Chapter 4.3

India's Tryst with Investment Arbitration

by Chirag Balyan and Nausha Naik

A. INTRODUCTION

India's Bilateral Investment Treaty (BIT) program is nearly three decades old. Pursuant to India's economic liberalization policy, in the year 1994, India signed its maiden BIT with the United Kingdom (UK). The India-UK BIT was premised on the "capital exporting model"[1] and was rooted in the Organization for Economic Cooperation and Development's 1967 Draft Convention for the Protection of Foreign Property.[2] India published the text of its first Model BIT in the year 2003.[3] The 2003 Model BIT was inspired by the 1993 India-UK BIT but the two treaties have some notable differences.[4] Meanwhile, India has signed 87 BITs. Out of these 87 BITs, 83 were signed before 2015 and 74 have entered into force.[5] In addition, between 1993 and 2014, India signed 13 treaties with investment provisions such as the India - Japan CEPA, the India - Republic of Korea CEPA, the India - Singapore CECA, etc.[6]

India's tryst with investment arbitration in the post-independence era can be divided into the following phases:

Phase 1 (1947-1990): Before the advent of economic liberalization in 1991, India was 'protectionist' in its approach though not completely averse to the idea of foreign investment.[7] One of the reasons for this could be the negative experience of the colonial era. Prabhash Ranjan describes this era as the 'phase of economic nationalism'.[8] India showed reluctance to sign any BIT in this period but

---

1 Aniruddha Rajput, *India's Shifting Treaty Practice: a Comparative Analysis of the 2003 and 2015 Model BITs*, (2016) 7(2) JGLR, pp. 201–226 at 204.

2 Saurabh Garg, *The Indian Model Bilateral Investment Treaty: Continuity and Change*, in Kavaljit Singh and Burghard Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (2016) 71.

3 Indian Model Text of Bilateral Investment Promotion and Protection Agreement (2003), http://www.ita-law.com/sites/default/files/archive/ita1026.pdf, hereinafter referred to as *2003 Indian Model BIT*.

4 Aniruddha, *supra* note 1, p. 204.

5 Department of Economic Affairs, Ministry of Finance, Government of India, *Bilateral Investment Promotion and Protection Agreements,* available at https://dea.gov.in/bipa.

6 These treaties take different forms such as: Free Trade Agreements (FTAs), Comprehensive Economic Cooperation Agreement (CECA), Comprehensive Economic Partnership Agreement (CEPA), Economic Partnership Agreement (EPA) etc. While International Investment Agreements (IIAs) includes both BITs and Investment chapters in Treaties, in this paper, term IIAs has been used to refer to investment chapters in investment treaties. *See,* Investment Policy Hub, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india.

7 See Prabhash Ranjan, India and Bilateral Investment Treaties: Refusal, Acceptance and Backlash, Oxford Univ. Press 2019, pp. ???.

8 *Id.*, p. ???.

that should not be construed to suggest that India didn't enter into bilateral arrangements to facilitate foreign investments.[9] Further, any labelling of the era between 1947 -1990 as only protectionist would be oversimplifying. India's initial reluctance to enter into BITs must be seen in light of its social structures, political institutions, economic policies and attitude towards the international legal order. Ranjan in his work has fairly dealt with these intersections. It is beyond the scope of this chapter to examine them in detail.

Phase 2 (1991 – 2002): In this phase, India signed 50 BITs with intention of creating a predictable investment environment in the country. The government believed that the new economic policy and BITs could attract FDI inflows. The objective was to promote and protect investments. In this phase, no investment claims were filed against India. The majority of the BITs were with capital exporting countries and few with developing countries.

Phase 3 (2003 – 2010): In this phase, India released and started using its 2003 Model BIT. For the first time, claims under BITs were filed against India. Between 2003-2004, nine ISDS claims were filed against India all arising from one energy project in the State of Maharashtra – the Dabhol power project.[10] While two adverse awards resulted from these claims,[11] all cases were finally settled.[12] The 2003 Model BIT was criticized for following a capital-exporting-state model.

Despite India's mammoth BIT program in this phase and the phase preceding it, there was no serious thinking amongst India's policy makers about the impact of BITs on its regulatory power. This could be attributed to India's lack of experience in the field of international investment law.[13] It is also a phase wherein India entered into 11 treaties with investment chapters.[14] Ranjan sums up the period from 1991 – 2010 as the phase of 'laissez-faire liberalism.'[15]

Phase 4 (2011 – 2015): The *White Industries* case was instituted against India in 2010 under the India-Australia BIT. The tribunal adopted an adverse award against India on 30 November 2011. Damages amounting to USD 4.1 million were awarded against the Indian government. The award was seen as an attack on judicial sovereignty of India.[16] As a result of this case, several other ISDS claims were initiated against India. Even before the White Industries award, there were internal discussions amongst the government to review India's BITs. Academics, as well as policy think tanks, were calling for reforms in the BIT landscape. In this environment, the adverse award

---

9 *Id.*, at 2.2.3.

10 *See,* Chirag Balyan, *Handbook on Investment Arbitration in India*, CAR-MNLUM (2021).

11 Prabhash, *supra* note 7, para 3.4

12 See, Investment Policy Hub, Investment Dispute Settlement Navigator, available at https://investment-policy.unctad.org/investment-dispute-settlement/country/96/india.

13 Aniruddha, *supra* note 1, p. 204.

14 Investment Policy Hub, International Investment Agreements Navigator - India, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india.

15 Prabhash, *supra* note 7, para 3.6

16 Prabhash Ranjan, *India and Bilateral Investment Treaties – A Changing Landscape,* (2014) 29 ICSID Review (445).

triggered immediate introspection and evaluation of the BIT program.[17] Ranjan describes this phase as a 'backlash' against BITs and ISDS.

Phase 5 (2016 – present): India released its new Draft Model BIT in 2015. It was prepared by the Working Group constituted by the Standing Committee of Secretaries. It received scathing criticism for not taking inputs from experts and stakeholders.[18] The Law Commission of India communicated its tentative viewpoint on the draft Model BIT, following which a subcommittee comprised of practitioners and academics was formed with the goal of thoroughly analyzing it. Following that, the Law Commission issued a full report recommending changes to the circulated draft.[19] Finally, on 14 January 2016, the Model Text for the Indian Bilateral Investment Treaty (2016 Model BIT) was adopted.[20] It is important to note that with respect to the new Model BIT, there is a confusion about the date of adoption. While the letter accompanying the text states 28 December 2015, the date of Model BIT adoption on India's Ministry of Finance's website is 14 January 2016.

The government's objective behind the new Model BIT was to balance the host's State regulatory power with the rights of the foreign investors.[21] This was intended to be achieved by limiting arbitral discretion by creating watertight provisions. To what extent the new Model BIT achieved this kind of drafting perfection, only time will tell. Many commentators have extensively written on India's new Model BIT approach.[22] It has also been questioned whether India is back to its protectionist approach.[23]

---

17 See Prabhash Ranjan and Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, (2017) 38 Nw. J. Int'l L. & Bus. at 14, 15.

18 *See* Kavaljit Singh, *An Analysis of India's New Model Bilateral Investment Treaty*, in Kavaljit Singh and Burghard Ilge (eds), 'Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices' (2016) at 82

19 Law Commission of India, Government of India, Report No. 246, *Amendments to the Arbitration and Conciliation Act 1996*, (2014) pp. 15-18, available at https://lawcommissionofindia.nic.in/report_twentieth/.

20 Indian Model Text of Bilateral Investment Treaties (2016), http://www.dea.gov.in/sites/default/files/Model-BIT_Annex_0.pdf, hereinafter referred to as *2016 Indian Model BIT*.

21 See Government of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion, Lok Sabha Unstarred Question No. 1290 (July 25, 2016), http://164.100.47.190/loksabha-questions/annex/9/AU1290.pdf.

22 See Manu Thadikkaran, *Model Text for the Indian Bilateral Investment Treaty: An Analysis*, (2015) 8 NUJS L. Rev. 31; Grant Hanessian & Kabir Duggal, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See*, (2017) ICSID REV. – FOREIGN INV. L. J.; Aniruddha Rajput, *India's Shifting Treaty Practice: a Comparative Analysis of the 2003 and 2015 Model BITs*, (2016) 7 JINDAL GLOB. L. REV. pp. 201-226; Prabhash Ranjan and Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, (2017) 38 Nw. J. Int'l L. & Bus.; Aditya Singh, *Investor-State Dispute Settlement and India*, in Dushyant Dave (ed.), *Arbitration in India* (2021), pp. 289-310

23 Aniruddha, *supra* note 1, p. 204.

India revised its BIT policy and published it in the year 2016.[24] To revise the existing treaties on the basis of the 2016 Model BIT, India terminated 77 older generation BITs (i.e. treaties which were signed prior to 2015).[25] The sunset clauses in the terminated BITs ensure that foreign investors can bring their claims for a period of 15 years beyond the termination. The paradigm shift in India's BIT regime can be seen as a consequence of the global backlash against BITs and the ISDS regime,[26] the flurry of claims filed against India under various BITs,[27] and India's strengthened economic position and experience in investment treaty making as compared to 1994 or 2003.[28] The adverse award against India in White Industries, triggered these positive and prompt steps in rethinking the BIT regime.[29]

Presently, only 6 older generation BITs are still in force. Out of these 6 BITs, India has signed Joint Interpretative Statements (JIS) with 2 countries, Bangladesh[30] and Colombia[31]. As a result, India's BIT with these countries will be interpreted in the light of JIS. Further, based on the 2016 Model Indian BIT, 4 new BITs have been signed with Belarus,[32] Kyrgyzstan,[33] Taiwan,[34] and Brazil[35]. As

---

24 Model Text for the Indian Bilateral Investment Treaty, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

25 UNCTAD, Investment Policy Hub, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india?type=tips.

26 Prabhash Rajan, Harsha Vardhana Singh, Kevin James and Ramandeep Singh, *India's Model Bilateral Investment Treaty: Is India Too Risk Averse?* (2018) Brookings India IMPACT Series No. 082018, at p 5, available at https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf; see also Kavaljit, *supra* note 18, p. 81.

27 Prabhash Ranjan and Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, (2017) 38 Nw. J. Int'l L. & Bus, at p. 13.

28 Aniruddha, *supra* note 1, p. 204.

29 James J. Nedumpara and Rodrigo Polanco Lazo, *Does India Need a Model BIT?* (2016) 7(2) JGLR, pp. 117–125, at p. 122.

30 Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (2017), https://dea.gov.in/sites/default/files/JIN%20with%20Bangladesh.pdf; hereinafter referred to as India-Bangladesh JIS.

31 Joint Interpretative Declaration between the Republic of India and the Republic of Colombia Regarding the Agreement for the Promotion and Protection of Investments Between India and Colombia (2018), https://dea.gov.in/sites/default/files/JID%20with%20Colombia.pdf; hereinafter referred to as India-Colombia JIS.

32 Treaty between the Republic of Belarus and the Republic of India on Investments, https://dea.gov.in/sites/default/files/BIT%20with%20Belarus.pdf, hereinafter referred to as India-Belarus BIT.

33 Bilateral Investment Treaty between the Government of the Kyrgyz Republic and the Government of the Republic of India, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download; hereinafter referred to as India-Kyrgyzstan BIT.

34 Bilateral Investment Agreement between the India Taipei Association in Taipei and the Taipei Economic and Cultural Center in India, https://dea.gov.in/sites/default/files/BIA%20between%20ITA%20and%20TECC.pdf.

35 Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic

per the data furnished by the Department of Economic Affairs to the Parliamentary Committee, negotiations for BITs/IIAs are underway with another 35 countries and 2 Blocs.[36]

After this overview of India's BIT program, this chapter will now trace the evolution of some jurisdictional, substantive and procedural protections under the international investment law regime. The definition of investment is discussed in Part B. Thereafter, substantive protections are dealt with in Parts C and D. Part C deals with expropriation and Part D deals with standards of treatment such as Fair and Equitable Treatment, Most Favored Nation Clause, and Full Protection and Security. Finally, Part E deals with dispute resolution, and Part F deals with enforcement.

B. INVESTMENT

Traditionally, the definition of investment in Indian BITs included both the asset-based approach and the enterprise-based approach. For example, the Indian Model BIT 2003 defined investment as 'every kind of asset established or acquired including changes in the form of such investment…'[37] The definition in the 2003 Model BIT was very broad and included within its ambit an array of assets. However, the 2016 Model BIT brings forth the paradigm shift in the scope of investment and restricts it to only an enterprise-based approach.[38] The definition in the 2016 Model stipulates as follows:

> *"investment" means an enterprise constituted, organized and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise…*[39]

Further, the investment must have certain characteristics to qualify for protection under the treaty. They include:[40]

- commitment of capital or other resources;
- certain duration;
- expectation of gain or profit;
- the assumption of risk, and
- significance for the development of the Party in whose territory the investment is made.

The requirement of 'real and substantial business operations' was also stipulated in the Draft BIT but was omitted in the 2016 Model BIT. The India-Colombia BIT lays down similar characteristics

---

of India, https://dea.gov.in/sites/default/files/Investment%20Cooperation%20and%20Facilitation%20Treaty%20with%20Brazil%20-%20English_0.pdf, hereinafter referred to as India-Brazil BIT.

36 Committee on External Affairs (2020-21), Seventeenth Lok Sabha, Ministry of External Affairs, *India and Bilateral Investment Treaties*, Tenth Report, Lok Sabha Secretariat (Sep. 2021) available at http://164.100.47.193/lsscommittee/External%20Affairs/17_External_Affairs_10.pdf.

37 Article 1(b), 2003 Indian Model BIT.

38 Committee on External Affairs (2020-21), supra note 36, at p. 30.

39 Article 1.4, 2016 Indian Model BIT.

40 Article 1.4, 2016 Indian Model BIT.

for protected investments. It only omits the duration requirement.[41] The new generation BITs, except for the one with Brazil, follow the same definition for investment.

The India-Brazil BIT follows the enterprise-based definition but has some deviations from the 2016 Model BIT. The India-Brazil BIT, unlike the 2016 Model BIT, also protects indirectly controlled investments, as well the investments over which a party 'exerts a significant degree of influence.' The characteristics of an 'investment' under the India-Brazil BIT include:

- commitment of capital;
- establishing a lasting interest;
- expectation of gain or profit, and
- assumption of risk.

Instead of the 'certain duration' requirement in the 2016 Model BIT, the India-Brazil BIT requires 'establishing a lasting interest'. Further, the 'significance of development' is not required in the India-Brazil BIT.

A negative list of investment is also stipulated in the new generation BITs. The list excludes debt securities, an order or judgment, expenditure incurred on permissions, portfolio investments, intangible rights, money claims etc., from the definition of investment.[42]

Pre-investment activities related to the establishment, acquisition, or expansion of an investment, as well as any law or measure governing such activities, are not covered by the India–Belarus, India–Brazil, or India–Kyrgyzstan BITs. Similarly, events that occurred prior to the entry into force of the treaties are not protected. This strategy is in line with the 2016 Model BIT. Notably, only the India-Bangladesh BIT protects investments made after 1 January 1980, if they were made prior to the treaty's entry into force.[43]

C. EXPROPRIATION

I. Scope

Article 5 of the 2016 Model Indian BIT deals with expropriation. Article 5.1 provides, "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…". Thus, the Model BIT protects the investor from both direct and indirect expropriation. However, expropriation may be done for public purposes following due process of law.[44] In such cases, adequate compensation must also be paid. The public purpose actions may pertain to land acquisition, public

---

41 Article 2(4), India-Colombia BIT.

42 Article 2.4.1, India-Brazil BIT; Article 1.4 2016 Indian Model BIT.

43 Article 2, India-Bangladesh BIT (2009), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/265/download.

44 While some investment treaties use the term 'due process of law' (e.g. the India–ASEAN Agreement on Investment, India–Japan CEPA, India–Korea CEPA, India–Malaysia CECA and India–Singapore CECA), others use the term 'in accordance with law' (e.g. the India–Bahrain BIT, India–Bangladesh BIT, India-Colombia BIT).

health, safety, or the environment. Actions taken in a commercial capacity, non-discriminatory regulatory measures, and measures or awards by judicial bodies, are excluded from the scope of expropriation.[45]

Except for the India-Brazil BIT, the standard for expropriation is same in all BITs signed by India on the basis of the 2016 Model BIT. The India-Brazil BIT only protects foreign investors from direct expropriation. Indirect expropriation is excluded from the India-Brazil BIT.

The BITs which were signed by India prior to the 2016 Model BIT also covered both direct and indirect expropriation. For example, the India-UAE BIT signed in 2014 states in Article 7 that "Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be nationalized, expropriated, dispossessed or subjected to direct or indirect measures having effect equivalent to nationalization, expropriation or dispossession…" Furthermore, Article 7(4) clarifies the scope of the expropriation provision providing that the provisions "…also apply to interventions or regulatory measures by a Contracting party such as the freezing or blocking of the investment, compulsory sale of all or part of the investment, or other comparable measures, that have a *de facto* confiscatory or expropriatory effect…"

II. Compensation in Expropriation Cases

The gold standard for compensation in expropriation cases is the 'Hull Formula'.[46] The India-UK BIT of 1994 provided that compensation should be 'fair and equitable.' The Model Indian BIT 2003 didn't follow the Hull Formula. It stated that expropriation shall be against "fair and equitable compensation… [and] amount to [the] genuine value of the investment…"[47] The Model Indian BIT 2016 provides for the fair market value standard. It stipulates '…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…"[48] The standard of compensation in the India-UAE BIT is that there shall be 'expeditious, adequate and effective compensation.'[49]

Some of the treaties with investment provisions (TIPs), however, provide that compensation for expropriation of land should be calculated as per national laws.[50] For example, the India-ASEAN agreement under Article 8(1)(c) provides that compensation for expropriation shall be 'prompt, adequate, and effective.' However, Article 8(8) provides that compensation for expropriation of land shall be as per the 'expropriating Party's existing domestic laws and regulations…'[51] Similarly, the

---

45 Articles 5.3 – 5.5, 2016 Indian Model BIT.

46 See Chapter 2.2, p. ???.

47 Article 5(1), Indian Model BIT 2003.

48 Article 5.1. Indian Model BIT 2016.

49 Article 7(1)(a), Indian Model BIT 2016.

50 See, India-Singapore CECA (2005), India-Malaysia FTA (2011), and the ASEAN-India Investment Agreement (2014).

51 Agreement on Investment under the Framework Agreement in Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India, https://investment-

India-Armenia BIT in Article 5(1) provides that expropriation shall be done upon the payment of compensation, 'according to the host country legislation.'[52] Furthermore, compensation in many BITs and IIAs is not payable if the expropriation was for public purpose. Under the India-Brazil BIT, any issues of compensation are not within the jurisdiction of an arbitral tribunal.[53]

D. STANDARD OF TREATMENT

I. Most Favored Nation Clause

The Model Indian BIT of 2016 doesn't have a Most Favored Nation (MFN) clause. All treaties negotiated after 2016 follow suit. Even the India-Brazil BIT doesn't have an MFN Clause, although the Brazil Model BIT stipulated MFN protection to foreign investors. The absence of MFN clauses in post 2016 BITs is a result of India's sour experience in the *White Industries case*.[54] Prior to 2016, MFN clauses featured in all investment agreements except the India-Colombia 2009 BIT and the India-UAE 2013 BIT. India's reluctance to incorporate MFN clauses is due to the wide interpretation given by tribunals to MFN clauses.

One of the legal issues in *White Industries* was whether, by virtue of an MFN clause in a treaty, beneficial provisions from treaties with other countries be borrowed? Being aggrieved by the inordinate delay in enforcement of a commercial arbitration award against Coal India Limited, a public sector undertaking, White Industries instituted proceedings against the Indian government for failing to provide 'effective means of asserting claims and enforcing rights.' The Australian investor, relying on the MFN clause in the India-Australia BIT, asserted that a more beneficial provision – the 'effective means standard' from the India-Kuwait BIT – should be imported into the India-Australia BIT by virtue of the MFN clause. The tribunal ruling in favor of the investor noted that MFN clauses can be used to import beneficial provisions from a treaty with another country.

II. Fair and Equitable Treatment

The Model Indian BIT 2016 doesn't explicitly provide the Fair and Equitable Treatment (FET) standard to investors. However, unlike the Brazil-UAE CFIA, it also doesn't expressly exclude the FET standard.[55] Article 3.1 of Model Indian BIT 2016 lays down standards of treatment which are

---

policy.unctad.org/international-investment-agreements/treaty-files/3337/download.

52 India-Armenia BIT (2003), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/138/download.

53 Article 19.2, India-Brazil BIT

54 *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (Nov. 30, 2011).

55 Article 4.3 of Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates (2019), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5855/download.

akin to the customary international law standard,[56] but comparatively narrower in scope.[57] The standard is limited to cases of

- denial of justice in any judicial or administrative proceedings; or
- fundamental breach of due process; or
- targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
- manifestly abusive treatment, such as coercion, duress and harassment.

This standard is a significant departure from the Indian Model BIT 2003 where the autonomous standard was adopted.[58]

Unless a treaty defines the FET standard, its meaning and scope is defined by judicial or arbitrator discretion. Various tribunals have equated the FET standard with one of these three standards:

- the *Neer* standard;[59]
- the customary international law (CIL) standard, with the understanding that CIL, hence also the FET standard, is evolving;[60]
- and/or the autonomous standard.[61]

Usually, BITs don't offer clarity on the scope of FET. Even in treaties where the FET standard is interlinked with customary international law, tribunals have interpreted it differently.[62] This has resulted in widespread use of the FET standard as a 'catchall provision'[63] to challenge all kinds of host State regulatory measures. Due to the lack of consensus on the precise scope of the FET standard,[64] India decided to give it a more precise meaning to avoid the ambiguity associated with

---

56 Article 3.1. states, "No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law."

57 Aniruddha, supra note 1, p. 214.

58 Article 3(2) of the Model India BIT 2003 provides, "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."

59 In *LFH Neer and Pauline Neer (USA) v. United Mexican States*, UNRIAA (1927) 60, the tribunal ruled that a violation of the FET standard does not occur unless a state act is 'sufficiently egregious and shocking', which is the case, for example, when there is a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination or a manifest lack of reason.

60 See, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, (Jan. 9, 2003) 179.

61 R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012), p. 134.

62 W. Michael Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, (2015) ICSID Review – Foreign Inv. L. J. 616, 30

63 Prabhash, *supra* note 17, p. 21.

64 See M. Sornarajah, *The International Law on Foreign Investment*, Cambridge Univ. Press, 2nd ed. 2004, at p. 332.

the term FET,[65] and to distance itself from the notion of 'legitimate expectations' which some tribunals have associated with FET.[66]

The use of word 'manifestly' indicates that there is an intention to set a higher threshold for challenge actions based on targeted discrimination and abusive treatment. Further, 'arbitrariness' as a ground to challenge host State regulatory measures is excluded. The part on 'Treatment of Investments' in the India-Brazil BIT follows similar lines like the 2016 Model BIT, with the exception that term 'manifestly' is omitted in case of discrimination.[67]

As a consequence of these efforts, the treatment standards provided under the Indian Model BIT 2016 have been seen as averse to foreign investors.[68]

III. Full Protection and Security

The scope of Full Protection and Security under various BITs is often debated.[69] The debate is whether FPS is confined to physical safety and protection,[70] or extends also to legal and regulatory security.[71] In order to avoid ambiguity associated with the FPS standard, the Indian Model BIT 2016, while guaranteeing FPS, confines its scope 'only' to physical security.[72] It is an improvement over the 2003 Model Indian BIT because the older model did not provide any FPS standard. The India-Belarus and India–Kyrgyzstan BITs adopt the 2016 approach. However, the India-Brazil BIT neither expressly allows nor expressly rejects the FPS standard. It merely provides that the parties must not take measures such as, "discrimination in matters of law enforcement, including the provision of physical security."[73] Some of the older generation BITs also had FPS clauses. For example, the India-Colombia and India-UAE BITs, which are yet to be terminated, provide for FPS standards.

Some variations in terminology can be found in older generation BITs. For example, while the India-Latvia BIT, which is still in force, provides for "protection and security",[74] the India-Syria BIT

---

65 Report No. 260, Law Commission of India, https://lawcommissionofindia.nic.in/report_twentieth/, at p. 15.

66 Prabhash, *supra* note 26, at p. 25.

67 Article 4.1, India-Brazil BIT.

68 See, Nishith Desai Associates, *Bilateral Investment Treaty Arbitration and India: With Special Focus on India Model BIT, 2016*, February 2018,at p. 28, available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf.

69 See, Jeswald D. Salacuse, *The Law of Investment Treaties*, Oxford Univ. Press 2010, pp. 208–210.

70 For example see, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, para. 84.

71 See, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, para. 613.

72 Article 3.2 Indian Model BIT 2016.

73 Article 4.1 (e), India-Brazil BIT.

74 Article 3(3) India-Latvia BIT (2010), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1572/download.

provided for "adequate protection and security",[75] and the India-Serbia BIT used the term "full legal protection and security".[76]

E. DISPUTE SETTLEMENT

All the first-generation Indian BITs had an Investor-State Dispute Settlement (ISDS) clause which provided for Investor-State arbitration. The ISDS mechanism is also continued in the Model Indian BIT 2016 and the BITs negotiated by India based on the 2016 Model BIT. The only exception is the India-Brazil BIT which is inspired by Brazil's Model BIT. The joint committee contemplated in Article 13 of the India-Brazil BIT is entrusted with amicable resolution of disputes and dispute prevention.[77] The ombudsmen of the respective countries, while following the recommendations of the joint committee, are required to address any differences in investment matters.[78] If the joint committee is unable to prevent a dispute, State-to-State arbitration (SSDS) will be utilized to resolve the dispute.[79]

As can be seen, the India-Brazil BIT is a departure from the Model Indian BIT which provides for both ISDS and SSDS mechanisms to resolve disputes.

I. Exhaustion of Local Remedies

Before an investor may initiate arbitration proceedings against the host State, the Model India BIT 2016 requires that all local remedies have to be exhausted, and that negotiations and consultations are carried out. The investor must spend at least five years in the courts of the host State to get a remedy unless it can prove that there are 'no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure'. The India-Belarus and India-Kyrgyzstan BITs follow this formula. However, the India-Brazil BIT has no requirement of exhaustion of local remedies.

Prior to the Model Indian BIT 2016, the India-Libya BIT (2007) required the investor to exhaust local remedies before filing a dispute.[80] However, it was not a compulsory requirement as the parties had the choice of international conciliation in lieu of local remedies. Some IIAs also have such a 'fork in the road' provision. For example, as per the provisions of the India-Lithuania BIT (2011), the investor can either submit a dispute to arbitration or conciliation or to local courts.[81] Further, a few

---

75 Article 3(2) India-Syria BIT (2008), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1605/download.

76 Article 3(2) India-Serbia BIT (2003), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1596/download.

77 Article 18 India-Brazil BIT.

78 Article 14 India-Brazil BIT.

79 Article 19 India-Brazil BIT.

80 Article 9(3) of the Agreement between the Republic of India and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1573/download.

81 Article 9 (3) of the Agreement between the Government of the Republic of India and the Government of the

BITs, like BLEU-India BIT (1997), the India-Switzerland BIT (1997), and the India-Austria BIT (1999)[82] provided that the ISDS mechanism can only be used when local remedies are not available.

II. Comparative Chart of the Dispute Resolution Provisions of the 2016 Model BIT and BITs That Were Introduced After 2016

Instrument Name & Date	Scope of disputes which can be referred to an arbitral tribunal	Preconditions to arbitral tribunal jurisdiction	Institutions to which the arbitration claim can be submitted
Model BIT 2016	Only treaty claims arising out of Chapter II of the instrument, excluding the obligations under Article 9 and 10 which deals with Entry and Sojourn of Personnel and Transparency respectively. Contractual Obligations are specifically excluded from the purview of the arbitral tribunal [Art. 13]	Investors must first submit a treaty claim before the domestic court or administrative bodies of the State. In case no decision is arrived at within 5 years, the Investor must then send a Notice of Dispute to the host State and attempts must be made to amicably resolve the dispute within 6 months. In case no settlement is reached, the Investor can make a Claim for Arbitration, subject to fulfilment of certain conditions [Art. 15].	The ICSID Convention, Additional Facility Rules of ICSID, or the UNCITRAL Arbitration Rules [Art. 16].
Treaty between Belarus and India on Investments [Signed on 24 September 2018; in force since 5 March 2020]	Same as the Model BIT of 2016 [Art. 13].	Same as the Model BIT of 2016 [Art. 15].	Same as the Model BIT of 2016 [Art. 16].

Republic of Lithuania for the Promotion and Protection of Investments, https://investment-policy.unctad.org/international-investment-agreements/treaty-files/1574/download.

[82] For example, Article 8(2) of the India-Austria BIT provides, "Each Contracting Party shall observe any obligation It may have entered into with regard to investments of an investor of the other Contracting Party, provided that dispute resolution under Article 9 of this Agreement shall only be applicable in the absence of normal, local, judicial remedy being available."

BIT between the Indian Taipei Association and Taipei Economic and Cultural Center, India [Signed on 18 December 2018; in force since 14 February 2019]	Same as the Model BIT of 2016 [Art. 13].	First, a Written Request for consultations and negotiations has to be made by the Investor in respect of the claim. Thereafter, attempts are to be made for at least six months to resolve the dispute amicably at a place where the investment was made. In case no settlement is reached, the Investor must submit the claim before domestic courts or other administrative bodies. Only if no satisfactory resolution is reached within 4 years or if the domestic proceedings are still pending after 5 years, the Investor may submit the claim to Arbitration [Art. 15].	UNCITRAL Arbitration Rules or other Rules, including ICC Rules, which are mutually agreeable to the disputing parties [Art. 17].
BIT between Kyrgyzstan and India [Signed on 14 June 2019]	Same as the Model BIT of 2016 [Art. 13].	Same as the Model BIT of 2016 [Art. 15].	Same as the Model BIT of 2016 [Art. 16].

Investment Cooperation and Facilitation Treaty between Brazil and India [Signed on 25 January 2020]	The limited purpose of arbitration is to decide on the interpretation of the treaty or observance by a Party of the terms of the treaty. The Arbitral Tribunal's scope is limited to matters relating to Part I Scope and Definitions, Part II General Obligation of the Parties (excluding Art. 8 Transparency, and Art. 10.1 Combating Corruption and Illegality), Article 16 Treatment of Protected Information, Article 21 Prudential Measures, and Part VII Final Provisions of the Instrument [Art. 19.2 and 19.3].	Any measure of a Party which is considered a breach of the treaty by the other Party will have to be first referred to the Joint Committee for dispute prevention set up under Art. 13. The Party needs to submit a Written Request to the other Party and the Joint Committee needs to meet within 90 days of the date of such request. The Committee has 120 days to evaluate and present its report. In case it is mutually agreeable to both the Parties, an extension may be granted. In case the Committee cannot resolve the dispute with the timeframe, or either of the Parties does not participate in the process of dispute prevention, then the Party can submit the dispute to arbitration in accordance with Art. 19 of the instrument.	Ad hoc Tribunal set up in accordance with Art. 19 of the instrument or if mutually agreeable, submission of the dispute to a permanent arbitration institution for the settlement of investment disputes [Art. 19.1].

III. Investment Claims Filed Against India

In its first phase, the BITs signed by India were with developed economies and they included strong investor protection provisions. The decision to enter into these BITs was due to the belief that the treaties would attract foreign investment by offering investment protection and an apolitical environment for dispute settlement. However, it is difficult to attribute the increase in FDI flows to the BITs alone.[83] According to the Department of Economic Affairs, "causality between BIT and investment inflows appear to be weak and insignificant…".[84]

According to UNCTAD, 26 ISDS claims have been filed against India so far.[85] Out of these 26 claims, 10 cases were settled, 9 cases are pending, 4 cases were decided in favor of the investor,

[83] Nedumpara & Polanco Lazo, *supra* note 29, p. 118.

[84] Committee on External Affairs (2020-21), *supra* note 87, para 3.10.

[85] See United Nations UNCTAD, *Investment Dispute Settlement Navigator-India*, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india.

one case was decided in favor of India,[86] and 2 cases were discontinued.[87] Notably, all of these disputes have arisen under BITs and not under other IIAs or FTAs.[88] According to the Department of Economic Affairs (DEA) of the Government of India, 37 notices of disputes have been served against India.[89] In its submission to the Committee on External Affairs, the DEA reported that India has won four arbitrations,[90] lost two arbitrations, and received an adverse award in three arbitrations, for all of which a challenge against the arbitral award is pending at the seat of arbitrations. Investors withdrew their claim in one dispute, and three others were settled amicably. Eight disputes are still in various stages of arbitration, and the claimants in another 14 disputes did not pursue the matter after an initial request under a Bilateral Investment Protection Agreement (BIPA). Two new notices were received recently.[91] With these numbers, India is amongst the top ten countries against which investment arbitration has been initiated by foreign investors.[92]

IV. Bits under Which 'Notice of Disputes' Have Been Filed Against India

No.	BIT or BIPA	Number of Times Invoked
1	India-Australia BIT (1999); India-Japan CECA (2011); India-Cyprus (2002); India-Korea BIT (1996); India-Sweden BIT (2000); India-Austria BIT (1999); India-Portugal BIT (2000); India-Finland BIT (2002)	1 x each
2	India-Germany BIT (1995); India-Netherlands BIT (1995); India- France BIT (1997); India-Switzerland BIT (1997); India-Singapore CECA (2005)	2 x each
3	India–Russia BIT (1994); India-UAE BIT (2013); India-Malaysia BIT (1995)	3 x each
4	India-UK BIT (1994)	8 x
5	India-Mauritius BIT (1998)	11 x

Except for the India-UAE BIT, all disputes arose under BITs concluded between 1994 and 2002. The India-UAE BIT was signed after the award in the *White Industries* case and is the last BIT

86 See *Louis Dreyfus Armateurs (LDA) SAS v. Republic of India*, PCA Case No. 2014-26, Award of 11 September 2018, https://www.italaw.com/cases/7942.

87 See *Carissa v. India* (2017) under the India - Mauritius BIT (1998); *Astro and South Asia Entertainment v. India* (2016) under the India - UK BIT (1994), and India - Mauritius BIT (1998).

88 Nedumpara & Polanco Lazo, *supra* note 29, p. 120.

89 Committee on External Affairs Report (2020-21), *supra* note 36.

90 Committee on External Affairs Report (2020-21), *supra* note 36. Case decided in favour of India according to Indian government data: *M/S Louis Dreyfus Amateurs v. Republic of India*; *Tenoch Holdings Limited & others v. GOI*; *Astro All Asia Network Ltd. & other v. GOI* (2015). The *Astro* case involved two notices of disputes (one by Astro and South Asia Entertainment and another by Astro All Asia Networks and South Asia Entertainment Holdings Limited); that is why the Government data treats it as two wins. Also, the award rendered in the *Astro* case is a consent award and all costs were awarded to India. The investor's allegation was that the investigation was unfair and biased. UNCTAD data shows the *Astro* case as discontinued.

91 Committee on External Affairs Report (2020-21), *supra* note 36, para 2.3.

92 See UNCTAD, *supra* note 86.

before the reform initiated with the Model Indian BIT 2016. Only two disputes arose under treaties with investment provisions (CECA). Both of these disputes involve Asian foreign investors (from Japan and Singapore). While the dispute involving Japan was settled outside arbitration,[93] the dispute involving Singapore is yet to proceed to arbitration.[94]

V. Cases Decided in Favor of the Foreign Investor

Year	Parties	BIT	Breach(es)	Disputed Measure	Sector
Initiated 2010 Award of 30 November 2011	White Industries v. India	India UK BIT (1994)	MFN	Delay in enforcement of awards by Indian courts	Mining
Initiated 2012 Award on Quantum of 13 October 2020	Devas v. India	India Mauritius BIT (1998)	Indirect expropriation and FET/MST including denial of justice	The electromagnetic spectrum allotted on lease to investors was cancelled by the Government to reserve it for national/security needs	Telecommunication
Initiated 2013 Award of 27 May 2020	Deutsche Telekom v. India	India Germany BIT (1995)	FET/MST including denial of justice	India cancelled the contract with Devas in which claimant held an interest	Telecommunication
Initiated 2014 Award of 25 September 2020	Vodafone v. India (I)	India Netherlands BIT (1995)	FET/MST including denial of justice	Retroactive taxation	Telecommunication
Initiated 2015 Award of 21 December 2020	Cairn v. India	India UK BIT (1994)	FET, Expropriation (direct and indirect) and Transfer of Funds	Retroactive taxation and prohibition on transfer of funds	Mining

93 *Nissan Motor Co. Ltd. (NML) v. Republic of India*, PCA Case No. 2017-37.

94 *Jaldhi Overseas Pte Ltd. v. Republic of India.*

F. ENFORCEMENT OF INVESTMENT AWARDS IN INDIA

India is not a signatory to the International Centre for Settlement of Investment Disputes (ICSID) Convention. Investment arbitration awards are enforced under the New York Convention (NYC). The Indian Council of Arbitration had expressed concerns about the fairness of the ICSID Convention.[95] Rajput argues that India didn't join the ICSID Convention because India was wary of using international law for protection of foreign investments and because of its vision to build an economic order wherein national law should be given primacy.[96] Ranjan, however, claims that this is an oversimplified explanation.[97] One of the primary reasons for India's reluctance to join the ICSID Convention is the lack of authority given to domestic courts for the review of arbitral awards.[98] It has also been contended that the ICSID Convention is pro-developed countries and has a pro-investor bias.[99] India's primary disagreement with ICSID includes

- jurisdiction of ICSID,
- absence of investors obligations,
- finality of the awards, and
- treatment of State and individuals on par.[100]

Part II of the Arbitration and Conciliation Act, 1996 ('Act') deals with the enforcement and recognition of foreign awards and arbitration agreements.[101] It provides the legal basis for enforcing NYC awards and Geneva Convention awards.[102] Since the Geneva Convention has become redundant after the NYC came into force, the key issues pertaining to enforcement of ITA awards arise under the NYC. [103] India, while ratifying the NYC, opted for the commercial reservation. Therefore, the NYC only applies to disputes which are declared commercial under Indian law.[104] The Act, however, doesn't define the term 'commercial' and thus leaves some room for interpretation to the courts.

---

95 The Hindu Business Line, *ICA Against India Joining Global Dispute Settlement Body*, 10 June 2000), https://www.thehindubusinessline.com/todays-paper/tp-others/article29064097.ece.

96 Aniruddha Rajput, *Protection of Foreign Investment in India and Investment Treaty Arbitration* (2017), at p.180.

97 Prabhash, *supra* note 7, para 2.2.2.

98 Article 53, ICSID Convention. It reads as: "(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention…"

99 Abhisar Vidyarthi, *Revisiting India's Position to Not Join the ICSID Convention*, Kluwer Arbitration Blog 2 August 2020, http://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/.

100 Prabhash, *supra* note 7, para 2.2.2.

101 Foreign award is defined under S. 44 of the Arbitration & Conciliation Act, 1996. The definition of foreign award reveals the two reservations India made while ratifying the 1958 NYC. The first reservation is that the arbitral award must arise out of a commercial dispute and the second reservation is about reciprocity.

102 Arbitration and Conciliation Act, No. 26 of 1996, Pt. II (India).

103 See Section 52 of the Indian Arbitration and Conciliation Act,1996.

104 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38.

Therefore, the enforceability of an ITA award in India depends upon the interpretation of the term 'commercial' under the NYC.

The term 'commercial' is not defined in the Indian Act. However, the term is explained in a non-exhaustive manner in the footnotes of the UNCITRAL Model Law on International Commercial Arbitration, based on which the India Arbitration and Conciliation Act 1996 was enacted.[105]

The Supreme Court of India[106] initially defined 'commercial' in wider terms to include all activities which are an integral part of international trade today. Following that, the Kolkata High Court[107] and the Delhi High Court,[108] in the cases involving anti-arbitration injunctions, gave contradictory definitions of the term 'commercial', with the former concluding that investment arbitration conducted under a BIT comes within the purview of Part II of the Act, and the latter concluding otherwise. The Gujrat High Court in *Union of India v. Lief Hoegh & Co. (Norway)* interpreted the term 'commercial' in a wide manner. It observed, "[commerce] is a word of the largest import and takes in its sweep all the businesses and trade transactions in any of their forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries."[109]

Notwithstanding the fact that there is uncertainty in the interpretation of the term 'commercial' under Section 44 of the Act, the following developments can help with the enforcement of ITA awards under Part II of the Act:

1) The 2016 Model BIT under Article 27.5 which deals with finality and enforcement of awards explicitly provides that any claim submitted to arbitration under the said article will be considered of commercial nature for the purpose of the New York Convention. Therefore, a fitting reference is made for future BIT negotiations by India.

2) With the Commercial Courts Act of 2015, jurisdiction over all arbitration related matters is now within the purview of the Commercial Division of the High Courts.[110] The Act goes on to define 'commercial disputes' in an exhaustive manner and at the same time leaves it open to the Central Government to notify any other transactions that shall be considered 'commercial'.[111] Furthermore, it explicitly clarifies that a dispute will not cease to be of commercial nature in case one of the parties is a State or a state entity. Therefore, the Commercial Courts Act is not limiting the jurisdiction of the commercial courts only to private individuals.

---

105 See UNCITRAL Model Law on International Commercial Arbitration, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

106 *RM Investment & Trading Co Pvt Ltd (India) v. Boeing Company*, (1994) 6 SCC 485.

107 *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures*, SAS 2014 SCC Online Cal 17695, para. 100.

108 *Union of India v. Vodafone Group*, 2018 SCC Online Del 8842, paras. 72, 144; see also *Union of India v. Khaitan Holdings (Mauritius) Ltd*, 2019 SCC Online Del 6755, paras 29, 30 (India).

109 Source ???.

110 Section 10 of the Indian Arbitration and Conciliation Act,1996.

111 Section 2(c) of the Indian Arbitration and Conciliation Act,1996.

G. CONCLUSION

This chapter has provided a sketch of India's journey with ISDS and several generations of BITs. Since independence in 1947, there has been a sea change in India's position. The growth of international investment law is not just a result of rulemaking but a combination of the country's political regime, economic policy, as well as social aspirations.

By way of the 2016 Model BIT, the Indian Government has made an earnest attempt to balance investors' rights with its power to regulate. In order to achieve this, arbitral discretion has been reduced by formulating more precise standards of investor protection. The extent to which the Government will succeed in this endeavor is a different question. But the earnestness of the Government to improve the regime can't be doubted. The present regime is definitely an improvement over the 2003 regime. The 2016 Model BIT has been criticized for not offering adequate protection to foreign investors. It is argued by scholars that the award in *White Industries* initiated a period of backlash and a return to protectionism. Reality is more complex, however. The distinctive feature of the present regime is a preference of clarity over ambiguity.

While a decade ago, many in the Indian Government were not even aware of BITs and ISDS, now at least there is serious consideration of these issues. After termination of almost all of its BITs, the Government is in the process of new BIT negotiations with 37 countries. India's ease of doing business ranking has consistently improved over the years. BITs may not have any direct nexus with FDI inflows but they contribute to creating a favorable investment climate. Given the country's 'Make in India' vision, it is hoped that the standards of protection vis-à-vis the host country's power to regulate will be more balanced in the future BITs. India's growing prominence as a capital exporting country also means that a balanced BIT regime will safeguard Indian investors in foreign countries. The judicial system has also shown increasing maturity while dealing with investment matters. In the last few years courts have shown a pro-enforcement bias. All these developments are certainly positive in India's tryst with investment arbitration.