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Imagining Space in India's Trade and Investment Agreements

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Abstract: Indian economy has opened up significantly in the last two decades, especially since the initiation of the economic reforms in 1991. Domestic opposition within India to its joining international economies treaties such as the World Trade Organization (WTO) resulted in India aggressively pushing for various flexibilities in areas such as public health and access to drugs, local content measures, environmental standards and trade remedies. In recent times, India has signed comprehensive economic partnership agreements with developed economies such as Japan, South Korea and Singapore and is negotiating a trade and investment agreement with the EU and the Regional Comprehensive Economic Partnership (RCEP).

This paper provides an analysis of the focus and coverage of issues under various trade and investment agreements and areas where India has negotiated development space or policy autonomy. In addition, the paper discusses the recent claims made against India under various Bilateral Investment Promotion Agreements (BIPA) and the safeguards adopted by India while negotiating such new agreements or renegotiating or reviewing existing agreements. Based on this approach this paper seeks to contribute to the project that attempts to compare and contrast the multiple strategies adopted by Southern countries in regulating trade and investment.

Keywords: India; trade and investment strategies; multilateral trade agreements; Bilateral Investment Promotion Agreements.

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1 Introduction

India's economy has transformed dramatically in the last decades. Major structural and macroeconomic reforms have been carried since the 1991 economic reforms; merchandise and service exports have risen and FDI has flowed in significant amounts. India has also emerged as a key player in international economic diplomacy. Notwithstanding these impressive developments, it was never easy for the successive governments in India in convincing the domestic constituents of the benefits of an open trade and investment policy. There is always a scepticism within India on the merits of actively participating in the multilateral or regional trade and investment negotiations. Although India is a founding member of the GATT and later the World Trade Organization, it is considered as a reluctant liberaliser and often an 'inflexible' negotiator in trade negotiations.

To an extent, this scepticism is a legacy of India's socialist, import substitution based model of development. For a country which laid its economic foundation on the Nehruvian model of mixed economy and central planning, convincing the domestic constituents of the merits of trade and investment liberalisation can be often difficult. In addition, the negative fallouts of losing some key disputes in the WTO in the late 1990s had significant political and economic consequences.[1] For India, losing the *India – Patent (Mail box)*[2] case at the WTO in 1999 and the compulsion to phase out the quantitative restrictions[3] pursuant to its loss before a WTO panel and Appellate Body was politically challenging. In the context of the above losses, justifying the benefits of undertaking additional obligations was politically untenable for India. At the same time, its perennial balance of payment crisis which heighted during 1990-91, left India with very little choice except to pursue economic liberation.

The scepticism has its own advantages. This scepticism and domestic backlash against assuming international obligations on sensitive matters such as goods, services and agriculture enabled India to play a crucial and often pivotal role in trade negotiations, especially in the multilateral trade negotiations. By the late 1990s, India had established domestic consultation

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[1] See SHAFFER, Gregory; NEDUMPARA, James; SINHA, Aseema. **Indian Trade Lawyers and the Building of State Trade-Related Legal Capacity**. Minnesota Legal Studies Research Paper n. 14-08, 2014. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390673>. Last visited: July 7, 2014.

[2] WORLD TRADE ORGANIZATION (WTO). Appellate Body Report. **India – Patent Protection for Pharmaceutical and Agricultural Chemical Products**, WT/DS 50/R and WT/DS 50/AB/R, (Dec. 19, 1997) (*adopted* Jan. 16, 1998) [hereinafter *India – Patents*].

[3] WTO. Appellate Body Report. **India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products**, WT/DS/AB/R (Aug. 23, 1999) (*adopted* Sep. 22, 1999) [hereinafter *India – QR*].

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mechanism and had built up strong stakeholder capacity that helped India participate in such negotiations in a more informed and meaningful way. India's understanding of the GATT dynamics and the multilateral trading system also equipped it to adopt well-thought through and calibrated positions especially in the Doha Round as well as in various free trade agreement negotiations.[4]

While there is an overwhelming literature on India's strategies and approaches to pushing for equitable and development friendly legal ordering in multilateral trade negotiations, especially in WTO negotiations, very little focus has been paid to India's approach in negotiating bilateral investment treaties or other free trade agreements with investment chapters. This was relatively a non-issue for India until very recently. However, a slew on challenges or potential challenges against India under the bilateral investment treaties (BITs) have rekindled the debate on whether India has carved out sufficient policy in the existing investment treaties and, more importantly, in the proposed negotiations. Especially after the cancellation of telecom licenses by the Supreme Court of India in February 2012, the Indian government has received a series of notices of dispute from a number of global telecom majors which had investments in India. (*See Annex I*). In light of these developments, the Department of Economic Affairs (DEA) in the Ministry of Finance is in the process of developing a Model BIPA as a template for future negotiations.

In this paper, I examine India's development thrust in trade and investment treaty negotiations and some of the areas where India had eloquently persuaded the multilateral trading community of the equity and desirability of leaving sufficient policy space. After tracing this history, the paper examines availability of policy space in India's bilateral investment agreements. The paper also examines the reasons that might have prompted India to take a review of its negotiating positions, especially in bilateral investment treaties and recommends a few policy flexibilities that India should insist upon in its current and future BIPA negotiations.

[4] NARLIKAR, Amrita. India and the World Trade Organization. In: SMITH, Steve et al. (Eds.). **The World Trade Organization**: a Very Short Introduction, 2005. p. 270, 272.

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2 India and the Debate on Development Space in Trade and Investment Agreements

There is a significant body of literature on the role of neo-liberal institutions such as the WTO on developing countries.[5] Liberal scholars consider the WTO and other preferential trade and investment agreements as a mechanism for these countries to achieve prosperity and economic welfare. Development scholars, on the other hand, contest the claims of liberal trade scholars and argue that multilateral trade institutions such as the WTO could cripple the regulatory autonomy of sovereign states and impose undesirable restrictions on them. India, for long, pursued a cautionary approach to stay clear of the traps of an "asymmetric system" of which it had significant misgivings. Although India had initiated economic liberalization in the early 1990s, liberalization remained constrained in scope.[6]

India's experience of the operation and implementation of the WTO Agreements, in a way, reaffirmed some of India's concerns. India was at the vanguard of negotiating flexibilities within the TRIPS Agreement.[7] Especially in the context of TRIPS, India used important flexibilities such as the limits on patentable subject matter[8], expansive procedural opportunities to challenge patents and restrictions on injunctive reliefs.[9] Some scholar's comment that India's set of exclusions to patentability is almost unknown elsewhere in the world.[10] India also adopted exceptionally high threshold for inventive step (non-obviousness) and mechanism for implementing mechanisms such as compulsory licensing. Especially, TRIPS and pharmaceutical product patents brought politicians, parliamentarians, NGOs and think tanks in to a transnational discourse on pharmaceutical patent law — a discourse which was hitherto unknown in India.

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[5] SANTOS, Alvaro. Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico. **Virginia J. Int'l L.**, v. 52, 2012, p. 551, 573; TRUBEK, David. **Reversal of Fortune? International Economic Governance, Alternative Development Strategies and the Rise of BRICS**. Paper presented at the European University Institute, Florence, 2012. Available at: <https://media.law.wisc.edu/s/c_638/3fwq9/eui_paper_final_june_2012.pdf>. Last visited: Nov. 21, 2014.

[6] WOLF, Martin. India in the World. In: ACHARYA, Shankar; MOHAN, Rakesh (Eds.). **India's Economy**: Performance and Challenges. Oxford: Oxford University Press, 2010. p. 369, 389.

[7] GOPAKUMAR K. M. Product Patents and Access to Medicine in India: A Critical Review of the Implementation of the TRIPS Regime. **The Law and Development Review**, v. 3, n. 2, 2010, p. 326, 338 (examining the role of flexibilities for India under the TRIPS Agreement).

[8] The most important exclusion is Section 3(d) of the Patent Act which forbids patents on both new uses of known substances that do not enhance "efficacy".

[9] KAPCZYNSKI, Amy. Harmonization and its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector. **Calif. L. Rev.**, v. 97, 2009.

[10] Ibid., at p. 1574 (noting that "India has mapped out an extraordinary array of TRIPS flexibilities, some of which are unknown elsewhere in the world").

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Coming closely on the heels of the *Patent- Mail Box* case, was another dispute concerning the implementation of quantitative restrictions on a wide category of agricultural and consumer items. The dispute settlement ruling in *India- QR* reignited the debate on trade agreements and policy space in India. Notwithstanding the 1991 economic liberalization, India continued to maintain import licensing and quantitative restrictions on products which constituted nearly 30 percent of the tariff lines. The import restrictions were maintained on balance of payment grounds, but provided protection to products generally manufactured by the small scale industries (SSI) in India. Although a number of countries had maintained quantitative restrictions on balance of payment grounds during the GATT period (1947-1995), as a matter of practice, such restrictions were hardly challenged before the dispute settlement panels. India defended the restrictions on the ground that pre-existing GATT practice under Article XXIII precluded Member countries from approaching dispute settlement panels on claims relating to balance of payment provisions under the GATT. The panel as well as the Appellate Body maintained that the quantitative restrictions amounted to a violation of Article XI: I of the GATT and that they cannot be justified under Article XVIII: B of GATT1994. The Appellate Body stated that the clear WTO rules could not be disregarded in order to safeguard institutional balance between political and quasi-judicial organs of the WTO.[11] This case also brought a marked change in substantive approach to balance-of-payments issues, which some commentators have interpreted as a movement away from the pragmatism of the GATT towards a more adjudicatory, “legalistic” approach.[12]

When India negotiated multilateral or other regional trade agreements, it had exercised extraordinary due diligence and broad-based stakeholder consultations. For example, at the time of Uruguay Round negotiations, the Indian Parliament appointed the I K Gujral Committee[13] to solicit views and prepare a report on the Dunkel Draft and to assess impact of the WTO Agreement on India.[14] Several other Parliamentary Committees including the Arjun Singh Committee was established to advise the government during the negotiating phase (1987-1994). The Indian

[11] ROESSLER, Frieder. The Institutional Balance between the Judicial and the Political Organs of the WTO. In: BRONCKERS, Marco; QUIC, Reinhard (Eds.). **New Directions In International Economic Law**. London: Kluwer Law International, 2000. p. 325, 325-46.
[12] ABBOTT, Kenneth W. The Many Faces of International Legalization. **Am. Soc’y Int’l Proc.**, v. 92, p. 57, 1998.
[13] I K Gujral the Prime Minister of India during 1997-98.
[14] Parliament of India, Report of the Department-related Standing Committee on Commerce (Dec. 13, 1993) (on file with author).

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Parliament also created several Parliamentary Committees to advise the government on the negotiating process.

The lessons learnt from these disputes prepared India to formulate clear negotiating positions in the Doha Round trade negotiations and a host of other preferential trade agreements. India also established domestic mechanisms and systems including vibrant investigating agencies for administering antidumping and safeguard duties. One could argue that India had an effective mechanism in identifying and preserving policy space especially in multilateral trade agreements.

3 India and International investment Agreements

Traditionally, India is a strong believer in the multilateral trading system and has shown inclination for preferential trade agreements only in recent times. India has a long history of participation in the multilateral trading system, being a founding member of both the GATT and the WTO. Of late, India has also been actively pursuing various regional trade agreements. (*See Annex II*). Some of the RTAs have been negotiated as part of the 'Look East' strategy. However, one could say that multilateralism is always the preferred route for international economic cooperation for India.

After India initiated its major economic reforms in 1991, the successive governments introduced a series of measures to encourage foreign direct investment (FDI).[15] India's FDI flows before initiation of the economic reforms, i.e in 1991 was $300 mn. In contrast, FDI inflows into India in 2013 itself was close to $28 bn. (*See Chart below*).

[15] BALASUBRAMANYAM, V. N.; SAPSFORD, David. Does India Need a Lot More FDI? **Econ. & Pol. Weekly**, v. 42, n. 17, p. 1549-55, 2007.

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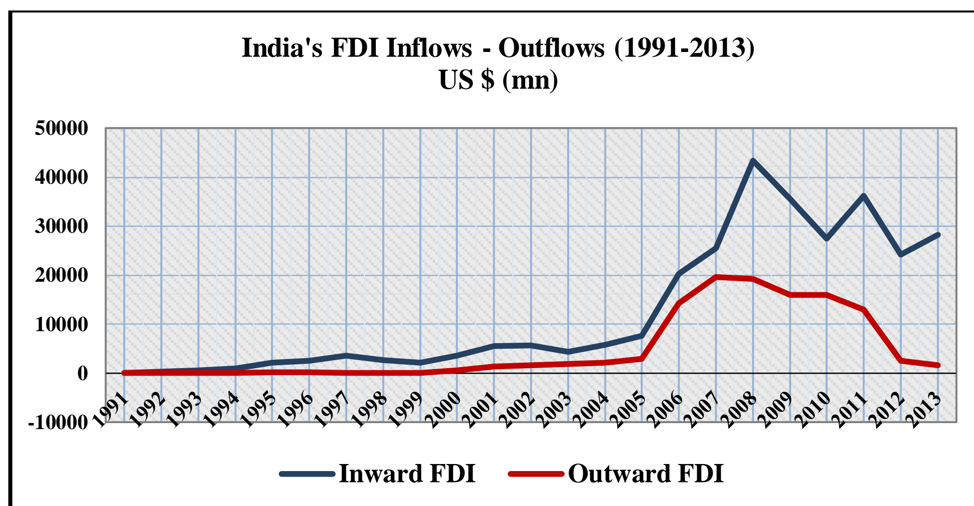
Figure 1: India's FDI inflows and outflows after economic liberalisation



At present, FDI is permitted in most sectors with certain exceptions and subject to certain caps and specific conditions. In sync with its neo-liberal economic policies, the government considered the Bilateral Investment Promotion Agreements (BIPA) or Bilateral Investment Treaties (BITS)[16] as an effective mechanism to boost investor confidence. India has signed BITs with a number of capital exporting countries including United Kingdom, Germany and Netherlands. In fact, most of the inward investment to India is routed through Mauritius with which India had a BIPA. (*See* Figure 2). As of 2013, India has signed 86 Bilateral Investment Promotion Agreements of which 72 in force.[17] A vast majority of India's BITs have been signed during the period 1996- 2003. In addition to the BITS, India has also signed three economic cooperation agreements with South Korea (2009), Singapore (2005), Japan (2011) and Malaysia (2011). These economic cooperation treaties are generally preferential trade agreements with investment protection clauses.[18]

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[16] Please note that BIPA and BITs are used interchangeably in this paper.

[17] **FTAs**, Press Information Bureau, Ministry of Commerce and Industry, Government of India (2012). Available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=83799>. Last visited: June 29, 2014.

[18] **Bilateral Investment Promotion and Protection Agreements (BIPAs): List of counties with whom IPA has been signed as on December 2013**, Ministry of Finance, Government of India. Available at: <http://finmin.nic.in/bipa/bipa_index.asp>. Last visited: June 25, 2014.

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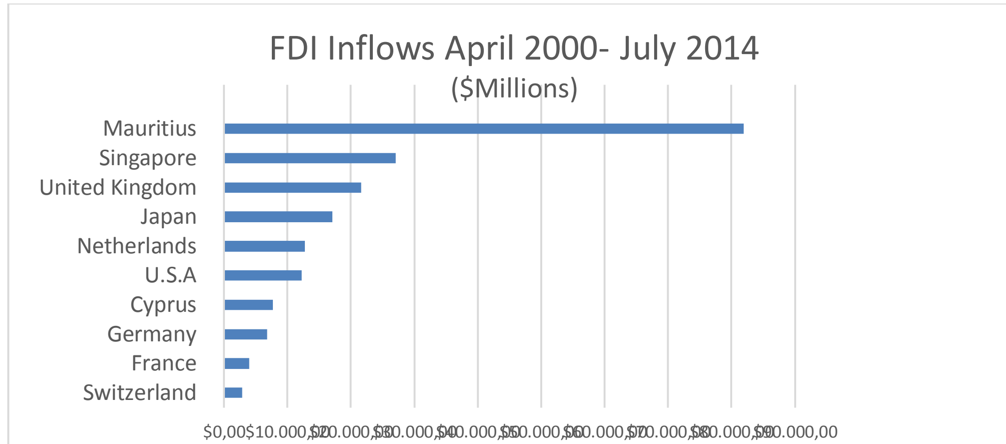
Figure 2: Major Sources of FDI Inflows into India



3.1 BITs and Policy flexibility

It remains unclear whether Indian negotiators had seriously considered the potential conflict between international investment regimes and the regulatory state during their negotiating phase.[19] It appears that the BIPA/BITs negotiations were generally undertaken without sufficient deliberation or preparedness. In a way they were quietly done.[20] Several scholars and stakeholders have commented that there was negligible stakeholder participation in the signing of BITs. This happened even after India had major disputes with several U.S. investors in connection with the Dhabol power project.[21] In the context of the failed Dhabol power project, although India did not have any BIPA/BIT with the United States, several U.S. investors sought arbitration under the India- Mauritius BIPA.[22] In the Dabhol matter, the foreign investors were compensated and the matter was settled.

[19] See **Metalclad Corp. v. Mexico**, ICSID Case n. ARB (AF) 97/1, Award (Aug. 30, 200) (dealing with a refusal to issue a waste disposal permit); **S. D. Myers Inc. v. Canada, Merits**, 8 ICSID Report 4 (Nov. 13, 2000) (concerning a ban on hazardous waste exports); **Ethyl Corp. v Canada, Jurisdiction Award** (June 24, 1998), 38 ILM 708 (1999) (concerning a proposed ban on ethyl as a carcinogenic substance).

[20] DHAR, Biswajit; JOSEPH, Reji; JAMES, T. C. India's Bilateral Investment Agreements: Time to Review. **Economic and Political Weekly**, v. XLVII, n. 52, Dec. 29, 2012, p. 1192. Available at: <http://www.epw.in/special-articles/indias-bilateral-investment-agreements.html>. Last visited: July 7, 2014.

[21] Enron, a U.S. based energy trading company, had invested US $3 billion in a 10-year Liquefied Natural Gas Power Plant Development Project in India. This was the largest development project in India, and also the single largest direct foreign investment in India's history at the time of investment (1991). Work on the Dabhol Power Plant ('Dabhol') near Mumbai, Maharashtra began in 1992, and the plant was scheduled to have become operational by 1997. Dabhol was supposed to supply India with more than 2000 megawatts of electricity. But endless disputes over prices and terms of the deal resulted in the eventual collapse of the venture.

[22] GHOSH, Jayati. Treacherous Treaties. **Frontline**, v. 27, n. 24, 2010. Available at: <http://www.flonnet.com/fl2724/stories/20101203272409200.htm>. Last visited: July 10, 2014.

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In the above context, India adopted a Model BIT in 2003 which was by and large based on the OECD model text of 1991. The Model BIT served as a template for its BITS negotiations, especially for the fresh BIPAs/BITs. However, the model BIT was based on the template developed by capital exporting countries. The OECD in its Investment Policy Review notes that Indian BIPAs/BITs generally offer strong guarantees in the post establishment phase on fair and equitable treatment, national treatment, expropriation and free transfers as well as direct access to international arbitration.[23] Some commentators even opine that India was "over enthusiastic" in signing these treaties and the consequences of any fall out from such treaties were not properly studied or explored by the government.[24] However, treaty provisions of the BIPA/ BITs were hardly invoked by any foreign investor until very recently.

Nothing explains better India's shock and dismay of the consequences of an investment arbitration award than the White Industries case.[25] In 2010, White Industries, an Australian co. approached an ad hoc Tribunal established under the UNCITRAL Rules under the India- Australia BIT. The Arbitral Tribunal rendered an award holding that India's 'inordinate delay' in enforcing an arbitral award violated the "effective means" standard incorporated by the MFN clause of the India-Australia BIT. White Industries, the Australian investor, had obtained an award for over Australian $ 4 mn in 2002 against Coal India Limited (CIL) in connection with supply of equipment and development of a coal mine. The matter resulted in a protracted litigation for enforcement and White Industries commenced arbitration proceedings in 2010. White Industries contended that the delay violated the provisions on fair and equitable treatment (FET), expropriation, most-favoured nation (MFN) treatment, free transfer of funds and several other provisions of the India- Australia BIT. The tribunal dismissed White Industries' allegations related to violation of FET, expropriation and free transfer of funds. Even on the claim of "denial of justice" the tribunal ruled in India's favour. The tribunal, however, found India guilty of violating the India-Australia BIT because the Indian judicial system was unable to deal with White Industries' jurisdictional claim in over nine years. The tribunal held that the delay by Indian courts violated India's obligation to provide White Industries with an "effective means of asserting claims and enforcing rights." This is despite the fact that the India-

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[23] Organization of Economic Cooperation and Development (OECD). **OECD Investment Policy Review: India**. Paris, 2009.
[24] Ibid.
[25] **White Industries Australia Limited v. The Republic of India**, UNCITRAL, Final Award (30 November, 2011) para. 11.4.19 [hereinafter "White Industries Arbitration Award"].

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Australia BIT does not mention or include such a duty for host states. The Tribunal allowed White Industries to base their claim by importing the "effective means" provision from the India- Kuwait BIPA.

3.2 White Industries and the Renewed Debate on Policy Space

The outcome in *White Industries*, brought into the center-stage the importance of policy space in trade and investment treaty negotiations. In the WTO negotiations as well as in RTA negotiations, India had carefully negotiated sufficient "wiggle room". In addition to TRIPS, which I have already explained in this paper, India negotiated hard for policy autonomy in areas such as subsidy disciplines in Agreement on Agriculture, reduction of duties under NAMA, Rules negotiations, exclusion of Singapore issues from the coverage of Doha negotiations, etc.[26] However, it is noticed that in the area of Bilateral Investment Treaties, the government did not explore the type of flexibilities which it had examined for trade negotiations. As *Mihaela Papa* notes, the emerging economies were not as organized and willing in the realm of international investment treaty negotiations and dispute settlement as they were in the realm of WTO and international trade.[27] While renegotiation of these BITs may not be immediately feasible or practicable, the paper examines the different areas where the existing BIPAs/BITs lack flexibility and how India should adopt a BIT/BIPA which could cater to India's development aspirations.

Sovereign states would always like to preserve their right to regulate. This objective can be attained only if arbitrators give deference to the actions of the state agencies. Therefore, the investment treaty language deserves special attention. Article 31 of the Vienna Convention of the Law Treaties (VCLT)[28] unambiguously state that, "[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Deference to the language of the BIT could alleviate the concerns of developing countries which are negotiating new agreements. Furthermore, as argued

[26] BHATIA, Ujal Singh. G-20 – Combining Substance with Solidarity and Leadership. In: MEHTA, Pradeep S. et al. (Eds.). **Reflections from the Frontline: Developing Country Negotiators in the WTO**. New Delhi: Academic Foundation, 2012; HOEKMAN, Bernard. Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment. **J. Int'l. Econ. Law**, v. 8, n. 2, p. 405-24, 2005.
[27] PAPA, Mihaela. Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field. **J. Int'l Dispute Settlement**, v. 3, n. 3, 2012.
[28] **Vienna Convention on the Law of Treaties**, done at Vienna, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. [for short, "VCLT"].

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elsewhere, 'vague, broad, inconsistent, and inadequately drafted provisions will defeat the interests of India particularly in the domain of regulatory domain".[29] The following section identifies certain areas where India should consider the availability of development space while it is engaged in formulating a new BIPA model.[30]

3.3 Tightening the scope and content of 'Investment'

The scope and definition of investment is a threshold issue which triggers the applicability of the investment treaty and the jurisdiction of an arbitral tribunal.

The 2003 Model BIPA adopted by India has included a broad asset-based definition of investment. All of India's BIPAs except the India-Mexico BIPA follows this broad asset-based definition of investment.[31] Such a definition would include every kind of asset including direct investment, portfolio investment, intellectual property rights, rights to money, business concessions conferred under law or contract, etc.[32]

The definition of "investment" was an issue in the *White Industries* arbitration as well. India argued during the arbitral proceedings that the mining contract between White Industries and Coal India Limited was an "ordinary commercial contract for the supply of goods and services" and that it did not constitute an investment. But according to the tribunal the contract rights fell with the terms "right[s] to money or to any performance having a financial value". The tribunal further noted that White Industries' commitment under the Mining Contract "extended far beyond the provision of equipment and technical services" since it provided its own working capital, equipment and technical know-how and assumed financial risks for cost escalation and other penalties for inadequate performance.[33]

India's experience in White Industries clearly demonstrate that open-ended definition of the term "investment" could bring a range of activities within the meaning of investment. There have been proposals to include an "enterprise based definition of investment" in the BITs. According to this approach, investment is limited to direct investments or investments made

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[29] SAXENA, Prabodh. Pathological Pace of Dispute Settlement in India: Implications of an International Arbitration. **Jindal J. of Public Policy**, v. 1, n. 1, 2012, p. 244.
[30] India to Draft Model Treaty on MNCs' Mediation Rush. **The Economic Times**, Aug. 9, 2013.
[31] RANJAN, Prabhash. India and Bilateral Investment Treaties – A Changing Landscape. *ICSID Review – Foreign Investment Law Journal*, v. 29, n. 2, p. 419-50, 2014. Available at: <http://ssrn.com/abstract=2427568>.
[32] Ibid.
[33] **White Industries Arbitration Award**, op. cit., para. 7.4.10.

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through a locally established enterprise. Such a definition could ensure that only "real and substantial business operations" within the territory of the host state could qualify the definition of investment and consequently the benefits available under the BIPAs/BITs.

3.4 Delineating the contours of 'Fair and Equitable Treatment'

Fair and equitable treatment (FET) is a widely invoked principle in international investment arbitration. In practice, it has been noticed that this principle has been given an extremely wide interpretation to include concepts such as stability, transparency, legitimate expectations, compliance with contractual obligations, procedural fairness, action in good faith, etc. For example, in *TECMED S.A v Mexico*, the Tribunal held that the FET treatment requires a host state to extend to foreign investors the legitimate expectations which the investor had at the time of making the investments.[34] As many as 71 out of 73 of India's currently active BIPAs incorporate the FET principle.[35] Again, a vast majority of these BIPAs do not define the substantive content of the FET or provide any additional guidance regarding its meaning. This provides room for an expansive interpretation of India's BIT provisions.

As the content of FET standard is largely uncertain, violation of FET claim serves as a "catch-all" claim in practically every treaty based arbitration claim.[36] As the Tribunal in *Gami v. Mexico* noted, "the standard [of FET] is to some extent a flexible one which must be applied to the circumstances of each case". In practice, a flexible interpretation of FET has often prejudicially affected the interests of the host state.

A perusal of India's BITs, indicate that only a few BITs have linked concept of FET provision to the minimum standard of treatment (MST) of aliens under the customary international law. A notable example is the investment provision under India- Korea Comprehensive Economic Cooperation Treaty (CEPA). It states that the FET does not require treatment in addition to or beyond what is required by the customary international law minimum standard of treatment of aliens.[37] There is an overwhelming view that linking FET to MST under

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[34] **Tecnicas Medioambientales Tecmed S.A (TECMED) v. United Mexican States**, ICSID Case n. ARB/A/00/2, para. 154 (May 29, 2003).
[35] RANJAN, op. cit.
[36] SPEARS, Suzanne A. The Quest for Policy Space in New Generation of Inyernational Investment Agreements. **J. Int'l. Econ. L.**, v. 13, n. 4, p. 1037-75, 2010.
[37] **Comprehensive Economic Partnership Agreement, India-Republic of South Korea**, done in Seoul, Aug. 7,

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customary international law could provide greater regulatory autonomy to the host state. The MST under customary international law is purportedly based on the *Neer standard* which contemplates that conduct amounts "to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that any reasonable or impartial man would readily recognize its inefficiency"[38]. In *Glamis Gold V. United States*, a NAFTA Tribunal has held that the *Neer Standard* was still the relevant standard to determine whether a country has violated the MST under customary international law. Linking FET with MST of aliens under customary international law is expected to raise the threshold for claims based on FET.[39]

There are different approaches to limiting the scope of FET. One approach would be to expressly exclude the reference to FET while retaining a language on MST. For example, the India- Singapore CECA has omitted any reference to "FET" or even "MST". Another approach would be to clarify that FET standard is subsumed within and not autonomous to the MST.[40] A third safeguard would be to segregate the core elements of FET such as "denial of justice", "due process", etc., and incorporate these terms in the BIPAs/BITs with appropriate qualifications. For example, prefixing qualifying terms such as " flagrant violation of natural justice", "egregious violation of due process", " gross unfairness" etc., could ensure a standard that is more deferential towards the host government. An appropriate qualifying term could eliminate the possibility of arbitral discretion and enhance the threshold benchmarks. This could also be a suitable safeguard against the autonomous interpretation of the fair and equitable treatment.

3.5 Defining the Limits of 'Expropriation'

Broadly, the concept of expropriation involves governmental taking of property for which compensation is required. Although, various Arbitral Tribunals have defined the term "expropriation" in myriad ways, it is widely considered that it includes both direct and indirect expropriation. While direct expropriation involves an outright transfer of title, cases of such direct expropriations have become relatively uncommon. However, a web of administrative machinery and regulatory policing

2009 [for short, "India-Korea CEPA (2005)], art. 10.4.

[38] Neer v. Mexico, 4 **R. Int'l Arb. Awards**, p. 60-62, 1926.

[39] **Glamis Gold, Ltd v United States of America**, Award of 8 June 2009, [2009] 48 ILM 1039 (ICSID).

[40] See art. VI (1), **Bilateral Investment Treaty, Spain-Mexico**, done on Oct 10, 2006.

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have led to frequent incidents of indirect expropriations. All of the 73 BITs signed by India contain some provisions on expropriation. A number of India's BITs expressly state that an investment shall not be nationalized or expropriated (direct expropriation) or subjected to measures having 'effect' equivalent to expropriation (indirect expropriation) unless or until there is a public purpose, and further that in such cases fair and equitable compensation should be promptly paid to foreign investors.[41]

There is a broad feeling that most of the BITs signed by India are drafted in an extremely open-ended manner. A bulk of the BITs does not provide much indication to arbitrators on how to identify indirect expropriation barring the focus on the effect on investment.[42] These BITs could be potentially risky for India as a large number of regulatory measures could be challenged as expropriation a long as they have an effect on investment.[43] According to a study conducted by Prabhash Ranjan, only 16 out of 73 BITs signed by India provide additional indicators that an arbitral tribunal may need to take into account while determining claims of indirect expropriation.[44] On the positive side, these 16 BITs contain the language that any non-discriminatory measures designed to protect legitimate public welfare objectives do not constitute expropriation except in rare circumstances.[45] These types of carve-outs—in the nature of methanex[46] type carve outs—could be particularly helpful for developing countries such as India.

The discussion on expropriation will have special significance in the context of grant of compulsory licenses on pharmaceutical products. Specifically in the context of the TRIPS Agreement, India has long maintained that compulsory license was one of the flexibilities available to the developing countries to meet public health emergencies. Only four of the BITs (Japan, Malaysia, Singapore and Korea) specifically exempt issuance of compulsory licences concerning intellectual property from the purview of expropriation.[47]

For example, the recent grant of compulsory license to an Indian firm NATCO to manufacture Nexavar, an anti-cancer drug has created significant controversy.[48] The patent is

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[41] RANJAN, op. cit.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] **Methanex Corp v United States**, Final Award 44 ILM 1345, Aug. 3, 2005 (noting that a "non-discriminatory regulation for public purposes, which is enacted in accordance with due process" is not expropriation).
[47] Ibid.
[48] **Natco Pharma Ltd *v*. Bayer Corporation**, Decision of the Controller of Patents in Compulsory License Application No. 1 of 2011 (March 9, 2012). Available at:

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owned in this case by a German firm, Bayer AG. The compulsory license was granted after the Indian Patent Office ruled that Bayer AG was selling the drug at an excessively high price. According to the terms of the compulsory license, NATCO agreed to supply the drug at Rs. 8,800 per month and to give the drug at no cost to at least 600 patients every year. It is often argued that exclusivity is a central feature to any intellectual property and that grant of compulsory license significantly devalues that asset and, therefore has an effect equivalent to appropriation under international law. However, nothing in the India's BITs prevent Bayer from provoking an investment treaty arbitration against India on the same.

Another major controversy was the amendment to the Indian Income Tax Act with retrospective effect from 1962 (which is the date of original enactment of the Income Tax Act) to assert the Central government's right to levy capital gains tax on share purchases involving overseas companies with business assets in India. The amendment was apparently to overcome a decision of the Supreme Court of India which ruled in favour of Vodafone, a UK listed telecom group, regarding its liability to withhold taxes on its indirect acquisition of Hutchinson Essar, an Indian mobile operator, in 2007.[49] Indian tax authorities had imposed tax on Vodafone for failing to deduct tax on its $11 billion payment to Hutchinson. In April, 2012, Vodafone served notice of dispute against the Indian government alleging that the retrospective amendments would amount of violation of international legal protection.[50]

At a time when some of the legal notices could lead to full-fledged investment treaty arbitration proceedings later, it will be instructive to examine how India could minimize the impact of these adverse claims. It will be impossible to exclude a language on direct and indirect expropriation from any of India's BITs. However, it is possible to expressly mention that "only a permanent and complete or near complete deprivation of property" could amount to expropriation. In certain cases such as *Occidental v Ecuador*[51], it was sufficient for the governmental measure to "affect the economic value of an investment" to constitute expropriation. It will be prudent on the part of India to adopt a test which could take care of sovereign functions such as taxation from being litigated before arbitral tribunals.

<http://www.ipindia.nic.in/iponew/compulsory_license_12032012.pdf> [hereinafter "Natco v. Bayer" or "Decision of Controller of Patents"].

[49] **Vodafone International Holdings B.V. v. Union of India & Anr.**, Civil Appeal No. 733 of 2012. 26529 of 2010.

[50] See YADAVA, Raag et al. **Vodafone and India: A Review of Claims in Investment Arbitration**. National Law School of India University Working Paper Series, 2012. Available at: <https://www.nls.ac.in/resources/report.pdf>.

[51] **Occidental Exploration and Production Co. v. Republic of Ecuador** (Award) LCIA Case No. UN 3467 (UNCITRAL, 2004).

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3.6 Leaving Out 'MFN Provisions'

Most-Favoured- Nation (MFN) principle has been used to import both substantive and procedural provisions into BITs. There have been incidents in the past where MFN clauses have been used to extend introduce liability standards[52] as well as bypass procedural preconditions for arbitration[53]. The significance of the MFN provisions came up for significant scrutiny after the Tribunal's finding in *White Industries* case. The argument of the White Industries was that the failure of the Indian courts to deal with White Industries' jurisdictional claim for over nine years violated India's obligation to provide the foreign investor an "effective means of asserting claims and enforcing rights." Such an "effective means" clause was not present in the India-Australia BIT. The tribunal stated that White Industries could rely upon the 'effective means' provision present in the India-Kuwait BIPA on the basis of the MFN provision of the India-Australia BIT.[54] The Indian government contended that relying upon the "effective means" provision in the India-Kuwait treaty will "fundamentally subvert the carefully negotiated balance of the BIT"[55]. However, this plea was overruled by the tribunal stating that borrowing beneficial substantive provisions from a third-party treaty would help achieve the result intended by the incorporation of the MFN provision.

Barring two BITs, India has included MFN principle in most of its investment treaties. This principle is worded broadly with limited exceptions.[56] These exceptions have narrow application and are meant for taxation or other obligations in connection with free trade agreements or custom areas.[57] Broad and unqualified MFN provisions in Indian BITs opens up the possibility of foreign investors borrowing beneficial treaty provisions from India's other BITs, as that happened in *White Industries*.[58]

In the BITs/BIPAs that India has formalized thus far, a very broad application of MFN provisions is very common.[59] For example, the MFN provisions of the BIPA with France accords "to

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[52] **Asian Agricultural Products Ltd v. Sri Lanka**, ICSID Case No. ARB/87/3.
[53] **Emilio Augustin Maffezini v. Kingdom of Spain**, ICSID Case No. ARB/97/7.
[54] **White Industries Arbitration Award**, op. cit.
[55] Ibid., para.11.2.1.
[56] Ibid.
[57] See e.g, India-Switzerland BIT provide exception to MFN obligation under Article 4(2) and (3) while according special advantages by virtue of FTA, Customs Union or a Common Market by virtue of an agreement on the avoidance of the other Contracting Party.
[58] Ibid.
[59] DHAR; JOSEPH; JAMES, op. cit.

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investments of investors of other Contracting Party, including their operation, management, maintenance, use, enjoyment or disposal by such investors, treatment which shall not be less favourable than that accorded to investments of its investors, or than the most favourable treatment accorded to investments of investors of any third country, whichever is more favourable".[60] However, in a later agreement entered into with Mexico, an attempt has been made to circumscribe the rights of the foreign investor by narrowing the MFN provisions.

3.7 National Treatment

National Treatment obligation constitutes one of the core obligations under international trade and investment law. The national treatment obligation measures the state's treatment of foreign investors against the treatment of similarly situated domestic investors. A large majority of India's BITs do not provide national treatment at the pre-establishment stage.[61] Interestingly, barring a few BITs such as the India-Mexico BIT, the national treatment provisions do not contain the 'like circumstances' clause.[62] Absence of this term allows foreign investments, which are not in like circumstances, to claim a violation of national treatment.[63] This will expand the scope of national treatment protection and reduce the regulatory space available to India to regulate foreign investment.[64] However, one should add that India's recent CEPAs with Japan, Korea, Singapore and Malaysia provide sector specific exceptions to the principle of national treatment.[65] Foreign direct investment in multi-brand retail has been a controversial issue in India. Accordingly, the India- Korea CEPA has specifically excluded retail trading sector from the application of national treatment.[66] This gives the regulatory space to India to enact laws that favour domestic retailers over foreign (Korea) retailers. However, such sector specific exemptions do not exist in all other 69 Indian BITs which reduces the regulatory space for India. However, wherever national treatment obligation is specifically provided, it is important to provide a tailored definition of the concept of 'like circumstances'.

[60] Ibid.
[61] RANJAN, op. cit.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] **India-Korea CEPA** (2005).

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3.8 Limiting Full Protection and Security

The obligation to provide foreign investors full protection and security (FPS) requires the host State to exercise due diligence in protecting foreign investments from adverse acts of private parties (for example, violence by private parties) and of instrumentalities of the state. A major proportion of India's BIPAs contain FPS provisions, although the meaning and scope of this concept remain unclear. However, India's recent agreements with Korea, Malaysia and Japan have provided more certainty to this concept.[67] These treaties link FPS to the protection granted under customary international law. Rather than treating FPS as a stand-alone requirement, it is a significant improvement to link this concept with normative concepts such as customary international law.

3.9 Crafting Public Policy Exceptions

Public international law recognizes the right of states to exercise police powers, including through the enactment and enforcement of regulatory functions.[68] The ability to use general exceptions from treaty obligations is considered to be a valuable right. All 73 of India's currently existing BIPAs/BITs contain some general exception clause or a non-precluded measure provision. Broadly, the general exceptions allow the respondent state to temporarily deviate from its BIT obligations in situations that warrant giving precedence to various public policy objectives over investment protection. In the case of India's BIPAs, it is however noticed that a majority of treaties provide only a narrow category of general exceptions. Those exceptions allow deviations from the treaty only in situations of essential security interest or in circumstances of extreme emergency. Stated differently, deviation from treaty obligations is allowed only in extremely compelling circumstances. It is also noticed that very few Indian BITs allow deviations from investment protection on significant grounds such as public order, health and the environment or on such grounds as boosting domestic industries in economically backward regions. There are, however, notable exceptions as well. For example, the India- Singapore

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[67] BROWN, Chester. **Commentaries on Selected Model Investment Treaties**. Oxford: Oxford University Press, 2013. p. 362.
[68] BROWNLIE, Ian. **Principles of Public International Law**. Oxford: Oxford University Press, 2008. p. 292-3.

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CEPA has general exceptions in the nature of GATT Article XX or GATS Article XIV.[69] The India- Malaysia CECA has included national security exception related to the infrastructure sector, which was quite innovative.[70]

An important, but less considered area where India might need public policy exception could be national food security. Although FDI is not permitted in the agriculture sector in India, foreign investment in agro-processing industries is available. Feeding more than a billion population would be an increasing challenge for India and one can expect significant foreign direct investment in food and agro-related industries in the foreseeable future. Although the linkages between FDI and food security are not fully explored or understood, there are certain suggestions in the field of international investment law that future BITs should consider including a public interest clause which could address food security issues, especially in the context of food deficit countries.[71]

3.10 Preamble of Investment Treaties

Preambles often serve as important guide to the interpretation of treaty provisions including their underlying purpose. The Preamble could inform the rest of the treaty and would be a valuable 'context' in treaty interpretation. Indeed, reference to non-investment policy objectives should be Formulated carefully, these provisions can provide a significant amount of flexibility for a developing country such as India to pursue its development goals in conjunction with providing investor protection. For example, the preamble of the India-Singapore Comprehensive Economic Cooperation Agreement has includes the following recitals, "[r]eaffirming their right to pursue economic philosophies suited to their development goals and their right to regulate activities to realize their national policy objectives".[72] The India-Korea CEPA has also used a similar language in the preamble. It is worth noting that India-Singapore

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[69] **Comprehensive Economic Partnership Agreement, India-Singapore**, done in New Delhi, June 29, 2005 [for short, "India-Singapore CEPA (2005)].

[70] **Comprehensive Economic Cooperation Agreement, India-Malaysia**, done at Kuala Lumpur, July 1, 2011 [for short, "India-Malaysia CECA (2011)" (exempting actions taken for the protection of critical public infrastructure, including communications, power and water infrastructure from deliberate attempts intended to disable or degrade such infrastructure).

[71] SMITH, Fiona; HÄBERLI, Christian. **Food Security, Foreign Direct Investment and Multilevel Governance in Weak States**. Society of International Economic Law (SIEL), 3rd Biennial Global Conference, June 25, 2012. Available at: <http://ssrn.com/abstract=2091209>.

[72] Preamble, **India-Singapore CECA** (2005).

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CECA and India-Korea CEPA are very detailed economic cooperation agreements and not essentially investment promotion and protection agreements.

4 Conclusion

As an established player in the international trading system, India had striven to preserve policy autonomy in areas such as TRIPS, Agreement on Agriculture Rules, exclusion of Singapore issues from Doha Agenda and several other areas. However, adoption of a western-type investment protection model for a bulk of India's BITs/BIPAs implies that a broad spectrum of policy or regulatory measures that the government has taken or may take, could be brought up in international investment arbitrations. This paper has examined various substantive provisions of India's investment agreements and recommends the areas where India should seek policy autonomy or development space. The paper has examined the key elements of policy flexibility such as tighter definition of investment, streamlining the meaning of FET standards, limiting the scope of indirect expropriation, exclusion of MFN and national treatment clauses and selection of appropriate public policy exceptions. The paper suggests the rejection of open-ended and undefined terms which could be susceptible for expansive interpretation. Although, it may not be practically feasible and desirable to terminate or review India's BIPA at this stage, this paper recommends caution at least with respect to India's future trade and investment treaty negotiations and any review proposals.

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Annex I

ITA NOTICE OF DISPUTE (INDIA)				
Investor	**Facts**	**BIT/Year of the claim or award**	**Claim ($)**	**Sector**
CREDIT LYONNAIS SA, (NOW CALYON SA)	Related to financing of Dahbol Plant. The case was settled under undisclosed terms.	India-France BIT 2004	Not Disclosed (ND)	Dahbol Power Plant [Energy]
OFFSHORE POWER PRODUCTION C.V., TRAVAMARK TWO B.V., EFS INDIA-ENERGY B.V., ENRON B.V., AND INDIAN POWER INVESTMENTS B.V. (NETHERLANDS)	Dahbol Power plant investment	India-Netherlands BIT 2004	An amount of compensation sought over $ 4 billion. The dispute was settled as part of a successful restructuring	Energy
CAPITAL INDIA POWER MAURITIUS I AND ENERGY ENTERPRISES (MAURITIUS) COMPANY	The investor made a claim under the UNCITRAL rules against the GOI against the investments made for the development of Dahbol Power Plant. The ICC International Court of Arbitration awarded US$94,700,000 with the simple interest thereon at the rate of 9% per annum from 2 May 2002 to the date of this award for the breaches by Maharashtra Development Cooperation for the breaches of Shareholder Agreement.	Clause under the Shareholder Agreement- 2005	Awarded US$94,700,000 with simple interest thereon at the rate of 9% per annum.	Energy
ERSTE BANK DER OESTERREICHISCHEN SPARKSSEN AG	Investments in Dahbol Power Plant. Contents not disclosed.	2004	ND	ND
BNP PARIBAS	Investments in Dahbol Power Plant. Contents not disclosed.	2004	ND	ND
CREDIT LYONNAIS SA, (NOW CALYON SA)	Related to financing of Dahbol Plant. The case was settled under undisclosed terms.	India-France BIT 2004	ND	ND
OFFSHORE POWER PRODUCTION C.V., B.V., EFS INDIA-ENERGY B.V., ENRON B.V., AND INDIAN POWER INVESTMENTS B.V. (NETHERLANDS)	Power plant investment with an amount of compensation sought over $4 billion. The dispute was settlement as part of a successful restructuring.	India-Netherlands BIT 2004	Nd	ND
ABN AMRO N.V	Investment related to financing of Dahbol Power Plant. The case was settled on undisclosed terms.	India-Netherlands BIT	ND	Energy
CREDIT SUISSE FIRST BOSTON	The investment was related to the financing of Dahbol Power Plant. The case was settled on an undisclosed terms.	India-Switzerland BIT 2004	ND	Energy
ANZEF LTD.	Investment related to financing of Dahbol Power Plant. The case was settled on undisclosed terms.	India-UK BIT 2004	Investment related to financing of Dahbol Power Plant.	ND
STANDARD CHARTERED BANK	Investment related to financing of Dahbol Power Plant and was settled on undisclosed terms	India-UK BIT 2004	ND	Energy
WHITE INDUSTRIES AUSTRALIA LIMITED	Contractual dispute with Coal India escalated into an ITA with the Indian Government over the inordinate delay in executing the claims by White Industries in the SC. ITA issued--- Dispute won by White Industries on the counts of MFN obligation that India took under its BIT with Australia. A tribunal can find a violation of the ***'effective means'*** standard even when the concerned BIT does not contain such a provision as long as it contains a ***broad MFN provision***, which some tribunals will use to import investor guarantees from other BITs. Such happened in this dispute.	India-Australia BIT 2010	$10 million with interest [decided]	Judicial propriety and consequence of undue delay.
BYCELL	Notice of dispute not made public.	India-Cyrus BIT and India-Russia BIT 2012	ND	Not made public
CC/DEVAS (MAURITIUS) LTD., DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED AND TELECOM DEVAS MAURITIUS LIMITED	Notice of dispute not made public	India-Mauritius BIT 2012	ND	Not made public
KHAITAN HOLDINGS MAURITIUS LIMITED	ND	India-Mauritius BIT 2013	ND	ND

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ITA NOTICE OF DISPUTE (Cont'd)				
Dispute	**Facts**	**BIT**	**Claim ($)**	**Sector**
VODAFONE GROUP PLC [NETHERLANDS]	Investor notified India under its BIPA with Netherlands apprehending a $2.2 bn tax demand on its buyout of Hutchinson Essar in 2007. Such was a consequence of an amendment in Section 9 of the Income Tax Act, 1961 in the 2012-13 budget retrospectively from the day of the commencement of the Act after an adverse SC decision that – overseas transactions involving Indian assets could not be taxed. Indian tax authorities has issued a demand notice on Vodafone for failing to deduct tax on its $11 billion payment to Hutchinson Telecommunications International for the acquisition of Hutchinson Essar.	India-Netherlands BIPA	-	Telecommunica tions
SISTEMA JFSC [RUSSIA]	In consequence to the SC's judgment on 2G spectrum case, Sistema, a Russian company, invoked its right under Article 9.1 of the bilateral investment treaty between Russia and India by filing a notice of dispute against India. Sistema has a joint venture with India's Shyam Group – SistemaShyam Teleservices, in which the Russian government also has a stake of 17.14%. Among the 122 licences cancelled by the SC, 21 licences belonged to Sistema Shyam TeleServices Ltd, in which Sistema owns a 56.68% share. Sistema stated that the cancellation of SSITL's licences following Sistema's investment of billions of dollars into the Indian cellular sector is contrary to India's obligations under the BIT, including obligations to provide investments with full protection and security and obligations not the expropriate investments. The company said that it would arbitrate against the cancellation and consequently protect its $3.1 billion investment.	India-Russia BIT	$3.1 billion worth of investment at stake	Telecommunica tions
THE CHILDREN INVESTMENT FUND (TCI) [UK-BASED HEDGE FUND]	TCI has a minority stake in Coal India (1% share-holding). It served an arbitration notice questioning the Government of India's direction to Coal India to delink the price of domestically produced coal from imported prices while concluding fuel supply agreements with independent power producers, a move that would lower the price of coal sold by the firm. TCI contends that Coal India's profits will decline by $20 billion and the interests of the minority shareholders in the firm will be affected as a result.		$20 billion of profits at stake	Coal
TELENOR (NORWEGIAN COMPANY)	Norwegian telecom operator Telenor, lost its 22 2G licences after the SC Judgment. It consequently served a notice on the government, threatening international arbitration and claiming damages of nearly $14 billion (Rs. 70,000 crores). Telenor invoked the provisions of India's CECA with Singapore to issue a notice seeking a solution from the government within six months or drag the matter for an international arbitration from failure to protect its investment. Telenor stated that there could be future breach of CECA from the manner in which these licences are now distributed through auctions. The notice further stated that the compensation has to be equivalent to the market value of the expropriated investment at the time of the decision which is 2 February 2012, the day when the SC cancelled 122 licences issued during ex-telecom minister .Telenor claims to have invested close to $14 billion in its Indian operations. However, the company has recently declared to have dropped its decision to seek arbitration given the set-off of Rs. 1,658 crore on payments to be made for the new spectrum it won after the quashing of its previous licences. Such a set-off is for the payment made by its previous JV partner, Unitech Wireless, towards its 22 licences that were quashed by the SC.	India-Singapore CECA	$14 billion damages	Telecom
AXIATA (MALAYSIA)	Malaysian telecom major, Axiata has notified an investor arbitration notice to India. Axiata owns 19.69% in Idea Cellular, claims that its investments in India faces risk because of the SC decision.	India-Mauritius BIPA	-	Telecom
CAPITAL GLOBAL AND KAIF INVESTMENT (MAURITIUS)	In October 2013, Khaitan Holdings Mauritius (KHML), a Mauritius-registered company owing 26% equity in Loop Telecom initiated an international arbitration notice against Indian Government seeking a compensation of US $ 1.4 billion over the cancellation of its 21 telecom licences by the SC. The SC while cancelling 12 licences of 22 telecom operators held that the allotment of spectrum was unconstitutional and arbitrary and directed the government to conduct fresh auctions for sale of the spectrum within a span of 4 months. The claim by the company consist of $140 million investment in Loop Telecom in 200 with 12 percent interest till the claim is received, loss of $1 billion in shareholder revenue and loss of $300 million in the market value of 21 licences.	India-Mauritius BIT	US$ 1.4 billion	Telecom

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Annex II

Sl. No.	Name of the Agreement and the participating countries	Date of Signing
Till 1995		
1.	India – Bhutan Agreement on Trade, Commerce and Transit	17.01.1972 (revised on 28.7.2006)
2.	Asia Pacific Trade Agreement (APTA) (Bangladesh, China, India, Republic of Korea, Sri Lanka)	July, 1975 (revised Agreement signed on 02.11.2005
3.	Global System of Trade Preferences (G S T P)	April, 1988
4.	Revised Indo-Nepal Treaty of Trade	06.12.1991 (Revised on 27.10.2009)
1995-2000		
5.	Agreement on South Asian Free Trade Area (SAFTA)	04.01. 2004
6.	India – Sri Lanka	
2003 onwards		
7.	India – MERCOSUR	25.01.2004
8.	India – Thailand FTA - Early Harvest Scheme (EHS)	01.09.2004
9.	India – Singapore Comprehensive Economic Cooperation Agreement (CECA); Second Review of the Singapore CECA	29.06.2005
10.	India – Afghanistan	06.03.2003
11.	India – MERCOSUR	25.01.2004
12.	India – Chile; Expansion of Indo- Chile Preferential Trade Agreement	08.03. 2006
13.	India – Japan Comprehensive Economic Partnership Agreement	16.02.2011
14.	India – Malaysia Comprehensive Economic Cooperation Agreement	18.02.2011
15.	India – Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSEC)	Negotiations ongoing.
16.	India – Gulf Cooperation Council (GCC) Free Trade Agreement (FTA)	Negotiations ongoing.
17.	India – South African Customs Union (SACU) Free Trade Agreement	Negotiations ongoing.
18.	India – Pakistan Trading Agreement	Negotiations ongoing
19.	India – New Zealand CECA	Negotiations ongoing
20.	India – Canada CEPA	Negotiations ongoing
21.	India – Australia CECA	Negotiations ongoing
22.	India – Indonesia CECA	Negotiations ongoing
23.	India – Israel Free Trade Agreement	Negotiations ongoing
24.	India – EU Broad Based Trade and Investment Agreement	Negotiations ongoing
25.	India – EFTA Broad Based Trade and Investment Agreement	Negotiations ongoing

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