, at 69; SINGH, *supra* note 38, at 81; Nish Shetty and Romesh Weeramantary, *India's New Approach to Investment Treaties*, 18:4 ASIAN DISP. REV. 189 (2016); Azermoosh Bazarafkan, *The (R)evolution of Indian Model bilateral investment treaty: escaping liability without mitigating risks*, 7:2 JINDAL GLOBAL L. REV. 245-261 (2016); Deepak Raju, *General Exceptions in the Indian Model BIT: Is the 'necessity' test workable?*, 7:2 JINDAL GLOBAL L. REV. 227-43 (2016).

after *White Industries* is this: in comparison to the period from 1994-2010, there has been a much more critical discussion on BITs in the Indian Parliament.<sup>80</sup> This heightened concern for BITs was manifestly clear when the *White Industries* award was criticised in the Indian Parliament as “an attack on the sovereignty of the Indian Judiciary.”<sup>81</sup> Similarly, civil society organizations, in the aftermath of *White Industries* and ISDS notices against India, are now demanding a review of India’s existing BIT program.<sup>82</sup> They argue that the threat of BIT arbitrations “will have a chilling effect on the ability of different ministries (of the Indian government) to regulate different social and economic needs.”<sup>83</sup>

The third development relates to the internal debate within the Indian government on BITs. The most important example of the emerging debate on BITs in India is the Ministry of Commerce’s discussion paper “International Investment Agreements Between India and Other Countries,”<sup>84</sup> prepared in 2011—the same year when India lost the BIT case to *White Industries*. Inspired by the work of United Nations Conference on Trade and Development (UNCTAD) on BITs<sup>85</sup> and developments in South

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<sup>80</sup> See Pinaki Misra, Lok Sabha Questions, Unstarred Question No. 5870 on Bilateral Investment Treaties, Parliament of India. A Member of Parliament, in May 2012, asked the government to supply the details of all BITs that India had entered into and whether the texts of those BITs were publicly available. See also M S Reddy, Lok Sabha Questions, Unstarred Question No. 3926 on Bilateral Investment Pacts, Parliament of India. Similarly, another Member of Parliament, in September 2012, asked the government whether any panel had been constituted to oversee the BIT disputes that had been brought against India. See also Bhola Singh, Lok Sabha Questions, Unstarred Question No. 4946 on Bilateral Investment Treaty, Parliament of India (16 December 2016). Questions in the Parliament have also been asked about whether India has entered into a BIT with the United States.

<sup>81</sup> Statement by P. Rajeev, Member of Parliament (India), Transcript of the Proceedings of the Rajyasabha (22 May 2012) 52-4, <http://164.100.47.5/newdebate/225/22052012/Fullday.pdf>.

<sup>82</sup> Forum against FDAs, *We Call Upon the Government to Review and Rescind Its Decision to Sign BIT/ BIPA with the USA-Open letter to the Indian Prime Minister, Dr Manhoman Singh* (Sept. 26, 2013), [http://www.bilaterals.org/IMG/pdf/letter\\_forum\\_ag\\_ftas\\_us\\_india\\_bits\\_26\\_sept.pdf](http://www.bilaterals.org/IMG/pdf/letter_forum_ag_ftas_us_india_bits_26_sept.pdf).

<sup>83</sup> Santosh M.R., *Concerns Regarding Proposed US-India Bilateral Investment Treaty* (June 13, 2012), <https://donttradeourlivesaway.files.wordpress.com/2012/06/civil-society-letter-on-us-india-bit.pdf> (letter written by many civil society organizations to the Indian Prime Minister expressing concerns about India’s BITs).

<sup>84</sup> Ministry of Commerce, Government of India, *International Investment Agreements between India and Other Countries* (on file with author) [hereinafter, Commerce Ministry Paper]. The paper is not publicly available but was obtained by members of an NGO through India’s Right to Information Act 2005.

<sup>85</sup> This is evident from the fact that the paper quotes various UNCTAD reports multiple times to support different arguments. See for UNCTAD’s work on BITs [http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/International-Investment-Agreements-\(IIAs\).aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/International-Investment-Agreements-(IIAs).aspx).

Africa<sup>86</sup> and Latin America,<sup>87</sup> the paper recognised that “when developing countries enter into BITs, a balance between investors’ rights and domestic policy must be ensured.”<sup>88</sup> The discussion paper also stated that “other legitimate public concerns must not be subordinated to investment protection issues.”<sup>89</sup> It identified a number of areas of concern in Indian BITs such as an expansive definition of investment, an undefined fair and equitable treatment provision, a broad provision on expropriation without any reservations and exceptions, and a broad provision that allows investors to freely transfer funds.<sup>90</sup> These broad and unqualified BIT provisions, according to the paper, could result in situations where India’s exercise of regulatory powers could be unduly compromised. For instance, the paper recognized that since the issuance of compulsory licenses for patented drugs was not excluded from the purview of expropriation, a patent holder could potentially file a BIT claim against India on this issue.<sup>91</sup> The paper concluded that India should review its existing BITs and if, after review, it decides to continue with BITs, then foreign investors’ rights should be balanced with India’s regulatory power to act in furtherance of public purposes, such as the protection of health and environment.<sup>92</sup> In the immediate aftermath of the *White Industries* case and after large numbers of foreign investors sued India under different BITs, some officials in the Indian government stated that India should renegotiate its BITs to drop the ISDS provision.<sup>93</sup> Nevertheless, as we will see, the 2016 Model BIT has retained the ISDS mechanism though in a much-diluted form.

The *White Industries* award and a spate of ISDS notices together, coupled with other developments mentioned above, resulted in a fundamental rethinking on BITs in India and paved the way for the review of BITs that began in 2012.<sup>94</sup> This review process led to two important

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<sup>86</sup> See *supra* note 25; *supra* note 26.

<sup>87</sup> See *supra* note 24.

<sup>88</sup> Commerce Ministry Paper, *supra* note 84.

<sup>89</sup> *Id.* at 17.

<sup>90</sup> *Id.* at 60.

<sup>91</sup> See, Commerce Ministry Paper, *supra* note 84. See also Prabhash Ranjan, *Medical Patents and Expropriation in International Investment Law – with Special Reference to India* 5 MANCHESTER J. INT’L ECON. L. 72 (2008). This issue was raised by the first author of this article much before the Commerce Ministry Paper.

<sup>92</sup> See Commerce Ministry Paper, *supra* note 84, at 21.

<sup>93</sup> See Subhomoy Bhattacharjee, *India seeks Treaty Revision to Deal with Corporate Suits*, THE INDIAN EXPRESS (Apr. 4, 2012), <http://archive.indianexpress.com/news/india-seeks-treaty-revisions-to-deal-with-corporate-suits/932195/>. See also SAURABH GARG ET AL., *supra* note 39, at 71-2.

<sup>94</sup> See SAURABH GARG ET AL., *supra* note 39, at 71; *The Indian Experience*, *supra* note 39. See also Statement by India at the World Investment Forum 2014, UNCTAD, <http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Mayaram.pdf> [hereinafter, India 2014 Statement].

public admissions being made by the Indian government. First, the Indian government admitted, as also evident from the Commerce Ministry paper discussed above, that Indian BITs were not well-drafted because they contained broad and vague provisions that could be subjected to wide interpretations by ISDS tribunals.<sup>95</sup> India's 2014 statement during UNCTAD'S World Investment Forum specifically mentioned that the FET and MFN provisions in Indian BITs were vague.<sup>96</sup> Specifically, India said that the MFN provision "has been expanded to include rights beyond what is granted by a treaty."<sup>97</sup> India's concern about the broad interpretation of MFN provisions stems directly from the *White Industries* case<sup>98</sup> discussed in Part IV of this paper. Second, India admitted that BITs containing broad and vague provisions were susceptible to broad and ambiguous provisions and could encroach upon the host state's regulatory powers.<sup>99</sup> Specifically, on the basis of the *White Industries* award and other ISDS notices served on India as discussed before, India said that the "current investment treaty regime . . . can be viewed as unfair for State's in the exercise of their regulatory power."<sup>100</sup>

The review process launched in 2012 led to three outcomes: first, the adoption of the Model BIT on January 14, 2016.<sup>101</sup> This adoption was preceded, by the circulation of the draft version of the Model BIT in March 2015<sup>102</sup> for comments.<sup>103</sup> The draft Model BIT attracted considerable

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<sup>95</sup> *The Indian Experience*, *supra* note 39; Government of India, *supra* note 61; SAURABH GARG ET AL., *supra* note 39, at 76–77. The first author of this article has consistently argued that Indian BITs contain broad and vague provisions that could be subject to very different interpretations depending on the discretion exercised by ISDS tribunals. See Ranjan, PhD Thesis, *supra* note 57; Ranjan, *Changing Landscape*, *supra* note 57; see also Henckels, *supra* note 30, who argues that "international investment treaties . . . typically contain broadly worded, open-textured obligations that do not address the relationship between investment protection and the continuing powers of host states to regulate. These provisions give investment tribunals significant discretion in interpreting state's obligations towards foreign investors and investments."

<sup>96</sup> India 2014 Statement, *supra* note 94.

<sup>97</sup> India 2014 Statement, *supra* note 94. The FET provision in a large number of Indian BITs does not provide any normative content and therefore is subject to wide interpretations. See Ranjan, PhD Thesis, *supra* note 57. See also the discussion in Part IV of the paper.

<sup>98</sup> See *White Industries*, *supra* note 70.

<sup>99</sup> Government of India, Ministry of Commerce and Industry, Rajya Sabha, Question No 1122, 26 July 2017, <http://164.100.47.5/qsearch/QResult.aspx>; India 2014 Statement, *supra* note 94; *The Indian Experience*, *supra* note 39.

<sup>100</sup> India 2014 Statement, *supra* note 94; see also Ranjan, PhD Thesis, *supra* note 57; Ranjan, *Changing Landscape*, *supra* note 57.

<sup>101</sup> See *supra* note 36.

<sup>102</sup> Draft Model Text for the Indian Bilateral Investment Treaty, [https://www.mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf) [hereinafter, 2015 Draft Indian Model BIT].

<sup>103</sup> Comments on the 2015 Draft Indian Model BIT, <https://www.mygov.in/group->

attention<sup>104</sup> including a full report from the Law Commission of India.<sup>105</sup> Second, subsequent to the adoption of the 2016 Model BIT, India issued notices of BIT termination to 58 countries<sup>106</sup> as mentioned before. The reason behind terminating these treaties was to negotiate new BITs based on the 2016 Model BIT.<sup>107</sup> Third, India has requested twenty-five of its BIT partner countries to issue joint interpretative statements in order to resolve, what India describes as ‘uncertainties and ambiguities that may arise regarding interpretation and application of the standards contained, in India’s BITs.<sup>108</sup> If these joint interpretative statements are finalized, India expects that they would become an important element in the process of treaty interpretation.<sup>109</sup> There is no information available as to how many

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issue/draft-indian-Model-bilateral-investment-treaty-text/.

<sup>104</sup>See Hanessian & Duggal, *Is this the Change the World wishes to See* (2015), *supra* note 38; Mahdev Mohan, *Asian Perspectives on Investment and Arbitration: An Evolving Marcottage*, YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY (Andrea Bjorklund ed., 2017); Lise Jhonson, Lisa Sachs & Sudhanshu Roy, *Next Generation Treaty*, THE INDIAN EXPRESS (Nov. 12, 2015), <http://indianexpress.com/article/opinion/columns/best-investment-treaty/>; Ranjan, *Comparing India’s FTA and BITs*, *supra* note 78; Prabhash Ranjan, *A BIT of an Overreaction*, THE FIN. EXPRESS, (April 4, 2015), <http://www.financialexpress.com/article/fe-columnist/column-a-bit-of-an-overreaction/60348/>.

<sup>105</sup>Government of India, Law Commission of India, Report No 260, Analysis of the Draft Model Indian Bilateral Investment (August 2015), <http://lawcommissionofindia.nic.in/reports/Report260.pdf>. See also Government of India, Ministry of Finance, Rajya Sabha, Unstarred Question Number 2635, 22 December 2015 <http://164.100.47.5/qsearch/QResult.aspx>. A question was also asked about the Law Commission Report on the Model BIT in the Indian Parliament.

<sup>106</sup>See *supra* note 40; however, the Indian government has not revealed which are these BITs i.e. with which countries. UNCTAD’s International Investment Agreements (IIAs) database states that India has terminated BITs with these 15 countries: Argentina, Australia, Austria, Croatia, Denmark, Egypt, Germany, Hungary, Indonesia, Italy, Malaysia, Netherlands, Oman, Switzerland, and Spain. See *India Bilateral Investment Treaties (BITS)*, UNCTAD INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu> (last visited, Aug. 8, 2017).

<sup>107</sup>Asit Ranjan Mishra, *India to Trade Partners: Sign new bilateral investment treaties by 31 March*, LIVE MINT (Jan. 11 2017), <http://www.livemint.com/Politics/8IRqZuiGhDAxjiO2IEJ3K/India-asks-trade-partners-to-sign-new-BIT-pact.html>.

<sup>108</sup>Government of India, Ministry of Finance, Department of Economic Affairs, *Office Memorandum - Regarding Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties*, (Feb. 8, 2016), [http://indiaibusiness.nic.in/newdesign/upload/Consolidated\\_Interpretive-Statement.pdf](http://indiaibusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf). [hereinafter, Consolidated Interpretative Statement].

<sup>109</sup>*Id.* In this context also see Vienna Convention on Law of Treaties 1969, arts. 31(3)(a) and 31(3)(b) May 23, 1969, 1155 UNTS 331: “There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by

countries have responded to this request except Bangladesh.<sup>110</sup>

After having understood the global debate on the backlash against BITs and ISDS mechanism and discussed the background to the adoption of the 2016 Model BIT, the paper now turns to studying the important features of India's 2016 Model BIT as delineated before.

### III. DEFINITION OF INVESTMENT

The BIT definition of 'investment' plays an important role in determining the scope of rights and obligations under the treaty and the establishment of the ISDS tribunal jurisdiction.<sup>111</sup> Most Indian BITs provide a broad asset-based definition of 'investment' where every kind of asset with economic value established or acquired by the foreign investor is an investment.<sup>112</sup> In the 2016 Model BIT, India moved away from a broad

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the other parties as an instrument related to the treaty; (c) Any relevant rules of international law applicable in the relations between the parties." *See also*, MARK VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009); OLIVER DÖRR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON LAW OF TREATIES: A COMMENTARY (2012); *See also*, Hervé Ascensio, *Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law*, 31:2 ICSID REV. – FOREIGN INV. L.J. 366-87 (2016). Issuing such joint interpretative statements is clearly an attempt to reassert control over investment treaty regime – on this *see generally* ELENI METHYMAKI & ANTONIOS TZANAKOPOULOS, *'Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation'* in REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME (Andreas Kulick ed. 2017).

<sup>110</sup>Jarrold Hepburn, *Unable to Unilaterally Terminate a 2011 BIT, The Government of India Persuades Counter-Party to Agree Joint Interpretive Note to Clarify BIT's Implications*, IA REPORTER (Jul. 17, 2017) <https://www.iareporter.com/articles/unable-to-unilaterally-terminate-a-2011-bit-the-government-of-india-persuades-counter-party-to-agree-joint-interpretive-note-to-clarify-bits-implications/>.

<sup>111</sup>On definition of investment in BITs *see generally* International Investment Law: Understanding Concepts and Tracking Innovations, OECD (2008); On definition of investment, *see also* DOLZER & SCHREUER, *supra* note 1, at 60-78; SALACUSE, *supra* note 1, at 166-86; Mavluda Sattorova, *Defining Investment under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond*, 2:2 ASIAN J. INT. L. 267 (2012); Julian Davis Mortenson, *The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law*, 51:1 HARVARD INT'L L. J. 257 (2010); Rajput, *supra* note 38, at 208; Hanessian & Duggal, *Is this the Change the World wishes to See* (2017), *supra* note 38, at 2-3.

<sup>112</sup>*See*, for instance 2003 Indian Model BIT, *supra* note 37, art 1(b) provides: "[I]nvestment' 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."

asset-based definition of investment to an enterprise-based definition where an enterprise is taken together with its assets.<sup>113</sup> Therefore, only an enterprise that is legally constituted in India can bring a BIT claim.<sup>114</sup> Moving away from an asset-based approach to an enterprise-based approach aims at narrowing the scope of investments to be protected and thus seeks to reduce the number of BIT claims that can be brought against India.<sup>115</sup>

In the 2016 Model BIT, investment means an enterprise that has been constituted, organized, and operated in good faith by an investor in accordance with the domestic laws of the country.<sup>116</sup> Article 1.4 also provides a non-exhaustive list of assets that an enterprise may possess.<sup>117</sup> Further, the enterprise must satisfy certain characteristics of investment such as commitment of capital and other resources, duration, the expectation of gain or profit, and the assumption of risk and significance for the development of the country where the investment is made.<sup>118</sup> From Article 1.4 it is not clear whether the characteristics of investment are to be satisfied just by an enterprise or by its assets. This can be understood with

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<sup>113</sup>See 2016 Indian Model BIT, *supra* note 36, art 1.4 provides: “‘Investment’ means an enterprise constituted, organized 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....”

<sup>114</sup>*Id.* art. 1.3 provides: “[E]nterprise means: (i) any legal entity constituted, organized and operated in compliance with the law of a Party, including any company, corporation, limited liability partnership or a joint venture; and (ii) a branch of any such entity established in the territory of a Party in accordance with its law and carrying out business activities there.”

<sup>115</sup>Srikar Mysore & Aditya Vora, *Tussle for Policy Space in International Investment Norm Setting: The Search for a Middle Path?* 7 JINDAL GLOB. L. REV. 135, 143 (2016).

<sup>116</sup>2016 Indian Model BIT, *supra* note 36, art 1.4.

<sup>117</sup>*Id.* art. 1.4 (a) to (h).

<sup>118</sup>The inclusion of these characteristics is clearly influenced by certain cases such as *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001); *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (Nov. 6, 2008); Investment chapters in India’s FTAs include the ‘characteristics test’ for assets. See Indian -Japan CEPA, *supra* note 47, art 3(i); India-Malaysia CECA, *supra* note 48, art 10.2(d); India-Korea CECA, *supra* note 49, art 10.1; India-Singapore CECA, *supra* note 46, art 6.1(1). However, these investment chapters only include the following three criteria: ‘the commitment of capital or other resources’, ‘the expectation of gain or profit’, and ‘the assumption of risk for the investor’ and not ‘contribution to host State’s economic development’. On the ‘characteristics test’, see generally NOAH RUBINS, *The Notion of Investment in International Investment Arbitration*, ARBITRATING FOREIGN INVESTMENT DISPUTES 283 (2004).

the help of the following example: Let us assume that a foreign pharmaceutical enterprise, legally constituted in India for the last 10 years, gets a patent on a drug. After, say, just six months from the granting of the patent, the Indian government revokes the patent for some reason, and the enterprise wishes to challenge before an arbitral tribunal. Here, will the “characteristics test” of investment be required to be satisfied by the asset (patent right), the enterprise, or both? If it is the patent right, then it might be difficult to satisfy the “characteristics test” due to the short duration for which the asset has been in existence. If, on the other hand, the “characteristics test” has to be satisfied by the enterprise, it would be easier to fall under the definition of investment and the short duration for which the patent right has been in existence will not matter.

The definition of investment is also not clear on the actual meaning of the characteristics that an enterprise or asset is expected to possess. For instance, the definition does not specify how long the enterprise should be in existence and thus leaves this determination to the discretion of an ISDS tribunal. Similarly, there is no guidance available in the text to determine whether an investment has ‘significance for the development’ of the country to be eligible for treaty protection, which gives discretion to ISDS tribunals.<sup>119</sup> It is argued that this requirement was inserted into the Model BIT to ensure that assets that do not contribute to the development of the host country do not enjoy treaty protection.<sup>120</sup> However, as the tribunal in *LESI SpA v. Algeria* held, it is difficult to ascertain whether an investment has contributed to the development of the host state.<sup>121</sup> For instance, it is not clear how sizeable or successful the investment should be to conclude that it has contributed to the development of the host state.<sup>122</sup> While some

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<sup>119</sup>DOLZER & SCHREUER, *supra* note 1, at 75 for example, states that the requirement that an asset qualifies as investment only if it makes a contribution to the development of the host State is ‘the most controversial criterion’. This is evident from the fact that while some tribunals have included the ‘development to host country’ criterion in their assessment in determining whether an investment has taken place. *See Salini, supra* note 118; *Joy Mining, supra* note 118; 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 (July 12, 2006) [hereinafter *LESI*]; *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); *See also* Alex Grabowski, *The Definition of Investment Under the ICSID Convention: A Defense of Salini*, 15 CHI. J. INT’L L. 287 (2014).

<sup>120</sup>SAURABH GARG ET AL., *supra* note 39, at 84. On broad asset based definitions of foreign investment allowing for a large range of transactions to enjoy protection under the BIT *see* UNCTAD, SCOPE AND DEFINITION - UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 9 (2011), 9.

<sup>121</sup>*LESI, supra* note 119, at ¶ 72(iv).

<sup>122</sup>*See Mr. Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No.

tribunals suggest that it is enough if the investment contributes in one way or another,<sup>123</sup> other tribunals have held that this contribution should be “significant.”<sup>124</sup> What are the benchmarks against which the “significance” of contribution is measured? Leaving such difficult questions for an ISDS tribunal to decide is the exact opposite of reducing arbitral discretion. Moreover, including this criterion to determine whether an investment has been made would also mean, as the Annulment Committee held in *Malaysian Historical Salvors v. Malaysia*,<sup>125</sup> that investments making “small contributions, and contributions of a cultural and historical nature” shall not get treaty protection.<sup>126</sup> It tilts the balance in favor of the host state because treaty protection could be denied to foreign investments despite being lawful and despite making a commitment of capital or other resources on the subjective ground that it is not significant for the development of the host state.

#### IV. MOST FAVORED NATION TREATMENT

The most favored nation (MFN) provision in BITs aims to create a level-playing field for all foreign investors by prohibiting the host state from discriminating against investors from different countries.<sup>127</sup> The actual working of an MFN clause in a BIT can be understood with this simple illustration as discussed by Schill.<sup>128</sup> Let us assume three states: A (the granting state), B (the beneficiary state) and C (the third state). Further, assume that states A and B have entered into a treaty containing an MFN clause (primary treaty). Now, if state A extends certain benefits to state C, state B can invoke the MFN clause in the primary treaty to ensure that state A extends the same benefits to it provided the granted benefits to state C fall within the scope of application of the MFN clause contained in the primary treaty between A and B.<sup>129</sup> In ISDS claims, foreign investors have

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ARB/99/7, Annulment proceeding, ¶ 33 (Feb. 9, 2004).

<sup>123</sup>*Id.*

<sup>124</sup>*Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 124 (May 17, 2007).

<sup>125</sup>*Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (Apr. 16, 2009).

<sup>126</sup>*Id.* ¶ 80 (b).

<sup>127</sup>OECD, *Most-Favoured-Nation Treatment in International Investment Law*, OECD Working Papers on International Investment 2004/02, [http://www.oecd.org/daf/inv/investment-policy/WP-2004\\_2.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf); Okezić Chukwumerije, *Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations*, 8 J. WORLD INV. & TRADE 597, 608 (2007); Jürgen Kurtz, *The MFN Standard and Foreign Investment: An Uneasy Fit*, 5 J. WORLD INV. & TRADE 861, 873 (2004).

<sup>128</sup>STEPHAN W. SCHILL, *MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 140 (2009).

<sup>129</sup>SCHILL, *supra* note 128 at 126; ENDRE USTOR, *Most Favoured Nation Clause*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, VOLUME III 468 (Rudolf Bernhardt & Peter

often used the MFN provision of the primary BIT (under which the dispute between investor and state arises) successfully to borrow a favorable substantive provision granted by the host state under another BIT (secondary BIT).<sup>130</sup> Foreign investors have also relied upon the MFN provision in the primary BIT to borrow beneficial ISDS provisions from secondary BITs<sup>131</sup> with varying degrees of success.<sup>132</sup>

An important case on a MFN provision involving India is *White Industries v. India*,<sup>133</sup> which has already been elaborately discussed elsewhere,<sup>134</sup> and will be discussed here briefly. In that case, an Australian

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Macalister-Smith eds., 1997). See also *Report of the International Law Commission on the Work of its Thirtieth Session 8 May-28*, U.N. Doc. A/33/10 (1978), reprinted in 2 Y.B. Int'l L. Comm'n (1978).

<sup>130</sup>See, *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, ¶ 179 (Apr. 21, 2006); *Asian Agricultural Products v Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶ 54 (June 27, 1990) [hereinafter *AAPL*]. Although in this case, the investor could not succeed because of being unable to show that Sri Lanka's BIT with Switzerland contained a more beneficial provision. See ¶ 54; *MTD Equity v. Republic of Chile*, ICSID Case No ARB/01/7, Award (May 25, 2004) [hereinafter *MTD*]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005) [hereinafter *Bayindir*]; Also see *Rumeli Telekom v. Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award, ¶¶ 572, 575 (July 29, 2008); *Pope and Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (Apr. 10, 2001) [hereinafter, *Pope and Talbot, Award on Merits*]; See also SCHILL, *supra* note 128.

<sup>131</sup>See Rudolf Dolzer & Terry Myers, *After Tecmed: Most Favoured Nation Clauses in International Investment Protection Agreements*, 19 ICSID REV. FOREIGN INV. L. J. 49 (2004); Stephen Fietta, *Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?* 8 INT'L. ARB. L. REV. 131 (2005); Dana H. Freyer & David Herlihy, *Most Favoured Nation Treatment and Dispute Settlement in Investment Arbitration*, 20 ICSID REV. FOREIGN INV. L. J. 58 (2005); Locknie Hsu, *MFN and Dispute Settlement*, 7 J. WORLD INV. & TRADE 25 (2006); Kurtz, *supra* note 127; SCHILL, *supra* note 128, at 151-72; ABBY COHEN SMUTNY & LEE A. STEVEN, *The MFN Clause: What are its Limits?*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS 351 (K. Yannaca-Small ed., 2010); Martins Paporinskis, *MFN Clauses and International Dispute Settlement: Moving beyond Mafezzini and Plama?*, 26 ICSID REV. FOREIGN INV. L. J. 14 (2011).

<sup>132</sup>See, *Emilio Augustine Mafezzini v. Spain*, ICSID Case No ARB/97/7, Award, (Nov. 13, 2000); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 108 (Aug. 3, 2004); *Gas Natural v. Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, ¶ 49 (Jun. 17, 2005); *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, ¶ 59 (Aug. 3, 2006); Also see, *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶¶ 159-60 (Dec. 8, 2008).

<sup>133</sup>*White Industries*, *supra* note 70.

<sup>134</sup>See Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Programme*, INV. TREATY NEWS (Apr. 13, 2012), <https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/>; Manu Sanan, *The White Industries Award: Shades of Grey* 13 J. WORLD INV. &

investor, relying on the MFN provision of the India-Australia BIT (the primary treaty), argued for the importation of a favorable substantive provision related to “*effective means of asserting claims and enforcing rights*” given in the India-Kuwait BIT (second treaty) into the India-Australia BIT.<sup>135</sup> The MFN provision in the India-Australia BIT is as follows: “A Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments or investors of any third country.”<sup>136</sup>

India argued such importation would ‘fundamentally subvert the carefully negotiated balance of the BIT.’<sup>137</sup> However, the tribunal did not agree with India and allowed for the importation of the substantive provision from the secondary BIT into the primary BIT.<sup>138</sup> The tribunal held that an importation of the substantive provision into the primary BIT served the purpose for which countries have incorporated the MFN provision in the BIT.<sup>139</sup> Post this setback, India took the stand that the use of the MFN provision by foreign investors to borrow beneficial substantive and procedural provisions from third country BITs in order to replace or supplement the provisions of the primary BIT, disturbs the various strategic, diplomatic, and political reasons behind negotiating bilateral treaties.<sup>140</sup> In order to ensure that there is no repeat of a *White Industries* situation, the Indian Model BIT does not include an MFN provision.<sup>141</sup>

However, not having an MFN provision in the BIT will expose foreign investment to the risk of discriminatory treatment by the host state at two levels. First, the host state could offer preferential treatment to the foreign investor under one BIT without providing the same treatment to another foreign investor under another. Here is a simple example to illustrate this: Assume the BIT between countries A and B does not contain a FET provision whereas the BIT between countries B and C does. Absence of an MFN provision in the A-B BIT would mean that while investors from C can enjoy FET protection in country B, country A’s investors will not be able to borrow the FET protection into the A-B BIT and thus not enjoy FET protection in country B. Second, the host state could offer preferential

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TRADE 661 (2012).

<sup>135</sup>*White Industries*, *supra* note 70, at ¶¶ 11.1.1 - 11.1.5. For more details on this case, *see* Ranjan, *supra* note 134; Sanan, *supra* note 134.

<sup>136</sup>Agreement between the Government of the Australia and the Government of the Republic of India on the Promotion and Protection of Investments, Feb. 26, 1999, entered into force May 4, 2000 [India-Australia BIT] art 4.2.

<sup>137</sup>*White Industries*, *supra* note 70, at ¶ 11.2.1.

<sup>138</sup>*Id.* ¶¶ 11.2.2 - 11.2.8; *See also* Bayindir *supra* note 130; *MTD* *supra* note 130.

<sup>139</sup>*Id.* ¶ 11.2.4; *See also* U.N. Commission, *Draft Articles on Most Favoured Nation Clauses with commentaries*, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (1979).

<sup>140</sup>India 2014 Statement, *supra* note 94; SAURABH GARG ET AL., *supra* note 39, at 75-76.

<sup>141</sup>SAURABH GARG ET AL., *supra* note 39, at 76.

treatment to foreign investors from one country and not offer the same treatment to foreign investors from another country in the application of domestic measures or regulations. For example, country B offers tax incentives to country C's investors and not to country A's investors. Absence of a MFN provision in the A-B BIT would mean that investors from country A cannot ask for the same tax concessions from country B. It is clear that India's concerns about MFN stems from the situation discussed before. This concern could have been addressed by limiting the scope of the MFN treatment in the BIT. The EU-Canada CETA<sup>142</sup> shows how this can be done. Article 8.7(1) of the EU-Canada CETA contains the MFN provision, which puts both sides under an obligation not to accord treatment less favorable to a foreign investor than that accorded in like situations to investors of a third country with respect to the establishment, acquisition, expansion, conduct, etc. This clearly means that host states cannot discriminate between foreign investors in the application of domestic regulatory measures, similar to the second situation discussed above. In order to limit the scope of the MFN provision so as to exclude first situation discussed above, Article 8.7(4) states that "treatment" referred to in Article 8.4(1) does not include "procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties" and that substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment'; thus, they cannot give rise to a breach of this Article [MFN] unless a host state has adopted or maintained measures pursuant to those obligations.<sup>143</sup> This clarification makes it very clear that investors cannot use the MFN provision to borrow beneficial procedural provisions or beneficial substantive provisions from a third country BIT unless it can be shown that the host state has adopted or is maintaining a domestic measure in accordance with some substantive provision given in the BIT. India should have followed this approach<sup>144</sup> and not done away with the MFN provision completely, exposing foreign investors to discriminatory treatment and tilting the balance in favour of the host state's regulatory power.

## V. FAIR AND EQUITABLE TREATMENT

FET has emerged as the most important standard of treatment in BITs<sup>145</sup> and has attracted considerable scholarly attention.<sup>146</sup> Numerous

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<sup>142</sup>Canada-EU CETA, *supra* note 31.

<sup>143</sup>*Id.* art. 8.7(4).

<sup>144</sup>Ranjan, *supra* note 76; *see also* UNCTAD, MOST FAVOURED NATION TREATMENT, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 107 (2010).

<sup>145</sup>NEWCOMBE & PARADELL, *supra* note 1, at 254; SALACUSE, *supra* note 1, at 219 (describing FET as the *grundnorm* or basic norm of the investment treaty system).

ISDS claims show that FET has become a catch-all provision capable of sanctioning many legislative, regulatory, and administrative actions of the host state.<sup>147</sup> One major reason for FET becoming a catch-all provision is because it often occurs in a large number of BITs<sup>148</sup> without much guidance about its normative content.<sup>149</sup> This has given rise to a debate regarding the meaning of the FET provision.<sup>150</sup> According to one view, FET merely refers to the customary international law minimum standard of treatment of aliens (hereinafter IMS).<sup>151</sup> The basic premise of IMS is that “an alien is protected against unacceptable measures of the host state by rules of international law which are independent of those of the host state.”<sup>152</sup> The argument that FET refers to IMS is strong in those BITs that link FET to customary international law.<sup>153</sup> However, even in such BITs, the debate regarding the

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<sup>146</sup>SALACUSE, *supra* note 1; VANDEVELDE, *supra* note 16, at 43.

<sup>147</sup>SURYA PRASAD SUBEDI, INTERNATIONAL INVESTMENT LAW 172-73 (2008); *See, Pope and Talbot, Award on Merits, supra* note 130, at ¶ 110; *Mondev International Ltd. v. United States*, ICSID Case No. ARB (AF)/99/2, Award (Oct. 11, 2002); *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award (Mar. 31, 2010) [hereinafter, *Merrill and Ring*]; *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, ¶¶ 442-44 (Mar. 17, 2015). *See also* VAN HARTEN, INVESTMENT TREATY ARBITRATION, *supra* note 12, at 89.

<sup>148</sup>NEWCOMBE & PARADELL, *supra* note 1, at 254 (2009). *See also* M.C. Porterfield, *An International Common Law of Investors Rights*, 27 U. PENN. J. INT’L L. 99 (2014).

<sup>149</sup>Scholars have described FET as wide, tenuous and imprecise. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 332 (2004); 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, *supra* note 1, at 241; VANDEVELDE, *supra* note 16, at 69.

<sup>150</sup>SALACUSE, *supra* note 1, at 245.

<sup>151</sup>*Id.*

<sup>152</sup>DOLZER & SCHREUER, *supra* note 1, at 3; *see* E. Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT’L L. 521 (1910). On FET and international minimum standard, *see generally* MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT (2013).

<sup>153</sup>For example, Article 10.4 (1) of the investment chapter of India-Korea FTA states: “Each Party shall accord to an investment of an investor of the other Party in its territory “fair and equitable treatment” and “full protection and security.” The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens[.]” *See also Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 Award (Jun. 25, 2011); *Occidental, supra* note 9; Interpretative Note to the art. 1105 NAFTA: “Minimum Standard of Treatment in Accordance with International Law (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (2) The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another

content of IMS persists. Whether this content should be determined by reference to the 1926 case, *Neer v. Mexico*,<sup>154</sup> a case that did not concern investment but the murder of the U.S. citizen in Mexico, where U.S.-Mexico General Claims Commission said that for treatment of an alien to constitute an international delinquency it “should amount to an outrage, to bad faith, to willful neglect of duty or to an insufficiency of action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency” (hereinafter *Neer* standard).<sup>155</sup> Some ISDS tribunals, like the tribunal in *Glamis Gold v. United States*,<sup>156</sup> held that the *Neer* standard of 1926 continues to reflect the IMS.<sup>157</sup> On the other hand, other tribunals have held that the IMS is not frozen in time and is “constantly in a process of development”<sup>158</sup> and thus, barring for cases pertaining to safety and due process, “today’s minimum standard is broader than that defined in the *Neer* case and its progeny.”<sup>159</sup> This clearly shows that even in BITs where FET is linked to the customary international law standard, there is no consensus regarding the meaning of this standard especially in the context of judging a host State’s regulatory behaviour,<sup>160</sup> and thus the determination of the actual content of the standard depends on arbitral discretion.

The other view on FET is that its meaning is not restricted to the IMS, but is broader and autonomous.<sup>161</sup> This view is particularly strong in those BITs where the FET provision appears as an autonomous standard, i.e. without it being linked to the customary international law standard.<sup>162</sup>

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provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”

<sup>154</sup>*LFH Neer and Pauline Neer (USA) v. United Mexican States*, 4 UNRIAA 60.

<sup>155</sup>*Id.*; see also *Elettronica Sicula SpA (ELSI) (U.S. v. Italy)*, 1989 ICJ REP. 15. [hereinafter, *ELSI*]

<sup>156</sup>*Glamis Gold v. The United States of America*, UNCITRAL, Award, ¶ 614 (Jun. 8, 2009).

<sup>157</sup>*Id.* ¶ 598–627.

<sup>158</sup>*ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, ¶ 179 (Jan. 9, 2003); see also *Merrill and Ring*, *supra* note 147, at ¶¶ 205–11; see also *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, ¶ 567 (Sept. 22, 2014).

<sup>159</sup>See *ADF*, ¶ 113; *Merrill and Ring* *supra* note 147, at ¶ 213; see also *Int’l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, ¶ 193 (Jan. 26, 2006) [hereinafter, *Thunderbird*]; ROLAND KLAGER, *FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT LAW* 48–61 (2011).

<sup>160</sup>Henckels, *supra* note 30, at 36; W. Michael Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 30 ICSID REVIEW. – FOREIGN INV. L. J. 616 (2015).

<sup>161</sup>DOLZER & SCHREUER, *supra* note 1, at 134.

<sup>162</sup>For example, 2003 Indian Model BIT, *supra* note 37, art. 3 (2) provides the FET provision as, “Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting

However, the autonomous standard provides no guidance as to how to find the content of the FET provision, which, in turn, provides unfettered adjudicative discretion to ISDS tribunals to supply content to the FET provision.<sup>163</sup>

Interestingly, the 2016 Model BIT does not contain a FET provision.<sup>164</sup> India decided not to include a provision on FET because ISDS tribunals often interpret this provision too broadly.<sup>165</sup> Instead, the Model BIT contains a provision entitled ‘Treatment of Investments.’<sup>166</sup> As part of this, Article 3.1 prohibits a country from subjecting foreign investments to measures that constitute a violation of customary international law through:

- 1) denial of justice, which covers both judicial and administrative proceedings; or,
- 2) fundamental breach of due process; or,
- 3) targeted discrimination on manifestly unjustified grounds such as gender, race or religious belief; or,
- 4) manifestly abusive treatment such as coercion, duress, and harassment.<sup>167</sup>

This is clearly an attempt to provide normative content to the IMS without making any reference to the FET provision. This content, distinct even from the standard formulated under the 1926 *Neer* award,<sup>168</sup> is also an attempt to reject the evolution of the IMS, which ISDS tribunals have elaborated upon as mentioned earlier. For example, North American Free Trade Agreement (NAFTA) tribunals, while dealing with IMS, have embraced the concept of legitimate expectations.<sup>169</sup> The tribunal in *Glamis*

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*Party.*” There is no reference to customary international law. See generally SALACUSE, *supra* note 1, at 249–51; F.A. Mann, *British Treaties for the Promotion and Protection of Investments* 52 BRIT. Y.B. INT’L L. 241, 244 (1981).

<sup>163</sup>SALACUSE, *supra* note 1, at 251.

<sup>164</sup>See Rajput, *supra* note 38.

<sup>165</sup>India’s 2014 Statement, *supra* note 94.

<sup>166</sup>See 2016 Indian Model BIT, *supra* note 36, art. 3.

<sup>167</sup>*Id.* art. 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.”

<sup>168</sup>Hanessian & Duggal, *Is this the Change the World wishes to See* (2015), *supra* note 38.

<sup>169</sup>See, *Thunderbird* *supra* note 159, at ¶ 147; *Glamis Gold*, *supra* note 156, at ¶ 621; *Bilcon v Mexico*, UNCITRAL, (NAFTA), PCA Case No 2009-04, ¶ 455.

*Gold v. USA* stated that legitimate expectations<sup>170</sup> relate to an examination under Article 1105(1) in such situations where a host state's conduct "creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct."<sup>171</sup> By not specifically including legitimate expectations as part of the IMS, India clearly wishes to distance itself from the large body of arbitral case law that includes legitimate expectations as part of the IMS. While it is true that some ISDS tribunals have given a very expansive meaning to legitimate expectations, heavily tilted in favor of foreign investment,<sup>172</sup> some tribunals like *Glamis v. Mexico*, as mentioned before, have narrowed it down to situations where a host state induces an investor to make an investment by making specific representations to the investor, which investor relies upon to make the investment, and then the host state frustrates the representation made.<sup>173</sup> Legitimate expectations worded in this narrower form would place constraints upon the discretion of ISDS tribunals<sup>174</sup> and, simultaneously, also signal to foreign investors that their investment shall be protected when the host state goes back on the assurances that induced the investor to invest.<sup>175</sup> By not including legitimate expectations even in the narrower form, the Indian Model BIT tilts the scale in favour of host state's regulatory power.

Another key omission in Article 3.1 of the Indian Model BIT is the

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<sup>170</sup>The concept of legitimate expectations has become central to the FET standard in most BITs. See, *Técnicas Medioambientales Tecmed, S.A v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, (May 29, 2003) [hereinafter, *Tecmed*]; *Occidental, supra* note 9, at ¶ 183, 190; *Enron Award, supra* note 8, at ¶ 260; *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, ¶¶ 252–253 (Jan. 19, 2007); *Duke Energy v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 340 (Aug. 18, 2008).

<sup>171</sup>*Glamis Gold, supra* note 156, at ¶ 621; *Thunderbird, supra* note 159, at ¶ 147.

<sup>172</sup>For example, in *Tecmed, supra* note 170, at ¶ 154, the arbitral tribunal gave a very expansive and wide meaning to legitimate expectations: "The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations." See also *CMS Award, supra* note 8, at ¶ 277; *National Grid v. Argentina*, UNCITRAL, Award, ¶¶ 176–79 (Nov. 3, 2008).

<sup>173</sup>See also Canada-EU CETA art 8.10 (4); Michele Potesta, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REVIEW 88, 105–10 (2013).

<sup>174</sup>Henckels, *supra* note 30, at 38.

<sup>175</sup>Henckels, in context of Canada-EU CETA, where such a meaning of legitimate expectations is given, writes that the text should also clarify the circumstances in which it would be permissible for the host State to deviate "from legitimate expectations once established." See Henckels, *supra* note 30, at 38.

ground of arbitrariness to challenge host state's regulatory measure. Many ISDS tribunals,<sup>176</sup> including NAFTA tribunals, have held that if a state acts in a manifestly arbitrary manner, it breaches the IMS.<sup>177</sup> The ICJ, in the *ELSI* case,<sup>178</sup> gave some guidance regarding the meaning of arbitrary action. The court said arbitrariness "is not so much something opposed to a rule of law, as something opposed to the rule of law . . . [i]t is a willful disregard of due process of law, an act which shocks, at least surprises, a sense of juridical propriety."<sup>179</sup> Non-inclusion of something like "manifest arbitrariness" in the Indian Model BIT as one of the grounds to challenge the host state's regulatory conduct leaves a gap in the protection of foreign investment. The inclusion of "manifest arbitrariness" would have meant that while the host state's regulatory conduct would be judged using a high standard and thus provide enough regulatory latitude, it would also ensure that foreign investors have a recourse when host states acts in bad faith or in an irrational or manifestly unreasonable manner.

Notwithstanding the absence of "manifest arbitrariness," a critical question is whether a foreign investor could make use of "customary international law" in Article 3.1 to invoke "manifest arbitrariness" as a ground to challenge host state's regulatory conduct. The answer to this question would depend on the ISDS tribunal. Also, the reference to "fundamental breach of due process" in Article 3.1 means that a host state can be held liable only if a violation of due process reaches a particular threshold of severity and not otherwise. However, in the absence of any guidance in the text about the meaning of "fundamental," it is again left to the discretion of ISDS tribunals to determine the threshold of severity.<sup>180</sup>

Therefore, while Article 3.1 of the Indian Model BIT imposes some limitations on the interpretative authority of ISDS tribunals by specifically trying to define the content of IMS, it is still open to question whether the reference to "customary international law" could be used to bring in other elements into the equation. Also, by not specifically mentioning FET in the Model BIT, India has been able to get rid of the problems pertaining to determining the content of the standard and also its expansive definition.

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<sup>176</sup>*Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, ¶ 284 (Mar. 17, 2006); *Metaplar v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award, ¶187 (January 6, 2008); *AES Summit Generation Limited and AES-Tisza Erömi Kft v. The Republic of Hungary*, Award, ¶ 9.3.40. (Sept. 23, 2010).

<sup>177</sup>*Thunderbird*, *supra* note 159, at ¶ 197; *See also Glamis Gold*, *supra* note 156, at ¶ 625; *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, ¶ 298 (Sept. 18, 2009).

<sup>178</sup>*ELSI* *supra* note 155, at ¶ 128

<sup>179</sup>*Id.*

<sup>180</sup>Henckels makes the same point for 'fundamental breach of due process' given in the FET provision of the Canada-EU CETA, see Article 8.10(2)(b). *See, e.g.*, Henckels, *supra* note 30; *see also* Ursula Kriebaum, *FET and Expropriation in the (Invisible) EU Model BIT* 15 J. WORLD INV. & TRADE 454, 474 (2014).

However, the absence of grounds like manifest arbitrariness or narrowed formulation of legitimate expectations against which host state's regulatory conduct could be judged tilts the scale towards host state's right to regulate.

## VI. EXPROPRIATION

A very important substantive provision in most BITs is the rule against expropriation whereby a state is prohibited from “taking” privately-owned property, directly or indirectly, except for public purposes, in accordance with due process and with compensation.<sup>181</sup> Where expropriation takes place fulfilling all the conditions as aforementioned, it is lawful; non-fulfillment of any of these conditions renders it unlawful.<sup>182</sup> Direct expropriations—“taking” coming through the state's actions thereby depriving investors of legal title<sup>183</sup>—have become rare.<sup>184</sup> As modern states adopt a number of regulations to regulate various spheres of life, instances of indirect interference with investor's property rights have become more prominent. However, the difficulty is in determining when such indirect interference constitutes expropriation.<sup>185</sup> Indirect expropriation refers to the deprivation of the substantial benefits flowing from the investment without any formal “taking” of the property.<sup>186</sup> Whether host country's regulatory measures result in indirect expropriation is a question that has acquired prominence due to a range of sovereign regulatory functions being challenged as acts of expropriation by different foreign investors under BITs in the last decade or so. This includes expropriation cases against Argentina for adopting regulatory measures to save itself from an extremely severe economic and financial crisis,<sup>187</sup> claims of expropriation for

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<sup>181</sup>See generally SALACUSE, *supra* note 1, at 313-357; DOLZER & SCHREUER, *supra* note 1, at 98-129; NEWCOMBE AND PARADELL, *supra* note 1, at 341-69.

<sup>182</sup>PRABHASH RANJAN & PUSHKAR ANAND, *Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law*, in JUDGING THE STATE IN INTERNATIONAL TRADE AND INVESTMENT LAW 127-151 (Leila Choukroune ed., 2016).

<sup>183</sup>SALACUSE, *supra* note 1, at 322

<sup>184</sup>DOLZER & SCHREUER, *supra* note 1, at 101.

<sup>185</sup>See generally *Feldman*, *supra* note 9, at ¶ 100 (The *Feldman* tribunal recognised the difficulty by saying that direct expropriation was relatively easy whereas ‘it is much less clear when the governmental action that interferes with broadly-defined property rights . . . crosses the line from valid regulation to compensable taking’); ORG. FOR ECON. CO-OPERATION & DEV., *Principles of Corporate Governance* (2004); Spears, *supra* note 15, at 1049-105; Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State* 8 J. WORLD INV. & TRADE 717 (2007).

<sup>186</sup>DOLZER & SCHREUER, *supra* note 1, at 92; SALACUSE, *supra* note 1, at 297; *Starrett Housing Corporation v. Islamic Republic of Iran*, 4 Iran-US CTR 122, 154 (1983). See also Tippetts, Abbett, McCarthy, Stratton, and *TAMS-AFFA Consulting Engineers of Iran v. Islamic Republic of Iran*, 6 Iran-US CTR 219, 225 (1984).

<sup>187</sup>See generally *supra* note 8.

environment-related regulatory measure,<sup>188</sup> regulatory measures aimed at addressing the supply of drinking water,<sup>189</sup> and regulatory measures involving sovereign functions like taxation.<sup>190</sup>

However, most BITs do not provide much guidance on how to determine whether a host state's regulatory measure amounts to indirect expropriation or not. Over a period, ISDS tribunals have developed different tests for ascertaining whether indirect expropriation has taken place or not. First among these tests is the sole effects test, where the focus is only on the severity of the effect of the regulatory measure on foreign investment.<sup>191</sup> According to this test, measures that do not constitute direct expropriation may nevertheless constitute indirect expropriation if the effect of the regulatory measure causes a substantial deprivation of foreign investment.<sup>192</sup> Second, is the police power doctrine according to which state measures that are prima facie a lawful exercise of powers of the government (such as adopting a measure pursuing legitimate public welfare objective), may affect foreign interests considerably without amounting to expropriation.<sup>193</sup> Apart from these two tests, there is a third approach for determining indirect expropriation, proportionality analysis, which requires balancing the public purpose behind the regulatory measure with the effect that measure has on foreign investment.<sup>194</sup>

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<sup>188</sup>See *supra* note 6.

<sup>189</sup>See *Biwater Gauff Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, (Jul. 24, 2008).

<sup>190</sup>See *Occidental supra* note 9; *EnCana supra* note 9.

<sup>191</sup>See Ben Mostafa, *The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law*, 15 AUSTRALIAN J. INT'L. L. 267, 267-296 (2008).

<sup>192</sup>See *Pope and Talbot v. Canada*, Ad hoc Tribunal (UNCITRAL), Interim Award, ¶ 96 (June 26, 2000); *PSEG, supra* note 170, at ¶¶ 278-80; *CMS Award, supra* note 8, at ¶ 262.

<sup>193</sup>See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 532 (2008); G.C. Christie, *What Constitutes a Taking of Property under International Law?* 38 BRIT. Y.B. INT'L. L. 307, 335-338 (1962); J. Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 517-519 (1999); George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran United States Claims Tribunal*, 88 AM. J. INT'L. L. 585, 609 (1994); ALAIN PELLET, *Police Powers or the State's Right to Regulate*, in *BUILDING INTERNATIONAL INVESTMENT LAW - THE FIRST 50 YEARS OF ICSID* 447-462 (M. Kinnear ed., 2015); *Methanex supra* note 6, at p 4, ¶ 7; *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, ¶ 284 (Mar. 17, 2006); *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011).

<sup>194</sup>See ALEC STONE SWEET, *Investor-State Arbitration: Proportionality's New Frontier*, in *LAW & ETHICS OF HUMAN RIGHTS* (forthcoming 2010); Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15:1 J. INT'L. ECON. L. 223-255 (2012); Prabhash Ranjan, *Using Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal*, 3 CAMBRIDGE J. INT'L & COMP. L. 853, 883 (2014); *Tecmed supra* note 170; *LG&E supra* note 8 at, ¶ 195; *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, ¶ 312 (July 14, 2006); *El Paso*, ¶ 241; *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on

The problem is that which approach to apply in any given case depends primarily on the discretion of the ISDS tribunal because most BITs are silent on how to determine indirect expropriation. In view of this, if the objective is to constrain unfettered regulatory discretion, then a BIT should clearly specify a particular approach. Article 5.1 of the Model BIT prohibits nationalization or expropriation either directly or through measures having an effect equivalent to expropriation, except for public purpose, in accordance with due process and on payment of adequate compensation.<sup>195</sup> The Model BIT explains that direct expropriation occurs either through nationalization or through a formal transfer of title or outright seizure.<sup>196</sup> Article 5.3 (a)(ii) of the Model BIT provides that indirect expropriation occurs if a country's measure or a series of measures has an effect "equivalent to direct expropriation," i.e. the effect should result in substantial or permanent deprivation of investor's fundamental attributes of property—rights of use, enjoyment, and disposal—of the investment, although without formal transfer of title.<sup>197</sup> This is a clear reference to the sole effects doctrine to determine indirect expropriation.

However, to muddy the water, Article 5.3 (b) of the Model BIT provides: that the determination of whether a measure or a series of measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, which takes into consideration the following:

- (i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
- (ii) the duration of the measure or series of measures of a Party;
- (iii) the character of the measure or series of measures, notably their object, context and intent; and
- (iv) whether a measure by a Party breaches the Party's prior binding written commitment to the investor whether by contract, licence or

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Jurisdiction and Liability, ¶ 285 (Jan. 14, 2010).

<sup>195</sup>2016 Indian Model BIT, *supra* note 36, art 5.1.

<sup>196</sup>*Id.* art. 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 nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."

<sup>197</sup>*Id.* art. 5.3(a)(ii) provides: "The Parties confirm their shared understanding that: a) Expropriation may be direct or indirect: (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."

other legal document.

In order to determine whether there is an effect equivalent to expropriation, this part mandates an ISDS tribunal to adopt a case by case, fact-based inquiry, taking into account a number of factors, which includes the economic impact<sup>198</sup> of the measures; duration; character of the measures including their object and intent; and whether there has been a breach of prior written commitment to the investor.<sup>199</sup> So far as duration and economic impact are to be taken into consideration as factors to determine the effect of alleged measures, one is still in bounds of sole effects doctrine. However, the moment, as required by the Model BIT, character, object, and intent of the alleged measure are taken into consideration, one steps away from sole effect doctrine and treads into proportionality analysis for determination of indirect expropriation.<sup>200</sup> This kind of treaty language raises two difficult questions. First, in determination of indirect expropriation, how does one reconcile the substantial deprivation test, which focuses only on effect of regulatory measure and not on purpose behind the impugned regulatory measure, given in Article 5.3(a)(ii), with the proportionality test, given in Article 5.3 (b) (i-iv), where both effect and purpose have to be taken into account? Second, assuming that an ISDS tribunal decides to use proportionality method, how will this tribunal, in the context of Article 5.3(b), decide what weight to be given to each factor? Should the economic impact of the measure on foreign investment be given more importance than the objective and intent behind the measure or vice-versa? The text does not answer these questions and thus vests high discretion in the hands of ISDS tribunals.<sup>201</sup> This significant discretion will

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<sup>198</sup>*Id.* art. 5.3 (b)(i) (explaining that the adverse economic impact on the investments does not establish the occurrence of indirect expropriation).

<sup>199</sup>*Id.* art. 5.3(b)(iv). Expropriation provision in some new BITs contain this kind of language see, Canada-EU CETA, annex 8-A; US Model BIT 2012, annex B (4)(a); Canadian Model BIT 2004, annex B.13(1). This kind of language is largely reflective of the test laid down in a leading US Case on regulatory takings – *Penn Central Transport v. City of New York*, 438 U.S. 104, 123-125 (1978).

<sup>200</sup>On use of proportionality in ISDS, *See generally* BENEDICT KINGSBURY & STEPHAN W. SCHILL, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 74-104 (Stephan W. Schill ed., 2010); A. KULICK, *GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW* 171-173 (2012); Henckels, *supra* note 194.

<sup>201</sup>*See* Henckels, *supra* note 30, (who offers similar critique for the Canada-EU CETA that contains similarly worded expropriation provision as the Indian Model BIT.) This test has also been criticized by others. For similar arguments in case of EU's proposal on indirect expropriation in the Transatlantic Treaty and Investment Partnership (TTIP) negotiations, *See* Federico Ortino, *Defining Indirect Expropriation: The Transatlantic Trade and Investment Partnership and the (Elusive) Search for 'Greater Certainty'*, 43 *LEGAL ISSUES OF ECONOMIC INTEGRATION*, 351 (2016).

allow ISDS tribunals to second-guess the regulatory measures adopted by host states by weighing and balancing the benefit of these measures with the effect on foreign investment.<sup>202</sup> Such a determination would either result in foreign investment protection trumping over the host state's regulatory power or vice versa based on the subjective determination of the tribunal.<sup>203</sup>

The complications do not end here. In addition to the sole effect test and the proportionality test, Article 5 also includes the police power doctrine: "non-discriminatory regulatory measures or the awards of the judicial bodies of a host state that are designed and applied to protect legitimate public interest or public purpose objectives such as health, safety and environment shall not constitute expropriation under this article."<sup>204</sup> The formulation of the aforesaid exception is quite close to the language used by the *Methanex* tribunal in its pronouncement of the doctrine of police powers where it held that "[A] non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory. . . ." <sup>205</sup> Similarly worded provisions are also present in other treaties such as EU-Canada CETA.<sup>206</sup> However, in these treaties, such provisions are qualified by the following words: "except in rare circumstances."<sup>207</sup> For example, Annex 8-A (3) of the EU-Canada CETA provides: "for greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose

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<sup>202</sup>See Han Xiuli, *The Application of the Principle of Proportionality in Tecmed v. Mexico*, 6 CHINESE J. INT'L L. 635, 636-37 (2007) (explaining that a proportionality analysis will contain three steps that must be assessed cumulatively. First, whether the measure is suitable for the legitimate public purpose—this will require a causal link between the measure and its object. If the measure satisfies, the first step, then, second step will be to find out whether the measure is necessary i.e. whether there is a less restrictive alternative measure that will achieve the same objective. If indeed the measure is 'necessary', then the third step (also known as proportionality *stricto sensu*) will involve balancing the effects of the measure on the right that has been affected with the public benefit sought to be achieved by the measure); KINGSBURY & SCHILL, *supra* note 200, at 85-88; KULICK, *supra* note 200, at 186-189; Erlend M. Leonhardsen, *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, 3 J. INT. DISP. SETTLEMENT 95 (2012); Jan H. Jans, *Proportionality Revisited*, 27 LEGAL ISSUES OF ECON. INTEGRATION 239, 240-241 (2000).

<sup>203</sup>See Ranjan, *supra* note 194; See also BENEDIKT PIRKER, *Seeing the Forest Without the Trees – The Doubtful Case for Proportionality Analysis in International Investment Arbitration*, in PROPORTIONALITY AND POST-NATIONAL CONSTITUTIONALISM (Alexia Herwig et al. eds., 2011).

<sup>204</sup>2016 Indian Model BIT, *supra* note 36, art. 5.5.

<sup>205</sup>*Methanex supra* note 6.

<sup>206</sup>See Canada-EU CETA, *supra* note 31, annex 8-A(3); Trans-Pacific Partnership, Annex 9-B(3)(b), Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

<sup>207</sup>See Canada-EU CETA, *supra* note 31, annex 8-A(3).

that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety, and the environment, do not constitute indirect expropriations.”<sup>208</sup> This provision, unlike Article 5.5 of the Indian Model BIT, recognises that there may be situations where a host state’s non-discriminatory measures designed and applied for public welfare purposes may amount to expropriation when the impact of a measure is manifestly excessive on foreign investment in light of its object and purpose.<sup>209</sup> Although it may be difficult to determine when measures are excessive in light of the regulatory purpose they seek to achieve,<sup>210</sup> language such as this at least provides an opportunity to balance investment protection with a host state’s regulatory power. In the case of the Indian Model BIT, Article 5.5 does not recognise any such opportunity. Thus, even if the impact of the regulatory measures is manifestly excessive or disproportionate, the regulatory measure will not amount to expropriation as long as the measure satisfies the bare minimum threshold of being non-discriminatory and aiming to fulfil some public welfare measure. Even the usual benchmarks to check regulatory overreach such as ensuring that a measure is adopted in “good faith” or following “due process” do not find any mention in Article 5.5. This leaves a major gap in protection of foreign investment because it allows the host state to completely shift the cost of a regulatory measure on foreign investors, which clearly tilts the balance in favour of the host state. Also, a broad provision such as this, with limited checks, could be abused by host states by adopting sweeping regulatory measures to further the claim for a large public benefit, which again would compromise protection of foreign investment.<sup>211</sup>

In sum, the expropriation provision does not reduce the arbitral discretion. Whether the state’s right to regulate will be balanced with investment protection, to a great extent, will depend on the ISDS tribunal interpreting the provision. With reference to the inclusion of the police power doctrine, the scale tilts in favour of the host state.

## VII. FULL PROTECTION AND SECURITY

Another major treaty provision found in most BITs is “full protection and security” (FPS). As part of this provision, host states undertake an obligation to provide FPS to foreign investment. However, BITs, like the FET provision, do not usually define FPS. This has given rise to the debate of whether FPS is confined to the physical safety and protection of

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<sup>208</sup>*Id.*

<sup>209</sup>*Id.*

<sup>210</sup>See Henckels, *supra* note 30 at 42-43.

<sup>211</sup>KENNETH J. VANDELDE, US INTERNATIONAL INVESTMENT AGREEMENTS 296 (2009).

investments or if it also includes other kinds of protection.<sup>212</sup> Many tribunals have interpreted FPS to mean that it puts the host state under an obligation to ensure physical safety and protection of foreign investment.<sup>213</sup> Some arbitral tribunals have expanded the meaning of FPS from physical protection to also include regulatory and legal security.<sup>214</sup> For example, in *CME v. Czech Republic*, the tribunal, while analyzing the obligation of FPS held that “the host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.”<sup>215</sup> We still have some tribunals that have held that FPS only provides protection to foreign investment from physical injury and does not encompass other kinds of regulatory protection such as maintenance of a stable and legal commercial or business environment.<sup>216</sup>

The 2016 Model BIT provides that foreign investment and investors shall be accorded full protection and security.<sup>217</sup> Further, the 2016 Model provides that FPS is restricted to physical security for foreign investment and investors and does not extend to “*any other obligation whatsoever*.”<sup>218</sup> Given the arbitral maze on the actual scope of the FPS provision, this clarity in the Indian Model BIT will help curb arbitral discretion. It also reconciles investment protection with the host state’s regulatory power. On the one hand, it puts the host state under an obligation to provide physical security to foreign investments, and at the same time, ensures that the host state’s adoption of regulatory measures that might impact the business or legal environment cannot be challenged as a violation of FPS, though such regulatory measures may be susceptible to challenge under other BIT provisions.

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<sup>212</sup>DOLZER & SCHREUER, *supra* note 1, at 160-61.

<sup>213</sup>See *AAPL supra* note 130; *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No ARB/93/1, Award (Feb. 21, 1997).

<sup>214</sup>NEWCOMBE AND PARADELL, *supra* note 1, at 310.

<sup>215</sup>*CME Czech Republic v. The Czech Republic*, UNCITRAL, Partial Award, ¶ 613 (Sept. 13, 2001); See also *Azurix, supra* note 194, at ¶¶ 406-408; *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, ¶ 303 (Feb. 6, 2007); *National Grid, supra* note 172, at ¶ 187-90; *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 343, (Dec. 27, 2010).

<sup>216</sup>*AWG Group v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶179 (Jul. 30, 2010); See also *Saluka, supra* note 176, at ¶ 484; *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, (Apr. 4, 2016).

<sup>217</sup>See 2016 Indian Model BIT, *supra* note 36, art 3.2.

<sup>218</sup>*Id.* art. 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.” Emphasis added.

### VIII. MONETARY TRANSFER PROVISIONS

Monetary Transfer Provisions (MTPs) in BITs regulate the transfer of funds related to investment in and out of the country. MTPs in BITs should not be confused with admission requirement clauses under which a host state is obligated to admit new investments.<sup>219</sup> MTPs in BITs cover transfers related to investments that have been made such as allowing entry of new capital to augment existing investment or to allow outflow of incomes derived from the investment made. 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 and whether the transfer can be made promptly.<sup>220</sup> In most BITs, MTPs cover all “transfers” or “payments” related to investment.<sup>221</sup> Further, depending on the treaty language, MTPs cover both inflows and outflows of funds.<sup>222</sup> These “transfers” include both current transfers<sup>223</sup> and capital transfers.<sup>224</sup>

MTPs are an integral part of the protection offered to foreign investment by host States in BITs. MTPs are important for foreign investors because they provide the freedom to transfer all funds related to investment for a number of business-related needs.<sup>225</sup> For example, a foreign investor may need to bring in additional capital to support the existing investment or might need to repatriate capital back to the home country in order to service debts or to pay dividends or to repatriate proceeds of the sale of investment, etc.<sup>226</sup> Restrictions on the transfer of funds related to an investment may result in investment not being made in the first place, 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 (for example, bringing in additional capital to support the existing investment).<sup>227</sup> Thus, as a general matter, foreign investors tend to

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<sup>219</sup>UNCTAD, TRANSFER OF FUNDS 32 (2000), <http://unctad.org/en/docs/psiteiid20.en.pdf>.

<sup>220</sup>VANDELDE, *supra* note 16, at 317.

<sup>221</sup>*Id.*

<sup>222</sup>*Id.*, at 319.

<sup>223</sup>For example, the obligation on States to allow free outward transfer of income derived from investments is an example of current transfers—the 2003 Indian Model BIT provides transfers of “Net operating profits including dividends and interest in proportion to their share-holdings,” which is an example of current transaction. 2003 Indian Model BIT, *supra* note 37, art. 7(1)(b).

<sup>224</sup>For example, the 2003 Indian Model BIT, art. 7(1)(f) provides an example of capital transaction—“Proceeds received by investors in case of sale or partial sale or liquidation.” 2003 Indian Model BIT, *supra* note 37, art. 7(1)(f).

<sup>225</sup>DOLZER & SCHREUER, *supra* note 1, at 212.

<sup>226</sup>SALACUSE, *supra* note 1, at 150.

<sup>227</sup>Thomas Wälde & Abba Kolo, *Investor-State Disputes: The Interface between Treaty-Based International Investment Protection and Fiscal Sovereignty*. 35 *INTERTAX* (2007) 424-

be free, at all times, to transfer funds in and out of the host country.

For the foreign investor to freely transfer funds out of the country, it is necessary to draw from the host country's foreign exchange reserve (for example, by converting earnings in the local currency into an international currency by drawing from the foreign exchange reserve).<sup>228</sup> However, the host country's foreign exchange reserve is finite and also serves other significant purposes, like paying for imports and maintaining the value of the domestic currency.<sup>229</sup> Thus, if the freedom to transfer funds out of the country severely impacts the finite foreign exchange reserve of the host country, the country could impose restrictions on the conversion of local currency into foreign currency,<sup>230</sup> which, in turn, will impact the right of the foreign investor to transfer funds out of the country. Similarly, large infusions of capital by the foreign investor can have adverse macroeconomic consequences, such as the appreciation of the country's currency, the consequent reduction of export competitiveness, and the widening of the current account deficit; it can also result in inflation by increasing the monetary supply, which can have other adverse macroeconomic consequences.<sup>231</sup> These might also 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 2016 Model BIT recognises the investor's right to transfer all funds related to investment such as contributions to capital, profits, dividends, interest payments, etc.<sup>232</sup> However, the investor's right to transfer funds is subject to three restrictions. First, Article 6.1 subjects the investor's right to transfer funds to the domestic laws of the host State. In 1999 India enacted the Foreign Exchange Management Act (FEMA).<sup>233</sup> Although Section 6(1) of the Act allows for capital account transactions, this allowance 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.<sup>234</sup> Also, Section 6(3) gives power to the RBI to prohibit, restrict, or regulate a number of capital account transactions.<sup>235</sup>

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449, 434.

<sup>228</sup>VANDEVELDE, *supra* note 16, at 316.

<sup>229</sup>*Id.*

<sup>230</sup>*Id.*

<sup>231</sup>SALACUSE, *supra* note 1, at 256.

<sup>232</sup>2016 Indian Model BIT, *supra* note 36, art. 6.1.

<sup>233</sup>The Foreign Exchange Management Act 1999, § 6(1), No. 42, Acts of Parliament, (1999) <http://indiacode.nic.in>.

<sup>234</sup>*Id.* § 6(2)(b).

<sup>235</sup>*Id.* §§ 6(3), (a) - (j).

Second, Article 6.3 of the 2016 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, labor obligations and laws on taxation, etc.<sup>236</sup> Third, Article 6.4 of the 2016 Model BIT provides that the host state may temporarily restrict the investor’s right to transfer funds in the event of serious BoP 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 the host State’s regulatory power, it is still not clear which situations would qualify as a serious balance of payment difficulty.

The same exception for serious BoP difficulties and external financial difficulties is also found in the general exceptions, Article 32.2 of the 2016 Model BIT (discussed in the following section). This will allow India to deviate from all substantive obligations, including MTPs, in order to remedy serious BoP problems, exchange-rate difficulties, and external financial difficulties.<sup>237</sup> Since these exceptions are already given as part of MTPs in Article 6, one does not understand the need of having them again in the general exception clause. Alternatively, if these exceptions are given in the general exception clause, then there is no need to have them as part of the MTP provision. Overall, the MTPs in the 2016 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 the host state to exercise its right to regulate.

#### IX. NON-PRECLUDED-MEASURES (NPM) CLAUSES OR GENERAL EXCEPTIONS

Non-Precluded Measures (NPM) provisions in a BIT, also known as General Exceptions clauses, starting with words such as “nothing in this agreement precludes. . .,” provide the regulatory latitude to host countries to deal with threats to important national interests.<sup>238</sup> NPM provisions provide flexibility to countries to deviate from the substantive obligations in certain circumstances that warrant giving preference to non-investment policy goals over investment protection. Given the debate on the conflict between investment protection and host countries’ regulatory power, NPM provisions in BITs are useful tools that allow a host country to adopt measures for the pursuit of non-investment objectives without incurring any

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<sup>236</sup>2015 Draft Indian Model BIT, *supra* note 102, art. 6.3, sub-items (i) to (xi).

<sup>237</sup>*Id.* art. 16.1 (iii).

<sup>238</sup>SALACUSE, *supra* note 1, 343; ANDREW NEWCOMBE, *General Exceptions in International Investment Agreements*, SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 356–357 (Marie-Claire C. Segger et. al. eds. 2011).

liability under international law.

NPM provisions in BITs were put to a test when a spate of arbitration cases was brought against Argentina for adopting measures aimed at addressing an economic crisis in early 2000.<sup>239</sup> For example, U.S. investors claimed that the regulatory measures adopted by Argentina violated many provisions of the U.S.-Argentina BIT, whereas Argentina relied on the NPM provision given in Article XI of the BIT<sup>240</sup> as a defence for these claims.<sup>241</sup> These cases, despite similar facts and law, have resulted in conflicting decisions with some ISDS tribunals concluding that Argentina's action cannot be condoned under Article XI<sup>242</sup> whereas some have held otherwise.<sup>243</sup>

An NPM provision has two main elements: first, the permissible objectives, and second, the nexus requirement. Permissible objectives means those objectives mentioned in the NPM provision for which the host state can deviate from its treaty obligations. It is important to note that a host state will be able to deviate from its BIT obligations, relying on the NPM provision, only for those objectives that are contained in the NPM provision and not for other objectives.<sup>244</sup> A nexus requirement in an NPM provision is the link between adopted measures and the permissible objective to be achieved through that measure. Words such as "necessary" require a stronger connection between the regulatory measure and permissible objective compared to words such as "related to."

The 2016 Model BIT contains a separate chapter on exceptions covering both general and security exceptions. Article 32 contains general

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<sup>239</sup>For more on the Argentine economic crisis and subsequent IIA disputes see ALVAREZ & KHAMSI, *supra* note 15; For Argentine case, see *supra* note 8.

<sup>240</sup>US-Argentina BIT provides "[t]his treaty shall not preclude the application by either party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests." US-Argentina BIT, *supra* note 14, art. XI.

<sup>241</sup>See *supra* note 8, for a list of cases where Argentina invoked NPM provision.

<sup>242</sup>*CMS Award*, *supra* note 8; *Enron Award*, *supra* note 8; *Sempra Award*, *supra* note 8.

<sup>243</sup>*LG&E*, *supra* note 8; *Continental Casualty Award*, *supra* note 8.

<sup>244</sup>For more discussion on this see William Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties* 48 VA. J. INT'L L. 314 (2008). For a discussion on NPM provision in Indian BITs see 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. For a different view point on the inclusion of General Exception clauses in BITs, see ANDREW NEWCOMBE, *The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?* in IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 267 (Armand de Mestral & Celine Lévesque eds. 2013).

exceptions with a long list of permissible objectives, which includes protection of public morals,<sup>245</sup> maintenance of public order,<sup>246</sup> protection of human, animal, or plant life or health,<sup>247</sup> protection and conservation of the environment,<sup>248</sup> to ensure compliance with domestic laws that are not inconsistent with the provisions of the treaty.<sup>249</sup> The inclusion of these permissible objectives will provide opportunities to reconcile investment protection with the host state's right to regulate.

Another interesting aspect of the NPM provision is that it contains "necessary" as the only nexus requirement for all the above-mentioned permissible objectives. Furthermore, the 2016 Model BIT, in footnote 6, provides guidance to the arbitral tribunal in how to determine whether a measure is "necessary."<sup>250</sup> 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. The first author of this article has already argued for this interpretation of necessary to be put in the text.<sup>251</sup>

This meaning of necessary is partly inspired from the WTO jurisprudence, which has developed a two-tier test to determine the meaning of necessary in Article XX of GATT.<sup>252</sup> The test involves, first, the proportionality, or the weighing and balancing, test, which will weigh and balance different factors like the importance of the regulatory value pursued, the contribution made by the challenged measure to the regulatory value, and the restrictive effect of the measure on international trade. Second, if the first step yields a preliminary conclusion of the measure being necessary, then the second step should compare this measure with other least trade restrictive measures, which are reasonably available to the importing country.<sup>253</sup> If such measures are available then the impugned

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<sup>245</sup>2016 Indian Model BIT, *supra* note 36, art 32.1 (i).

<sup>246</sup>*Id.*

<sup>247</sup>*Id.* art. 32.1 (ii).

<sup>248</sup>*Id.* art. 32.1 (iv).

<sup>249</sup>*Id.* art. 32.1 (iii).

<sup>250</sup>*Id.* art. 32.1 n. 6.

<sup>251</sup>Ranjan, *supra* note 244, at 33–34; Ranjan, Ph.D. Thesis, *supra* note 57. For a different view on this see Raju, *supra* note 79.

<sup>252</sup>See Chad P. Brown & Joel P. Trachtman, *Brazil—Measures Affecting Imports of Retreaded Tyres: A Balancing Act*, 8 WORLD TRADE REV. 85, 87 (2009). For WTO jurisprudence on 'necessary' in Article XX of GATT see Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS 161 and 169/AB/R (adopted Dec. 11, 2000); Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/AB/R (adopted Apr. 25, 2005); Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007).

<sup>253</sup>Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law*, 14 CHI. J. INT'L L.

measure is not necessary. The Indian Model BIT has adopted the second part of the two-tier test. Consequently, this will not allow for any weighing and balancing review, or, in other words, for subjective assessment to be made by an ISDS tribunal regarding whether a regulatory measure is significant vis-à-vis the cost imposed on foreign investment. By specifying the meaning of necessary, the Indian Model BIT has curtailed arbitral discretion, and at the same time, it ensures that foreign investment will get adequate protection by requiring that only least investment restrictive measures which are reasonably available to the host country be adopted.

The specification of the meaning of necessary also ensures that an ISDS tribunal should not conflate treaty based defence of necessity with the necessity defence under customary international law.<sup>254</sup> This is specifically important as many ISDS tribunals interpreted necessary in the treaty by taking recourse to necessary in customary international law<sup>255</sup> like the necessary interpretation in Article XI of the US-Argentina BIT.<sup>256</sup>

However, a major textual flaw in Article 32 is the absence of a chapeau, which would have ensured that host states' measures are applied in a manner that does not constitute a misuse or abuse of the NPM provisions. The only requirement is that measures should be applied on a 'non-discriminatory' basis.<sup>257</sup> To make sure that host states don't abuse their regulatory power, the NPM provisions should contain a chapeau specifying that there shall be no unjustifiable discrimination or that there shall be no disguised restriction, as is the case with Article XX of GATT.<sup>258</sup>

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93, 98 (2013).

<sup>254</sup>G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, at art. 25 (Dec. 12, 2001) provides: "(1) Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. (2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity."

<sup>255</sup>See *CMS Award*, *supra* note 8; *Enron Award*, *supra* note 8. Some tribunals didn't follow this approach—*Continental Casualty Award*, *supra* note 8; See also Jürgen Kurtz, *Adjudging the exceptional at International Investment law: Security, Public Order and Financial Crisis*, 59:2 INT'L. & COMP. L. QTRLY. 325-371 (2010)

<sup>256</sup>US-Argentina BIT, *supra* note 14, at art. 11: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests."

<sup>257</sup>See 2016 Indian Model BIT, *supra* note 36, art. 32.1.

<sup>258</sup>The significance of the chapeau in context of Article XX of GATT has been repeatedly asserted by the WTO Appellate Body. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996); Appellate Body Report, *United States: Import Prohibition of Certain Shrimp and*

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

## X. OTHER EXCEPTIONS

Apart from the NPM provisions or the general exception clauses, Article 2 of the 2016 Model BIT, while describing the scope and coverage of the treaty, specifically excludes certain regulatory measures from the purview of the treaty. We discuss two important regulatory measures here.

### *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.*”<sup>259</sup> This article further provides that a host state’s decision that a particular regulatory measure is related to taxation, whether made before or after the commencement of arbitral proceedings, shall be non-justiciable.<sup>260</sup> No arbitral tribunal shall be able to review such decision.<sup>261</sup>

As previously discussed, in response to Vodafone and Cairn challenging India’s retrospective application of taxation law under different BITs, it is quite evident that India has decided to keep taxation measures outside the purview of the BIT. Excluding taxation measures completely means that foreign investors shall not be able to challenge such measures under BITs under any circumstance. Moreover, allowing host states to have the last word on whether a regulatory matter pertains to taxation or not might lead to regulatory abuse. In any case, excluding taxation measures altogether from the purview of the BIT is a disproportionate reaction especially when it has been argued that taxation is part of a state’s police power and thus it justifies non-compensation even in cases of deprivation of foreign investment.<sup>262</sup> Though one concedes that the actual scope of claiming that taxation is part of a state’s police powers and is thus non-compensable is far from settled,<sup>263</sup> it is also true that arbitral tribunals should give due deference to host states while adjudicating on host state’s taxation-related regulatory measures. For example, the tribunal in *EnCana*

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*Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); *See also* Canada-EU CETA *supra* note 31, art. 28.3.

<sup>259</sup>2016 Indian Model BIT, *supra* note 36, art 2.4(ii) (emphasis added).

<sup>260</sup>*Id.*

<sup>261</sup>*Id.*

<sup>262</sup>NEWCOMBE AND PARADELL, *supra* note 1, at 358. *See also* BROWNLIE, *supra* note 193; Louis B. Sohn & R. R. Baxter, *International Responsibility of States for Injuries to Aliens* 55 AM. J. INT’L L. 545 (1961).

<sup>263</sup>RANJAN & ANAND, *supra* note 182.

v. *Ecuador* recognized that if a tax law “is extraordinary,” or “punitive in amount,” a claim of indirect expropriation can be made.<sup>264</sup> On the same line, the tribunal in *Burlington v. Ecuador* observed that “confiscatory taxation constitutes an expropriation without compensation and is unlawful.”<sup>265</sup>

### *Compulsory License*

The Model BIT also excludes the issuance of compulsory licenses (“CLs”) from the purview of the BIT provided that such issuance is consistent with the WTO treaty.<sup>266</sup> In other words, notwithstanding the specific exemption of CL from the scope of the BIT, foreign investors can still challenge the issuance of CLs as a violation of some BIT provision arguing that CLs have not been issued in accordance with the TRIPS Agreement.<sup>267</sup> In other words, an ISDS tribunal, which may not have expertise in WTO law,<sup>268</sup> would then have to make a substantive determination as to whether the issuance of CL is consistent with TRIPS, if not, then the BIT would continue to apply.<sup>269</sup> Thus, this provision too, like many other provisions previously discussed, does not reduce arbitral discretion, which India claimed to be one of the key objectives behind the Model BIT.

## XI. INVESTOR-STATE DISPUTE SETTLEMENT

The investor-state dispute settlement (ISDS) provision in BITs<sup>270</sup> acts

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<sup>264</sup>*EnCana, supra* note 9, at ¶ 177.

<sup>265</sup>*Burlington, supra* note 9, at ¶ 395; *see also Occidental, supra* note 9, at ¶ 85, (“Taxes can result in expropriation as can other types of regulatory measures.”); *Link-Trading Joint Stock Co. v. Dep’t for Customs Control of the Republic of Moldova, Ad Hoc/UNCITRAL, Final Award, ¶ 64* (April 18, 2002) (“As a general matter, fiscal measures only become expropriatory when they are found to be an abusive taking. Abuse arises where it is demonstrated that the State has acted unfairly or inequitably towards the investment, where it has adopted measures that are arbitrary or discriminatory in character or in their manner of implementation, or where the measures taken violate an obligation undertaken by the State in regard to the investment.”)

<sup>266</sup>2016 Indian Model BIT, *supra* note 36, at art. 2.4(iii) (providing that the treaty shall not apply to “the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the international obligations of Parties under the WTO Agreement.”)

<sup>267</sup>*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, 421 (2010); Bryan Mercurio, *Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements*, 15:3 J. INT’L ECON. L. 871, 905–906 (2012).

<sup>268</sup>Mercurio, *supra* note 267, at 905.

<sup>269</sup>*Id.*

<sup>270</sup>For a general discussion on ISDS *see* SALACUSE, *supra* note 1, at 369–392; *see also*

as a standing offer on part of the host state to submit the dispute to arbitration if any foreign investor alleges breach of the substantive obligations under that BIT.<sup>271</sup> The Indian Model BIT provides for ISDS; however, foreign investors recourse to international arbitration is heavily qualified in three ways<sup>272</sup> discussed below.

### *Jurisdictional Qualification*

The Indian Model BIT limits the scope of ISDS to disputes that arise out of an alleged breach of an obligation of the host state under Chapter II of the BIT and not under any other chapter.<sup>273</sup> However, any dispute arising from the breach of the obligations contained in Articles 9 (Entry and Sojourn of Personnel) and 10 (Transparency) of this Treaty is excluded from the scope of ISDS.<sup>274</sup> In other words, a foreign investor can bring a claim against a host State only for alleged violation of “treatment of investments.”<sup>275</sup> Treatment of investments includes FPS, national treatment, expropriation, MTPs and compensation for losses (a provision that obligates a host state to accord national treatment in terms of payment of compensation, etc. when foreign investment suffers losses due to war, armed conflict, civil strife, etc.).<sup>276</sup> The foreign investor cannot bring disputes arising out of any other provision of the BIT.

A very important jurisdictional limit that 2016 Model BIT imposes on an ISDS tribunal is to restrict its jurisdiction to disputes arising solely out of the breach of the BIT.<sup>277</sup> The Model BIT specifically excludes disputes arising solely out of the breach of contract between an investor and host state from the jurisdiction of an ISDS tribunal, which have to be resolved in the domestic courts or in accordance with the dispute resolution process that has been provided for specifically in the concerned contract.<sup>278</sup> In other

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ERIC DE BRABANDERE, *INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS AND IMPLICATIONS* (2014); CAMPBELL MCLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007); VAN HARTEN, *supra* note 12; Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74:1 BRIT. Y.B. INT'L. L. 151 (2003). For detailed discussion of the ISDS provision in the 2016 Model BIT, see PRABHASH RANJAN & PUSHKAR ANAND, *Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it Go Too Far* in *INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA* (Julien Chaisse & Luke Nottage eds., 2018) (*forthcoming*).

<sup>271</sup>BRABANDERE, *supra* note 270, at 50–51.

<sup>272</sup>See Hanessian & Duggal, *Is this the Change the World Wishes to See* (2017), *supra* note 38, at 226.

<sup>273</sup>2016 Indian Model BIT, *supra* note 36, art. 13.2.

<sup>274</sup>*Id.*

<sup>275</sup>*Id.*

<sup>276</sup>*Id.* art. 7.

<sup>277</sup>*Id.* art. 13.2; Rajput, *supra* note 38.

<sup>278</sup>*Id.* art. 13.2.

words, the Indian Model BIT does not contain, what is known as an umbrella clause that elevates a contractual breach on the part of the host state to the breach of BIT obligations by requiring host states to observe not just the treaty, but “any other obligations” it may owe to foreign investors.<sup>279</sup> “Any other obligations,” arguably, would include contractual obligations and therefore an umbrella clause allowing an investor to access ISDS even for contractual breaches by the host state, even though the purpose of ISDS in BITs is to address treaty breaches.<sup>280</sup> Over the years, ISDS tribunals have not been consistent in deciding the scope of umbrella clauses in BITs.<sup>281</sup> Therefore, the specific exclusion of contractual breaches from the jurisdiction of ISDS tribunals in the Indian Model BIT is significant in both limiting arbitral discretion, and in bringing clarity about the rights of foreign investors and host states.<sup>282</sup>

In addition to these limits, the Model BIT also imposes two other limitations on an ISDS tribunal. First, an ISDS tribunal shall not have the jurisdiction to review the merits of a decision made by a domestic judicial authority.<sup>283</sup> Second, an ISDS tribunal cannot accept jurisdiction over any claim that is or has been subject to arbitration under Chapter V of the treaty, which provides for interstate dispute settlements.<sup>284</sup>

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<sup>279</sup>See, e.g., German Model BIT 2008 art. 7.2, Swiss Model BIT art 10.2; see Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5:2 J. WORLD INVESTMENT & TRADE 231 (2004); Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20:4 ARBITR. INT'L 411 (2004); Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18:1 MINN. J. INT'L L. 1 (2009); Jonathan B. Potts, *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization*, 51:4 VA. J. INT'L L. 1005 (2011); BRABANDERE, *supra* note 270, at 38; Thomas W. Walde, *The “Umbrella” Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INVESTMENT & TRADE 183 (2005).

<sup>280</sup>See, e.g., German Model BIT 2008 art. 7.2, Swiss Model BIT art 10.2; see Schreuer, *supra* note 279; Sinclair, *supra* note 279; Potts, *supra* note 279; BRABANDERE, *supra* note 270, at 38.

<sup>281</sup>See *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Objections to Jurisdiction (Aug. 6, 2003); *Joy Mining supra* note 118 (denying the applicability of umbrella clauses); *Eureko B.V. v. Republic of Poland*, Ad Hoc, Partial Award (Aug. 19, 2005) (holding that the umbrella clause automatically transforms a contract violation into a treaty violation); *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction (Jan. 29, 2004) (holding that a contract violation gets transformed into a treaty violation provided that the contract does not contain any exclusive dispute settlement clause).

<sup>282</sup>See also Rajput, *supra* note 38.

<sup>283</sup>2016 Indian Model BIT, *supra* note 36, art 13.5(i).

<sup>284</sup>*Id.* art. 13.5(ii).

*Exhaustion of Local Remedies*

The rule related to “exhaustion of local remedies” is a long-standing rule of customary international law,<sup>285</sup> even predating the existence of the modern international law.<sup>286</sup> However, countries in their BITs have followed different Models varying from express requirement of exhaustion of local remedies,<sup>287</sup> to making no reference to exhaustion of local remedies,<sup>288</sup> to express rejection of the exhaustion principle in certain BITs.<sup>289</sup>

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<sup>285</sup>Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), Judgment, 1989 I.C.J. Rep. 1989, ¶ 31 (July 20); Interhandel Case (Switzerland v. U.S.), Judgment, 1959 I.C.J. Rep. 1959, ¶ 6 (Mar. 21); See also Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 Brit. Y.B. Int'l. L. 83 (1959); A.A. Cancado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, 12 BELGIAN REV. INT'L L. 499 (1976); CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* (2d ed. 2004); JAMES R. CRAWFORD & THOMAS D. GRANT, *Exhaustion of Local Remedies* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007).

<sup>286</sup>Matthew C. Potterfield, *Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?* 41 YALE J. INT'L L. (2015); see also for the doctrine of exhaustion of local remedies in international investment law—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 21<sup>ST</sup> CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (2009); Paul Peters, *Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties* 44:2 NETHERLANDS INT'L L. REV. 233-243 (1997); 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).

<sup>287</sup>For example, Agreement on economic cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore, May 16, 1972, entered into force Sept. 7, 1973 [Netherlands-Singapore BIT], 1972, art. XI – The Contracting Party in the territory of which nationals of the other Contracting Party make or intend to make investments, *shall after the exhaustion of all local administrative and judicial remedies*, agree to any demand on the part of such nationals to submit, for arbitration or conciliation, to the Centre established by the Convention of Washington of 18 March 1965 on the settlement of investment disputes between States and nationals of other States, any disputes that may arise in connection with the investments (emphasis added).

<sup>288</sup>Most of the BITs fall in this category. For example, see India-UK BIT, art.10, which makes no reference whatsoever to the “exhaustion principle.” Such absence is generally interpreted as the waiver of the requirement of exhaustion of local remedies. See, Potterfield, *supra* note 286, at 3-4.

<sup>289</sup>For example, see the Agreement Between the Government of the Republic of Croatia and the Government of The Kingdom of Cambodia Rjon the Promotion and Reciprocal Protection of Investments, May 18, 2001, entered into force June 15, 2002 [Croatia-Cambodia BIT], art. 10.2(b):

In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre. *This consent implies the renunciation of the requirement that the internal administrative or judicial remedies should*

A critical qualification to India's consent to ISDS, as given in the 2016 Model BIT, is that foreign investors should first exhaust local remedies for a period of at least five years before commencing international arbitration.<sup>290</sup> These five years are to be counted from the date when the foreign investor first acquired knowledge of the measure in question and the resulting loss or damage to the investment or when the investor should have first acquired such knowledge.<sup>291</sup>

The Model BIT further provides that the requirement to exhaust local remedies shall not be applicable "if the investor . . . can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure."<sup>292</sup> This provision present in the Model BIT gives effect to the "futility exception"<sup>293</sup> to the doctrine of exhaustion of local remedies, in a limited sense. Thus, the burden to show that there is no reasonably available relief falls on the foreign investor.<sup>294</sup> The Model BIT has another clarification attached to Article 15.1, which on the one hand restricts the foreign investors from asserting that the "obligation to exhaust local remedy does not apply on them," and on the other hand, precludes the investors from claiming that they have complied with the exhaustion requirement on the basis that the claim under this treaty is by a different party or in respect of different cause of action. This clarification is probably an attempt to water down the effect of the "triple test" adopted by several tribunals while discussing the fork in the road provisions.<sup>295</sup> According to this test, the parallel proceedings may

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*be exhausted* (emphasis added).

<sup>290</sup>2016 Indian Model BIT, *supra* note 36, art. 15.2.

<sup>291</sup>*Id.* art. 15.1.

<sup>292</sup>*Id.*

<sup>293</sup>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" (emphasis added). *Draft Articles on Diplomatic Protection with Commentaries*, II:2 Y.B. Int'l. L. Comm'n pt.3, at 76, UN Doc A/61/10 (2006), art. 15(a). The formulation in the Indian Model BIT apparently gives effect to the later part of art. 15(a), where despite existence of local remedies, there appears to be no reasonable possibility of getting a relief or remedy. See also, Hanessian & Duggal, *Is this the Change the World Wishes to See* (2017), *supra* note 38.

<sup>294</sup>The burden of proof imposed by the formulation of 'futility exception' used in the Model BIT is lower than that imposed by the '*obvious futility*' rule but greater than '*absence of reasonable prospects of success*' rule. For further details see the commentary to art. 15(a) of the Drafts Articles on Diplomatic Protection.

<sup>295</sup>See *Occidental supra* note 9, at ¶ 52: "The distinction between these different types of claims has relied on the test of triple identity. To the extent that a dispute might involve the *same parties, object and cause of action*, it might be considered as the same dispute and the '*fork in the road*' mechanism would preclude its submission to concurrent tribunals." (emphasis added); Hanessian & Duggal, *Is This the Change the World Wishes to See* (2015), *supra* note 38.

be allowed at both the domestic level and the treaty level if the investor is able to show that the domestic remedy was availed by a different party (which actually may be another corporate entity within the same group), on a different cause of action (which is easy to show as the cause of action in domestic forum shall be formulated in domestic law term which would be different from the cause of action formulated in the treaty terms).<sup>296</sup> While the Model BIT does not provide for a “fork in the road” provision, it intends to plug any attempt on the part on investors to circumscribe the mandatory requirements of exhausting the local remedies by resorting to technicalities and to reduce the arbitral discretion which may be exercised in this regard.

### *Additional Qualifications*

The foreign investor, after exhausting all local remedies for five years, if no satisfactory resolution has been reached, can commence the arbitral process by transmission of a notice of dispute to the host state.<sup>297</sup> This “notice of dispute” will be accompanied by another six months of attempts by the investor and the state to resolve the dispute through meaningful negotiation, consultation, or other third party procedures.<sup>298</sup> In case there is no amicable settlement of the dispute, the investor can submit a claim to arbitration<sup>299</sup> subject to the following additional conditions: *first*, not more than six years have elapsed from the date on which the investor first acquired or should have acquired knowledge of the measure in question;<sup>300</sup> and/or, *second*, not more than 12 months have elapsed from the conclusion of domestic proceedings;<sup>301</sup> *third*, before submitting the claim to arbitration, a minimum of 90 days’ notice has to be given to the host state;<sup>302</sup> *fourth*, the investor must waive the “right to initiate or continue . . . any proceedings” under the domestic laws of the host state.<sup>303</sup> The result of cumulative application of these conditions can be better understood by the following example. Let us assume that a measure allegedly violating the BIT came to the knowledge to foreign investors on May 1, 2017. The foreign investor must first submit the dispute in the local courts within one year of such knowledge. Assuming that the investor submits the dispute on 1 May 2017 itself, domestic legal remedies should be exhausted at least for a period of

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<sup>296</sup>See Gus Van Harten, Comment to *Draft Indian Model Bilateral Investment Treaty Text*, <https://www.mygov.in/group-issue/draft-indian-Model-bilateral-investment-treaty-text> (last visited Mar. 22, 2017).

<sup>297</sup>2016 Indian Model BIT, *supra* note 36, art. 15.2.

<sup>298</sup>*Id.* art. 15.4.

<sup>299</sup>*Id.* art. 15.5.

<sup>300</sup>*Id.* art. 15.5(i).

<sup>301</sup>*Id.* art. 15.5(ii); See also Hanessian & Duggal, *Is This the Change the World Wishes to See* (2015), *supra* note 38, at 222-23.

<sup>302</sup>2016 Indian Model BIT, *supra* note 36, art. 15.5(v).

<sup>303</sup>*Id.* art. 15.5(iii).

five years, i.e. until April 30, 2022, unless it can demonstrate the available domestic legal remedies cannot reasonably provide any relief. If the investor is not satisfied with the outcome of the domestic legal proceedings, it can submit a notice of dispute. Assuming that the “notice of dispute” is filed without delay on May 1, 2022 itself, a further period of six months must be spent by the investor trying to “amicably settle the dispute with the host state”, i.e. until October 31, 2022. After this, the foreign investor can submit a “notice of arbitration” to the host state. Only at the end of these further 90 days, i.e. in January 2023, can the foreign investor actually submit a proper “claim to arbitration”. However, this claim to arbitration must be submitted by April 2023, as the “claim for arbitration” must be submitted within 12 months from the conclusion of domestic proceedings, which in our example is April 30, 2022.

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 former, the juridical person shall have to waive its right to initiate, or continue any proceedings under the laws of the host state.<sup>304</sup>

In conclusion, the combined reading of the qualifications on ISDS that the 2016 Model BIT contains, makes it very difficult, if not impossible, for the foreign investor to make effective use of the ISDS mechanism. The necessary requirement to exhaust local remedies especially when the domestic judicial system in India is excessively burdened with a humungous backlog of cases<sup>305</sup> and the rigid limitation periods, make the ISDS provision more favourable to host State than to foreign investor.

## XII. CONCLUSION

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

India claims that the change in the terms of this engagement is to strike a balance between investment protections with host state’s right to regulate.

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<sup>304</sup>*Id.* art. 15.5(iv).

<sup>305</sup>*See* Law Commission of India, Report No. 245, Arrears and Backlog: Creating Additional Judicial (wo)manpower, [http://lawcommissionofindia.nic.in/reports/Report\\_No.245.pdf](http://lawcommissionofindia.nic.in/reports/Report_No.245.pdf).

However, as the discussion in the paper shows, barring some of the provisions like FPS and MTPs, the Model BIT has not been able to reconcile the interests of foreign investors with host state's right to regulate. The Model BIT contains a narrow definition of investment, an extremely narrow FET-type provision, excludes MFN clause, and taxation measures from the purview of the BIT. Furthermore, the expropriation provision in the Model BIT blurs the line between lawful and unlawful expropriation, it provides for a NPM provision without a chapeau, and contains a complicated and sequential ISDS. The presence of these provisions makes the Model BIT very pro-state with limited rights to foreign investors. India's purpose behind the Model BIT seems to be to immunize itself from future BIT claims because Indian government is concerned about the financial implications of BIT awards rendered against India.<sup>306</sup> Furthermore, although the attempt of the Model BIT is to reduce arbitral discretion, as the discussion shows, many provisions still remain undefined and vague; thus, continue to grant significant discretion to ISDS arbitral tribunals.

Indian BIT practice needs to evolve keeping two things in mind. First, India's desire to increase foreign investment inflows especially under projects like Make in India.<sup>307</sup> While the role of BITs in attracting foreign investment should not be exaggerated, there is some recent evidence to show that BITs in India have played an important role in attracting foreign investment.<sup>308</sup> The significance of BITs for foreign investors in India also assumes importance because India does not enjoy the reputation of being a friendly place to do business. For instance, India's rank in World Bank's ease of doing business is abysmal at 130 out of 190 nations.<sup>309</sup> When it comes to specific factors that are critical for foreign investors, such as enforcing contracts, India's rank is even worse at 172.<sup>310</sup> Intervention in businesses or regulatory abuse is common in India, which has been the key cause of most BIT claims against India—whether it pertains to the imposition of retrospective taxes,<sup>311</sup> or sudden cancellation of licenses<sup>312</sup> as mentioned before. In recent times, there have been many instances where

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<sup>306</sup>See Government of India, Ministry of Finance Lok Sabha, Answer to Unstarred Question No: 5174, <http://164.100.47.194/Loksabha/Questions/QResult15.aspx?qref=23651&lsno=16>.

<sup>307</sup>This is a recent and major initiative of the Government of India, launched in September 2014 to make India a manufacturing hub by attracting foreign investment. See for details, *Make in India*, <http://www.makeinindia.com/about>.

<sup>308</sup>See Bhasin & Manocha, *supra* note 57; see also Nottage & Singh, *supra* note 57.

<sup>309</sup>Ease of Doing Business in India, THE WORLD BANK, <http://www.doingbusiness.org/data/exploreconomies/india>.

<sup>310</sup>*Id.*

<sup>311</sup>*Vodafone*, *supra* note 72; *Cairn Energy*, *supra* note 72.

<sup>312</sup>*Devas*, *supra* note 73.

sudden and drastic changes have been made, negatively impacting businesses, such as the current government's decision to suddenly withdraw 86 percent of the currency in circulation,<sup>313</sup> or the decision to interfere in the business of companies like Monsanto<sup>314</sup> and Amazon.<sup>315</sup> These undue regulatory interventions create an atmosphere of uncertainty for foreign investors, thus the significance of BITs. A pro-state BIT with limited protection to foreign investment will not be of much interest to those countries that are major exporters of capital to India. Indeed, after the adoption of the new Model BIT India has not been able to sign any BIT based on the new Model barring with Cambodia.<sup>316</sup> India's negotiations with the US,<sup>317</sup> Canada,<sup>318</sup> and EU Member countries<sup>319</sup> are stuck due to disagreements over the new Model.

Second, today, India is not just an importer but also an exporter of capital. India's overseas FDI has increased from less than \$1 billion in 2000-01 to more than \$21 billion in 2015-16.<sup>320</sup> A BIT that tilts towards host state's regulatory power will reduce protection for Indian companies abroad. The significance of BITs for Indian companies can be gauged from three recent instances. First, a few months back, an Indian investor, Flemingo Duty-free Shop Private Limited (FDF), successfully sued Poland under the India-Poland BIT, winning damages of €17.9 million.<sup>321</sup> The tribunal found that Poland, by illegally terminating a series of lease agreements enjoyed by FDF's indirect Polish subsidiary, had expropriated FDF's investment and denied fair and equitable treatment to it under the

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<sup>313</sup>Livemint, *How Demonetization Has Impacted Key Sectors* (Dec. 9, 2016), <http://www.livemint.com/Politics/a0Fk7NwHwSKcxu4A3i4tK/How-demonetisation-has-impacted-key-sectors.html> (last visited Mar. 28, 2017)

<sup>314</sup>Mayank Bhardwaj, Rupam Jain & Tom Lasseter, *Cotton Crunch: Seed Giant Monsanto Meets its Match as Hindu Nationalists Assert Power in Modi's India* (Mar. 28, 2017), <http://www.reuters.com/investigates/special-report/monsanto-india/>.

<sup>315</sup>Aditya Kalra, *India Privately Took Amazon to Task Over Insulting Flag Doormat* (Mar. 31, 2017), <http://in.reuters.com/article/amazon-com-india-politics-idINKBN17208G>.

<sup>316</sup>See Press Information Bureau, Government of India, *Cabinet Approves Bilateral Investment Treaty Between India and Cambodia to Boost Investment* (Jul. 26, 2016), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=147849>.

<sup>317</sup>See Ranjan, *supra* note 51.

<sup>318</sup>Amiti Sen & Surabhi, *Canada to India: Tighten Investment Protection Norms in New Model Treaty*, THE HINDU (Oct. 23, 2016), <http://www.thehindubusinessline.com/economy/canada-india-bilateral-investment-treaty/article9258701.ece>.

<sup>319</sup>Indivjal Dhasmana, *India-EU Ties Stumble Over Keeping Tax Out of Bilateral Investment Treaty*, BUSINESS STANDARD (Apr. 10, 2017), [http://www.business-standard.com/article/economy-policy/india-eu-ties-stumble-over-keeping-tax-out-of-bilateral-investment-treaty-1170410\\_00416\\_1.html](http://www.business-standard.com/article/economy-policy/india-eu-ties-stumble-over-keeping-tax-out-of-bilateral-investment-treaty-1170410_00416_1.html).

<sup>320</sup>Reserve Bank of India, *Data on Overseas Investment*, [https://www.rbi.org.in/Scripts/Data\\_Overseas\\_Investment.aspx](https://www.rbi.org.in/Scripts/Data_Overseas_Investment.aspx).

<sup>321</sup>Flemingo DutyFree Shop Private Limited v. the Republic of Poland, UNCITRAL, Award, ¶ 942 (Aug. 12, 2016).

India-Poland BIT. Second, an Indian mining company, Indian Metals & Ferro Alloys Ltd. (IMFA), has sued Indonesia under the India-Indonesia BIT at the Permanent Court of Arbitration, The Hague, claiming \$599 million in damages for regulatory problems pertaining to the claimant's coal mining permits.<sup>322</sup> Third, in a newly surfaced challenge, an Indian investor has sued Macedonia under the India-Macedonia BIT for the alleged expropriation of mining concessions awarded to the Indian investor.<sup>323</sup>

In view of the two factors mentioned above, instead of adopting an inward looking and a protectionist or a defensive attitude to BITs, the Indian BIT practice needs to emerge in a manner that balances interests of foreign investors without compromising India's right to regulate. This will further India's interest, both as a capital importer and also as a capital exporter.

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<sup>322</sup>Indian Metals & Ferro Alloys Limited (India) v. the Government of the Republic of Indonesia, PCA Case No. 2015-40.

<sup>323</sup>Allison Ross, *Indian Couple Threatens Claim Against Macedonia*, GLOBAL ARB. REV. (Nov. 11, 2016), <http://globalarbitrationreview.com/article/1073304/indian-couple-threatens-claim-against-macedonia>.