BILATERAL INVESTMENT TREATIES – HAS INDIA TAKEN IT A 'BIT' TOO FAR?

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Abstract

Why do countries exchange sovereignty for business through investment treaties? Is there no other way? Past experience with such treaties have some advocating re-negotiation and rationalization of existing regimes, or even moving away from such regimes altogether, especially in developing countries like ours. This would involve an economic analysis, a reconsideration of treaty language and the resulting balance between international and domestic law, aimed at harmonizing restrictions on sovereignty with economic policy. This Article seeks to explore, some of the means to this end.

The fulcrum of this article is India's new Model BIT. At first blush, it seems reactionary, protectionist and possibly, that we've taken it a bit too far. It does not seem either balanced or tempered and reflects India's focus on exclusion of liability and its eagerness to regulate. Whilst one cannot criticize this draft from the standpoint of strict legal protection, it may fail on its economic (de)merits. In this light, the author compares the new Model to its predecessor and India's concluded treaties. The author also considers the approach of other countries in trying to find a middle ground between the current regime, which potentially exposes India to huge risks, and the proposed regime, which will protect India from BIT exposure, possibly by preventing investment in the first place.

Key words: Bilateral Investment Treaties, International Law, Investment Arbitration, Foreign Investment

I. INTRODUCTION

"There is no principle of the law of nations, more firmly established, than that which entitles the property of strangers, within the jurisdiction of another country, in friendship with their own, to the protection of its sovereign, by all efforts in his power."[1]

- U.S. Secretary, John Adams (1796)

Sovereign protection to foreign property has been around for centuries. Perhaps the best example of the erstwhile equivalents of today's investment treaties, were the Friendship, Commerce and Navigation treaties, in vogue in the 17th century.[2] Under these treaties, European powers provided protection to foreign investors from actions such as interference, seizure etc. and compensated them for loss of property, in cases such as confiscation during war. The colonial times also witnessed the imposition of such principles by the colonial rulers, to protect

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[1] Quoted in R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), at 11.

[2] The first Friendship, Commerce and Navigation Treaty signed between the United States and France in 1788 contained provisions regulating treatment of foreign investment. *See also* UNCTAD, Bilateral Investment Treaties, 1995–2006: Trends in Investment Rulemaking U.N., New York and Geneva, 2007 available at http://unctad.org/en/docs/iteiia20065_en.pdf.

investments in their colonies. The system of '*capitulations*'; essentially unilateral impositions of foreign law and jurisdiction in their colonies; demonstrated the economic dominance of the colonial rulers.[3] With the colonial powers losing control over time, it became necessary to enter into treaties by consent rather than imposition, to ensure continued protection of investments.[4] These evolved into today's BIT's;[5] which are negotiated based on mutual consent. Not one to be left out, India joined in and signed its first BIT with the U.K. in 1994, in line with its open-door liberalization policy of the 90's.[6] Over the next two decades, India amassed 86 BIT's,[7] some of which are based on a model BIT prepared in 2003 ("2003 Model").[8]

These treaties have two main facets; economic considerations and issues of international law. The interaction of these two facets reveals an exchange of sovereignty for business, which is *ex-facie* unacceptable, unless accompanied by compelling economic reasons.[9] Such reasons could only be lack of alternatives to lure investment that do not involve the surrender of sovereignty. As a developing country, India should also note that a majority of BIT's are signed between developing and developed countries, probably to ensure that the developing countries retain competitive advantages in the international market.[10] Notably, while BIT's contain reciprocal protections, statistics suggest that BIT's favour developed countries.[11] Research is also inconclusive as to whether BIT's increase foreign investment.[12] This means that there is no guarantee that BIT's will make enough economic sense to give up sovereignty. This requires India, as a developing country, to tread carefully.

Reviewing India's BIT regime, has assumed imminent importance in light of the *White Industries*[13] case and the ensuing flurry of BIT claims against India[14] which were seemingly spurred on by *White Industries*. In what appears to be protectionist reaction, India is looking to revise its model BIT, which forms the basis for BIT negotiations. Moving away from an investment

[3] F. Francioni, Access to Justice, Denial of Justice and International Investment Law, European Journal of International Law, (2009) 20 (3): 729-747.
[4] *See generally* L. Poulsen, Sacrificing Sovereignty by Chance; Investment Treaties, Developing Countries, and Bounded Rationality, The London School of Economics and Political Science (June 2011) at para 2.1 at p. 29. This thesis studied whether developing countries fail to carefully consider the costs of BIT's by sacrificing sovereignty by '*chance*' rather than by '*design*'. *See also* p. 29-46 with respect to the evolution of BIT's.
[5] Indian BIT's are sometimes titled as Bilateral Investment Protection Treaties or "BIPA's
[6] S. Patil and P. Jain, Bilateral Investment Treaties and their impact on the Global Economy, Nishith Desai Associates, available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Bilateral%20Investment%20Treaties.pdf.
[7] As per the website of the Ministry of Finance, Government of India, at http://finmin.nic.in/bipa/bipa_index.asp?pageid=3, last seen on November 10, 2015.
[8] The text of the 2003 Model BIPA is available at http://www.italaw.com/sites/default/files/archive/ita1026.pdf.
[9] *Poulsen supra at* 4, at 23.
[10] E. Neumayer and L. Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries? World Development, Vol. 3, No. 1, 31-49 (2005) at 9.
[11] *S. Patil & P. Jain supra at* 6, at p. I-326,327. *See also* M. Hallward-Driemeier, Do Bilateral Investment Treaties Attract FDI? Only a bit… and they could bite, World Bank, DECRG, June 2003, at 8.
[12] There is research which supports the view that FDI does benefit from BIT's. *See Neumayer and Spess supra* at 10 at p. 27,28. This study does also attempt to distinguish based on statistical considerations, the prior body of research which suggests that BIT's do not have the desired effect on FDI. Whilst it does not comment on whether the benefits of BIT's outweigh the actual cost of BIT's in terms of negotiation, conclusion and compliance with the BIT, it does conclude to the limited extent that BIT's do increase FDI.
[13] White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award, (November 30, 2011)
[14] As of May 2013, there were 12 pending BIT claims against India. *See* Recent Developments in Investor-State Dispute Settlement (ISDS) Updated for the Multilateral Dialogue on Investment, UNCTAD, updated 28-29 May 2013 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

protection motive, India released a model BIT in 2015 ("2015 Model")[15] to elicit public comments, which seeks to protect India from liability, above all else. Whilst it is a relatively tempered approach considering that it was once rumoured that India was planning simply to remove arbitration clauses from future BIT's,[16] the 2015 Model is an anti-thesis to the essence of BIT's; instead of luring investment by guaranteeing minimum investment standards and a stable investment environment, it may scare foreign investment away to other countries, which promise actual and effective investment protection. With the 2015 Model on the anvil, striking a balance between the concerns of India as a sovereign nation and its foreign investors is critical.

II. WHITE INDUSTRIES & A 'BIT' OF PANIC

The *White Industries* case,[17] relates to certain disputes which arose under a mining contract entered into by Coal India Limited ("CIL"), an Indian PSU and White Industries Australia Limited ("WIAL"), an Australian company and the resulting arbitration proceedings. This arbitration resulted in an award, in favour of WIAL, which was challenged by CIL in Calcutta and simultaneously sought to be enforced by WIAL in Delhi. Multiple proceedings were filed before Indian courts, including the Supreme Court, which were not heard expeditiously, per WIAL. This led WIAL to invoke arbitration against India under an Indo-Australia BIT ("AI-BIT"),[18] which resulted in an award declaring that India had breached its obligation under the AI-BIT to provide WIAL, effective means of asserting claims and enforcing rights with respect to its Indian investments. This was based on treaty-shopping under the AI-BIT Most-favoured Nation ("MFN") principle,[19] which allowed the Tribunal to import and incorporate the '*effective means*' obligation of the India-Kuwait BIT.[20] Though India argued against its incorporation, as it would '*fundamentally subvert the carefully negotiated balance of the BIT*',[21] it was held that its incorporation would further the cause of the AI-BIT.

The investment forming the subject matter of this case, was the award arising out of the mining contract arbitration. The award was treated as an '*investment*' based on the *Chevron*[22] and *Saipem*[23] cases, which *inter alia* held that rights under the award constituted a part of the original

[15] Model Text for the Indian Bilateral Investment Treaty, (Apr. 2015) available at https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

[16] Sanjeet Malik BIT of Legal Bother, Business Today, May 27, 2012 available at http://businesstoday.intoday.in/story/india-planning-to-exclude-arbitrationclauses-from-bits/1/24684.html

[17] *White Industries, supra at* 13.

[18] The Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, New Delhi (February 29, 1999) [AI-BIT]available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/154.

[19] *Ibid, See* §4(2).

[20] The Agreement Between the Republic of India and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, (November 27, 2001), §4(5) available at http://finmin.nic.in/bipa/Kuwait.pdf.

[21] *White Industries, supra at* 13 para 11.2 at 106,107

[22] Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador, UNCITRAL, P.C.A. Case No. 34877, Interim Award (December 1, 2008), at 185. *See also* Mondev International Ltd. v. United States of America, ICSID Case No. ARB. (A)/99/2, Award, (October 11, 2002), at 81.

[23] Saipem S.P.A. v. The Peoples Republic of Bangladesh, ICSID Case No. ARB./OS/07, Decision on Jurisdiction and Recommendation on Provisional Measures, (March 21, 2007), at para 127 4. *See also* White Industries at para 4.1.25 which noted that *Saipem* recognized that rights were embodied in an award, which were not created by the award but arose out of contract and were crystallized in the award.

investment of WIAL, being a crystallization of rights under the mining contracts.[24] The award was treated as an investment under the AI-BIT, inasmuch *as it was a* subsisting interest in the original investment, which continues to exist and be protected, until its ultimate disposal has been completed. *Chevron*[25] was also relied on with respect to the '*effective means*' standard, to hold that for means of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay, which would amount to a denial of access. Having held India to be in breach of its BIT obligations awarded a sum of approx. four million Australian dollars, with interest, to WIAL.[26]

This seems to have awoken a sleeping giant. In the year that followed this case, India received multiple BIT claims.[27] If these claims were to succeed, it would acknowledge the treaty erosion of India's sovereignty and in certain cases, amount to allowing BIT tribunals to sit in appeal over the Supreme Court of India and over-ride its decisions. The influence of these claims can be seen and felt, in the 2015 Model.

This is not an isolated instance. The Occidental Petroleum award of 1.77 Billion U.S. Dollars against Ecuador is fresh in the minds of Ecuador and other countries.[28] In fact, Ecuador believes that the enforcement of this award would cause catastrophic irreparable harm to its economy[29] and has recently expressed its frustration with the current investment arbitration regime.[30] This shows that India is not alone.[31]

III. THE 2015 MODEL BIT: INDIA BIT-ES BACK

Some believe that BIT'S are '*diplomatic photo-opportunities*' unaccompanied by legal awareness.[32] This is not so with the 2015 Model. It is much more detailed than its predecessor. Its detailed substantive and procedural provisions seemingly demonstrate that India has considered most of its BIT problems. In fact, were our past BIT's based on the 2015 Model, India would likely be able to defeat all of its pending BIT claims, including *White Industries*. This is

[24] *Ibid*. *See also* White Industries, *supra* at 13, at para 7.6.8,7.6.9, footnote 41[noting that instead of defining awards as "*investments*" in and of themselves, cases such as *Mondev, Chevron* etc. have characterized such awards as subsisting interests which the investor continues to hold in the original investment. Chevron (Id.) in this regard held that once an investment is established, it continues to exist and be protected until its ultimate disposal has been completed.]

[25] Chevron Corporation and Texaco Petroleum Company v. Ecuador, Partial Award on the Merits (March 30, 2010) at para. 244. *See also White Industries supra* at 8 at para 11.3.2, for a summary of the *Chevron* analysis of 'effective means'.

[26] *See White Industries, supra at* 8. In addition, a sum of approx. 700,000 Australian dollars was awarded towards costs / fees etc. (with interest).

[27] *Supra at* 14.

[28] T. Cheng**,** ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v. the Republic of Ecuador (December 19, 2012), Kluwer Arbitration Blog available at http://kluwerarbitrationblog.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/. This award was recently reduced to approx. 1 Billion U.S. dollars according to recent news reports.

[29] N. Gill and E. Orr, Oil field seizure threatens to haunt Ecuador nine years later, Tulsa World, available at http://www.tulsaworld.com/business/energy/oil-field-seizure-threatens-to-haunt-ecuador-nine-years-later/article_34480ef0-f985-5b6f-a795-55d2be59c8bb.html. From recent news reports, it appears the Ecuador is in negotiations with Occidental Petroleum to reduce the quantum of the award.

[30] A. Arauz, Ecuador's Experience with International Investment Arbitration (Minister of Knowledge and Human Talent, Republic of Ecuador) Investment Policy Brief, No. 5, August 2015, South-centre [*See '5. There is Always an Alternative*'].

[31] N. Karunakaran, How developing countries like India are petrified of being dragged into international arbitration, ET Bureau(June9,2015) ,available at http://economictimes.indiatimes.com/articleshow/47592993.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[32] India's many investment treaties make it vulnerable, Interview with Lata Jishnu, Down To Earth magazine, (Jan. 2012), available at http://www.iisd.org/pdf/2012/com_india_investment_treaties.pdf.

because of the extensive carve-outs in the 2015 Model which reflect India's intention to continue to exercise and retain the right to regulate. This also means that Indian investors abroad must fend for themselves.

When this model is subjected to negotiations, it may well be that India will refuse to budge from its stand. It is also possible, that India has recognized its bargaining limitations as a developing country and has intentionally taken an extreme position, to offset anticipated dilution of its terms.[33] The former seems more likely the way things stand. However, this will remain subject to the dynamic pressures of diplomatic relations.

A. THE PREAMBLE SETS THE TONE

The change in focus of the Government is evident from the preamble of the 2015 Model itself, which signifies the objective and intention of the parties of entering into the BIT. To illustrate this point, the 2003 Model referred to creating favourable conditions for fostering cross-border investment and also recognized that encouragement and reciprocal protection of investment is conducive to business stimulation and prosperity;[34] however, in an ideological paradigm shift, the 2015 Model refers to promoting bilateral cooperation; aligning investment with sustainable development and inclusive growth; and notably, the reaffirmation of the territorial right to regulate investments, including the right to modify applicable conditions. Significantly, there is no reference to investment protection in the preamble of the 2015 Model.

This is significant as the language of the preamble to BIT's forms part of the context in which the BIT was made. This has interpretative implications and therefore consistency with the substantive provisions of the BIT is key.[35] It seems the idea behind the 2015 Model's preamble, in line with the general protectionist approach of the Government, is to take away some of the interpretative discretion of tribunals. This is because in the past, '*favourable conditions*' preambles such as is the case in the 2003 Model, as also the title of the BIT's,[36] have been used to support investor-friendly interpretations of substantive provisions.[37] Such clauses, are treated as presumptive of investor protection, reflecting the *raison d'être* of investment treaties.

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[33] *See* S.Patil and P. Jain *supra at* 6 at p. I–352,353. [Noting that India's past BIT's been negotiated away from the Model BIT and developing countries do compromise and modify their model BIT's in favour of a pro-investment stance, often to keep in line with the pre-establishment protection requirements of countries such as the US, Canada and Japan.]

[34] *See* Preamble, *2003 Model*.

[35] *See* §31, *VCLT*. *See also* UNCTAD *supra at* 2.

[36] In this regard, it may be noted that in India's investment treaties are *inter alia* titled "*Agreements between the Government of the Republic of India & __ for the Promotion and Protection of Investments*" *i.e.* BIPA's. *See for example*, the Indo-UK BIPA, available at http://finmin.nic.in/bipa/United%20Kingdom.pdf.

[37] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB./02/8 (Feb. 2007) at para 290. *See also S.G.S.* Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, (Jan. 2004), at para 116, where the Tribunal used a '*favourable conditions*' preamble to favour the resolution of uncertainties in interpretation in favour of protection of covered investments. *See also* Plama Consortium Limited v. Republic of Bulgaria ICSID Case No. ARB/03/24 (Feb. 2004) at para 193 [quoting Ian Sinclair, The Vienna Convention on the Law of Treaties, Manchester: Manchester University Press 1984, p. 130.], where the ICSID Tribunal noted the risk of placing undue emphasis on '*object and purpose*', which may encourage teleological methods of interpretation which may even deny the intentions of the parties to the treaty. *See also* Saluka Investments B.V. (The Netherlands) v. The Czech Republic, UNCITRAL, Partial Award, (March 17, 2006) at para 298, where the Tribunal linked a Preamble clause, which mentioned stimulation of economic development, to the '*fair and equitable*' treatment requirement of the BIT, as a contextual consideration to be kept in mind.

P.R. Thulasidhass presents a noteworthy counter-view; the guarantee of protection to foreign investors is only incidental to investment treaties, which are essentially politico-economic arrangements between two sovereigns to promote economic interests. Though their effectiveness is tested on investor confidence, they are not made solely for the protection of investors, who are not even parties to these treaties. Accordingly, a presumptive interpretation that favours investors should not be used to circumvent the real intention of the BIT's. For example, while interpreting public policy or security interest exceptions, tribunals need not refer to the object and purpose of the BIT, as such exception clauses *ipso facto* exclude the application of the BIT.[38]

Recognizing the territorial right to regulate investments, including the right to modify applicable conditions, at the very outset of the 2015 Model, will put investors on alert. This is because legal and regulatory, certainty and transparency, are critical factors in choosing jurisdictions for out-bound investments. The Vodafone case is an example of retrospective modification of applicable conditions, which India is trying to provide for, and foreign investors will try to avoid, by investing in other favourable BIT jurisdictions.[39] In this light, the preamble, as the introduction to the BIT, must set the tone for the rest of the instrument and promise and reassure investors that the investment environment will remain stable and transparent, in terms of law and policy. Having done so, it may be qualified by recognizing exceptions *inter alia* in case of war, emergency, public policy, social welfare, etc. It may also provide that in such cases, reasonable efforts will be taken to protect the investment, or facilitate the exit of the investors.

B.INVESTMENT

The 2003 Model adopts a broad asset-based definition of Investment, which refers to '*every kind of assets*', including shares, intellectual property rights ("IPR"),[40] rights to money or performance etc. as investments. This definition did not require an examination of the intention motive, for example, whether the investment is a strategic or portfolio investment, so long it is an '*asset*'. The scope of such asset-based definitions have been considered by tribunals: In *Saluka*,[41] the tribunal noted that a similar definition in a Dutch-Czech BIT[42] did not require the

[38] *P.R. Thulasidhass*, Most-Favoured-Nation Treatment in International Investment Law: Ascertaining the Limits through Interpretative Principles Amsterdam Law Forum, Vol 7:1 Summer Edn. 2015 at p.16.

[39] *See* Kate Holton, *Vodafone to push ahead with Indian tax arbitration case*, LiveMint (July 10, 2014), available at http://www.livemint.com/Companies/pfYXCXeAvtzUmXKBGpbpbM/Vodafone-to-push-ahead-with-Indian-tax-arbitration-case.html.

[40] "*Investment*" under the current BIT regime, includes IPR. This may potentially expose India to claims of expropriation in cases where the patent authorities in India have allowed generic production of patented pharmaceuticals. *See* Gavin Pereira, India's Obligations under Bilateral Investment Treaties (Part A): "Bilateral Inhibiting Treaty?" — Investigating the Challenges that Bilateral Investment Treaties pose to the Compulsory Licensing of Pervasive Technology Patent Pools, the Centre for Internet & Society (Aug. 2013) available at http://cis-india.org/a2k/blogs/bilateral-inhibiting-treaty-investigating-challenges-that-bilateral-investment-treaties-pose-to-compulsory-licensing-of-pervasive-technology-patent-pools. *See also* B. Vasani, G. Castanias, M. Gorsline & C. Kotuby Jr., Treaty Protection for Global Patents: A Response to a Growing Problem for Multinational Pharmaceutical Companies, Jones Day (October 2012) available at http://www.jonesday.com/treaty_protection/.

[41] *Saluka supra at* 37 at para 211. This was an arbitration arising out of a transaction involving a sale of shares of a Czech Bank (IPB) by the Nomura group, to the Dutch Saluka Investments BV. Noting the wide definition of the term investment (as is the definition of investment in the 2003 BIT), which *inter alia* includes shares of a company, it was argued that Saluka had not really invested in IPB, as there was no intention for it to be treated as a true investment in IPB's Banking operations, and was made with a bare profit-making motive. The Tribunal held that the definition of investment did not exclude bare profit-making transactions and that the motive of investment, whether portfolio or strategic, is of no relevance to the investment. The Tribunal held that the definition of investment did not admit an examination of the economic processes

claimant to prove that the investment involved contribution to a local economy or to the investee company, to be considered an investment. However, the Preamble, which referred to the '*stimulation of economic development*', was linked to the fair and equitable treatment ("FET") clause in the BIT and treated as a contextual consideration to be kept in mind by the Tribunal when adjudicating claims under a BIT. In *Salini*,[43] contribution to the economic development of the Host-state, was treated as a condition to be considered to be an investment.

Under the 2015 Model, instead of an asset-based definition, investment is defined with reference to an '*Enterprise*', which is separately defined to mean *inter alia* a validly incorporated legal entity under Host-law, which has its management, and real and substantial operations in the Host-state, which would exclude passive holdings without actual operations. '*Real and substantial operations*' is determined with respect to five factors all required to be present at the same time *i.e.* long term financial commitment, substantial employees in the Host-State, substantial contribution to the Host-State through operations alongwith technology transfer, assumed entrepreneurial risk and operations in accordance with Host-law.[44] This entity must also be owned *i.e.* holding of more than 50% of capital contributions, directly or beneficially, or controlled (on similar lines to '*control*' under the Companies Act, 2013[45] and including LLP/Partnership Firms), in good faith. This excludes claims by minority shareholders.

Having narrowed down the language of the definition, the 2015 Model further excludes assets such as interest in government debt securities, pre-operational expenditure (this seems to be a reaction to the *Sistema*[46] claim), portfolio investments[47] and claims to money that do not involve the kind of interests or operations set-out in the definition of Investment. Ostensibly keeping *White Industries*[48] in mind, awards or judgements are not included as investments.

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involved in investments and cannot be read to require some element of contribution to a local economy or to the investee company, in the absence of such substantive conditions in the definition.

[42] Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic, (April 29, 1991). Text available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/968.

[43] Salini Costruttori S.P.A. and Italstrade S.P.A. v. Marocco, ICSID Case No. ARB/00/4, July, 23 2001 at para 52.

[44] *See* §1.2, 2015 Model for the meaning of "*real and substantial business operations*". Tax avoidance arrangements, passive holding of stocks, securities, properties etc. and the ownership / leasing of property used in trade or business, will not constitute real and substantial business operations.

[45] *See* §2(27), Companies Act,2013.

[46] Times of India, Sistema threatens arbitration in 2G case, (February 28, 2012) available at http://timesofindia.indiatimes.com/business/india-business/Sistema-threatens-arbitration-in-2G-case/articleshow/12070637.cms.

[47] *See Saluka supra* at 37 at p.86, with respect to portfolio investment. This represents the requirement that the investment must be strategic and not merely a profit-making or profit-taking arrangement.

[48] *See* White Industries *supra* at 13. There are other cases where open ended asset-based definitions have resulted in BIT claims. *See* Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3 [Six individual shareholders of a company, initiated arbitration against the Republic of Burundi, for cancellation of a free-zone certificate (allowing tax and customs exemptions), granted to the company. In this case, expenditure incurred between the grant and cancellation of the certificate, was considered to be an investment. (Since this award was rendered in French, the author has referred to Cases, Goetz v. Burundi Cambridge University Press, 0521829887 – ICSID Reports, Vol. 6 – Ed. J. Crawford, K. Lee.)] *See also* Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19 at para 129 to 157. [This was an arbitration initiated by shareholders of a company, which was the holder of the concession granted by the Respondent, including the right to the revenue stream arising from a water and sewage system in Buenos Aires. This company did not own the underlying assets of the system. The claimants only had an indirect interest in the concession, by virtue of equity investment.] *See also* Catherine Yannaca-Small, International Investment Law: Understanding Concepts and Tracking Innovations, Chapter 1: Definition of Investor and Investment in International Investment Agreements; (O.E.C.D. 2008) [An O.E.C.D. Survey confirmed that a variety of activities can be included within the concept of investments, which so far has been interpreted in case-law in broader terms.] *See also* Marie-France Houde,

As seen above, the 2015 Model severely restricts the scope of the BIT. The ownership and control requirements would restrict the corporate structuring options of the investors. Further, the definition of real and substantial operations is far too restrictive. The Government should consider providing indicative factors to determine such operations or providing for such matters in the alternate. There is also uncertainty as to what would constitute a substantial number of employees in the Host-state. This is important in the context of new-age technology companies, many of which are '*asset/employee-light*' and which may not need large offices in the Host-State to operate. Similarly, it is unclear as to what will constitute a '*substantial contribution to the development of the Host State*' and when technology transfer will be applicable.

C.SCOPE OF THE 2015 MODEL

The 2015 Model applies to investments in existence at the time of the BIT but not to any law or measure,[49] made/taken before the execution of the BIT. In fact, this does not apply to subsequent modifications of such laws or measures, which means that the scope is restricted to new laws or measures only and which are not modifications to existing laws or measures. It also reaffirms the right of the Host-State to formulate, revoke or modify the law[50] and the right to exercise *inter alia* regulatory and prosecutorial discretion, including establishment of penalties.[51] It also does not apply to activities undertaken prior to the establishment of the investment, including expenditure post-regulatory compliance and expenditure with respect to the laws relating to admission of investments.[52] This is a major factor to be considered by investors, who may spend huge sums of money to set-up their projects in the Host-state.

Matters such as government procurement, subsidies, services, taxations measures, IPR licenses and commercial contracts with respect to investments, are also excluded.[53] In this regard, it may be noted that customary International law recognizes the power of Governments to act in the broader public interest, through the laws relating to taxation, government subsidies, zoning restrictions etc. Accordingly, bona fide non-discriminatory taxation or regulation, commonly accepted to be within the policing power of sovereign states, would not make a State responsible for loss of property or for any other economic disadvantage resulting from such measures.[54] This is subject, of course, to freedom from arbitrariness, abusive taking or ostensible dispossession outside of normal taxation practices.[55] Further, the latitude in enacting and enforcing tax laws, does not allow a party to avoid compliance with treaties. Similarly, dressing up expropriatory measures such purposeful dispossession as '*taxation*' would render international investment

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PART II, *Chapter 6:* Novel Features in Recent O.E.C.D. Bilateral Investment Treaties, International Investment Perspectives, (O.E.C.D. 2006), [Recognizing that BIT's have in the recent past, sought to assign greater precision to the asset-based definition of "investment", due to its far-reaching implications. For example, the 2004 Canada Model BIT sets-out of a finite list of categories of assets constituting investment. The 2004 Canada Model BIT (*See* p.4) is available at http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf]

[49] *Supra* at 8, §1.10,1.11

[50] *Supra* at 8, §1.10

[51] *Supra* at 8, §2.4

[52] *Supra at* 46.

[53] *Supra* at 8, §2.6

[54] Marvin Feldman v. Mexico, Award, ICSID Case No. ARB (AF)/99/1, NAFTA (December 16, 2002), at para 103 to 106.

[55] Link-Trading Joint Stock Company v. Department for Customs Control of Moldova, Final Award, (April 18, 2002), at para 64, 72. [Not all fiscal measures necessarily constitute an expropriation, although their effect is to cause the tax-payer to surrender part of his income or property to the State. As a general matter, fiscal measures only become expropriatory when they are found to be an abusive taking, which arises when the State acts unfairly, inequitably or imposes arbitrary or discriminatory measures, or implements measures in such a manner]

protection illusory. Accordingly, tribunals should exercise their judgement without giving unnecessary importance to labels. However, tribunals should not be quick to treat ostensible tax measures as compensable takings. The presumption must be that the measures are *bona fide*, until disproved on a comprehensive assessment of the facts and circumstances of each case.[56]

Customary International law in this regard seems balanced. It recognizes the right of a sovereign to regulate and tax, within reason. In this light, the 2015 Model is likely to be viewed as an attempt to permit arbitrary taxation, more so in the light of the Vodafone and Cairn Energy BIT claims.[57] This is not helped at all by the fact that taxation measures are non-justiciable under the 2015 Model. The exclusion of government procurement may also hamper sectors that are largely dependent on capital imports.

The 2015 Model also provides self-judging general and security exceptions to the protections of the BIT, which apply so long as the Host-state considers it necessary.[58] Under the general exceptions, the Host-State may take certain actions or measures, *inter alia* with respect to public morality, order, health and safety; financial integrity and stability; balance-of-payments, foreign exchange, environmental protection etc. It also provides the power to secure compliance with laws *inter alia* relating to deceptive and fraudulent practices, privacy and contractual defaults. However, it does not apply to local bodies or authorities, which gives wide discretion to the Host-state to unilaterally restrict the scope of the BIT.[59]

The security exceptions allow the Host-State to deny furnishing information or to take actions, which it considers necessary for the protection of its essential security interests, which include nuclear material; war-time, emergency measures; traffic in arms and ammunition; and essential public infrastructure. This also includes obligations under the U.N. Charter with respect to maintenance of international peace and security. Further, if such measures as above are taken by the Host-State, which confer benefits on a non-party or its investors, there is no requirement to provide any such benefit to the counter-party to the BIT or its investors. The 2015 Model also *inter alia* provides that measures taken under security exceptions will be imposed on a non-discriminatory but non-justiciable basis.[60]

D. STANDARD OF TREATMENT & THE OLD STANDARD OF FAIR & EQUITABLE TREATMENT

[56] Renta 4 S.V.S.A, Ahorro Corporacionemergentes F.I., Quasar de Valors S.I.C.A. V.S.A., Orgor de Valores S.I.C.A. V.S.A., G.B.I. 9000 S.I.C.A. V.S.A., ALOS 34 S.L v. The Russian Federation, A.I.S.C.C. Award, (July 20, 2012) at para 179 to181. *See also* Yukos Universal Limited (Isle of Man) v. The Russian Federation, Energy Charter Treaty, P.C.A. Case No. AA 227 UNCITRAL Award (July 18, 2014) at para 1437 to 1447

[57] *Supra at* 39. *See also* Rakteem Katakey, Cairn Energy seeks compensation for lost value in Indian driller, LiveMint, (August 18, 2015) available at http://www.livemint.com/Companies/nyaf2o0USmSV1CFccp9RlK/Cairn-Energy-seeks-compensation-for-lost-value-in-Indian-dri.html

[58] *See generally* 260th Report, Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, Law Commission of India, (August 2015), para 3.3.6 at p. 22, available at http://lawcommissionofindia.nic.in/reports/Report260.pdf.

[59] To invoke these general exceptions, the Host-State must submit a request to the Home-State for joint-determination of the validity and extent of the claim to the exception, within 120 days of the receipt of the notice of the arbitration. The States then engage in consultations in good faith, with a positive determination being binding on the tribunal. If the consultations do no result in a joint determination within 120 days, the power shifts to the tribunal to decide such issues, without drawing any inferences from the failure of the joint-determination. It must consider the submissions of the non-disputing Party in this regard and if no such submissions are made it will be presumed the position of such party, is consistent with the position of the other Party.

[60] *See* 2015 Model, Annex I r/w. §2.6(iv).

In the past, India has assumed the obligation to accord FET to its foreign investors. The 2015 Model is guided by UNCTAD's "*options for negotiators and policy makers"*, which states that parties may clarify and narrow down the FET standard, by providing specific obligations such as prohibition of denial of justice, flagrant violations of due process and manifestly arbitrary treatment.[61] Moving away from FET, the 2015 Model provides for a Standard of Treatment clause, which is a statement of prohibited actions which ring-fences the scope of FET. This does away with the interpretational leeway of FET clauses and places a specific evidentiary burden on claimants, to fit in the prescribed categories; these are denial of justice under customary international law, un-remedied and egregious violations of due process and manifestly abusive treatment, coercion or harassment. These are considered to be the bare minimum standards of treatment; an international lowest common denominator or a floor for the assessment of governmental conduct.[62]

The requirement to prove denial of justice has in the past been treated as forming a part of the larger FET standard.[63] It has been held to set a high threshold and to require a claimant to demonstrate serious shortcomings and egregious conduct that shocks, or at least surprises, a sense of judicial propriety, to sustain a claim of denial of justice.[64] It has been applied by International tribunals, as a part of the customary international law Standard of Treatment, with tribunals observing that to constitute a violation of FET or standards of treatment clauses, a measure must be '*sufficiently egregious and shocking*', '*manifestly arbitrary*', '*completely lacking due process*' or '*evidently discriminatory*'.[65] Similarly, due process has been held to mean non-abusive decision-making with adequate notice and opportunities to be heard.[66] Abusive treatment, coercion and harassment have also been considered to be FET breaches, especially in cases of repeated and

[61] A sequel, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2012 at 108.
[62] *Ibid* at 13.
[63] Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, (July 29, 2008) at para 621,631 and 651.
[64] *Chevron supra* at 25 para 244. *See also Mondev supra* at 22 at para 127.
[65] Glamis Gold, Ltd. v. U.S.A., ICSID (May 2009) at para 616 to 627, observed that to violate §1105 of the NAFTA on minimum standards of treatment (which codifies customary international law), the measure in question must be sufficiently egregious and shocking; a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons. Though bad faith is not required to constitute a violation of the fair and equitable treatment standard, its presence is conclusive evidence of such violation. Arbitrariness that contravenes *the* rule of law, rather than *a* rule of law, would occasion surprise not only from investors, but also from tribunals (citing Elettronica Sicula SpA (ELSI) (United States v. Italy), 20 July 1989, 1989 I.C.J. 15. at para 73-77) This is not a mere appearance of arbitrariness, however a tribunal's determination that an agency acted in a way with which the tribunal disagrees or that a state passed legislation that the tribunal does not find curative of all of the ills presented; rather, this is a level of arbitrariness that, as amounts to a "*gross denial of justice or manifest arbitrariness falling below acceptable international standards*." (citing International Thunderbird Gaming Corporation v. The United Mexican States, (Jan. 2006). *See also* Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States at Case No. ARB(AF)/97/2 at para 102, 103 [refusal to entertain a suit, undue delay, inadequate administration of justice or clear and malicious misapplication of the law, would constitute denial of justice. It also tied the *Elettronica Sicula* formulation of arbitrary conduct (wilful disregard of due process of law, which shocks, or at least surprises, a sense of judicial propriety), to denial of justice]. *See also* Francesco Francioni, Access to Justice, Denial of Justice and International Investment Law, European Journal of International Law, (2009) 20 (3): 729-747. *See also* Mondev International Ltd. v. USA, Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2.
[66] *See* Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000) paras. 91 and 97 and Alex Genin, Easter Credit Ltd., Inc. and A.S.Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award (June 25, 2001), paras. 363–365 [Failure to give notice and opportunities to be heard, will constitute violations of due process.] However, in *Alex Genin* above, since the action was found to be a reasonable regulatory decision, the due process violation was ignored as regards FET violations. In fact, GAMI Investments, Inc. v. The Government of the United Mexican States (UNCITRAL NAFTA, Award (November 15, 2004) at para 97) recognized that good faith of Governments to achieve legitimate legal and regulatory objectives, may counterbalance disregard of legal or regulatory requirements.

sustained treatment,[67] deliberate conspiracies to destroy or frustrate the investment;[68] or take away legitimately acquired rights".[69] *Saluka*[70] also observed that FET requires States to ensure freedom from coercion or harassment by its regulatory authorities". Similarly, "*threats and attacks*" by the host, such as arrests of employees and family members, armed interference, physical and financial duress and pressure, have also been considered to be FET breaches.[71]

Therefore, the Standard of Treatment clause does not add anything which is not recognized as forming a part of customary international law (although treaty codification gives it more teeth). It is the intention behind its codification in BIT's *i.e.* to rein in arbitral creativity, which is important.[72] Though there remains room for interpretation, the use of selected adjectives to qualify the language of the sub-clauses, places a heavy the evidentiary burden on claimants and will allow minor infractions to slip through.[73]

E. NATIONAL TREATMENT & MOST-FAVOURED NATION

The National Treatment clause under the 2015 Model is fairly restrictive. It only applies to the management, conduct, operation, sale or other disposition of domestic investments. Words used in such clauses in other treaties, such as '*establishment*', '*acquisition*' and '*expansion*' have been excluded in the 2015 Model.[74] This is aligned with the definition of investment, which excludes pre-investment activity and pre-operational expenditure. This is because India believes that BIT's should only grant National Treatment post-establishment of the investment. Once the investment is established as per Host-law, National Treatment will be available and the investment will be treated at par with domestic investments. This is because India believes that while BIT's may be considered as a factor in creating a favorable investment environment when taken with other factors such as the market, infrastructure, political stability etc., there is limited empirical evidence to suggest direct consequential growth in foreign investment. Therefore, India would rather liberalize FDI policies to entice inbound investment, in harmony with its developmental needs and concerns.[75] This may not be completely untrue though recent research

[67] Eureko v. Poland, Partial Award (August 19, 2005) at para. 237
[68] Waste Management v. Mexico, Final Award (April 30, 2004) para. 138.
[69] PSEG Global, Inc. & ors. v. Republic of Turkey, ICSID Case No. ARB/02/5 (January 19, 2007) para. 245. It was also noted in GAMI Investments (*Ibid.*) that the record as a whole and not isolated events determine whether there has been a breach of international law.
[70] *Saluka supra* at 37 at para 308.
[71] Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award, (February 6, 2008) at paras 179,185-193. *See also* Pope & Talbot Inc v. The Government of Canada, Award on Damages, (May 31, 2002) at para. 68, where the tribunal found instances of unfounded "*threats of reductions and even termination of the Investment's export quotas, suggestions of criminal investigations of the Investment's conduct*". *See also UNCTAD supra* at 61.
[72] *See also UNCTAD supra* at 61 at p.109.
[73] This is especially so, when it has been held in the past, that violations of due process, can be ignored in certain circumstances, if the underlying measures are legitimate. *See Alex Genin supra at* 66. Even the nine year delay in proceedings in *White Industries*, did not pass the high threshold of '*denial of justice*'.
[74] International Investment Agreements Negotiators Handbook: APEC/UNCTAD Modules (IIA Handbook), (December 2012) at p.34-36, available at http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_APEC%20Handbook.pdf.
[75] Communication from India, Stocktaking of India Bilateral Agreements for the Promotion and Protection of Investments, Permanent Mission of India (March 22, 1999) available at http://commerce.nic.in/trade/international_trade_papers_nextDetail.asp?id=111.

suggests that BIT's have been accompanied by increased foreign investment; however, the causal link is not conclusively established.[76]

The National Treatment clause only includes intentional, unlawful and non-discretionary laws or measures. However, laws or measures of local or regional Governments have been excluded. This will be an issue for foreign investors, as post-investment, a large amount of regulatory matters fall within the province of state governments. This may also be a problem for Indian investors, when entering into a BIT with a country that follows a federal structure.

The National Treatment clause also features the addition of the words '*in like circumstances*' which was missing in the 2003 Model. This allows a Government to discriminate between investments based on differentials in goods, services, nature, sector of enterprise etc.[77] This will have to be determined on a case-to-case basis by using a two-step approach; first, the tribunal must verify that there has been differential treatment and only after such treatment is established, the tribunal may look into whether the differential treatment was meted out in like circumstances.[78] In this regard it may be noted that differential treatment between domestic and foreign investors, if justified by a legitimate and rational policy, has not been considered to be '*in like circumstances*' by NAFTA tribunals.[79]

In the 2003 Model, the MFN clause could be found clubbed with the National Treatment clause. It has now been deleted in the 2015 Model meaning that international investment arbitration ("IIA") tribunals can no longer import obligations and principles from other treaties, as was done in the *White Industries* case.[80] This represents India's belief, as argued in *White Industries*, that allowing MFN for treaty-shopping and importing principles from other treaties would fundamentally subvert the carefully negotiated balance of the BIT.[81] It seems that this move was aimed at restoring bilateralism into India's BIT regime.[82] Though this provides certainty to the scope of the BIT, it dilutes the efficacy of the BIT and allows inter-national discrimination.

F. EXPROPRIATION

The 2015 Model, prohibits nationalization or expropriation of investments, whether direct or indirect, except for public purposes, in accordance with due procedure established under law. Apart from this basic obligation, there is not much similarity between the 2003 and 2015 Model. Under the 2015 Model, measures will not '*usually*' be considered to be indirect expropriation, unless it results in complete or near complete deprivation;

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[76] *See Neumayer and Spess supra at* 10 and UNCTAD, The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014, September 2014, available at http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2024.pdf.
[77] *See 2015 Model* §4.1 footnote 2.
[78] S.D. Meyers v. Canada, UNCITRAL, First Partial Award, (November 13, 2000).
[79] *Ibid. See also* Pope & Talbot Inc. v. Canada, UNCITRAL, Award on Merits (April 10, 2001) & *UNCTAD supra at* 2.
[80] *White Industries supra at* 13.
[81] *Ibid* at para 11.2 at p. 106-107
[82] *See also* S. Rai, A. Dwivedi, T. Sethi, First SRIL International Research Initiative, Suggestions and Comments in Response to Model Text for the Indian Bilateral Investment Treaty, 2015, available at https://mygov.in/sites/default/files/user_comments/SRIL-%20Suggestions%20and%20Comments%20on%20Model%20Text%20of%20Indian%20BIT%202015.pdf at p.24.

i. Of the value of the investment (economic deprivation[83]);

ii. The management and control of the investment (legal deprivation[84]); and

iii. An appropriation amounting to transfer of the investment to the host or its instrumentalities.

Further, these criteria must be established concurrently. This places an onerous evidentiary burden on investors, since legal and economic deprivation may not go hand-in-hand. Accordingly, it should be required to prove either economic or legal deprivation, in the alternative. There is also uncertainty as to what will constitute a complete or near-complete deprivation of the investment. Since investment is defined with reference to an enterprise, this may not include expropriation of say one asset of an enterprise, which may have many assets, by treating this as only a part-deprivation of the investment. It is also specified that expropriation is to be determined on fact-based, case-to-case enquiry.

However, it has been clarified that measures taken by parties to the BIT in a commercial capacity will not constitute expropriation. This clause is not new to BIT's;[85] Distinctions between breaches of contractual obligations on the one hand, whilst acting in commercial capacity; and inherently governmental acts on the other, have been recognized by tribunals in the past. Mere exercise of rights under a contract without acting in a public capacity or through passage of a law

[83] The Model BIT separately provides for economic and legal deprivation *i.e.* deprivation of economic value and legal right to management and control. *See* Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, (September 13, 2006), at para 64 [substantial deprivation of economic value. Mere impediments to business, imposition of taxes or other levies do not by themselves constitute expropriation. Every investment involves risks and is likely to be regulated. No compensation is due in such cases, which are part of the price of investment. Unreasonable behaviour on the part of officials and breaches of contract, even if serious, do not by themselves constitute acts of expropriation, unless they have a major adverse impact on the economic value of the investment.] *See also* Parkerings Compagniet v. Republic of Lithuania, ICSID Case No ARB/05/8, Award, (September 11, 2007), para 455. [substantial decrease of the value of the investment]. *See also* Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States Case No. ARB. (A.F.)/00/2 (May, 2003) at para 132 [negative economic impact].

[84] *Ibid. See* Pope & Talbot Inc. v. Canada, UNCITRAL (NAFTA), Award (Jun. 2000) at para. 100 [referred to in Chemtura Corporation v. Government of Canada, UNCITAL (NAFTA) (Aug. 2010) at 245 to 249] which prescribed multiple criteria to determine indirect expropriation, including matters such as control, day-to-day operations, detention of officers/employees, interference with management/shareholder activities etc. *See also* Enron Corporation
Ponderosa Assets, L.P v. Argentine Republic, ICSID Case No. ARB./01/3, Award, (May 22, 2007), at para 245, where the *Pope v. Talbot* formulation was considered to the legal standard for indirect expropriation. Similarly, C.M.S. Gas Transmission Co. v. Argentina, ICSID Case No. ARB/1/8) para 258-263 [referring to Ronald S. Lauder v. Czech Republic (Lauder), UNCITRAL Final Award of (Sept.2001)] noted that indirect or "*de facto*", or "*creeping*" expropriation is not clearly defined but it is something other than an overt taking, which effectively neutralizes the enjoyment of property. It also noted that tribunals have interpreted substantial deprivation in a variety of ways [*See* Metalclad Corporation v. United Mexican States, Case No. ARB(AF)/97/1, (Sept. 2000) at para. 103- incidental interference with the use of property which has the effect of depriving the whole or in significant part, of the use or reasonable-to-be-expected economic benefit of property, even if not to the obvious benefit of the host State. *See* Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 CTR 219 (1984-II), at 225; Phelps Dodge Corp. v. Islamic Republic of Iran, 10 CTR 121 (1986-I). C.M.E. Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL Partial Award (September 2003) - deprivation affecting fundamental rights of ownership] *Chemtura* held that the test of substantial deprivation is one of degree and not one of specific conditions and referring to *Pope v. Talbot*, noted that the ingredients laid down in that case were not present. There was no indirect expropriation, as the investor was not deprived of control, ownership or day-to-day operation.

[85] *See for example* Multilateral Investment Guarantee Agency, Contract of Guarantee for Equity Investments / Shareholder Loans, 2012 Forms –December 31, 2012, §4.3, available at https://www.miga.org/documents/disclosure/Contract%20of%20Guarantee%20for%20Equity%20Investments.pdf.

or governmental act, have not been treated as amounting to expropriation.[86] Similarly, mere non-payment of debts or breach or non-performance of contractual obligations by itself, without an outright repudiation of the investment, will not amount to taking of property tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts.[87] Accordingly, this clause can be retained.

If expropriation is established, the 2015 Model provides for '*adequate*' compensation, based on an objective fair market value assessment, based on the genuine value of the investment at the time of investment. This is a departure from the '*fair and equitable*' compensation of the 2003 Model, though it may be noted that fair market value and genuine value have at times been treated to mean one and the same thing.[88] Additionally, the 2015 Model provides for a vast variety of mitigating factors *inter alia* with respect to the nature, history, duration and profits of the investment, insurance pay-outs etc. Other facts based on acts or omissions of the investor such as possibility of mitigation, reasonable efforts of the investor, contributory conduct and un-remedied damage to the environment or local community. A residuary '*any other relevant considerations*' is also provided, as may be required, to balance public interest and the interests of the investor.

Whilst the standard of fair market value, prescribes a relatively objective ceiling to compensation, the subjective mitigating factors provide substantial scope for reducing compensation. This is supported by Explanation I to clause §5.7, which excludes claims of consequential, exemplary losses as also speculative and windfall profits.

G. FREE TRANSFER OF FUNDS & REPATRIATION

Once expropriation is established and compensation is determined, investors will seek transfer and repatriation of the compensation. Under the 2003 Model, compensation was to be effectively realizable, freely transferable and transferred without unreasonable delay. Under the 2015 Model, transfers of compensation for expropriatory measures and otherwise, including capital contributions, profits, dividends etc.[89] may be refused or made conditional, in good faith,

[86] Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Award (December 22, 2003) (French). *See also* Christoph Schreuer, The Concept of Expropriation under the ETC and other Investment Protection Treaties (revised May 20, 2005) at para 70.

[87] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004), at para 159-65, 173-174. *See also* Jalapa Railroad and Power Co., (U.S. v. Mexico) American Mexican Claims Commission, 1948, reprinted in M. Whiteman (ed.), Digest of International Law, Vol. 8 (1976, 908-909. [The American Mexican Claims Commission observed that a legislative act of declaring a clause in a contract void, was not an '*ordinary breach of contract*' and the Government of Veracruz stepped out of the role of contracting party and sought to escape vital contractual obligations using its sovereign power. This was a confiscatory breach of contract.] *See also* SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (January 29, 2004) at para 161, GEAgroup Aktiengesellschaft v. Ukraine ICSID Case No. ARB/08/16, Award (March 31, 2011) at 262, International Technical Products Corporation and Anr. v. Islamic Republic of Iran and Ors., Award No. 196–302–3, 24 (Oct. 1985), Iran-United States Claims Tribunal Reports, vol. 9 (1985- II), p. 238 to 240 [referred to in Materials on the Responsibility of States for Internationally Wrongful Acts, United Nations Legislative Series, U.N. New York, 2012, No. ST/LEG/SER B/25, available at http://legal.un.org/legislativeseries/documents/Book25/Book25.pdf.] [The question was whether Bank Tejarat, a Government-owned bank with a separate legal personality, had acted in its capacity as a State organ with regard to taking of real-estate property. Since it had acted in a commercial capacity and not on the instructions of the Government of the Islamic Republic of Iran or otherwise performed governmental functions, there was no expropriation]

[88] *See UNCTAD supra at* 74 at p.61. *See also* C.M.E. Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL Final Award (March 14, 2003), at 493.

[89] These are referred to as "*funds*" of the investor. *See 2015 Model* §6.1

for a variety of reasons including insolvency, taxation, social security and penal laws. This is because international economies are increasingly inter-dependent, with developing countries facing concerns of capital flight and inflows, in the administration of monetary and financial policies.[90] Temporary restrictions may also be imposed due to serious balance of payment difficulties or issues relating to macro-economic management, monetary or exchange rate policies. Though this is described as a temporary restriction, the 2015 Model does not contemplate situations where such circumstances continue indefinitely or if other such circumstances crop-up during the subsistence of the original circumstance and which continues post the cessation of the original circumstances. In such cases, it would appear that the temporary restrictions could continue indefinitely until complete cessation of all such circumstances, as the case may be.

In such cases, the Host-State should be subjected to an obligation to transfer the investors' funds, in a phased manner. A maximum time limit may be specified for temporary restrictions regardless of whether or not the circumstances have ceased at the end of this period. This period should be calculated from the initial circumstance resulting in the restrictions, irrespective of new circumstances arising before the restrictions are lifted. This would allow the Host-State to take immediate measures of protection against capital flight or to secure macro-economic concerns, whilst also providing assured progressive relief to its foreign investors. This would be reasonable arrangement offering Host-states the opportunity to protect their interests whilst also ensuring certainty in the minds of investors.

H. INVESTOR & HOME-STATE OBLIGATIONS

The 2015 Model sets out minimum obligations for responsible business conduct by investors and for certain Home-state obligations. It requires investors to refrain *inter alia* form committing, inciting, aiding, abetting, conspiring or authorizing acts of corruption; this operates in the pre-establishment as well; or making illegal political contributions, illegally engaging persons to influence the Host-government to grant contracts or rights to the Investor.[91] These obligations should also be made to apply pre-establishment. The 2015 Model also specifies that investments will be subject to *inter alia* Host-laws of taxation, information sharing, consumer protection and fair competition laws of the Host-State, as also accepted standards of corporate governance and accounting practices.[92]

Investors are also required to make disclosures in accordance with Host-law, with the Host-State having the right to require disclosure of the source and channel of Investor funds, to be supported by documentary evidence of its legitimacy.[93] This does not consider protection of

[90] *UNCTAD Supra at* 2 at p.56.
[91] *2015 Model* §9.
[92] *Ibid.* §11,12.
[93] *Ibid.* §10.

confidential information; Drawing from the Canada-Colombia F.T.A.,[94] disclosure of confidential information which would prejudice the competitive position of the investor or the covered investment, may be protected, with exceptions provided in case of public interest or the application of laws in good faith. To give clarity to investors, it may be considered to exhaustively list the disclosures that may be required or at least indicatively specify the nature of disclosures that may be required by the Host-state.

Compliance with these obligations is mandatory to receive treaty protection and must be set-out in the notice of dispute, in an accompanying self-certified statement of the investor. Breaches of these obligations may be taken into account when making an award and may also form the basis for a counter-claim. This allows Host-states to hold foreign investors accountable but it will neither be treated as a waiver of its right to make jurisdictional objections in BIT arbitration nor operate as a *res judicata* against legal, enforcement or regulatory action or proceedings under Host-law. Such breaches can be defended to the limited extent of proving justifiable reasons for non-compliance or attempts at mitigation.[95] However, it may allow Host-states to deny treaty protection and defeat claims, which are otherwise valid, due to minor non-compliances. An alternative would be to prescribe a list of non-compliances, which would *ipso facto* and without exception, result in a breach of the treaty and consequently, disentitle an Investor from treaty protection; in other cases, the mitigation and justifiability defences may be retained.

There is also a Home-State Obligations clause, which provides that irrespective of the jurisdiction of Host-Courts, Investors and Investments shall be subject to civil actions for liability in the Home-State with respect to acts in the Home-State which lead to significant damage, personal injuries or loss of life in the Host-State. Appropriate measures must be put in place by the Home-State, to ensure that such actions are allowed under its legal systems.[96] This seeks to remove jurisdictional constraints, such as *forum non-conveniens*, as Home-Courts do not exercise jurisdiction over acts of investors in the Host-State.[97] In such cases, there is an asymmetry of international law where BIT rights are not accompanied by corresponding liabilities.[98] This is significant for example with respect to nuclear liability and would have allowed India to sue Union Carbide in U.S. Courts in the Bhopal Gas Tragedy.[99] However, this contradicts the Convention for Supplementary Compensation for Nuclear Damage

[94] Canada-Colombia Free Trade Agreement, §812, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/chapter8-chapitre8.aspx?lang=eng. [*"a Party may require an investor of the other Party, or its covered investment, to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law"].*

[95] *2015 Model* §14

[96] *2015 Model* §13

[97] *260th Report supra* at 58 para 4.6.2 at 36.

[98] H. Mann, K. Moltke, L. Peterson, A. Cosbey, Negotiators' Handbook, I.I.S.D. Model International Agreement on Investment for Sustainable Development, (Apr. 2006) at 28, https://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf.

[99] *See* In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984 634 F. Supp. 842 (May 12, 1986). In this case, India filed several suits against UCC for an environmental disaster in a chemical plant in Bhopal, owned and operated by an India subsidiary of UCC. These suits, filed on behalf of the victims of the tragedy, were consolidated and dismissed by the New York U.S. District Court, on the principles of *forum non conveniens.*

("CSCND")[100] which provides that jurisdiction over actions concerning nuclear damage from a nuclear incident shall lie only with the courts of the party within which the nuclear incident occurs. Such inconsistencies are to be resolved in accordance with the Vienna Convention on the law of Treaties ("VCLT").[101]

I. DISPUTE RESOLUTION

(i) SCOPE

The system for settlement of Investor-State disputes ("ISDS") under the 2015 Model is restricted in its scope to disputes under Chapter II (Obligations of Parties) between a party-state and a counter-party state investor, including counter-claims in such disputes.[102] ISDS cannot re-examine finally settled legal issues or the merits of decisions of judicial authorities. Similarly, it cannot review the applicability of exceptions taken by the Host-State with respect to financial stability, foreign exchange concerns or State security.[103] As regards disputes between parties to the BIT, relating to interpretation of the BIT or to the obligations to consult in good faith, it is provided that such disputes should, as far possible, be settled by consultation, negotiation or mediation. If these disputes cannot be settled within a period of six months of the dispute arising, a separate arbitration procedure is provided under §15.

(ii) PRE-CONDITIONS TO ISDS ARBITRATION

As a pre-condition to the submission of an ISDS claim, the claimant-investor must either exhaust domestic and administrative remedies, without satisfactory resolution or establish that even after diligent pursuit of domestic remedies, reasonable remedies are not available or that there is no reasonable possibility of obtaining relief within a reasonable period of time.[104] This shows that ISDS is not meant to be a substitute or alternative to domestic remedies; which is a necessary step to be taken before ISDS can be invoked.[105] This is however, relaxed to a limited degree; where the investor can prove that diligent pursuit of such remedies would be futile, as set-out above. However, adjudication on merits or the final settling of any legal issues while pursuing such remedies, bars ISDS from entertaining any claims so adjudicated or finally settled. Accordingly, ISDS may not be able to entertain a number of issues, other than decisions such as *prima facie* threshold decisions on procedural or technical grounds. In this regard, India may consider restricting the preclusion to re-examination of only municipal legal issues, whilst

[100] India has signed the CSND in May 2010, but it has not been ratified. *See* International Atomic Energy Agency – Status Table, Convention on Supplementary Compensation for Nuclear Damage, available at https://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf

[101] *2015 Model* §19.3

[102] *2015 Model* §14.11

[103] *2015 Model* §16.1(ii),(iii) r/w. 14.2(ii)(d) and §17. ISDS is also excluded if §15, which deals with disputes between parties relating to consultation requirements or interpretations of the treaty, has been or is being invoked over the same claim.

[104] Exhaustion of local remedies has been recognized in International law. *See* The Loewen Group, Inc. and Raymond L. Loewen v. U.S.A. ICSID Case No. ARB (AF)/98/3 Award (June 26, 2003) at para 165 to 170 [the claimant is required to exhaust local remedies before invoking arbitration under BIT's. This does not refer to remedies which are impossible in law, or practically impossible, in fact. The remedy must be reasonable available *inter alia* in the light of the situation, including financial and economic circumstances. This also does not refer to every remedy, but only adequate and effective remedies.]

[105] A time-limit of one year is imposed on submitted such claims for such domestic or administrative remedies, calculated from actual knowledge or constructive knowledge of the measure in question and the resulting loss or damage. *See 2015 Model* §14.3.

allowing the re-examination of issues of International law, if any. The preclusion on review on merits, which is generally accepted by States,[106] may be retained.

Non-compliance with any of these conditions is an absolute bar to ISDS jurisdiction and will not be considered to be merely procedural or technical. Once these conditions are established, the investor can file a notice of dispute with the Host-state, from which commences a one year cooling-period of '*best efforts*' amicable consultation, negotiation or continued pursuit of domestic remedies; this cooling-off period is specified to be mandatory, probably because in the past such periods have been by-passed by tribunals as being directory requirements.[107]

Once the cooling-off period for amicable settlement has lapsed, the disputing investor can submit a claim to arbitration, provided;[108]

i. the claim is submitted within three years of the first knowledge (actual or deemed) of the impugned measure and the resulting loss or damage;

   or;

   after eighteen months of the conclusion or abandonment of domestic proceedings, as the case may be; whichever is later; and

ii. at least ninety days before submitting the claim, a written notice of the intention to so submit a claim has been provided to the Respondent-Party.

This notice is required to demonstrate compliance with the pre-conditions above and must also be accompanied by a written waiver of rights to any dispute settlement systems of the Host-State. If these conditions are satisfied, the claim may be submitted to an ad-hoc arbitral tribunal.[109]

The language of the 2015 Model allows submission of claims subject to compliance with the pre-conditions set-out in the BIT; this includes the written consent for the submission of the

[106] *260th Report supra at* 58 at 5.3.4 at p.42.
[107] *See for example*, S.G.S. Societe Generale de Surveillance SA v. Islamic Republic of Pakistan, where the tribunal treated consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. ICSID Case No ARB/01/13, Decision on Jurisdiction (August 6, 2003), p 184. Similarly in Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award (September 3, 2001) at 190 [insistence on the expiry of a waiting period before the commencement of arbitration proceedings would amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties], *see* Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (November 14, 2005) at para 100, [Insisting on the waiting period would mean that an investor would have to file a new request for arbitration and restart the whole proceeding, which would benefit no-one. It may be noted that there are decisions to the opposite effect as well: *see* Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case No. ARB/08/4, Award on Jurisdiction (December 15, 2010) at para 149,150 [such requirements are not, as some arbitral tribunals have stated, a procedural or a directory rule, which can or cannot be satisfied by the concerned party. Instead, it is a fundamental requirement under ICSID Rules. It referred to a decision in Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 (para 315 at p. 65) which held that such cooling-off periods are meant to allow party-states time to consider and redress the dispute before ISDS is initiated. To deprive the Host-state of that opportunity would defeat ISDS jurisdiction. It also held that such periods benefit investor-state relations which suffer once ISDS is initiated. It is not an inconsequential procedural requirement but rather a key component of the legal framework established in the BIT.]
[108] *See 2015 Model* §14.4
[109] Each party appoints one arbitrator. These arbitrators in turn, appoint a third presiding arbitrator.

claim to arbitration *'by the Parties'*.[110] This seems to be a mistaken reference to the parties to the dispute, instead of only investor-claimants. The author believes that this is intended to reflect a standing offer by the Host-country to arbitrate, that the investor must consent to.[111] However, the current language seems to admit an alternative interpretation; that ISDS requires the consent of the Respondent-State, as well. In fact, the title of the 2015 BIT defines '*parties*' to mean the party-states, which would admit an interpretation that even the non-disputing party's consent is required. This would make the BIT an agreement to enter into an arbitration agreement which would defeat its purpose.[112] It is important for investors to be certain that ISDS will be available, without the consent of the Respondent-State. Accordingly, the reference to '*parties*' should be changed to '*Investor*' or the inclusive reference to such consent be removed altogether, since the consent of the Investor/Investment is already required as a pre-condition to for submission of disputes.[113]

(iii) THE TRIBUNAL

The tribunal is required to possess the relevant expertise and experience in International law and must also be impartial, independent and without actual or potential conflicts of interest. Disclosures relating to neutrality are to be made at the threshold and on an ongoing basis.[114] An option to challenge and substitute the arbitrator is also provided, if there are justifiable doubts in the minds of the parties as to the arbitrator's neutrality; or if the arbitrator fails to act; or it becomes *de jure* or *de facto* impossible for the arbitrator to perform his functions.[115] If all of the parties agree to the challenge or the arbitrator withdraws himself, no inference as to the validity of the grounds for the challenge may be drawn. If not, the challenge continues which must be determined using the test of an objective third party; if the challenge meets this test, the challenge will be successful, even in the absence of actual bias. Importantly, the arbitrator cannot avoid the obligation to disclose these circumstances by claiming that the parties already have independent access or access via the public domain to such information. In cases of doubt, the 2015 Model presumes that disclosure is required and leaves the ball in the court of the parties to the ISDS dispute.

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[110] *2015 Model BIT* §14.4(ii)

[111] United States Court of Appeals, Second Circuit. Republic of Ecuador v. Chevron Corporation, Texaco Petroleum Company, Docket Nos. 10-1020-cv (L) 10-1026(Con) (March 17, 2011)

[112] There are BIT's that do adopt such an approach. It is known as an '*opt-in*' approach, which means that the parties would have to refer BIT disputes to arbitration on a *post-facto* mutually agreeable basis. *See for example* §12(3),(4) of the Agreement between the Government of the Argentine Republic and the Government of New Zealand for the Promotion and Reciprocal Protection of Investments (August 27, 1999) available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/108.

[113] *2015 Model* §14.4(i)B(e) r/w. 14.14.4(ii).

[114] This includes any other relevant circumstances pertaining to the subject matter of the dispute, existing or past, direct or indirect, financial, personal, business, or professional relationships with any of the parties, legal counsel, representatives, witnesses, or co-arbitrators. This disclosure is to be made forthwith on receiving knowledge of such circumstances. This includes certain circumstances which will be deemed to constitute justifiable doubts as to an arbitrator's independence, impartiality or conflicts of interest, in cases *inter alia* where the arbitrator or his associates/relatives are interested in the outcome of the arbitration, arbitrator is or has been a legal representative/advisor of the appointing party, an affiliate of the appointing party in the three years preceding the commencement of arbitration, the arbitrator is a lawyer in the same law firm as the counsels of the parties, the arbitrator acts concurrently with the lawyer or law firm of any of the parties in other disputes, has publicly advocated a fixed position regarding an issue in the case, etc.

[115] This challenge is to be made within fifteen days of the knowledge of the constitution of the tribunal or the relevant facts/circumstances giving rise to the challenge.

(iv) CONDUCT OF PROCEEDINGS, BURDEN OF PROOF & GOVERNING LAW

While ICSID's institutional rules carry the favour of over 150 contracting states,[116] India prefers an ad-hoc system with UNCITRAL Rules. However, parties remain free to adopt any other rules and also choose any seat and place of arbitration. In these proceedings, objections with respect to jurisdiction or legal basis are to be decided as preliminary objections, on an expedited basis, during which adjudication on merits remains suspended. However, failure to make such an objection will not operate a waiver of objections as to competence or any argument that the Respondent-State may make on the merits of the case.

These proceedings are required to be transparent to the public; all pleadings, transcripts, orders, awards etc. are required to be made public. However, where required to protect confidential information or the safety of parties, tribunal may conduct hearings in private. This only refers to keeping '*hearings*' private. In this regard, the 2015 Model should specify that without-prejudice negotiations including written proposals/submissions and other situations requiring protection from disclosure, should be kept private, except with the written consent of the parties. In matters of evidence, if the Respondent-state claims that production of certain documents is protected from disclosure under the Host-laws of confidentiality or privilege, the tribunal is powerless to compel production. Further, the disputing Party can require the arbitral tribunal to redact information in the award and also all documents submitted to or issued by the tribunal.

At all times, the entire burden of proof of issues such as jurisdiction, violations, occurrence and direct causation of losses, is placed on the claimant-investor, meaning investors cannot call upon presumptive rules of evidence for their benefit. The governing law of the BIT is its provisions, general principles of public international law relating to the interpretation of treaties and Host-law for domestic matters. A recent decision of the Delhi High Court may be noted in this regard, which read the directive principle of the Constitution to foster respect for international law and treaty obligations, enshrined in Article 51(c), along with the principles of *Pacta Sunt Servanda*, observance of treaties and general rules of interpretations,[117] to hold that there is an obligation cast on India to remain bound by the terms of its treaties and not to cite domestic law as a justification for failure to perform its treaty obligations. Further, treaties are required to be interpreted in good faith, in accordance with the ordinary meaning given to their terms, taken in context, and in the light of its stated object and purpose.[118] This goes one step further than the Supreme Court, which had recognized that though India is not a party to the VCLT, it contains principles of customary international law and that its principles of interpretation,[119] may be considered to be broad guidelines in interpreting treaties in the Indian context. In this light, it is a positive move to incorporate the principles of the VCLT by reference, as above, mirroring judicial intent.

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[116] ICSID, Database of Member States, available at https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx?tab=AtoE&rdo=CSO&ViewMembership=All

[117] *See VCLT* §26,27,31.

[118] Awas 39423 Ireland Ltd. and Ors. v. Directorate General of Civil Aviation and Ors. W.P.(C) 871 and 747/2015 (March 3, 2015) at para 25.2.

[119] Ram Jethmalani & Ors v. Union Of India & Ors. (2011) 8 S.C.C. 1 at para 60. *See VCLT* §31.

The 2015 Model also provides that pending disputes, the Non-Disputing Party-State shall not give diplomatic protection, or bring an international claim, in respect of such disputes, unless the Respondent-Party has failed to abide by and comply with an award or the decisions of its courts, in accordance with §14 and applicable law regarding recognition and enforcement of foreign judgments and awards.[120] However, it does not preclude a Respondent-Party from requesting consultations or seeking agreement with the other Party on issues of interpretation or application of the BIT.

(v) AWARD

ISDS Awards only bind parties to the arbitration and must be enforced as per the laws of the place of enforcement. These awards can only provide monetary compensation against the Respondent-state and cannot, under any circumstance, grant punitive or moral damages or injunctive relief, against either party. In cases of counter-claims, the Respondent-state has a wider scope of remedies and can seek declaratory relief and enforcement action, in addition to monetary compensation. The award may also direct either party to bear the entire costs or a greater share of costs of the ISDS proceedings, in the discretion of the tribunal. The ISDS tribunal may also award damages to the Respondent-state, if it believes that an investor has used or threatened to use ISDS to force the hand of the Host-state in any manner. It should instead provide that the Investor should not use any means outside of the means authorized under the BIT or use any illegal or illegitimate means to coerce the Respondent-state into settling its claims or granting the Investor any rights or benefits, ostensibly, in lieu of compensation.

As regards the award, it is to be made publicly available subject to the redaction of confidential information. The language of the relevant provision suggests that this is a discretionary power to be exercised by the tribunal, without the right to the investor or the non-disputing Party-State to require redaction. However, the disputing Party-State may require the tribunal to redact information in the award and also other documents submitted to or issued by the tribunal, in the course of proceedings, if it deems fit in public interest. It should be considered to allow the tribunal to redact confidential information at the request of the investor as well.[121] The 2015 Model could have also exhaustively set-out or illustratively indicated when investors can seek redaction and when redaction may be refused.

J. DENIAL OF BENEFITS

The 2015 Model provides that at any time, even after institution of BIT arbitration, the Respondent-State may deny of any benefits of the BIT to Investors/Investments owned or controlled by a non-Party or by Host-state entities. It may also do so in cases where the Investors/Investments have been established or restructured with the primary purpose of gaining access to ISDS under the BIT. Such clauses are used in treaties to avoid "*Shell*" or "*letterbox/Mailbox*" companies from using the BIT for treaty-shopping;[122] in such cases, smaller economies such as Singapore and Mauritius, which have BIT's with India, act as platforms for

[120] *See generally* ICSID §27
[121] *See for example* §29, Uruguay-U.S. BIT (2005) available at http://www.bilaterals.org/IMG/pdf/US-UruguayBIT.pdf.
[122] *UNCTAD supra at* 2 at p.75

channeling third party investment into India.[123] However, the true investor and the real beneficiary of the investment in such cases, is not a Mauritian or Singaporean entity and naturally India would like to avoid being forced to offer protection to such investors. Such investors are based in states which may not executed a BIT with India, possibly because of poor economic relations with India; and if such countries do have a BIT with India, such investors must stand by the bargain of their home-states and should not be allowed to avail of favourable provisions in another BIT, between India and a platform jurisdiction.

However, the use of such clauses has been considered to be unnecessarily politicize economic relations[124] and it may be advisable to require prior notification to be given to the Home-State before invoking such provisions, supported by reasons, which may be made non-justiciable.

K.DURATION & TERMINATION

The 2015 Model provides that the BIT shall automatically lapse on the expiry of its term of ten years, unless there is an express renewal agreement in writing. In contrast, the 2003 Model provided for an indefinite deemed extension of the BIT unless and until the parties agree to terminate the BIT in writing. During its term under the 2015 Model, it may be terminated by either party by giving notice of its intention six months in advance, to the logical inference that the BIT terminates six months after the receipt of the notice. However, the 2015 Model goes on to say that the BIT will terminate sixty days after the receipt of the notice by the other party; four months before the expiry of the six month notice-period. This appears to be an inadvertent error which in all likelihood will be tackled in negotiations.

A survival clause provides that investments will continue to receive BIT protection for a further period of five years post-termination. This may be considered too short compared to other BIT's which commonly have 10-15 year terms; especially since the 2003 Model also provided for a fifteen year period. Further, this applies only '*when the termination becomes effective*' which could be interpreted to mean that this would not apply in case the BIT lapses. This should be clarified.

L. MISCELLANEOUS

The 2015 Model provides that it shall not affect existing treaties or the right to enter into any further treaties that are consistent with the BIT. Conflicts between the BIT and other treaties, such as possible conflict with the CSCND, as discussed above, will be resolved in accordance with the VCLT. It also provides for amendments by an agreement of both parties, in writing. In the interests of clarity, the date of coming into force of amendments must be specified as also whether such amendments can apply retrospectively.[125]

[123] *Ibid.* at p.76.
[124] *Ibid.*
[125] Other miscellaneous provisions are included that deal with matters such as good-faith consultations, the making of supplemental rules, issuance of binding interpretations, taking of joint measures in pursuance of the BIT, review of the BIT (once every 5 years) etc.

IV. NATIONAL INVESTMENT CODE, INVESTMENT TREATIES OR A 'BIT' OF BOTH?

Some States firmly believe that investment treaties are not crucial to FDI.[126] India has also demonstrated that it is leaning towards this view. An Indian policy advisor too once reported that India has seen similar growth with respect to FDI from both BIT and non-BIT states.[127] One of the states to act on this belief is South Africa, which recently terminated several investment treaties, representing a shift of opinion amongst developing countries.[128] It believes that instead of investment treaties, it must focus on ease-of-business, protection of property rights, market growth, infrastructural quality etc. whilst also assuring continued protection to its investors. It intends to do so by strengthening its national laws of investment protection.[129]

Ecuador also recently expressed its frustration with the investment treaty regime and the resulting geo-political pressure it faces as a developing country. Expressing hope for an alternative, it is now entering into private contracts with its investors, instead of BIT's. These contracts are based on its domestic laws of investment protection and provides for arbitration only after domestic remedies are exhausted. It prefers this direct arrangement of mutual rights and obligations, as opposed to issuing a BIT '*blank-cheque*' to investors.[130] These contracts grant certain incentives and financial support to investments and have resulted in almost two billion U.S. dollars worth of foreign investment in 2015.[131] This shows that BIT's are not necessarily the only way to attract foreign investment, which may be why other BRICS countries are considering moving away from the IIA regime.[132]

Several African countries have also adopted national investment legislations or codes. Cameroon for example confirms basic guarantees of free repatriation, property ownership, tax incentives and the freedom from discrimination between local and foreign investors, through its investment code. Stamp duty, VAT incentives are provided, even in pre-establishment phases (limited to a period of five years upto establishment). However, admission of investments does require government approval and also investment visas to avail of protection during the operation phase.[133] Similarly, Kenya makes admission of enterprises conditional upon receipt of a

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[126] India in a representation to the WTO (1999) stated its belief that BIT's may be taken to be a factor in creating a favourable investment climate but there is limited empirical evidence to suggest that it ipso facto increases foreign investment. Accordingly, the focus should be on liberalizing FDI and regulatory policies. *See supra at* 75.

[127] J. Singh, Do Bilateral Investment Promotion & Protection Agreements (BIPAs) attract Foreign Direct Investment (FDI) Inflows into India? (March 26, 2014), available at http://www.eaindustry.nic.in/discussion_papers/BIPA_Research_Study.pdf. He suggests that DTAA's are statistically a better mode of attracting investment.

[128] S. Hurt, Why South Africa has ripped up foreign investment deals (December 17, 2013) available at http://theconversation.com/why-south-africa-has-ripped-up-foreign-investment-deals-20868.

[129] R. Davies, LETTER: Termination of bilateral investment treaties won't harm relations (July 19, 2013) available at http://www.bdlive.co.za/opinion/letters/2013/07/19/letter-termination-of-bilateral-investment-treaties-wont-harm-relations.

[130] *A. Arauz supra at* 30.

[131] Ecuador has new private investment contracts adding up to 1,948 million dollars this year, (July 31, 2015) available at http://www.andes.info.ec/en/news/ecuador-has-new-private-investment-contracts-adding-1948-million-dollars-year.html.

[132] *See also* Catherine Saez, Ecuador, BRICS Moving Away From International Investment Dispute Regime, Paper Says, Intellectual Property Watch (August 18, 2015) available at http://www.ip-watch.org/2015/08/18/ecuador-brics-moving-away-from-international-investment-dispute-regime-paper-says/.

[133] Hogen Lowells, The new Cameroonian investment code available at http://www.hoganlovells.com/files/Publication/1442914d-f5c9-4030-ae34-490a56bb2807/Presentation/PublicationAttachment/6830e29c-7482-482a-87bd-

government certificate of approval. However, it does recognize the right of the Kenyan government to enter into special arrangements with other States to further promote or protect inbound investment.[134] South Korea provides a limited open-admission policy with only reporting requirements in some cases and prior permissions in fields such as defense. This is not so different from the extant Indian FDI policy, which permits certain items under the automatic route and some, which require government scrutiny due to policy considerations, under the approval route. To ensure consistency with Korea's treaties, it is clearly provided that this does not in any manner affect the contents of concluded treaties.[135]

Such investment codes or national legislations contain substantive rules such as FET, MFN, National Treatment etc. which are traditionally granted via investment treaties. These codes are essentiality unilaterally adopted undertakings to all eligible foreign investors, which have the effect of creating International obligations.[136] Naturally these are broader in application to BIT's; which apply only to counter-party foreign investors; and investment contracts; which apply only to the contracting investor. To decide which one of these routes to follow, India would have to decide whether it wants to give universal protection or protection only to selected beneficiaries, with reciprocal protections granted by their Home-states. If it does decide that all investors must be treated equally, regardless of reciprocal arrangements, India may consider adopting a suitable national legislation. If that were the case, India could bring the substantive provisions of the 2015 Model into law, with several options as to enforcement;[137]

firstly, the '*opt-out*' option of enforcement which provides exclusively for domestic remedies and completely excludes IIA;[138]

secondly, the '*opt-in*' option which provides for domestic remedies with resort to IIA only if there is a investment treaty or contract to that effect.[139]

5238a002e3d2/The_new_Cameroonian_investment_code_June%202013.pdf. *See also* Henry, Samuelson & Co., Cameroon Investment (Legal) Environment, available at http://www.hg.org/article.asp?id=7159.

[134] §3,8B, The Kenya Foreign Investments Protection Act, Chapter 518, Revised Edition 2012 [1990], National Council for Law Reporting, available at http://admin.theiguides.org/Media/Documents/ForeignInvestmentsProtectionAct35of1964.pdf.

[135] Ministry of Legislation, Foreign Investment Promotion Act (Republic of Korea) available at http://legal.un.org/avl/pdf/ls/Shin_RelDocs.pdf. Similarly, Kyrgyz law sets out a domestic code but provides that investment treaties will take precedence in case of contradictions. *See* Consulate General of the Kyrgyz Republic, §2(3), Law on Investments, available at http://kyrgyzconsulate.com/index.php/investment-in-kyrgyzstan/law-on-investments (adopted February 7, 2003).

[136] Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010, para. 79,84,85. The Tribunal shares that analysis, which is in line with the decision taken in *CSOB v. Slovak Republic* and ultimately also in *Zhinvali v. Georgia*. Legislation and more generally unilateral acts by which a State consents to ICSID jurisdiction must be considered as standing offers to foreign investors under the ICSID Convention. Those unilateral acts must accordingly be interpreted according to the ICSID Convention itself and to the rules of international law governing unilateral declarations of States. *See Tradex Hellas (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, (1999) 14 *ICSID Rev. – Foreign Inv. LJ*, pp. 186–187. *IBM World Trade Corporation v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction, 22 December 2003, para. 24. *See also Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 45.

[137] *See generally* Makane Moïse Mbengue, Consent to Arbitration Through National Investment Legislation, Investment Treaty News, IISD (July 19, 2012)

[138] *See for example* The Foreign Investment Law, Pyidaungsu Hluttaw Law No. 21, 2012 (November 2, 2012) available at http://www.myanmarlegalservices.com/wp-content/uploads/2012/11/NEW-FILEnglish-from-DICA-2.pdf. However, it should be noted that there is draft Myanmar Investment law of 2015 which *inter alia* also provides for UNCITRAL, ICSID arbitration. *See* The Investment Law of [2015] MIC/DICA – Draft-V.2 (February 24, 2015) available at http://www.burmalibrary.org/docs21/2015-Myanmar-Investment-Bill-V2-24-02-2015.pdf. From publicly available sources, it appears that efforts have been made to pass this draft act but have not yet come to fruition.

Thirdly, the '*agree to agree*' option which allows arbitration on a mutually agreeable basis *i.e.* it is essentially an agreement to enter into an arbitration agreement.[140] This would require specific consent of India and the investor to settle disputes by arbitration. This may bring diplomatic relations in play and being a developing country, India may be pushed to arbitrate.

finally, the '*standing offer*' option which only require investors to consent to dispute settlement procedures, with the consent of the state already being granted, expressly or impliedly, in its investment laws.[141]

If India were to adopt such an investment code, it would be advisable to adopt the opt-in approach which would give India the freedom to adopt suitable dispute settlement procedures in line with its interests; the '*standing offer*' approach should be avoided as it would involve a relinquishment of the right to interpret its own domestic law.[142]

Such a law would also mean that Indian investors would lose out on BIT protections while India protects all inbound investment. In this regard, doing away with BIT's altogether and adopting a national investment code may not be appropriate,[143] unless the code only protects investors of states which have adopted suitable reciprocal obligations, officially recognized as such by India. However, such a system of matching reciprocal legislative obligations, in effect, is the same as BIT's. There will also be concerns that reciprocity may not be recognized due to imperfect alignment. It may then be sensible for countries to come straight to the point and negotiate a BIT. However, assuming India does adopt a suitable investment code, it will have the power to modify, amend or repeal it at will. It will also have the regulatory space it is seeking in the 2015 Model and will be able to mould the code to mirror the dynamic demands of social and public policy; in such a scenario, the code will be tested based on what India decides to do with this regulatory freedom.

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[139] *See for example* §25 of the Mongolian Foreign Investment Law, available at http://www.mram.gov.mn/pdac/law/en/2.pdf and §30, Decree on the Proclamation of the Foreign Investment Law, (Montenegro) No. 18/11 (April 1, 2011) available at http://www.mipa.co.me/dcs/THE_FOREIGN_INVESTMENT_LAW.pdf.

[140] §13, Investment Code of Seychelles Act, 2005 (available at http://www.wipo.int/edocs/lexdocs/laws/en/sc/sc008en.pdf) provided for such a method of dispute settlement. However, §13 of the Seychelles Investment Act of 2010 (available at http://www.wipo.int/edocs/lexdocs/laws/en/sc/sc011en.pdf) now provides for appeals under the Act to a special panel and to the Supreme Court of Seychelles. *See also* Seychelles, 2015 Investment Climate Statement, U.S. Department of State, (June 2015), available at http://www.state.gov/documents/organization/241945.pdf.

[141] This is done by using language such as '*the consent is made up of this article, as far as the government is concerned*' *See* §21, Republic of Mali, Law No. 91-048/AN-RM, (February 26, 1991), Investment related law, Presentation of the Investment Law and the Procedures of Approval available at http://www.ambamali-jp.org/investment_related_law.php. *See also* §8(2), Albanian Law on Foreign Investment, 1993 available at http://pbosnia.kentlaw.edu/resources/legal/albania/forinv.htm. [Albania hereby consents to…]. *See also* §26(1),(2), the Greater Colombo Economic Commission Law, 1978 available at http://www.investsrilanka.com/images/welcome/pdf/Act_No_4_of_1978.pdf. *See generally* UNCTAD, ICSID, '*2.3. Consent to Arbitration*' (2003) available at http://unctad.org/en/docs/edmmisc232add2_en.pdf.

[142] *See* D. Caron, "The Interpretation of National Foreign Investment Laws as Unilateral Acts under International Law", in M. H. Arsanjani et al. (eds.), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman, *Martinus* Nijhoff Publishers, Leiden/Boston, 2011, p. 655.

[143] *See also S.Rai, A.Dwivedi, T.Sethi supra at* 82.

V. CONCLUDING REMARKS

A BIT is an inherently complex instrument. This is because, two States negotiate, finalize and execute these treaties with the real beneficiary being the foreign investor; who is only a silent party to these arrangements. The States also have to consider the intricate web of domestic and international laws, all the while dealing with under-currents of diplomatic relations. States, especially developing states like ours, have also to consider limiting their exposure to liability and the effect on its investment environment. All of these matters have to be finely balanced, so that a surrender of sovereignty is justified resulting in a balanced and tempered BIT, which protects inbound investment with appropriate legal and regulatory exceptions, in matters of national importance. Further, since both parties to the BIT get equal reciprocal protections, a watertight BIT such as the 2015 Model, protects the counter-part states at the cost of the investors. If that is its effect, why have BIT's at all?

For the foreseeable future, the author believes that BIT's are *sine qua non* for India in the world of International trade and business. We cannot be blind to instances such as the Jet-Etihad deal, where India may be compelled or at least influenced to enter into BIT's to '*facilitate*' deal-making.[144] In the light of the diplomatic pressure that India faces as a developing country, doing away with BIT's is unlikely to be a holistic solution, at least for the time being. It is the same with the 2015 Model, whose large subjective carve-outs will send a cautionary message to investors. Assuming India continues down this path and even assuming that States are willing to execute the 2015 Model as it stands, India's victory will be pyrrhic. It will protect its interests, possibly by preventing investment in the first place as investors may be driven to BIT jurisdictions with favourable protections. Instead, what India needs is a strong but rational BIT regime including re-negotiation of existing BIT's, which will balance India's legitimate interests with the need to protect its foreign investors. The proposals of the author may be some of the means to this end.

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[144] Etihad invested in Jet Airways upon the condition that India and UAE conclude a BIT. *See* Bidhuri, A. Chaubey & A. Sarin, Why India's draft Model Bilateral Investment Treaty is a bit of a misnomer (May 11, 2015) available at http://www.legallyindia.com/Blogs/why-india-s-draft-model-bilateral-investment-treaty-is-a-bit-of-a-misnomer. *See also* Y. Sapkale, Jet-Etihad deal: Handing over benefits to Abu Dhabi on a platter, Moneylife (July 4, 2013) available at http://www.moneylife.in/article/exclusive-jet-etihad-deal-handing-over-benefits-to-abu-dhabi-on-a-platter/33469.html.