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EDITORS' INTRODUCTION

Does India need a model BIT?

James J. Nedumpara[1] · **Rodrigo Polanco Lazo**[2]

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1 Introduction

Bilateral Investment Treaties (BITs) are meant for promotion and protection of foreign investments. After emerging from several decades of economic isolation and import-substitution led policies, the Indian economy opened its doors to international trade and foreign direct investment in the early 1990s. In the mid-1990s, India also began entering into BITs. This engagement was part of a comprehensive economic agenda initiated by the Narasimha Rao government and its Finance Minister Dr. Manmohan Singh. Foreign Direct Investment (FDI) reforms were also among the first generation reforms undertaken to attract multinational corporations to open, expand and operate various production facilities in India.[1] The decision to enter into BITs was also broadly in line with the overwhelming trend at that time that such treaties by providing investment security and a depoliticized environment could attract foreign investment. Although, subsequent studies have shown only a tenuous relationship between the flow of investment and the availability of a BIT

[1] Raj Bhala, *First Generation Indian External Reforms in Context*, 5(2) TRADE L. & DEV. 6, 23 (2013).

James J. Nedumpara—Associate Professor and Executive Director; Rodrigo Polanco Lazo—Researcher, Lecturer and SNIS/SECO Project Coordinator.

✉ James J. Nedumpara
jnedumpara@jgu.edu.in

✉ Rodrigo Polanco Lazo
rodrigo.polanco@wti.org

[1] Centre for International Trade and Economics Laws, Jindal Global Law School, O.P. Jindal Global University, Sonipat, Haryana, India

[2] World Trade Institute, Bern, Switzerland

framework, at least in India's case, there is a positive correlation between the signing of the BITs and the FDI flows into several sectors of Indian economy.[2] Although it is difficult to attribute any causal role to the signing of BITs, India attracted unprecedented foreign investment flows in the early days of economic liberalization.

India's initial BITs were with developed economies and incorporated high investor protection terms—fairly uncharacteristic for a developing country that had been vocal in asserting the rights of developing countries in the GATT negotiations. India's initial BITs were based on the 1993 Model which itself was modelled on the Organisation for Economic Co-operation and Development's (OECD) Draft Convention for Protection of Foreign Property of 1967.[3] India developed another Model BIT[4] in 2003 that was by and large similar to the 1993 Model. In other words, there have been attempts in the past to revise India's previous BIT Model text to tailor it to suit India's changing political profile and economic conditions.[5] India's quest for adopting a new Model BIT will have to be seen in this context.

2 India's policy of investment agreements

India has signed BITs with several countries, both developed and developing in the last two and half decades. Between 1994 and 2013, India signed eighty-four BITs, of which, seventy-two are currently in force. According to the information publicly available, India has only terminated two of these treaties: the 1999 Argentina-India BIT and the 1999 Indonesia-India BIT. The first BIT concluded by India was with the United Kingdom in 1994, and the latest was with the United Arab Emirates in 2013. The most active period of negotiation of these agreements was during 1997 when ten agreements were concluded.

In the meantime, India started engaging with several Association of South-East Asian Nations (ASEAN) economies on negotiating comprehensive economic partnership agreements. To have a complete overview of the International Investment Agreements (IIAs) signed by India, we need to add the five treaties with investment provisions (TIPs) to India's existing BITs. These treaties include the ASEAN – India Investment Agreement (2014), and the investment chapters of the comprehensive economic partnership with Malaysia (2011), Japan (2011), South Korea (2009), and Singapore (2005).

[2] Jennifer Tobin & Susan Rose Ackerman, *Foreign Direct Investment and Business Environment in Developing Countries* (Yale Law and Economics Research Paper No. 293, May 2, 2004).

[3] Saurabh Garg, et.al., *The Indian Model Bilateral Investment Treaty: Continuity and Change, in* RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES 69, 82 (KAVALJIT SINGH & BURGHARD ILGE, EDS., 2016).

[4] *Indian Model Text of Bilateral Investment Promotion and Protection Agreement* (2003), http://www.italaw.com/sites/default/files/archive/ita1026.pdf.

[5] Sumati Chandrasekharan & Smriti Parsheera, *Why the New Model BIT May Not Work*, THE HINDU: BUS. LINE (May 25, 2016), http://www.thehindubusinessline.com/opinion/columns/why-the-new-bit-may-not-work/article8645025.ece.

In the above context, it is important to know the broad features and the investor protection rights that these agreements guarantee. At a time when several countries have started re-examining their BITs, it is desirable to know where India stands with respect to the investor protection rights it has provided under its BITs or the Bilateral Protection and Promotion Agreements (BIPAs), as they are often referred to in India.

A vast majority of Indian IIAs have a broad scope of application on both the definition of investor and of investment. Indian investment treaties largely define "investor" as natural persons who have the nationality or the citizenship of the contracting party or in few cases, the permanent residency of the contracting party. The definition also includes corporations, with the place of incorporation being the factor that usually defines the nationality of the investor. Although in certain cases, the place of principal seat or effective business activities is also required.

The definition of investment commonly found in Indian IIAs is an illustrative list of assets and requires that the investment be made in accordance with host state's laws. Only the 2007 India-Mexico BIT defines "investment" as an exhaustive list of enterprise-based assets. Moreover, about half of the Indian BITs exclude portfolio investments from the definition of investment.

Most of Indian IIAs extend protection of the treaty only after the investment has been established in the host state. In other words, the protection is available only post-establishment. Only six Indian investment treaties extend the protection of the treaty to the pre-establishment phase: the 2014 ASEAN-India investment agreement, the 2011 India-Malaysia Free Trade Agreement (FTA), the 2011 India-Japan Economic Partnership Agreement (EPA), the 2009 India-South Korea Comprehensive Economic Partnership Agreement (CEPA), the 2005 India-Singapore Comprehensive Economic Cooperation Agreement (CECA), and the 2001 India-Kuwait BIT.

With respect to standards of treatment, the large majority of Indian IIAs define national treatment and most-favoured-nation (MFN) treatment broadly. Only two agreements exclude investor-state arbitration from the operation of the MFN-treatment: the 2009 Colombia-India BIT, and the latest Indian BIT concluded in 2013 with the United Arab Emirates. Most Indian IIAs include the fair and equitable treatment standard but they do not always include full protection and security standards.

Regarding standards of protection, Indian IIAs frequently consider prompt, adequate and effective compensation (Hull Formula) for expropriation as the applicable standard. Only three agreements accord compensation for expropriation of land in accordance with the national laws: the 2005 India-Singapore CECA, the 2011 India-Malaysia FTA and the 2014 ASEAN-India Investment Agreement. A further limitation could be found in the 2003 Armenia-India BIT that requires all expropriations to be compensated in accordance with host state's laws. All Indian IIAs also provide compensation for indirect expropriation. However, in around a quarter of these agreements, it is declared that compensation will not be due if the measure was taken for the protection of public welfare.

India's IIAs usually do not include the so-called "umbrella clause" which requires that the host state observe all its obligations it has entered into with the foreign investor. Only thirteen IIAs contain this provision.

A provision guaranteeing the free transfer of funds (including capital and remittances) is included in most Indian IIAs without any restrictions. Only few agreements (ten IIAs) consider the possibility of restricting the transfer of funds in order to obtain compliance from the foreign investor to protect the creditors or because of balance of payments difficulties (thirteen IIAs).

Explicit prohibition of performance requirements is seldom found in Indian investment treaties, and only five agreements include such prohibitions. For instance, the India-Kuwait BIT (2001) and India- Japan CEPA (2011) contain certain restrictions on performance requirements.

While these are some of the broad features of India's BITs, the scope of protection will depend on the precise language of individual treaties. However, as the OECD report stated India's BIT incorporate generally strong investor protection provisions.[6] In the above backdrop, it will be useful to examine India's experience with Investor-State Dispute Settlement.

3 India's experience with investor-state dispute settlement (ISDS)

Majority of Indian IIAs include an ISDS clause, which provides for Investor-State arbitration. Only two agreements require the investor to exhaust the local remedies before a dispute arises (the 1997 India-Switzerland BIT in case of contractual breaches, and the 2007 India-Libya BIT), and two treaties establish that the investor could bring a claim against the host state only in the absence of local remedies (the 1997 BLEU-India BIT and the 1999 Austria-India BIT).

Today, India is one of the top ten respondent countries with regard to investor-state arbitrations (twenty in all, with ten arbitrations still pending).[7] If we examine the treaties that have been used as basis of the respective claims, we find that all of them have been brought under BITs – not under investment chapters of the FTAs or Economic Partnership Treaties. Twenty-five percent of all the claims were initiated under the 1994 India-UK BIT (five cases), twenty percent under the 1998 India-Mauritius BIT (four cases), and fifteen percent under the BITs with France and Netherlands (three cases each). The other home states of the claimants have been Germany, Russia, Cyprus, Australia, Switzerland and Austria (one case each). All the treaties that triggered Investor-State arbitration against India were concluded within a period of eight years (between 1994 and 2002).

Another important characteristic of the Indian experience in ISDS is that disputes tend to be concentrated in specific sectors. Eleven of the twenty disputes are related

[6] ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT, OECD INVESTMENT POLICY REVIEW: INDIA (2009), http://www.oecd.org/india/india-investmentpolicyreview-oecd.htm.

[7] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), Investment Dispute Settlement Navigator Investment Policy Hub (2016), http://investmentpolicyhub.unctad.org/ISDS.

to energy, oil and gas sector[8] – and nine of them are exclusively connected to the Dabhol energy project in Maharashtra.[9] Multiple disputes have been raised in the telecommunication service sector (seven cases).[10] The remaining two cases are in the mining sector (*White Industries*)[11] and of transportation (maritime port).[12]

As India is not a contracting party to the International Centre for Settlement of Investment Disputes (ICSID), all the disputes against India have been under Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), without a specific administering institution, with the exception of *Tenoch* et al. v. *India* and *Devas* v. *India*, where the case is administered by the Permanent Court of Arbitration (PCA).

A majority of Indian ISDS cases have been settled (the nine cases related to the Dabhol Project) and ten are currently pending. Yet, India was confronted with difficulties stemming from Investor-State arbitration after losing the *White Industries* case on November 30, 2011.[13] This was the first time that India lost a treaty-based Investor-State arbitration.[14] The case involved claims arising out of alleged judicial delays by the government of India that left the claimant unable to enforce an International Chamber of Commerce (ICC) award for over nine years concerning a contractual dispute with Coal India, a State-owned mining entity. The case was particularly worrying for India as the investor in that case successfully used the provisions of a third party investment treaty involving India by invoking the MFN clause.

[8] *Cairn Energy PLC v. India*, UNCITRAL, Notice of Arbitration, (Mar. 10, 2015); *Vedanta Resources PLC v. India*, UNCITRAL, Notice of Arbitration, (Mar. 13, 2015).

[9] *Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v. The Government of India*, UNCITRAL; *Standard Chartered Bank v. Republic of India*, UNCITRAL; *Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power Investments B.V. v. Republic of India*, UNCITRAL; *Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India*, UNCITRAL; *Credit Suisse First Boston v. Republic of India,* UNCITRAL; *Credit Lyonnais S.A. (now Calyon S.A.) v. Republic of India*, UNCITRAL; *BNP Paribas v. Republic of India*, UNCITRAL; *ANZEF Ltd. v. Republic of India*, UNCITRAL; and *ABN Amro N.V. v. Republic of India*, UNCITRAL.

[10] *Tenoch Holdings Limited, Mr. Maxim Naumchenko and Mr. Andrey Poluektov* v. *The Republic of India*

(PCA Case No. 2013-23); *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India* (PCA Case No. 2013-09); *Khaitan Holdings Mauritius Limited v. India*, UNCITRAL, Notice of Arbitration, (Sep. 30, 2013)*; Deutsche Telekom v. India*, UNCITRAL, Notice of Arbitration, (Sep. 2, 2013); *Vodafone International Holdings BV v. India*, UNCITRAL, Notice of Arbitration, (Apr. 17, 2014); *South Asia Entertainment Holdings Limited v. India*, UNCITRAL, Notice of Arbitration, (Mar. 7, 2016); and *Astro All Asia Networks v. India*¸ UNCITRAL, Notice of Arbitration, (Mar. 7, 2016).

[11] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, (Nov. 30, 2011) [hereinafter *White Industries*].

[12] *Louis Dreyfus Armateurs SAS (France) v. The Republic of India*, UNCITRAL, Proceedings, (Mar. 31, 2014).

[13] *White Industries*, *supra* note 11.

[14] Sapna Jhangiani & Joseph P. Matthews, *"White Industries" and State Responsibility: Lesser-Known Facts about the Case as Discussed during the 2014 ICCA Young Arbitration Practitioners Conference*, KLUWER ARBITRATION BLOG (2014), http://kluwerarbitrationblog.com/2014/06/30/white-industries-and-state-responsibility-lesser-known-facts-about-the-case-discussed-at-2014-icca-young-arbitration-practitioners-conference/.

4 Looking for a new model (of investment treaty)

After *White Industries*, the government of India felt the need to replace the 2003 Model BIPA, and to have a new Model BIT to use it as a basis to sign new treaties, and to renegotiate the existing ones. The process of redrafting a new Model BIT was further advanced by the release of a Draft Model BIT ("Draft BIT") in April 2015 for public consultation and comments, which also included a report of the Law Commission of India suggesting several changes. A final version of the new Indian Model BIT was made public in December 2015.[15]

This issue of the Jindal Global Law Review (JGLR) is devoted to analysing the new Indian Model BIT, and how it will affect the investment climate in India, aiming to provide a closer look at India's approach to investment treaty negotiations. Several questions have guided the edition of this issue: what are the reasons that led India to adopt a new model of bilateral investment agreement? Are these reasons sufficiently addressed in the 2015 Model BIT? Are the substantive and procedural terms of the Model BIT calibrated to advancing India's long-term interests? We also wanted to examine the benefits and shortcomings of the new Indian model. In this regard, the key question is whether India's new Model BIT reflects the lessons learned from its own experience, from other southern/developing countries, or from northern/developed countries? Equally important is the question whether other countries would be interested in negotiating a treaty prepared on the basis of India's new Model BIT. We also wanted to ask a range of questions including whether India could draw lessons from comparative efforts in other countries such as Brazil, Indonesia, and South Africa—countries that share more or less similar interests and concerns with India. Another interesting factor was India's potential conflict in negotiating treaties as part of larger trade and investment agreements such as the Regional Economic Partnership Agreement (RCEP) where investment is one of the issues. We asked the question whether India's new Model BIT is integrated with India's approach under other IIAs such as those concluded with ASEAN, Japan and Korea? Finally, we posed the question whether India's BITs would reflect and guard against the recent developments in investor-state dispute settlement under the existing IIAs.

The contributions that are included in this Special issue of JGLR have attempted to address some of the above-mentioned questions from different perspectives. Kabir Duggal presents the challenges of the changing landscape of Investor-State Arbitration in India and the potential issues in negotiating or renegotiating India's treaties based on the new Model BIT. Srikar Mysore and Aditya Vora examine the importance of policy space in international investment law and examine if there is a middle path in investment norm setting, especially in the context of some of the new and emerging agreements such as the Transpacific Partnership (TPP), European Union proposal in the Trans-Atlantic Trade and Investment Partnership, and the Brazil Co-operation and Investment Facilitation Agreement. Leïla Choukroune's article highlights the importance of a right-based approach in international investment

[15] Ashutosh Ray, *Unveiled: Indian Model BIT*, KLUWER ARBITRATION BLOG (2016), http://kluwerarbitrationblog.com/2016/01/18/unveiled-indian-model-bit/.

treaties and the need for greater and original integration of non-investment concerns (NIC) in India's current negotiations and investment treaty drafting.

While the role of BITs in attracting investment is debated, it is important to know why and how these agreements came into place. Kanu Agrawal provides an historical perspective to this Model BIT, by situating it in the context of various developments that shaped the emergence and evolution of these treaties. It is important to note that the shape, structure and contents of the investment treaties have changed and evolved over a period of time. Anriduha Rajput chronicles and evaluates the shifting treaty practice in the scope, definitions, jurisdiction, nature of investment protection and several other ancillary topics in the new Model BIT when compared with the earlier Models. Azernoosh Bazrafkan has done the arduous work of comparing the text of the Model BIT with texts of a number of India's exiting IIAs. This exercise is highly useful in re-calibrating India's position either in renegotiating old treaties or in negotiating fresh treaties with India's trading partners.

Other essays in this Special issue examine some of the specific provisions. Deepak Raju's article examines the use of general exceptions and, in particular, the "necessity" defence in India's Model BIT. Raju's article highlights the particular difficulty in applying a WTO-type necessity test in the context of investment treaty arbitration. Yet another issue is the definition of "investment" itself, which could also be a jurisdictional issue. In this regard, Bhagirath Ashiyah discusses the consequences of the shift toward an enterprise-based definition of investment in India's Model BIT and the pitfalls of using the *Salini test*.[16]

In a related context, Professor Ernst-Ulrich Petersmann presents an overview of the methodological problems in international economic law and examines methodological challenges resulting from the often incomplete, fragmented and under-theorized nature of multilevel, public and private regulation of transnational movements of goods, services, persons, capital and related payments. Professor Petersmann's article highlights the need for a thorough re-examination of the legal foundations of the United Nations (UN), World Trade Organisation (WTO) and international investment treaty law, including the drafting of model BITs.

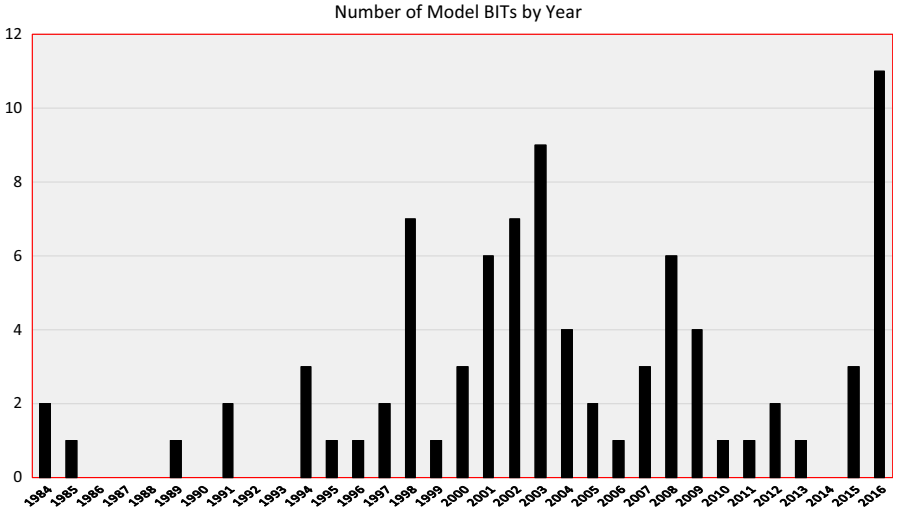
5 How useful model BITs are?

Discussing a Model BIT presents before us the question of how worthwhile these agreements are in promoting capital flows. It is important to know the usefulness of Model BITs. We posed the question: how many countries have developed Model BITs? And, whether real treaties are indeed concluded on the basis of such Model treaties?

Using the information available both at the UNCTAD Investment Hub and that collected at the SNIS Project "Diffusion of International Law: A Textual Analysis of International Investment Agreements", from different governmental websites and publications[17] (that gives us an overall number of eight-five Model BITs), we can conclude that Model BITs were largely prepared and made public during the decade

[16] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4.

of 1998-2008 (a period during which the maximum number of BITs were concluded), and then followed by a decline in the last decade. Of late, standalone BITs are less frequently negotiated, while preferential trade agreements with investment chapters are increasingly common.



Source: UNCTAD

While examining India's Model BIT, we wanted to know as to who is preparing such Model BIT of late. The answer is straightforward: largely the countries that have concluded more BITs in the investment treaty universe—a list that is led by Germany and China, followed closely by the United States.

But how effective have these Model BITs been in producing new investment treaties modelled after them? The facts show us that they have not been useful, as the United States has concluded just two agreements based on its recent 2012 Model BIT (with Uruguay and Rwanda). Something similar has happened with Germany, who has only used its 2009 Model BIT with Iraq and Congo. Finally, China has been relatively more successful and used its 2009 Model BIT in the negotiations with Turkey, Tanzania, Canada, Democratic Republic of the Congo, Uzbekistan, Libya, Chad, Bahamas, Malta and Mali.

Yet, in the case of India, the previous experience with the 2003 Model BIPA seemed to be a useful one, as India concluded thirty-four BITs after the Model BIPA was made public. The BITs in large part follow its text, with the important exception of the BIT with the United Arab Emirates that was the sole agreement signed after the *White Industries* case. Anyhow, this positive experience is not

[17] *See inter alia*, UNCTAD, International Investment Agreements by Economy Investment Policy Hub (2016), http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu; Chester Brown, Commentaries on Selected Model Investment Treaties (2013). On the Swiss Network of International Studies (SNIS) Project, see http://www.snis.ch/project_diffusion-international-law-textual-analysis-international-investment-agreements.

necessarily replicable, particularly if India aims to renegotiate agreements already concluded with other states.

In any case, the debate on the utility of model BITs needs to be framed in broader terms. With respect to foreign investment, there is a heated ongoing debate about the effectiveness of investment treaties – and particularly BITs – on foreign investment flows. Some studies show that IIAs have a great positive impact as they minimize political risk, others have a modest or limited impact, and some that have no impact or even a negative one.[18]

The quest for a Model BIT is a continuing one. India's current Model BIT reflects the current global and national thinking on the role of such treaties in attracting investment while taking into account the need for preserving regulatory autonomy and policy space. India's views on BITs need not be static, and they may change soon. India may become a net capital exporter in the years to come. The nature and contours of the world economic order may change, and world may be a more volatile place to do business. Nothing can be ruled out in the field of international economic relations. The purpose of this Special issue of Jindal Global Law Review is to provide an informed debate on India's new Model BIT and how India should calibrate its position with changing times.

[18] *See*, *inter alia*: Andrew Kerner & Jane Lawrence, *What's the Risk? Bilateral Investment Treaties, Political Risk and Fixed Capital Accumulation*, 44 Br. J. Polit. Sci. 107–121 (2014); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 World Dev. 1567–1585 (2005); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int. Law J. 67–130 (2005); Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 Law Soc. Rev. 805–832 (2008); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit? and They Could Bite*, WORLD BANK (2003), http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-3121; Lauge Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, (2010), https://works.bepress.com/lauge_poulsen/4/.