India's

Changing Attitude

to

Investment Protection Treaties

Volume I
Chapters 1-9 and Bibliography

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India's Changing Attitude to Investment Protection Treaties
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Preface

> *Finance minister Nirmala Sitharaman said on Saturday, 15th February 2025 that the country needs a new model for bilateral investment treaties (BITs), saying the 2016 template is "inadequate" for meeting countries' requirements and that investment treaties should be kept separate from future free trade agreements. Sitharaman emphasised that including BITs within free trade agreements (FTAs) often reduces them to "a negotiating card," compromising their fundamental purpose. "Issues related to BIT are so unique to the sovereign that we think BIT should be negotiated as a standalone negotiation rather than make it as a part of an FTA agreement," said the finance minister, who mentioned an overhaul was in the works while presenting the Union Budget on February 1.*[1]

The above news makes it clear that Government of India is thinking of a new Model BIT which will form the basis of further negotiations regarding investment treaties with various countries. Not surprisingly, the above news received hardly any attention in the national media.

It is not the media alone that has ignored investment treaties executed by India or being negotiated by India. Every segment of India's intelligentsia, including the political class, bureaucrats, judiciary, legal professionals and academicians, has treated bilateral investment treaties as trivial documents not worthy of their mind and attention.

India executed more than eighty BITs from 1995 to 2015. Each of these BITs had an arbitration clause which allowed a third-country investment arbitration tribunal to pass awards against the Republic of India. Such awards could not be challenged even before Honourable Supreme Court of India. Essentially, the BITs created an extra-constitutional authority over and above the President of India, the Parliament of India, Supreme Court of India and all High Courts. It is surely shocking to hear that such an authority was indeed created; but more shocking is the fact that this was done without approval or consent of the Parliament of India. In fact, the Parliament was not even informed.

[1] https://www.hindustantimes.com/india-news/fmcalls-for-a-new-model-for-bilateral-investment-treaties-101739646802529.html

Executive wing of Union of India signed the BITs without involving the legislature in any way. One, often gets the impression that the BITs were drafted, negotiated and finalized by junior bureaucrats and even the persons who put their signatures on the BITs did not bother to read them. Courts of India have never deliberated on the BITs. Law schools and law departments of Indian universities have not bothered to even cursorily glance at the BITs. Probably, they are not even aware that BITs are law and arbitration tribunals can (and have) passed awards on the basis of BITs running into millions of dollars.

The apathy of Indian intelligentsia especially academicians towards BITs has hurt the country very badly. It will not be an exaggeration to say that, generally speaking, the country does not know what she has committed through the large number of investment treaties. Lack of debate and deliberations about these treaties has meant that the arbitration awards based on BITs came as shocks to the government and the political class. It was the sense of surprise and irritation that led to knee-jerk termination of all BITs by India during post-2015 phase.

Ignorance about investment treaties has led to another problem for the country. India lacks experts in the field of investment protection law. The experts are needed to help draft, negotiate and finalize the treaties. The experts are also needed to act as arbitrators and arbitration counsels before international investment arbitration tribunals. In the past few decades, whenever such need arose the country depended on generalists (read, retired Judges and Senior Advocates) with no specialized expertise in the field. Needless to say, depending on generalists in such a specialized field has been detrimental to the country's interests.

This book is the first attempt by legal professionals in India to study various BITs executed by India and also to examine the historical development of BITs in India. The BITs have been studied with reference to the following key terms – definition of investment, definition of investor, expropriation, fair and equitable treatment (FET), most favoured nation (MFN), and investor state dispute settlement (ISDS). Relevant clauses containing the said key terms have been collated in the appendices.

We hope that the book will serve as a starting point for debate and deliberations about BITs in India. We also hope that the book will serve as a wake-up call for Indian law schools to start treating investment protection law with all the seriousness that it truly deserves.

Dr. Anil Chawla & Dr. Yogita Pant
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Abbreviations

ASEAN	The Association of Southeast Asian Nations
BIPA	Bilateral Investment Protection Agreement
BIT	Bilateral Investment Treaty
BLEU	Belgium Luxembourg Economic Union
CE	Common Era
CEC	Capital Exporting Country
CECA	Comprehensive Economic Cooperation Agreement
CEPA	Comprehensive Economic Partnership Agreement
CIL	Customary International Law
Curial Law	Law applicable to arbitration proceedings
DEA	Department of Economic Affairs
DSA	Dispute Settlement Arrangement
ECT	Energy Charter Treaty
FCN	Friendship Commerce and Navigation Treaty
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FOI	Freedom of Investment
FPI	Foreign Portfolio Investment
FTA	Free trade Agreement
FY	Financial Year
G20	The Group of Twenty
GATT	General Agreement on Tariffs and Trade
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
ICFT	Investment Cooperation and Facilitation Treaty
ICSID	International Centre for Settlement of Investment Disputes

IIA	International Investment Agreement
IPR	Intellectual Property Right
ISDS	Investor-State Dispute Settlement
JID	Joint Interpretative Declaration
JIN	Joint Interpretative Note
JIS	Joint Interpretative Statement
LCIA	London Court of International Arbitration
MFN	Most Favoured Nation
MST	Minimum Standard of Treatment
NAFTA	North American Free Trade Agreement
NT	National Treatment
ODI	Overseas Direct Investment
OECD	Organization for Economic Co-operation and Development
RCEP	The Regional Comprehensive Economic Partnership
TNC	Transnational Company
TOI	Treatment of Investments
TPP	Transpacific Partnership Agreement
TRIPs / TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UK	The United Kingdom of Great Britain and Northern Ireland
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	The International Institute for the Unification of Private Law
USD	US Dollar
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on Law of Treaties

Chapter 1
Introduction

Whenever an entrepreneur or investor moves out of his / her home country to a foreign land, there are many unforeseeable risks. Investment protection treaties between countries are intended to protect investors from such risks to some extent.

India signed her first Bilateral Investment Protection Agreement (BIPA) with United Kingdom in 1994, with the objective of attracting and incentivizing foreign investment. India's first BIPA was based on a model created by a developed country - where emphasis was on protection of foreign investment, rather than internationally recognized regulatory powers of the State. This excessively investor friendly regime remained unchanged for nearly two decades.

The India-UK BIPA served as the base template for India to negotiate further BIPAs. The regime garnered scanty attention and until 2011, only one arbitration was initiated against India internationally. This was ultimately settled and did not result in an international investment arbitration award.

India's approach to investment treaties started undergoing a sea-change after the case of White Industries in 2011. Government of India received several notices and several cases were filed against India between 2011 and 2016. This irritated the powers in Delhi. India unilaterally terminated almost all of the BIPAs by end of March 2017. Subsequently, India has signed BIPAs with a few countries. But most large developed countries that invest in India have shunned the new draft BIPA proposed by India.

India signed a treaty named Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, January 25, 2020 with Brazil (India-Brazil Treaty). India Brazil treaty differs from the investment treaties executed by India before 2020.

India's post-independence investment protection regime can be divided into three phases as follows:

a) From independence to year 1995 when India-UK treaty came into force

b) From 1995 to 2020

c) After year 2020 when India-Brazil Treaty came into force

In all three phases, the key concepts or building blocks that are part of investment-protection have undergone a sea change, both, in definition and scope. The key building blocks can be outlined as follows:

1) Definition of Investor and Investment

2) Fair and Equal Treatment

3) Most Favoured Nation

4) Expropriation

5) Dispute Resolution Process between Investor and the State

This book attempts to study the evolution of India's investment protection regime through the three phases as outlined above with reference to the above key concepts / building blocks. In addition, it also attempts to study key international investment arbitration cases that have caused the change in India's attitude to investment treaties.

1.1. Foreign direct investment and investment protection

Foreign Direct Investment (FDI) is a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy in an enterprise that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. Basic forms of FDI are investment made to develop a production or manufacturing plant from the ground up ("greenfield investments"), mergers and acquisitions, and joint ventures. Three components of FDI are usually identified: equity capital, reinvested earnings, and intracompany loans.

FDI is considered to be both an important indicator and a driving force of what is called economic globalization. The growth of FDI has been facilitated by various political actors, including national governments and international organizations. FDI inflow is considered as a crucial presupposition of economic development. FDI has potentially both positive and negative effects on host economies. These effects depend on a number of factors, including a host economy's level of development, the type of investment, and the position of the particular investment site in the investor's business strategy.

"Since the mid-1980s, most developing countries have become much more open to FDI, with a view to benefiting from the development contributions which FDI – particularly high-quality FDI – can generate for host countries. Since the early 1990s, transition economies have joined in this trend. Both groups of countries, often hostile or at best distrustful vis-à-vis transnational corporations (TNCs) in the decades that followed the Second World War, began to perceive TNCs no longer as part of the problem but increasingly as part of the solution, bringing not only much needed capital to stimulate growth and development, but also technology, skills and access to foreign markets and creating employment. Consequently, previous restrictive and controlling policies and institutions were replaced by new ones aimed at attracting FDI. Thus, many developing countries and countries in transition1 have reduced – to various degrees – bans and restrictions on FDI entry, improved the standards of treatment and protection of foreign investors and eased or eliminated restrictions on their operations. Finding themselves in increasing competition with other countries for attracting FDI, they often also implemented incentive schemes for TNCs. Efforts to promote FDI also included the establishment of investment promotion agencies (IPAs) and export processing zones (EPZs)."[1]

"Generally reluctant to bind their FDI policies in multilateral agreements, developing countries have increasingly submitted some aspects of their investment frameworks, especially those concerning protection and treatment of FDI to international treaties. The result has been an explosive growth of international investment agreements (IIAs)."[2]

"In concluding IIAs, developing countries seek to make the regulatory framework for FDI more transparent, stable, predictable and secure – and thereby more attractive for foreign investors (UNCTAD 2003a: 84). However, a recurrent issue in the discussions about IIAs is to what degree IIAs *actually* fulfil their objective of encouraging more FDI."[3]

[1] Reports International: UNCTAD Series on International Investment Policies for Development,2009
[2] Reports International: Ibid.
[3] Reports International: Ibid.

"The impact of IIAs on FDI has been measured in a series of econometric and other studies, published between 1998 and 2008. While these studies often arrive at different conclusions, and their findings are subject to important qualifications, several concur that IIAs can influence a company's decision where to invest. Several studies also concur that this impact is generally stronger (in terms of increased FDI inflows) in the case of free trade agreements, regional integration agreements or economic cooperation agreements than in the case of BITs. This is because PTIAs – more broadly – improve the economic determinants of FDI, as opposed to BITs, whose influence is limited to the policy determinants of FDI.

IIAs add a number of important components to the policy and institutional determinants for FDI, and thereby contribute to enhancing the attractiveness of countries to foreign investors. In particular, they improve investment protection and add to the security, transparency, stability and predictability of the investment framework. If IIAs liberalize market access, as many of them do (in particular free trade agreements and regional integration schemes) they also improve an important economic determinant of foreign investment – the market size. The geographical expansion of regional integration schemes and/or deepening of integration, can, and in a number of cases did, stimulate additional investment inflows.

The impact of BITs on investment flows into developing countries is confirmed by investor surveys. For the majority of reviewed companies from all sectors, BITs' participation in host developing countries and transition economies plays a role in making a final decision on where to invest. Further evidence that TNCs increasingly make use of BITs is provided by the rapidly increasing number of investment arbitration cases based on these agreements – a development which is also creating increasing challenges for host countries.

In sum, developing countries wanting to attract more and better foreign investment may wish to strengthen the role of IIAs as an investment promotion instrument."[4]

While the prevalent opinion is that IIAs are effective as investment protection instruments and lead to increased FDI inflows, the strong view that has come from a study of more than 74 studies carried out by Josef C Brada[5] and others is exactly opposite.

[4] Reports International: Ibid.

[5] Articles and Studies: Does Investor Protection Increase Foreign Direct Investment? 2021

In this paper we have carried out a meta-analysis of 74 studies, yielding 2107 estimates, of the effects of international investment treaties on foreign direct investment. Our meta-synthesis, presented in Table 3, indicates that, based on either random-effects or WAAP estimates of the partial correlation coefficients of these studies, all types of international treaties, bilateral investment treaties, multilateral investment treaties, bilateral trade agreements and multilateral trade agreements have an effect on FDI that is so small as to be considered as negligible or zero. However, this does not rule out the possibility that the effect of these agreements is, in fact, positive and that current research methods and measures are insufficiently powerful or precise to identify the underlying genuine effect.

Given the widespread interest devoted to the effect of IIAs and the intuitively appealing notion that providing a measure of protection for foreign investors should reduce the riskiness of FDI and thus increase it, it is worthwhile to reflect on why the measured effect of IIAs is so negligibly small. One possibility is that the protection provided to investors by IIAs is in fact insufficient to alter their investment decisions. This could be because investors find the cost of arbitration under IIAs to be too costly (potentially in excess of $5 million); too risky (in that they have no better than a 50:50 chance of winning in arbitration); or that the arbitral awards are inadequate compensation for their losses (arbitrators often award amounts that are less than the plaintiff firms claim as losses). A second possibility could be the proliferation of IIAs. Over 3000 BITs have been signed and to these should be added the investor protection mechanisms embodied in the other types of treaties we have discussed in this paper. Thus, as the number of IIAs increases, their marginal effect on FDI should fall, perhaps rapidly. Early treaties were negotiated between host countries that saw themselves as potentially attractive hosts and those countries that were a major source of FDI. Successive treaties had to include host countries that were less attractive targets for FDI for reasons other than the risks they posed to foreign investors and potential investors' home countries that were less important sources of FDI. There are also IIAs signed between pairs of countries that are both net importers of capital and FDI, and the effect of such IIAs is likely nil. Thus, the importance of *choosing appropriate home and host countries and their IIAs for study is important for the results obtained.*[6]

1.2. Nature of investment treaties

"Investment treaties are concluded between two or more governments. They typically offer covered foreign investors protection for their investments from host government conduct in violation of the treaty such as expropriation without compensation, discrimination or treatment that is not in accordance with "fair and equitable treatment" obligations. They include both stand-alone investment treaties (often referred to as bilateral investment treaties or BITs or BIPAs) and investment chapters in broader trade and investment agreements such as the North American Free Trade Agreement (NAFTA), the Transpacific Partnership agreement (TPP) or the Energy Charter Treaty (ECT). Investment treaties were developed to protect investors of one country when investing in another country, to lower non-commercial risk for such investors, and overall to promote a sound investment climate. A mostly-older generation of investment treaties provides little detail on the applicable substantive and procedural rules, while a number of modern agreements provide significantly greater detail on these and other issues."[7]

"Today, there are over 3 000 investment treaties, including many stand-alone investment treaties (often referred to as bilateral investment treaties or BITs or BIPAs) and a much smaller but growing number of investment chapters in broader trade and investment agreements, such as the North American Free Trade Agreement (NAFTA) or the Energy Charter Treaty (ECT). Investment treaties have become a high-profile issue in recent years in a growing number of countries. Claims under investment treaties involving the regulation of tobacco marketing, fracking, nuclear power and health care have attracted intense public interest. An ad hoc investment arbitration tribunal recently awarded USD 50 billion to shareholders in Yukos. A public consultation in the European Union on proposed investment provisions in the Transatlantic Trade and Investment Partnership (TTIP) with the United States generated a record 150,000 comments. G20 and OECD governments have been considering investment treaty policy issues on an on-going basis

[6] Articles and Studies: Ibid.

[7] International Reports: OECD, 2016 p. 224

since 2010 at the OECD-hosted Freedom of Investment (FOI) Roundtable and many governments are actively engaged in reform of their treaty policies."[8]

"Investment treaty law, like all systems of law, reflects a permanent tension between stability and flexibility. Stability nurtures predictability, while flexibility helps legal systems stay in alignment with changing circumstances and evolving needs."[9]

"Thus, parties to investment treaties (as well as investors) have interests both in treaty stability and in securing some flexibility – that is, in providing tools they can use to influence the way that their treaties are used and interpreted. A number of options are available to governments wishing to exercise such influence."[10]

A different perspective on investment treaties is provided by Prof. Anthea Roberts. She talks of investment treaties as triangular treaties. Relevant extracts from her article[11] is as follows:

> *Investment treaties should be reconceptualized as triangular treaties, i.e., agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries. State A (the host state) agrees to provide certain protections to investors coming from State B (the home state) and vice versa. If the investor considers that these protections have been violated, investment treaties also grant the investor permission to bring an arbitral claim directly against the host state. As a result, the agreement is entered into by the home and host state (collectively, the treaty parties) but the protections are created for the benefit of, and are typically enforced by, an investor from one state against the other state.*
>
> *There is a tendency to understand these treaties as creating two bilateral relationships. The first is a treaty relationship between the treaty parties at the inter-state level. The second is a contractual relationship between the investor and host state that governs the arbitral dispute in a particular case after the investor accepts the host state's standing offer to arbitrate. However, this bifurcated approach proves inadequate when it comes to*

[8] Ibid. p. 225
[9] Working Papers: Gordon, 2015 p. 4
[10] Ibid. p. 6
[11] Articles and Studies: Triangular treaties: the nature and limits of investment treaty rights, 2015

analyzing questions about the relationship between (1) investors and their home states and (2) investors and the treaty parties acting collectively. For that, we need a theory that conceptualizes the triangular relationship between investors, home states, and host states as part of an integrated whole.

[…]

Investment treaties expressly protect investors against certain unilateral actions by host states, such as expropriation without compensation and discriminatory treatment, and permit investor-state arbitration to enforce these obligations. However, it is unclear whether they also protect investors against certain unilateral actions by home states and collective actions by the treaty parties. These questions arise with respect to a range of existing and emerging controversies, including:

- *Can a home state bring and settle a class action claim on behalf of its investors against the host state in which they invested, if it acts without the knowledge or consent of its investors?*
- *Can a host state excuse its treaty violation in an investor-state arbitration on the basis that its action was a lawful countermeasure in response to a previous violation by the investor's home state?*
- *Can the treaty parties agree to jointly terminate or amend an investment treaty with immediate effect and thereby avoid the ten to twenty year survival clause that typically applies to unilateral terminations?*

To answer these issues, we must confront fundamental and unanswered questions about what rights have been given to investors and what powers have been retained by home and host states acting individually and the treaty parties acting collectively.

It may come as a surprise to those unfamiliar with the field that investment treaties do not answer these basic questions. But they do not. On a substantive level, investment treaties impose certain obligations on host states to provide protections to foreign investors and investments, but they do not clarify whether these obligations give rise to substantive rights for *the investor, the home state, or both. On a procedural level, investment treaties typically contain two dispute resolution clauses—one permitting investor-state arbitration over investment disputes; and the other permitting state-to-state arbitration over disputes concerning the treaty's interpretation and/or application—but most say nothing about how these two forms of dispute resolution should interact.*

[...]

I contend that investment treaties should be reconceptualized as triangular treaties, i.e., agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries. This triangular framework draws on principles from public international law, domestic contract law, and public law in a way that captures the unique, hybrid nature of investment treaties. Investment treaties are international agreements between states (hence the need for a public international law premise), but they depart from typical treaties by granting investors enforceable rights instead of simply regulating state-to-state rights and obligations (hence the need for a third-party-beneficiary paradigm). Unlike traditional contract law models, however, they involve an agreement by sovereign par- ties to bestow rights on a non-sovereign entity (hence the need for a public law qualification).

When negotiating bilateral investment treaties, each country enters into negotiations based on whether the country is a capital importing country or is a capital exporting country. However, as time passes the distinction between capital importing and capital exporting countries tends to get blurred. The following extract from the article of Anthea Roberts emphasises the point very strongly.

Instead, states with asymmetrical interests—as clear capital importers or clear capital exporters—have entered into different treaties often reflecting the strength of their relative bargaining power, as shown by the early U.S. and Chinese investment treaties discussed above. These investment treaties may be inefficient because they provide too much investor protection (as is arguably the case with early U.S. treaties) or too little investor protection (as is arguably the case with early Chinese treaties). However, they are *signed because they suit the interests of both parties given the inequality of bargaining power against which the negotiation is conducted.*

[...]

A similar development can be seen in recent Model Bilateral Investment Treaties (Model BITs). States typically negotiate investment treaties from pre-formulated Model BITs and many states are reluctant to depart from their model. In developing a Model BIT, a state determines what rules it is happy to accept in the absence of knowledge about whether it will have greater interests as a home state or host state in relation to a particular negotiation in the future. A state may still skew its approach if it knows that it is more likely to end up on one side of the equation in most treaty negotiations. However, the situation mimics the veil of ignorance to some extent by encouraging states to develop balanced treaty terms that weigh the gains and costs for both home and host states.

This can be seen most clearly in the evolution of the U.S. Model BIT. Early versions of the U.S. Model BIT were extremely investor protective. However, as the United States has come to recognize that it has significant interests as a capital importing state, in addition to its clear interests as a capital exporting state, it has transformed its Model BIT to provide a much more calibrated approach that seeks to weigh investor protection against state sovereignty rather than overly privileging either one. The United States then uses its Model as a basis for negotiations with a wide range of states where its relative interests as a capital importer and exporter are likely to differ, from concluded negotiations with Rwanda and Uruguay to current negotiations with China and the European Union.

[...]

When viewed from a general perspective, investment treaties involve an equal number of capital importers and capital exporters as foreign investors always come from one state and invest in another. When viewed on an individual level, ideal treaty parties replicate and internalize these interests because they represent contracting parties that have dual and equal interests as capital importers and capital exporters. Thus, rules that *will be fair and balanced for the system in general should accord with the rules that ideal treaty parties would select for their negotiating position. This perspective is thus helpful in crafting untailored default rules against which specific pairs of treaty parties with asymmetrical interests and unequal bargaining power might wish to contract out.*[12]

1.3. Benefits of investment treaties

"Bilateral investment treaties (BITs) partly offset the costs associated with investing in faraway and/or unfamiliar markets. Having a BIT with a particular destination country increases the likelihood of investing there. Most BITs contain commitments to protect foreign investors in the host country, ranging from assurances of fair, equitable, and non-discriminatory treatment to undertakings to observe investment contracts and other investment-related obligations. These protections are accompanied by a powerful international arbitration mechanism that allows investors to bring claims directly against the host state. Thus, by providing stable and clear rules, BITs facilitate cross-border investments. It is also possible, however, that BITs are signed between countries that already have close ties and implicit mechanisms for better conflict resolution. International trade agreements also increase the perceived attractiveness of a host country to potential investors. Experimental data drawn from the survey suggests that, while the host country's participation in international trade and investment treaties may not be the most prominent factor influencing the choice of an investment location by transnational companies (TNCs) from emerging markets, it is taken into account by a sizable share of foreign investors. Firms prefer investing in countries that are members to trade and investment agreements because these treaties allow them to benefit from lower barriers of access to other countries' markets and to export back to the home country. These market-enhancing effects of international agreements appear to be more relevant than their role as signalling mechanisms, or as commitment devices constraining predatory behaviour by host governments."[13]

"Every year, more than USD 1 trillion in FDI (foreign direct investment) flows across countries worldwide. These investment flows are governed by a vast network of thousands

[12] Articles and Studies: Ibid.

[13] Working Papers: Gomez-Mera, 2015, p. xv-xvi

of bilateral investment treaties ("BITs") and International Investment Agreements ("IIAs"). IIAs refer to both BITs, as well as investment chapters of Free Trade Agreements. Most BITs grant investors a common set of protections, including guarantees of compensation in case of expropriation, fair and equitable treatment and non-discriminatory treatment. These protections are usually enforceable directly against the host state government in an international arbitration."[14]

"Investors are increasingly using BITs to sue host state governments for alleged violations of treaty protections. For instance, the International Centre for Settlement of Investment Disputes ("ICSID"), which was created specifically for administering investor-state disputes, has seen its caseload increase from only 35 cases in its first thirty-years of operations (1966-96) to nearly 670 registered cases as of mid-2018. Surge in the number of investor-state claims has resulted in a significant backlash from states against the investment treaty regime, in the form of premature termination of BITs, denunciation of international institutional mechanisms, halt on the negotiations of new treaties and, most commonly, negotiation of new treaties that are more prescriptive and less protective of investors' rights. It is widely understood that BITs are risk mitigation tools which are supposed to protect and encourage investment flows."[15]

"On the one hand, IIAs could be an important tool to attract foreign investment because by signing an IIA the host country signals congenial investment environment and offers treaty-based protection and thus enhanced security for investment. This enhanced security does play a role in boosting investor confidence to make investments. However, on the other hand, arguably, signing IIAs alone do not ensure greater foreign investment inflows because foreign investment is more related to macro-economic factors such as host country's overall economic stability, advantages as a location, level of infrastructure and other related factors."[16]

"From the perspective of capital exporting countries, greater liberalisation and cross border investment flows has meant more and more investors are investing abroad and, as a result, subjecting themselves to the sovereign powers of the host state. This, in turn, has increased the demand for international investment law to regulate the relationship between investors and host states. The weakness and vagueness of customary

[14] Articles and Studies: Centre for Trade and Investment Law, 2020 p. 1
[15] Ibid. p. 1
[16] Articles and Studies: Prabhash Ranjan, 2012, p. 11-12

international law (CIL) and also of contractual guarantees given by countries to investors has strengthened the need to develop an international investment law regime. This international investment law regime has been developing in the form of IIAs. It has been argued that the ascend in the number of IIAs can be seen as an endeavour to develop international investment law as a new regulating structure where foreign investment has the benefit of treaty-based protection and where investor-state arbitration is used to police state's regulatory conduct. Furthermore, since there is no multilateral treaty for investment protection, capital exporting countries are relying more and more on IIAs to develop higher treaty protection standards for their investment."[17]

It is interesting to also read in this context the advantages and objectives of BITs mentioned by Office of the United States Trade Representative on its website:

> *The U.S. bilateral investment treaty (BIT) program helps to protect private investment, to develop market-oriented policies in partner countries, and to promote U.S. exports.*
>
> *The BIT program's basic aims are:*
>
> - *to protect investment abroad in countries where investor rights are not already protected through existing agreements (such as modern treaties of friendship, commerce, and navigation, or free trade agreements);*
> - *to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and*
> - *to support the development of international law standards consistent with these objectives.*
>
> *U.S. BITs provide investors with six core benefits:*
>
> - *U.S. BITs require that investors and their "covered investments" (that is, investments of a national or company of one BIT party in the territory of the other party) be treated as favorably as the host party treats its own investors and their investments or investors and investments from any third country. The BIT generally affords the*

[17] Ibid. p. 12

better of national treatment or most-favored-nation treatment for the full life-cycle of investment -- from establishment or acquisition, through management, operation, and expansion, to disposition.

- *BITs establish clear limits on the expropriation of investments and provide for payment of prompt, adequate, and effective compensation when expropriation takes place.*
- *BITs provide for the transferability of investment-related funds into and out of a host country without delay and using a market rate of exchange.*
- *BITs restrict the imposition of performance requirements, such as local content targets or export quotas, as a condition for the establishment, acquisition, expansion, management, conduct, or operation of an investment.*
- *BITs give covered investors the right to engage the top managerial personnel of their choice, regardless of nationality.*
- *BITs give investors from each party the right to submit an investment dispute with the government of the other party to international arbitration. There is no requirement to use that country's domestic courts.*[18]

The Organization for Economic Cooperation and Development (OECD) in its OECD Business and Finance Outlook 2016[19] mentions the key impact of investment treaties as follows:

- *Investment treaties are concluded between two or more governments. They typically offer covered foreign investors protection for their investments from host government conduct in violation of the treaty such as expropriation without compensation, discrimination or treatment that is not in accordance with "fair and equitable treatment" obligations. They include both stand-alone investment treaties (often referred to as bilateral investment*

[18] Source: https://ustr.gov/trade-agreements/bilateral-investment-treaties#:~:text=BITs%20establish%20clear%20limits%20on,a%20market%20rate%20of%20exchange.

[19] Reports International: OECD Business and Finance Outlook, 2016

treaties or BITs) and investment chapters in broader trade and investment agreements such as the North American Free Trade Agreement (NAFTA), the Transpacific Partnership agreement (TPP) or the Energy Charter Treaty (ECT).

- *Investment treaties were developed to protect investors of one country when investing in another country, to lower non-commercial risk for such investors, and overall to promote a sound investment climate. A mostly-older generation of investment treaties provides little detail on the applicable substantive and procedural rules, while a number of modern agreements provide significantly greater detail on these and other issues.*
- *Investment treaties create economic incentives and disincentives. As treaties become better known to investors and lawyers, and apply to more investments between advanced economies, their economic impact is likely to increase. At least 70 investment claims against governments were filed last year, many against developed countries, far outstripping the 14 requests for consultations at the World Trade Organization (WTO).*
- *As interpreted by arbitral tribunals in claims brought by covered investors against governments, many of the over 3 000 existing investment treaties establish a unique combination of rules. Some of those rules significantly modify widely-applied corporate law and corporate governance principles, and can result in fragmentation of companies. The unique combination includes i) the acceptance of claims by covered shareholders for losses incurred by companies in which they own shares (claims for reflective loss); and ii) the general availability of damages, including lost profits, as a remedy for government misconduct in breach of a treaty, subject to adequate proof.*
- *The general acceptance of covered shareholder claims against governments for damages for reflective losses under many investment treaties is unique because such claims are generally barred under national corporate law and other systems of law. The*

injured company, not its shareholders, owns the claim for redress and recovers any damages. The impact of the unique treaty rules in fragmenting recovery of corporate loss is amplified because frequently indirect shareholders higher up the corporate ownership chain have also been permitted to recover reflective loss.

- *Because the unique rules can allow covered shareholders to bring claims that could be perceived as stripping assets from the company to the detriment of company creditors and other shareholders, they could affect the availability, pricing and other conditions of debt and equity financing for investment that is subject to regulatory risk. The unique rules provide greater rights to covered foreign shareholders than those of non-covered domestic shareholders which is likely to affect the ratio of foreign and domestic share ownership. The unique rules can also fragment corporate governance because they shift power on key issues from the centralised corporate board of directors to covered shareholders.*
- *By allowing a wide range of claims by direct and indirect shareholders of a corporation injured by a government, the unique rules may also encourage the complex structuring of investment through multi-tiered corporate structures. Each covered shareholder can be a potential claimant under a different treaty. Governments and others should carefully analyse and evaluate the impact of treaty incentives on companies and stakeholders as part of their investment treaty policy.*[20]

1.4. Significance and utility

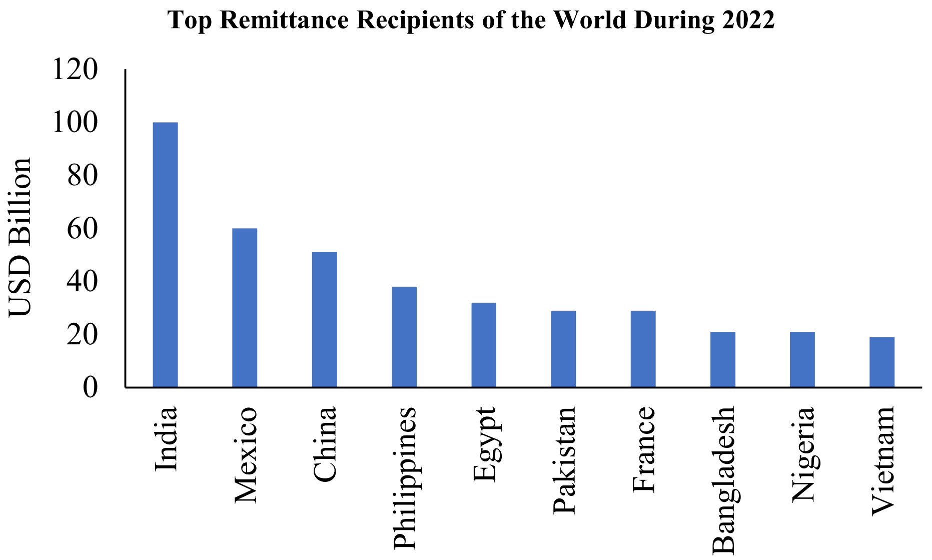
Foreign investment, consisting of Foreign Direct Investment (FDI) and foreign portfolio investment (FPI), is the largest component of India's capital account[21]. India recorded inflow of USD 83.57 billion in the financial year 2021-22. India's FDI inflows have

[20] Reports International: Ibid.
[21] Reports India: Economic Survey, 2022-23

increased 20-fold since FY 03-04, when the inflows were USD 4.3 billion only[22]. Notably, the disturbances caused by Covid-19 pandemic did not adversely affect FDI inflows into India. It may be noted that FDI inflow increased by 23% post-Covid (March 2020 to March 2022: USD 171.84 billion) in comparison to FDI inflow reported pre-Covid (February 2018 to February 2020: USD 141.10 billion) in India[23].

In terms of FDI inflow, during April-September 2022 Singapore was the top investing country with a 37.0 per cent share, followed by Mauritius (12.1 per cent), UAE (11.0 per cent), and the USA (10.0 per cent)[24].

Fig. / Gr. 1.1 Top remittance recipients of the world during 2022



[25]

Top 5 sectors receiving highest FDI Equity Inflow during FY 2021-22 were Computer Software & Hardware (24.60%), Services Sector (Fin., Banking, Insurance, Non-Fin/Business, Outsourcing, R&D, Courier, Tech. Testing and Analysis, Other) (12.13%), Automobile Industry (11.89%), Trading 7.72% and Construction (Infrastructure) Activities (5.52%). Top 5 States receiving highest FDI Equity Inflow during FY 2021-22 were Karnataka (37.55%), Maharashtra (26.26%), Delhi (13.93%), Tamil Nadu (5.10%) and Haryana (4.76%)[26].

[22] Reports India: Press Note, Ministry of Commerce & Industry, 2022
[23] Reports India: Ibid.
[24] Reports India: Economic Survey based on World Bank data
[25] Reports India: Economic Survey of India, 2022-2023
[26] Source: https://www.investindia.gov.in/foreign-direct-investment

Fig. / Gr. 1.2 Foreign direct investment to India, 2011-2022

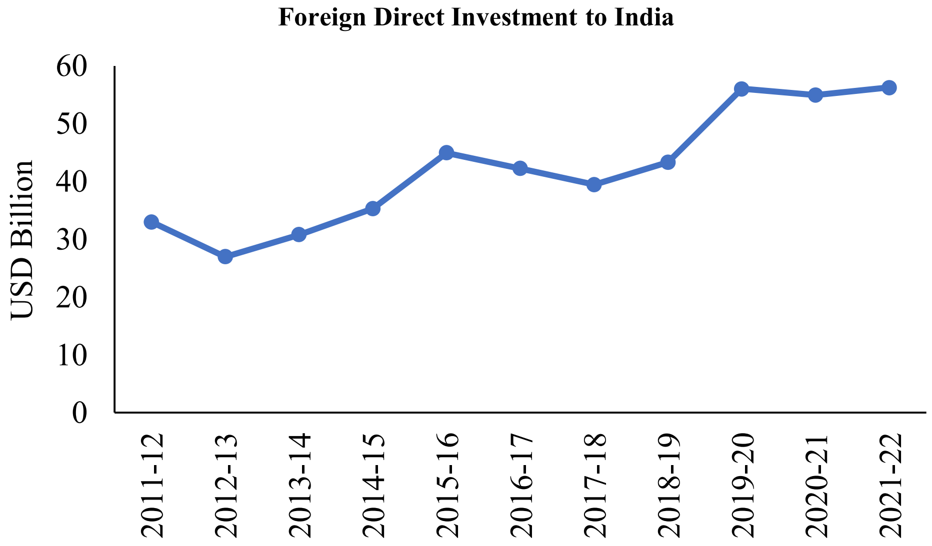


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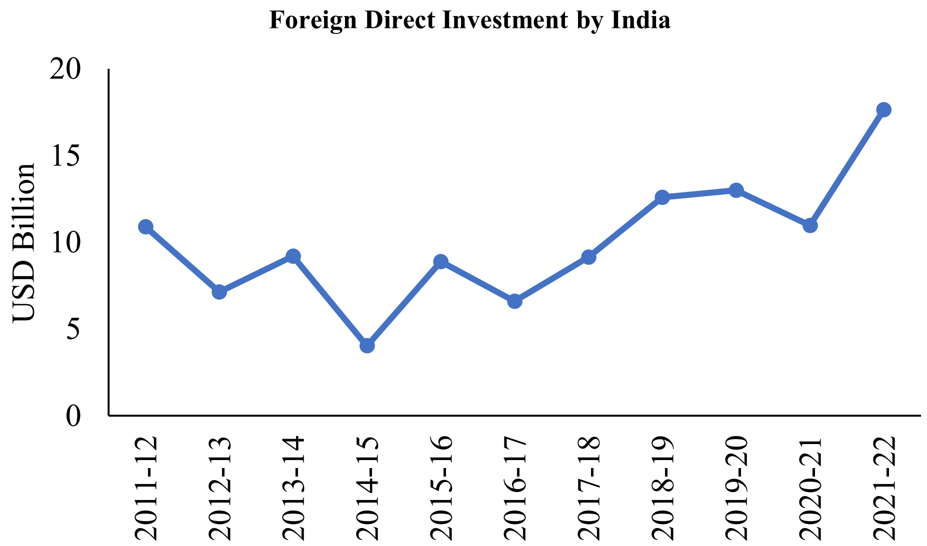
Fig. / Gr. 1.3 Foreign direct investment by India, 2011-2022



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Clearly, on one hand FDI plays an important role in India's capital inflows and on the other hand India is a major global player both as a recipient of FDI and also as a provider of FDI to various countries. With foreign investment (both inward and outward) playing such an important role for India, it is surprising that India's bilateral investment treaties have not received significant attention from India's academic community as well as civil society and media.

[27] Based on data from Reports India: Reserve Bank of India, Investment Inflows (2022)
[28] Based on data from Reports India: Reserve Bank of India, Investment Inflows (2022)

India's bilateral treaties have been studied for their economic impact (Research Thesis by Amrita Goldar[29]) by students of economics. The treaties have also been studied for their impact on political science (Research Thesis by Jahangir Ahmad Khan[30]) by students of political science. However, departments of law of Indian universities and law schools have mostly ignored the investment treaties executed by India. One does not find any major work analysing the provisions of different investment treaties executed by India from a lawyer's perspective. One also notices a lack of debate in Indian academic circles about different key elements of investment treaties.

The gap has serious implications for India in two ways – (a) in the absence of any academic discussion on the provisions of India's investment treaties the concerned departments of Government of India have no academic guidance while negotiating treaties (b) in various international investment arbitration cases across the world involving either Indian investors or Republic of India, the legal expertise available to the Indian side is weak which has resulted in India losing many of such cases.

The present work aims to fill the above gap and hopes to start detailed discussion in India's law schools and universities with law departments about the various provisions of India's bilateral investment treaties. It is hoped that the present study will provide a comprehensive reference work giving comparative study of India's bilateral investment treaties giving detailed perspective on the key building blocks of bilateral investment treaties – (a) Definition of Investor and Investment, (b) Fair and Equal Treatment, (c) Most Favoured Nation, (d) Expropriation, and (e) Dispute Resolution Process between Investor and the State.

1.5. History of global investment protection regime

"In the 17th century several European countries decided to protect foreign individuals and their assets according to Minimum International Standards (MISs). However, in the 19th century, foreign investors' protection was included in the legal system. Just as citizens, corporations abroad were to be protected and treated according to MISs - compensation for expropriation became a right - a violation of which might justify and defend home

[29] Articles and Studies: Amrita Goldar, Impact of Bilateral Investment Treaties on FDI Inflows, 2017

[30] Articles and Studies: Jahangir A. Khan, Impact of Bilateral Investment Treaties on Policy Space, 2017

State's intervention. Similarly, by the early 20th century Capital Exporting Countries (CECs) including the United Kingdom (UK) and the United States (US) took strong positions that their investors and their investment, abroad were entitled to a minimum standard of treatment under Customary International Law (CIL). This treatment provided that host countries have to treat foreign investors and their investment in accordance with globally set principles. However, Garcia *et al.* (2015) argues that CECs required measures to protect their investors, but these requirements were beyond that were offered by the national laws of the CECs. It were these unfair requirements that the subsequent BIT regime sought to legalise. The result is that many BITs are now allowing investors to override host State's genuine concerns. These CECs have no interest in providing policy space to developing host countries, which is actually restraining developing countries' democratic choices."[31]

"It is safe to consider that BITs are the principal devise to regulate international investment at the global level.[32] All IIAs enshrine a series of obligations on the parties to ensure a stable and favourable business environment for foreign investors. These obligations pertain to the treatment that foreign investors are to be afforded in the host country by the domestic authorities. Meanwhile, such "treatment" that encompasses many laws, regulations, and practices from public entities also significantly affect foreign investors or their investments. Thus, analysis of the quality of investment treaties is important to provide a clearer view of their likely impacts. Not all investment treaties are drafted similarly as many of their provisions may vary significantly in terms of scope of application and likely economic impact."[33]

1.6. Development of India's investment protection programme

"India's bilateral investment treaty (BIT) programme is part of a larger trade and investment agenda of the Indian government to boost investor confidence and increase investment flows into and out of the country. India launched the programme by signing its first BIT with the United Kingdom (UK) in 1994, signing nearly 50 BITs over the next

[31] Articles and Studies: Khan, 2017, p. 108
[32] Working Papers: Julien Chaisse, 2014, p. 4
[33] Ibid. p. 9-10

decade or so. Around 2003, India decided to review its BIT programme, and created a Model BIT. The 2003 Model formed the basis for conducting subsequent BIT negotiations between India and other countries." [34]

"Post 1991 economic reforms and up to 2015, India signed BITs with 83 countries out of which 74 were enforced. These BITs were largely negotiated on the basis of the Indian Model BIT text of 1993."[35]

India's approach in regard to BIT was highlighted by the Secretary (ER), Ministry of External Affairs in his opening statement during the course of briefing on the subject on 7 September 2020:

> *India's approach to BITs has been aimed at providing appropriate protection to foreign investors in India and Indian investors in foreign countries in the light of the relevant international precedents and practices while maintaining a balance between the investor's rights and the Government's obligations by accommodation and cooperation. Our interests in this domain have grown with our rising stature in global affairs. We also remain conscious of the realities of negotiations with sovereign Governments while upholding our national interests and priorities.*[36]

"India has also entered into Free Trade Agreements (FTAs) some of which have a dedicated chapter on investment, that are substantially similar to the standalone BITs. Explaining about IIAs/BITs and Free Trade Agreement (FTA)/Comprehensive Economic Cooperation Agreement (CECA)/Comprehensive Economic Partnership Agreement (CEPA). Investment agreements could also form part of FTA or CECA/CEPA. In such cases, this is usually one among the several chapters in the CECA/CEPA. CECA/CEPA/FTAs are dominated by trade in Goods and Services issues. Free Trade Agreements generally focus only on trade issues but trade being a major portion in a CECA/CEPA, the terms FTA/CECA/CEPA are used inter-changeably. BITS/IIAs can also be in the form of investment chapters of such a comprehensive regional agreement, for example, covering the countries in the Association of Southeast Asian Nations (ASEAN) or the Regional Comprehensive Economic Partnership (RCEP). Investment chapters in

[34] Reports (India): Law Commission of India, 2015
[35] Reports (India): Committee on External Affairs, 2021, p. 1
[36] Ibid. p. 1

FTA/CECA/CEPAs negotiated in the past are similar to the BITs signed in the pre-2015. They have liberal commitments like MFN, ISDS with fork-in-the-road approach, non-conforming measures with Reservation Lists. One of the differences between a BIT and an FTA Investment Chapter is that Investment Chapters do not carry a separate termination clause and hence is linked to the tenure of the FTA, with a common termination clause for the entire FTA. There are, however, renegotiation clause/amendment clauses in most FTAs applicable to investment chapters. Till 2005, there was wide variability and liberal approach in undertaking investment protection commitments in a BIT/Investment Chapters of a FTA/CECA/CEPA. After the Cabinet approved the Model BIT Text 2015, this has been the guiding force and has led to uniformity in the approach towards different IIAs – be it a BIT or an Investment Chapter."[37]

"Some of the Free Trade Agreements have investment chapters as part of the agreement, such as India - Japan CEPA, India - Republic of Korea CEPA, India - Singapore CECA, etc. Though the FTA of negotiations, as a whole, are coordinated by the Department of Commerce, the investment chapters under these FTAs are negotiated by DEA and cover provisions related to investment protection."[38]

1.7. Post-2015 India's approach to investment protection

"As a result of the adverse award in the White Industries case[39] and the notices of dispute under different BITs, there was a renewed focus on India's BIT regime and questions were raised about balancing investment protection with India's regulatory power, compelling India to re-think its BIT programme. Over time, especially after 2010, global and Indian experience with Investment Treaties, and the substantial increase in international arbitration cases arising out of these Investment Treaties, led to a revisit of India's earlier Model BIT text."[40]

With the approval of the Cabinet, a new Model text was adopted in 2015. The Cabinet also approved (i) to use the Model text in 2015 as the starting point for renegotiations of

[37] Ibid. p. 2
[38] Ibid.
[39] International Tribunal Awards: White Industries, 2011
[40] Reports (India): Committee on External Affairs, 2021, p. 3

existing and future BITs and investment chapters of CECAs/CEPAs/FTAs with appropriate modifications, alterations or concessions as approved by the Minister of Finance, and (ii) adopting the strategy of terminating existing BITs whose initial treaty period was over and issue Joint Interpretative Statement for those BITs whose initial treaty period is still valid.

The model BIT, unlike the earlier BITs, has an enterprise-based definition for investments covered by the treaty. It also does not contain Fair and Equitable Treatment (FET) clause but rather has a treatment of investments clause that prohibits the host country from subjecting foreign investments to measures that constitute a violation of customary international law through denial of justice (judicial and administrative), breaches of due process, and targeted discrimination on manifestly unjustified grounds or manifestly abusive treatment, such as coercion, duress and harassment.

While the new model BIT does not include an MFN (Most Favoured Nation) clause, it does provide for national treatment to the extent that a Party shall not apply measures that accord less favourable treatment than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory. The new model BIT also states what would constitute like circumstances.

In the dispute resolution provisions in the new model BIT, the focus has been on domestic remedies with investors having to exhaust local/domestic remedies including invoking the jurisdiction of the domestic courts of the host country for a minimum period of five years before being able to resort to arbitration under the treaty. This condition is however exempt if there is no domestic remedy available to the investor and the only remedy available is under the BIT. The new model treaty also elaborates the mode and requirements for arbitrator appointments and also tries to elaborate the possible conflict of interest issues. Further, the new model BIT tries to incorporate principles of transparency by having provisions which require the proceedings under the BIT to be made available to the public, subject to applicable law on protection of confidential information.[41]

[41] Ibid. p. 3-4

1.8. Status of India's investment treaties

After the approval of the new model BIT by the Cabinet, India initiated the process of termination of the existing BITs whose initial duration/term as concluded and began the process of renegotiating these treaties based on the new model BIT. Based on the Cabinet decision, till date (September 2021) India has issued termination notice to countries with whom the initial period has expired.

"The list of Countries to whom Notice of Termination for terminating respective BITs were issued is as under:"[42]

Table 1.1 List of countries to whom notice of termination was issued with respect to BIT

S. No.	Country	Date of Initial Expiry of BIPA Agreement	Date on which Notice of Termination Issued by India
1	Argentina	11 August 2012	23 March 2016
2	Armenia	29 May 2016	23 March 2016
3	Australia	03 May 2010	23 March 2016
4	Austria	28 February 2011	23 March 2016
5	Bahrain	04 December 2017	23 March 2020
6	Belarus	22 November 2013	23 March 2016
7	Belgium	07 January 2011	23 March 2016
8	Bosnia & Herzegovina	13 February 2018	01 August 2018
9	Britain	05 January 2005	23 March 2016
10	Brunei Darussalam	14 February 2019	22 March 2019
11	Bulgaria	22 September 2009	23 March 2016
12	China	31 July 2017	04 October 2017
13	Congo	Never Enforced	23 March 2016
14	Croatia	18 January 2012	23 March 2016
15	Cyprus	11 January 2014	23 March 2016
16	Czech Republic	05 February 2008	23 March 2016

[42] Ibid. p. 4-6

S. No.	Country	Date of Initial Expiry of BIPA Agreement	Date on which Notice of Termination Issued by India
17	Denmark	27 August 2006	23 March 2016
18	Djibouti	Never Enforced	23 March 2016
19	Egypt	21 November 2010	23 March 2016
20	Ethiopia	Never Enforced	23 March 2016
21	Finland	08 April 2018	01 August 2018
22	France	16 May 2010	23 March 2016
23	Germany	12 July 2008	23 March 2016
24	Ghana	Never Enforced	23 March 2016
25	Hellenic (Greece)	12 April 2008	23 March 2016
26	Hungary	01 January 2016	23 March 2016
27	Iceland	15 December 2018	01 August 2018
28	Indonesia	21 January 2014	23 March 2016
29	Israel	17 February 2007	23 March 2016
30	Italy	27 March 2008	23 March 2016
31	Jordan	21 January 2019	22 March 2019
32	Kazakhstan	25 July 2011	23 March 2016
33	Kuwait	27 June 2018	26 June 2017
34	Kyrgyz	11 May 2010	23 March 2016
35	Lao PDR	04 January 2018	01 August 2018
36	Latvia	26 November 2020	26 November 2020
37	Macedonia	16 October 2018	01 August 2018
38	Malaysia	11 April 2007	23 March 2016
39	Mauritius	19 June 2010	23 March 2016
40	Mexico	22 February 2018	31 July 2018
41	Mongolia	28 April 2012	23 March 2016
42	Morocco	21 February 2011	23 March 2016
43	Mozambique	22 September 2019	22 March 2019
44	Myanmar	07 February 2019	22 March 2019
45	Nepal	Never Enforced	23 March 2016

S. No.	Country	Date of Initial Expiry of BIPA Agreement	Date on which Notice of Termination Issued by India
46	Netherlands	30 November 2016	23 March 2016
47	Oman	12 October 2010	23 March 2016
48	Philippines	28 January 2011	23 March 2016
49	Poland	30 December 2007	23 March 2016
50	Portugal	18 July 2012	23 March 2016
51	Qatar	14 December 2009	23 March 2016
52	Romania	08 December 2009	23 March 2016
53	Russia	04 August 2006	23 March 2016
54	Saudi Arabia	19 May 2018	01 August 2018
55	Serbia	23 February 2019	22 March 2019
56	Seychelles	Never Enforced	23 March 2016
57	Slovak	Valid for 12 months after issue of the Notice of Termination	23 March 2016
58	Slovenia	Never Enforced	23 March 2016
59	South Korea	06 May 2006	23 March 2016
60	Spain	15 October 2008	23 March 2016
61	Sri Lanka	12 February 2008	23 March 2016
62	Sudan	17 October 2020	19 October 2020
63	Sweden	31 March 2011	23 March 2016
64	Switzerland	15 February 2010	23 March 2016
65	Syrian Arab Republic	21 January 2019	20 June 2019
66	Taiwan	24 February 2015	22 March 2017
67	Tajikistan	22 November 2013	23 March 2016
68	Thailand	12 July 2011	23 March 2016
69	Trinidad & Tobago	06 September 2017	16 August 2017
70	Turkey	17 October 2017	09 July 2018
71	Turkmenistan	26 February 2016	23 March 2016
72	Ukraine	11 August 2013	23 March 2016
73	Uruguay	Never Enforced	23 March 2016
74	Uzbekistan	Valid for 12 months after issue of the Notice of Termination	23 March 2016
75	Vietnam	30 November 2009	23 March 2016
76	Yemen	24 February 2015	23 March 2016
77	Zimbabwe	Never Enforced	23 March 2016

"The details regarding older BITs which are still in force with six countries are as under:"[43]

Table 1.2 List of BITs in force

S. No.	Country	Date of Expiry of BIPA Ageement	Remarks
1	Bangladesh	06 July 2022	Joint Interpretative Note (JIN) has been signed on 4 October 2017.
2	Colombia	01 July 2022	Joint Interpretative Declaration (JID) has been signed on 4 October 2018.
3	Senegal	16 October 2024	Notice of Termination is proposed to be issued in 2024 if no response received on JIS.
4	Libya	24 March 2019	Termination Notice could not be conveyed due to the lack of a credible institutional counterpart.
5	Lithuania	30 November 2026	Notice of Termination is proposed to be issued in 2026 if no response received on JIS.
6	UAE	12 September 2024	The BIT was signed with the understanding that both countries would commence negotiations no later than 1 January 2016 (as per Article 18 of the India-UAE BIPA). The negotiations are ongoing.

"Out of the above-mentioned BITs still in force, Joint Interpretative Statements (JISs) have been signed with two countries namely, Bangladesh and Colombia as per the details below:"[44]

[43] Ibid. p. 7
[44] Ibid. p. 7

Table 1.3 List of countries with whom joint interpretative statements have been signed

Country and Name of Agreement	Date of Agreement	Date of Enforcement	Present Status
Bangladesh : Joint Interpretative Statement	04 October 2017	04 October 2017	Active
Colombia : Joint Interpretative Declaration	04 October 2018	04 October 2018	Active

"Post 2015, India has signed BITs / Investment Agreements with Belarus, Kyrgyzstan, Taiwan and Brazil. The date of agreement, date of enforcement and present status of the BITs / BIAs / Agreements signed subsequent to adoption of the Model BIT Text 2015 are as under:"[45]

Table 1.4 List of countries post 2015 with whom BITs / investment agreements have been signed

S. No.	Country / Region	Date of Agreement	Date of Enforcement	Present Status
1	Belarus	24 September 2018	05 March 2020	Active
2	Taiwan	18 December 2018	14 February 2019	Active
3	Kyrgyz Republic	14 June 2019		To be ratified
4	Brazil	25 January 2020		To be ratified

"Negotiations of various IIAs are in various stages with 37 countries / blocks as given below:"[46]

[45] Ibid. p. 8
[46] Ibid. p. 8-9

Table 1.5 List of countries / blocks with whom IIAs are at negotiation stage

S. No.	List of Countries with whom negotiations are ongoing	List of Countries with whom negotiations are at a preliminary stage
1	Switzerland	Mongolia
2	Argentina	Thailand
3	Morocco	Philippines
4	Mauritius	Australia
5	Russia	Oman
6	Israel	Egypt
7	Tajikistan	Turkmenistan
8	Uzbekistan	Armenia
9	Qatar	Ethiopia
10	Ukraine	Zimbabwe
11	Mexico	Kuwait
12	Saudi Arabia	Hongkong
13	United Arab Emirates	Ivory Coast
14	Iran	San Marino
15	Canada	Zambia
16	USA (Investment Incentive Agreement)	European Union
17	Azerbaijan	Asia-Pacific Trade Union
18	Cambodia	
19	Peru	
20	Sri Lanka	

1.9. Investment arbitration cases / Notices against India

"So far (till September 2021), there have been 37 notices of dispute or letters intending to raise a dispute by claimants or investors against Republic of India. Out of these only 16 have proceeded to arbitration[47]. India has won 4 arbitrations, lost 2 arbitrations, received

[47] Ibid. p. 14

adverse award in 3 arbitrations out of which all three cases are pending challenge to the arbitral award at the seat of arbitrations. In 1 dispute the investors withdrew their claim and 3 disputes have been resolved amicably. 8 disputes are still active at different stages of arbitration and in another 14 disputes, the claimants did not pursue the matter after the initial request under BIPA. 2 new notices have been received[48] by India. Out of the 9 disputes concluded thus far (apart from the two disputes resolved amicably), only one case (White Industries Case) has resulted in India paying the claimant the arbitral award; in four cases, India has had favorable decisions and 3 cases are pending challenge to the arbitral award at the seat of arbitration or at various stages post arbitration"[49].

"There has been considerable rethink in the developing world as to the need for and structure of BITs. While developed countries, which are the key sources of investment, have a very liberal approach to protect the large investments made in other countries, the policies of developing countries which are largely recipients of FDI is generally conservative"[50].

"Most of the disputes (of India) are from what can be called the first-generation BITs prior to 2015, which have very liberal provisions capable of wide interpretation as well as abuse by investors. India learnt from its experience and redrafted the Model in 2015 with an attempt to improve the treaty negotiations. Hence the drafting has been tightened with the following goals"[51]:

1. *Protect enterprise-based investments that qualify as per the characteristics of investment, exclude sensitive policy matters such as taxation that are integral functions of the sovereign.*
2. *Remove provisions prone to abuse*
3. *Carefully drafted articles so as to reduce arbitral discretion for varied interpretations.*[52]

"Disputes involving India are mainly on account of commitments like Most Favored Nation (MFN) and Fair and Equitable Treatment (FET) in the first-generation treaties. Most Favored Nation (MFN) in investment treaties have been misused to import favorable

[48] Ibid. p. 17
[49] Ibid. p. 17
[50] Ibid. p. 18
[51] Ibid. p. 18
[52] Ibid. p. 18

clause from other treaties, which is known as treaty shopping. In order to prevent treaty shopping, in the new model BIT (2015) text, there is no MFN clause. There has been expansive interpretation by arbitral tribunals of the FET provision. The Indian Model BIT of 2015 does not have the "FET term" standard but provides protection only against treatment such as manifestly abusive treatment or fundamental breach of due process. It is expected that discretion of the arbitral tribunals assessing claims made under the new standard of the Model is circumscribed leaving little scope for wide interpretation under the FET regime. The absence of the FET provision explicitly in the Indian Model BIT 2015 safeguards India's right to regulate by minimizing the possibilities of unexpected restrictions on its regulatory power that broad interpretations of an undefined FET may bring."[53]

"BITs essentially take away policy space ceded in the treaty articles, especially in more liberal BITs. Hence, for a developing country this poses challenges in terms of inability to change policies that may impact existing investors. Liberal provisions in BITs signed by India in the past have been causes of investment disputes. there has been a remarkable rise in the number of BIT disputes globally and BIT disputes are very expensive. In the absence of any jurisprudence regarding BIT interpretations and the fact that there are more than 3000 BITs internationally, the arbitral tribunals have wide ranging powers in interpretation of the clauses. Sometimes, the arbitral awards in BIT disputes tend to undermine the sovereignty, democratic decision making and right to regulate."[54]

1.10. Key features of Model BIT proposed by India

The Department of Economic Affairs, Ministry of Finance has provided an analysis of the provisions of the Model BIT 2015 as under:

(i) ***Preamble:*** *The Model BIT has a focused preamble referring to the key objective of bilateral cooperation between Contracting Parties in matters relating to the encouragement and reciprocal protection of investments to stimulate the flow of capital. The use of terms such*

[53] Ibid. p. 19

[54] Ibid. p. 25

as "sustainable development" reinforces the development goals of investment in terms of the overall framework of the BIT.

(ii) ***Definition of "Investment":*** *The Model BIT adopts an "enterprise" based definition. An "enterprise" based approach equates "investment" with an "enterprise" incorporated in the Host State and aligns the BIT regime with the Indian FDI Policy. The definition also clarifies the types of assets of the enterprise which are entitled to protection of the treaty. These include equity and debt instruments, IPRs, long-term contracts, licenses conferred by domestic law and property rights as long as such assets are owned by the enterprise. Further, an investment also has to demonstrate certain minimum characteristics such as commitment of capital, the expectation of gain or profit, the assumption of risk and have significance for the development of the host state in order to qualify for protection under the treaty.*

(iii) ***Definition of "Investor":*** *The definition of "investor" is important to determine who is protected by the treaty. While both juridical and natural persons are qualified as investors, the Model BIT requires investors to have substantial business activities in the Home State. In terms of natural persons, dual nationals are deemed to be protected under their dominant and effective nationality.*

(iv) ***Definition of "Measures":*** *The definition of "measures" is important to determine what type of actions by the Contracting Parties can lead to a claim. The Model BIT defines "measures" in a broad manner to include law, regulation, rule, procedure, decision, administrative action, practice, etc.*

(v) ***Scope:*** *The Model BIT protects investments existing at the time of entry into force of the Agreement as well as those made thereafter till the validity of the agreement. However, it excludes any disputes relating to investments prior to entry into force of the agreement. Further, matters relating to public procurement, taxation, public services provided by state enterprises, compulsory licenses and* *measures by local government have been excluded from the scope of the treaty.*

(vi) ***Substantive obligations:*** *In focusing on the substantive investor protection clauses, the Model BIT has two objectives: (i) clarifying the interpretation and application of substantive obligations by having contemporary language; and (ii) taking into account the recent jurisprudence emanating out of decisions of various investor state arbitrations.*

(a) ***Standard of treatment:*** *The Model BIT does not have the terms „Fair and Equitable Treatment" (FET) or the Minimum Standard of Treatment (MST) clause. Without referring to any such pre-existing standards, it seeks to define the core elements of the MST standard as found in customary international law by replacing it with specific obligations such as denial of justice, fundamental breach of due process or targeted discrimination or manifestly abusive treatment. The intention behind using such language is that the standard of review of the measure in question should be deferential towards governments and that the threshold for finding a violation rather high.*

(b) ***Non-discrimination****: Traditionally, the two core non-discrimination obligations are National Treatment (NT) and Most Favoured Nation (MFN). However, the MFN obligation has in the past allowed investors to selectively "import" favourable substantive provisions from other treaties concluded by the Host State. MFN clauses have also been used to waive jurisdictional/dispute settlement requirements. The MFN clause is accordingly removed in the Model BIT. NT is retained as the sole non-discrimination obligation. The Model clarifies that a violation of NT will only be found if the measure discriminates against foreign investors and if the Investments being compared are in "like circumstances".*

(c) ***Expropriation:*** *The Model BIT protects investors against both direct and indirect expropriation. For defining the scope of indirect* *expropriation, the Model text adopts the "substantial or permanent deprivation" test to determine whether an indirect expropriation has occurred. The provision also clarifies that non-discriminatory measures of general applicability such as public health, safety and environment are not considered expropriations. For the calculation of compensation, the standard provided for is the fair market value of investment.*

(d) ***Transfers:*** *The Model BIT provides investors the right to transfer funds relating to their investments in and out of the country without restrictions as permitted under domestic law. However, there are broad exceptions to allow the state parties to introduce capital control measures in the event of serious balance of payment problems and in times of monetary crisis.*

(vii) ***Investor State Dispute Settlement (ISDS):*** *ISDS is a powerful tool and protection for foreign investors, but also raises extensive and diverse policy concerns for States. The Model BIT text attempts to strike a balance between those potential costs and benefits of ISDS – retaining it for foreign investors while minimizing Host States" undue exposure to claims and liability. It does so through the following approaches and principles outlined below:*

(a) ***Scope of ISDS:*** *The Model text focuses ISDS mechanisms only for an alleged breach of the substantive investor protection clauses found in Chapter II, other than the obligations of transparency and entry and sojourn of personnel. The tribunal's power has been limited to awarding monetary compensation alone.*

(b) ***Conditions precedent:*** *The Model requires the investor to exhaust all local remedies for five years prior to commencing international arbitration. The investor is only excused from this requirement if the Investor can show that there is no domestic remedy capable of reasonably providing any relief. This exception is based on the recognition that that are certain BIT obligations (e.g., national treatment or restrictions on transfers) for which there may not be a domestic remedy as the measure will be valid under* *domestic law, but may violate international obligations. After exhaustion of remedies, the investor has the duty to engage in good faith consultations or negotiations in order to attempt to find a resolution for a period of six months. A failure to comply with that requirement bars the investor from pursuing investor-state arbitration. Initiating arbitration also requires the Investor and Investment to provide a clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures in question.*

(c) ***Dismissal of frivolous claims:*** *The Model introduces a mechanism by which the State can raise a preliminary question that a claim is frivolous or without jurisdiction. The tribunal is then required to suspend the merit-based review of the claim and first decide the jurisdictional question.*

(d) ***Prevention of conflict of interest of arbitrators:*** *In recent years, there have been several instances where arbitrators have a personal or pecuniary interest in proceedings they adjudicate. The Model BIT addresses this concern by providing clear and unequivocal language requiring arbitrators to be impartial, independent and free of any conflict of interest for the entire period of the arbitration.*

(e) ***Transparency:*** *The Model BIT permits non-disputing States to make submissions before the tribunal. These obligations also provide for Parties to make available documents relating to the arbitration such as the notice of arbitration, pleadings, transcripts, orders and awards at a publicly available source, subject to protection of confidential information in accordance with law. These provisions are now common worldwide and are likely to increase public confidence in the BIT regime.*

(viii) Exceptions: *The Model text contains two types of exceptions: general exceptions and security exceptions. The attempt is to carve out a policy space for the State. The general exceptions include,* *among others, the protection of environment, ensuring public health and safety, and protecting public morals and public order.*

(ix) ***Investor obligations:*** *A key concern with the investment treaty regime is that it is asymmetrical in as much as it provides investor's important protections and procedural avenues to challenge Host State action irrespective of their own conduct. The Model BIT adopts an approach whereby it seeks to balance investor rights with their obligations under domestic law. Consequently, it has a chapter on investor obligations which requires that foreign investors comply with domestic laws on corruption, disclosures, transparency at all times. Further, a clause has been added to the chapter on investor-state dispute settlement prohibiting an investor from submitting a claim if the investment was been made through fraudulent misrepresentation, concealment, corruption, money laundering or similar illegal mechanisms.*[55]

[55] Ibid. p. 30-33

Chapter 2
Historical Evolution of International Investment Protection Globally and in India

2.1. Seventeenth century – minimum international standards

As Europeans started moving across the world in their missions of exploration and colonization in various countries, a key issue that came up often was about the rights of aliens or foreigners in a country. The Europeans who reached Asia and Africa had one set of laws and rules when dealing with the countries of Asia and Africa, and an entirely different set of rules and laws (called international law) to deal with relations between two European countries or between a European country and a European citizen. Clara Kemme sums it up well when she says as follows:

> *During the nineteenth century international law as it was construed by European and American publicists, asserted that inter-national law applied only to civilized sovereign states that composed the "Family of Nations."*
>
> [...]
>
> *The history of international law has predominantly focused on the history of European international law, leaving out of consideration normative orders regulating the relations between polities outside Europe or the relations between European states and non-European entities. While at present international law is accepted as a universal order, the study of its*

history is often geographically limited to Europe and thus strongly regionalized.

[...]

It was the intensification of global relations that led to a regionalization of European international law. In a period when the European Law of Nations became more elaborate and institutionalized and at the same time the Europeans learned more about non-European customs, international lawyers began to emphasize the particularity of European international law. However, it was not uniquely the Europeans that had developed a system regulating inter-state relations. Other world views in different regions also laid down principles of inter-state conduct. When Europeans set sail to trade in other parts of the world they were confronted with new cultures and different normative orders. In order to be able to achieve their goals they had to find ways to on the one hand protect their own rights as they were accustomed to in their homelands and on the other hand to comply with the rules set by the host authorities. In the sixteenth and seventeenth century, unless agreements for extra-territoriality were convened, the Europeans participated in the various regional systems existing in Asia. However, European international law became increasingly entangled with these regional orders in the eighteenth century and more persistently in the nineteenth century, creating new dynamics and in the case of India a new system for regulating relations between states.

Indeed, in Asia, before European hegemony, the interactions between polities were regulated according to specific world views. The main normative orders which regulated Asian states in their interactions were the Islamic system of international law, the Hindu system of international law and the Chinese tributary system – also named the Confucian system of international law. While the Chinese tributary system was the dominating normative system in East Asia and parts of Southeast Asia, Hinduism and Islam influenced South- and Southeast Asia, sometimes intersecting with each other in the same regions. Scholars of the history of international relations in Asia have studied the interactions between states

> *in East Asia, describing the central function of China in regional exchange. However, there is less extensive literature on the interactions between states in South and South-east Asia outside the European colonial system. Although it is known that the Europeans, when they arrived in Asia, did not immediately impose their own legal systems on local societies, but initially participated in the existing regional systems, the process from a participation of Europeans in regional international orders to the imposition of European international (and, in part, municipal) law has not been sufficiently studied.*[1]

Most authors of international law have a strong biased European perspective which only looks at the way Europeans dealt with each other and with each other's citizens completely ignoring the well-developed international law as it existed in India and most of Asia before colonization by European powers. It is interesting to look at the way the so-called international law (which was European international law) was twisted to justify imperialism and colonialism when European explorers were on their mission of loot and rampage in much of Asia, Africa and Americas.

> *Although European territorial expansion was not a very important subject for European international lawyers until the close of the nineteenth century, European international law did provide a couple of doctrines for legitimization of the acquisition of territory. Yet these doctrines were extremely abstract, their vagueness leaving plenty of room for interpretation and the publicists elaborating on them would rarely use contemporary examples of the extension of sovereignty over foreign territories outside Europe. Nevertheless, there were lawyers, mainly working for the European colonial offices, who attempted to find a legal sanction for the imperial facts of their respective home countries. In studying the correspondence between the colonial office and British representatives in India, we find that legal doctrines existed which were specific for the Indian sub-continent and did not come up in the treatises of the international lawyers.*

[1] Books: Clara Kemme, Entanglements in Legal History: Conceptual Approaches, 2014

According to European international law sovereign states were allowed to occupy land which belonged to no one, also called terra nullius. Usually this was defined as uninhabited land, or land where humans did not live permanently and which was not cultivated. Nomads, for example, were not sedentary societies so their territories were considered terra nullius. In reality however, many regions of the world were permanently occupied by peoples. Yet they were deprived of the right of sovereignty over their land in European international law theory of the nineteenth century because they were not considered civilized by the Europeans. In their opinion land should be used in the most effective manner and the more civilized states had a better title to foreign lands because they knew how to put the land into effective use. At the same time international lawyers sought to bring order to the relations between the European powers, who had, markedly in the second half of the nineteenth century, gotten into fierce competition over non-European territories. Some were for decades, some even for centuries, nominally in possession of territories by the title of discovery but had not actually assumed control over the land. Rivaling European states could hence claim that they did not practice effective occupation and that they in turn did have the intention to take effective control. The European possessor of the foreign territory was allowed a certain period of time to assume effective occupation of the land and if no other state laid claim on the territory, the doctrine of acquiescence was recognized. Thus, the doctrine of effective occupation served two purposes: to legitimize the acquisition of territory by European states from non-European entities and to regulate the relations between the European states.

Another title for the acquisition of territory was conquest. European international law theory allowed for territorial acquisitions during wartime. The just war theory of the early modern period, which sanctioned war when it was fought for a just cause or a just reason, lost its relevance at the close of the nineteenth century when positivism had replaced religious morale. Waging war was considered a prerogative of the sovereign, and its initiation was scarcely limited. Positivist lawyers were

> *more interested in making conduct in war more humane and protecting non-combatants than to actually prevent the occurrence of war.*
>
> *Finally, next to discovery, occupation and conquest, territory could be acquired by cession. This meant that the sovereign of a state was allowed to give or sell a part or all of his territory to a successor state. Express permission was usually given in form of a treaty. Most European colonies were founded on the title of cession. However, it was not always territory which was ceded in treaties. It was also possible to cede parts of the rights inherent to a sovereign. International lawyers from the nineteenth century onward pro-posed that the sovereignty over a territory could be split into external and internal sovereignty. External sovereignty had to do with the relations between states and contained the right to wage war and make peace, to maintain peaceful relations with other states and to conclude treaties. Internal sovereignty was the right to rule the peoples within the territory of the state. This strict separation between internal and external sovereignty allowed for the establishment of protectorates. Protectorates constituted an agreement in which the protected state ceded its external rights in return for a military alliance.*[2]

The above discussion is important to understand the context in which investment treaties and international laws evolved during subsequent centuries. In the Seventeenth century (CE) Europeans relied on John Locke's theory of natural rights of man to develop what were called as Minimum International Standards. Importance of Locke's theory of natural rights of man in the history of modern civilization (or rather Western civilization) can be seen from the following extracts from a thesis published in the middle of twentieth century:

> *Today many nations of the earth are being enslaved by ideologies which glorify the state and trod upon the individual, denying completely all God-given rights. The subject of natural rights therefore, is of great importance. It is as important as man is himself. Two centuries ago, the writers of the American constitution thought natural rights so important that they took them as a founding principle. Thomas Jefferson, the author of the*

[2] Books: Ibid.

> *Declaration of Independence, is said to have been greatly influenced by the writings of John Locke on the subject of natural rights. Four fundamental political ideas, the doctrine of natural law and natural rights, the compact theory of the state, the doctrine of popular sovereignty, and the right of revolution against an unjust government, are all found in the Declaration much in the phraseology of John Locke.* [3]

Notably, the natural rights of man in the seventeenth century were restricted to White man and did not include persons of any other skin colour and even gender. The aristocratic White men of seventeenth century were seeing wealth flowing in from the colonies and such other lands in different continents. The wealth was being invested by the wealthy in other countries of Europe and also in other countries across the world. A key worry for Europeans at that time was protecting the properties acquired in different countries from acquisitions and other such state actions of the host countries. John Locke's theory of natural rights of man came in handy at this stage and protecting property rights of individuals (read foreign investors) was considered a primary duty and responsibility of each sovereign state.

John Locke had the following to say about property:

> *44. From all which it is evident, that though the things of Nature are given in common, man (by being master of himself, and proprietor of his own person, and the actions or labour of it) had still in himself the great foundation of property; and that which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own, and did not belong in common to others.*[4]

While Locke did not specifically focus on property rights very strongly in his works, the people who relied on his natural rights of man emphasized that right to property is a natural right of man and must not be trampled upon by a state. This was further extended to say that even if a state treats its own subjects unfairly and acquires their property arbitrarily the state must not do the same for aliens (read Europeans). This was argued to be the Minimum International Standard which every sovereign state must adhere to. Thus

[3] Articles and Studies: Mark Francis, Philosophy of Natural Rights According to John Locke, 1952

[4] Books: John Locke, Two Treatises of Government, (1634-1704)

began the principle of a state treating aliens (if they are White men) better that its own citizens.

It may be mentioned here that the Minimum International Standards was part of European International Law with very limited or practically no application in rest of the world. India had a very different international law during the seventeenth century (CE). The following extract sums up the situation at that time very well:

> *The universalization of European international law was a long process and the Law of Nations was not at once accepted by non-European states. The history of the colonization of India confirms this. It is possible to define several stages in which different systems regulated the relations between states on the Indian sub-continent. In the first stage, at the time when the East India Company was still becoming a territorial power, European international law did not have any application to India. This by no means meant there was no international order on the sub-continent. On the contrary, Hinduism and Islam provided for very clear ideas of the role of sovereigns and how they should interact with each other. From these world views derived a complex network in India which was based on tributary relations. At the head of this network was the Mughal Emperor. He was the one who distributed offices and held the system together. The British East India Company initially participated in the Indian international system. It received firmans from the Mughal Emperor and became the empire's tax collector. The relations between the Company and the Indian states were those of equal sovereign states and this permitted the Company to pursue its policy of treaty alliances. The concept of protected states already existed in the Indian international system; the Company only added to it the standard of written treaties.*[5]

2.2. Nineteenth century – foreign investors' protection

Protection of foreign investors' rights acquired importance for Europeans as they moved to various countries and bought properties in those countries. It was disturbing for them

[5] Books: Clara Kemme, Entanglements in Legal History: Conceptual Approaches, 2014

to learn that property rights were not sacrosanct in most parts of the world and sovereign powers of a king included rights over properties of all subjects. The White man wanted more than that. The White man wanted to be treated better than the way different sovereign states treated their own subjects. Of course, justification for this was provided by various philosophers who developed the theory of natural rights of man. It is interesting to note that the concerns of the White man about foreign investors' rights were being raised when aliens did not have property rights in most of the Western world including United States of America. The following writing about alien property rights makes interesting reading:

> *Courts in the fledging United States adopted various tenets of English common law, including alien property disabilities—that is, restrictions on various property rights based on alienage. The idea of restricting a foreigner's access to land stemmed from the structure of feudalism itself. Under feudal land tenure, land was directly connected to allegiance. All land was under the control of the monarch, who granted it to individuals only upon assurances of their service to him. Such assurances took various forms, typically either financial or military—as a landholder, you had a duty to provide money, defense, or some other such service to the sovereign. The modern "citizen" did not exist; in a monarchy, all those owing allegiance to the king were his subjects. Holding land was the privilege of subjectship; those who were the subjects of another—say, the king of France—could not legally hold English lands. As an English legal scholar later summarized:*
>
> > *By feudal law every tenant of lands owed fealty to the lord of whom his lands were holden. In England the King is the ultimate feudal lord and owner of all lands, and an alien owing allegiance to a foreign prince was held incapable of taking the oath of fealty which imposed obligations that might be inconsistent with the fidelity due to his own sovereign.*
>
> *From the feudal era until the late nineteenth century, then, aliens in England could not legally inherit property or leave it to others upon death; if they purchased property, they held it only so long as the King allowed.*

Alien property disabilities also interacted with married women's property law: a woman who was an alien could be barred from receiving her dower. Owners who attempted to sell, rent, or otherwise convey their property to an alien would lose that property to the crown through forfeiture, since such a transaction would be "contrary to law." As William Blackstone noted in his Commentaries on the Law of England, a highly influential eighteenth-century treatise on English law, aliens were "disabled to hold by purchase, except by the King's license." The ability to inherit or devise property was not available to them, since they had no "inheritable blood in them." In this way, Blackstone noted, "they are on a level with bastards."

Alien property disabilities grew out of a time not only of monarchical rule, but also of perpetual allegiance: one could not hold dual or multiple citizenships, and one's allegiance was not a matter of choice. Subjectship was not based on consent; it was based on duty. This notion extended beyond property law; for example, prior to the seventeenth century, aliens were unable to sue in English courts.

There were exceptions to the rule against alien property ownership, however. Some foreigners were granted the status of denizen, if the sovereign chose to extend it. Denization empowered aliens to hold a life estate in real property; they were then able to devise the property, but only to after-born children. As English legal historians Frederick Pollack and Frederic Maitland explain, "A denizen thus made can hold land, and he can acquire land by gift, sale or the like, but he cannot inherit, and a child of his born before the act of denization cannot inherit from him." Alien merchants were granted some exceptions so that they could rent property for their trade.

[...]

In the American colonies, alien disabilities "mirrored those of England" and were sustained in the courts. There were some exceptions; some colonial governments enacted laws to exempt certain aliens at certain times from the operation of the common law rules. Land laws were not always uniformly prosecuted. Some aliens did hold land and passed it on

> *to their heirs, since they were not challenged by competing heirs and governments did not act to dispossess them. This left many Americans confused as to the state of the common law, with some assuming that aliens were able to hold land. Yet for the most part, the English common law rules regarding alien property were adopted wholesale in the colonies and in the states after independence. Because of this common law tradition, the United States and Great Britain specifically made an exception to the rules governing alien land ownership in the 1794 Jay Treaty, which ensured that British citizens in the fledgling American republic would be able to hold land as natives rather than as aliens.*[6]

The Jay Treaty 1794 can be one of the earliest examples of a bilateral treaty that allowed citizens of one country (Britain) to hold property in the other country (USA). The 1794 Treaty is not surprising since it was a treaty granting rights and protection to a White man by another White Man. Notably, in the eighteenth century the United States of America consisted of only White citizens. The following paragraph describes the requirement of citizenship of USA at that time:

> *The first federal naturalization law, enacted by Congress in 1790, made citizenship available to "**free white persons**" who had resided in the United States for two years and in the state where they sought naturalization for one. Applicants also had to demonstrate "good moral character" and pledge to support the Constitution. These were the only requirements.*[7] (Emphasis added)

Eighteenth and nineteenth century (CE) was the time when the European countries (including American capitalists) were spreading out for loot in the form of colonialism and imperialism. In the process, they were often clashing with rulers of different states demanding protection for their investments. They were not satisfied in being treated on par with the nationals of the host country. They wanted to be treated better than the citizens of the host country. Bilateral arrangements (treaties and such other instruments) to protect investments were executed in different countries during this period which

[6] Articles and Studies: Allison Brownwell Tirres, Ownership Without Citizenship, 2013
[7] Articles and Studies: Ibid. p. 16

granted higher rights to nationals of the imperialist or colonizing powers as compared to the rights available to the citizens of the host countries.

2.3. Early twentieth century – customary international law

Customary International law was a term that was often used during the early twentieth century by European and American jurists and academicians. The basis for customary international law was at times prevalent practices in Europe, at times was theology and at other times was popular philosophical theories of the time (positivist thinking, natural rights of man etc.). However, mostly the customary international law was modified and amended as per the needs of the Western powers. The situation of twentieth century is summed up by Ole Spiermann as follows:

> *In political terms, the 20th century brought about a gradual transfer of power from Europe, ' a forest of symbols ' , to what had until then been the peripheries, in particular the United States. In the first half of the century, influential ideas about international law were promoted by American statesmen in European cities such as The Hague and Paris. The names of Elihu Root, Woodrow Wilson, and Francis B. Kellogg come to mind, among others. Many of those ideas – a permanent court of international justice, a general association of nations, and renunciation of war – were taken further when establishing the United Nations Organization in the aftermath of the Second World War, the key defining event of the century. Principles of individual criminal responsibility were articulated by the International Military Tribunal at Nuremberg, the establishment of which had been preceded by clashes between traditions and policies.*[8]

The terminology "international law" had started to emerge in the twentieth century. It was a new discipline, very different from national law, which was developed by jurists and academicians.

> *Many lawyers seem to know that international law maintains a somewhat uneasy relationship with bindingness. But in order to understand, one*

[8] Articles and Studies: Ole Spiermann, Twentieth Century Internationalism in Law, 2007

would have to bear in mind that international law represents an expansion of the rule of law beyond the confines of national law to, in the first place, what is traditionally phrased relations between states. The true problem is not whether international law is binding, but whether relations between states – and other issues taken to affect the interests of a plurality of states – may be subject to law at all. Relations between states are located outside the conceived confines of national law for the simple reason that each national legal system is linked to a particular state – the theory of state sovereignty – and, therefore, inapt to govern issues involving other sovereign and independent states. Once an issue has been defined as involving the interests of a plurality of states, for whichever reason, tradition or otherwise, national law no longer recommends itself, even to national lawyers. Whether law is excluded from certain areas of life may be a philosophical conundrum of considerable intellectual depth. Suffice it to say that the positioning of international law on the periphery of law adds an idealistic, if not missionary, flavour to international lawyering, even today. And that, more significantly, lawyers confronted with specific cases generally recognize the need for, as well as the possibility of, law also in situations related to the interests of more than one state. Reconciling sovereignty of a state with the binding character of international law has been agreeable, or at least more agreeable than a Hobbesian vision of the state subjecting other sovereign states to its national legal system in contradiction with their sovereignty (and independence). In this light, bindingness presents itself as the lesser of two evils.

Lawyers know that international law is a legal system separate from national law. But international law is not a legal system in the sense that national law is a legal system. Rather, international law is the only legal discipline treated as a separate legal system, as distinct from a branch of national legal systems. It would hardly make sense to refer issues to international law on the ground of national law being inadequate if, in turn, international law were treated as part and parcel of national law. On that view, international law would have dissolved into so many ' äußere Staatsrechte ' , or foreign relations laws, of so many states. Nevertheless, *the raison d ' être of international law is a need felt by national lawyers for residual and complementary law governing what is outside the confines of national law. One might say that the accepted inadequacies of national law determine which questions need to be addressed in international law; separateness of international law is achieved by answering these questions independently of national law. Leaving aside treaties, issues affecting the interests of a plurality of states and thus internationalism has been roughly synonymous with inter-state relations, a circumstance that has informed traditional opposition against non-state actors as subjects of international law. Even today international law is necessarily fragmented and not fully conversant with notions of system and order developed with a view to national legal systems.*[9]

The term "international" was a new term of the era. Internationalism was developing as Europeans were becoming firm in their colonies.

A rather more prosaic term, i.e. ' international ' , was coined by Jeremy Bentham in the spectacular year 1789 amidst developments that served to ground (national) law in the axiom of all individuals being born equal. Bentham drew distinctions between three classes of legal relationships not confined to a single state:

- transactions between individuals belonging to different states: these were governed by national law;

- transactions between a sovereign of one state and a private member of another state: also governed by national law; and

- mutual transactions between sovereigns: this was the 'branch of jurisprudence which may be properly and exclusively termed international' and for which national law was inapt.

The 20th century witnessed an expansion of internationalism beyond the latter class and a consequent erosion of Bentham's distinctions. This was not solely, or even primarily, by judicial fiat, yet practical application of international law served to underline the consequences and difficulties of

[9] Articles and Studies: Ibid.

expansion. International law was evidently concerned not solely with relations between states, but with issues affecting the interests of states that, to a degree, involved ' subjects ' of international law other than states. As the 20th century was drawing to a close, international lawyers would necessarily regard this as trite learning, yet the same lawyers persisted in surprising numbers in conceiving internationalism in a narrow, Benthamite way equivalent to the third class of relations between sovereign states.

Which relations are to be governed by international law depend in part on what it means to be a subject of international law, a roguish notion developed by the Buchrecht to exclude individuals and others from internationalism. Existence of rights and obligations must be distinguished from their enforcement, as the International Court of Justice stated in its path-breaking opinion from 1949 about the United Nations: ' [w]hat it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims ' . Designating each and every person and entity which may incur or invoke responsibility under international law as subjects of international law certainly provides a better understanding of internationalism than does the conceptual straitjacket of the Buchrecht. The presence of a supervisory body is not a condition for international legal rights, or the correlative obligations, whether imposed on states or other subjects of international law. Considering this to be a travesty of law, and international lawyers to be ' sorry comforters ' , and one is paying too much regard to ideals of national legal systems, and too little to international law being an expansion of law beyond the confines of national law. Precisely because residual and complementary, neither cynics nor idealists are likely to be truly enlightened by judging international law against ideals of national legal systems (nor against possibly shared notions of system or order).[10]

[10] Articles and Studies: Ibid.

As "international law" was developing as a discipline, two key notions that had to develop were international private law and international public law. The terms were unheard of earlier.

> *The first example is the most notable retreat of internationalism in the 20th century, or perhaps just before. This is the example of private international law, or the conflict of laws; an area of law concerned with cases between private parties containing foreign or trans-border elements. It is widely assumed that in the event of foreign elements being present the proper law to be applied to the facts of a case might ultimately be that of a national legal system other than that of the forum state. Lawyers of today know that referral of cases to a national legal system, the choice of law, is governed by the national law of the forum (the lex fori), as opposed to international law. But it is an open question whether we understand why. In the very least, understanding would take a traditional, Benthamite conception of internationalism, one that is narrow but also capable of assuring separateness.*
>
> *Historically, private international law, and in particular choice of law, went hand in hand with jurisdiction and delimitation of the powers of a state vis-à-vis other states. Jurisdiction forms a classical topic of international law, also an archetype of general international law (the international law of coexistence): To what extent should a state tolerate that other states extend their national law, possibly accompanied by adjudicative and enforcement mechanisms, to matters with which the first-mentioned state is concerned? May a state claim exclusive jurisdiction, at least prima facie, over matters within its territory? Problems of choice of law emerge when translating the question of competence into a question of substantive law: To what extent should a state tolerate that courts of other states apply local law to matters with which the first-mentioned state is concerned? May a state insist that such matters are resolved in accordance with its national law even in foreign courts?*
>
> *Still in the 19th century, choice of law was treated together with jurisdiction as issues belonging to what would today be termed public international law. Von Savigny referred to ' an international common law of nations [*

einer völkerrechtlichen Gemeinschaft] having intercourse with one another ' , but various labels and categorizations were in play reflecting in part the national legal training of the contributors. In Ernst Rabel's words, ' these authors wrote on conflicts law in a common atmosphere, among brethren of the same creed, envisaging its application in all countries '[11]

As international law has developed notions of customary international law have also developed. There are various views about the origins and purpose of customary international law.

According to one of the more prominent authors of this push-back, Professor Prosper Weil of the University of Paris, the purpose of international law throughout the centuries has never been to better mankind, but rather has been to ensure a set of universally recognized and agreed upon rules which allow mankind to live in relative peace and order. Given this, the international legal system is always looking to ensure that its power and function are universally accepted and applicable, rather than hierarchical.[12]

The following overview of customary international law (CIL) gives a very good perspective on what constitutes CIL and what are the sources of CIL.

Customary international law (CIL) is one of the most controversial sources of contemporary international law, precisely because of its theoretical difficulty. According to article 38.1(b) of the Statute of the International Court of Justice, CIL is one of the sources of international law, and it consists of "evidence of general practice accepted as law". This definition of CIL conceals endless theoretical problems, to the point that some have even suggested getting rid of this problematic and obsolete source of international law. In spite of these provocative proposals, contributions from scholars and jurists seeking to disentangle the conceptual difficulties of CIL are abundant in current literature. What these contributions point out is that there are three major problems concerning the legitimacy of CIL

[11] Articles and Studies: Ibid.

[12] Articles and Studies: Roozbeh Baker, Customary International Law in the 21st Century, 2010

as a source of legal obligation, i.e. political concerns; cultural prejudices; and methodological inconsistencies.

As for the first set of concerns, custom is accused of being a politically biased source of law. Indeed, because it traditionally relies on tacit consensus it can represent the hegemonic expression of the will of the most powerful states, which over time had the power and influence to impose respect for a customary rule of their choice and to turn it into an established and generally accepted practice. In this respect, less influential states (mostly, non-European states) would find themselves in the position of having to accept and observe a customary rule, the formation of which had not involved their contribution or explicit consent. In a similar manner, the "volatility" of CIL (in contrast to positive, written law) can be a powerful rhetorical device in the hands of more influential states that make use of it to pursue their own interests or political agendas. To solve this problem, recent international law has seen an increased sense of the importance of treaty law, and therefore of expressed rather than tacit consensus, precisely with the purpose of ameliorating the "democratic deficit" of CIL.

These political concerns are a consequence of the widely-perceived cultural insufficiency of CIL as a source of legal obligation in facing the pluralist challenges of a global world. In other words, CIL might not only be the result of Western states politically imposing their own agendas on the world, but also of their own cultural mindset and legal tradition.[13]

2.4. Post-World-War II – investment protection treaties

"During the early days of twentieth century, the capital exporting countries were strongly expressing the opinion that private property and enterprises must be protected and this ought to be treated as a minimum obligation of each state. A major event that shook the world at this time was World War I or the First World War (WWI) (28 July 1914 – 11 November 1918). WWI was fought between two coalitions, the Allies and the Central Powers. Fighting occurred throughout Europe, the Middle East, Africa, the Pacific, and

[13] Articles and Studies: Francesca Iurlaro, Unpuzzling Customary International Law (CIL), 2018

parts of Asia. An estimated 9 million soldiers were killed in combat, plus another 23 million wounded, while 5 million civilians died as a result of military action, hunger, and disease."[14]

The period before World War I was characterized by one of the greatest expansions in the history of the major world economies of the time, with the exception of the United Kingdom that was still the dominant world financial center in 1914. In fact, the whole period has been labelled as the first modern globalization. At the time that preceded World War I and in spite of the rise of economic liberalism and globalization, the protectionist infant industry arguments held their sway among some of the major economies of the time (US, Germany). Simultaneously, along with economic expansion came imperialism, the expansion of colonialism and the ever deeper divide between the center and periphery of the world economy. It has been argued that war arose out of economic rivalry between Britain and Germany. Some countries wanted to have larger control on colonies while the ones in control of colonies were worried about losing colonies which were feeding key resources.

While WWI was in progress, October Revolution took place through an armed insurrection in Petrograd (now Saint Petersburg) on 7 November 1917. The October Revolution was a key moment in the larger Russian Revolution of 1917–1923. This period saw Russia abolish its monarchy and adopt a socialist form of government following two successive revolutions and a bloody civil war. The Russian Revolution can also be seen as the precursor for the other European revolutions that occurred during or in the aftermath of WWI, such as the German Revolution of 1918.

Russian Revolution led to the birth of Union of Soviet Socialist Republics (USSR). On 28 December 1922, a conference of plenipotentiary delegations from the Russian SFSR, the Transcaucasian SFSR, the Ukrainian SSR and the Byelorussian SSR approved the Treaty on the Creation of the USSR and the Declaration of the Creation of the USSR, forming the Union of Soviet Socialist Republics. Formation of USSR, a communist country, with no respect for property rights added to the worries of capital exporting countries.

[14] Source: https://en.wikipedia.org/wiki/World_War_I

Post-WWI efforts to arrive at some form of global agreement for protection of property rights are summed up very well by Newcombe and others as follows:

> ***Efforts to codify treatment standards in the 1920s and 1930s*** *In 1924, the League of Nations established a Committee of Experts for the Progressive Codification of International Law. The Committee reported in 1927, recommending that seven subjects were ripe for codification. On 27 September 1927, the Eighth Assembly of the League of Nations resolved to submit three topics to the First Conference for the Codification of International Law (the 1930 Codification Conference), including the 'Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners.'*
>
> *In anticipation of the 1930 Codification Conference, a number of organizations, including the Institute of International Law, Association de Droit International du Japon, the American Institute of International Law and the International Commission of Jurists instituted research projects on rules of international responsibility relating to injuries to foreigners. The Harvard Law School undertook a program of research in international law for the purpose of preparing a draft international convention on each of the three topics to be discussed at the 1930 Codification Conference. The reporter for responsibility of states, Edwin Borchard, prepared a Draft Convention on Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners (1929 Harvard Draft).*
>
> *Divided opinion on standards of treatment, however, was evident at the 1930 Hague Conference, during its proceedings on codifying customary international law rules on the 'Responsibility of States for Damage Caused in Their Territories to the Persons and Properties of Foreigners.' Article 10 of the draft codification provides as follows:*
>
> > *As regards damage caused to the person or property of foreigners by a private person, the State is only responsible if the damage sustained by the foreigner results from the fact that the State has failed to take the measures which may*

> *reasonably be expected of it in the circumstances in order to prevent, remedy or inflict punishment for the damage.*

In voting on the article, seventeen states (mainly capital importing states) maintained the position that foreign nationals were only entitled to equality of treatment with nationals, while twenty-one states, including the capital exporting states, maintained the existence of a minimum standard of treatment. Divided opinion on the issue of the minimum standard was a significant factor in the breakdown of the conference's codification efforts in the area of state responsibility. The final version of the codification was not adopted because it failed to receive the requisite support of two-thirds of the states at the conference.

Convention on the Treatment of Foreigners *In addition to the codification efforts at the 1930 Codification Conference, states also attempted to conclude a Convention on the Treatment of Foreigners (1929 Draft Convention), in the late 1920s and early 1930s, under the auspices of the League of Nations. A diplomatic conference – the International Conference on the Treatment of Foreigners – was held in Paris in late 1929 with forty-seven states participating. The origin for the conference lay in Article 23 of the Covenant of the League of Nations, under which states undertook to 'secure and maintain equitable treatment for the commerce of all members of the League.' At the World Economic Conference in Geneva in 1927, the International Chamber of Commerce (ICC) had submitted a report on the treatment of foreigners, recommending that the Council of the League hold a diplomatic conference. The Council entrusted the Economic Committee of the League of Nations to prepare a draft convention to serve as a basis for discussions at the conference.*

The twenty-nine articles of the draft convention were far-reaching. They accorded foreigners equality with nationals (national treatment) in almost all respects, including the right of establishment, freedom in relation to fiscal matters, freedom to travel, carry on a business and engage in all occupations, and the ability to exercise civil, judicial and succession rights. The conference, however, revealed significant differences of opinion *between capital exporting and importing states on the principle of equality.*[15]

The differences between capital exporting and capital importing countries continued throughout the period between the two World Wars and also after the Second World War. While at that time, the Asian and African countries were in no position to raise any demands or to take over property of nationals of Western nations, it was the countries of South America that resisted the demands by capital exporting countries. Mexico was at the forefront of countries that insisted on foreigners being treated on par with citizens. The situation at that time is well summed up by Newcombe (supra) as follows:

> ***The Hull Rule*** *The disagreement between capital exporting and importing states over the minimum standard of treatment came to a head in an exchange of correspondence between Mexico and the US in 1938 regarding the standard of compensation for expropriation. The US insisted on the Hull Rule, named after US Secretary of State Cordell Hull, who, in response to the expropriation of American held oil interests by Mexico in 1938, argued that 'adequate, effective and prompt payment for the properties seized' was required under international law. By contrast, Mexico argued that, in the case of general and impersonal expropriation for the purpose of redistribution of land, it was only required to pay compensation in accordance with its national laws. In Mexico's view, international law distinguished between expropriations resulting from a 'modification of the juridical organization and which affect equally all the inhabitants of the state and those otherwise decreed in specific cases and which affect interests known in advance and individually determined.' General social reforms imposed no international obligation to provide immediate compensation, as foreigners were only entitled to the same treatment as Mexican citizens. Thus, although the Hull Rule focuses on the required standard of compensation under international law, the actual dispute between Mexico and the US that gave rise to the articulation of the rule concerned the types of measures affecting property that are compensable under international law. The standard of compensation for*

[15] Articles and Studies: Newcombe, Historical Development of Investment Treaty Law, 2009

> *expropriation continued to be a source of significant disagreement in the post-WWII era.*[16]

On the same subject, it is interesting to read the following account of protest by Mexican Government about demand by United States of America regarding higher compensation for US landowners:

> *IN its note of August 3, 1938, the Mexican Government, by its Minister of Foreign Affairs, contested the right of the United States to demand compensation for the agricultural lands of American citizens expropriated by Mexico since l 92 7. It asserted that the countries of this continent have vigorously maintained*
>
> > *"the principle of equality between nationals and foreigners, considering that the foreigner who voluntarily moves to a country ... in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed. It would be unjust that he should aspire to a privileged position safe from any risk, but availing himself, on the other hand, of the effort of the nationals which must be to the benefit of the collectivity."*
>
> *The Mexican Minister of Foreign Affairs then invoked article 9 of the Convention on the Rights and Duties of States signed at Montevideo, 1933, which provides for complete jurisdiction of states within their national territory over all inhabitants, to the effect that*
>
> > *"nationals and foreigners are under the same protection of the law and the national authorities, and foreigners may not claim rights other than or more extensive than those of nationals."*[17]

While one reads the demand by Mexican Government to treat the US citizens at par with Mexicans, one should also read the reply by the US Government which reads as follows:

[16] Articles and Studies: Ibid.

[17] Articles and Studies: Edwin Borchard, Minimum Standard, 1940

Secretary Hull in his reply of August 22nd paid tribute to the doctrine of equality but contended that it "invariably referred to equality in lawful rights of the person and to protection in exercising such lawful rights." He then expressed surprise at Mexico's announcement of the "astonishing theory" that this beneficent principle of equality should be invoked not "to protect both human and property rights" but to deprive and strip "individuals of their conceded rights." He denied that this was permissible because Mexican nationals were also despoiled. As to exposure to the same risks and the claim that aliens enjoy a privileged position by seeking to escape confiscation, Secretary Hull maintained that the Mexican doctrine of risk

> *"presupposes the maintenance of law and order consistent with principles of international law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations."' ·*

He denied that this was a claim of special privilege in contravention of the Montevideo treaty and maintained that confiscation could not be excused by the "inapplicable doctrine of equality."[18]

Denial of the doctrine of equality in some form or the other formed the basis of protection of foreign investors more than a hundred years ago and still forms the basis of all investment protection treaties.

Development of the regime for protection of rights of foreign investors is described very well by Adriana Sanchez Mussi as follows:

The Minimum Standard of Treatment can claim a long existence in international law throughout its origins in the ancient doctrine of denial of justice and the origins of the latter can be traced back as far as ancient Greece. Hugo Grotius and Emer de Vattel embraced the doctrine as part of the law of nations, which was viewed during the 17th and 18th centuries as

[18] Articles and Studies: Ibid.

derived primarily from natural law. During the 19th century, the natural law version was supplanted by the modern, positivist view of the law of nations. According to this view, the law of nations is based in the implicit consent of nations as demonstrated through customary practice. Yet, despite the rise of the positivist approach to international law, the doctrine of denial of justice endured into the early 20th century as part of the natural law legacy of the law of nations.

Professor Wallace Jr. in an article, when explaining the origins of "denial of justice", express that in ancient times as a result of a missing central power when people of one "country" or state, specially merchants, could not acceded nor obtained justice from a foreign country or state for the acts of their citizens some practices and law4 became spread by which the merchant, who was looking for the satisfaction of his rights or grievances, appealed to his prince or authorities who in turn appealed to the authority of the debtor and, in case of no response, the aggrieved person was authorized to take reprisal. This institution of reprisal became regularized and evolved into gunboat diplomacy and "Out of this history there eventually developed, as institutions of customary international law, the more civilized practice of diplomatic protection and the attendant idea of an international minimum standard."

Something quite similar was repeated during the colonial times. People and investor from the old continent were migrating to the new colonies which, by the time, were lacking evolved forms of government, institutions and legal framework. Worried about their citizens and interests, this capital exporting countries began to design new legal doctrines for the protection of their nationals (and even intervening in the host country if necessary). An international minimum standard was necessary in order to provide them satisfactory protection.

During colonial times the idea of minimum standard was linked to the protection of the life and liberty of nationals which evolved to protect also their properties and investments against expropriation and economic measures in developing countries. The international law doctrine of State responsibility for injuries to nationals provided that the injury caused to *the national of a foreign State was an injury profited to the national's State, allowing the protection of the latter when domestic recourse was unavailable or exhausted. Two conditions were necessary: the nationality of the alien (corporations were also entitled to this protection), and the exhaustion of local remedies in the host State. Hence, the State of nationality owned the investor's claim and under such power could pursue it, settle it or just ignore it.*

National treatment was not an option for this capital exporting countries which, as said before, were not satisfied with the political, legal and judiciary system governing in these uncivilized countries. Investors and their countries were demanding for an absolute protection, a minimum standard, below which international law and their diplomatic protection would come in their defense.[19]

Former colonialists and imperialists who had become capital exporting countries were not satisfied with being treated at par with the citizens / nationals of the host countries. They wanted absolute protection which they called as minimum standard. Surely, not all countries were willing to accept this. Resistance to this absolute minimum standard came from South American countries. **The Calvo Doctrine** had emerged from this resistance.

As a reaction to the abusive exercise of power, in defense of their citizens, by capital exporting countries (especially Europe and United States) Latin American countries started to develop a series of resistance founded in the principles of Sovereign Equality of States and the Equality of Nationals and Aliens. For this reason Carlos Calvo, a distinguished jurist from Argentina (born in Uruguay), declared in 1896 that the responsibility of governments toward foreigners cannot be greater than that which these Governments have towards their own citizens thus, an investor could not be granted with better rights than local citizens and investment disputes would be adjudicated by local courts applying domestic law.[20]

[19] Articles and Studies: Adriana Sanchez Mussi, International Minimum Standard of Treatment, 2008
[20] Articles and Studies: Ibid.

The Calvo Doctrine was popular in the 1960s and 1970s and there were attempts to spread it to various parts of the world. However, in the years that followed and especially after the collapse of USSR, most countries, including of South America, left the Calvo Doctrine behind and moved ahead.

Interestingly, when the USA became a capital importing country, their attitude changed and they espoused the Calvo Doctrine without referring to the doctrine.

> *Latin American Countries have entered into bilateral investment treaties that contain languages and principles that notably leave behind the Calvo doctrine. However, in ironic contrast, in 2002 the U.S. Congress passed the Trade Promotion Authority Act instructing its trade negotiators to ensure that foreign investors are not accorded greater substantive rights than U.S. nationals. "This language is clearly reminiscent of Calvo, and flows from the greater sensitivities in U.S. federal, State, and local governments affected by NAFTA Chapter XI cases.*[21]

"World War II or the Second World War, often abbreviated as WWII or WW2, was a global conflict that lasted from 1939 to 1945. The vast majority of the world's countries, including all of the great powers, fought as part of two opposing military alliances: the Allies and the Axis. Many participants threw their economic, industrial, and scientific capabilities behind this total war, blurring the distinction between civilian and military resources. World War II was by far the deadliest conflict in history, resulting in an estimated 70 to 85 million fatalities, mostly among civilians. Tens of millions died due to genocides (including the Holocaust), starvation, massacres, and disease. World War II changed the political alignment and social structure of the globe and set the foundation for the international order of the world's nations for the rest of the 20th century and into the present day. The United Nations was established to foster international co-operation and prevent future conflicts, with the victorious great powers—China, France, the Soviet Union, the United Kingdom, and the United States—becoming the permanent members of its Security Council. The Soviet Union and the United States emerged as rival superpowers, setting the stage for the nearly half-century-long Cold War." [22]

[21] Articles and Studies: Ibid.
[22] Source: https://en.wikipedia.org/wiki/World_War_II

"After the end of WW2, the world saw end of colonization. In the first postwar years there were some prospects that (except in the case of the Indian subcontinent) decolonization might come gradually and on terms favourable to the continued world power positions of the western European colonial nations. After the French defeat at Dien Bien Phu (Vietnam) in 1954 and the abortive Anglo-French Suez expedition of 1956, however, decolonization took on an irresistible momentum, so that by the mid-1970s only scattered vestiges of Europe's colonial territories remained. The reasons for this accelerated decolonization were threefold. First, the two postwar superpowers, the United States and the Soviet Union, preferred to exert their might by indirect means of penetration—ideological, economic, and military—often supplanting previous colonial rulers; both the United States and the Soviet Union took up positions opposed to colonialism. Second, the mass revolutionary movements of the colonial world fought colonial wars that were expensive and bloody. Third, the war-weary public of western Europe eventually refused any further sacrifices to maintain overseas colonies."[23]

End of colonialism after WW2 was not end of greed for the powerful countries who needed resources from the former colonies at cheap rates and also wanted to protect their investments in former colonies from acquisition by the newly liberated countries. Post-WW2 scenario is very well described as follows:

> *Disputes over the treatment of foreign investment increased and intensified after WWII as the process of decolonization resulted in colonial territories becoming states. Many of these newly independent states, along with the Eastern European communist states, adopted socialist economic policies, including large scale nationalizations of key sectors of their economies. Notable examples include the nationalizations of major industries in Eastern European states, China, Cuba, and Latin America (Argentina, Bolivia, Brazil, Chile, Guatemala and Peru); the Indonesian nationalization of Dutch properties; the Egyptian nationalization of the Suez Canal; and the nationalizations of the oil industry throughout the Middle East and Northern Africa (Algeria, Iran, Iraq, Libya, Kuwait and Saudi Arabia). The foreign investment disputes that ensued focused on two principal issues: the extent to which acquired rights, including natural*

[23] Source: https://www.britannica.com/topic/Western-colonialism/Decolonization-from-1945

resource concessions granted by colonial powers, were to be respected; and the standard of compensation for the expropriation of those acquired rights. In a series of cases, newly independent and developing states asserted that, upon independence, states were entitled to review concession agreements that had been granted by colonial powers, and, furthermore, maintained that compensation for the expropriation of property would be based on national laws. [24]

The period from end of WW2 to the collapse of USSR has often been called post-colonial era. Developments during the period are described as follows:

The Post-Colonial Era in the history of international investment agreements began with the end of the Second World War and continued until the collapse of the Soviet Union. Three events in particular shaped the structure and content of international investment agreements during that period.

First, as a reaction to the severe economic depression that had preceded the war and that many believed had been exacerbated by the protectionist policies of the 1920s, the victorious allies forged a consensus in favor of liberalizing trade. That consensus led in 1947 to the conclusion of the General Agreement on Tariffs and Trade (GATT), which shifted the primary legal framework for international trade relations from bilateral to multilateral agreements and set in motion successive rounds of negotiations aimed at worldwide trade liberalization. A separate treaty, the Havana Charter, that was intended to create a liberal investment regime for both trade and investment never entered in to force. Thus, entry into force of the GATT created a major multilateral organization with competence over trade, but not investment. Investment would need to be treated outside the GATT framework, which to a large extent meant separately from trade.[25]

[24] Articles and Studies: Newcombe, Historical Development of Investment Treaty Law, 2009

[25] Articles and Studies: Vandevelde, A Brief History of International Investment Agreements, 2005

During the early years of post-colonial era, many efforts at arriving at a multilateral arrangement for investment protection failed. There were many proposals put forth by non-government bodies for investment protection.

From the 1940s to the early 1960s there were four important non-governmental initiatives designed to create a multilateral legal framework for foreign investment. In 1949, the ICC proposed an International Code of Fair Treatment for Foreign Investment (ICC Code).115 The ICC Code reflected high standards of treatment for foreign investment by providing national treatment and MFN treatment for investments, prohibiting restrictions on transfers of funds, ensuring 'fair compensation according to international law' in the event of expropriation, and providing binding state-to-state dispute resolution before the ICC International Court of Arbitration. States were reticent to accept such a broad ranging investment regime and the ICC Code was never adopted.

The next initiative was the International Law Association (ILA) Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court (ILA Statute). The purpose of the proposed tribunal and court was to provide an impartial forum for the resolution of foreign investment disputes rather than to establish specific standards of treatment for foreign investment. States never adopted the ILA Statute.

Although the ICC Code and the ILA Statute were not adopted, the initiatives were significant in signaling both a conceptual and semantic change from the traditional notions of protection of aliens and their property. Instead of state responsibility for injuries to aliens and their property, the primary concern had become the protection of foreign investment with the object of promoting economic development. The change reflected a shift in emphasis from the protection of private property as an end in itself to a policy of promoting conditions upon which the private foreign investment necessary for economic development could occur. This shift from the language of property to investment took place at the same time that newly independent states were beginning to challenge the system of acquired rights (concessions, contracts and other forms of tangible and intangible property) and could be seen as an attempt to reground the protection of *private property in the language of international economic development. This conceptual and semantic change would be reflected in future developments in the international legal framework for investment.*

The third non-governmental initiative was the 1959 Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention). The Draft Convention was prepared under the leadership of Hermann Abs, the Director-General of Deutsche Bank, and Lord Shawcross, former Attorney General of the UK. The draft had its origins partly in a 1957 draft document entitled the International

Convention for the Mutual Protection of Private Property Rights in Foreign Countries, published by a group of German business people called the Society to Advance the Protection of Foreign Investments. The Abs-Shawcross Draft Convention provided for a minimum standard of treatment (defined as 'fair and equitable treatment'), protection against 'unreasonable or discriminatory measures,' observance of undertakings, and 'just and effective' compensation for expropriation. Importantly, the Abs-Shawcross Draft Convention was the first instrument that expressly provided for direct investor-state arbitration.

Two years later, the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens (1961 Harvard Draft) was prepared by Louis Sohn and Richard Baxter at the request of the UN Secretariat in an attempt to codify the international law on state responsibility. The 1961 Harvard Draft is an updated version of the 1929 Harvard Draft. Early drafts of the 1961 Harvard Draft were presented to the International Law Commission (ILC). The draft has been cited by a number of IIA tribunals as an authoritative statement of certain aspects of the minimum standard of treatment.[26]

Drafts prepared by various non-government organizations created awareness about the key elements that later became integral part of BIPAs. Before BIPAs could take shape, a

[26] Articles and Studies: Newcombe, Historical Development of Investment Treaty Law, 2009

new format of bilateral treaties emerged. This format was called **Friendship Commerce and Navigation (FCN) treaties**.

> *In the post-WWII era, several states, including the UK, US and Japan, entered into bilateral treaties on commerce and navigation. These treaties were often called Treaties of Friendship, Commerce and Navigation, or FCN treaties. Although traditionally the focus of FCN treaties had been to promote trade and commercial relationships, in the post-WWII era the investment protection function of these treaties came to dominate. FCN treaties, designed to facilitate post-war reconstruction in Europe, provided significant investment protections. In addition, the implementation of the GATT in 1947 reduced the need for trade provisions in FCN treaties amongst GATT Contracting Parties. In Europe the most significant development was the creation of the common market in 1957.*
>
> *One of the earliest post-war examples of a regional initiative was the Ninth International Conference of American States (1948), which adopted the Economic Agreement of Bogotá. The Agreement was signed by twenty Latin American states, but never entered into force. Although certain provisions of the Economic Agreement of Bogotá could be viewed as providing for a minimum standard of treatment, many Latin American states made reservations providing that standards of treatment were governed by the state constitution.*[27]

FCN treaties were a new concept in international law. Before FCNs, treaties were executed by two states and created rights and obligations of one state against the other state. FCNs for the first time created rights of corporations against the state who had executed the treaty.

> *The post-war FCNs included some innovations. First, they extended treaty protections to corporate entities. Earlier agreements had protected individuals. The post-war agreements for the first time regularly included protection against exchange controls.*

[27] Articles and Studies: Ibid.

Further these agreements included a dispute resolution provision consenting to the jurisdiction of the International Court of Justice over disputes involving the interpretation or application of the agreement. The inclusion of a dispute resolution provision solved the problem that a host state could not be subject to the jurisdiction of an international tribunal without its consent, though it did not relieve investors of the need to exhaust local remedies and to persuade their home state to espouse their claim before pursuing a remedy under international law.

The conclusion of the post-war FCNs with important investment provisions reflected the fact that investment protection for the first time had become a primary goal of the FCN agreements. The United States recognized that a bilateral treaty providing for investment protection was necessary. At the same time, however, the FCN agreements came to be seen as less than ideal vehicles because they were primarily trade agreements and trade relations now were being negotiated principally through the GATT.[28]

Even as FCN treaties and drafts prepared by non-government organizations were defining key terms like fair and equitable treatment, a key development that was taking place simultaneously was increased recourse to international arbitration to settle disputes between investors and states.

Increasing resort to international arbitration post-WWII *In the post- WWII era, the use of international arbitration to resolve foreign investment disputes significantly increased. The assertion of economic sovereignty by capital importing states and the implementation of socialist economic policies in the 1950s augmented the risks for foreign investment of expropriations, nationalizations, the imposition of new regulatory controls, and breaches of contract. Although many developing countries viewed international arbitration with distrust, foreign investors generally preferred it to submitting disputes to local courts where decisions might be affected by bias, corruption and inefficiency. Investors began to use various contractual mechanisms, including stabilization, choice of law and international arbitration clauses in order to mitigate political risks. Other*

[28] Articles and Studies: Vendevelde, A Brief History of International Investment Agreements, 2005

> *risk management mechanisms, such as political risk insurance, also began to be available at this time.*[29]

During the post-WW2 era, rise of USSR and its socialist ideology presented a new challenge to the capital exporting countries (past colonial masters). The ideology did not respect right to property and argued that national resources must belong to the people of the nation. Under the influence of the ideology, more and more countries were arguing for nationalization or expropriation of resources controlled by foreign companies under license agreements signed by the colonial masters before the country became independent.

USSR encouraged developing countries in the view that economic relations with the developed countries of Western Europe and North America would be inherently exploitative and that the best path to economic development lay in extensive state regulation of the economy rather than through the free market.

By the early 1970s, the developing and socialist countries pushed in the United Nations General Assembly, where they held a numerical majority, to establish recognition of their right to expropriate foreign investment without payment of fair market value for the expropriated assets. On May 1, 1974, the General Assembly adopted the Declaration of the New International Economic Order (NIEO), which declared that states have "full permanent sovereignty" over their natural resources and other economic activities. On December 12, by a vote of 120-6 with ten abstentions, the General Assembly adopted the Charter of Economic Rights and Duties of States (CERDS). Article 2.2(c), which was adopted by a separate vote of 104-16, with six abstentions, declared that each state has the right "*to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent*." The Charter thus stated that compensation should be paid, not that it must be paid, and that the amount of compensation would be based on national law, which might not provide for any compensation, rather than international law.

Developed countries responded to the threat of uncompensated expropriation by creating the bilateral investment treaty (BIT). The United Nations Charter, adopted at the end of the war, had prohibited the use of military force except in self-defence, which rendered

[29] Articles and Studies: Newcombe, Historical Development of Investment Treaty Law, 2009

the use of force to collect debts or protect investment illegal under international law. Given the serious deficiencies of customary international law as a means of protecting international investment, treaties offered potentially the most effective means for preventing uncompensated expropriations.

Development of BITs is described very well by Newcombe[30] as follows:

> ***The origins of international investment agreements*** *The development of IIAs was primarily a response to the uncertainties and inadequacies of the customary international law of state responsibility for injuries to aliens and their property. In addition, capital exporting states sought to obtain better market access commitments from capital importing states for investors and investment, and to obtain progressive development in the standards of investment protection. As already noted, although there were early efforts to create an international framework for foreign investment, disagreement between capital exporting and importing states about standards of treatment for foreign investors derailed the conclusion of a multilateral treaty. As a result, capital exporting states began concluding BITs dedicated to foreign investment promotion and protection.*
>
> *Prior to the development of the investment-focused BITs, treaty-based investment protection was available under some general economic treaties. As discussed above, after WWII numerous states, including the US and the UK, entered into FCN treaties that focused on the protection of property rights and the business interests of foreigners. For example, the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the US, although not formally called a BIT, essentially served the same function – the treaty's preamble highlights the contribution to be made by 'mutually beneficial investments' between the two states. Indeed, the 1956 Nicaragua-US FCN Treaty might be considered as providing more comprehensive substantive standards of investment protection than many of the early European BITs.*

[30] Articles and Studies: Newcombe, Historical Development of Investment Treaty Law, 2009

Germany is commonly cited as the first state to develop a BIT program and to sign the first BIT, with Pakistan, in 1959. The Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (Germany-Pakistan (1959)) contains many of the substantive provisions that have become common in subsequent BITs. The term investment is defined broadly. The contracting states undertake a general obligation to encourage foreign investment, although the right of admission is determined by national law. The parties are obliged to refrain from discrimination based on the nationality of the investor and there is to be no discrimination against investment activities. Investments are to enjoy protection and security. Provision is made for compensation due in the event of an expropriation and a right of subrogation may be exercised where the investor has been compensated under an insurance arrangement. There are guarantees on the transfer of capital and investment returns, as well as a general guarantee that the state will observe any obligation it has undertaken. Finally, the BIT provides for state-to-state dispute settlement before the ICJ if the parties agree, or if they do not agree, to an arbitration tribunal upon the request of either party. This recourse to state-to-state arbitration before a three person arbitral tribunal, as an alternative to ICJ jurisdiction, represents one of the major differences between early post-WWII agreements such as the Nicaragua-US FCN and the BITs that were developed in the early 1960s.

Germany's efforts to conclude BITs were quickly followed by other capital exporting states: Switzerland in 1961, The Netherlands in 1963, Italy and the Belgo-Luxembourg Economic Union (BLEU) in 1964, Sweden and Denmark in 1965, Norway in 1966, France in 1972, the UK in 1975, Austria in 1976 and Japan in 1977. BITs in this period were generally quite short - approximately five to six pages and focused on core protections such as national treatment, MFN treatment, a general minimum standard of treatment, compensation for expropriation and rights to transfer capital and returns. Many of the BITs in this period were based on the 1962 and 1967 OECD Draft Conventions.

> *A characteristic of BITs during this period was the asymmetrical economic and political relationship that existed between capital exporting and importing states. Although the obligations on the state parties to BITs were formally reciprocal, BITs were developed by capital exporting states to protect the economic interests of their nationals abroad. Until Romania began concluding BITs with developing states in 1978, the Iraq-Kuwait (1964) was the only one that did not fall within the developed-developing state paradigm. It is also noteworthy that several major developing states did not conclude BITs until much later. China, for example, did not conclude its first BIT until 1982; Brazil and India not until 1994.*

2.5. Pre-liberalization investment protection in India

At the time of independence, India had large foreign investment which was mostly British. The situation at that time is well described as follows:

> *With independence, India became host to a large body of foreign capital. It was three-quarters British, almost entirely privately-owned, and still fairly typical of business investment in a colonial economy. Characteristically, it concentrated on extractive industries and processing for export for international trade, and on ancillary services. At the first official count, less than a year after Independence, a little over one-quarter was in tea and jute which together made up half [of] India's exports; 17 percent in trading; finance and management accounted for just 8 percent; and utilities (electricity mainly) and transport (shipping mainly) for about 6 percent each. No more than one-fifth was invested in manufacturing jute.*[31]

British policy was to favour British owned businesses in India and discourage Indian businesses. After independence, there was a strong reaction to this from Indian businesses who pleaded for nationalization of all foreign businesses.

[31] Books: Michael Kidron, Foreign Investment in India, 1965

Having faced discrimination at the hands of the British Government during the colonial times, there was resentment towards foreign investment from the domestic industry. The domestic industry was insisting that all foreign investments are bought and their control from foreign hands be taken away. The existing foreign investments were mostly in natural resource extraction; therefore, they were retarding the nation's development.

The newly formed government of independent India did not accept this approach. During this time, especially in the 1950s and 1960s, the Government was receptive and welcoming towards foreign investment. The economic philosophy in this duration was to allow foreign investors to operate with the knowledge that eventually they would have to transfer technology, skill and finally control to nationals of the host state. In the Industrial Policy Resolution of 1948, the Government gave an indication to that effect. It was unequivocally stated that whenever the control of the foreigner's property would be taken, it would be subject to the fundamental rights under the Indian Constitution, and, fair and equitable compensation. At that time, right to property was a fundamental right.[32]

[...]

The insistence on the transfer of ownership within ten years was changed in the following year. There was a retreat from the Industrial Policy Statement of 1948, and the Indian government adopted an open foreign investment regime. The World Bank was influential in India's policy-making right from the early years of independence. In 1949, the Bank sent its first Mission to survey the potentialities of Indian economy. As a follow-up of the Industrial Policy of 1948, the Prime Minister, Jawaharlal Nehru submitted a special policy statement on foreign capital to the Parliament on 6 April 1949. It was declared that:

1. *Existing foreign interests would be accorded 'national treatment': 'Government does not [sic]intend to place any restrictions or impose*

[32] Books: Aniruddha Rajput, 2018

any conditions which are not applicable to similar Indian enterprise'.

2. *New foreign capital would be encouraged: 'Government would so frame their policy as to enable further foreign capital to be invested in India on terms and conditions that are mutually advantageous.'*

3. *Profits and remittances abroad would be allowed, as would capital remittances of concerns 'compulsorily acquired'.*

4. *Fair compensation would be paid 'if and when foreign enterprises are compulsorily acquired'.*

5. *Although majority ownership by Indians was preferred, 'Government will not object to foreign capital having control of a concern for a limited period, if it is found to be in the national interest, and each individual case will be dealt with on its own merits'.*

6. *'Vital importance' was still attached to rapid Industrialization of personnel, but 'Government would not object to the employment of non-Indians in posts requiring technical skills and experience when Indians of requisite qualifications are not available'.*

From the legal standpoint, two principles emerge from this policy and they remained the cornerstone of the Indian attitude towards foreign investment at the international level: national treatment (NT – no higher treatment to foreign investors than domestic investors), and the right of nationalization, subject to the payment of fair compensation.[33]

[...]

The peculiar characteristic of India was absence of mass scale nationalization of foreign business as was done in other newly independent countries. The post-independence era was marked by economic nationalism for many states. This was the time when the governments of the newly independent states took over control of major industries with

[33] Books: Ibid.

strategic importance and high economic value from foreigners. These foreigners belonged mostly to the colonizing powers. The governments of the newly independent states nationalized or expropriated properties of foreigners. Whereas, targeted nationalization or expropriation of foreign property did not take place in India. There were no xenophobic tendencies, and the relations between India and its former colonizer England remained cordial and friendly.[34]

[...]

The time during 1965–1981 was turbulent. This was a period of economic difficulty for India and economic disparity within India. In response, inward-looking protectionist policies were adopted, which made foreign investors lose faith in the economy. Relations with the US became difficult because India was unwilling to support the US in the Vietnam War. Food aid from the US was seen to be used as a lever to interfere in internal affairs. It was at this time that the second wave of nationalizations took place. It targeted domestic companies and excluded foreign investors. Economic inclusion was one of the planks hailed by the then Prime Minister, Mrs Gandhi.[35]

[...]

The Foreign Investment Board (FIB) was setup in 1968 to regulate incoming foreign investment. Once the economic policy became protectionist and inward-looking in the 1970s, it became difficult to obtain permissions. The FIB conducted tougher scrutiny of investment proposals. The rigid approach undertaken from 1973 through the enactment of Foreign Exchange Regulation Act (FERA), 1973 further antagonized the foreign investors. List of favoured sectors for setting up of industries was issued. The problem with the list was that the foreign investors were not interested in investing in those areas. And, where the foreign investors were interested in investing they had to have a domestic collaborator. In

[34] Books: Ibid.

[35] Books: Ibid.

most situations, none existed. Shareholding of foreign firms in various sectors was strongly controlled.[36]

[...]

As per the Industrial Policy of 1977, foreign companies were required to dilute their equity up to 40% to get NT. Companies in many sectors, such as airline, shipping and banking, were forced to incorporate under the Indian Companies Act. Multinational corporations that did not have manufacturing plants and were in the field of services or were monitoring the economy could not dilute to less than 40% and had to leave. In 1977, Coca-Cola left the Indian market because the government insisted that it collaborate with an Indian entity. It came back in 1993, when the economy was liberalized.[37]

During the years after India's independence, India was influenced by socialist ideology and was leaning towards the block led by USSR even though officially the country was non-aligned. At international fora, India argued for national treatment of investments and rights of sovereigns over natural resources.

India rejected the argument that there was a customary international law on state responsibility for losses caused to aliens, and insisted that this area should be based on treaties. The discussion above has shown that in domestic policy, India had insisted on NT. India did not support absolute protection of private property. After independence, the urgent priority of India was social justice. Lands were concentrated in the hands of rulers of former princely states, aristocrats, land hoarders (called zamindars) and others close to the colonial administration. If steps for redistribution of land were not taken, the exploitation of the deprived would have continued and independence from colonial rule would have no real meaning or impact for the large majority. The domestic policies and the laws were shaped in a manner that redistribution of land would be upheld.

The Indian position can be summarized as follows: absence of state responsibility for economic losses caused to foreign investors due to actions

[36] Books: Ibid.
[37] Books: Ibid.

of host state; the foreign investors are regulated by NT principle, whereby they should approach the domestic courts of the host state and should not claim higher protection than domestic investors and their home state should not grant them diplomatic protection; and third, the right of nationalization as an attribute of state sovereignty.[38]

2.6. Post-1995 BITs in India

During the 1950s to 1980s India had a slow rate of GDP growth – around 3.5% per annum (often called Hindu rate of growth). Persistently low growth rate was accompanied by low per capita income. Even as the country was moving slowly on the growth path, the shock came during 1991 with the crisis in balance of payments and foreign currency.

In mid-1991, India's exchange rate was subjected to a severe adjustment. This event began with a slide in the value of the Rupee leading up to mid-1991. The authorities at the Reserve Bank of India took partial action, defending the currency by expending international reserves and slowing the decline in value. However, in mid-1991, with foreign reserves nearly depleted, the Indian government permitted a sharp depreciation that took place in two steps within three days (July 1 and July 3, 1991) against major foreign currencies: for example, 9.5% and then another 23 percent against the U.S. dollar. With assistance from the IMF and after an initial stage of stabilization through administrative controls, the government embarked on an adjustment program featuring macroeconomic stabilization and structural reforms. Structural measures initially emphasized accelerating the process of industrial and import delicensing and then shifted to further trade liberalization, financial sector reform, and tax reform. [39]

The currency crisis of mid-1991 pushed India towards liberalization. Of course, it must be remembered that the world order had changed in the meanwhile with the collapse of USSR which was unfolding at that time (1988-91). With the dissolution of USSR, the countries that had argued for National Treatment found themselves without their leader. In the

[38] Books: Ibid.

[39] Working Papers: Valerie Cerra and and Sweta Chaman Saxena, IMF, 2000

post-USSR world, India was forced to reassess her relations with the Western world. While India might have hesitated in doing an ideological somersault, the crisis of mid-1991 combined with events in USSR pushed India's hands. Economic reforms and liberalization post-1991 saw India welcoming foreign investment with open arms.

> *In April 1992, India joined the Multilateral Investment Guarantee Agreement (MIGA). On 20 December 1993, the European Union (EU) and India signed third generation Cooperation Agreement on Partnership and Development. Article 11 contemplated 'encourage[ment] and increase in mutually beneficial investment by establishing a favorable climate for private investments including better conditions for the transfer of capital and exchange of information on investment opportunities'.*
>
> *After these early steps for encouraging foreign investment, India started entering into BITs with many countries. India expressed its willingness to adhere to higher standards of protection for foreign investment and gave up the insistence on NT. Writing in 2000, the legal adviser of India stated that: 'in the current context of negotiation of investment protection agreements a less ideological and more pragmatic approach to these concepts has become possible'.*
>
> *It was at this point of time that India wholeheartedly joined the project of BITs. India started entering into BITs to attract foreign investment. The programme was called BIPAs. The dominant thinking within the Government was that entering into BITs would result into greater inflow of foreign investment. It first floated a model BIT and entered into the first BIT with UK in 1994. The second Model BIT was released in 2003. This Model BIT had strong capital-exporting country features. A capital-exporting country feature means a model of a treaty that capital-exporting developed countries would prefer to protect their investments abroad. The jurisdiction and dispute resolution clauses in these treaties are broad. The foreign investor would have the right to initiate arbitration against the host state for violation of the BIT, without the need of going to domestic courts. The treatments standards were broad and would lean in favour of investor protection, rather than seeking a balance between investor protection and the protection of regulatory freedom of the host state. These*

> *treaties obviously meant there was little space for the host states to exercise regulatory freedom. From 1994 to 2000, India entered into BITs with major European countries including France, Germany, Italy, Netherlands, Belgium, Denmark, Poland, Switzerland and Sweden. From 2000 onwards, India entered into BITs with many developing countries such as Argentina, Mexico, China, Thailand, Indonesia and Saudi Arabia, as well as with LDCs such as Bangladesh, Sudan and Mozambique. There is little literature or any other record of the reasons behind the Government of India undertaking the BIT programme. There were disparities within the BITs and FTAs that were entered into during this time because the nodal ministries for negotiating them were different. The FTAs were more carefully drafted that the BITs. The FTAs ensured that regulatory freedom is protected. No steps were taken to find out the extent to which these investment treaties would affect the freedom to regulate. Despite these efforts, the amount of foreign investment India attracted in this period was much less as compared to China – despite the fact that India had vital points of democracy and the rule of law as highlights. During this time, India did not face any investment claim, except a brief brush in the Dabhol Power Project.*[40]

Committee on External Affairs, Seventeenth Lok Sabha summed up the overall BIT scenario in India as follows:

> *Bilateral Investment Treaty (BIT) is an agreement for according protection to investments by nationals and companies of one State in another State. International Investment Agreements (IIAs) which include Bilateral Investment Treaties and Investment Chapters of Trade and Economic Agreements provide for a reciprocal commitment to protect the private foreign investments in each other's countries. India signed its first Bilateral Investment Treaty with the United Kingdom (UK) in 1994. Post 1991 economic reforms and up to 2015, India signed BITs with 83 countries out of which 74 were enforced. These BITs were largely negotiated on the basis of the Indian Model BIT text of 1993.*

[40] Books: Aniruddha Rajput, 2018

1.2. India's approach in regard to BIT was highlighted by the Secretary (ER), Ministry of External Affairs in his opening statement during the course of briefing on the subject on 7 September 2020:

> *"India's approach to BITs has been aimed at providing appropriate protection to foreign investors in India and Indian investors in foreign countries in the light of the relevant international precedents and practices while maintaining a balance between the investor's rights and the Government's obligations by accommodation and cooperation. Our interests in this domain have grown with our rising stature in global affairs. We also remain conscious of the realities of negotiations with sovereign Governments while upholding our national interests and priorities".*

1.3. India has also entered into Free Trade Agreements (FTAs) some of which have a dedicated chapter on investment, that are substantially similar to the standalone BITs. Explaining about IIAs/BITs and Free Trade Agreement (FTA)/Comprehensive Economic Cooperation Agreement (CECA)/Comprehensive Economic Partnership Agreement (CEPA), the Department of Economic Affairs (DEA) in the Ministry of Finance, in its written reply informed the Committee that investment agreements could also form part of FTA or CECA/CEPA. In such cases, this is usually one among the several chapters in the CECA/CEPA. CECA/CEPA/FTAs are dominated by trade in Goods and Services issues. Free Trade Agreements generally focus only on trade issues but trade being a major portion in a CECA/CEPA, the terms FTA/CECA/CEPA are used inter-changeably. BITS/IIAs can also be in the form of investment chapters of such a comprehensive regional agreement, for example, covering the countries in the Association of Southeast Asian Nations (ASEAN) or the Regional Comprehensive Economic Partnership (RCEP). Investment chapters in FTA/CECA/CEPAs negotiated in the past are similar to the BITs signed in the pre-2015. They have liberal commitments like MFN, ISDS with fork-in-the-road approach, non-conforming measures with Reservation Lists. One of the differences between a BIT and an FTA Investment Chapter is that

Investment Chapters do not carry a separate termination clause and hence is linked to the tenure of the FTA, with a common termination clause for the entire FTA. There are, however, renegotiation clause/amendment clauses in most FTAs applicable to investment chapters. Till 2005, there was wide variability and liberal approach in undertaking investment protection commitments in a BIT/Investment Chapters of a FTA/CECA/CEPA.

[...]

1.4. The Ministry of Commerce and Industry (Department of Commerce), in a written note furnished to the Committee, have also stated that some of the Free Trade Agreements have investment chapters as part of the agreement, such as India - Japan CEPA, India - Republic of Korea CEPA, India - Singapore CECA, etc. Though the FTA of negotiations, as a whole, are coordinated by the Department of Commerce, the investment chapters under these FTAs are negotiated by DEA and cover provisions related to investment protection. [41]

During the post-liberalization phase, India had executed BITs with enormous speed covering most of the major countries in the world. At this time, BITs were seen as zero-cost means of attracting foreign investment into the country. Nobody was even thinking about claims arising out of investor-state disputes.

2.7. Post-2015 BITs in India

The thinking in the official circles of India changed with the arbitral award in the case of White Industries[42]. It may be said that India's honeymoon with BITs ended with the arbitral award in case of White Industries. The award was seen as a challenge to India's sovereignty and also to supremacy of India's courts.

Serious rethinking of an overly liberal investment protection regime in the BITs started only when India lost the first investment case in White

[41] Reports India: Committee on External Affairs, 2021
[42] International Tribunal Awards: White Industries v. India, 2011

Industries v. Australia in 2011. There have been concerns about the expansive interpretation of investment treaties. Some states have experienced wearisome consequences of investment arbitration. This was the first time India had a first-hand experience of an investment claim. The experience was painful for various reasons. It exposed the possibility that the actions of the Supreme Court (which is the highest Court of Appeal in India and also serves as the constitutional court) could be challenged before an arbitral tribunal. The claim in White Industries was based on delays in the Indian judicial system. The Supreme Court of India has a special position in the psyche of the political establishment, legal community and the general public, has steadfastly protected its independence and has intervened in various public interest issues. The other troubling issue in the case was that a commercial arbitration award, which would technically be enforced by an Indian court, was enforced by the investment tribunal, thereby replacing the function of Indian courts. The tribunal adopted an expansive approach by invoking India-Kuwait BIT to import more convenient treatment standards through the MFN clause in the India-Australia BIT. This exposed the possibility that an investment tribunal could import any provision from any treaty to hold India liable even if the investment claim was not based on a treaty in which a convenient standard is present. Almost all Indian BITs contained an MFN clause.

After losing this case, many investment claims were filed against India and the third phase with a policy shift thus commenced.[43]

Parliamentary Committee on External Affairs summed up the situation arising after the White Industries (supra) case as under:

1.7. MEA has further informed the Committee that from 1994, when India started its BIT programme, until the end of 2010, BITs in India did not attract much attention. India also had only marginal involvement with Investment Treaty Arbitration, which refers to the dispute resolution mechanism available under BITs. During this period, India was involved

[43] Books: Aniruddha Rajput, 2018

in only one Investment treaty dispute, and even this dispute did not result in an arbitral award. Towards the end of 2011, India received its first adverse award in relation to a BIT in the White Industries Australia Limited V. Republic of India Case. The tribunal found that India had violated its obligations to the investor under the India-Australia BIT. This Award holds significance as the first Investment Treaty Arbitration Award against India.

1.8. As a result of the adverse award in the White Industries case and the notices of dispute under different BITs, there was a renewed focus on India's BIT regime and questions were raised about balancing investment protection with India's regulatory power, compelling India to re-think its BIT programme. Over time, especially after 2010, global and Indian experience with Investment Treaties, and the substantial increase in international arbitration cases arising out of these Investment Treaties, led to a revisit of India's earlier Model BIT text.

1.9. With the approval of the Cabinet, a new ***Model text was adopted in 2015****. The Cabinet also approved (i) to use the Model text in 2015 as the starting point for renegotiations of existing and future BITs and investment chapters of CECAs/CEPAs/FTAs with appropriate modifications, alterations or concessions as approved by the Minister of Finance, and (ii) adopting the strategy of terminating existing BITs whose initial treaty period was over and issue Joint Interpretative Statement for those BITs whose initial treaty period is still valid.*

1.10. The model BIT, unlike the earlier BITs, has an enterprise based definition for investments covered by the treaty. It also does not contain Fair and Equitable Treatment (FET) clause but rather has a treatment of investments clause that prohibits the host country from subjecting foreign investments to measures that constitute a violation of customary international law through denial of justice (judicial and administrative), breaches of due process, and targeted discrimination on manifestly unjustified grounds or manifestly abusive treatment, such as coercion, duress and harassment. While the new model BIT does not include an MFN (Most Favoured Nation) clause, it does provides for national treatment to *the extent that a Party shall not apply measures that accord less favourable treatment than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory. The new model BIT also states what would constitute like circumstances.*

1.11. In the dispute resolution provisions in the new model BIT, the focus has been on domestic remedies with investors having to exhaust local/domestic remedies including invoking the jurisdiction of the domestic courts of the host country for a minimum period of five years before being able to resort to arbitration under the treaty. This condition is however exempt if there is no domestic remedy available to the investor and the only remedy available is under the BIT. The new model treaty also elaborates the mode and requirements for arbitrator appointments and also tries to elaborate the possible conflict of interest issues. Further, the new model BIT tries to incorporate principles of transparency by having provisions which require the proceedings under the BIT to be made available to the public, subject to applicable law on protection of confidential information.

1.12. After the approval of the new model BIT by the Cabinet, GoI has initiated the process of termination of the existing BITs whose initial duration/term as concluded and began the process of renegotiating these treaties based on the new model BIT. Based on the Cabinet decision, till date India has issued termination notice to countries with whom the initial period has expired. [44]

It is open to dispute whether unilateral notices of termination issued by India for BITs are valid under international law. However, it cannot be doubted that the BITs which were to expire due to efflux of time have certainly expired after the issue of termination notice by the Government of India.

The list of countries to which Notices of Termination were issued along with the dates of issue of the Notices is given in Table 1.1 in the previous chapter. The six countries with whom older BITs are still in force (due to the countries executing Joint Interpretative Statement or some other reason) is given in Table 1.2 in the previous chapter. India

[44] Reports India: Committee on External Affairs

succeeded in getting two countries to sign Joint Interpretative Statements (JISs) as per details given in Table 1.3.

Post 2015, India has signed BITs/Investment Agreements with Belarus, Kyrgyzstan, Taiwan and Brazil. The date of agreement, date of enforcement and present status of the BITs/BIAs/Agreements signed subsequent to adoption of the Model BIT text 2015 are given in Table 1.4 in the previous chapter.

In addition, India is currently in negotiations with 37 countries / blocks as per the details given in table 1.5 in chapter 1.

Chapter 3

Key Terms in Investment Treaties

Interpretation of any treaty is different from interpretation of domestic laws. In case of domestic laws, domestic courts interpret laws and the interpretation by the highest court of the country has the force of law. Interpretations by domestic courts have no relevance in case of treaties. Indian lawyers, who are used to referring to judgments of the Supreme Court of India as the final word on all matters regarding interpretation of laws, find themselves at sea when interpreting bilateral and multilateral treaties since judgements of Supreme Court and High Courts of India cannot be referred to.

The first and foremost guide for interpretation of treaties is Vienna Convention on Law of Treaties (VCLT)[1]. Article 27 of VCLT clearly excludes application of internal law of a state for the purpose of interpretation of treaties. Article 27 reads as follows:

Article 27

Internal law and observance of treaties

> *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.*

Having excluded the provisions of internal law, VCLT lays down the general rules of interpretation of treaties vide Article 31 which reads as follows:

Article 31

General rule of interpretation

> 1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

[1] Rules International: Vienna Convention, 1969

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

   a. *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*

   b. *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

3. *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 subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. *A special meaning shall be given to a term if it is established that the parties so intended.*

Reading the above article, one can understand that the following are relevant aides for interpretation of treaties:

a) Ordinary meaning of the terms

b) Context of the treaty

c) Objects and purpose of the treaty as given in the treaty or as given in common declaration signed by both parties to the treaty

d) Preamble and annexes to a treaty

e) Any subsequent agreement or instrument related to the treaty executed by the parties to the treaty

f) Any subsequent agreement executed by the parties relating to interpretation of the treaty

g) Any subsequent practice adopted by the parties which establishes that the parties agree to a certain interpretation

h) Any relevant rule of international law applicable to relations between the parties to the treaty

i) A special meaning given to a term of the treaty if it is established that the parties intended for the said meaning of the specific term.

The above parameters clearly indicate that the interpretation of a treaty has to be done as per the understanding and intention of the parties to the treaty. However, this poses a problem when dealing with investment treaties. Issues of interpretation often arise in investor-state-disputes. In such cases, while the party to the treaty is the state which on one hand is supplying interpretation of terms of the treaty and on the other hand is the respondent facing a claim from the investor. Anthea Roberts sums up this problem beautifully as follows:

> *A key problem in the investment treaty field is that the balance of power between treaty parties and tribunals concerning the authority to interpret investment treaties is askew. In theory, treaty parties are supreme when creating the law and tribunals are supreme when applying it in particular cases. In practice, this separation is never complete. How treaty parties interpret and apply the law affects what tribunals decide in particular cases. And tribunal awards in particular cases informally contribute to the interpretation, and thus the creation, of the law. As a result, some interpretive balance exists between treaty parties and tribunals, though neither enjoys ultimate interpretive authority in all circumstances.*
>
> *As investment treaties create broad standards rather than specific rules, they must be interpreted before they can be applied. Investor-state tribunals have accordingly played a critical role in interpreting, hence developing, investment treaty law. Yet their jurisprudence frequently resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular. This*

disconnect alienates treaty parties from the interpretive process, which increases prospects for dissonance between states and tribunals about interpretation and adds fuel to the growing fire about the legitimacy of investment treaty arbitration.

In an effort to recalibrate this imbalance, this article proposes an interpretive approach that draws more heavily on an important, but significantly underutilized source: the subsequent practice and agreements of treaty parties. The Vienna Convention on the Law of Treaties (Vienna Convention) provides that the treaty parties' subsequent agreements and practice shall be taken into account in interpretation, recognizing the significant and ongoing role of the parties in interpreting their treaties. Yet investor-state tribunals have tended to shun this interpretive approach, apparently because of concerns about ensuring the equality of arms between claimant investors and respondent states and protecting against the adoption by states of self-interested interpretations.

This divergence can be traced to states' dual role under investment treaties as treaty parties (with an interest in interpretation) and actual or potential respondents in investor-state disputes (with an interest in avoiding liability). The Vienna Convention's approach highlights the former, while investment tribunals often focus on the latter. This tension in turn implicates the proper role of investment tribunals, which simultaneously act on behalf of the treaty parties in interpreting and developing investment treaty law and on behalf of the disputing parties in arbitrating investor-state disputes. While investment treaties expressly delegate the power to resolve investor-state disputes to tribunals, any delegation of interpretive power from treaty parties to tribunals is implied and partial, rather than express and exclusive.

The clash between viewing states chiefly as treaty parties and principally as respondents causes practical and theoretical difficulties. An acute (though extreme) example of the controversies that it can create was the ruckus caused by the joint interpretive statement issued by the North American Free Trade Agreement (NAFTA) states under the auspices of the Free Trade Commission (FTC) in response to what they perceived as

> *expansive interpretations adopted by several NAFTA tribunals. Beyond the regular provisions of the Vienna Convention on subsequent agreements and practice, NAFTA stipulates that the FTC, which is composed of cabinet-level representatives of the treaty parties, has responsibility for resolving "disputes that may arise regarding [the treaty's] interpretation or application" and that its interpretations are binding on NAFTA tribunals.*[2]

While acknowledging the difficulties of interpretation in case of investment treaties, Anthea Roberts argues for the states to play a more pro-active role by setting up mechanisms for interpretation of the treaties and also, if need be, to provide mutually agreed interpretations of various terms used in the investment treaty. The argument for Joint Interpretive Agreements has found support in the working paper prepared by David Gaukrodger and published by OECD. Relevant extract from conclusion of the working paper is as follows:

> *With an increasing number of investment treaties covering relationships where governments have more complex and more overlapping interests, joint interpretive agreements are likely to be an increasingly important tool for ensuring that treaties are interpreted in accordance with the treaty parties' intent and achieve their purposes. This paper analyses the legal framework applicable to those agreements. Providing they can agree, governments have considerable flexibility in this area. They can provide, as in a growing number of treaties, for an express mechanism allowing them to agree on interpretations over time as the treaty is interpreted in ISDS cases.*
>
> *Where governments have not set out an express regime for joint interpretive agreements in their investment treaty, such agreements are governed by more general principles of international law. An understanding of these principles and their application to the specific characteristics of investment treaties should help governments to use joint agreements effectively where they are appropriate. In some cases, governments may wish to consider explicitly addressing the temporal*

[2] Articles and Studies: Anthea Roberts, 2010

application of binding interpretations that would otherwise apply retroactively.[3]

One can conclude by saying that the treaty states as well as ISDS tribunals both interpret provisions of investment agreements. The position was also confirmed in a working paper prepared by the Secretariat of UN General Assembly which states as follows:

> *13. Although treaty Parties and ISDS tribunals play different roles in the interpretation of investment treaties, they share interpretive authority. By introducing ISDS in investment treaties, treaty Parties have delegated the authority to ISDS tribunals to settle investor-State disputes by applying the relevant investment treaty provisions to a particular fact situation relating to a specific dispute.*
>
> *14. Interpretation of treaty provisions by ISDS tribunals is necessary to delineate the scope of the rights and obligations of the disputing parties and thereby helps distinguish between those acts that constitute an interference with investors' rights and those that fall within a State's legitimate conduct. Lack of precise wording of many investment treaties amplifies the need for interpretation that allows these broadly worded provisions to be applied to specific fact situations.*
>
> *15. While it remains the task of the arbitral tribunal to decide a case and interpret and apply an investment treaty to this end, the treaty Parties retain the power to clarify the meaning of a treaty through an authoritative interpretation. By virtue of general public international law, they can clarify their authentic intentions and issue authoritative statements on the interpretation of their treaties.16 The most widely used interpretative rules are found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). These rules establish the elements interpreters must take into account when giving meaning to treaty provisions.* [4]

The above discussion about interpretation of terms used in investment treaties is intended to only highlight the problem involved in understanding meaning of key terms used in

[3] Working Papers: David Gaukrodger, International Investment, 2016
[4] Working Papers: UN General Assembly, Possible reforms of ISDS, 2020

IIAs. It is not surprising that each BIT signed by India defines the key terms that are relevant to investment treaties in general. Notably, almost each BIT executed by India has somewhat different definitions of the key terms. Detailed discussions related to the definitions as given in BITs executed by India will follow in subsequent chapters. At this stage, the aim is to give a broad perspective on the key terms using definitions accepted by international bodies like UNCTAD. There is no reference to any BIT signed by India in this chapter.

Before we proceed with understanding the key terms involved in investment treaties, it is worthwhile to remember that definitions of key terms are not objective truths defined by some globally accepted authority. The definitions keep changing in each BIT. In this context, the following extract from UNCTAD document related to key issues in investment agreements makes interesting reading:

> *Definitions serve many purposes. In international agreements, they raise difficult policy issues and are often the subject of hard bargaining between the negotiating parties. Accordingly, they should be seen not as objective formulations of the meaning of terms, but as part of an agreement's normative content, since they determine the extent and the manner in which the other provisions are to be applied.*[5]

3.1. Investment

As is to be expected, investment is a key term in any international investment agreement. Definition of the term usually lays down the scope of the IIA specifying what is covered and what is not covered. There are many issues involved in the definition, for example, are only direct investments covered or are indirect investments covered; is only FDI covered or FPI is also covered; are contracts covered as investments; are licenses and such rights granted by statutory bodies covered by definitions; and so on. One may also raise the question of legality of the investment as per laws of the host country. If an investment is made in an activity which is illegal in the host country, will the protection of IIA be available to such investments? Are investments made before the date of IIA covered by the

[5] International Reports: UNCTAD, 2004 p. 115

IIA? Historical development of the definition of investment in IIAs is very well provided by UNCTAD as follows:

> *The conception of what constitutes foreign investment has changed over time as the nature of international economic relations has changed. The development of the types of assets that could be the subject of protection under international investment agreements has widened significantly since the mid-nineteenth century. Prior to that time, trans-frontier capital flows typically assumed the form of lending by European investors to borrowers in other European States (Kindleberger 1993, pp. 208-224). Foreign direct investment (FDI) was not as such the main form of international investment. Rather, foreign-owned property in a country often took the form of tangible property and financial interests in investments. International law was thus concerned principally with the protection of such property against seizure and the right of creditors to collect debts. Some countries negotiated treaties that protected foreign property, such as merchandise and vessels, against expropriation.*
>
> *By the mid-twentieth century, the protection of foreign investment in the form of equity stock in companies became an increasing concern of international law. Since much FDI was in the primary sector, concession agreements for natural resource extraction became a matter of importance in international law. By the late twentieth century, the forms of foreign investment became more diverse. As technological innovations spread around the world, the producers of technology sought to protect their patents and copyrighted materials against infringement. The consolidation of business enterprises to form transnational corporations (TNCs) with global name recognition has given great value to certain trademarks that are associated with high quality and/or high demand goods. Thus, the regulation of intellectual property has become a concern of growing importance to national and international law. Many developed economies that had concentrated their productive resources in the manufacturing sector in the nineteenth century began to shift a large portion of these resources to the services sector, and continuing improvements in communication and transportation made it feasible for*

service providers to render services to clients in foreign countries (UNCTAD 2004). As this suggests, changing circumstances create new ways of investment in foreign countries. In other words, there is an increasing array of foreign-owned assets that have economic value and thus may be regarded as foreign investment.[6]

The following extract from document dated 2004 of UNCTAD explains the importance of definition of investment and how it is central to any investment treaty.

At this point, it is necessary to point out that an "investment" may, in the language of the agreements, be itself a legal person. For instance, a corporation established in the host country by a foreign investor is, in effect, the foreign investor's "investment". Yet the foreign investor, if it is a parent company, is itself a corporation. Furthermore, should the corporation in the host state make its own investments -- as through acquisitions, joint ventures or the establishment of a local subsidiary -- it too becomes an "investor". Thus both "investors" and "investments" can in practice possess legal personality.

As will be seen later, moreover, different types of international investment flows have different economic implications. In implementing their economic and development policies, countries thus may wish to accept different rules concerning the treatment of different types of foreign investment. In other words, countries may be willing to assume certain obligations only with respect to foreign investment that has specified economic implications. Thus, the scope of the definition of "investment" generally will depend upon the purpose and the operative provisions of an investment agreement. For example, an investment agreement that deals with rules on the admission of investment may define "investment" differently from one that deals with post-admission treatment.[7]

[6] International Reports: UNCTAD, 2011
[7] International Reports: UNCTAD, 2004

3.2. Investor

Definition of investor is critical in any investment treaty since it specifies who will be eligible to take the benefit of the treaty. Typically, two key criteria define an investor - (a) type of entity – whether only individuals are recognized or companies, firms, trusts, societies etc. are also included (b) key determinant that decides whether one is an investor or not – citizenship, country of incorporation, permanent residence, permanent establishment etc. can be some of such determinants. The position is very well summed up as follows:

> *Investment agreements generally apply only to investment by those who qualify as covered investors according to the agreement's provisions. The definition of the term "investor" thus can be critical to determining the scope of an investment agreement. Two general issues arise in defining the term "investor": what types of person or entity may be considered investors, and what are the criteria that determine that a person is covered by an agreement? Two types of person may be included within the definition of "investor": natural persons or individuals and legal persons, also referred to as legal or juridical entities. Sometimes, the term "investor" is not used. Instead, agreements refer to "nationals" and "companies", with the former defined to include natural persons and the latter defined to include a range of legal entities.*
>
> ***(i) Natural Person***
>
> *In relation to the category of natural persons, the major issue concerns the determination of whether a natural person is covered by an agreement. This is based on the qualifying links of the person with the State party to the agreement. Typically, this is a nationality link but other links, such as permanent residence, domicile, residence or combinations thereof are also in use.*

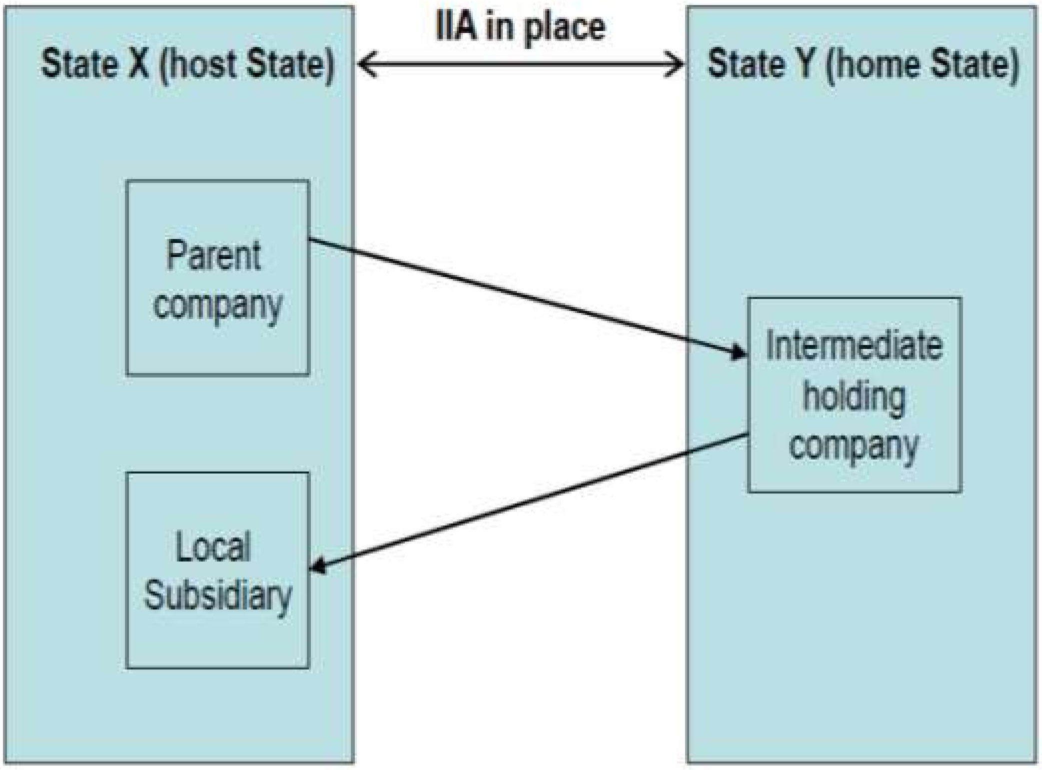
[…]

> ***(ii) Legal Entities***
>
> *The category of legal entities, by contrast, can be defined to include or exclude a number of different types of entities. Entities may be excluded on*

the basis of their legal form, their purpose or their ownership. Differences in the legal form of an entity may be important to a host country in a variety of circumstances. The form of the entity determines, for example, which assets may be reached by creditors of the entity to satisfy debts and perhaps the extent to which the entity can be sued in its own name in the courts. A host country may wish to exclude from the category of covered investors State-owned entities such as sovereign wealth funds or those entities that, because of legal limitations on liability or susceptibility to suit, are insulated from financial responsibility for any injuries that they may cause. In addition, the host country may require that the entity have real and effective commercial links with the home country party to the relevant IIA. In this way, only investors from that contracting party will have the right to protection under the agreement.

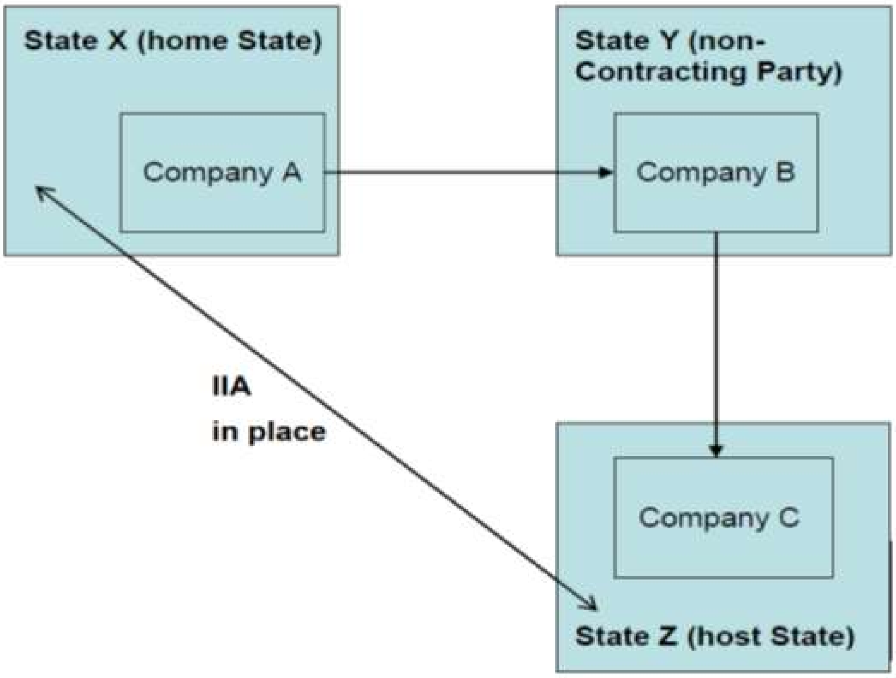
Indeed, corporate nationality may raise questions of its misuse, especially in the context of transnational corporate group structures. For example, nationals of one contracting party to an IIA may incorporate an entity in the other contracting party, so as to take advantage of the IIA rules against their own country (figure 1). Arguably, this is incompatible with the actual intent of the IIA, which is to give protection to foreign investors from another contracting party and not to domestic investors operating through a foreign "shell" company. Equally, investors from a country that is not a party to any IIAs with the host country may incorporate an entity in a third country to take advantage of its IIA with the host country. This is known as "treaty shopping" and it too raises questions as to the proper approach to defining corporate investors for the purposes of an IIA. These two situations raise the question whether the IIA should authorize an arbitral tribunal to "lift the corporate veil" to reach the actual controlling interests and to determine whether they qualify, by reason of nationality, as proper parties to the claim made under the IIA in question. Such arrangements have caused controversy in arbitral awards.

Fig./Gr. 3.1 Indirect investment with the parent company originating from the host state



A further problem arising out of complex corporate group structures is whether an indirect controlling interest that possesses the nationality of a contracting party can still make a claim on behalf of an indirectly owned affiliate where its direct owner is located in a non-contracting party. The specific problem here is whether a company indirectly owned or controlled by another comes within the scope of an agreement. For example, where company "A" has a controlling interest in company "B" that has a controlling interest in company "C", does that make company "C" an investment controlled by company "A" as well as company "B" (figure 2)? This has particular repercussions where not every country in which the companies operate is a party to an agreement. Thus, to return to the example, should company "B" have the nationality of a country not party to the agreement, while companies "A" and "C" have the nationality of countries party to the agreement, can company "A" still claim the protection of the agreement despite the fact that its investment in "C" is *channelled through "B", i.e. through a non-party? Arbitral awards have on the whole been sympathetic to accepting jurisdiction over such indirect claims.*

Fig. / Gr. 3.2 Indirect investment structured through a third state which does not have an IIA with the host state[8]



Definition of investor covers some type of persons and entities. Often, parties to an IIA agree on a **Denial of Benefits** clause. Such a clause is drafted to take care of the types of situations discussed above and to eliminate misuse of the investment treaty. The features of the clause are summed up as follows:

In policy terms, the issue of establishing the nationality of an investor presents the question of the extent to which the parties to an agreement wish to link the legal coverage of the agreement with the economic ties between the parties and the covered investment. One country may be seeking to establish a generally favourable investment climate and may be prepared to extend treaty coverage to investments that have minimal economic ties with the other party, while another country may wish to

[8] International Reports: UNCTAD, 2011

extend treaty coverage only to investments with strong economic ties to the treaty partners. Thus, IIAs have included "denial of benefits" clauses to restrict the benefit of the agreement only to investors who possess that nationality of a contracting party. Pursuant to a denial-of-benefits clause, a host State may deny benefits of the treaty to "letterbox" companies constituted in the territory of the other party by persons from a third country or from the host State itself. [9]

3.3. Expropriation

Expropriation is defined in most dictionaries as "*the action by the state or an authority of taking property from its owner for public use or benefit*". Informally speaking and in some countries, expropriation is referred to as "*takings*". The taking over or expropriation of private assets by public authorities raises significant issues of international law, where such takings involve the assets of foreign private investors. UNCTAD document on expropriation sums up the position on takings as follows:

States have a sovereign right under international law to take property held by nationals or aliens through nationalization or expropriation for economic, political, social or other reasons. In order to be lawful, the exercise of this sovereign right requires, under international law, that the following conditions be met:

a. *Property has to be taken for a public purpose;*

b. *On a non-discriminatory basis;*

c. *In accordance with due process of law;*

d. *Accompanied by compensation.*

While the right of States to expropriate is recognized as a fundamental one, the exercise by States of this right has triggered conflicts, debates and disagreements that are far from over, although the tone and content, coupled with the procedural means to settle disputes, have varied significantly over time.

[9] International Reports: Ibid.

In the first part of the twentieth century, the first major phase of mass expropriations (nationalizations) occurred during revolutionary movements in Russia and Mexico. A second wave of nationalizations and expropriations followed the period of decolonization that took place after the Second World War.

[...]

Through IIAs, States have established a guarantee for foreign investors against the expropriation of their investments without compensation. Today virtually all bilateral investment treaties (BITs) contain an expropriation provision. Customary international law also contains rules on the expropriation of foreign owned property and continues to supplement IIAs on those issues where the latter leave gaps or require interpretation.

The IIA terminology on takings is not fully consistent. Different terms, such as expropriation, taking, nationalization, deprivation and dispossession, can be encountered. These terms are often used interchangeably; their use typically depends on legal tradition and translation.

Nationalization usually refers to massive or large-scale takings of private property in all economic sectors or on an industry – or sector-specific basis. Outright nationalizations in all economic sectors are generally motivated by policy considerations; the measures are intended to achieve complete State control of the economy and involve the takeover of all privately owned means of production. Many former colonies regarded nationalizations as an integral part of their decolonization process in the period following the end of the Second World War. Nationalizations on an industrywide basis take place when a government seeks to reorganize a particular industry by taking over the private enterprises in the industry and creating a State monopoly. In these cases, the assets taken become publicly owned.

Expropriations generally refer to property-specific or enterprise-specific takings where the property rights remain with the State or are transferred by the State to other economic operators. Expropriations may consist of a *large-scale taking of land by the State, made with the purpose of redistributing it, or specific takings where the target is a specific foreign firm (for example, a firm dominating a market or industry) or a specific plot of land (for example, to build a highway).*

Both nationalizations and expropriations, if they are direct, involve the transfer of title and/or outright physical seizure of the property. However, some measures short of physical takings may also amount to takings in that they permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way. These measures are categorized as indirect expropriations. Finally, there are also regulatory measures, i.e. acts taken by States in the exercise of their right to regulate in public interest. These measures will typically not give rise to compensation, even though they may have the same effects as an indirect expropriation.[10]

3.4. Fair and equitable treatment (FET)

Fair and Equitable Treatment (FET) is the most commonly invoked ground in investor-state-disputes. FET is also the most debated term in IIAs since it is often phrased vaguely and is extremely broad in its coverage. UNCTAD document on FET sums up the position related to FETs in IIAs as follows:

The obligation to accord fair and equitable treatment (FET) to foreign investments appears in the great majority of international investment agreements (IIAs). Among the IIA protection elements, the FET standard has gained particular prominence, as it has been regularly invoked by claimants in investor-State dispute settlement (ISDS) proceedings, with a considerable rate of success.

The wide application of the FET obligation has revealed its protective value for foreign investors but has also exposed a number of uncertainties and risks. First, with regard to the capacious wording of most FET provisions, many tribunals have interpreted them broadly to include a variety of

[10] International Reports: UNCTAD Expropriation 2012

specific requirements including a State's obligation to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making and respect investors' legitimate expectations. This extensive list of disciplines can be taxing on any State, but especially developing and least-developed ones. The second issue concerns the appropriate threshold of liability, that is, how grave or manifest a State's conduct must be to become FET-inconsistent. Thirdly, the application of FET provisions has brought to light the need to balance investment protection with competing policy objectives of the host State, and in particular, with its right to regulate in the public interest.

As far as treaty practice is concerned, IIAs employ the following main formulations and approaches of the FET standard:

a. Unqualified obligation to accord fair and equitable treatment;

b. FET obligation linked to international law;

c. FET obligation linked to the minimum standard of treatment of aliens under customary international law;

d. FET obligation with additional substantive content such as denial of justice.

The actual practice of application of FET clauses by arbitral tribunals has drawn a distinction solely between FET as an unqualified standard and the FET obligation linked to the minimum standard of treatment of aliens under customary international law.

Historically, the FET standard – regardless of how it is expressed – came into existence as an expression of the minimum standard of treatment. However, where the FET obligation is not expressly linked textually to the minimum standard of treatment of aliens, many tribunals have interpreted it as an autonomous, or self-standing one. Instead of deriving the content of the standard from its original source (customary international law), these tribunals chose to focus on the literal meaning of the provision itself.

The question of the relationship between FET and the minimum standard of treatment of aliens has received particular attention in the ISDS cases brought under the North American Free Trade Agreement (NAFTA), where the two standards are expressly linked. Although not all NAFTA decisions have interpreted the FET obligation consistently, the view has been gaining dominance that for a breach to be found, a State's conduct must be "egregious" or "shocking" from an international perspective (high liability threshold) and that, for example, a simple illegality under domestic law is not sufficient to establish a violation of the minimum standard of treatment. Importantly, however, the understanding of what can be seen as egregious has evolved since the 1920s, when this test had been conceptualized.

NAFTA cases have also exposed certain problems of applying FET as part of the minimum standard of treatment of aliens, in particular that the latter was largely developed in the context of claims regarding treatment of individuals (not businesses), outside the context of economic policymaking. Furthermore, given that the minimum standard of treatment of aliens forms part of customary international law, a claimant would carry a heavy burden of demonstrating general and consistent State practice and opinio juris in order to show that the minimum standard incorporates a certain substantive requirement. For these reasons, a link between FET and the minimum standard of treatment has been mostly useful, not from the point of view of the substantive content of the obligation, but as an expression of the gravity of the conduct required for that conduct to be held in violation of the standard.

Tribunals established under IIAs other than NAFTA and applying FET clauses not linked to the minimum standard of treatment of aliens have on the whole been paying less attention to the discussion of the applicable liability threshold. Some of them have suggested that it is "a high one"; others held the view that it is lower than under the minimum standard of treatment, while most did not address the matter. At the same time, non-NAFTA tribunals have tended to allow some inefficiency, trial and error, and imperfection in a government's conduct and have accepted that *a violation by the host State of an investment contract or of its own domestic law does not necessarily amount to a breach of the FET standard.*

The substantive content of the FET standard (specific requirements comprising it) has been fleshed out by arbitral tribunals on a case-by-case basis. It is a continuing development, which is reinforced by the practice of tribunals to refer to, and discuss, earlier awards. Although each tribunal interprets a FET provision from the investment treaty applicable in that specific case, there has been considerable convergence in terms of the elements that the FET standard incorporates, regardless of how it is expressed in the treaty. The following five main concepts have emerged as relevant in the context of fair and equitable treatment:

(a) Prohibition of manifest arbitrariness in decision-making, that is, measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation;

(b) Prohibition of the denial of justice and disregard of the fundamental principles of due process;

(c) Prohibition of targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

(d) Prohibition of abusive treatment of investors, including coercion, duress and harassment;

(e) Protection of the legitimate expectations of investors arising from a government's specific representations or investment inducing measures, although balanced with the host State's right to regulate in the public interest.[11]

3.5. Most favoured nation (MFN)

Most Favoured Nation or MFN is a relatively new concept in international investment treaties. MFN has not arisen from minimum international standards. MFN was largely unknown before the 1990s. MFN is a relative standard that compares treatment extended

[11] International Reports: UNCTAD, Fair and Equitable Treatment, 2012

to investors of the treaty country with the treatment extended to investors of another country and assures that the treaty country investors will not be treated any less favorably than any other country investors. A quick overview of MFN is provided by UNCTAD document on MFN as follows:

> *The inclusion of most-favoured-nation (MFN) treatment provisions in international investment agreements (IIAs) followed its use in the context of international trade and was meant to address commitments made by States in free trade agreements (FTA) to grant preferential treatment to goods and services regarding market access. However, in the context of international investment that takes place behind borders, MFN clauses work differently. In early BITs, as national treatment (NT) was not granted systematically, the inclusion of MFN treatment clauses was generalized in order to ensure that the host States, while not granting NT, would accord a covered foreign investor a treatment that is no less favourable than that it accords to a third foreign investor and would benefit from NT as soon as the country would grant it. Nowadays the overwhelming majority of IIAs have a MFN provision that goes alongside NT, mostly in a single provision.*
>
> *The MFN treatment provision has the following main legal features:*
>
> - *It is a **treaty-based obligation** that must be contained in a specific treaty.*
> - *It requires a comparison between the treatment afforded to two foreign investors in like circumstances. It is therefore, a **relative standard** and must be applied to **similar objective situations.***
> - *An MFN clause is governed by the **ejusdem generis principle**, in that it may only apply to issues belonging to the same subject matter or the same category of subjects to which the clause relates.*
> - *The MFN treatment operates without prejudice to the freedom of contract and thus, States have no obligation under the MFN treatment clause to grant special privileges or incentives granted through a contract to an individual investor to other foreign investors.*

- *In order to establish a violation of MFN treatment, a **less favourable treatment** must be found, based on or originating from **the nationality** of the foreign investor.*

In practice, violation or breaches of the MFN treatment per se have not been controversial. However, an unexpected application of MFN treatment in investment treaties gave raise to a debate that has so far not found an end and that has generated different and sometimes inconsistent decisions by arbitral tribunals. The issue at stake is the application of the MFN treatment provision to import investor-State dispute settlement (ISDS) provisions from third treaties considered more favourable to solve issues relating to admissibility and jurisdiction over a claim, such as the elimination of a preliminary requirement to arbitration or the extension of the scope of jurisdiction.

[...]

When it comes to importing procedural provisions, mainly ISDS provisions from other treaties, arbitral tribunals have gone into divergent directions. A series of cases have accepted to follow the argument raised by the claimant that an MFN clause can be used to override a procedural requirement that constitutes a condition to bring a claim to arbitration. On a slightly different issue, namely jurisdictional requirements, a number of cases have however decided that jurisdiction can not be formed simply by incorporating provisions from another treaty by means of an MFN provision.

[...]

The universe of BITs, to date composed of over 2,700 treaties, is atomized and lacks consistency mainly as a result from the negotiation process of treaties. So far, arbitral tribunals have taken different and sometimes inconsistent approaches. Therefore the possibility for one IIA to contain looser or more stringent commitments of protection than others is a concrete reality for many countries that have been signing IIAs with different treaty partners. It is important to have a clear understanding of the way MFN treatment clauses have been applied by arbitral tribunals to *import allegedly better treatment and then to assess whether this is a desired outcome of IIAs. It is also important to take stock of the way treaty practice has evolved and to what extent States have reacted to the debate on MFN treatment. This would allow States to:*

- *Make better-informed decisions for drafting and negotiating purposes (more precise scope, wording, exceptions, etc. in MFN clauses);*
- *Administer their international commitments (through negotiation, re-negotiation, issuance of joint interpretations or other ways such as unilateral statements); and*
- *Be aware on the arguments that may fail or succeed in the context of arbitration.*

It should be noted at the outset that access by foreign investors to international arbitration as provided by the ISDS clauses of a vast majority of IIAs is a specific feature that has no equivalent in other areas of international economic law. This benefit granted to foreign investors is of extraordinary legal nature insofar as it derogates from customary international law, which requires that any acts or measures taken by the State must be challenged before the national jurisdictions of the State. Only after the investor has exhausted local remedies can the State from which it derives its nationality file an action against the host State, but never the investor himself. Derogating from this basic principle of international law comes with strong implications considering the exposure of States to international responsibility and it is therefore not surprising that broadening the base for international arbitration (formed by explicit consent) by applying MFN treatment clauses has generated debate and concern on the part of the States.

It is also noteworthy here to remind that ISDS provisions in IIAs seek essentially to compensate investors for damages and losses arising from acts or measures taken by the State. In most MFN treatment claims, tribunals have been directly applying the allegedly better treatment as opposed to finding a violation and compensating for the damage created *by this violation. It may not be within the role of investment tribunals to enforce commitments or secure their compliance. For instance, they could not force a State to admit an investment in the host State through an MFN treatment clause but only compensate for damages if selective and discriminatory liberalization were established.*

In the context of international investment, the current debate is not centered on alleged violation or breaches of the MFN treatment per se. Instead it focuses on the possibility for claimants to pick from third treaties allegedly more favourable provisions relating to protection standards or ISDS and thereby derogate from or modify provisions of the basic treaty. Such application of MFN treatment has been designated in certain arbitral awards and by some commentators as "treaty shopping". The term is generally understood in the context of investments being structured or set up in a given country to seek the benefits of double-taxation treaties or BITs (more seldom), when in reality the investors have little or no commercial activities there. In the context of MFN treatment, however, "treaty shopping" has been used to refer to the import practice of provisions from third treaties concluded with the home country of the TNC and does not presuppose in and by itself a negative connotation.

International and national frameworks for investment have generally evolved towards more certainty and predictability in the conditions relating to the entry and operation of foreign investors in host countries. The surge of investor-State disputes since the early 2000 and the interpretation of IIAs by arbitral tribunals (although not a formal source of international law) have shed some light on the actual content and practical application of IIAs. In the case of MFN treatment however, the awards have not provided clear guidance for negotiators or beneficiaries of the treaties, rather they have generated contradictory decisions (not necessarily justified by differences in wordings) and different conceptual understandings on how MFN treatment operates. States negotiating and concluding IIAs, policymakers shaping investment policies and investors investing and operating in foreign countries are seeking predictability with respect to the scope of their commitments and benefits. Negotiators *need to know in advance which obligations they are in fact undertaking when including an MFN treatment clause in their IIAs. In the context of arbitration, both States and investors would have reason for concern when seeing that the same argument may succeed one day and fail the next. The current discussion regarding the scope and content of MFN treatment is therefore of particular importance.* [12]

3.6. Investor state dispute settlement (ISDS)

BITs or IIAs have often provided a provision for investor-state-dispute-settlement (ISDS). Most treaties earlier provided for disputes to be settled between states and treaties did not create rights for third parties (investors). IIAs broke from this practice and created a mechanism for ISDS. The mechanism has also been called Dispute Settlement Arrangement (DSA). Provision of DSA / ISDS in BITs has created a mechanism that an investor could challenge the actions of the host country without involving government of the home country. In recent years, this has come under significant debate as capital importing countries have questioned the decisions of investment arbitration tribunals. UNCTAD has summed up the position regarding ISDS / DSA as follows:

Every foreign direct investment (FDI) transaction entails a trilateral relationship involving a host State, a foreign investor and the latter's home State. Inherent in the concept of State sovereignty lies the notion that a State has the power – which can be qualified in an IIA – to admit foreigners within its territory and to regulate their activities, as well as to protect its nationals abroad from acts contrary to international law. Thus, within the context of the regulation and protection of the investment activities of transnational corporations, disputes might arise between States or between States and investors.

Investment-related disputes between States could arise from various governmental measures that affect cross-border economic activities, some of which are addressed in IIAs. IIAs put into place frameworks consisting of general and specific undertakings and obligations by the States party to

[12] International Reports: UNCTAD, Most Favoured Nation, 2010

such agreements that determine the scope, extent and manner of their involvement with the cross-border investment activities of their nationals. The genesis of State-to-State (or "inter-State") disputes in IIAs can be traced either to issues that arise directly between the signatories of IIAs, or to issues that first arise between investors and their host States, but then become inter-State disputes.

It should be noted at the outset that, by comparison with investor-State disputes, State-to- State disputes in the field of investment, which have gone to third party settlement, are few and far between. Thus, experience of such disputes is relatively limited. The present chapter should be read in the light of this fact. This situation requires some clarification. It is true to say that, in a certain sense, even a dispute between an investor and a State that arises under an IIA contains an inter- State element, in that the investor is a national of another State party to the IIA, and that State might even have been involved in attempts to negotiate an amicable settlement of the dispute. Nonetheless, such a dispute remains an investor-State dispute albeit one arising out of an IIA agreed between States.

The main explanation for the lack of State-to-State investment disputes lies in the manner in which foreign investment law has developed in recent decades. That development is marked by the move from the era of Friendship, Commerce and Navigation (FCN) treaties, and investment treaties that pre-dated the establishment of the International Centre for Settlement of Investment Disputes (ICSID), in which the investor had no right to institute proceedings against a host State, to the current era where the investor has direct rights to do so under many investment agreements. Such agreements often contain a dispute settlement clause permitting the investor to bring a claim before an international arbitral tribunal or before ICSID. Similarly, regional agreements may provide for direct rights of this type before regional dispute settlement bodies. Such agreements give ascendancy to the investor, who is the principal beneficiary of rights contained in agreements entered into between States. In this context, it is to be expected that the principal disputes will be between the investor and the host State, not between the State contracting parties to an IIA.

[...]

Inter-State disputes and their settlement, arising within the context of IIAs, involve processes that are, to a large extent, addressed by dispute settlement arrangements (DSAs) therein. Such arrangements in IIAs give rise to a number of general considerations. First, while mutually agreed standards and rules in IIAs set forth the undertakings, rights and obligations of their signatories, like all other agreements, IIAs cannot be drafted in such a way as to foresee all possible contingencies and eventualities. Moreover, disagreements could develop as to the precise nature and scope of those undertakings, rights and obligations. Thus, the need might arise for their interpretation and application in specific contexts and factual situations. Indeed, it is not uncommon that the solution to a particular dispute would require the development of still more detailed criteria or ancillary rules.

Second, in national systems, compulsory procedures exist within the jurisdictions of various official fora that could be initiated to handle such matters should there be no provisions on dispute settlement in an agreement. By contrast, there is a lack of compulsory dispute settlement fora within the international system at large.3 In these circumstances, the involved parties must ensure that they can settle the dispute amicably and peacefully. Otherwise, the absence of such arrangements could lead to the settlement of a dispute on the basis of the relative power of the parties involved rather than on the merits of their claims. Equally, lack of appropriate DSAs might result in unilateral decision-making on disputed matters by the parties, thus setting off an unsound chain reaction, which could lead to the termination of mutually beneficial relations between the signatories, or perhaps even an escalation of the dispute into a higher-level political conflict. DSAs provide for mutually acceptable fora that allow for certain decision-making mechanisms and procedures, which the parties agree to engage should a dispute arise within the context of an IIA, thereby reducing the scope for recourse to unilateral acts by the parties.

Third, as with many international agreements, it might not be practicable (or desirable) to put into place complex rules that set forth highly detailed *provisions in certain substantive areas covered by IIAs. In those circumstances, the development and growth of a set of standards and rules in particular substantive areas covered under an IIA could be delegated to when issues arise in specific contexts, by leaving the detailed formation, interpretation and application of rules to a case-by-case review. The latter issue is of increasing significance given that IIAs increasingly involve the internationalisation of matters that have traditionally belonged within the sphere of national policy-making, including the exercise of domestic jurisdiction to regulate matters such as the environment, labour standards and the competitive structure of national markets. DSAs contribute to this rule-making process by providing the mechanisms for case-by-case reviews.*

Fourth, the objectives of IIAs can be considered effective only where DSAs are incorporated into "packages" that ensure, to the extent possible, that the agreed upon rights and obligations provided for in IIAs are realizable. DSAs complete and make effective such rule-based systems by allowing for a challenge and review process vis-à-vis measures and practices of all actors involved in the FDI relationship.

The conception of arrangements for the settlement of inter-State disputes in IIAs involves careful deliberations on certain fundamental notions concerning the purposes for which DSAs are established. In this connection, first, a primary purpose is to ensure that, when disputes arise, a pre-determined set of procedures will be available to the parties, the engagement of which will result in a final, authoritative decision that will fully settle the matter. Second, the purposes and objectives behind DSAs appertain not only to the settlement of particular disagreements concerning the interpretation, implementation or application of the provisions in IIAs, but also the avoidance of conflict. The latter implies two ideas: first, that prior to a measure being taken by a Government that might affect a foreign investment covered by an IIA, there should be a notification and discussion with regard to the proposed measure; and second, that prior to resort to particular dispute settlement mechanisms *provided for in IIAs, there should be discussions intended to avoid recourse to such mechanisms.*

In sum, the purposes and objectives behind the establishment of DSAs include a contribution to the avoidance, management and settlement of State-to-State disputes. In order for DSAs to achieve these objectives, effective structures – processes, mechanisms and procedures – must be agreed to and provided in IIAs. The general processes encompass two extremes: either ensuring the close control by the disputing parties of the settlement procedures and decisions that might effect the outcome; or their limited control and influence over procedures and decisions that affect the final results. The mechanisms under which States retain control are negotiations, consultations, fact-finding, good offices, conciliation and mediation, and those under which there is practically no control over the final outcome are arbitration, judicial settlement or other third party decision-making mechanisms. Third party dispute settlement procedures could still involve two decision-making models: non-binding and binding outcomes.[13]

[13] International Reports: UNCTAD, 2004

Chapter 4
Investment Protection in India – Independence to Year 1995

India's approach to foreign investment has been evolving after independence. Initially, India was welcoming but cautious. During the 70s and 80s, India was enthusiastically pursuing socialism and was nationalizing domestic as well as foreign businesses. This phase ended with the start of liberalization in the 90s.

While analyzing India's approach to foreign investment in the post-independence era, one must remember that India had been colonized by a company (East India Company) which had come to India for doing business. During pre-independence era, British did all that they could do to promote and support British businesses while discouraging Indian businesses and businessmen. Having faced discrimination during British rule, it is indeed creditable that India, unlike many other newly liberated countries, did not pursue reverse discrimination or revenge-based policies against British / European / foreign investors and investments.

4.1. Background

After India's independence, Constituent Assembly was set up to draft a constitution for the newly liberated country. The Constituent Assembly had leaders who had participated in the freedom movement. India's freedom movement had gained from leaders who had been educated in Britain and had imbibed the liberal and democratic values that were part of the discourse in British and European universities in the early twentieth century. As a result, the Constituent Assembly deliberated at length on rights that must be recognized as fundamental rights.

Notably, while the founding fathers of India's Constitution were firm about giving right to property the status of fundamental right, they were aware of the need to guard against arbitrary expropriation without payment of adequate compensation. It may also be pointed out that the Constituent Assembly leaders while talking of rights were not talking about only rights of citizens – they were concerned with the rights of man. In other words, rights of foreigners were also covered by the fundamental right of property.

> *The question before the Constituent Assembly was how to ensure the transition to a liberal democratic legal order, which guaranteed rights to liberty, equality, and property, while at the same time preserving the Congress' commitment to land reform, a cause that many leaders had championed as essential for the economic and social development of the country, and social redistribution. The difficulty of doing this given the inherent contradiction between conserving existing property rights and ushering in a more egalitarian society through redistribution of land led to intense debate within the Constituent Assembly.*
>
> *In the Assembly, there was an early decision (March and April 1947) by the Advisory Committee to deal with the protection of property rights separately from personal rights of "life and liberty". After some discussion in the Advisory Committee and in its Sub-Committee on Fundamental Rights, Vallabhbhai Patel, as Chairman of the Rights Sub-Committee, first brought a draft of the article on compulsory acquisition to the Assembly in his Interim Report on Fundamental Rights.*
>
> *On May 2, 1947, Patel moved Clause 19 (as it was then numbered), which read:*
>
> > *No property, movable or immovable, of any person or corporation, including any interest in any commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of compensation for the property taken or acquired and specifies the principles on which and the manner in which the compensation is to be determined.*

Both in the Fundamental Rights Sub-Committee, and later in the Constituent Assembly, the debate on the right to property centred on the following questions.

1. *What are the scope and limits of the right to property? How do we balance the need to guarantee everyone the dignity to hold property, especially women and Dalits (who at the time of drafting of the Constitution could not inherit certain forms of property like land), with social and economic reform to be conducted within the contours of the utilitarian development discourse?*
2. *What is meant by "public purpose"? That is, whether it is restricted to government purpose or can also include within its ambit broader social purposes?*
3. *What constitutes an "acquisition or deprivation" within the meaning of the provision that would justify payment of compensation?*
4. *What is the meaning of "compensation" as well as the terms "fair, equitable and just?"*
5. *Who will be the ultimate arbiter of the quantum of compensation and the form in which it is to be paid, the legislature or the judiciary?*

These questions had not been settled when the Supplementary Report on Fundamental Rights was debated at the end of August 1947. The Constituent Assembly took up only the clauses preceding the one dealing with property rights. Then it adjourned subject to call by the President. More than a year later, on 17 November 1948, the Constituent Assembly began to address the draft constitution article by article. The debate on the property article (now renumbered 24) was reached on 9 December.

[...]

In the mould of the Fabian socialists, Nehru and others in the Constituent Assembly believed that it was possible to balance the individual's right to property with the community's interest or right in that property. On 10 September 1949, speaking in the Constituent Assembly, Nehru stated that there were two different approaches—one from the point of view of the individual's right to property and the other from the point of view of the *community's interest or right in that property; but the two approaches did not necessarily conflict with each other. In drafting the constitutional property clause, it was important to take into consideration both these rights and to avoid any conflict between them.*

Yet the achievement of such a balance greatly puzzled the drafters. Drafts and redrafts from various members were debated without success. On 9 August 1949, as the Congress was moving toward a final compromise that could be put before the Constituent Assembly, the Assembly party (those members of the Constituent Assembly who were also members of the Congress party) voted 57 to 52 to make compensation for commercial and industrial property justiciable and to empower federal and state legislatures to make the final determination of whatever compensation would be provided to the zamindars. T.T. Krishnamachari, the first Minister for Commerce and Industry and later Finance Minister in the Nehru government had threatened to resign from the Assembly rather than accept a draft unsatisfactory to business and propertied interests. The contrast evident in the protection of industrial property rights and hostility toward zamindari property, derived from the prevailing development discourse, would be reflected in the compromise clause ultimately adopted by the Constituent Assembly.

On 10 September 1949, Prime Minister Nehru personally presented the compromise formula to the Constituent Assembly in the form of a revised Article 24 of the draft Constitution. This clause was adopted with only minor modifications and renumbered as Article 31 in the Constitution.

> *Article 24 of the Draft Constitution provided as follows:*
>
> *Compulsory acquisition of property*
>
> *(1): No person shall be deprived of his property save by authority of law*
>
> *(2): No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking shall be taken possession of or acquired for public purposes under*

any law authorizing the taking of such possession or acquisition, unless the law provides for compensation for the property taken possession of or acquired, and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3): *No such law as is referred to in clause (2) of this article made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.*

(4): *If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, received the assent of the President, then notwithstanding anything in the Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).*

(5): *Save as provided in the next succeeding clause, nothing in clause (2) of this article shall affect—*

a. *the provisions of any existing law, or*

b. *the provisions of any law which the State may hereafter make for the purpose of imposing or levying any tax or penalty or for the promotion of public health or the prevention of danger to life or property*

(6): *Any law of the State enacted not more than one year before the commencement of this Constitution, may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court* *on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub section (2) of Section 299 of the Government of India Act, 1935.*

According to Nehru, the clause ultimately adopted tried to balance the interests of the individual and the community by providing for no expropriation without compensation in general, while at the same time making a distinction between petty acquisitions and large schemes of social reform and social engineering, where there could be expropriation on the payment of little or no compensation. The latter could not be considered from the point of view of the individual.[1]

In the Constitution of India that was adopted right to property was present as a fundamental right at Article 19(1)(f) which mentioned – All citizens shall have the right "*to acquire, hold and dispose of property …*". The right to property was also at Article 31 which has been mentioned and quoted above. Notably, the right to property under Article 19 was available only to citizens (though Article 31 bestowed the right on all persons) and not to foreigners unlike say Article 14 which promises equality before law to all persons and not merely to citizens.

It is interesting to understand the developments that took place in India regarding the right to property in post-independence India very well summed up by Gopal Sankaranarayanan as follows:

Barely months after the Constitution came into force, it's property provisions were invoked by individuals in the northern States of Bihar, Uttar Pradesh and Madhya Pradesh to challenge the respective land reform legislations of those states. The first reverse suffered by the Government was by courtesy of the High Court of Bihar which struck down as unconstitutional the Bihar Management of Estates and Tenures Act, 1949 for being unreasonable in not providing for compensation and being generally onerous. A few months later, it was the turn of the High Courts of Lucknow and Allahabad in Uttar Pradesh to issue orders restraining the Government from acquiring lands under that State's land reforms law. In

[1] Articles and Studies: Namita Wahi, 2021

a sign of things to come, Prime Minister Nehru wrote to the Chief Ministers saying, "[I]f the Constitution itself comes in our way, then surely it is time to change that Constitution." Shortly thereafter, a judgment of the Calcutta High Court rejected the stand of the Government that compensation for land calculated as of the date of notification for acquisition in 1946, although taken over in 1950 would be valid. This was found not to be just compensation, and hence violative of Article 31. Understandably agitated that the much-touted land reform programme was beginning to go awry, the Government promptly set about amending the Constitution to circumvent the judgments handed down. By way of the First Amendment to the Constitution, Articles 31A and 31B were inserted in Part III, which excluded judicial review where laws sanctioned the taking over of estates, and also provided a Schedule in which all central and provincial laws vulnerable to constitutional challenges could be placed for judicial immunity.

Nehru's actions, though probably justified at the time, showed a lack of prescience, because with one fell blow, he created two mechanisms by which the supremacy of Parliament would be emphasized – (a) the power of the Constitutional Amendment to nullify the judgments of the courts, used for the first time in this instance, and (b) the Ninth Schedule, by which the very power of judicial review of legislative action (one accorded by the Constitution itself) would be excluded. In the years to come, these two instruments more than any other would be used by less responsible Governments to trammel the judiciary and muzzle the electorate. On the issue of property rights alone, much of Indian public law jurisprudence has evolved. In what could well be a unique history of conflict between the legislative and the judiciary, a series of Constitutional amendments were carried out with the sole objective of neutralizing the effect of judicial interpretation of the Constitution. In the two and a half decades during which Article 31 continued in force, this trend was in evidence on six separate occasions, the first of which has been detailed above. The rest are considered in brief here:

i. *In the wake of the judgment of the Supreme Court in Bela Banerjee's case, where it was held that the owner of expropriated property must be paid full 'market value' as compensation, Parliament enacted the Constitution (4th Amendment) Act, 1955 by which an insertion was made in Article 31(2) to the effect that "no such law shall be called in question on the ground that the compensation provided by that law is not adequate".*

ii. *In I.C. Golak Nath's case, the Constitution (17th Amendment) Act was challenged, which had inserted the offending Punjab Land Tenures legislation in the Ninth Schedule, and resulted in a deprivation of the fundamental right to own and enjoy property. Invoking the principle of prospective overruling, the Court concluded that no Constitutional amendment could alter any of the fundamental rights. This radical position was sought to be reversed by the passage of the Constitution (24th Amendment) Act, 1971.*

iii. *At the same time, challenges to the quantum of compensation continued, and the Supreme Court again observed that the very word 'Compensation' itself indicated only 'full compensation'. This observation in the Bank Nationalization Case prompted the Government to enact the Constitution (25th Amendment) Act, 1971 whereby the word 'Compensation' in Article 31(2) was substituted by the word 'Amount' so that the grammatical interpretation provided by the Court would no longer apply.*

iv. *When the 25th Amendment Act was challenged before the Bench in Kesavananda Bharati, the Court was of the view that even though the justiciability of the adequacy of the amount did not abide, the Court would still intervene where the amount was illusory and the principles for fixing the amount were irrelevant. The Court further went on to sustain the 24th Amendment by overruling the decision in Golak Nath.*

v. *Cases such as Ranganatha Reddy, and Madan Mohan Pathak showed that challenges to the law of acquisition on the ground of the* *contravention of Article 31(2) continued notwithstanding the 25th Amendment.*

A note on Kesavananda's case would not be out of place at this juncture, being as it is the most celebrated case in India's constitutional firmament. When the land reforms laws of the State of Kerala were impugned for attempting to interfere with the Petitioner seer's management of his religious temple, it was argued on his behalf that the Constitution contained certain essential features that could not be altered even by exercise of Parliament's constituent power. Interestingly, it was this argument – later to be made famous as the 'basic structure' doctrine - that acknowledged the contribution of a German academic.

Prof. Dieter Conrad was a Head of the Law Department at the South Asia Institute of the University of Heidelberg, who had an opportune occasion to address the Law Faculty of Banaras Hindu University in February 1965 on the issue of "Implied Limitations of the Amending Power". This formed the basis of the arguments of counsel M.K.Nambyar before the Golak Nath court, which were however not accepted.36 A few years later, Conrad published a detailed paper on the subject.37 Finally, when the implied limitations argument was raised again in Kesavananda's case, they were accepted, thereby carving a via media between the extreme positions of Golak Nath and the Government. The argument that the right to property was a basic feature of the Constitution, and that hence there could be no amendment to that right as it stood, was rejected by the majority of 7 judges, with the remaining 6 finding no merit in the basic structure argument itself. It was but a logical consequence of the actions of the executive in restricting the property rights enjoyed by individuals that resulted in the Constitution (44th Amendment) Act, 1978 which wholly annulled the right to property and created severe anomalies in the law.[2]

Right to Property as enshrined under Article 19(1)(f) and Article 31 survived for only about three decades and was revoked by The Constitution (Forty Fourth) Amendment Act, 1978. Statement of Objects and reasons of the Amendment Act read as follows:

[2] Articles and Studies: Sankaranarayanan Gopal, 2011

Recent experience has shown that the fundamental rights, including those of life and liberty, granted to citizens by the Constitution are capable of being taken away by a transient majority. It is, therefore, necessary to provide adequate safeguards against the recurrence of such a contingency in the future and to ensure to the people themselves an effective voice in determining the form of government under which they are to live. This is one of the primary objects of this Bill.

[...]

3. In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to article 19 and article 31 is being deleted. It would, however, be ensured that the removal of property from the list of fundamental rights would not affect the right of minorities to establish and administer educational institutions of their choice.

4. Similarly, the right of persons holding land for personal cultivation and within the ceiling limit to receive compensation at the market value would not be affected.

5. Property, while ceasing to be a fundamental right, would, however, be given express recognition as a legal right, provision being made that no person shall be deprived of his property save in accordance with law.[3]

Section 34 of the Constitution (Forty Fourth) Amendment Act inserted a new Article 300A in the Constitution. The section reads as follows:

34. Insertion of new Chapter IV in Part XII.-In Part XII of the Constitution, after Chapter III, the following Chapter shall be inserted, namely:-

"CHAPTER IV.-RIGHT TO PROPERTY

300A. Persons not to be deprived of property save by authority of law.- No person shall be deprived of his property save by authority of law.".

[3] Laws & Constitution: Constitution (Forty Fourth) Amendment Act, 1978

By the above Constitution Amendment Act, right to property became a constitutional right instead of a fundamental right. Notably, the constitutional right to property is bestowed on all "persons" unlike the fundamental right under Article 19(1)(f) which was available only to citizens.

4.2. Investment protection law and application

After independence and till mid-90s, India's priority was social justice and not promotion / protection of investments. While the Constitution of India granted protection to investments (initially as fundamental right and later as constitutional right), there were hardly any laws to protect investments and investors, whether foreign or domestic.

The global scenario regarding protection of foreign investments and India's perspective on the same has been summed up very well by Aniruddha Rajput as follows:

> *There was a fear that under the garb of state responsibility the old practice of diplomatic protection would be 'used as a device for securing economic or political domination or supremacy in the life of another State" The arguments for absence of state responsibility for affecting aliens and lack of support in international law for diplomatic protection were pointed out by Indian scholars. Foreigners are entitled to a treatment not higher than nationals. India supported the national treatment principle and Indian scholarship also supported this view. At the International Law Commission (ILC), the Special Rapporteurs had narrowed the work on state responsibility only to the question of treatment of aliens. This focus remained despite the support for identification of substantive principles on state responsibility. The narrow approach to state responsibility was also opposed by the Latin American countries. When it came to finding state responsibility for deprivation of property of foreigners, the Indian member at the ILC Justice Radhabinod Pal opposed the doctrine of state responsibility for injuries to aliens because this was 'a completely different ideology of social justice, involving completely different social and economic systems which engender, among other things, the existing conception of private property.' Ultimately, the ILC dropped any reference to protection of foreign investors or aliens in the final Draft Articles.*

> *India rejected the argument that there was a customary international law on state responsibility for losses caused to aliens and insisted that this area should be based on treaties. The discussion above has shown that in domestic policy, India had insisted on national treatment. India did not support absolute protection of private property. Post independence, the urgent priority of India was social justice. Lands were concentrated in the hands of rulers of former princely states, aristocrats, land hoarders (called zamindars) and others close to the colonial administration. If steps for redistribution of land were not taken, the exploitation of the deprived would have continued and independence from colonial rule would have no real meaning or impact for the large majority. The domestic policies and the laws were shaped in a manner that redistribution of land would be upheld.*
>
> *The Indian position can be summarised as follows: absence of state responsibility for economic losses caused to foreign investors due to actions of host state; foreign investors are regulated by national treatment principle, whereby they should approach the domestic courts of the host state and should not claim higher protection than domestic investors and their home state should not grant them diplomatic protection; and third the right of nationalization as an attribute of state sovereignty.*[4]

From independence in 1947 to liberalization in year 1995, right to property was slowly eroded in India. The erosion affected not just foreign investors or large business houses. While the Constitution was amended with socialist ideals as the declared objective the fading away of the right to property affected many small landowners, farmers and forest dwellers. The position after Constitution 44th Amendment Act is summed up as follows:

> *Therefore, in one fell swoop, the right to property was taken from a position of pre-eminence and consigned to being a mere legal right. With the passage of the 44th Amendment, both Articles 19(1)(f) and 31 were deleted, with only the first clause of Article 31 being reproduced elsewhere in the Constitution as Article 300-A.*

[4] Working Papers: Aniruddha Rajput, 2017

The Fallout

The result of this Amendment has been evident from the actual problems faced by the nation over the last three decades since then. Stripped of even the right to enforce the enjoyment of property in a court of law, much disgruntlement has set in, particularly among the weaker and less privileged sections of society. Widespread acquisition of land for private purposes and arbitrary licensing policies, have led to a rise in resistance movements in India, with violent Marxist nationalism cutting a red swathe across the nation. Much of this has been attributed to the deprivation of land to the landless. Large infrastructure projects have also been the source of disgruntlement, with issues concerning the Sardar Sarovar Project in Gujarat and Vedanta in Orissa finally receiving their approvals from the Supreme Court of India. As India continues with a high growth rate of over 8%, substantial local and foreign investment finds its way into highways, airports, housing and power projects. All of these ventures require land, and with local governmental support, many small landholders are deprived of their land for paltry sums of compensation.

Acknowledging the problems that have arisen, Bills have been introduced in Parliament in March 2009, both for the limited basis on which land may be acquired, and for the rehabilitation of those who have been displaced. Unfortunately, now that the right to property has itself been removed from the hallowed fundamental rights chapter of the Constitution, those aggrieved by the excesses of State action have a very limited recourse to the law, only seeking greater compensation amounts, which also have lost the protection earlier afforded by Article 31.

[…]

Initially Article 31 consisted of 6 sub-clauses, where Article 31(1) laid down the protection against deprivation of private property without following the procedure laid down by law, and Article 31(2) provided the safeguard of compensation necessarily having to be paid in the event of such taking of property. This extended to both movable and immovable property. However, the 44th Amendment succeeded in creating an unprecedented anomaly. While the entirety of Article 31 was deleted from Part III with the *intention of reproducing it elsewhere in the Constitutional text, eventually only Article 31(1) found itself reincarnated as Article 300-A, while all the remaining sub-clauses including the assurance of compensation contained in Article 31(2) were omitted. As a consequence, the Constitution today permits a law to acquire private property, with no requirement to pay compensation. Any argument that the right to compensation need not be spelt out as it inheres in other provisions of the Constitution (right to life; right against arbitrary action), has been effectively rejected by virtue of the judgment of the Supreme Court in Jilubhai where it has been observed:*

> *By necessary implication the obligation of the State to pay compensation for property acquired or indemnification of property deprived under Article 300-A or other public purpose is obviated.*

Even in the provinces, this position has been reinforced. In Bihar, a challenge to the Debt Relief Act, 1977 on the ground that it provided for no compensation was rejected when Article 300-A was invoked.

The prominent Constitutional commentator H.M. Seervai has commented on this grave omission in the following words:

> *The rights conferred by Article 19(1)(f) and Article 31 (read with the entries in the Legislative Lists regarding acquisition and requisition of property) were so closely interwoven with the whole fabric of our Constitution that those rights cannot be torn out without leaving a jagged hole and broken threads. The hole must be mended and the broken threads replaced so as to harmonise with the other parts of our Constitution. The task is not easy, and the courts will be called upon to answer problems more formidable than those raised by Article 31 after it was amended a number of times.*

Several other experts on the Indian Constitution have all been united in their criticism of the deletion by the 44th Amendment, and that it was only to fulfill an electoral pledge of the Janata party and for no other reason.

By deleting the right to compensation available in Article 31(2), the 44th Amendment also results in discriminations at as many as three levels, all of which violate the equality code and once again occasion a breach of the basic structure of the Constitution. While compensation is no longer a right to a deprived property owner covered by Article 300-A:

- *an amount of compensation would still be paid to the property owner of a minority institution [Article 30(1A)];*
- *market value compensation would have to be paid to an estate owner who personally cultivates his land within the ceiling limit [Article 31-A second proviso]; and*
- *no compensation need be paid to a landless peasant who tills the land of another.*

The above circumstance leads to discriminations between majority and minority communities, between personal holders of land and actual tillers and between the agrarian rich and rural poor. This is not only anomalous, but wholly against the ideals of the Constitution enshrined in the Directive Principles, particularly with reference to economic and social justice.[5]

From the above discussion it can be concluded that the domestic law of India (including the Constitution) is biased against protection of rights of various categories of property owners including small farmers, forest dwellers etc. With the inadequacy of India's domestic laws for protection of domestic property-owners, it is obvious that in the absence of any special treaty protection foreign investors are not protected in any way. The statement was true in the period 1947 to 1995 (the year when India started the process of executing BITs) and is also true today when there is no clarity about BITs since India has terminated most of the BITs. Nevertheless, it can be said that India's investor protection regime (under domestic law), which began on a strong note with the adoption of the Constitution in 1950, weakened or faded away with the passing of the Constitution Forty-Fourth Amendment Act in 1978.

[5] Articles and Studies: Sankaranarayanan Gopal

Chapter 5
Investment Treaties of India
1995 to 2015

In the previous chapter it was mentioned that, as a result of pursuit of socialist agenda in the post-independence era, India had a weak investor protection regime both for domestic investors and foreign investors. When India embarked on the path of liberalization with the goal of attracting global investments, it was felt that protection of foreign investors is a key area that needs to be addressed. India gave up her insistence on national treatment and the right to nationalize as an attribute of state sovereignty. While no steps were taken for protection of domestic investors and property owners (farmers, forest dwellers etc.), India decided to move ahead for protection of foreign investors. The following extract from the Budget 1993-94 speech of then Finance Minister, Dr. Manmohan Singh shows the thinking of Government of India at that time:

> *28.A new policy towards foreign investment has been an integral part of our strategy of modernising the economy, and establishing global linkages which will be of critical importance in the emerging world economy. I have already mentioned that the initiatives taken in this area thus far have yielded encouraging results. I have no doubt that as our reforms proceed and gain momentum, we can expect to attract a substantial share of the private investment that is presently flowing to many developing countries in Asia. The Government has signed the Multilateral Investment Guarantee Agency (MIGA) convention and we expect to join MIGA formally as soon as membership procedures are completed. Several countries, including the UK, Germany and the United States, have expressed an interest in signing*

> *bilateral investment treaties. The Government has indicated a willingness to enter into bilateral negotiations on this issue.*[1]

As India prepared to welcome foreign investors, India prepared a Model BIT Text of 1993. This Model Text was the basis of negotiations with all countries. Model BIT Text of 1993 is not available. However, the first BIT executed by India based on the Model BIT Text of 1993 was Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India dated 14 March 1994 which entered into force on 6th January 1995. It seems reasonable to assume that the India-UK BIT was largely the Model BIT Text of 1993 on which all subsequent BITs executed by India during the next two decades were based. The following paragraph from Parliamentary Committee Report sums up the progress made from 1994 to 2015.

> *Bilateral Investment Treaty (BIT) is an agreement for according protection to investments by nationals and companies of one State in another State. International Investment Agreements (IIAs) which include Bilateral Investment Treaties and Investment Chapters of Trade and Economic Agreements provide for a reciprocal commitment to protect the private foreign investments in each other's countries. India signed its first Bilateral Investment Treaty with the United Kingdom (UK) in 1994. Post 1991 economic reforms and up to 2015, India signed BITs with 83 countries out of which 74 were enforced. These BITs were largely negotiated on the basis of the Indian Model BIT text of 1993.*[2]

Even though the 83 BITs executed by India were based on the Model BIT Text of 1993, each BIT executed by India is different in some way or the other. Despite being based on a common model, no two BITs are identical.

The authors have focused on the following parameters in the 83 BITs executed by India:

a) Definition of Investment

b) Definition of Investor

c) Expropriation

d) Fair and Equitable Treatment (FET)

[1] Speeches: Manmohan Singh, 1993

[2] Reports (India): India and Bilateral Investment Treaties, Tenth Report, 2021

e) Most Favoured Nation (MFN)

f) Investor State Dispute Settlement (ISDS)

5.1. Definition of investment in BITs

Investment is defined in different ways in the 83 BITs executed by India. Considering that all the BITS are based on one Model Text of 1993, one would expect that variations from the Model Text will be minimal and confined to a handful of types. The reality is very different. While a few BITs have identical definitions of investment and investor with minor variations, mostly the BITs are different. Considering definitions of investment and investor with minor variations as one type, it is noticed that there are forty-seven different definitions of investment and investor. All the definitions of investment and investor are collated in Appendix A with the following details:

Table 5.1 Definitions of investment and investor in India's BITs 1995-2015

Sub-Appendix No.	Countries
A1	United Arab Emirates
A2	Nepal, Seychelles, Democratic Republic of Congo
A3	Slovenia
A4	Lithuania
A5	Latvia, Qatar
A6	Colombia
A7	Mozambique, Myanmar, Libya, Trinidad and Tobago, Egypt, Oman, Vietnam, Tajikistan
A8	Bangladesh, Jordon, United Kingdom
A9	Senegal, North Macedonia, Poland
A10	Syrian Arab Republic
A11	Brunei Darussalam

Sub-Appendix No.	Countries
A12	Uruguay
A13	Ethiopia, China, Armenia, Taiwan, Yemen, Ghana, Cyprus, Ukraine, Mongolia, Lao People's Democratic Republic, Thailand, Sri Lanka
A14	Iceland, Bosnia and Herzegovina, Bahrain, Indonesia, Romania
A15	Mexico
A16	Greece
A17	Slovakia
A18	Saudi Arabia
A19	Hungary
A20	Sudan, Djibouti, Kyrgyzstan
A21	Serbia, Belarus
A22	Finland
A23	Kuwait
A24	Croatia
A25	Sweden
A26	Portugal, Bulgaria
A27	Philippines
A28	Austria
A29	Argentina, Israel
A30	Uzbekistan, Kazakstan, Turkmenistan
A31	Australia
A32	Morocco
A33	Zimbabwe
A34	Turkey
A35	Mauritius

Sub-Appendix No.	Countries
A36	Belgium-Luxembourg
A37	Spain
A38	France
A39	Switzerland
A40	Czech Republic
A41	Republic of Korea
A42	Italy
A43	Netherlands
A44	Denmark
A45	Malaysia
A46	Germany
A47	Russian Federation

A quick look at the above table shows that the definition of investment and investor as given in Sub-Appendix A13 is the most commonly used one, with twelve (12) BITs adopting the same with minor variations. Broadly the definition reads as follows (without considering the minor variations adopted by the twelve different BITs):

1. *"investment" sha1l mean every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:*

   (i) *movable and immovable property as well as other rights such as mortgages, liens or pledges;*

   (ii) *shares in and stocks 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 concession conferred by law or under contract, including concessions to search for and extract oil and other minerals;*

2. *"investor" shall mean any natural person or a legal entity of a Contracting Party;*

(i) *natural person is a person deriving his status as a national from the laws in force of that Contracting Party;*

(ii) *legal entity means an entity constituted or incorporated under the laws of each contracting Party such as companies, corporations, firms and associations having its economic activity in the territory of that same Contracting Party.*

Notably, in the above definition investment means every type of asset and property; while investor includes natural persons as well as all types of legal entities constituted under the laws of the country concerned.

The second most commonly adopted definition is given in Sub-Appendix A7. Eight (8) BITs have adopted the definition given in the Sub-Appendix with minor variations. Broadly the definition reads as follows (without considering the minor variations adopted by the eight different BITs):

(b) *The term "investment" means every kind of asset established or acquired, including changes in the form of such investment in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:*

(i) *movable and immovable property as well as others rights such as mortgages, liens or pledges;*

(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;*

(c) *The term "investors" means any national or company of a Contracting Party.*

(d) *The term "nationals" means:*

(i) *in respect of the Republic of India, persons deriving their status as Indian nationals from the law in force in India;*

(ii) *in respect of the Republic of Mozambique, any mozambican citizen, in accordance with the Constitution in force in the Republic of Mozambique.*

If one compares the definitions of investment given in A7 and A13, one notices that the two definitions are largely the same. In case of investors, definition given in A7 covers nationals and companies while the definition given in A13 covers nationals and all types of legal entities. In other words, A13 includes firms and associations whereas A7 excludes such legal entities.

5.2. Investor in BITs

Definition of Investor is included with the definition of investment and is collated in Appendix A.

5.3. Expropriation in BITs

Expropriation is a key concern for any foreign investor. Definition of expropriation and provisions regarding the same vary greatly in different BITs executed by India. However, the variety is not as large as in the case of definition of investment and investor. Forty-four

(44) countries have adopted an almost identical clause related to expropriation which is given in Appendix B5.

Overall, there are thirty-seven (37) different types of expropriation clauses in the 83 BITs executed by India. The same are collated in Appendix B as per the following details.

Table 5.2 Provisions related to expropriation in India's BITs 1995-2015

Sub-Appendix No.	Countries
B1	United Arab Emirates, Kuwait
B2	Nepal, Colombia
B3	Slovenia, Austria
B4	Lithuania
B5	Seychelles, Democratic Republic of Congo, Latvia, Mozambique, Bangladesh, Senegal, Myanmar, Brunei Darussalam, Iceland, Libya, Trinidad and Tobago, Jordan, China, Bosnia and Herzegovina, Bahrain, Sudan, Armenia, Djibouti, Ghana, Cyprus, Ukraine, Croatia, Mongolia, Lao People's Democratic Republic, Thailand, Philippines, Argentina, Indonesia, Zimbabwe, Bulgaria, Romania, Belgium-Luxembourg, Kyrgyzstan, Egypt, Switzerland, Oman, Vietnam, Sri Lanka, Kazakstan, Czech Republic, Poland, Israel, Tajikistan, Turkmenistan
B6	Syrian Arab Republic
B7	North Macedonia
B8	Uruguay
B9	Ethiopia
B10	Mexico
B11	Greece
B12	Slovakia
B13	Saudia Arabia
B14	Hungary
B15	Serbia

Sub-Appendix No.	Countries
B16	Belarus
B17	Finland
B18	Taiwan
B19	Yemen
B20	Sweden
B21	Portugal
B22	Uzbekistan
B23	Qatar
B24	Australia
B25	Morocco
B26	Turkey
B27	Mauritius
B28	Spain
B29	France
B30	Republic of Korea
B31	Italy
B32	Netherlands
B33	Denmark
B34	Malaysia
B35	Germany
B36	Russian Federation
B37	United Kingdom

A quick look at the above table shows that the definition of expropriation as given in Sub-Appendix B5 is the most commonly used one, with forty-four (44) BITs adopting the same with minor variations. Broadly the definition reads as follows (without considering the minor variations adopted by the forty-four different BITs):

(1) *Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as " expropriation") in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable genuine rate until the date of payment, shall be made without unreasonable delay, be effectively realizable and be freely transferable.*

(2) *The investor affected shall have right, under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. The Contracting Party making the expropriation shall make every endeavour to ensure that such review is carried out promptly.*

(3) *Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares*[*l*]

A quick glance at the above clauses shows the following key points that form the backbone of the most commonly adopted definition of expropriation:

(a) Shall not be nationalized or expropriated except as provided in the BIT.

(b) Nationalization or expropriation for public purpose is allowed.

(c) Nationalization or expropriation should be non-discriminatory.

(d) Nationalization or expropriation should be against fair and equitable compensation.

(e) Compensation should be equal to genuine value before expropriation.

(f) Interest at a fair and equitable rate should be paid till the date of payment which should not be delayed unreasonably.

(g) Compensation should be effectively realizable and be freely transferable.

(h) Right to review of expropriation as well as valuation by a judicial or other independent authority.

(i) Review to be carried out promptly.

(j) When a domestic company is expropriated and foreign investors are shareholders, the foreign shareholders to be compensated as per above principles.

5.4. FET in BITs

Fair and Equitable Treatment (FET) is a key element in almost all BITs executed by India before 2015. There is only one BIT (India-Turkey BIT, 1998) which does not have provision of FET. It may be mentioned here that even though India-Turkey BIT does not have a clause / article devoted to FET, the Preamble to the Treaty says, "*Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;*". Clearly, India-Turkey BIT provides for FET through Preamble and not through a specific article.

Provisions related to FET vary greatly across different BITs. However, forty (40) BITs have almost identical clause related to FET. Overall, there are thirty-three (33) different types of FET clauses in the 83 BITs executed by India. The same are collated in Appendix C as per the following details.

Table 5.3 Clauses related to FET in India's BITs 1995-2015

Sub-Appendix No.	Countries
C1	United Arab Emirates
C2	Nepal, Seychelles, Democratic Republic of Congo, Latvia, Mozambique, Bangladesh, Myanmar, North Macedonia, Uruguay, Ethiopia, Libya, Jordan, China, Bosnia and Herzegovina, Bahrain, Sudan, Armenia, Djibouti, Belarus, Yemen, Ghana, Cyprus, Ukraine, Mongolia, Lao People's Democratic Republic, Qatar, Indonesia, Zimbabwe, Bulgaria, Romania, Belgium-Luxembourg, Kyrgyzstan, Egypt, Oman, Vietnam, Sri Lanka, Kazakhstan, Poland, Israel, Turkmenistan
C3	Slovenia
C4	Lithuania
C5	Colombia
C6	Senegal
C7	Syrian Arab Republic, Iceland, Greece, Hungary, Serbia, Argentina
C8	Brunei Darussalam, Czech Republic
C9	Mexico
C10	Trinidad and Tobago
C11	Slovakia, Netherlands, Malaysia, Russian Federation
C12	Saudi Arabia
C13	Finland
C14	Taiwan
C15	Kuwait
C16	Croatia
C17	Thailand
C18	Sweden
C19	Portugal
C20	Philippines

Sub-Appendix No.	Countries
C21	Austria
C22	Uzbekistan
C23	Australia
C24	Morocco
C25	Mauritius
C26	Spain
C27	France
C28	Switzerland
C29	Republic of Korea, United Kingdom
C30	Tajikistan
C31	Italy
C32	Denmark
C33	Germany

A quick look at the above table shows that the provision related to FET as given in Sub-Appendix C2 is the most commonly used one, with forty (40) BITs adopting the same with minor variations. Broadly the provision reads as follows (without considering the minor variations adopted by the forty different BITS):

> *(2) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.*

The above article / clause does not really define FET. It only says that all investments will be accorded FET. This leaves a large open area where Arbitration Tribunals can take their own decision about what constitutes FET and what is not FET.

5.5. MFN in BITs

Most Favoured Nation (MFN) is another key element in all BITs executed by India before 2015. Provisions related to MFN vary greatly across different BITs. However, thirty-six (36) BITs have almost identical clause related to MFN.

Overall, there are forty-five (45) different types of MFN clauses in the 83 BITs executed by India. The same are collated in Appendix D as per the following details.

Table 5.4 Clauses related to MFN in India's BITs 1995-2015

Sub-Appendix No.	Countries
D1	United Arab Emirates
D2	Nepal, Lithuania, Seychelles, Democratic Republic of Congo, Latvia, Mozambique, Myanmar, North Macedonia, Libya, Jordan, China, Sudan, Armenia, Djibouti, Belarus, Yemen, Ghana, Ukraine, Croatia, Mongolia, Sweden, Uzbekistan, Qatar, Zimbabwe, Bulgaria, Mauritius, Romania, Kyrgyzstan, Egypt, Oman, Vietnam, Sri Lanka, Kazakhstan, Poland, Tajikistan, Turkmenistan
D3	Slovenia, Austria
D4	Colombia
D5	Bangladesh
D6	Senegal
D7	Syrian Arab Republic
D8	Brunei Darussalam
D9	Uruguay
D10	Ethiopia
D11	Iceland
D12	Mexico
D13	Greece

Sub-Appendix No.	Countries
D14	Trinidad and Tobago
D15	Slovakia
D16	Bosnia and Herzegovina
D17	Saudi Arabia
D18	Bahrain, Cyprus
D19	Hungary
D20	Serbia
D21	Finland
D22	Taiwan
D23	Kuwait
D24	Lao People's Democratic Republic
D25	Thailand
D26	Portugal
D27	Philippines
D28	Argentina
D29	Australia
D30	Morocco
D31	Indonesia
D32	Turkey
D33	Belgium Luxembourg Economic Union
D34	Spain
D35	France
D36	Switzerland
D37	Czech Republic, Israel
D38	Republic of Korea
D39	Italy
D40	Netherlands

Sub-Appendix No.	Countries
D41	Denmark
D42	Malaysia
D43	Germany
D44	Russian Federation
D45	United Kingdom

A quick look at the above table shows that the provision related to MFN as given in Sub-Appendix D2 is the most commonly used one, with thirty-six (36) BITs adopting the same with minor variations. Broadly the provision reads as follows (without considering the minor variations adopted by the thirty-six different BITs):

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

(2) In addition, each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State.

(3) The provisions of paragraphs (1) and (2) above shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from:

(i) any existing or future customs unions or similar international agreement to which it is or may become a party; or

(ii) any matter pertaining wholly or mainly to taxation.

5.6. ISDS in BITs

Investor State Dispute Settlement (ISDS) provisions are a key element in all BITs executed by India before 2015. Provisions related to ISDS vary greatly across different BITs. However, twenty-nine (29) BITs have almost identical article related to ISDS. Overall, there are fifty-three (53) different types of ISDS clauses in the 83 BITs executed by India. The same are collated in Appendix E as per the following details.

Table 5.5 Clauses related to ISDS in India's BITs 1995-2015

Sub-Appendix No.	Countries
E1	United Arab Republic
E2	Nepal, Seychelles, Democratic Republic of Congo, Mozambique, Myanmar, Iceland, Libya, Bahrain, Sudan, Armenia, Djibouti, Belarus, Yemen, Ghana, Cyprus, Ukraine, Mongolia, Thailand, Uzbekistan, Kyrgyzstan, Egypt, Oman, Vietnam, Sri Lanka, Kazakhstan, Poland, Tajikistan, Turkmenistan, Malaysia
E3	Slovenia
E4	Lithuania
E5	Latvia
E6	Colombia
E7	Bangladesh
E8	Senegal
E9	Syrian Arab Republic
E10	Brunei Darussalam
E11	North Macedonia
E12	Uruguay
E13	Ethiopia
E14	Mexico
E15	Greece

Sub-Appendix No.	Countries
E16	Trinidad and Tobago
E17	Jordan
E18	China
E19	Solvakia
E20	Bosnia and Herzegovina
E21	Saudi Arabia
E22	Hungary
E23	Serbia
E24	Finland
E25	Taiwan
E26	Kuwait
E27	Croatia
E28	Lao People's Democratic Republic
E29	Sweden
E30	Portugal, Spain
E31	Philippines, Mauritius
E32	Austria
E33	Argentina
E34	Qatar
E35	Australia
E36	Morocco
E37	Indonesia
E38	Zimbabwe
E39	Bulgaria
E40	Turkey
E41	Romania

Sub-Appendix No.	Countries
E42	Belgium-Luxembourg
E43	France
E44	Switzerland
E45	Czech Republic
E46	Republic of Korea
E47	Israel
E48	Italy
E49	Netherlands
E50	Denmark
E51	Germany
E52	Russian Federation
E53	United Kingdom

A quick look at the above table shows that the provision related to ISDS as given in Sub-Appendix E2 is the most commonly used one, with twenty-nine (29) BITs adopting the same with minor variations. Broadly the provision reads as follows (without considering the minor variations adopted by the twenty-nine different BITs):

(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

(2) Any such dispute which has not been amicably settled within a period of six months may, if both parties agree, be submitted:

(i) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies; or

(ii) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

(3) *Should the parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:*

(i) *If the Contracting Party of the Investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 and both parties to the dispute consent in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes such a dispute shall be referred to the Centre; or*

(ii) *If both parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding proceedings.; or*

(iii) *to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:*

(a) *The appointing authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party;*

(b) *The parties shall appoint their respective arbitrators within two months;*

(c) *The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding on the parties to the dispute; and*

(d) *The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.*

Chapter 6
India's Investment Protection 2015 Onwards

6.1. Model BIT proposed by India

India's investment protection treaty regime underwent a sea-change from mid-2014 onwards when a new government took charge. On 28th December 2015 Department of Economic Affairs (Investment Division), Ministry of Finance, Government of India issued an Office Memorandum[1] addressed to various Secretaries of Government of India enclosing with it a Model Bilateral Investment Treaty and directing that the enclosed Model Treaty would replace the existing Model Treaty.

6.2. India Brazil BIT

After India's publication of Model Bilateral Investment Treaty on 28th December 2015, India has signed four BITs on the following dates:

[1] Reports (India): India's Model BIT Text, 2015

Table 6.1 BITs executed by India after December 2015 along with date of signature

Short title	Date of signature
India-Brazil	25 January 2020
India-Kyrgyz	07 June 2019
India-Taiwan	18 December 2018
India-Belarus	24 September 2018

Source: Reports(India): Committee on External Affairs, 2021

Of the four BITs signed by India, only two (Belarus and Taiwan) have been ratified and are in force. Brazil and Kyrgyz BITs have yet to be enforced. Nevertheless, India-Brazil BIT has attracted the maximum attention because it is the first investment treaty based on India's Model Investment Treaty with a major country. It signified an indication that the world was moving towards accepting India's Model Bilateral Investment Treaty. However, the fact that the treaty has not been ratified more than five years after its signing has acted as a damper to the indications. Moreover, while there is no denying that Brazil is a major country and is also a strong economy, the undeniable fact is that Brazil has hardly any investments in India or the other way round. So, signing of India Brazil BIT is seen as nothing more than a good publicity act by both governments.

6.3. Definition of investment in Model BIT

Definition of Investment given in the Model Bilateral Investment Treaty of December 2015 reads as follows:

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

territory the investment is made. An enterprise may possess the following assets:

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

(b) a debt instrument or security of another enterprise;

(c) a loan to another enterprise

(i) where the enterprise is an affiliate of the investor, or

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

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

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

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

(g) moveable or immovable property and related rights;

(h) any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value;

For greater clarity, investment does not include the following assets of an enterprise:

(i) portfolio investments of the enterprise or in another enterprise;

(ii) debt securities issued by a government or government-owned or controlled enterprise, or loans to a government or government-owned or controlled enterprise;

(iii) any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the enterprise incurred before the commencement of substantial business operations of the enterprise in the territory of the Party where the investment is made;

(iv) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party;

(v) goodwill, brand value, market share or similar intangible rights;

(vi) claims to money that arise solely from the extension of credit in connection with any commercial transaction;

(vii) an order or judgment sought or entered in any judicial, administrative or arbitral proceeding;

(viii) any other claims to money that do not involve the kind of interests or operations set out in the definition of investment in this Treaty.[2]

6.4. Definition of investor in Model BIT

Definition of Investor given in the Model Bilateral Investment Treaty of December 2015 reads as follows:

*1.5 "**investor**" means a natural or juridical person of a Party, other than a branch or representative office, that has made an investment in the territory of the other Party;*

*For the purposes of this definition, a "**juridical person**" means:*

[2] Reports (India): Ibid.

(a) a legal entity that is constituted, organised and operated under the law of that Party and that has substantial business activities in the territory of that Party; or

(b) a legal entity that is constituted, organised and operated under the laws of that Party and that is directly or indirectly owned or controlled by a natural person of that Party or by a legal entity mentioned under subclause (a) herein.[3]

6.5. Expropriation in Model BIT

Provisions related to Expropriation given in the Model Bilateral Investment Treaty of December 2015 read as follows:

*5.1 Neither Party may nationalize or expropriate an investment of an investor (hereinafter "**expropriate**") of the other Party either directly or through measures having an effect equivalent to expropriation, except for reasons of public purpose*[3]*, in accordance with the due process of law and on payment of adequate compensation. Such compensation shall be adequate and be at least equivalent to the fair market value of the expropriated investment immediately on the day before the expropriation takes place ("**date of expropriation**"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.*

5.2 Payment of compensation shall be made in a freely convertible currency. Interest on payment of compensation, where applicable, shall be paid in simple interest at a commercially reasonable rate from the date of expropriation until the date of actual payment. On

[3] Reports (India): Ibid.

payment, compensation shall be freely transferable in accordance with Article 6.

5.3 *The Parties confirm their shared understanding that:*

a) *Expropriation may be direct or indirect:*

(i) *direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and*

(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.*

b) *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, that takes into consideration:*

(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 other legal document.*

5.4 For the avoidance of doubt, the Parties agree that an action taken by a Party in its commercial capacity shall not constitute expropriation or any other measure having similar effect.

5.5 Non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article.

5.6 In considering an alleged breach of this Article, a Tribunal shall take account of whether the investor or, as appropriate, the locally-established enterprise, pursued action for remedies before domestic courts or tribunals prior to initiating a claim under this Treaty.

3 For the avoidance of doubt, where India is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in its Law relating to land acquisition and any questions as to "public purpose" and compensation shall be determined in accordance with the procedure specified in such Law.[4]

6.6. Fair and equitable treatment in Model BIT

There is **no mention of fair and equitable treatment** in the Model Bilateral Investment Treaty. Instead, the Model Bilateral Investment Treaty has an article titled **Treatment of Investments**, which reads as follows:

3.1 No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law[1] *through:*

(i) Denial of justice in any judicial or administrative proceedings; or

[4] Reports (India): Ibid.

(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.

3.2 Each Party shall accord in its territory to investments of the other Party and to investors with respect to their investments full protection and security. 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.

3.3 A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

3.4 In considering an alleged breach of this article, a Tribunal shall take account of whether the investor or, as appropriate, the locally-established enterprise, pursued action for remedies before domestic courts or tribunals prior to initiating a claim under this Treaty.

1 For greater certainty, it is clarified that "customary international law" only results from a general and consistent practice of States that they follow from a sense of legal obligation.[5]

6.7. Most favoured nation in Model BIT

Model Bilateral Investment Treaty of December 2015 does not have any clauses which can be construed to provide Most Favoured Nation (MFN) treatment. Instead, Article 4 of the Model Treaty provides for National Treatment which reads as follows:

[5] Reports (India): Ibid.

4.1 Each Party shall not apply to investor or to investments made by investors of the other Party, measures that accord less favourable treatment than that it accords, in like circumstances,[2] to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory.

4.2 The treatment accorded by a Party under Article 4.1 means, with respect to a Sub-national government, treatment no less favourable than the treatment accorded, in like circumstances, by that Sub-national government to investors, and to investments of investors, of the Party of which it forms a part.

2 For greater certainty, whether treatment is accorded in "like circumstances" depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives. These circumstances include, but are not limited to, (a) the goods or services consumed or produced by the investment; (b) the actual and potential impact of the investment on third persons, the local community, or the environment, (c) whether the investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the investment.[6]

6.8. Investor state dispute settlement (ISDS) in Model BIT

Settlement of Disputes between an Investor and a Party has received great attention in the Model Bilateral Investment Treaty of December 2015. Chapter IV running from Article 13 to Article 30 (both inclusive) is devoted to ISDS. The said articles read as follows:

Article 13

Scope and Definitions

[6] Reports (India): Ibid.

13.1 Without prejudice to the rights and obligations of the Parties under Chapter V, this Chapter establishes a mechanism for the settlement of disputes between an investor and a Defending Party.

13.2 This Chapter shall only apply to a dispute between a Party and an investor of the other Party with respect to its investment, arising out of an alleged breach of an obligation of a Party under Chapter II of this Treaty, other than the obligation under Articles 9 and 10 of this Treaty.

13.3 A Tribunal constituted under this Chapter shall only decide claims in respect of a breach of this Treaty as set out in Chapter II, except under Articles 9 and 10, and not disputes arising solely from an alleged breach of a contract between a Party and an investor. Such disputes shall only be resolved by the domestic courts or in accordance with the dispute resolution provisions set out in the relevant contract.

13.4 An investor may not submit a claim to arbitration under this Chapter if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms.

13.5 In addition to other limits on its jurisdiction, a Tribunal constituted under this Chapter shall not have the jurisdiction to:

(i) review the merits of a decision made by a judicial authority of the Parties; or

(ii) accept jurisdiction over any claim that is or has been subject of an arbitration under Chapter V.

13.6 A dispute between an investor and a Party shall proceed sequentially in accordance with this Chapter.

13.7 For the purposes of this Chapter:

*(i) "**Defending Party**" means a Party against which a claim is made under this Article.*

(ii) *"**disputing party**" means a Defending Party or a disputing investor.*

(iii) *"**disputing parties**" means a disputing investor and a Defending Party.*

(iv) *"**disputing investor**" means an investor of a Party that makes a claim against another Party on its behalf under this Article, and where relevant, includes an investor of a Party that makes a claim on behalf of the locally established enterprise.*

(v) *"**ICSID**" means the International Centre for Settlement of Investment Disputes.*

(vi) *"**ICSID Additional Facility Rules**" means the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Dispute.*

(vii) *"**ICSID Convention**" means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington on 18 March 1965.*

(viii) *"**New York Convention**" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.*

(ix) *"**Non-disputing Party**" means the Party to this Treaty which is not a party to a dispute under Chapter IV of this Treaty.*

(x) *"**UNCITRAL Arbitration Rules**" means the arbitration rules of the United Nations Commission on International Trade Law.*

Article 14

Proceedings under different international agreements

14.1 Where claims are brought pursuant to this Chapter and another international agreement and:

(a) there is a potential for overlapping compensation; or

(b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Chapter,

a Tribunal constituted under this Chapter shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award.

Article 15

Conditions Precedent to Submission of a Claim to Arbitration

15.1 In respect of a claim that the Defending Party has breached an obligation under Chapter II, other than an obligation under Article 9 or 10, a disputing investor must first submit its claim before the relevant domestic courts or administrative bodies of the Defending Party for the purpose of pursuing domestic remedies in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed. Such claim before the relevant domestic courts or administrative bodies of the Defending Party must be submitted within one (1) year from the date on which the investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the investment, or the investor with respect to its investment, had incurred loss or damage as a result.

For greater certainty, in demonstrating compliance with the obligation to exhaust local remedies, the investor shall not assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action.

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

*15.2 Where applicable, if, after exhausting all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question, no resolution has been reached satisfactory to the investor, the investor may commence a proceeding under this chapter by transmitting a notice of dispute ("**notice of dispute**") to the Defending Party.*

15.3 The notice of dispute shall: specify the name and address of the disputing investor or the enterprise, where applicable; set out the factual basis of the claim, including the measures at issue; specify the provisions of the Treaty alleged to have been breached and any other relevant provisions; demonstrate compliance with Article 15.1 and 15.2, where applicable; specify the relief sought and the approximate amount of damages claimed; and furnish evidence establishing that the disputing investor is an investor of the other Party.

15.4 For no less than six (6) months after receipt of the notice of dispute, the disputing parties shall use their best efforts to try to resolve the dispute amicably through meaningful consultation, negotiation or other third party procedures. In all such cases, the place of such consultation or negotiation or settlement shall be the capital city of the Defending Party.

15.5 In the event that the disputing parties cannot settle the dispute amicably, a disputing investor may submit a claim to arbitration pursuant to this Treaty, but only if the following additional conditions are satisfied:

(i) *not more than six (6) years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the disputing investor with respect to its investment, had incurred loss or damage as a result; or*

(ii) *where applicable, not more than twelve (12) months have elapsed from the conclusion of domestic proceedings pursuant to 15.1.*

(iii) *the disputing investor or the locally established enterprise have waived their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Defending Party that is alleged to be a breach referred to in Article 13.2.*

(iv) *where the claim submitted by the disputing investor is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls, that enterprise has waived its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Defending Party that is alleged to be a breach referred to in Article 13.2.*

(v) *At least 90 days before submitting any claim to arbitration, the disputing investor has transmitted to the Defending Party a written notice of its intention to submit the claim to arbitration ("n**otice of arbitration**"). The notice of arbitration shall:*

a. *attach the notice of dispute and the record of its transmission to the Defending Party with the details thereof;*

b. *provide the consent to arbitration by the disputing investor, or where applicable, by the locally* *established enterprise, in accordance with the procedures set out in this Treaty;*

c. *provide the waiver as required under Article 15.5 (iii) or (iv), as applicable; provided that a waiver from the enterprise under Article 15.5 (iii) or (iv) shall not be required only where the Defending Party has deprived the disputing investor of control of an enterprise;*

d. *specify the name of the arbitrator appointed by the disputing investor.*

Article 16
Submission of Claim to Arbitration

16.1 *A disputing investor who meets the conditions precedent provided for in Article 15 may submit the claim to arbitration under:*

(a) *the ICSID Convention, provided that both the Parties full members of the Convention;*

(b) *the Additional Facility Rules of ICSID, provided that either Party, but not both, is a member of the ICSID Convention; or*

(c) *the UNCITRAL Arbitration Rules.*

16.2 *The applicable arbitration rules shall govern the arbitration except to the extent modified by this Chapter, and supplemented by any subsequent rules adopted by the Parties.*

16.3 *A claim is submitted to arbitration under this Chapter when:*

(a) *the request for arbitration under paragraph (1) of Article 36 of the ICSID Convention is received by the Secretary-General of ICSID;*

(b) *the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General of ICSID; or*

(c) *the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the Defending Party.*

16.4 Delivery of notice and other documents on a Party shall be made to the Designated Representative for each Party.

Article 17
Consent to Arbitration

17.1 Each Party consents to the submission of a claim to arbitration in accordance with the terms of this Agreement.

17.2 The consent given in Article 17.1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties; and

(b) Article II of the New York Convention for an agreement in writing.

Article 18
Appointment of Arbitrators

18.1 The arbitral Tribunal shall consist of three arbitrators with relevant expertise or experience in public international law, international trade and international investment law, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent of, and not be affiliated with or take instructions from a disputing party or the government of a Party with regard to trade and investment matters. Arbitrators shall not take instructions from any organisation, government or disputing party with regard to matters related to the dispute.

*18.2 One arbitrator shall be appointed by each of the disputing parties and the third arbitrator ("**Presiding Arbitrator**") shall be appointed by agreement of the co-arbitrators and the disputing parties.*

18.3 If a Tribunal has not been constituted within one hundred twenty days (120) days from the date that a Claim is submitted to *arbitration under this Article, the appointing authority under this Article shall be the following:*

a. *in case of an arbitration submitted under ICSID Convention or the ICSID Additional Facility Rules, the Secretary-General of ICSID;*

b. *in case of an arbitration submitted under the UNCITRAL Rules, the Secretary-General of the Permanent Court of Arbitration;*

Provided that if the appointing authority referred to is sub-paragraph (a) or (b) of Article 18.3 is a national of a Party, the appointing authority shall be in the following order: the President, the Vice-President or the next most senior Judge of the International Court of Justice who is not a national of either Party.

18.4 *The appointing authority shall appoint in her/his discretion and after consultation with the disputing parties, the arbitrator or arbitrators not yet appointed.*

Article 19

Prevention of Conflict of Interest of Arbitrators and Challenges

19.1 *Every arbitrator appointed to resolve disputes under this Treaty shall during the entire arbitration proceedings be impartial, independent and free of any actual or potential conflict of interest.*

19.2 *Upon nomination and, if appointed, every arbitrator shall, on an ongoing basis, disclose in writing any circumstances that may, in the eyes of the disputing parties, give rise to doubts as to her/his independence, impartiality, or freedom from conflicts of interest. This includes any items listed in Article 19.10 and any other relevant circumstances pertaining to the subject matter of the dispute, and to existing or past, direct or indirect, financial, personal, business, or professional relationships with any of the parties, legal counsel, representatives, witnesses, or co-arbitrators. Such disclosure shall* *be made immediately upon the arbitrator acquiring knowledge of such circumstances, and shall be made to the co-arbitrators, the parties to the arbitration and the appointing authority, if any, making an appointment. Neither the ability of those individuals or entities to access this information independently, nor the availability of that information in the public domain, will relieve any arbitrator of his or her affirmative duty to make these disclosures. Doubts regarding whether disclosure is required shall be resolved in favour of such disclosure.*

19.3 A disputing party may challenge an arbitrator appointed under this Treaty:

(a) if facts or circumstances exist that may, in the eyes of the parties, give rise to justifiable doubts as to the arbitrator's independence, impartiality or freedom from conflicts of interest; or

(b) in the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of the arbitrator performing his or her functions,

Provided that no such challenge may be initiated after fifteen days of that party: (i) learning of the relevant facts or circumstances through a disclosure made under Article 19.2 by the arbitrator, or (iii) otherwise becoming aware of the relevant facts or circumstances relevant to a challenge under Article 19.3, whichever is later.

19.4 The notice of challenge shall be communicated to the disputing party, to the arbitrator who is challenged, to the other arbitrators and to the appointing authority under Article 18.3. The notice of challenge shall state the reasons for the challenge.

19.5 When an arbitrator has been challenged by a disputing party, all disputing parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither *case does this imply acceptance of the validity of the grounds for the challenge.*

19.6 *If, within 15 days from the date of the notice of challenge, the disputing parties do not agree to the challenge or the challenged arbitrator does not withdraw, the disputing party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority as specified under Article 18.3.*

19.7 *The appointing authority as specified under Article 18.3 shall accept the challenge made under Article 19.3 if, even in the absence of actual bias, there are circumstances that would give rise to justifiable doubts as to the arbitrator's lack of independence, impartiality, freedom from conflicts of interest, or ability to perform his or her role, in the eyes of an objective third party.*

19.8 *In any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in the Treaty and the arbitration rules that were applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a disputing party to the arbitration had failed to exercise its right to appoint or to participate in the appointment.*

19.9 *If an arbitrator is replaced, the proceedings may resume at the stage where the arbitrator who was replaced ceased to perform his or her functions unless otherwise agreed by the disputing parties.*

19.10 *A justifiable doubt as to an arbitrator's independence or impartiality or freedom from conflicts of interest shall be deemed to exist on account of the following factors, including if:*

a. *The arbitrator or her/his associates or relatives have an interest in the outcome of the particular arbitration;*

b. *The arbitrator is or has been a legal representative/advisor of the appointing party or an affiliate of the appointing party in the preceding three (3) years prior to the commencement of arbitration;*

c. *The arbitrator is a lawyer in the same law firm as the counsel to one of the parties;*

d. *The arbitrator is acting concurrently with the lawyer or law firm of one of the parties in another dispute;*

e. *The arbitrator's law firm is currently rendering or has rendered services to one of the parties or to an affiliate of one of the parties out of which such law firm derives financial interest;*

f. *The arbitrator has received a full briefing of the merits or procedural aspects of the dispute from the appointing party or her/his counsel prior to her/his appointment;*

g. *The arbitrator is a manager, director or member of the governing body, or has a similar controlling influence by virtue of shareholding or otherwise in one of the parties;*

h. *The arbitrator has publicly advocated a fixed position regarding an issue on the case that is being arbitrated.*

19.11 *The Parties shall by mutual agreement and after completion of their respective procedures adopt a separate code of conduct for arbitrators to be applied in disputes arising out of this Treaty, which may replace or supplement the existing rules in application. Such a code and may address topics such as disclosure obligations, the independence and impartiality of arbitrators and confidentiality.*

Article 20
Conduct of Arbitral Proceedings

20.1 *Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a country that is a party to the New York Convention, selected in accordance with:*

(a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or

(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.

20.2 Unless otherwise agreed by the disputing parties, the Tribunal may determine a place for meetings and hearings and the legal seat of arbitration. In doing so, the Tribunal shall take into consideration the convenience of the disputing parties and the arbitrators, the location of the subject matter, the proximity of the evidence, and give special consideration to the capital city of the Defending Party.

20.3 When considering matters of evidence or production of documents, the Tribunal shall not have any powers to compel production of documents which the Defending Party claims are protected from disclosure under the rules on confidentiality or privilege under its law.

Article 21
Dismissal of Frivolous Claims

21.1 Without prejudice to a Tribunal's authority to address other objections, a Tribunal shall address and decide as a preliminary question any objection by the Defending Party that a claim submitted by the investor is: (a) not within the scope of the Tribunal's jurisdiction, or (b) manifestly without legal merit or unfounded as a matter of law.

21.2 Such objection shall be submitted to the Tribunal as soon as possible after the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the Defending Party to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the Tribunal fixes for the Defending Party to submit its response to the amendment).

21.3 On receipt of an objection under this Article, the Tribunal shall suspend any proceedings on the merits, establish a schedule for *considering the objection consistent with any schedule it has established for considering any other preliminary question and issue a decision or award on the objection, stating the grounds therefor. In deciding an objection under this Article, the Tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof). The Tribunal may also consider any relevant facts not in dispute.*

21.4 The Tribunal shall issue an award under this Article no later than 150 days after the date of the receipt of the request under Article 21.2. However, if a Defending Party requests a hearing, the Tribunal may take an additional 30 days to issue the decision or award.

21.5 The Defending Party does not waive any objection as to competence or any argument on the merits merely because the Defending Party did or did not raise an objection or make use of the expedited procedure set out this Article.

21.6 When it decides on a preliminary objection by a Defending Party under Article 21.2 or 21.3, the Tribunal may, if warranted, award to the prevailing Defending Party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the Tribunal shall consider whether either the claim by the disputing investor or the objection by the Defending Party was frivolous, and shall provide the disputing parties a reasonable opportunity to present its cases.

Article 22

Transparency in arbitral proceedings

22.1 Subject to applicable law regarding protection of confidential information, the Defending Party shall make available to the public the following documents relating to a dispute under this Chapter:

a. the notice of dispute and the notice of arbitration;

b. *pleadings and other written submissions on jurisdiction and the merits submitted to the Tribunal, including submissions by a Non- disputing Party;*

c. *Transcripts of hearings, where available; and*

d. *decisions, orders and awards issued by the Tribunal.*

22.2 *Hearings for the presentation of evidence or for oral argument ("hearings") shall be made public in accordance with the following provisions:*

a. *Where there is a need to protect confidential information or protect the safety of participants in the proceedings, the Tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.*

b. *The Tribunal shall make logistical arrangements to facilitate public access to hearings, including by organizing attendance through video links or such other means as it deems appropriate. However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.*

22.3 *An award of a Tribunal rendered under this Article shall be publicly available, subject to the redaction of confidential information. Where a Defending Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, all other documents submitted to, or issued by, the Tribunal shall also be publicly available, subject to the redaction of confidential information.*

22.4 *The Non-disputing Party may make oral and written submissions to the Tribunal regarding the interpretation of this Treaty.*

Article 23
Burden of Proof and Governing Law

23.1 This Treaty shall be interpreted in the context of the high level of deference that international law accords to States with regard to their development and implementation of domestic policies.

23.2 The disputing investor at all times bears the burden of establishing: (a) jurisdiction; (b) the existence of an obligation under Chapter II of this Treaty, other than the obligation under Article 9 or 10; (c) a breach of such obligation; (d) that the investment, or the investor with respect to its investment, has suffered actual and non-speculative losses as a result of the breach; and (e) that those losses were foreseeable and directly caused by the breach.

23.3 The governing law for interpretation of this Treaty by a Tribunal constituted under this Article shall be: (a) this Treaty; (b) the general principles of public international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the Parties are party; and (c) for matters relating to domestic law, the law of the Defending Party.

Article 24
Joint Interpretations

24.1 Interpretations of specific provisions and decisions on application of this Treaty issued subsequently by the Parties in accordance with this Treaty shall be binding on tribunals established under this Article upon issuance of such interpretations or decisions.

24.2 In accordance with the Vienna Convention of the Law of Treaties, 1969 and customary international law, other evidence of the Parties subsequent agreement and practice regarding interpretation or application of this Treaty shall constitute authoritative interpretations of this Treaty and must be taken into account by tribunals under this Chapter.

24.3 The Tribunal may, on its own account or at the request of a Defending Party, request the joint interpretation of any provision of this Treaty that is subject of a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the Tribunal within sixty (60) days of the request. Without prejudice to the rights of the Parties under Article 24.1 and 24.2, if the Parties fail to submit a decision to the Tribunal within sixty (60) days, any interpretation issued individually by a Party shall be forwarded to the disputing parties and the Tribunal, which may take into account such interpretation.

Article 25

Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, and unless the disputing parties disapprove, a Tribunal may appoint experts to report to it in writing on any factual issue concerning environmental, health, safety, technical or other scientific matters raised by a disputing party, subject to such terms and conditions as the disputing parties may agree.

Article 26

Award

26.1 An award shall include a judgement as to whether there has been a breach by the Defending Party of any rights conferred under this Treaty in respect of the disputing investor and its investment and the legal basis and the reasons for its decisions.

26.2 The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both disputing parties to the arbitration.

26.3 A tribunal can only award monetary compensation for a breach of the obligations under Chapter II of the Treaty. Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided by a Party. For the *calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure, or other mitigating factors.*[4]

26.4 *A tribunal may not award punitive or moral damages or any injunctive relief against either of the Parties under any circumstance.*

4 *Mitigating factors can include, current and past use of the investment, the history of its acquisition and purpose, compensation received by the investor from other sources, any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor.*

Article 27

Finality and enforcement of awards

27.1 *An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case and the tribunal must clearly state those limitations in the text of the award.*

27.2 *Subject to Article 27.3, a disputing party shall abide by and comply with an award without delay.*

27.3 *A disputing party may not seek enforcement of a final award until:*

(a) *in the case of a final award made under the ICSID Convention*

(i) *120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or*

(ii) *revision or annulment proceedings have been completed; and*

(b) *in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules* *(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or*

(ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

27.4. Each Party shall provide for the enforcement of an award in its territory in accordance with its law.

27.5 A claim that is submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.

Article 28
Costs

The disputing parties shall share the costs of the arbitration, with arbitrator fees, expenses, allowances and other administrative costs. The disputing parties shall also bear the cost of its representation in the arbitral proceedings. The Tribunal may, however, in its discretion direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing parties and this determination shall be final and binding on both disputing parties.

Article 29
Appeals Facility

The Parties may by agreement or after the completion of their respective procedures regarding the enforcement of this Treaty may establish an institutional mechanism[5] to develop an appellate body or similar mechanism to review awards rendered by tribunals under this chapter. Such appellate body or similar mechanism may be designed to provide coherence to the interpretation of provisions in this Treaty. In developing such a mechanism, the Parties may take into account the following issues, among others:

a) *the nature and composition of an appellate body or similar mechanism;*

b) *the scope and standard of review of such an appellate body;*

c) *transparency of proceedings of the appellate body;*

d) *the effect of decisions by an appellate body or similar mechanism;*

e) *the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 20.1 of this Treaty; and*

f) *the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.*

5 *This may include an appellate mechanism for reviewing investor-state disputes established under a separate multilateral agreement in future*

Article 30

Diplomatic Exchange between Parties

30.1 *If a disputing investor has commenced a dispute against a Defending Party under this Chapter, the Non-disputing Party shall not give diplomatic protection, or bring an international claim, in respect of such dispute between one of its investors and the Defending Party, unless the Defending Party has failed to abide by and comply with an award or the decisions of its courts, as the case may be, in accordance with this Chapter and other applicable law regarding recognition and enforcement of foreign judgments and arbitral awards.*

30.2 *Nothing in this Chapter precludes a Defending Party from requesting consultations or seeking agreement with the other Party on issues of interpretation or application of the Treaty. In response* *to such a request, the other Party shall engage in good faith consultations on the matters requested.*[7]

6.9. Definition of investment in new BITs

The four BITs signed by India post-2015 are modeled on Model Bilateral Investment Treaty. Nevertheless, there are signficant differences in the four BITs about definition of investment and investor. The definitions of investment and investor as given in the four post-2015 BITs are given in Appendix F in the following sub-appendixes.

Table 6.2 Definitions of investment and investor in post-2015 BITs

Sub-Appendix No.	Countries
F1	Brazil
F2	Kyrgyz
F3	Taiwan
F4	Belarus

6.10. Definition of investor in new BITs

The definitions of investor in post-2015 BITs are also given in Appendix F as per the list given above in section 6.9.

6.11. Expropriation in new BITs

The provisions related to expropriation as given in the four post-2015 BITs are given in Appendix G in the following sub-appendixes.

[7] Reports (India): Ibid.

Table 6.3 Provisions related to expropriation in post-2015 BITs

Sub-Appendix No.	Countries
G1	Brazil
G2	Kyrgyz, Belarus
G3	Taiwan

6.12. FET in new BITs

As mentioned earlier, there is no provision related to Fair and Equitable Treatment (FET) in the BITs signed by India after 2015. One may probably consider the Articles titled Treatment of Investments as a replacement for FET clause, though the FET clause was very wide and the Article in the new BITs offers extremely limited protection. The Articles related to Treatment of Investment as given in the four post-2015 BITs are given in Appendix H in the following sub-appendixes:

Table 6.4 Provisions related to FET in post-2015 BITs

Sub-Appendix No.	Countries
H1	Brazil
H2	Kyrgyz, Belarus
H3	Taiwan

6.13. MFN in new BITs

The post-2015 BITs do not provide for Most Favoured Nation (MFN) treatment. The new BITs have an article titled National Treatment. It is undeniable that National Treatment is no substitute for MFN and offers much lower level of protection to investors. The Articles related to National Treatment as given in the four post-2015 BITs are given in Appendix I in the following sub-appendixes:

Table 6.5 Provisions related to MFN in post-2015 BITs

Sub-Appendix No.	Countries
I1	Brazil
I2	Kyrgyz
I3	Taiwan
I4	Belarus

6.14. ISDS in new BITs

Investor State Dispute Settlement (ISDS) has received the maximum attention in the post-2015 BITs. The provisions related to ISDS are relatively brief in case of India-Brazil BIT while the same run into pages and pages in case of other post-2015 BITs. The Articles related to ISDS as given in the four post-2015 BITs are given in Appendix J in the following sub-appendixes:

Table 6.6 Articles related to ISDS in post-2015 BITs

Sub-Appendix No.	Countries
J1	Brazil
J2	Kyrgyz
J3	Taiwan
J4	Belarus

Chapter 7
A Glance at India's BITs

7.1. Overview

As one starts reading through the more than eighty BITs signed by India before 2015 and post-2015, one cannot help notice the shoddy manner that the treaties are prepared. Spelling mistakes, grammatical errors, typing errors, missing text, poorly scanned documents and even gibberish are common. It is interesting to read "***Without Prejudice; Subject to Legal Scrubbing and internal approvals 3 June 2019***" stamped on each page of the BIT between Kyrgyz Republic and Government of Republic of India[1].

Without Prejudice
Subject to Legal Scrubbing and internal approvals
3 June 2019

BILATERAL INVESTMENT TREATY

BETWEEN

THE GOVERNMENT OF THE KYRGYZ REPUBLIC

AND

THE GOVERNMENT OF THE REPUBLIC OF
INDIA

[1] Treaties: India-Kyrgyz Republic BIT, 2019

In general, "*legal scrubbing*" is a slang term for a lawyer's review of a document for the purpose of removing potentially actionable language. Use of the term in a formal investment treaty between two countries seems unprecedented. One wonders whether a document that has yet to go through "*legal scrubbing*" and has also not yet gone through "*internal approvals*" is worthy of being considered a legally binding document. Such a document is surely nothing more than a statement of intent. Notably, the India-Kyrgyz BIT has not yet been enforced.

While no other BIT except India-Kyrgyz BIT[2] has such a stamp mentioning "legal scrubbing" to be carried out in future, it seems that **almost all BITs executed by India could do with some editorial brushing up correcting obvious errors in language, grammar and even scanning post-execution**.

It might seem silly to point out minor errors in bilateral treaties as the first observation on more than eighty BITs. But the slips and errors are neither trivial nor silly. The errors show the seriousness with which the treaties have been negotiated and finalized. One is inclined to conclude from the errors that negotiating and finalizing drafts of the BITs was done by some junior incompetent officials on both sides who were under pressure from their political masters to get some draft ready for signature at short notice.

BITs have the status of law for any investment arbitration tribunal set up to settle ISDS. However, the sharpness and rigour that one expects from a law is, generally speaking, missing from the BITs executed by India.

BITs are issued without any Explanatory Statement and there is no public record of the deliberations that took place before draft of any particular BIT is finalized. Hence, we are unable to understand the reasons why any particular BIT has one set of words and provisions as against another set of words and provisions used in another BIT. One presumes that wise representatives of two nations thinking of national interests of their respective sides applied their minds individually as well as collectively to arrive at a mutually agreed draft of BIT which was then vetted by the bureaucratic and political leadership before the two nations put their seals of approval on it. While that presumption is what we shall live with, reading of the BITs indicates a picture that is not so rosy and nice. Variations among various BITs often seem to be without any rational of national interest or legal practices particular to one country or the other. It may be not an

[2] Treaties: Ibid.

exaggeration if one hazards a guess and says that the two junior clerks who sat down to negotiate an investment treaty made modifications in the draft model treaty as per their own whims, quirks and preferences.

As far as it is seen in public records, it seems that **no department of law in any Indian university or institute has applied its mind on provisions, clauses and articles of any of India's investment treaties** either before signing of the treaties or after execution. The thesis by a co-author of this book is the first research work undertaken on investment treaties by a department of law in an Indian university or institute. Other works on BITs in India were either carried out by either department of economics or department of political science.

The total absence of work by Indian legal faculty in the field of investment treaties, even though India started on the path of investment treaties almost three decades ago, has resulted in complete absence of expertise in the field in India. This shows firstly in the quality of drafting of the treaty text and subsequently in the way the country defends herself in case of claims filed against India under different BITs.

India's attitude to BITs started undergoing a change after investment tribunal passed award against Republic of India in White Industries[3] and such other cases. While it will not be proper for the authors to comment on the merits of any of the claim cases lost by India, the country surely needs to introspect and ask herself whether as a country we have the expertise to draft and negotiate investment treaties and also to prepare / defend claims under BITs before international tribunals. Looking at the eighty-seven BITs studied, a humble and objective observation indicates gross inadequacies at the national level in drafting of BITs. While the expertise to prepare / defend claims under BITs is not the subject matter of this book, such an expertise is surely linked to the skills required for drafting and negotiating of BITs. Since there seems to be lack of competence in the case of latter, it may be concluded that there is inadequacy in case of the former too.

The inadequacies or lack of competence at national level pointed out above is a serious national issue since the same has affected the view taken by the country's leadership on BITs in general. India unilaterally terminated during 2016 to 2020[4] all BITs executed by it during the period 1994-2013. The termination was carried out based on the feedback

[3] International Tribunal Awards: White Industries v. Republic of India, 2011
[4] Reports India: Committee on External Affairs, Tenth Report, 2021

given to political leadership that the pre-2015 BITs are detrimental to India's interests. It is relevant to ask the question – **whether the fault lies in the BITs or the legal professionals of the country who have no expertise in BITs and are not competent to deal with matters arising out of BITs**. This question is all the more important since India has failed to get any major investment exporting country or major investment importing country to accept the new Model Bilateral Investment Treaty[5] published by India.

The above discussion on professional inadequacy of India's legal fraternity (including academic world) along with low level of priority assigned to drafting and negotiation of BITs by India's executive wing has to be kept in mind when one goes through the following discussion and analysis of various clauses and provisions related to definition of investment, definition of investor, expropriation, FET, MFN and ISDS. The authors have made an attempt to look for rationale and patterns in the pre-2015 as well as post-2015 BITs in relation to various clauses and provisions related to definition of investment, definition of investor, expropriation, FET, MFN and ISDS. However, it seems that there is hardly a pattern or rationale in the diverse BITs signed by India. While there is no denying that the two classes – pre-2015 and post-2015 – are distinct, within each class different BITs seem almost random with hardly any rational basis.

7.2. Definition of investment

In all pre-2015 BITs "Investment" is defined as asset(s) while in all post-2015 BITs "Investment" is defined as "an enterprise". In pre-2015 BITs most (80 out of 83) BITs cover every / any kind of asset(s). In one BIT (Slovakia) rights are included along with assets. In one BIT (Belgium-Luxembourg) any contribution in cash, kind or services is eligible to be treated as investment along with assets. It is only in one BIT (Mexico) that the definition is restricted to include only specified assets.

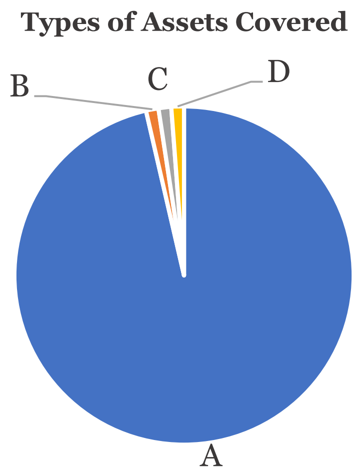
The following table and the chart below give an overall picture of Types of Assets covered in pre-2015 BITs.

[5] Reports India: India's Model BIT Text, 2015

Table 7.1 Types of assets covered in definition of investment in pre-2015 BITs

Types of Assets Covered In Pre-2015 BITs			
	Definition of Investment	**No. of BITs**	**Countries**
A	Every / any kind of asset(s)	80	
B	Every / any kind of asset(s) or right(s)	1	Slovakia
C	Any kind of assets and any contribution in cash, in kind or in services	1	Belgium-Luxembourg
D	Specified assets only	1	Mexico

Fig. / Gr. 7.1 Types of assets covered in definition of investment in pre-2015 BITs



A, B, C, and D stand for Definition of Investment as given in the Table above.

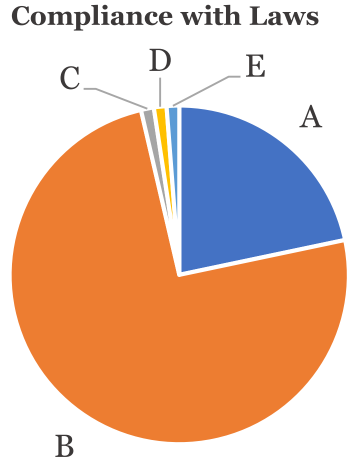
A common condition that is prescribed in all pre-2015 BITs is that the assets should be in compliance with the laws of the host countries. Even at this point, a small difference emerges. In case of eighteen (18) BITs the assets must comply with laws as well as regulations of the host country. In case of sixty-two (62) BITs the assets need to comply with only the laws of the host country, and presumably not with the regulations of the host country. In case of one (Australia) BIT the compliance has to be with the laws and investment policies of the host country (again one presumes that compliance with regulations is not necessary). In case of only one (Malaysia) BIT, the investment must comply with laws, regulations as well as national policies of both (home and host) countries. It is only in case of Switzerland that compliance with laws or regulations or policies of either home or host country is not a prescribed condition.

The following table and the chart below give an overall picture of requirements of compliance with laws for Assets covered in pre-2015 BITs.

Table 7.2 Compliance with laws in definition of investment in pre-2015 BITs

Compliance with Laws			
	Definition of Investment	**No. of BITs**	**Countries**
A	In accordance with the laws and regulations of host	18	UAE, Slovenia, Lithuania, Latvia, Bangladesh, Jordan, UK, Syria, Indonesia, Finland, Austria, Argentina, Israel, Morocco, Zimbabwe, Turkey, Mauritius, Netherlands
B	In accordance with the laws / national legislation of host	62	
C	In accordance with the laws and investment policies of host	1	Australia
D	No mention of host country laws	1	Switzerland
E	In accordance with the laws, regulations and national policies of both countries	1	Malaysia

Fig. / Gr. 7.2 Compliance with laws in definition of investment in pre-2015 BITs



A, B, C, D and E stand for Definition of Investment as given in the Table above.

Notably, in post-2015 BITs as definition of investment moved from assets to enterprise, the requirement of compliance with laws of the host country was retained in three of the four BITs where the clause read as follows: "*in accordance with the law of the Party in whose territory the investment is made*". In case of only one (Brazil) BIT that the requirement has been removed.

7.3. Definition of investor

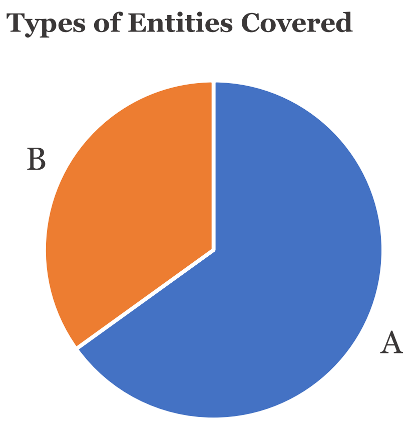
In common man's language, an investor is a person who invests. But in the world of BITs, it is not so simple. Nationals or natural persons (individuals) who are citizens of a country and have invested money are covered by the definition of "investor" in all BITs whether pre-2015 or post-2015.

The issue that sees divided view is about inclusion of different types of entities. Companies incorporated in a country are always included in the definition of "investor" in all pre-2015 BITs. However, other legal entities like firms, trusts and societies are covered in some pre-2015 BITs and not covered in many pre-2015 BITs. Fifty-Four (54) BITs cover all types of entities or juridical persons as investors, while Twenty-Nine (29) pre-2015 BITs include only companies in the definition of investor. The following table and the chart below give an overall picture of types of entities covered by definition of investor in pre-2015 BITs.

Table 7.3 Types of entities covered in definition of investor in pre-2015 BITs

Types of Entities Covered		
	Entity Covered	**No. of BITs**
A	Natural person / national and legal entity / person / juridicial person	54
B	Natural person / national and company	29

Fig. / Gr. 7.3 Types of entities covered in definition of investor in pre-2015 BITs



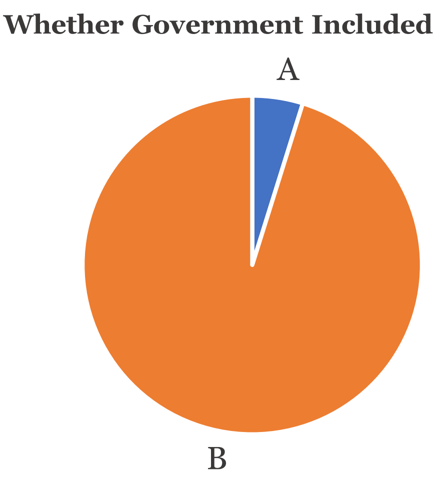
A and B stand for Types of Entities as given in the Table above.

Another issue that distinguishes different BITs is whether government can be an investor or not. It may be mentioned here that "government" in the context of BITs can include union / federal government, governments of different states / regions / provinces, municipal authorities, and even public sector enterprises. A vast majority of pre-2015 BITs do not cover Government of either country under definition of investor. Only four (4) pre-2015 BITs (UAE, Qatar, Saudi Arabia and Kuwait) include government under the definition of investor. The following table and the chart below give an overall picture of coverage of government in the definition of investor in pre-2015 BITs.

Table 7.4 Inclusion / exclusion of government in definition of investor in pre-2015 BITs

Whether Government Included		
	Government Included / Not Included	**No. of BITs**
A	Government included	4
B	Government not included	79

Fig. / Gr. 7.4 Inclusion / exclusion of government in definition of investor in pre-2015 BITs



A and B stand for Inclusion / Exclusion of Government as given in the Table above.

Interestingly, all post-2015 BITs include all types of entities / enterprises / juridical persons in the definition of investor. Government is not covered in any of the four (4) post-2015 BITs.

7.4. Expropriation

All BITs, whether pre-2015 or post-2015, prescribe that investments "*shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation*". The words may differ but, generally speaking, the effect is the same. While expropriation is prohibited, exceptions are permitted on account of the following:

- For public purpose
- In accordance with the due process of law
- On a non-discriminatory basis
- Against fair and equitable (as well as genuine) compensation / against fair market value
- Compensation without unreasonable delay
- Compensation be effectively realizable
- Compensation be freely transferable
- Compensation shall include interest at a fair rate

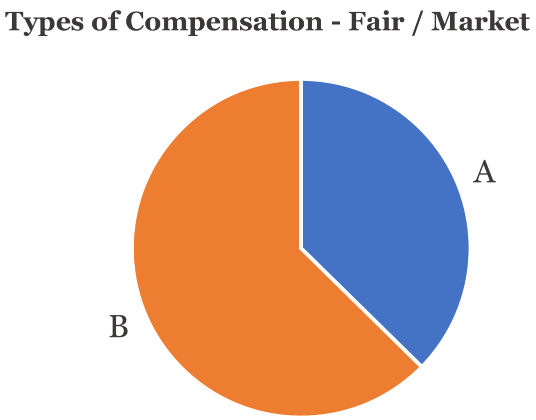
While almost all the BITs (pre-2015 and post-2015) have the above provisions, we shall at present compare the BITs on only two criterion (a) Fair and equitable vs. market value of compensation and (b) Inclusion of interest.

Majority (52 out of 83) pre-2015 BITs provide for compensation to be paid as per market value, while in 31 pre-2015 BITs fair and equitable compensation has to be paid. In some cases, fair and equitable compensation has been defined as compensation at market rates. In such cases, the concerned BIT has been classified under Market Value of compensation. Terminology used for fair and equitable compensation varies quite often. For example, genuine compensation is used in some BITs. All such different terms which have broadly the same meaning as "fair and equitable" are classified as fair and equitable. The following table and the chart below give an overall picture of nature of compensation provided under the provisions for expropriation in pre-2015 BITs.

Table 7.5 Nature of compensation provided under expropriation in pre-2015 BITs

Nature of Compensation		
	Basis of Compensation	**No. of BITs**
A	Fair and equitable compensation	31
B	Market value of compensation	52

Fig. / Gr. 7.5 Nature of compensation provided under expropriation in pre-2015 BITs



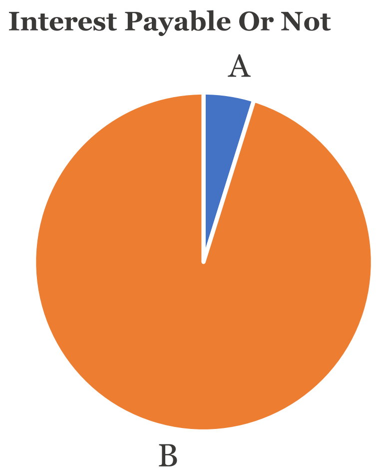
A and B stand for Fair and Equitable / Market Compensation as given in the Table above.

Vast majority (79 out of 83) of pre-2015 BITs provide for payment of interest in case of delayed payment of compesnation. It is only in four (4) pre-2015 BITs that there is no provision for payment of interest in case of delayed payments. The four BITs are – Nepal, Colombia, Yemen and Sweden. Not including provision for payment of interest in case of delayed payment of compensation appears to be a case of oversight. However, it may be pointed out that despite not providing for payment of interest, it is likely that interest will become payable even under these four BITs due to MFN clause which allows investors to take benefit of more favourable provisions of other BITs. The following table and the chart below give an overall picture of provisions about payment of interest provided under the provisions for expropriation in pre-2015 BITs.

Table 7.6 Payment of interest provided under expropriation in pre-2015 BITs

Interest Payable / Not Payable		
	Interest	**No. of BITs**
A	Interest Payable	79
B	Interest Not Payable	4

Fig. / Gr. 7.6 Payment of interest provided under expropriation in pre-2015 BITs



A and B stand for Interest Payable / Not Payable as given in the Table above.

When we look at the four (4) post-2015 BITs we note that all four provide for compensation to be equal to "*fair market value*" and also provide for interest in case of delayed payments.

7.5. Fair and equitable treatment (FET)

Fair and equitable treatment (FET) is undoubtedly the most powerful clause in any BIT. FET provisions, when not constrained by additional clauses, can be interpreted in the widest manner to apply almost every wrong done to an investment by a state. No BIT aims to define FET.

FET provisions in pre-2015 BITs executed by India typically include some or anyone of the following:

i. Adequate / full legal protection and security to investments.

ii. Non-discriminatory basis / shall not impair with arbitrarory / discriminatory measures.

iii. Prohibition against denial of justice in criminal, civil, or administrative proceedings.

iv. Shall not impair in any way by unreasonable means.

v. National treatment – not treat investments in any way less favourable than that accorded to domestic investors.

vi. Third Party - not treat investments in any way less favourable than that accorded to investors of any other country. This amounts to including the MFN clause in the FET clause.

vii. Treatment under taxation or facilities under trade treaties extended to third country investors may be better.

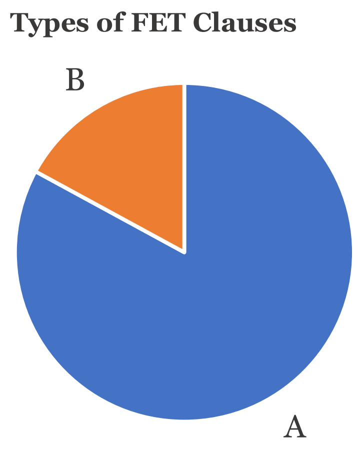
viii. Returns on investments and in the event of their re-investment, the returns there from shall enjoy the same protection as the investments.

If we consider FET clauses that include only points i to iv above as Simple FET Clauses on one hand and clauses that include one or more of v to viii above, the clauses can be called Detailed FET clauses. There are Sixty-Eight (68) BITs with Simple FET Clauses and Fourteen (14) with Detailed FET clauses. The countries with Detailed FET Clauses are - UAE, Colombia, Mexico, Trinidad and Tobago, Finland, Taiwan, Kuwait, Philippines, Austria, Morocco, France, Korea, UK, and Denmark. Notably, India-Turkey BIT does not have a FET clause. Hence, the total of two figures mentioned hereinabove is Eighty-Two (82) and not Eighty-Three (83).

Table 7.7 Simple and detailed FET clauses in pre-2015 BITs

Type of FET Clause		
	FET Clause	**No. of BITs**
A	Simple FET Clauses	68
B	Detailed FET Clauses	14

Fig. / Gr. 7.7 Simple and detailed FET clauses in pre-2015 BITs



A and B stand for Types of FET Clauses as given in the Table above.

Absence of definition of FET in pre-2015 BITs allowed investment arbitration tribunals to interpret the term in the widest possible manner and rule against India in various investor-state-disputes that India had to face. This caused much irritation to the powers in Delhi. In fact, it may be argued that the reason for unilateral termination of all BITs by Indian authorities stemmed from the wide interpretation of what constitutes FET in pre-2015 BITs. Sure enough, India has been insisting for doing away with the FET clause in all negotiations related to investment treaties post-2015.

The four (4) BITs signed by India post-2015 do not have an FET clause. Instead, the relevant article is titled Treatment of Investments. Both parties to the BIT agree to abstain from the following:

a) denial of justice in any judicial or administrative proceedings;

b) fundamental breach of due process;

c) targeted discrimination, such as gender, race or religious belief;

d) manifestly abusive treatment, such as coercion, duress and harassment; or

e) discrimination in matters of law enforcement, including the provision of physical security (not present in Kyrgyz, Belarus and Taiwan BITs).

Even the adequate / full legal protection and security granted to investments in pre-2015 BITs have been done away with in Brazil ICFT of 2020. "*Full protection and security*" is mentioned in Kyrgyz, Belarus and Taiwan post-2015 BITs, but with the rider which says, "*For greater certainty, "full protection and security" only refers to a Party's obligations* *relating to physical security of investors which means ensuring foreign investors and their investments same level of physical security as provided to domestic investors and their investments and not to any other obligation whatsoever*".

Restricting protection and security to only physical security and that too only to the extent available to domestic investors amounts to denial of full legal protection and security which most investors are looking for when choosing a country for making investment. It seems that Indian authorities when insisting on such watered-down standards of treatment of investments have been looking at India as an investment importing country and have not considered India as an investment exporter.

7.6. Most favoured nation (MFN)

Most Favoured Nation (MFN) treatment clause is a part of every pre-2015 BIT. There are two key constitutents of the MFN clause – (a) National Treatment – investments by a foreign investor to be treated in no less favourable way than domestic investments (b) Third Country Parity – investments from treaty country to be treated in no less favourable way than any third country investments.

Many MFN clauses in pre-2015 BITs also include a FET clause. There are also provisions in many BITs excluding the benefits from customs union or taxation treaties.

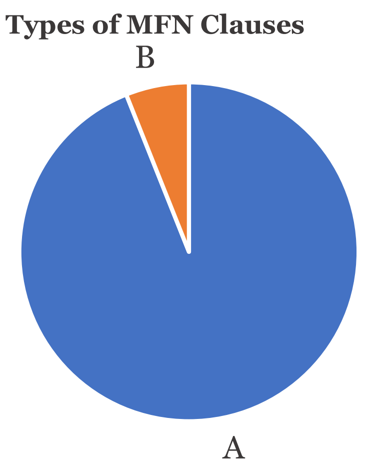
A vast majority (78 out of 83) pre-2015 BITs provide for both – National Treatment and Third Country Parity – treatments, with the one more favorable to the investor being applicable. Only five (5) BITs provide for only Third Country Parity and do not provide for National Treatment. The five countries are Mexico, Indonesia, Taiwan, Turkey and Malaysia.

The following table and the chart below give an overall picture of Types of MFN Clauses in various pre-2015 BITs.

Table 7.8 National treatment and third country parity MFN in pre-2015 BITs

Type of MFN Clause		
MFN		No. of BITs
A	National Treatment + Third Country Parity	78
B	Only Third Country Parity	5

Fig. / Gr. 7.8 National treatment and third country parity MFN in pre-2015 BITs



A and B stand for Types of MFN Clauses as given in the Table above.

In post-2015 BITs the MFN clause is conspicuous by its absence. Instead of MFN clause, a clause / article titled National Treatment / Non-Discrimination / Non-Discriminatory Treatment is inserted. Irrespective of how it is titled, the essence of the provision is National Treatment or parity with domestic investors. The concept of parity with third country investors has been completely dispensed with in the post-2015 BITs.

7.7. Investor state dispute settlement (ISDS)

ISDS provisions in pre-2015 BITs were fairly detailed. However, once the ISDS matters started reaching investment arbitration tribunals, the inadequacy of ISDS provisions in BITs was felt by the state authorities as well as by the investors.

Majority (51 out of 83) of the pre-2015 BITs executed by India provide for a Three Stage dispute resolution process, while only thirty-two (32) BITs provide for a Two Stage dispute resolution process. In both, three stage or two stage processes, the first step is to attempt for amicable settlement through negotiations and discussions. Once the attempt for amicable settlement fails, in case of two-stage dispute resolution process, the investor must choose one of the processes – (a) domestic courts / authority (b) conciliation (c) arbitration. In case of three-stage resolution process, the post-negotiations fork leads to domestic forum or international conciliation and after that fails, the investor may go for international arbitration. Notably, international conciliation is often present even in the two-stage dispute resolution process just as it is present in the three-stage process. The key difference is that in the three-stage process, failure of conciliation leads to arbitration, while in two stage process failed conciliation, if present and chosen, will lead to a dead end.

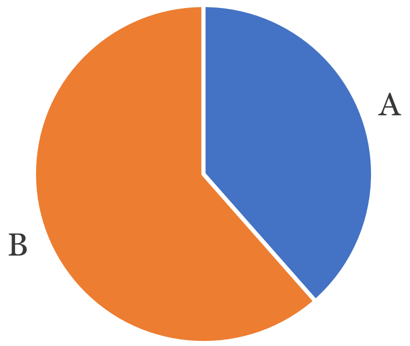
The following table and the chart below give an overall picture of Dispute Settlement Stages in ISDS provisions in various pre-2015 BITs.

Table 7.9 Two stage / three stage ISDS in pre-2015 BITs

Dispute Settlement Stages		
	MFN	**No. of BITs**
A	Two Stage - Amicable + Domestic Process / Conciliation / Arbitration	32
B	Three Stage - Amicable + Conciliation + Arbitration	51

Fig. / Gr. 7.9 Two stage / three stage ISDS in pre-2015 BITs

Two-stage / Three-stage Dispute Resolution



A and B stand for Types of ISDS Clauses as given in the Table above

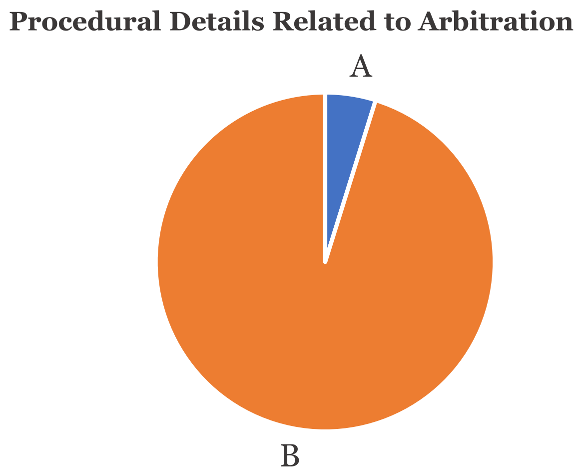
In most (78 out of 83) of the BITs, the ISDS article has minimal details regarding arbitration procedure. The minimal details often include some or all of the following – (a) Procedure for appointment of one arbitrator each by investor and state (b) Procedure for appointment of third or presiding arbitrator (c) Arbitral award to state reasons for the award (d) Award to be based on BIT and the domestic laws (e) Award to be binding and (f) Costs sharing between Investor and the State. It is only in five (5) BITS that more procedural details are provided in the article(s) related to ISDS. The five BITs are UAE, Mexico, Saudi Arabia, Australia and Belgium-Luxembourg.

The following table and the chart below give an overall picture of Procedural Details Regarding Arbitration in ISDS provisions in various pre-2015 BITs.

Table 7.10 Details regarding arbitration procedure in ISDS article in pre-2015 BITs

Procedural Details Regarding Arbitration		
	ISDS Provisions	**No. of BITs**
A	Arbitration Clause Bare	78
B	Arbitration Clause With Procedural Details	5

Fig. / Gr. 7.10 Details regarding arbitration procedure in ISDS article in pre-2015 BITs



A and B stand for Types of ISDS Clauses as given in the Table above

While one may point out many crucial issues that are left untouched in the clauses / articles related to ISDS in pre-2015 BITs, the one that stands out most prominently is regarding appealability of arbitral awards. Only three (3) BITs – Mexico, Saudi Arabia and Zimbabwe – provide that "*The award shall be binding and shall not be subject to any appeal or remedy*". One does not know whether appeal is permitted in case of other BITs. This is an open issue and final call on the same may be by judicial pronouncements in a few appeals filed by Republic of India against adverse awards received from some arbitration tribunals.

Similarly, another issue that has been covered in a few BITs relates to insurance. In case the investor has received claim against the losses suffered by it from an insurance company, can the investor still raise a dispute under the relevant BIT and get compensation? A few BITs clearly provide that the fact that the investor's losses have been compensated by an insurance company will not be a defence in the favour of the state. While the position is clear with regard to the BITs where provision related to insurance claim is clearly included in the ISDS provisions of the BIT, it is not clear whether in case of other BITs (with no provision regarding insurance claims) the investor who has received claim from an insurance company will be barred from getting compensation for losses and damages. The issue has never been raised before an arbitration tribunal. Even if the issue is so raised, apart from academic interest, the answer will be in favour of the investor due to application of MFN clause present in all pre-2015 BITs.

Post-2015 BITs retain the arbitration option as available under pre-2015 BITs. However, all four (4) post-2015 BITs prescribe such onerous pre-conditions for taking a matter to arbitration that it is virtually impossible for an investor to take a matter to the stage of international arbitration. Each of the post-2015 BITs comes with a long list of prior steps that must be completed before an investor can even think of arbitration. On top of the steps are conditions that must be satisfied. For example, the India-Kyrgyz BIT of 2019 provides, "*An investor may not submit a claim to arbitration under this Chapter if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms*." An investor is likely to be afraid that he / she will be forced to run from pillar to post to just prove that his / her investment was not tainted by the said black marks. These issues should typically be raised at the stage when an investor invested money or resources and not at the stage of dispute. Similarly, India Brazil BIT has a long list of exceptions. It will not be an exaggeration to say that the complicated and cumbersome ISDS provisions of post-2015 BITs have made the post-2015 BITs practically useless or dead letter. The post-2015 BITs do not serve the essential purpose that an investment treaty is intended to serve – protection and assurance of investors. ISDS provisions in the post-2015 BITs give an impression of being strongly tilted in the favour of the state against the investors. No investor will like to be bogged down in the serpentine process that post-2015 BITs have created for ISDS.

Chapter 8

India's Uneasy Relationship with Investor Protection Treaties

8.1 Historical overview

After independence, India was mostly following the socialist path with support from USSR. While India did not pursue a revengeful approach of mass scale nationalizations towards foreign-owned businesses, the clear message was that foreign owners should do technology transfer, provide management support and eventually transfer the business to Indian owners. Economic inclusion was the focus of the government and protection of foreign investments was seen as protecting the former colonial powers. During these years, India argued for treating foreign investment no better than domestic investment and sovereign right of government of an independent country to control the country's resources and businesses. During these years up to mid-eighties, India believed that the right of nationalization was an attribute of a country's sovereignty.

Before 1994, investment protection regime available to foreign investors was the same as available to domestic investors. While post-independent India did not pursue mass scale nationalizations, the general impression conveyed to foreign investors was that they should transfer their holdings in Indian companies to Indian businessmen. Indian judiciary and fundamental rights provided under Constitution of India[1] were the guarantee of fair and equitable treatment, the political leadership was pursuing socialist path with nationalization as essential right of a sovereign country. During this period (1947 to 1994), especially the first four decades, many foreign and domestic enterprises were nationalized.

[1] Laws and Constitution: The Constitution of India, 1950

In 1949, the Reserve Bank of India (RBI) was nationalized. Imperial Bank was nationalized in 1955 into State Bank of India. On 18 July 1969 President of India, VV Giri signed and promulgated an ordinance which nationalized the 14 largest Indian banks with deposits more than ₹50 crore. Advocate Nani Palkhivala (on behalf of RC Cooper) challenged the validity of the ordinance (and later when the ordinance was passed in Parliament as the Banking Companies Act, 1969). The main challenge was the lack of any clear legal principles in determining compensation. The Act did not value the entire bank in any systematic way, but valued only some components. Important assets like goodwill were left out of the valuation, and that land, rents, interest payable, etc., were undervalued. The most outrageous provision of the Act was that once the total compensation was determined, it was not paid in cash, but in government of India securities maturing in 10 years. Chief justice J.C. Shah led the 11-judge bench. Shah (joined by 9 justices) wrote in the majority opinion that the Act violated the principles for compensation guaranteed under Article 31(2). The majority also held that the ordinance amounted to an act of hostile discrimination, preventing the 14 banks from carrying on their business under Article 19 of the Constitution, whereas other Indian and foreign banks could carry on with their business. The lone dissent came from justice A.N. Ray, who upheld the constitutionality of the legislation. Palkhivala won the battle but lost the war against nationalization. In March 1970, soon after the judgement, the government redrafted the Banking Companies Act. The main difference was an additional ₹58 crore paid out to bank owners. The new Act was implemented without challenge and its legacy, mostly for the worse, continues till date[2].

One notices from the above account of the developments related to nationalization of banks that during the period 1947-1994, the executive wing of the Union of India acted as per its own wishes in expropriating and in determining compensation for expropriation. There were practically no rules or internationally acceptable norms of fair and equitable treatment. The judiciary did, of course, act in its own limited way to ensure fair and equitable treatment.

During the 1950s to 1980s India had a slow rate of GDP growth – around 3.5% per annum (often called Hindu rate of growth). Persistently low growth rate was accompanied by low

[2] Website: https://www.livemint.com/opinion/columns/opinion-the-heroes-and-villains-of-bank-nationalisation-1563783156952.html

per capita income. Even as the country was moving slowly on the growth path, the shock came during 1991 with the crisis in balance of payments and foreign currency.

Just as India was experiencing financial stress, the world saw collapse of USSR during 1988-1991. The two events – internal financial stress and change in global scenario - forced India to change course and move on the path of liberalization. This was an ideological somersault which saw India abandon her insistence on National Treatment and also on right of nationalization. In April 1992, India joined the Multilateral Investment Guarantee Agreement (MIGA). This started the journey of India on the path of investment protection for foreign investors.

India signed her first BIPA with United Kingdom[3] on 14th march 1994. This was the start of a journey. India signed a total of 83 (Eighty-Three) BITs with the last in this set signed on 12th December 2013.

The thinking in the official circles of India changed with the arbitral award in the case of White Industries[4]. The award was seen as a challenge to India's sovereignty and also to supremacy of India's courts.

It seems that prior to White Industries[5], India did not treat the BITs that she executed with any level of seriousness. BITs were probably seen as nothing more than good tools to get nice publicity for the country. They were seen as public relations exercise which allowed the heads of states nice photo-opportunity and made some good headlines in the newspapers next morning. It is as if the text of the BITs was considered irrelevant and inconsequential. Apparently, no attention was devoted to the text of the BITs at either the higher echelons of political leadership or even bureaucratic cadre. The legal fraternity, judiciary and even law faculty at Indian universities and institutes were neither consulted nor bothered about the exercise of signing treaties since the treaties were seen as an executive function which did not come within their domain.

[3] Treaties: India and UK, 1994

[4] International Tribunal Awards: White Industries v. India, 2011.

[5] International Tribunal Awards: Ibid.

8.2 Legal foundation of India's BITs

During the almost two-decade long period that India signed eighty-three BITs, the BITs or their draft or so-called Model Bilateral Investment Treaty was never even once discussed by the Parliament of India. Treaty making has been treated as an executive function in India with no judicial or Parliamentary review or approval required for the treaties. This view has been taken based on Article 73(1) and Article 253 of the Constitution of India which read as follows:

> ***73. Extent of executive power of the Union***.*—(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—*
>
> *(a) to the matters with respect to which Parliament has power to make laws; and*
>
> *(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:*
>
> *Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.*[6]
>
> ***253. Legislation for giving effect to international agreements***.*—*
>
> *Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.*[7]

The above two Articles of the Constitution do not deal with the treaty making powers of executive wing of the Union of India in a direct way. First time the question of treaty

[6] Laws & Constitution: Constitution of India, 1950
[7] Laws & Constitution: Ibid.

making power arose before Honourable Supreme Court of India in Berubari[8] reference case

> ***34.*** *What then is the nature of the treaty-making power of a sovereign State? That is the next problem which we must consider before addressing ourselves to the questions referred to us for our opinion. As we have already pointed out it is an essential attribute of sovereignty that a sovereign state can acquire foreign territory and can, in case of necessity, cede a part of its territory in favour of a foreign State, and this can be done*

Notably, in the above-mentioned case, Honourable Supreme Court raised the question about treaty making powers of a sovereign State, not about the executive wing of the sovereign State. Even in the limited context of the said reference case, Honourable Supreme Court did not give blanket powers to the executive to sign any and all types of treaties.

The opinion of Honourable Supreme Court in Berubari reference case was summed up very well in Union of India vs. Sukumar Sengupta[9] as follows:

> ***3.*** *Subsequently, there was doubt as to whether the implementation of the 1958 Agreement relating to Berubari Union and the exchange of Enclaves requires any legislative action either by way of a suitable law of the Parliament relatable to Article 3 of the Constitution or in accordance with the provisions of Article 368 of the Constitution or both. Accordingly, in exercise of the powers conferred upon him by Clause (1) of Article 143 of the Constitution, the President of India referred the following three questions, to this Court for consideration:*
>
> > *(1) Is any legislative action necessary for the implementation of the agreement relating to Berubari Union?*
> >
> > *(2) If so, is a law of Parliament relatable to Article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary in addition or in the alternative?*

[8] Domestic Court Judgements: In Re. Berubari, 1960

[9] Domestic Court Judgements: Union of India vs. Sukumar Sengupta, 1990

> *(3) Is a law of Parliament relatable to Article 3 of the Constitution sufficient for implementation of the agreement relating to the exchange of Enclaves or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary for the purpose in addition or in the alternative?*

4. *This Court answered the questions as follows. So far as question No. 1 was concerned, it was answered in affirmative. So far as second question was concerned, this Court answered it by saying that a law of Parliament relatable to Article 3 of the Constitution would be incompetent and a law of Parliament relatable to Article 368 of the Constitution is competent and necessary and also by saying that a law of Parliament relatable to both Article 368 and Article 3 would be necessary only if Parliament chooses first to pass a law amending Article 3 as indicated above; in that case Parliament may have to pass a law on those lines under Article 368 and then follow it up with a law relatable to the amended Article 3 to implement the agreement. Question No. 3 was also answered as aforesaid. The said decision is reported in Re. The Berubari Union and Exchange of Enclaves [1960] SCR 3. Ninth Amendment to the Constitution was made thereafter. The Objects and Reasons of the Constitution (Ninth Amendment) Act, 1960 stated that the Indo-Pakistan agreements dated September 10, 1958, October 23, 1959, and January 11, 1960, which settled certain boundary disputes relating to the borders of the State of Assam, Punjab and West Bengal, and the Union Territory of Tripura involved transfer of certain territories to Pakistan after demarcation. The Act amended the Constitution to give effect to the transfer of those territories. After setting out the title of the Act, which was called the Constitution (Ninth Amendment) Act, 1960, it provided the definitions and amendments to the First Schedule to the Constitution*[10].

If one looks at the summing up of the actions taken after the opinion provided by Honourable Supreme Court in Berubari reference case (supra), one notices that the Constitution was amended by the Parliament under Article 368 to implement the accord

[10] Domestic Court Judgements: Ibid.

between the two countries. It clearly demonstrates that the executive wing of Union of India does not have unrestrained treaty making powers.

The issue of treaty making powers of Union of India came up before Honourable Supreme Court of India in the matter of Maganbhai[11] when the issue was about defining the international border between India and Pakistan in the Rann of Kutch. Honourable Court opined as under:

> ***79.*** *The Judicial Committee in Attorney-General for Canada v. Attorney-General for Ontario and Ors. [1937] A.C. 326 made some observations in the context of a rule applicable within the British Empire, which are pertinent:*
>
>> *It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the! obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the Government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.... .Parliament, no doubt, ...has a Constitutional control over the executive : but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default.*

[11] Domestic Court Judgements: Maganbhai Ishwarbhai Patel and Ors. vs. Union of India and Ors., 1969

These observations are valid in the context of our Constitutional set up. By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our Constitution makes no provision making legislation a condition of the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. ***But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modules the laws of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty***. (Emphasis added)

80. *The argument raised at the Bar that power to make treaty or to implement a treaty, agreement or convention with a foreign State can only be exercised under authority of law, proceeds upon a misreading of Article 253. Article 253 occurs in Ch. I of Part XT of the Constitution which deals with legislative relations : Distinction of Legislative Powers. By Article 245 the territorial operation of legislative power of the Parliament and the State Legislatures is delimited, and Article 246 distributes legislative power subject-wise between the Parliament and the State Legislatures. Articles 247, 249, 250, 252 and 253 enact some of the exceptions to the rule contained in Article 246. The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with*

> *legislative power : thereby power is conferred upon the Parliament which it may not otherwise possess. But it does not seek to circumscribe the extent of the power conferred by Article 73.* ***If, in consequence of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation : where there, is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power***.[12] (Emphasis added)

Clearly, Maganbhai case allowed the executive wing to proceed with treaty making as long as long as the treaty or agreement does not operate "*to restrict the rights of citizens or others or modules the laws of the State*". It would appear from the judgement in case of Maganbhai, that BITs that overrule the domestic laws and cede power to arbitration tribunals over the sovereign State of India should be ratified by the Parliament of India before being enforced.

Supremacy of domestic laws over international conventions and treaties was also stated in Jolly Varghese[13] case by Honourable Supreme Court. The issue before the Court was whether an international convention duly ratified by India can be applied without due sanction from a domestic law. The court opined as follows:

> ***10.*** *Right at the beginning, we may take up the bearing of Article 11 on the law that is to be applied by an Indian Court when there is a specific provision in the Civil Procedure Code, authorising detention for non-payment of a decree debt. The Covenant bans imprisonment merely for not discharging a decree debt. Unless there be some other vice or mens rea apart from failure to foot the decree, international law frowns on holding the debtor's person in civil prison, as hostage by the court. India is now a signatory to this Covenant and Article 51(c) of the Constitution obligates the State to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another". Even so, until the municipal law is changed to accommodate the Covenant what binds the court is the former, not the latter. A.H. Robertson in "Human Rights- in National and International Law" rightly points out that international*

[12] Domestic Court Judgements: Ibid.

[13] Domestic Court Judgements: Jolly George Varghese vs. The Bank of Cochin, 1980

> *conventional law must go through the process of transformation into the municipal law before the international treaty can become an internal law. P. 13*
>
> ***11.*** *From the national point of view the national rules alone count.... With regard to interpretation, however, it is a principle generally recognised in national legal system that, in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations.*[14]

The above observations were further confirmed by Honourable Supreme Court in the matter of PB Samant[15] where the issue before the Court was about signing of GATT treaty. Concluding remarks in the judgement read as follows:

> *Shri Dada submitted that the treaty is not a self-executive treaty and the provisions of the treaty will be given effect to by passing requisite laws. Shri Dada further pointed out that the concluded negotiations at Urugway Round have already been circulated to all the members of the Parliament and to all the Chief Ministers and discussion had already taken place in the Rajya Sabha and the Lok Sabha. Shri Dada submitted and, in our judgment, with considerable merit that the issue as to whether the Government should enter into treaty or agreement is a Policy decision and it is not appropriate for the Courts in exercise of jurisdiction under Article 226 of the Constitution of India to disturb such decisions. In our judgment, the petitioners are not entitled to any relief and the petition must fail.*[16]

Shri Dada, Learned Counsel appearing for Government of India had pleaded before the Court that the Government had initiated the process of approval by Parliament and the GATT treaty will become binding only after the due parliamentary process. Somehow, it appears that the parliamentary process which was felt necessary for GATT was not felt necessary for the BITs executed by India.

It is not only in the case of BITs that the executive wing of Union of India has taken the liberty of signing a treaty and not getting approval from the Parliament. The following extract from a Consultation Paper published by National Commission to Review the

[14] Domestic Court Judgements: Ibid.
[15] Domestic Court Judgements: P.B. Samant v. Union of India, 1994
[16] Domestic Court Judgements: Ibid.

Working of The Constitution describes in detail the liberty taken by Government of India in the matter of TRIPs.

> *45. Taking advantage of the fact that Parliament has chosen not to make any law regulating the treaty-making power, the Union Government has been, taking advantage of Article 73 of the Constitution, freely entering into treaties on its own without reference to the Parliament. Only where legislation is required to give effect to the terms of a treaty or a convention or a covenant has the Central Government been approaching the Parliament to make laws in those terms. By way of example, it would be instructive to notice what happened in the case of TRIPs agreement. The draft Agreement (on TRIPs) – which according to the HDR 1999, published by UNDP, was being pushed mainly by the multi-national drug companies – ran counter to almost each and every major premise of the “Background” paper submitted by India to the Negotiating Committee on July 27, 1989. India was evidently rattled by the draft Agreement on TRIPs produced by the Conference. The Government probably thought it would be appropriate to bring the matter to the notice of Parliament. Accordingly, the Standing Committee of Parliament attached to the Commerce Ministry consisting of forty Members of Parliament drawn from all political parties, considered the draft Agreement and submitted a Report on November 13, 1993. The Standing Committee opposed all the major stipulations and terms contained in the draft agreement. It opined that product patent system should not be imposed on India since it would result in steep increase in prices of medicines. It said that it should be left to the Indian state to determine whether it will go in for product patent or not. The Parliamentary Committee also opposed the 20-year period for the patents and the provision of the draft agreement which entitled the patent holder not to manufacture drugs and medicines within India while at the same time enjoying the benefits of patent in India. It also apposed the onerous conditions attached for permitting transition period to countries like India (which were not only developing countries but also did not recognize product patent till then). What is relevant to mention however is that the Government of India signed the TRIPs agreement in 1994, practically in the same shape as the draft agreement, without again approaching the*

Parliamentary Committee or the Parliament. The question that arises in such a situation is what was the relevance of consulting the Standing Committee of Parliament and then signing the agreement in total disregard of the Report and recommendations of the Parliamentary Committee. It is obvious that had there been a law regulating the treaty-making power of the Government and if such law had provided for either prior approval, ratification, consideration or discussion of the treaty before it comes into force, such a thing could not have happened. It needs to be emphasized that TRIPs agreement is not the only agreement signed by the Government of India in the course of Final Round of Uruguay negotiations. We have signed several agreements concerning trade, services, agriculture and so on - all of which seriously impinge upon our economy, upon our agriculturists, businessmen and industrialists. The results of these agreements are already becoming evident to us. Cheap agricultural, industrial and engineering goods from South-east Asia and China are flooding our markets driving out local producers. We do not know what is going to happen after 1.4.2001 when the existing quota and other restrictions will disappear, leaving the field free for free trade in goods, services, agricultural products and what not. It is a matter of common knowledge that neither the Parliament nor the people of this country were taken into confidence before signing these agreements having such serious repercussions upon the life and the lives of the citizens of this country. It therefore becomes essential to think of subjecting the treaty-making power of the Central Government to appropriate checks and controls, as is sought to be done in several countries all over the world.[17]

The above Consultation Paper also sums the approach adopted by India in approval of treaties.

47. It is also brought to our notice by certain experts in the field that the present method has worked well in India for the last 50 years except perhaps in the case of WTO treaties (agreements entered into in the course

[17] Working Papers: Treaty-Making Power under our Constitution, 2001

of Uruguay Round of GATT Negotiations). It is pointed out that as a matter of fact:

(1) The views of all concerned ministries are taken into consideration and different interests are identified and reconciled before the Cabinet is requested to approve a treaty. As part of this consideration, the administrative ministry is also required in consultation with and approval from the Department of Legal Affairs of the Ministry of Law to identify the need for any implementing legislation either by way of amendments to the existing law or by the enactment of a new legislation.

(2) Treaties of importance are first brought to the attention of the Parliament and decision of ratification is kept pending in the absence of a clear decision, approval by Parliament. The comprehensive Treaty on banning the Nuclear Tests (CTBT) is an example.

(3) Important treaties are placed before the Parliament. In some of the cases, discussion was also held and resolutions were passed approving such treaties. The Tashkent Declaration 1966, the Treaty of Peace, Friendship and Cooperation between India and USSR 1971 and the Shimla Agreement 1972 are the examples.

(4) Treaties ceding territory of India are subject to constitutional amendment.

It seems that BITs have been considered neither as Treaties of Importance (under paragraph 2 mentioned above) nor as Important Treaties (under paragraph 3 mentioned above) since the BITs were neither brought to the attention of the Parliament before ratification (under paragraph 2 mentioned above) nor placed before the Parliament (under paragraph 3 mentioned above). This once again confirms that BITs were taken lightly or rather too lightly by the authorities of India who signed the treaties.

It remains an open issue whether the eighty-seven (87) BITs signed by India are constitutionally valid. It is beyond the scope of this book to examine the constitutionality of BITs. However, considering the fact that BITs grant power to an extra-constitutional authority (international arbitration tribunal) over Union of India and also the fact that the decisions of the extra-constitutional authority cannot be overturned by Honourable Supreme Court of India, the constitutional validity of BITs is certainly an extremely important issue that needs to be debated by the judicial and academic circles of the country.

8.3 Treating BITs as unimportant trivial documents

Indian political class as well as bureaucratic class, during the period before White Industries[18] award, treated BITs as something trivial and unimportant. This shows in the fact that it was not considered worthwhile to place these treaties before the Parliament either before signing or after signing. Parliament of India has never passed any Act in pursuance of any signed BIT under Articles 73(1) and 253 of Constitution of India.

Constitutional propriety aside, one can see the negligent attitude towards BITs at the highest level of bureaucratic and political class by just a quick glance at the texts of BITs published by Government of India. The texts are shoddy and are full of spelling and grammatical errors. In some cases, one can even see gibberish. Treaties are scanned and scanned copies are published. Scanning quality is poor and done without any attention to detail. Portions of text missing from scanning is not a rare occurrence.

It seems that all wings of Union of India – Legislature, Executive, Judiciary, Academicians and Press – failed completely in realizing the importance of the treaties that the country was signing away in a frivolous manner. No one apparently realized that these documents could in future saddle the country with claims of billions of dollars with no legal recourse within the country.

8.4 Lack of professional expertise

With BITs being treated as nothing more than useless scraps of paper, it is not surprising that India did not make any efforts to develop any expertise either in drafting and negotiation of investment treaties or in defending / presenting claims before investment arbitration tribunals. When a country does not have expert lawyers to present / defend

[18] International Tribunal Awards: White Industries Australia Limited vs. India, 2011

claims, the country cannot obviously be having any experts who can serve on international investment tribunals as arbitrators.

The lack of expertise is glaring and has also been noted by the Parliamentary Committee on External Affairs in its various recommendations as follows:

> *1.27 The Committee feel that the drafting of international treaties, whether it is investment related or trade specific is crucial to avoid any ambiguity or leave scope for wider interpretation by arbitrators and tribunals as well as abuse of certain provisions by investors. Loosely drafted or broad provisions should be avoided and safeguards put in place at the drafting stage itself. The Committee, therefore, desire that the MEA should work in close coordination with the Department of Legal Affairs, Department of Economic Affairs and other concerned Ministries/Departments and make a combined effort to develop in-house expertise and panel of lawyers who have experience in investment treaty law so that best international treaties are drafted with least scope of arbitrations.*
>
> *(Recommendation No.3)*
>
> *1.28 The Committee note that the Ministry is organizing capacity building workshops and courses by engaging experts from India and abroad. Under the PCA - India Conference series, workshops in investment treaty and investment treaty arbitrations were conducted. MEA has also conducted capacity building exercises with UNCITRAL National Coordination Committee and virtual course for GoI officials has also been conducted by the Chartered Institute of Arbitrators, London. While appreciating the efforts made by the Ministry in this regard, the Committee desire that a full term course for Government officials in the field of investment treaty and investment treaty arbitration may also be started and the workshops for training and developing young counsels of the country in these fields may also be organized on priority.*
>
> *(Recommendation No.4)*
>
> *[...]*
>
> *2.23 The Committee note that investment arbitration requires lawyers/judges who possess the expertise and experience at international*

> *fora. India is still lacking in adequate number of persons who have the expertise and experience in this domain. The Committee have been informed that law firms and lawyers, both Indian and international have been engaged to represent the country in the hearings of arbitration. In order to avoid payment of huge fees for foreign lawyers and international law firms and costly arbitral awards against the country, the Committee feel that developing local expertise in this domain is crucial. The Committee, therefore, recommend that MEA, DoLA, DEA and other concerned Departments/Agencies should work in close coordination to develop domestic talent in the form of panel of domestic lawyers and law firms who will have the requisite expertise and experience to represent India successfully in investment treaty arbitrations.* [19]
>
> *(Recommendation No. 9)*

Notably, the above recommendations came in September 2021, more than twenty-five years after the first BIT was signed and about ten years after award in White Industries (supra). While, no official data is available in this regard, one can say that neither the legal fraternity nor judiciary nor law faculties have taken any steps to correct the lacuna.

It may be pointed out that India does not have a single reputed international arbitration lawyer who has been designated as Senior Advocate. Under section 16 of Advocates Act[20], High Courts and Supreme Courts are empowered to designate advocates as Senior Advocates. Different High Courts have issued their Rules for Designation of Senior Advocates. None of the said Rules issued by different High Courts even recognize international arbitration practice as legal practice eligible for being considered while designating Senior Advocates. Honourable Supreme Court issued Guidelines for Designation of Senior Advocates[21] by the Supreme Court of India in July 2023. Paragraph 10 of the Guidelines makes it necessary that an advocate to be eligible for being considered must "*Practice mainly in the Supreme Court*". There is a note which says that "*Applicant-advocates having domain expertise of practicing before specialized Tribunals may be given concession with regard to the extent of appearances in the Supreme Court*". Getting such a concession for a specialized international arbitration

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[19] Reports India: Committee on External Affairs, 2021
[20] Laws & Constitution: Advocates Act, 1961
[21] Laws & Constitution: Guidelines for Designation of Senior Advocates, 2023

tribunal advocate may be almost impossible if he / she does not appear before either a High Court or Supreme Court. We know that such a concession has never been granted so far. Of course, we do not even know whether "*international arbitration tribunals*" will even be eligible to be counted as "*specialized Tribunals*" in the eyes of Honourable Supreme Court of India since the arbitration tribunals do not have the airs and trappings of official tribunals set up by laws.

With no official recognition and encouragement by either the top courts or by the Government, it is least likely that any talented capable young lawyer will ever take up international arbitration as his / her field of specialization. With no young lawyers taking up the field, there is no way that the country will ever have the professionals to present / defend international investment arbitration claims running into billions of dollars.

It may be worthwhile to mention here that the neglect of investment arbitration and BITs is not restricted to only bureaucracy, political class and judiciary. The law departments and faculty at various universities and law institutes are equally to blame. There is no published thesis or serious research work by any student / faculty of law in the field of BITs or international investment arbitration. It seems that law departments of Indian universities and law institutes do not consider BITs as law. With total absence of research in the field, it is unlikely that the universities and institutes can build legal professionals in the field.

8.5 India and investment disputes under BITs

The position of India as regards disputes raised under different BITs was summed up very well by Parliamentary Committee on External Affairs as under:

> *2.2 So far, there have been 37[*] notices of dispute or letters intending to raise a dispute by claimants or investors against Republic of India. Out of these only 16 have proceeded to arbitration.*

[...]

> *2.3 India has won 4 arbitration, lost 2 arbitrations, received adverse award in 3 arbitrations out of which all three cases are pending challenge to the arbitral award at the seat of arbitrations. In 1 dispute the investors withdrew their claim and 3 disputes have been*

resolved amicably. 8 disputes are still active at different stages of arbitration and in another 14 disputes, the claimants did not pursue the matter after the initial request under BIPA. 2 new notices have been received.[22]

* Out of the 37 notices received by India, two (2) were issued by the authors of this book.

International investment arbitration suffers from lack of rules on transparency. Unlike in case of court judgements, which are public documents, arbitration awards are considered private and confidential. To the best of knowledge and efforts of the researcher, only four (4) international awards (final / awards on merits, not including awards on procedural matters or on quantum) involving India are available in public domain in full. The four awards are as follows:

(1) Final Award, White Industries Australia Limited v. The Republic of India [23]

(2) Award on Jurisdiction and Merits, CC/Devas (Mauritius) Ltd. and ors. v. The Republic of India[24]

(3) Final Award, Deutsche Telekom AG v. The Republic of India[25]

(4) Award, Permanent Court of Arbitration, Cairn Energy Plc Cairn and Anr. v. The Republic of India.[26]

The above four awards have taken almost similar views with regard to the key parameters of definition of investment, definition of investor, expropriation, FET, MFN and ISDS.

8.6 Post-2015 scenario regarding BITs

India unilaterally terminated all pre-2015 BITs during 2016-2020. It appears that the termination was a result of the irritation that Indian authorities felt in view of various awards of investment arbitration tribunals that went against India.

[22] Reports India: Committee on External Affairs, 2021
[23] International Tribunal Awards: White Industries v. The Republic of India, 2011
[24] International Tribunal Awards: CC/Devas (Mauritius) v. The Republic of India, 2016
[25] International Tribunal Awards: Deutsche Telekom v. The Republic of India, 2020
[26] International Tribunal Awards: Cairn Energy v. The Republic of India, 2020

Initially, India wanted various countries to sign Joint Interpretative Statement (JIS). The only countries who responded to the request were Bangladesh and Colombia. India and Bangladesh signed a Joint Interpretative Note (JIN) on 4th October 2017. India and Colombia signed a Joint Interpretative Declaration (JID) on 4th October 2018.

Post-2015 India has signed new BITs with only four (4) countries – Belarus, Taiwan, Kyrgyz, and Brazil. Of these only two (2) BITs (Belarus and Taiwan) have been enforced. The four countries are neither major capital-exporting countries for India nor significant capital-importing countries for India.

It may be concluded that almost all countries who export capital to India as well as almost all countries who import capital from India have not responded to India's attempts to negotiate new investment treaties. This is a major failure for a large country like India which is a major capital importer as well as a significant capital exporter. The failure has also been noted by the Parliamentary Committee as follows:

> *The Committee, however, are astonished to note that India has signed BITs/ Investment Agreements only with Belarus, Kyrgyzstan, Taiwan and Brazil and negotiations of various International Investments Agreements (IIAs) are in the various stages. The Committee treat the number of BITs/Investment Agreements signed post 2015 and the number under negotiations as inadequate and find that it is not commensurate with the growth of India's interest in this domain and our rising stature in global affairs. The Committee are of the view that signing of new BITs/Investment Agreements especially in priority/core sectors particularly with the countries with whom there were such treaties in the past should be encouraged while keeping in mind the need for balancing investment protection of foreign investors in the country and Indian investors abroad with India's regulatory power without compromising our national interests and priorities.*
>
> *(Recommendation No.1)*
>
> *1.26 The Committee are not satisfied with the progress of the negotiations of International Investment Agreements with 37 countries/blocks. Presently, negotiations are ongoing with 20 countries while it is still at the preliminary stage in respect of 15 countries/blocks. The Committee are*

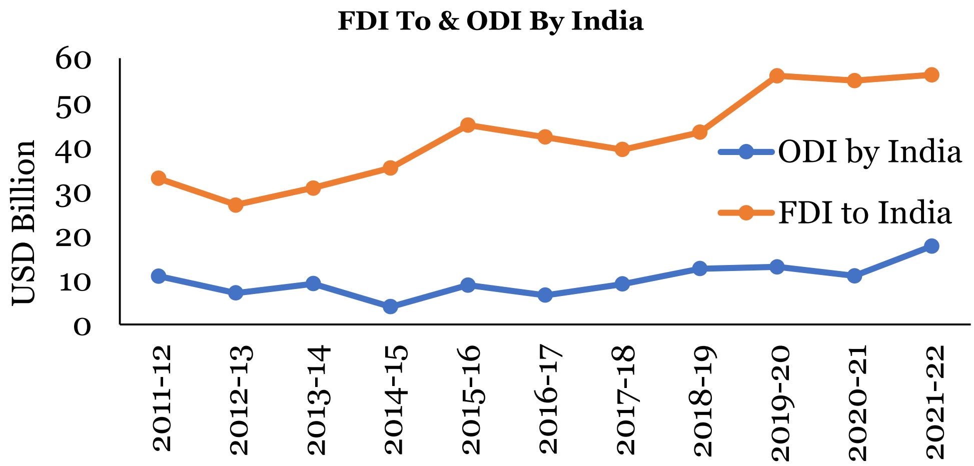
conscious of the realities of negotiations with sovereign Governments but are of the view that the long drawn out process of negotiations should be reduced especially if there appears to be limited areas of convergence. In view of the likely impact of such delays on investment, FDI inflow and increased production under the BIT regime, the Committee urge the Ministry to take pro-active steps and coordinate with the concerned Ministries/Departments so that negotiations are concluded and the agreements are finalized at the earliest.

(Recommendation No.2)[27]

The concern expressed by the Parliamentary Committee is indeed based on facts and should raise some level of concern in other parts of Indian polity and government. Taking into consideration the fact that more than 99.9% of the capital imported in to India and exported from India is not covered by any investment protection treaties, one can conclude that the post-2015 investor protection regime has failed to protect foreign as well as Indian investments and investors.

In unilaterally terminating BITs, India has failed to recognize the growing capital exports from India and the need to protect Indian investors venturing abroad. The following chart gives an overview of FDI into India and ODI from India.

Chart 8.1 FDI to India and ODI by India during 2011-22



[28]

[27] Reports India: Committee on External Affairs, 2021

[28] Based on data from Reports India: RBI, Handbook of Statistics on Indian Economy, 2022

One can see from the above chart that while ODI is much less than FDI, it is not insignificant. One can look at the total ODI from April 2000 to June 2023 summed up in the table and chart below:

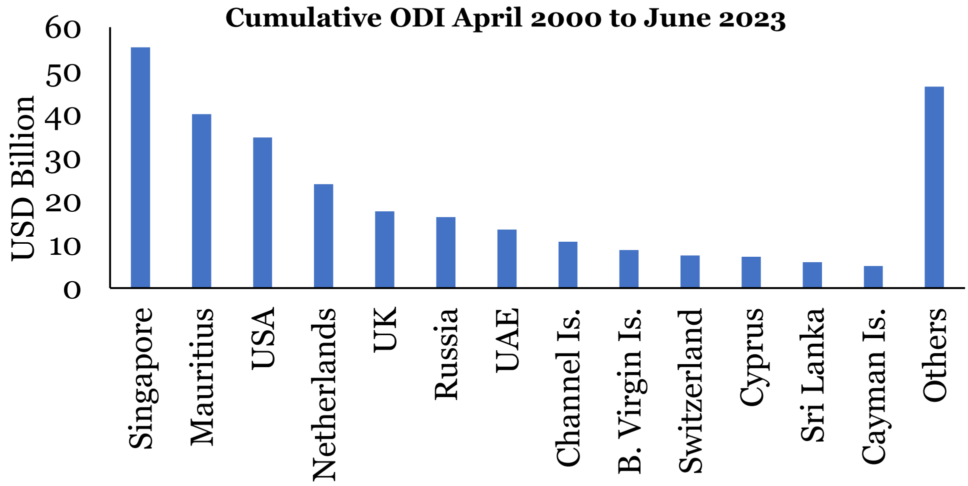
Table 8.2 ODI from India to various countries April 2000 to June 2023

Country	ODI USD Billion	As % of Total ODI
Singapore	55.44	19%
Mauritius	40.01	14%
United States of America	34.63	12%
Netherlands	23.93	8%
United Kingdom	17.68	6%
Russia	16.35	6%
United Arab Emirates	13.44	5%
Channel Island	10.58	4%
British Virgin Islands	8.72	3%
Switzerland	7.49	3%
Cyprus	7.13	2%
Sri Lanka	5.95	2%
Cayman Island	5.03	2%
GRAND TOTAL	**292.66**	**100%**

Based on Monthly Factsheet for June 2023[29]

[29] Reports India: Monthly Factsheet, DEA, GOI, 2023

Chart 8.2 ODI from India during April 2000 to June 2023



Based on Monthly Factsheet for June 2023[30]

One can see that the cumulative ODI in about two decades is about USD 293 billion, which is surely not an insignificant figure that India can afford to not protect. The top ten countries for ODI over the past three years are as follows:

Table 8.3 Top ten countries for ODI from India during 2021-22 to 2023-24

Country	ODI USD Billion		
	2021-22	2022-23	2023-24*
Singapore	4.48	2.18	3.98
Mauritius	1.36	1.13	0.06
United States of America	3.46	2.03	0.82
Netherlands	1.05	0.82	0.94
United Kingdom	2.35	2.80	0.40
Russia	0.57	0.20	0.00
United Arab Emirates	0.49	1.26	0.78
British Virgin Islands	0.30	0.28	0.10
Switzerland	0.45	0.32	0.28
Cyprus	0.34	0.00	0.00

[30] Reports India: Ibid.

Country	ODI USD Billion		
	2021-22	2022-23	2023-24*
Total ODI to Top 10 Countries	14.85	11.01	7.36
TOTAL ODI to All Countries	18.01	13.28	9.84

Note: Channel Island is not included in Top Ten for lack of data.
* Annualized based on April-June 2023 data.

Based on Monthly Factsheet for June 2023[31]

Notably, India does not have an investment protection treaty with any of the above-mentioned countries importing capital from India. This is a serious matter from the viewpoint of long-term national interest.

The texts of the four post-2015 BITs have clearly failed to appeal to the global community at large including both the developed countries and the developing countries. It is beyond the time and resources available to the authors of this book to get opinion of world leaders on what they have found objectionable or not-appealing in the Model Investment Treaty presented by India. However, a quick glance at the provision for FET (National Treatment) indicates that it falls significantly short of reasonable, fair and equitable treatment that investors, whether Indian or foreign, have come to accept as normal. The ISDS provisions are too cumbersome and appear to be creating roadblocks rather than encouraging investments. While the provisions related to investment, investor and expropriation, may not be as obnoxious as the ones related to FET and ISDS, the conspicuous absence of MFN is bound to be unacceptable to a world which has become used to third-country-parity.

One may conclude by saying that the text being pushed by India for bilateral investment protection treaties surely needs serious rethinking at the national level with participation from Indian business, investors, bureaucrats as well as law faculties of Indian universities and institutes.

[31] Reports India: Ibid.

Chapter 9
Concluding Remarks

Investment protection is an important matter, both from the viewpoint of assuring foreign investors coming to India and from the perspective of protecting Indian investors and investments stepping outside the country. On one hand, the country needs to project a good image globally; and on the other hand, India must protect her valuable assets abroad. An investment treaty serves both purposes and hence, is too important a matter to be left to the whims and fancies of either junior level bureaucrats or the political class. All sections of Indian society – including business houses, lawyers, judiciary, academicians, executive wing of Union of India and the Parliament – must actively deliberate on the subject.

India needs to introspect actively and publicly about the international investment arbitration awards that have gone against her. One must resist the temptation of treating every adverse award as an attack on the country. India is now a mature and strong country. It is not proper for such a country to adopt a victim mindset and treat everyone else as enemy with bad intentions. There may be genuine lessons to be learnt from some awards. For example, the message of White Industries (supra) that delay of nine years in judicial proceedings is not fair and equitable treatment should be taken positively and act as a prod to the country to improve the judicial system and to remove delays in judicial procedures. There may be other valuable lessons to be learnt from adverse arbitration awards that can be used for improving Ease of Doing Business in India.

The academic community, especially faculties of law, should not turn a blind eye to investment treaties (or for that matter other trade related treaties such as double taxation avoidance agreements, free trade agreements etc.). Indian universities and law institutes need to develop competence and capability in drafting and analyzing investment treaties. The community must study not only BITs and other treaties executed by India, but should also study such treaties by various countries globally. India cannot close herself from the global trends in treaty-making.

The academic community should also study on regular basis various international investment arbitration awards, whether involving India or not involving India. The community should develop expertise to educate, train and prepare legal professionals who can draft investment treaties as well as be involved with investment arbitration process both as counsel and as arbitrator.

Capacity building in all aspects related to international investment protection should be encouraged across board – in business houses, law firms, lawyers, universities, law institutes, bureaucracy, and parliamentarians.

The executive wing of Union of India should develop close relationship with the faculties of law who develop competencies and expertise as mentioned above to seek active support in drafting, negotiation and finalization of investment treaties. The relationship should extend further to assisting the counsels who are representing India in investment arbitration tribunals as well as before appellate forums across the globe. The executive may also take the help of academic community to advise about the performance of counsels in investment arbitration matters lost as well as won by India. Let there be an objective assessment of every victory and defeat to learn valuable lessons instead of the country indulging in knee-jerk reactions like unilateral termination of treaties.

Honourable Supreme Court and High Courts need to recognize international business and related arbitration matters as important parts of legal practice. The attitude that only lawyers who stand every day before their Lordships serve justice is clearly out of place in the modern global world. Lawyers who do international business and never appear before any domestic court must be recognized and duly honored. India cannot develop as an international center for investment and commercial arbitration unless Indian judiciary recognizes and respects international arbitration (investment and commercial) lawyers.

Parliament should act to amend the Advocates Act to enable due recognition of advocates (either as Senior Advocates or in some other form) who do not attend domestic courts but defend India's national interests by working before or as part of international arbitration tribunals.

Parliament should also assert itself and not let the executive treat investment treaties as unimportant documents. Each and every investment treaty must be placed before the Parliament and due deliberations must take place on the same.

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