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India's Reform of the Investment Regime

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Making BITs Less Biting: India's Reform of the Investment Regime

ABSTRACT

In response to increasing criticism of the existing international investment regime, various countries, including India, have been revising their model investment treaties. This paper analyses India's recently approved Model Bilateral Investment Treaty (BIT). It makes an assessment of the text's practical implications from the perspective of ongoing negotiations of investment agreements with several countries, as well as India's transition towards a capital-exporting country, with a growing volume of outward FDI. Offering an alternative to the flawed bilateral format, the paper concludes by encouraging a reform of the system at the multilateral level—and this, the paper argues, is an important opportunity for emerging economies to present a coordinated proposal for the future design of the investment regime.

INTRODUCTION

The traditional international investment regime, established over 50 years ago, has recently become the subject of growing criticism from many quarters. According to the UN Conference on Trade and Development (UNCTAD), at least 60 countries are currently reforming or have already revised their model international investment agreements (IIAs).[1] India is no exception. Following its first defeat in investment arbitration (the *White Industries* case[2]) and the flood of claims brought against it by foreign investors in the last few years, the government decided to rethink its existing investment obligations. After a more than four-year long review of its bilateral investments treaties (BITs), India's new Model BIT was approved by the Union Cabinet in December 2015. It is intended to serve as the basis for India's negotiations of future investment agreements as well as re-negotiations of existing ones.

Following an introductory section on the historical rise of BITs, the second part of the paper discusses India's approach to IIAs, including the investment arbitration disputes involving India. The subsequent three sections provide an analysis of the recently approved Model BIT from three different perspectives: i) the way it addresses the most controversial aspect of the existing investment regime, i.e.,the investor-State arbitration system; ii) its impact on India's ongoing negotiations of IIAs and FTAs with investment chapters with other countries, by comparing the Model text with the investment treaty practice of India's major trading partners; and iii) its effect on India's growing outward FDI flow. Finally, the paper concludes by encouraging a reform of the investment system at the multilateral level.

I. RISE OF BITs

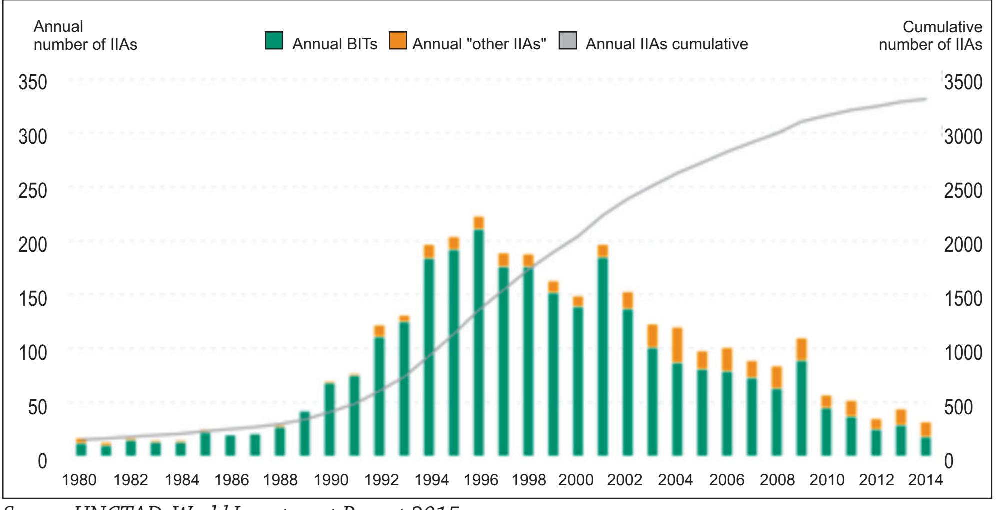
BITs are agreements signed between two countries in order to provide for reciprocal protection and promotion of investments in their territories. The concept of special rules to protect foreign business dates back to the times of Ancient Greece and the Roman Empire.[3] It was later developed to take a form of diplomatic protection, which a home country would extend over its citizens abroad, based on the principles of customary international law. During the colonial period there was no real need for a special regime for investments abroad, as they were primarily shielded by the military and political influence of the imperial powers. Following the dissolution of the colonial empires, the capital-exporting nations advocated the creation of a legal system protecting their investors abroad.[4] The expansion of the modern type of treaty-based international investment law took place in the post-colonial era, in response to the nationalisation of foreign investment by the newly independent countries, as well as the large-scale expropriation of private property which took place in the Soviet Union. The first BIT was signed between Germany and Pakistan in 1959.

By concluding an IIA, a country commits itself to guarantee specific standards of treatment to foreign investors in its territory. Traditionally, these included substantive obligations to provide foreign businesses with national treatment, non-discrimination, physical security, fair and equitable treatment, and liberal financial transfer procedures. Finally, reaffirming host States' right to expropriate investments, the treaties established that any taking of property must be conducted in the public interest, follow due process and entail payment of prompt and effective compensation based on market value.

The most important procedural evolution granted investors the right to directly challenge host States before international arbitration tribunals. The Investor State Dispute Settlement (ISDS) provision was, for the first time, included in the BIT signed by the Netherlands with its former colony, Indonesia, in 1968. It was intended to provide investors with a neutral forum to raise their grievances. It stemmed from the assumption that domestic judicial systems in developing host countries would not guarantee an independent, fair and reliable forum to adjudicate upon the complaints brought by foreigners. ISDS has gradually become a standard clause in the majority of investment treaties, whose number accelerated rapidly in the 1990s. Table 1 presents the expansion of IIAs and trade agreements with investment chapters. In 2015, there were 3,304 concluded IIAs.[5]

The burgeoning of IIAs was primarily attributed to the collapse of the Soviet bloc, interpreted as a 'triumph' of free market ideology. Also, the financial crisis of the early 1990s which dried up development aid funds resulted in a situation where the only capital available to developing countries was controlled by multinational corporations.[6] A large number of developing economies started entering into BITs with a desire to attract investment flows. In a 1992 document, Guidelines on the Treatment of Foreign Direct Investment, the World Bank argued that "a greater flow of foreign direct investment brings substantial benefits to bear (...) on the economies of developing countries in particular"[7] and encouraged creating a favourable and secure environment for such investments, as well as made institutional loans conditional upon domestic reforms based on economic liberalisation principles.

Table 1: Growing rate of IIAs till 2014



Source: UNCTAD, World Investment Report 2015

However, despite various studies, there is no conclusive evidence that IIAs actually stimulate FDI. This is particularly visible in the case of India, where a substantial volume of inward investment comes from the US, though no BIT has been concluded between the two countries. Similarly, Brazil has attracted a lot of FDI despite never ratifying any of its BITs. Again, the assumption of the necessarily positive impact of FDI on the host State's economy has been rejected. Incidents like the Bhopal disaster illustrate the potentially harmful effect foreign investments may have in a host country.[8] In addition, although both parties to the treaty formally assume reciprocal commitments, in practice, due to the traditional unidirectional flow of FDI, the obligations of a host State fall primarily on developing economies.

This has led to the realisation that BITs unduly favour foreign investors, granting them additional rights and legal protection not available to domestic businesses. It has been pointed out that by giving access to investor-State arbitration, IIAs provide foreign investors with additional privileges beyond the national treatment, while domestic players have to rely on the local judicial system alone to ascertain their rights against the State. Finally, foreign companies invest in new markets seeking lucrative business opportunities, and thus are reasonably expected to be well aware of the various risks related to entering a foreign country. On the other hand, a special regime designed for foreign investors has been justified on the ground that it ensures they remain compensated for the host State's political decisions which benefit its society, but could be simultaneously harmful to the economic interests of the investors. In other words, IIAs guarantee that foreign businesses are not the only ones paying the price of the host States' policies, pursuing public policy objectives. The lack of similar protection for domestic investors has been explained by the fact that local players, through the exercise of their political rights and regular voting processes, control their governments and indirectly participate in shaping the economic policies of their countries.

Finally, with the present change in the pattern of FDI flows, a growing volume of investment is directed to countries which historically played the role of capital-exporters. This has led to the realisation that developed economies are now being targeted by the investment protection rules, which they initially designed to protect their own investors in developing countries.[9] It may come as a paradox that Germany, a precursor of investment treaties having one of the highest numbers of concluded BITs, has recently been very vocal about its discontent with the system and, in particular, with investor-State arbitration.[10]

At the initial stage, BITs were viewed as instruments providing minimum guarantees against the host State's unfair treatment, with the investor-State dispute resolution mechanism as the investors' last resort in safeguarding their rights. However, following several arbitral awards of recent years, it appears that what was intended to constitute a minimum level of protection against outrageous or discriminatory treatment by host States has turned out to involve far-reaching concessions to foreign investors. This has induced a lively debate about the IIAs' economic and social effects and the limits they impose on host countries' policy space, as well as about eventual solutions to remedy the most pressing challenges of the current system.

II. INDIA'S BITs PROGRAMME

The Indian government's decision to rethink its existing investment treaty obligations came after its first defeat in investment arbitration (*White Industries* case) and the flood of claims brought by foreign investors against India in the last few years. According to UNCTAD, with 17 known disputes initiated against it by investors, India is the 12th most frequent respondent-State in investor-state arbitration (ISDS). The list of all publicly known investment claims filed against India is in Appendix 1.

Although a series of cases were brought by foreign investors against India after the government's repudiation of the power purchase agreement between the Maharashtra State Electricity Board and Dabhol Power Company, *White Industries v. India* was the first dispute which reached the final award. India was required to pay over $4 million in damages, after the investment tribunal found that it was unable to provide the investor, an Australian mining company, with effective means to assert its rights. The case concerned an arbitral award granted in favour of White Industries in a contractual dispute with Coal India, the State-owned mining entity. The investor tried to enforce the award through Indian courts, but was unable to get a final decision for more than nine years. The investment tribunal decided that judicial delays led to the breach of India's obligations towards a foreign company.

The second investment case, recently decided in favour of foreign shareholders is that of *Devas Multimedia*.[11] It concerns the cancellation of a telecommunications contract concluded by Devas with Antrix Corporation, the Indian State entity controlled by the Indian Space Research Organisation (ISRO). Under the contract, concluded in 2005, Antrix agreed to provide Devas with a segment of S-Band spectrum which it was supposed to use to offer digital multimedia services to remote areas in India. Following allegations of irregularities in the allocation of the spectrum and claims that the deal endangered national security, the government cancelled it in 2011. Although the reasoning of the investment tribunal leading to the decision and the extent of damages have not been announced yet, according to Devas's press release of July this year, the arbitrators found that the repudiation of the contract with Devas constituted an expropriation and a violation of fair and equitable treatment of foreign investors.[12] Devas claimed $1 billion as compensation. The cancellation has also led to another pending case against the Indian government brought under the India-Germany BIT by Deutsche Telekom, an indirect shareholder of Devas.[13]

Various investment claims were initiated in the so-called 2G scandal. Following the Supreme Court's finding that the allotment of spectrum was arbitrary, all 122 2G telecom licences issued in 2008 were cancelled. Although Norwegian telecom company, Telenor, has dropped its claim against India,[14] other foreign shareholders of Indian telecom companies, such as By Cell India[15] and Loop Telecom,[16] have brought arbitration cases which are currently pending resolution under the United Nations Commission on International Trade Laws (UNCITRAL) rules. Arguing that withdrawal of their licences constituted breach of investors' right to fair and equitable treatment which amounted to denial of justice as well as an arbitrary and discriminatory measure, the shareholders of By Cell and Loop Telecom have demanded compensation of $400 million and 1.4 billion, respectively.

Two other foreign investors, Vodafone and Cairn Energy, dragged India into arbitration over its retroactive taxation measure. In the first case, the tax authorities argued that Vodafone was liable to pay to India's exchequer over $2 billion for its 2007 takeover of the Indian telecom operations of Hutchison Whampoa. In 2012, the Supreme Court ruled that the deal was exempted from tax, yet Parliament responded by amending the Income Tax Act allowing the authorities to retroactively tax overseas M&A transactions involving transfer of Indian assets. The amendment led to an additional case brought by Cairn Energy. The UK oil company, in the pending dispute, demands $1 billion as compensation from India.[17]

The award in the White Industries case woke up Indian policymakers and provoked a debate about the potential risks behind BITs. Various critics argued that the case represented "an attack on judicial sovereignty" and advocated termination of all investment agreements as "damaging (to) the country's interests."[18] They also contested the need for a separate dispute resolution mechanism for foreign investors, while Indian citizens have to wait several decades for their grievances to be addressed by overburdened courts without any compensation for the delays, arguing that it was contrary to India's constitutional guarantee of equality.[19]

India's new model investment treaty, formulated after more than four years of review of its existing BITs, was approved by the Union Cabinet in December last year. The first draft was prepared by the Ministry of Finance and circulated at the beginning of 2015.[20] The final text is the result of consultations among various ministries as well as responses from the public. Although the text of the model IIA, due to the implications of such agreements on the national budget, is ultimately decided by the Ministry of Finance, the framework for foreign investors operating in India is laid down by different ministries. Certain aspects of FDI policy – for instance, finalising of BITs – fall within the jurisdiction of the Ministry of Commerce and Industry. Consequently, the likely opposing interests of various agencies, including budgetary considerations, the economic effects of inward FDIs as well as promotion of the interests of India's investors abroad, must be taken into account at the time of drafting and negotiating of BITs, rather than at the stage of their implementation. The most comprehensive, publicly available commentary on the draft model is that of the Law Commission of India in its report released in August 2015.[21] Recognising the need to review certain aspects of the existing investment framework, the Law Commission found that the draft failed to adequately strike a balance between rights of investors and the host State's regulatory powers. It suggested various amendments to the draft to bring it more in line with the government's agenda of increasing investments flows into the country, reflected *inter alia* by the 'Make in India' project. With several modifications to the initial draft, the Model BIT was approved by the Cabinet in December 2015.[22]

The Model is intended as the basis for India's negotiations of future investment agreements as well as re-negotiations of existing ones. Since the economic liberalisation of the early 1990s, India has entered into over 80 BITs. The majority of these agreements belong to the category of 'old-generation' BITs which were designed by the capital-exporting countries to protect their investors abroad. Although the relationship between BITs and the flow of capital has not been definitely established, India entered into such agreements to attract foreign funds. The new Model indicates the government still believes that BITs send a positive signal to foreign investors; however, it has simultaneously attempted to ensure that investment protection does not impair the State's regulatory powers.

III. VILLAIN OUT OF THE BOX?

The Model BIT seeks to address the major 'villain' of the current regime, i.e., investor-State arbitration. The ISDS, provided in the majority of BITs, is generally viewed as an investor-friendly dispute resolution mechanism. This is despite the fact that statistically, more judgments have gone in favour of States than investors (according to UNCTAD, out of 444 cases concluded by the end of 2015, only 26 percent saw rulings in favour of investors[23]) and an overwhelming majority of enforced BITs (over 90 percent as of 2015) have never been invoked in arbitration proceedings.[24] However, in many instances, disputes remain confidential, making a complete assessment of the success rate of investor-State cases difficult.

The ISDS is characterised as a system which prioritises speed and finality of resolving disputes over the process of legal reasoning.[25] The absence of a governing framework of the system has led to several arbitral tribunals reaching contradictory decisions in cases based on similar facts.[26] The secretive nature of the proceedings, which often involve matters of public interest—and can result in high monetary compensation for a private investor (the highest award is that of $50 billion to shareholders of Yukos in their cases against the Russian Federation[27])—adds fuel to the discussion over the legitimacy of the ISDS.

The sharp rise in the number of ISDS cases initiated against both developing and developed countries in the last two decades has sparked a debate over the soundness of the system and led various governments to announce their dissatisfaction with the existing state of play. According to UNCTAD's Investment Report, 70 new ISDS cases were initiated in 2015, which is a new record. Although this trend is usually attributed to the corresponding rise of global FDI flows, various analyses of the sectoral distribution of ISDS do not necessarily correlate with the sectoral allocation of overall FDI flows among different industry sectors. The studies reveal that there is a correlation between the countries most frequently dragged into arbitration and their poor scores on indexes measuring quality of legal systems, such as the World Economic Forum Index on Efficiency of Legal Framework.[28] It has been also argued that investment protection has gone out of control, with foreign investors benefiting from the flaws in the system in an opportunistic manner to compensate for lost profits.[29] Moreover, in practice, the privilege of ISDS is available predominantly to multinational corporations, which are financially equipped to bear the costs of international litigation. This has led to instances when substantial arbitral awards have had to be paid to multinational companies by taxpayers from developing countries, an award of $1.8 billion in the case brought by Occidental Petroleum against Ecuador approximates the country's annual health budget.[30]

In particular, there is resistance to the system due to the arbitrators' alleged conflict of interest, combined with the lack of independence and impartiality of the tribunals. The ISDS is administered by a small group of lawyers specialising in the field, who in some cases act as counsel representing private investors and in others are appointed as arbitrators.

Given the significant costs of the litigation, including representation and arbitrators' fees, it has been argued that international investment arbitration has been turned into a lucrative business for the legal practitioners. Since the ISDS mechanism can be initiated only by the investors – there is no reciprocal right under IIAs for a State to initiate an arbitration case against an investor – it has been argued that arbitrators have material incentive to rule in favour of foreign investors to preserve the current system. The Corporate Europe Observatory in its report on ISDS argued that "if an arbitrator's main source of income and career opportunities depends on the decision of companies to sue, we should wonder how impartial their decisions are."[31] On the other hand, it has been also put forward that arbitration, as a system based on the principle of party's autonomy, gives equal rights to both parties in the dispute to appoint their preferred arbitrators.[32] Consequently States have an equivalent privilege to decide who will sit in the arbitration panel.

Finally, it has been argued that international investment arbitration, which derives from commercial arbitration, does not constitute a proper forum to adjudicate upon issues involving a state's regulatory powers and that as a result it limits governments' rights to legislate on sensitive matters of public concern. In the *Vattenfall v Germany* case, the energy company demanded $5.14 billion as compensation for Germany's decision to phase out all its nuclear power plants shortly after the Fukushima nuclear incident of 2011. Recalling that investments in high-resource industries, such as the energy sector, are based on long-term planning and require commitment of significant amounts of money, Vattenfall sought damages for the loss of value of its investment caused by the regulatory change. Without undermining Germany's sovereign right to reorient its energy policy, it argued that the foreign investor should not be the only one paying the price for such a decision.[33] In cases brought by *Philip Morris*, the investor argued breach of fair and equitable treatment obligation and indirect expropriation by depriving it of its intellectual property right, when Australia and Uruguay passed plain packaging legislation requiring that cigarettes be sold in standardised packaging showing no trademarks. Before the cases were resolved in favour of the host States, it was pointed out that the simple threat of initiating ISDS lawsuits and claims of large compensations can have "a chilling effect" on countries by dissuading them from regulating in the public interest. In *Lone Pine Resources v Canada*, a private company questioned the host government's decision to cancel its natural gas exploration permit after concluding that the project would be harmful to the environment. It argued that the decision constituted an indirect expropriation of its investment as well as breach of fair and equitable treatment. These are just a few recent examples underlining the peril of using a BIT to challenge a State's regulatory powers.

The judicial evolution of expanding investors' rights has made some experts, like Lori Wallach, director of Global Trade Watch refer to arbitration as "a quiet, slow-moving coup d'état."[34] In a debate concerning inclusion of the ISDS clause in the negotiated Transatlantic Trade and Investment Partnership (TTIP), Ska Keller, Member of the European Parliament, Green Party, said that "democratic decision-making is forcefully going under the knife through international arbitration. The accused states have only two options: either they can be like others and take back the decisions they have made, or they can pay huge sums in compensation to the investor."[35]

There is thus recognition that BITs initially intended to signal that a country is open to foreign investors and will provide them with basic standards of treatment, have now been twisted by the investors, pushing for the sweeping interpretation of various treaty standards, and limiting the State's ability to legislate. In turn, this has led countries to take steps necessary to ensure that IIAs do not undermine their policy space for regulating in the public interest, e.g., on health- or environment-related matters. A comparative study of 'new generation' BITs conducted by UNCTAD reveals that a growing number of countries decided to "include specific language in their BITs, aimed at making it clear that the objective of investment promotion and protection must not be pursued at the expense of other key public policy goals, such as the protection of health, safety, the environment and the promotion of internationally recognized labour rights."[36]

Investment arbitration has also been criticised for permitting broad interpretation of investors' rights enshrined in the treaties, such as fair and equitable treatment or indirect expropriation. One way to restrain arbitral discretion is to eliminate vagueness in BIT provisions which in the past led to controversial, and often diverging, opinions by the tribunals.

Apart from clarifying the meaning of investors' standards of treatment – e.g., by explicitly limiting the obligation to provide 'full protection and security to foreign investors' to physical security alone – India's new Model BIT contains an elaborate list of economic, social and environment exceptions intended to ensure States' rights to pursue public welfare objectives. The Model also provides that certain measures, including taxation, government procurement, measures taken by local governments and, to a certain extent, compulsory licences, remain out of the ambit of arbitration tribunals. Even further, the Model BIT stipulates that laws and decisions related to taxation are non-justiciable, i.e., if a host State argues that a contested measure is taxation-related, an investment tribunal will not be able to review such a decision.

These carve-outs constitute a clear response to the pending arbitration cases filed by foreign investors in response to the retroactive amendment of the Income Tax Law. It also goes against the jurisprudence of investment tribunals which, like in the *Yukos* case,[37] established that in extraordinary circumstances the host State's actions taken under the guise of taxation may actually amount to indirect expropriation. Similarly, the Model BIT provides that any measure adopted by the host State for the protection of its 'essential security interests', including the country's self-judging decision that a measure constitutes a security measure, is exempt from any judicial review. The provision relating to security exception is a reaction to the *Antrix-Devas* dispute, where India's argument that revocation of the contract was essential for its national security, has been rejected by the arbitration tribunal. Such non-justiciable exceptions, however, enhancing the State's regulatory powers, could lead to abusive interpretations and misuses. Interestingly, the issuing of compulsory licences and other IPRrelated issues have not been entirely removed from the ambit of the Model treaty. Instead, the exclusion is limited to measures which are consistent with WTO law. Consequently, it provides investment tribunals with the jurisdiction to assess compliance of compulsory licenses issued by Indian courts with the WTO's Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement. It is particularly relevant in the light of the currently pending *Eli Lilly* case brought by the pharmaceutical company which argues that the decision of Canadian courts to invalidate patents of two of its drugs does not meet international standards and thus amounts to expropriation under the IIA.

Despite significant criticism of investor–State arbitration, the Model BIT maintains it as the mechanism for settlement of disputes. Yet in order to address some of the concerns, it introduces various conditions, making it more difficult for an investor to initiate a lawsuit. Most importantly, it requires foreign investors to exhaust domestic remedies before taking recourse to international arbitration. An investor is obliged to pursue local remedies for at least five years before it can commence ISDS proceedings. Given India's infamous backlog of cases (with the longest case pending before the courts dating back to the 19th century[38]), reflected in its poor score in the World Bank's ease of enforcement of contracts ranking, such a requirement will almost certainly be difficult to swallow for foreign businesses. Further, it explicitly bars investors involved in corruption from pursuing claims against the State although it does not specify what is required to prove corruption. It goes in line with earlier jurisprudence on the matter. Investment tribunals repeatedly decided that engagement in bribery disqualified investors from benefiting from legal protection.[39] However, in its report on the draft Model BIT, the Law Commission has indicated that the non-corruption obligation is “toothless without complementary obligations upon the host State, such as the requirement of transparency and competition in public procurement and decision-making.”[40] Following the North American Free Trade Agreement (NAFTA) example, it also allows both host and home countries to issue binding joint interpretations of specific provisions and decisions on the interpretation of the BIT. These may also be issued at the request of the arbitration tribunal. Finally, the Model text includes important provisions permitting third parties to submit interventions (*amicus curiae*) as well as ensuring transparency of arbitration procedure and independence of arbitrators. The former is particularly relevant in cases where a tribunal adjudicates upon issues of public concern, allowing civil society to voice its view.

The Model text is a clear reaction to India's first lost battle and several pending cases in investment arbitration. Its primary objective is to ensure sufficient regulatory space and shield the government from future investors' claims.

IV. QUO VADIS, MODEL BIT?

The recently adopted Model BIT, with its numerous creative innovations, constitutes an important step towards much required reform of the current investment regime, yet its practical implications remain questionable. India is currently negotiating IIAs and Free Trade Agreements (FTAs) with investment protection chapters with several countries, including the US, Canada, Australia, New Zealand and the EU. Moreover, the finance ministry has lately served notices to over 40 countries informing them about the government's intention to terminate their existing BITs and re-negotiate new ones on the basis of the approved Model. Although it is said that the latest BIT concluded with Cambodia complies with the new Model,[41] it is not clear to what extent India will be able to incorporate its provisions into other negotiated agreements.

Despite a growing consensus among many countries on the need to reconcile rights of investors with States' regulatory powers, India's Model BIT tilts this balance in favour of the host country's interests. A quick comparison with model investment agreements of other countries as well as their recent treaty practice indicates that India's new text significantly departs from the practice of its partners. Appendix 2 compares selected features of India's Model BIT with the investment provisions included in the recently signed Trans-Pacific Partnership (TPP) Agreement,[42] the investment chapter proposed by the EU for the TTIP and already accepted in its Comprehensive Economic and Trade Agreement (CETA) with Canada,[43] as well as China's recent IIA with Canada.[44]

The first manifest difference concerns the range of investments protected under the BIT. The text of India's Model agreement limits its coverage by adopting a narrow enterprise-based definition of an investment; it also contains an undefined requirement that the investment should contribute to the development of the host country's economy. By doing away with the predominant practice of industrial countries which favour an asset-based definition of investment, it excludes portfolio investments or goodwill from the scope of the treaty.

Another salient feature of the approved Model is the absence of the most favoured nation (MFN) clause, which is intended to counter discrimination among foreign investors. The rejection of the MFN provision clearly reflects India's experience from its loss of the White Industries case, in which the Australian company invoked the MNF clause from the India-Australia BIT to benefit from the more favourable rights of investors provided in India's BIT with Kuwait. This treaty-shopping was criticised by India as it fundamentally subverts the carefully negotiated balance of individual BITs. While the investment chapter proposed by the EU for TTIP and already incorporated in CETA also limits the possibility of foreign investors taking recourse to agreements with third countries to obtain more advantageous substantive provisions, both the US Model BIT as well as the TPP Agreement include quite a broad MFN clause.

The Model also does away with the obligation to provide foreign investors with fair and equitable treatment, which is one of the most frequently invoked standards of treatment in the ISDS, with the majority of successful cases based on claims of infringement of this provision. Despite its recognised popularity, the exact meaning of the standard is still far from clear. Controversy surrounds the diverging jurisprudence on the issue, with some tribunals arguing that fair and equitable treatment reflects the minimum standard prescribed in international customary law, while others see it as setting up a separate and more expansive standard of treatment. Article 3 of the Model text appears to substitute the controversial fair and equitable treatment with a prohibition of subjecting foreign investors to measures inconsistent with customary international law, i.e., denial of justice and due process, discrimination or manifestly abusive treatment. Given the evolving nature of customary international law, this attempt to limit arbitral discretion may appear counterproductive in the long run. In comparison, other countries, though maintaining the fair and equitable standard in their BITs, have also aimed at clarifying and limiting its scope. In the TPP, the parties explicitly linked it with the minimum standard of treatment under customary international law, whereas the EU proposal for the TTIP, included in the CETA, specifies a closed list of instances – similar to those provided in the Model text – which amount to a breach of the standard. Moreover, both the TPP and the EU texts refer to protection of the investor's legitimate expectations, which is not included in India's Model.

Finally, there is a significant difference in the approach towards extending investment protection to the pre-establishment stage. Although traditionally, under the European BITs, national treatment kicks in only after the investment has been established in the host country, the recently concluded CETA includes the pre-establishment phase under the market access and national treatment provisions. Also, in line with long pursued US practice, the TPP extends its investment provisions to the pre-entry stage.

The following analysis indicates a significant discrepancy between India's Model BIT and those of its partners. In particular, the divergences between the India's new text and the US' practice seem to have further postponed wrapping up of the ongoing negotiations with the US. Although, in the India-US Joint Statement of January 2015, President Barack Obama and Prime Minister Narendra Modi affirmed a “shared commitment to facilitating increased bilateral investment flows and fostering an open and predictable climate for investment [and] moving forward with high-standard bilateral investment treaty,"[45] the Model text has been viewed by the US as a step back from the objective of the high-standard agreement.[46] Referring to the prospects of the future bilateral treaty, the US Trade Representative was quoted as saying that such an agreement could only be concluded if it is in keeping with the standard of other treaties the US negotiated in the region.[47]

In this context, the TPP and its investment chapter, should it ultimately go through and enter into force in the post-US election scenario, is of particular importance. The agreement is likely to constitute a vehicle for norm-setting, shaping future rules governing investments in the regional and multilateral context. The TPP disciplines are expected to influence the ongoing as well as future negotiations of BITs and comprehensive FTAs. Non-participating countries like India will also inevitably be affected, both in terms of envisaged decrease of future inward FDI flows—as foreign investors may opt to locate their operations in TPP economies to reap the benefits of deeper economic liberalisation—as well as its negotiating strategy for new IIAs. This is particularly important in the light of the stringent commitments incorporated in the TPP which, apart from already discussed standards of treatment, also includes comprehensive provisions intended to ensure equal treatment between State-owned enterprises (SOEs) and foreign investors.[48] The TPP disciplines, in particular regarding SOEs, reflect the US' attainment of a critical mass of countries ready to adopt norms, which in the long run may serve as templates for negotiations of future agreements.

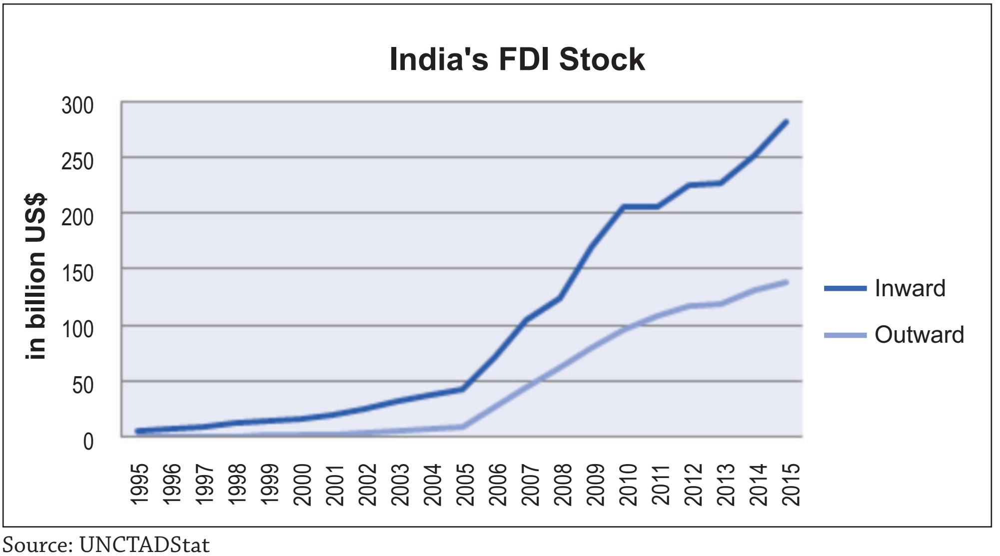
In addition, uncertainty persists over the negotiations of new IIAs intended to replace existing agreements with the EU countries. These include treaties with some of the major investors in India which are also important destinations of India's outward FDI flows, i.e., the UK and Germany. Apart from expressing dissatisfaction with India's decision to terminate current agreements with EU Members, stating that "the unilateral termination of the existing BITs by India would entail serious consequences. It would create a gap in investment protection and consequently discourage EU enterprises from further investing in India,"[49] the EU Trade Commissioner in her letter to India's Ministers of Commerce and Finance pointed to a major legal constrain in concluding new agreements. Pursuant to the EU Lisbon Treaty of 2009, the protection of foreign investments has become an exclusive EU competence which in turn prohibits the EU Member States from negotiating individual BITs. Yet, considering the extensive framework of BITs already concluded by the European countries and the significant time it would take for the EU to conclude new investment agreements, a transitional solution has been adopted, giving the Member States a certain degree of leeway to ensure that European investments abroad benefit from the legal protection. The EU Regulation[50] allows the EU countries, in specific circumstances, after obtaining prior authorisation from the European Commission, to amend their existing bilateral BITs and conclude new ones. The authorisation can be refused *inter alia* when the negotiations of a BIT by an individual EU Member State are superfluous because the Commission has in any case submitted or decided to submit a recommendation to open negotiations with the third country, or would constitute a serious obstacle to the negotiations or conclusion of an IIA with the third country by the EU. In this context, the envisaged EU–India Bilateral Trade and Investment Agreement (BTIA), envisaged to include an investment chapter, will stand in the way of individual Member States concluding separate BITs with India. Although the swift conclusion of the FTA, negotiated since 2007, is rather unlikely in the near future, according to the EU Commission the "discussions have resumed since January 2016 with the purpose of assessing whether sufficient progress can be made in key outstanding issues before formally resuming negotiations."[51] It thus appears that the ongoing formal FTA talks would constitute an impediment for individual EU Member States to even start negotiating new BITs with India.

Despite recognising India's impressive economic growth and status of a preferred investment destination which puts it in a position to dictate the conditions for investing in its territory, various countries expressed reservations over several features of the Model BIT, indicating that they hoped that India would remain flexible and use the Model text only as a starting point for negotiations.

V. INDIA'S GROWING OUTWARD INVESTMENTS LEFT OUT

Finally, the question arises as to what extent the newly approved Model protects the interests of Indian companies investing abroad. The text has clearly been drafted with the objective of securing the rights of the government vis-à-vis foreign investors; however, India is no longer solely a capital-importing country. In recent years, it has become an important exporter of capital, with the stock of its investment outflow amounting to almost half its inward FDI. India's outward stocks accounted for almost $140 billion in 2015. Table 2 indicates the trends of India's inward and outward FDI flows in the last two decades.

Table 2: India's FDI trend



Source: UNCTADStat

A majority of India's outward FDI flow is directed towards developed countries which generally maintain reasonably sound legal systems offering adequate protection for investors. However, there is also a growing appetite among Indian companies to explore opportunities in developing economies, where the legal and judicial regime may be offering lower level of security to foreign businesses. With $15 billion of FDI stocks, India was the eighth top investor economy in Africa in 2014. Motivated by prospects of significant financial gains, India's corporations are increasingly active in the continent. Bharti Airtel, for example, is expanding its operations in developing countries in Africa and Asia. In Nigeria alone it has invested over $1.7 billion between 2010 and 2014.[52] Also, Indian outward FDI flows to Bangladesh were encouraged during Prime Minister Modi's visit to Dhaka in June last year. The two countries concluded a Memorandum of Understanding which facilitates establishment of special economic zones designated exclusively for Indian investors in Bangladesh. The announced $2 billion line of credit to Bangladesh will also offer investment opportunities for Indian firms.[53] Yet, both Nigeria and Bangladesh struggle with maintaining an investor-friendly environment: Nigeria has been ranked 14th and Bangladesh 13th in the list of most corrupt countries in the world, in the Transparency International Corruption Index. In judicial independence, Bangladesh was 130th and Nigeria 96th out of 140 economies, based on the Global Competitiveness Report. Broad investment treaty protection would benefit Indian companies investing in these countries.

In addition, relying on the already concluded IIAs, Indian investors are increasingly referring to the ISDS mechanism. The number of arbitration claims initiated by Indian investors remains modest in comparison to those by developed countries. UNCTAD has recorded three cases of Indian companies seeking arbitration while US investors brought 138 claims. Yet, China, with outward FDI stocks seven times higher than India's (i.e. over $1 trillion in 2015), has only four such cases.[54] The first two Indian claims were brought against developed economies. The first dispute, initiated in 2000 against Germany, has been settled,[55] while the outcome of the second case,[56] against the UK, is not publicly available. The latest dispute was initiated against Indonesia by India Metals & Ferro Alloys (IMFA) in 2015.[57] The mining company acquired a concession to develop a coal mine in Central Kalimantan, Indonesia, for over $8.7 million in 2010. However, following Indonesia's decentralisation reform, which provided local administration with powers to issue permits for mining activities in their jurisdictions, it turned out that the Central authorities had been granting overlapping mining concessions in the same areas. As a result of conflicting licences, IMFA argued that it was unable to pursue its mining operations. Relying on the provisions of the India-Indonesia investment protection agreement concluded in 1999, IMFA demanded almost $560 million as compensation from Indonesia. The case is currently pending before the Permanent Court of Arbitration in The Hague.

Despite India's outward FDI flow being projected to accelerate in the future, it seems that the interests of Indian investors abroad are not duly reflected in the approved text of the Model IIA. Instead, its main objective is to protect the country from claims of foreign corporations. It appears that the changing economic landscape has yet to induce India's recalibration of its national interests in the field of investment law.

VI. TOWARDS A MULTILATERAL FRAMEWORK

Notwithstanding several shortcomings, the Model BIT constitutes an important contribution to the global debate on the future of the international investment regime, with almost 60 countries currently revising their model IIAs. There is a reviving conviction that universal rules for investments are necessary for a comprehensive reform of the system. Moreover, it is perceived that, in contrast to bilaterally negotiated treaties, the multilateral platform offers developing countries more bargaining leverage. This will ensure that the emerged framework remains sustainable and development-oriented.

Accounting for a significant share of world FDIs, BRICS countries have a particular opportunity to initiate key reforms of the existing investment regime which could further shape the foundations of the global framework. According to World Investment Report, in 2015, the group received $256 billion of investment inflows, i.e., 15 percent of the world's total, and held $2.4 trillion worth stock, i.e., nine percent of global share. BRICS countries are also rapidly increasing their investments in other countries. In 2014, together they held 14 percent of the world's outward FDI stock (Table 3). Their intensified cooperation in the field of international arbitration, reflected by the already existing BRICS Dispute Resolution Shanghai Centre and the Conference on International Arbitration in BRICS hosted by India, provides an important opportunity for the five major emerging economies to launch a proposal for the future multilateral framework for resolution of investment disputes.

Table 3: BRICS FDI Stock, 2014 (in billion US$)

FDI Stock	Brazil	China	India	Russia	South Africa	BRICS Total
Inward	755	1,085	252	377	145	2,616
Outward	316	730	130	432	134	1,741

Source: UNCTADStat

Although the significance of a common position among these five major FDI destinations should not be underestimated, it appears that there is no uniformity among BRICS countries on the level of protection required for foreign investors. Their individual approaches towards investment agreements seem to be developing in different directions.

At one extreme, South Africa decided to terminate several of its BITs, in particular with the European countries, after an Italian investor challenged the country's mining law introduced as part of national policy aimed at rehabilitation of apartheid's victims. Instead, it adopted domestic legislation which ensures equal treatment of foreign and domestic businesses and requires exhaustion of domestic remedies before the State consents to international arbitration. At the same time, Brazil, though it has never enforced any of its 20 signed BITs,[58] has recently developed a new model IIA. Apart from traditional standards of treatment, it sets forth new features intended to prevent disputes between foreign investors and host States such as an ombudsman/focal point, which is expected to act as intermediary between investors and the host country, or a joint committee, made up of government representatives from both countries and the private sector. Interestingly, the model mentions arbitration as a mechanism for the resolution of conflicts between States, yet it does not allow foreign investors to initiate arbitration cases directly against the State.

Finally, with China emerging as a major source of outward investments, its approach to international investment law has evolved profoundly. From the defensive position of a host State, it became a home country of FDI with an agenda to promote and protect operations of its investors abroad. The recent change in its position is reflected in the ongoing negotiations of its IIA with the US, initiated in 2008. Both countries announced that they aimed at an ambitious high-standard BIT. It appears that China has also agreed to negotiate the agreement on the basis of a 'negative list' approach to the pre-establishment national treatment.[59] This is something it has traditionally been resistant to; even quite recently, it rejected granting any pre-entry rights under its BIT with Canada, concluded in 2012.

China has also indicated its desire for an active rule-making agenda at the multilateral level. This is exemplified by its latest initiative, under its presidency of G20, to create the G20 Trade and Investment Working Group. Any universal agreement on investments should ideally be anchored in the WTO, as it already provides substantive rules for various aspects of investments, but due to the current stalemate in Geneva, it might be more pragmatic to initiate the talks in another forum. Comprising the major economies of the world, the G20 could provide a good platform to establish the foundation for a subsequent multilateral framework. As a first step in promoting global investment policy cooperation, trade ministers at the meeting of the G20 Trade and Investment Working Group held in Shanghai in July 2016 endorsed the Guiding Principles for Global Investment Policymaking. Reaffirming host States' right to regulate for legitimate public policy purposes, the Principles also recognise that investors should be granted strong protection with access to an effective dispute settlement mechanism. Further, they encourage the international community to "cooperate and engage in dialogue with a view to maintaining an open and conducive policy environment for investment, and to address shared investment policy challenges".[60] It appears that G20 provides a forum where a coordinated BRICS position on the future architecture of the investment framework could be particularly effective.

CONCLUSION

The existing investment regime was designed in the period marked by substantial power asymmetries between developed/capital-exporting and developing/capital-importing economies. This North-South division stemmed predominantly from the traditional single-direction flow of FDIs. Presently, outward investments from the emerging economies account for a significant share of world FDIs to both developed and developing countries. This convergence of interests between home and host countries has been reflected in China's recalibrated position towards IIAs. In comparison, India's new Model BIT still predominantly focuses on preserving its interests as a host State.

The Model text quite significantly departs from the treaty practice of its major trading partners. Depending on the level of flexibility that India exercises during the negotiations of future IIAs and the comprehensive FTA with investment chapters, it appears likely that, due to these disparities, other countries may prefer to refrain from concluding any agreement, rather than entering into a treaty which lowers the level of investment protection. Nevertheless, the Model should not be expected to have a major effect on the flow of inward FDI to the country. Given that the link between the flow of FDI and BITs has never been definitively established, it appears that foreign investors would rather take into account India's spectacular economic growth, increasing domestic consumption capacity and preferred investment destination status when taking decisions to locate their operations in India. These positive economic indicators give India an advantageous position in deciding on the conditions under which foreign investors can enter the market.

Despite India's historic resistance to global agreements on investments, the multilateral forum appears to be a preferred path to resolve the challenges of the existing investment system. In order to ensure sustainable development and inclusive growth, a coherent investment policy should strike a fair balance between creating a conducive investment environment, with the adequate level of protection to foreign investments, and the host States' right to regulate in the public interest. As a starting point, G20 offers an important opportunity for the emerging economies to present a coordinated proposal for the future structure of the investment regime.

Appendix 1: List of investment arbitration cases initiated against India

Sr	Case	Year of initiation of the case	Measure that gave rise to the dispute	Investor's Home State	Outcome	Compensation (awarded/ claimed)
1	Cairn Energy PLC v. Republic of India	2015	Retrospective tax	United Kingdom	Pending	$1 billion (claimed)
2	Louis Dreyfus Armateurs SAS v. Republic of India	2014	Government's measure which prevented the effective implementation of a joint venture related to a port modernization project at Haldia, West Bengal	France	Pending	$11 million (claimed)
3	Vodafone International Holdings BV v. Republic of India	2014	Retrospective tax	Netherlands	Pending	N/A
4	Deutsche Telekom v. Republic of India	2013	Government's cancellation of a satellite contract concluded by Devas with Antrix, a state-owned enterprise	Germany	Pending	N/A
5	Khaitan Holdings Mauritius Limited v. Republic of India		Supreme Court's decision to cancel telecom licence and allocation of 2G spectrum held by Loop Telecom	Mauritius	Pending	$1.4 billion (claimed)
6	CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India	2013	Government's cancellation of a satellite contract concluded by Devas with Antrix, a state-owned enterprise	Mauritius	Pending compensa-tion award	$1 billion (claimed)
7	Tenoch Holdings Limited, Mr. Maxim Naumchenko and Mr. Andrey Poluektov v. The Republic of India	2012	Supreme Court's decision to cancel telecom licence and allocation of 2G spectrum of ByCell India	Russian Federation and Cyprus	Pending	$400 million (claimed)
8	White Industries Australia Ltd v. The Republic of India	2010	Judicial delays left the claimant unable to enforce an earlier arbitral award against Coal India, a state-owned mining entity	Australia	Decided in favour of the investor	$4 million awarded (claimed: $8.8 million)

9	ABN Amro N.V. v. Republic of India	2004	Government's alleged failure to protect investor's loans associated with the financing of the Dabhol energy project in Maharashtra	Netherlands	Settled	Non-pecuniary relief (claimed: $42.8 million)
10	ANZEF Ltd. v. Republic of India	2004	Government's alleged failure to protect investor's loans associated with the financing of the Dabhol energy project in Maharashtra	United Kingdom	Settled	Non-pecuniary relief (claimed: $42.8 million)
11	BNP Paribas v. Republic of India	2004	Government's alleged failure to protect investor's loans associated with the financing of the Dabhol energy project in Maharashtra	France	Settled	Non-pecuniary relief (claimed: $42.8 million)
12	Credit Lyonnais S.A. (Calyon S.A.) v. Republic of India	2004	Government's alleged failure to protect investor's loans associated with the financing of the Dabhol energy project in Maharashtra	France	Settled	Non-pecuniary relief (claimed: $42.8 million)
13	Credit Suisse First Boston v. Republic of India	2004	Government's alleged failure to protect investor's loans associated with the financing of the Dabhol energy project in Maharashtra	Switzerland	Settled	Non-pecuniary relief (claimed: $42.8 million)
14	Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India	2004	Government's alleged failure to protect investor's loans associated with the financing of the Dabhol energy project in Maharashtra	Austria	Settled	Non-pecuniary relief (claimed: $42.8 million)
15	Standard Chartered Bank v. Republic of India	2004	Government's alleged failure to protect investor's loans associated with the financing of the Dabhol energy project in Maharashtra	United Kingdom	Settled	Non-pecuniary relief (claimed: $42.8 million)
16	Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power Investments B.V. v. Republic of India	2004	Repudiation of the Power Purchase Agreement signed by the Maharashtra State Electricity Board with the Dabhol Power Company	Netherlands	Settled	Non-pecuniary relief (claimed: $4 billion)
17	Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v. The Government of India	2003	Repudiation of the Power Purchase Agreement signed by the Maharashtra State Electricity Board with the Dabhol Power Company	Mauritius	Settled	$160 million ($1.2 billion sought)

Appendix 2: Comparison of selected features of India's Model BIT with other agreement

	India's Model BIT	TPP	EU proposal for TTIP/CETA	China-Canada IIA
Definition of investor	Enterprise-based definition	Broad asset-based definition	Broad asset-based definition	Closed list asset-based definition
Fair and equitable treatment	N/A Instead prohibits measures inconsistent with international customary law (denial of justice and due process, discrimination or manifestly abusive treatment)	Included, as international law minimum standard of treatment	Included, but limited by closed list of instances which constitute a breach	Included, as international law minimum standard of treatment
Investor's legitimate expectations	N/A	Included, but cannot be invoked as an independent ground for breach of fair and equitable treatment	Included, limited to situations where a specific promise or representation was made by the host State.	N/A
Pre-establishment rights	Excluded	Included	Included	Excluded
Most-favoured nation	N/A	Included, with the exception of dispute resolution mechanisms	Included, with the exception of dispute resolution mechanisms. Substantive provisions of other treaties requiring implementing measures adopted by the host State to constitute 'treatment'	Included, with the exception of dispute resolution mechanisms
Full protection & security	Included, but limited to physical security	Included as international law minimum standard of treatment	Included, but limited to physical security	Included as international law minimum standard of treatment

Expropriation	Included, but non-discriminatory legitimate public policy measures do not constitute expropriation	Included, but except in rare circumstances non-discriminatory legitimate public policy measures do not constitute expropriation,	Included, but except in rare circumstances non-discriminatory legitimate public policy measures do not constitute expropriation	Included. but except in rare circumstances non-discriminatory legitimate public policy measures do not constitute expropriation
General exceptions	Includes an elaborated list of exceptions and several care-outs	Safeguard clause for regulatory measures 'otherwise consistent' with the investment chapter; carve-out for tobacco control measures	Incorporates GATT Article XX and GATS Article XIV-type general exception clause	Includes elaborated general exception clause
Investor - State arbitration	Included, but requires an investor to pursue local remedies for at least five prior to initiating arbitration proceedings	Included	Included, through a permanent investment tribunal and an appellate tribunal	Included. China requires an investor to pursue the domestic administrative reconsideration procedure for four months prior to initiating arbitration proceedings

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