

INDIA AND BRAZIL: RECENT STEPS TOWARDS HOST STATE CONTROL IN THE INVESTMENT TREATY DISPUTE RESOLUTION PARADIGM

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Abstract

Over the past five years, two of the ten largest economies in the world, India and Brazil,¹ have undertaken significant reforms of their bilateral investment treaty frameworks. While India's motivation for reform has been largely reactive, responding to its losing a spate of investor-State arbitrations, Brazil's motivations – as a State that has never ratified any of the international investment agreements it has signed – have been more preventive. The reform processes undertaken by both India and Brazil have resulted in the issuance of a revised Model BIT and new Agreements on Cooperation and Facilitation of Investments, respectively. Interestingly, in late 2016, India and Brazil signed a new bilateral investment treaty that reportedly does not contain any investor-State dispute settlement provisions. This article examines these two States' recent model agreements and considers whether these developments are evidence of a trend by developing States, inter alia, to remove from their terms the possibility of direct recourse by foreign investors to binding third-party international dispute resolution procedures against a host State. Given that this was the singular aspect of investment treaties that made them particularly relevant, it will be interesting to contemplate what might be their possible utility in its absence. Finally, the article considers whether this could have an impact on treaty-making practice more broadly, particularly in light of the recent protectionist rhetoric of developed States.

I. Introduction

Recent changes to India and Brazil's bilateral investment treaty ["**BIT**"] frameworks appear to reflect a drive in treaty-making towards increasing symmetry between host State control and the interests of investors. India's revised Model Bilateral Investment Treaty ["**Revised Model BIT**"], published on December 28, 2015, contains a number of provisions ostensibly aimed at reducing, diluting or curtailing the level of protection commonly afforded to foreign investors and at providing increased protections to the host State. Other provisions introduce even more thought-provoking items like the exhaustion of local remedies requirements and a denial of benefits clause,

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¹ See INT'L MONETARY FUND, 2016 WORLD ECONOMIC OUTLOOK SUBDUED DEMAND: SYMPTOMS AND REMEDIES (Oct. 2016).

both of which merit particular comment. Similarly, Brazil has been promoting its efforts to reconfigure the investment landscape by entering into a number of new Agreements on Cooperation and Facilitation of Investments [“ACFIs”] with various trading partners. Those ACFIs reflect Brazil’s coordinated approach in negotiating new agreements with its trade counterparties and contain similar features and style, resulting, *de facto*, in a model ACFI [“**Model ACFI**”].² The announcement of the signing of an India-Brazil BIT [“**India-Brazil BIT**”] earlier this year further confirmed a concurrence in the approach of these two BRICS States, *inter alia*, as evidenced by the reported lack of any investor-State dispute settlement provisions in that BIT.³ With increasing protectionist rhetoric emanating from the developed world, investment treaty-making may indeed be headed for realignment. This article analyses the recent investment treaty-making approaches taken by India and Brazil, compares them with the still more prevalent forms and content of BITs and examines whether these rapidly burgeoning economies can transform themselves successfully from rule-takers to rule-makers.

The article is structured as follows: section **II** surveys the history of India’s foreign investment treaty-making practice, with a particular eye on the surge of entry into BITs in the late 1990s to 2000s, culminating in the marked increase in investment treaty arbitration [“**ITA**”] proceedings initiated against India in the last five years; section **III** outlines India’s response to that recent ITA experience and analyses the consequent revisions it has sought to make to its BIT framework and programme, including through the Revised Model BIT; and section **IV** undertakes a comparative analysis of the Revised Model BIT and Brazil’s Model ACFI. The article concludes in sections **V** and **VI** with some thoughts on possible future trends for investment treaty-making in an increasingly protectionist environment.

II. India’s BIT History and its Influence on India’s Revised Model BIT

A. From Colonization to Investment Policy Reform

India’s international investment treaty-making history and involvement in recent ITA proceedings have had a major impact on its decision to adjust its BIT policy. As such, it is the logical starting point in any discussion of India’s BIT practice. Prior to the structural economic reforms of the 1990s, India’s BIT practice was virtually non-existent. Historically, during India’s period of colonisation by Britain, large amounts of foreign direct investment [“**FDI**”] came from British investors.⁴ In the immediate post-WWII period, while British investment continued to be the most dominant source of FDI, Japanese investors also began to enter the market.⁵ Following independence from Britain in 1947, however, and until the late 1980s, India’s approach to FDI became largely protectionist, reflecting a strong sense of nationalism. FDI was welcomed in high technology areas but discouraged in low technology areas in order to protect and nurture domestic

² For the sake of convenience, this article will use the catch-all term Model ACFI when discussing Brazil’s new instruments.

³ See Joel Dahlquist, *Brazil and India conclude Bilateral Investment Treaty*, INV. ARB. REPORTER, (Nov. 28, 2016), <https://www.iareporter.com/articles/brazil-and-india-conclude-bilateral-investment-treaty/>.

⁴ A. K. Ray & Dipayan Ghosh, *Foreign Direct Investment: A time of Indian Economy*, 16(1) IOSR J. BUS. & MGMT. 54 (2014).

⁵ *Id.*

industries.⁶ Indeed, the ‘draconian’ provisions of the Foreign Exchange Regulation Act, 1973 [“**FERA 1973**”] “*stifled foreign acquisitions, expansion, exports and joint ventures*”.⁷ In particular, section 29 of that Act made it mandatory for companies with a foreign-held interest greater than 40 percent operating in India to dilute their holdings.⁸ After refusing to dilute their foreign shareholdings, global companies like IBM and Coca-Cola decided to leave India, thereby deterring prospective foreign investors from looking to India.⁹

In the early 1990s, India suffered a severe balance of payments crisis, which was exacerbated by political instability, high rates of inflation and the outbreak of the first Gulf War in 1991.¹⁰ At one time, “*foreign exchange became so scanty that, it was insufficient to pay even for one week [sic] imports*”.¹¹ The financial crisis prompted the Indian government to introduce substantial reforms in favour of economic liberalisation and industrial growth, culminating, *inter alia*, in the 1991 New Industrial Policy. This Policy introduced many changes to the workings of FDI in India, for example, by increasing the then-existing 40 percent foreign shareholding cap under the FERA 1973 to 51 percent, by removing FDI-based restrictions in low technology sectors and by establishing a foreign investment promotion board to provide “single window clearance” for project proposals and automatic approval for FDI in 35 priority sectors.¹²

B. India’s BIT Practice, 1990-2011

During the 1990s, in addition to general investment policy reform, India also began to enter into BITs. On March 14, 1996, India signed its first BIT with the United Kingdom. In quick succession, from the mid to late 1990s, India entered into numerous BITs, predominantly with European countries.¹³ In the first decade of the new millennium, India continued entering into BITs at a relatively hectic pace, signing BITs with a majority of the developed countries, with the notable

⁶ *Id.*

⁷ *FERA: Businessman’s POTA*, INDIA TODAY, Aug. 18, 2003, <http://indiatoday.intoday.in/story/foreign-exchange-regulation-act-had-a-controversial-stint-from-1973-to-2002/1/205502.html>.

⁸ Foreign Exchange Regulation Act (FERA), No. 46 of 1973 (India), § 29; FERA § 29 was subsequently amended in 1993 by §16 of the Foreign Exchange Regulation (Amendment) Act, No. 29 of 1993 (India), to omit the reference to companies “in which the non-resident interest is more than forty per cent.” See Shaji Vikraman, *How ‘draconian’ FERA clause triggered flush of retail investors*, THE INDIAN EXPRESS, Jun. 10, 2015, <http://indianexpress.com/article/explained/express-economic-history-series-3-how-draconian-fera-clause-triggered-flush-of-retail-investors/>. For the sake of completeness, the authors note that the FERA 1973 was repealed by the Foreign Exchange Management Act, No. 42 of 1999.

⁹ T.N. Ninan Chander & Uday Singh, *What has foreign exchange regulation act achieved*, INDIA TODAY, Aug. 15, 1982, <http://indiatoday.intoday.in/story/what-has-foreign-exchange-regulation-act-achieved/1/391995.html>.

¹⁰ Ray & Ghosh, *supra* note 4, at 55.

¹¹ *Id.*

¹² *Id.* at 56. Those 35 priority sectors included agricultural machinery, chemicals, drugs and pharmaceuticals, electrical equipment, industrial machinery, prime movers and transportation. The “foreign investment promotion board” has been abolished, with the relevant Ministry now processing applications for foreign investment under the government approval route, See Memorandum from the Dept. of Econ Affairs (Ministry of Finance), Abolition of the Foreign Investment Promotion Board (FIPB) (June 5, 2017), <http://fipb.gov.in/Forms/OMabolitionFIPB.pdf>. Additionally, at present and per the FDI policy, only investment in 11 sectors requires government approval.

¹³ In order of date of signature, these States included Russia, Germany, Malaysia, Denmark, Turkmenistan, Netherlands, Italy, Tajikistan, Israel, The Republic of Korea, Poland, the Czech Republic, Kazakhstan, Sri Lanka, Vietnam, Oman, Switzerland, Egypt, Kyrgyzstan, France, Spain, BLEU (Belgium-Luxembourg Economic Union), Romania, Mauritius, Turkey, Bulgaria, Indonesia, Zimbabwe, Morocco, Australia, Qatar, Uzbekistan, Argentina and Austria.

exceptions of the United States and Canada. In total, by the end of 2011, India had signed a total of 82 BITs, which meant that India had one of the largest BIT programmes in the world, especially among developing countries.¹⁴ Of those 82 BITs, 73 were in force at the end of 2011.¹⁵

C. Influence of ITA Proceedings

Since the economic reforms of the 1990s, the level of FDI in India has increased dramatically.¹⁶ At the same time, India has faced an upsurge in ITA proceedings over the past half-decade. That upsurge appears to have awakened India to the potentially adverse repercussions of its BIT arrangements, whilst ignoring the role that those arrangements may have had in its increased FDI inflow and consequent economic growth. The upsurge thus appears to have been the key factor behind India's move to re-evaluate, reform and revise its BITs.¹⁷ According to the United Nations Conference on Trade and Development ["UNCTAD"], 21 ITA proceedings have been commenced against India as the respondent State, making India one of the top ten respondent States in ITA proceedings.¹⁸ Of these, 11 are pending, nine have been settled and one case – *White Industries Australia Limited v. The Republic of India* ["**White Industries v. India**"] – resulted in a loss for India.¹⁹ Thus, India has only ever lost one ITA proceeding in its history. Not only that, but there are currently four ITA proceedings in which India is the home State of the claimant(s) who have brought proceedings against countries like Germany, Indonesia, Poland and the United Kingdom.²⁰

In this context of a dramatic economic growth, having lost only one ITA case and experiencing an increasing reliance on ITA by its own nationals, an objective observer might be forgiven for thinking that India would embrace the concept of ITAs in its BITs. However, counter-intuitively, India's lone ITA loss, *White Industries v. India*, appears to have provided the impetus for a shift in India's approach to BITs and, in particular, to ITA.

¹⁴ *India, International Investment Agreements Navigator*, INV. POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu> (last accessed July 26 2017).

¹⁵ *Id.*

¹⁶ Ray & Ghosh, *supra* note 4, at 11. Actual FDI increased from USD 165m in 1991-92 to USD 2.7 bn in 2008-09.

¹⁷ Prabhash Ranjan, *Investor State Dispute Settlement in India's New Model Bilateral Investment Treaty: Does it go too far?* Address at the International Law Association, Investment Arbitration Across Asia Conference, Sydney (Feb. 17, 2017) [*hereinafter* "Ranjan (Address)"]. See also Prabhash Ranjan, *India and Bilateral Investment Treaties – A Changing Landscape*, 29(2) ICSID REV. 419-450 (2014).

¹⁸ These statistics are correct as of early 2017; As of July 2017, India is in eleventh position. See *Investment Dispute Settlement*, INV. POLICY HUB, <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>. The authors note that a number of additional cases appear to have been commenced recently against India.

¹⁹ *White Industries v. The Republic of India*, Final Award, Nov. 30, 2011 [*hereinafter* "*White Industries v. India*"]. The tribunal's award found that India had violated Article 4(2) of the India-Australia BIT (in failing to provide an effective means for the investor to assert its claims and enforce its rights with respect to its investment and the ICC award rendered in its favour), although it did not conclude that there had been a denial of justice. Specifically, with respect to the set aside proceedings commenced by India in the Calcutta High Court, it held that "*the Tribunal has no difficulty in concluding the Indian judicial system's inability to deal with White's jurisdictional claimin over nine years, and the Supreme Court's inability to hear White's jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White with 'effective means' of asserting claims and enforcing rights*". The Tribunal incorporated the 'effective means' standard from Article 4(5) of the India-Kuwait BIT through the MFN provision in Article 4(2) of the India-Australia BIT.

²⁰ *India - as home State*, INV. POLICY HUB, <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=1>.

Shortly after *White Industries v. India*, a number of other multinational corporations commenced proceedings against India in relation to retrospective changes to taxation laws and amendments to other regulatory rules. These proceedings, all of which are pending, include *Vodafone v. India*,²¹ *Devas v. India*²² and *Cairn Energy v. India*.²³

D. India's Review of its BIT Framework and Practice

In response to facing numerous BIT claims for the first time in its history, India decided to undertake a wholesale review of its BIT network and its commitment to ITA.²⁴ India's response is far from atypical among developing States. Indeed, "*many – perhaps most – developing country governments did not engage in sophisticated cost-benefit considerations but rather failed to even consider the risk of the treaties until they were hit by their first claim*".²⁵ A recent academic study into the response of developing States to their first ITA claim found that, prior to that first claim against them, 92 percent of stakeholders in developing countries had not realised the far-reaching nature and the enforceability of the obligations enshrined in BITs.²⁶ By way of example, Pakistan has publicly expressed the view that "*BITs were initially instruments that were signed during visits of high-level delegations to provide for photo opportunities*".²⁷ As a consequence, "*it was ... not until Pakistan was hit by a multi-million dollar arbitration claim that officials actually realized the implications of treaties signed by successive governments since 1959*".²⁸

India's reaction has been three-pronged. The first was a review of its 2003 Model BIT, which was met with the criticism that it was undertaken with little consultation with key stakeholders such as local business leaders, and also from other influential voices in academics or members of the legal profession.²⁹ The second was an invitation to 25 of its BIT counterpart States to issue joint interpretive notes regarding the meaning of existing BIT provisions.³⁰ To that end, on February 8, 2016, India issued a "Joint Interpretative Statement for Indian Bilateral Investment Treaties".³¹ The third was a decision taken towards the end of 2016 to unilaterally terminate 58 of its BITs, primarily

²¹ *Vodafone v. India*, Notice of Arbitration (Apr. 17, 2014) (not publicly available).

²² *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09 [*hereinafter* "Devas v. India"]. Following an award rendered on July 25, 2016 (*inter alia*, finding expropriation and breaches of treaty commitments to accord fair and equitable treatment), the case moved on to the quantum phase. See Luke Eric Peterson, *India liable for expropriation and unfair treatment in satellite dispute, but majority of tribunal says "essential security" defence scales back liability*, INV. ARB. REPORTER (July 26, 2016), <https://www.iareporter.com/articles/india-liable-for-expropriation-and-unfair-treatment-in-satellite-dispute-but-majority-of-tribunal-says-essential-security-defence-scales-back-liability/>.

²³ *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7. See also Jillian Ambrose, *Cairn Energy calls for return of \$51m from India*, THE TELEGRAPH, Mar. 8, 2017, <http://www.telegraph.co.uk/business/2017/03/08/cairn-energy-calls-return-51m-india/>.

²⁴ Ranjan, *supra* note 17.

²⁵ Lauge Poulsen & Emma Aisbett, *When the claim hits: bilateral investment treaties and bounded rational learning*, 65(2) WORLD POL. 14 (2013).

²⁶ *Id.* at 12.

²⁷ *Id.* at 9.

²⁸ *Id.* at 10.

²⁹ Ranjan (Address), *supra* note 17.

³⁰ *Id.*

³¹ Government of India, Ministry of Finance, Department of Economic Affairs, Investment Division, Joint Interpretative Statements for Indian Bilateral Investment Treaties (Feb. 8, 2016).

those in force with the European Union States.³² The scale of India's step was virtually unprecedented in BIT relations, and while it appears that India hopes to renegotiate these BITs, a fundamental question remains: will India succeed in concluding new BITs based on its Revised Model BIT?

III. India's Revised Model BIT

India's Revised Model BIT represents, and proposes, a significant departure from India's previous BITs. It includes novel provisions that favour investors, particularly those provisions aimed at increasing the transparency of host State laws and regulations.³³ At the same time, it has reduced, diluted and curtailed a number of protections commonly afforded to foreign investors, for example in relation to fair and equitable treatment, national treatment and full protection and security. These protections are discussed in section III(B).³⁴ Perhaps most notably, however, as detailed in section III(C), the Revised Model BIT contains two headline elements, namely, its provisions relating to exhaustion of local remedies and denial of benefits.

In analysing the unique provisions of the Revised Model BIT, this section will also note the ways in which the final version of the Revised Model BIT differs from the draft revised model BIT, which was released for public comment on April 10, 2015 [**Draft Revised Model BIT**].³⁵ In many respects, the Revised Model BIT represented a watered-down version of the Draft Revised Model BIT, either providing an insight into the direction in which the Indian government intended to head all along with its revision process or a reflection of India's ultimate acceptance of the political reality within which it must operate. For example, the Preamble to the Draft Revised Model BIT only included the 'promotion' of investments, not the concurrent 'protection' of investments.³⁶ The Revised Model BIT, however, was amended to encompass both precepts. Another provision in the Draft Revised Model BIT,³⁷ which ultimately was excluded from the Revised Model BIT, allowed for counterclaims by the host State.

³² Government of India, Ministry of Commerce & Industry, Department of Industrial Policy and Promotion, Bilateral Investment Treaties, Unstarred Question no. 1290 (July 25, 2016), <http://dipp.nic.in/sites/default/files/lu1290.pdf>. See also Prabhash Ranjan & Pushkar Anand, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. (2018) (forthcoming).

³³ See Revised Model Indian Bilateral Investment Treaty, 2015, arts. 10 & 12, [*hereinafter* "Revised Model BIT"].

³⁴ See e.g., Ranjan (Address), *supra* note 17. See also Caroline Simson, *Investors Could Be At Risk Under India's New Model Treaty*, LAW 360 (Mar.15, 2017), <https://www.law360.com/articles/901841/investors-could-be-at-risk-under-india-s-new-model-treaty>. For the sake of good order, the authors note that this article does not examine all of the provisions of the Revised Model BIT.

³⁵ 2015 Model Text for the Indian Bilateral Investment Treaty (Draft) (April 2015) [*hereinafter* "Draft Revised Model BIT"].

³⁶ Draft Revised Model BIT, pmb1.

³⁷ *Id.* art. 14.11. Article 14.11 provided as follows: "A party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Article 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation".

A. Definition of ‘Investment’

In contrast to India’s 2003 Model BIT, the Revised Model BIT takes an enterprise-based approach to defining an investment, making express reference to the so-called “*Salini* criteria”.³⁸ Article 1.4 of the Revised Model BIT provides that ‘investment’ means:

“[a]n **enterprise** constituted, organised and operated **in good faith** by an investor in accordance with the law of the Party in whose territory the investment is made, **taken together with the assets** of the enterprise, has the **characteristics of an investment** such as the commitment of capital and other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made.”³⁹

By comparison with the definition of ‘investment’ contained in other BITs, the myriad elements covered by this definition could act to restrict the scope of applicability of the BIT. More commonly, BITs define investment by reference to assets. For example, the US 2012 Model BIT takes an asset-based approach, defining an investment as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment...”.⁴⁰ The China-India BIT does the same.⁴¹ Additionally, the requirement in the Revised Model BIT that the enterprise be constituted, organised and operated ‘in good faith’ is particularly noteworthy. The inclusion of that subjectively nebulous concept of good faith could lead more easily to differing interpretations and, consequently, to more frequent disputes over its meaning.

Finally, in what appears to be a direct response to the decision in *White Industries v. India*, India is seeking to narrow the scope of potential ITA claims against it, if not the future ability of investors to bring those claims at all. The Revised Model BIT’s definition of ‘investment’ specifically excludes “an order or judgment sought or entered in any judicial, administrative or arbitral proceeding”.⁴² It also specifically excludes “any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the enterprise incurred before the commencement of substantial business operations of the enterprise in the territory of the Party where the investment is made”.⁴³

B. Investor Protections

The Revised Model BIT further limits the scope of protection offered to investors by not including: (1) a most favoured nation [“**MFN**”] clause; (2) a fair and equitable treatment provision [“**FET**”]; or

³⁸ By contrast, Article 1(b) of India’s 2003 Model BIT defined ‘investment’ to mean “every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made.”; *Cf.* Revised Model BIT, art. 1.4; *See also* *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (July 23, 2001), 42 I.L.M. (2003) 609, ¶ 52.

³⁹ Revised Model BIT, art. 1.4 (emphasis added).

⁴⁰ US Model Bilateral Investment Treaty 2012, art.1 [*hereinafter* “2012 US Model BIT”].

⁴¹ Agreement between the Government of the Republic of India and the Government of the People’s Republic of China for the Promotion and Protection of Investments, Nov. 21, 2006 [*hereinafter* “China-India BIT”], art 1(b).

⁴² Revised Model BIT, art. 1.4(vii).

⁴³ *Id.*, art. 1.4(iii). Article 1.4 of the Revised Model BIT sets out everything that is excluded from the definition of “investment”; *See also* Revised Model BIT, art. 2.4 (which excludes other types of government conduct from the treaty’s scope).

(3) an umbrella clause. It also narrowly defines “full protection and security” [“FPS”].⁴⁴ And while Article 4 does contain a national treatment clause [“NT”], unlike the NT provisions in other BITs (like the US 2012 Model BIT), it does not extend the application of the clause to the establishment, acquisition or expansion phases of an ‘investment’.⁴⁵ This tweak accompanies the exclusion of pre-operational expenditure from the definition of ‘investment’ mentioned in section III(A) above.

The NT provision in the Revised Model BIT does include, however, a reference to the treatment of investors by ‘sub-national governments’ that was not included in the Draft Revised Model BIT.⁴⁶ In light of the fact that India is comprised of 29 ‘states’ and 7 ‘union territories’, each with its own governing body,⁴⁷ the extension of the NT clause to cover ‘sub-national governments’ is important. Without that amendment, the scope of the BIT would have been limited even more severely. Equally notably, the Revised Model BIT does not contain the controversial – and widely criticised – element originally included in the Draft Revised Model BIT to limit the reach of the NT provision only to intentional nationality-based discrimination.⁴⁸

As with the narrowed definition of ‘investment’, the exclusion of an MFN clause from the Revised Model BIT can be linked conceivably to the outcome in *White Industries v. India*. Specifically, it may be traced to the use that the *White Industries v. India* tribunal made of the more favourable dispute resolution provision in the India-Kuwait BIT by virtue of the MFN provisions of the India-Australia BIT. The tribunal did not accept India’s argument that reliance on the provision in the India-Kuwait BIT would upset the balance negotiated in the India-Australia BIT, stating that its decision “*does not ‘subvert’ the negotiated balance of the BIT. Instead, it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause*”.⁴⁹ Clearly, by excluding MFN *in toto* from its Revised Model BIT, India hopes to prevent or to circumscribe significantly, the ability of investors to ‘provision-shop’ in the future.

India’s decision also to exclude FET from its Revised Model BIT is perhaps less controversial. Indeed, attempts by host States to limit investor protections to those (and to the levels) presumptively required by customary international law are more commonplace.⁵⁰ The perception that tribunals are giving ever-increasingly broad, pro-investor interpretations to FET provisions has resulted in a new generation of BITs covering only measures that violate customary international

⁴⁴ *Id.* art. 3.2. Article 3.2 states that full protection and security only refers to “a Party’s obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever”.

⁴⁵ *Id.* art. 4; *Cf.* 2012 US Model BIT, art. 3(2).

⁴⁶ *See id.* art.4.2; *Cf.* Draft Revised Model BIT, art. 4.

⁴⁷ Ashutosh Ray, *Unveiled: Indian Model BIT*, KLUWER ARB. BLOG (Jan. 18, 2016), <http://kluwarbitrationblog.com/2016/01/18/unveiled-indian-model-bit/>.

⁴⁸ *See* Draft Revised Model BIT, art. 4.2. *See also* Luke Eric Petersen, *Analysis: India invites comments on draft model investment treaty; Text offers radical departure and calls to mind Norway’s past efforts at revision*, INV. ARB. REPORTER (Mar. 24, 2015), <http://www.iareporter.com/articles/analysis-india-invites-comments-on-draft-model-investment-treaty-text-offers-radical-departure-and-calls-to-mind-norways-past-efforts-at-revision/>.

⁴⁹ *White Industries v. India*, ¶ 11.2.4.

⁵⁰ *See e.g.*, 2012 US Model BIT, art. 5; 2004 Canada Model BIT, art. 4; 2006 France Model BIT, art 3.

law.⁵¹ This is the approach taken in Article 3 of the Revised Model BIT, which limits the obligations of the host State to avoiding subjecting investments to measures:

“[w]hich constitute a violation of customary international law through: (i) denial of justice in any judicial or administrative proceedings; (ii) fundamental breach of due process; (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; and (iv) manifestly abusive treatment, such as coercion, duress and harassment.”⁵²

That said, the FET protection enshrined in the Revised Model BIT is a less extreme version of the approach taken in the Draft Revised Model BIT, which had sought to limit the application of the FET provision to measures which constitute: (1) denial of justice under customary international law; (2) un-remedied and egregious violations of due process; or (3) manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment.⁵³

Considering the broad interpretation given to the FET provision in cases like the oft-cited *Tecmed v. Mexico*,⁵⁴ it is perhaps not unusual that developing States, in particular, would wish to retain (or claw back) as much regulatory freedom as possible. Considering the holding in *Tecmed*, as well as some of the pending claims against India relating to fiscal measures (e.g., *Vodafone v. India*, *Vedanta v. India*, *Cairn Energy v. India*)⁵⁵ and/or to the revocation of regulatory permits (e.g., *Devas v. India* and *Tenoch Holdings v. India*)⁵⁶, it is not hard to see why India is advocating for a more limited scope of investor protection through its Revised Model BIT.

Finally, the FPS clause in the Revised Model BIT is limited, *expressis verbis*, to “a Party’s obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever”.⁵⁷ The fact that the Revised Model BIT limits FPS to physical protection, and excludes legal protection from its reach, further signals India’s intention to seek to limit the scope of investor protections in any future BITs. In narrowing the conception of FPS, India is pulling back from the trend, shown in cases like *Azurix v. Argentina*, of extending FPS beyond mere physical security.⁵⁸ Nonetheless, perhaps the putative investor in India can take some

⁵¹ *Id.*

⁵² Revised Model BIT, art. 3.1.

⁵³ Draft Revised Model BIT, art. 3.1.

⁵⁴ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) 43 I.L.M. (2004) 133, ¶ 154 [*hereinafter* “*Tecmed v. Mexico*”] (“*The foreign investor expects the host state to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations... . The foreign investor also expects the host state to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.*”).

⁵⁵ *Vodafone International Holdings BV v. India*, Notice of Arbitration, Apr. 17, 2014 (not publicly available); *Vedanta Resources PLC v. Government of India* (Mar. 27, 2015); *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7.

⁵⁶ *Devas v. India*, PCA Case No. 2013-09; *Tenoch Holdings Limited, Mr. Maxim Naumchenko and Mr. Andrey Poluektov v. The Republic of India*, PCA Case No. 2013-23.

⁵⁷ Revised Model BIT, art. 3.2.

⁵⁸ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006), ¶ 408 (confirming that cases that deal with FPS show that “[f]ull protection and security was understood to go beyond protection and security ensured by the

comfort in the fact that the Revised Model BIT does not go as far as the Draft Revised Model BIT did. The Draft Revised Model BIT (like the 2003 Model BIT before it) contained no FPS clause at all.

Against the foregoing backdrop, it should come as no surprise that India recently unilaterally terminated its BIT with the Netherlands.⁵⁹ The Netherlands-India BIT, which is applicable in *Vodafone v. India*, contains unqualified (and, therefore, less-than-palatable from India's perspective) FET and FPS clauses.⁶⁰

C. ITA

India has re-crafted its preferred ITA procedure to ensure greater control in arbitral proceedings for itself as the host State. The Revised Model BIT significantly reduces the range of disputes for which an investor may look to commence ITA proceedings, specifically excluding “disputes arising solely from an alleged breach of contract between a Party and an investor”, and leaving investors to resolve such contractual disputes in domestic courts or in accordance with the dispute resolution provisions of the contract in question.⁶¹ It also explicitly provides that ITA tribunals shall not have jurisdiction “to review the merits of a decision made by a judicial authority of the Parties”, i.e., by a national court of either the investor or the host State.⁶² Once again, the combined spectre of *White Industries v. India* and India's recent ITA experiences appear to have motivated the drafters of the Revised Model BIT.

Two headline elements of India's Revised Model BIT which will be considered in further detail below are its provisions which relate to the exhaustion of local remedies and its denial of benefits clause. The first is enshrined in Article 15 of the Revised Model BIT. The second, reflecting India's desire to redress a perceived imbalance and to provide a greater measure of host State control, is contained in Article 35, which permits the host State to deny the benefits of the BIT “**at any time**, including **after** the institution of arbitration proceedings”.⁶³

Another interesting element of India's Revised Model BIT is that it does not provide for restitution and excludes injunctive relief and punitive or moral damages.⁶⁴ Indeed, it provides that only monetary damages may be awarded for a breach of the BIT, which “monetary damages shall not be

police. It is not only a matter of physical security; the stability afforded by a secure environment is as important from an investor's point of view) As an aside, under the EU-Canada Comprehensive Economic and Trade Agreement (CETA), “full protection and security” relates to the physical security of investors and covered investments. See EU-Canada Comprehensive Economic and Trade Agreement (CETA), art. 8.10.5.

⁵⁹ See discussion *supra* section II(D) regarding India's unilateral termination of a large number of its BITs.

⁶⁰ Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments, India-Neth. Nov. 6, 1995 [*hereinafter* “India-Netherlands BIT”], art. 4 provides that “[i]nvestments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party”.

⁶¹ Revised Model BIT, art. 13.3.

⁶² *Id.* art. 13.5(i).

⁶³ *Id.* art. 35 (emphasis added).

⁶⁴ *Id.* arts. 26.3 & 26.4.

greater than the loss suffered by the investor”.⁶⁵ In a footnote, the Revised Model BIT enumerates a list of mitigating factors to be taken into account when awarding monetary damages, including “other relevant considerations regarding the need to balance public interest and the interests of the investor”.⁶⁶ Ultimately, this seeming catch-all may serve to promote more uncertainty than certainty and lead to disputation over the appropriateness of any monetary award.

In line with prevalent BIT practice, however, and despite the fact that the Draft Revised Model BIT excluded ICSID and ICSID Additional Facility arbitration entirely and required all investor-State arbitration to be conducted under the UNCITRAL Rules,⁶⁷ the Revised Model BIT preserves the investor’s choice among ICSID, ICSID Additional Facility or UNCITRAL arbitration.⁶⁸ That said, the ITA provisions of the Revised Model BIT have a sting in their tail, permitting a modification of the chosen arbitral rules. Indeed, Article 16.2 provides that “*the applicable arbitration rules shall govern the arbitration except to the extent modified by this Chapter, and supplemented by any subsequent rules adopted by the Parties*”.⁶⁹ Yet again, the language of the Revised Model BIT highlights the primacy of India’s desire to ensure that its future BITs will allow the host State to exert more influence (and retain more control) over the conduct of investor-State arbitral proceedings than was the case in the past, under the previous generation of BITs.

i. Exhaustion of Local Remedies

The first of the two headline elements referred to above contained in India’s Revised Model BIT is the requirement – presumptively, with a view to exhausting all local and administrative remedies – to engage with the domestic courts for a period of five years before a notice of dispute to settle the claim through ITA may be issued.⁷⁰ Article 15 of the Revised Model BIT sets out a complicated series of steps and timeframes in which and/or before which action must be taken, ultimately giving investors what is, in effect, a six-month window during which to pursue ITA.⁷¹ To wit, after pursuing an action in local courts for at least five years, investors only have 12 months from the end of that five-year period of domestic proceedings (and six years from the time they first acquired or should have acquired knowledge of the measure in question) during which to submit a notice of dispute.⁷² That said, however, Article 15.4 adds another hurdle (in the form of a cooling-off period) before an investor-State arbitration can commence in earnest, requiring that:

⁶⁵ *Id.* art. 26.3. For the sake of completeness, the authors note that Article 26.3 does not expressly mention interest, and while it would seem unlikely that any calculation of monetary damages would exclude interest, the less-than-crystalline language of the provision may engender disagreement.

⁶⁶ *Id.* n. 4 to art. 26.3.

⁶⁷ Draft Revised Model BIT, art 14.7(1).

⁶⁸ Revised Model BIT, art. 16.1. At the time of writing, India is not a signatory to the ICSID Convention, with the attendant consequences that has for ICSID jurisdiction.

⁶⁹ *Id.* art. 16.2.

⁷⁰ *Id.* art. 15.2.

⁷¹ *See id.* arts. 15.2-15.5.

⁷² *Id.* art. 15.5(i)-(ii).

“For no less than 6 months after receipt of the notice of dispute, the disputing parties shall use their best efforts to try to resolve the dispute amicably through meaningful consultation, negotiation or other third party procedures.”⁷³

These strict conditions – temporal, durational or otherwise – place a greater, more formal, emphasis on a domestic litigation process that investor-State arbitration tribunals often have seen as no more than a sterile, “box-ticking” exercise. Indeed, some distinguished commentators have posited that a key purpose of ITA is “to avoid the vagaries of proceedings in the host State’s courts”.⁷⁴ To be clear, by way of example, the ICSID Convention does permit States to condition their consent to arbitration on a requirement to exhaust local remedies,⁷⁵ and a number of so-called older form BITs contained a requirement that local remedies be pursued for a more limited period of 18 months. Even so, such provisions have been called “nonsensical from a practical point of view”.⁷⁶

Viewed in that context, the approach set out in the Revised Model BIT represents a notable departure. In a State where court proceedings tend to be lengthy, a carefully worded pre-condition for a five-year timeframe within which to exhaust local remedies is likely to be used up in full and, therefore, likely to be less-than-satisfactory from an investor’s perspective. Such a provision will undoubtedly produce both delay and additional cost and, thus, higher risk, with the consequence of a dampening effect on foreign direct investment. Foreign investors with choices about where to place their investments will presumably act in accordance with the view that this provision is highly non-commercial.⁷⁷ Given the already reduced scope of protections offered to investors in the Revised Model BIT (as discussed in section III(B) above), it will be interesting to see whether India will be able to introduce this particular provision in its new, yet-to-be-negotiated BITs.

ii. Denial of Benefits

The broad scope of the denial of benefits clause in Article 35, which provides that the host State may deny the benefits of the BIT “*at any time, including after the institution of arbitration proceedings*”,⁷⁸ is the second, and perhaps most provocative, headline element contained in India’s Revised Model BIT. Generally speaking, a denial of benefits clause allows a State to “*reserve the right to deny the benefits of a treaty to a company that does not have an economic connection to the State on whose nationality it relies*”.⁷⁹ Whilst the investment treaty-making practice of certain States favours the inclusion of such clauses, not all States favour this type of provision in their model BITs.⁸⁰ Further, even those

⁷³ *Id.* art. 15.4.

⁷⁴ RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 249 (2008).

⁷⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [*hereinafter* “ICSID Convention”], art. 26, providing that “*A contracting state may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.*”).

⁷⁶ DOLZER & SCHREUER, *supra* note 74, at 250.

⁷⁷ Pieter Bekker et al., *India Approves Model Bilateral Investment Treaty*, *WORLD SECURITIES LAW REPORT*, BLOOMBERG BNA (Feb. 11, 2016), <https://www.bna.com/india-approves-model-n57982067216>. *See also* Simson, *supra* note 34.

⁷⁸ Revised Model BIT, art. 35 (emphasis added).

⁷⁹ DOLZER & SCHREUER, *supra* note 74, at 55.

⁸⁰ Lindsay Gastrell & Paul-Jean Le Cannu, *Procedural Requirements of ‘Denial-of-Benefits’ Clauses in Investment Treaties: A Review of Arbitral Decisions*, 30(1) *ICSID REV.* 80 (2015). *See also* 2006 France Model BIT, 2008 Germany Model BIT and UK 2008 Model BIT, all of which do not contain denial of benefits clause.

model BITs that include denial of benefits clauses do not contain an express reference to *when* the denial of benefits clause may be invoked by the host State.⁸¹ In this respect, Article 35 represents a notable departure from existing practice.

Numerous arbitral tribunals have considered the timing of a State's invocation of a denial of benefits clause in ITA proceedings. A recent review by ICSID of the procedural requirements of denial of benefits clauses noted that in the absence of any specific requirement regarding timing in the applicable IIA, "*tribunals have had to look beyond the text of the clause to define the contours of the procedural requirements applicable to a State's exercise of the right of denial*".⁸² In the context of interpreting US BITs, the ICSID review concluded that "*a host State validly exercises its right of denial by invoking the relevant denial-of-benefits provision within the time limit for the submission of jurisdictional objections under the applicable arbitration rules*".⁸³ Tribunals have adopted an even stricter temporal cut-off when interpreting the denial of benefits clause in the Energy Charter Treaty ["**ECT**"],⁸⁴ requiring States to notify the investor of the denial of benefits either before the investment is made or before the dispute arises, with no retrospective effect.⁸⁵

Article 35 of India's Revised Model BIT, however, appears to permit going further than either one of those conclusions. First, the express wording of the Article provides that the host State may invoke the denial of benefits clause after ITA proceedings have commenced, i.e., at a later point than has been accepted as the cut-off by tribunals with respect to the ECT. Second, the use of the expansive phrase "at any time" suggests that the host State may exercise its right of denial during the pendency of the ITA proceedings, i.e., not necessarily only up to the point at which jurisdictional objections are to be filed. Thus, while reflecting India's desire to prevent treaty shopping, the denial of benefits clause enshrined in Article 35 of the Revised Model BIT introduces a high (query whether too high) level of uncertainty and likely will give pause to foreign investors.

iii. Challenges to Arbitrators

The Revised Model BIT also contains detailed provisions for challenging the appointment of an arbitrator that may cause concern for prospective arbitrators and their appointing parties.⁸⁶ Article 19.10 lists a number of factors which, if present, *ipso facto* would deem there to be a "justifiable doubt" regarding an arbitrator's independence or impartiality. These factors include:

- 1) where the arbitrator is a lawyer in the same law firm as the counsel to one of the parties;⁸⁷
- 2) where the arbitrator is acting concurrently with the lawyer or law firm of one of the parties in another dispute;⁸⁸

⁸¹ See 2012 US Model BIT, art. 17; 2004 Canada Model BIT, art. 18.

⁸² Gastrell & Le Cannu, *supra* note 80, at 84.

⁸³ *Id.* at 94.

⁸⁴ Energy Charter Treaty art. 17(1), Dec. 17, 1991, 2080 U.N.T.S. 95, 34 I.L.M. 373 (1995).

⁸⁵ Gastrell & Le Cannu, *supra* note 80, at 94.

⁸⁶ See Revised Model BIT, art. 19.

⁸⁷ *Id.* art. 19.10(c).

⁸⁸ *Id.* art. 19.10(d).

- 3) where the arbitrator's law firm is currently rendering or has rendered services to one of the parties or to an affiliate of one of the parties out of which such law firm derives financial interests;⁸⁹ and
- 4) if the arbitrator has publicly advocated a fixed position regarding an issue that is "live" in the case being arbitrated.⁹⁰

On this score, commentators have suggested that the model favoured by India has the ability to create "tension with ICSID's default standards and mechanisms for arbitrator challenges".⁹¹ Indeed, the language of Article 19.10(h) brings issue conflicts squarely into the realm of what constitutes "justifiable doubt" when assessing the question of impartiality and may lead to insurmountable problems for arbitrators who have published widely in the field of investment arbitration.

Perhaps not surprisingly, the nod to issue conflicts as a factor for determining impartiality (or the lack thereof) appears to stem from another one of India's recent experiences, that is, from India's recent challenges to the appointments of the Hon. Marc Lalonde and Professor Orrego Vicuña in *Devas v. India*.⁹² In that case, India argued that previous statements attributable to those arbitrators "reflect[ed] their pre-determined view"⁹³ and that they "might have a 'professional interest' in a particular result to avoid contradicting their earlier decisions".⁹⁴ In fine, India's concern was that the two arbitrators "strongly held and articulated positions on the interpretation of the 'essential security interests' provision together in two cases (*CMS and Sempra*) and that Professor Orrego Vicuña repeated that position in *Enron* and defended it in a 2011 book chapter he authored".⁹⁵ As the President of the appointing authority, i.e., of the International Court of Justice, Judge Peter Tomka was called upon to decide the challenge. He considered that:

*"to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind."*⁹⁶

In the end, Professor Orrego Vicuña was disqualified from the proceedings and the Hon. Marc Lalonde was not. Judge Tomka analysed the contours of the precise circumstances to conclude that

⁸⁹ *Id.* art. 19.10(e).

⁹⁰ *Id.* art. 19.10(h).

⁹¹ Joel Dahlquist and Luke Eric Peterson, *Analysis: In final version of its new model investment treaty, India dials back ambition of earlier proposals – but still favours some big changes*, INV. ARB. REPORTER (Jan. 3, 2016), <http://www.iareporter.com/articles/analysis-in-final-version-of-its-new-model-investment-treaty-india-dials-back-ambition-of-earlier-proposals-but-still-favors-some-big-changes/>.

⁹² *Devas v. India*, PCA Case No. 2013-09, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (Sept. 30, 2013). See generally Prabhash Ranjan & Pushkar Anand, *Investor State Dispute Settlement in India's New Model Bilateral Investment Treaty: Does it go too far?*, in INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA (Luke Nottage & Julien Chaisse eds.) (forthcoming 2018).

⁹³ *Devas v. India*, PCA Case No. 2013-09, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (Sept. 30 2013), ¶ 52.

⁹⁴ *Id.*

⁹⁵ *Id.* ¶ 53.

⁹⁶ *Id.* ¶ 58.

“being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to Professor Orrego Vicuña’s ability to approach the question with an open mind”.⁹⁷ With respect to the Hon. Marc Lalonde, Judge Tomka expressed the view that his “more limited pronouncements on the relevant text [were] not sufficient to give rise to justifiable doubts regarding his impartiality”.⁹⁸

Thus, it may be argued that Judge Tomka’s reasoned decision reached a defensible result without being the product of an inflexible application of a pre-determined qualifying factor for disqualification. In that context, India’s express inclusion in the Revised Model BIT of those factors that *will* lead to disqualification – while seeking to codify presumptively correct (from its perspective) disqualification decisions – may be perceived as an unnecessary step towards ensuring consistency of result through rigidity of application, i.e., as a step towards subversion of those rules already in place for arbitrator challenges.

D. Transparency and Corporate Social Responsibility

Finally, India’s Revised Model BIT contains innovations in the areas of transparency by States and of corporate social responsibility by investors. Investors are likely to welcome the requirement that host States be transparent with respect to the publication of their laws, regulations and procedures.⁹⁹ This requirement will permit potential investors to acquaint themselves with the relevant, applicable legal framework prior to making the decision to invest.

Chapter III of the Revised Model BIT also contains a list of ‘Investor obligations’ that not only requires compliance with laws (including a specific requirement for investors to “comply with ... provisions ... concerning taxation, including timely payment of ... tax liabilities”, which is yet another nod to India’s recent ITA experience),¹⁰⁰ but also, more uniquely, extends to requiring investors to voluntarily incorporate “internationally recognised standards of corporate social responsibility”.¹⁰¹ One immediately notable feature about this provision is that India has clearly not felt sufficiently confident to make the reference standard the Indian standards of corporate social responsibility. This requirement that foreign investors adhere to a different standard from domestic investors has the potential to wreak havoc by introducing an internal incompatibility in Indian BITs with the public international law concepts of national treatment and nondiscriminatory treatment. Nonetheless, this novel provision appears to encourage foreign investors to support various social causes in, and important to, the host State. The “internationally recognised standards” include statements of principle supported by a State, which may address issues as varied as labour, the environment, human rights, community relations and anti-corruption.¹⁰² Time will tell whether the imposition of these additional obligations, which arguably also serve to reduce an investor’s ability to

⁹⁷ *Id.* ¶ 64 (emphasis added).

⁹⁸ *Id.* ¶ 66.

⁹⁹ Revised Model BIT, art. 10. Breach of the transparency provisions enshrined in Article 10, however, does not entitle investors to bring a claim against the State. Such an action is specifically excluded from the scope of the investor-state dispute settlement chapter. *See* Revised Model BIT, art. 13.2.

¹⁰⁰ *Id.* art. 11(iii); *See generally id.* art. 11.

¹⁰¹ *Id.* art. 12.

¹⁰² *Id.*

obtain the protections enshrined in any future BIT that will be based on the Revised Model BIT (i.e., by the investor having to comply with these additional hurdles),¹⁰³ actually will succeed in reducing the numbers of successful ITA claims.

IV. Brazil's Approach and the Model ACFI

A. Brazil's Progression to the Model ACFI

The Model ACFI provides an alternative view to traditional-form BITs. That alternative view has been developed through a combination of Brazil's particular requirements (and characteristics) as a developing country with historically high levels of FDI and, more recently, its increasing levels of capital export.¹⁰⁴ Similar to India, in the 1990s, Brazil went through a period during which it entered into a number of BIT arrangements with predominantly developed States.¹⁰⁵ Brazil's attitude towards negotiating its BITs during that time has been described "*as passive, in the sense that the country was not actively pursuing an autonomous development policy*".¹⁰⁶ In that sense, Brazil's experience is different from India's. Unlike India, Brazil did not ratify any of the BITs it entered into during that period. The consensus view seems to be that this was due to "*strong political opposition by Congress and the Judiciary, combined with an unresolved Executive*".¹⁰⁷ In particular, Brazil took an adverse view to ITA; it felt that:

*"Direct access of foreign investor to international arbitration would place her in equal footing with the Brazilian sovereignty, and this would be equivalent to protecting the investor to the detriment of national interests."*¹⁰⁸

Following a strategic review in 2012 by the Brazilian Chamber of Foreign Exchange, there was an affirmative change in Brazil's approach. It went from rule-taker to rule-maker.¹⁰⁹ The mandate was to create a new IIA that was "*sensitive to Brazilian needs and concerns a[bo]ut the international economic scenario*".¹¹⁰ Consequently, the review process involved consultation with the private sector to ensure that any new IIA would be responsive and sensitive to the specific needs of investors, while

¹⁰³ Consider also whether the reference to "internationally recognised standards of corporate social responsibility" may operate to broaden the regulatory space of the host State (and to increase the regulation of investors in those areas), whilst simultaneously excluding the review of such regulation from the investor-State dispute mechanism. *See id.* art. 13.2.

¹⁰⁴ *See* Fabio Morosini & Michelle Rattton Sanchez Badin, *The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?*, 6(3) INV. TREATY NEWS 4 (2015).

¹⁰⁵ Belgium-Luxembourg (1999), Chile (1994), Cuba (1997), Denmark (1995), Finland (1995), France (1995), Germany (1995), Italy (1995), The Netherlands (1998), Portugal (1994), United Kingdom (1994), South Korea (1995), Switzerland (1994) and Venezuela (1995).

¹⁰⁶ Fabio Morosini and Michelle Rattton Sanchez Badin, *The New Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs): Navigating between resistance and conformity with the global investment regime*, Draft Paper presented at the Global Fellows Forum, at 7. The paper was based on a joint research project by the Center for Law, Globalization and Development at the School of Law in the Federal University of Rio Grande do Sul and the Center on Global Law of FGV São Paulo School of Law.

¹⁰⁷ Morosini & Badin, *supra* note 104, at 3.

¹⁰⁸ Morosini & Badin, *supra* note 106, at 9.

¹⁰⁹ *See, e.g.*, Morosini & Badin, *supra* note 104, at 3.

¹¹⁰ Morosini & Badin, *supra* note 106, at 17.

simultaneously respecting the regulatory framework of the host country.¹¹¹ Clearly, the Model ACFI was (and is) intended to represent a departure from Brazil's more passive BIT practice of the 1990s, more obviously aimed at reflecting Brazil's unique position as one of the world's ten largest economies and an increasingly significant capital exporter.¹¹²

B. Key Features of the Model ACFI

i. State-led investment facilitation

As its title suggests, the unique elements of the ACFIs are based on the key, twin concepts of 'cooperation' and 'facilitation'. As noted by Morosini and Badin, "[c]onstant cooperation among governmental agencies, mediated by diplomatic action, and deference to domestic legislation can be considered the leading notions behind this model agreement".¹¹³ It is uncertain, however, what these terms really mean in practice.

In terms of investor protection, the ACFIs include some elements traditionally found in BITs, including NT and MFN provisions.¹¹⁴ They do not include, however, any FET or FPS provisions. While the ACFIs do provide protection from direct expropriation,¹¹⁵ they do not protect the investor from indirect expropriation, which was "one of the issues that faced resistance before Congress in the 1990s".¹¹⁶

From Brazil's perspective, it was important that each ACFI entered into with a counterpart State contain a country-specific list detailing the type of facilitation – based on certain "thematic agendas"¹¹⁷ that each State would be willing to lend to investors of the other. These thematic agendas include things like "programs on money transfers, visa proceedings, technical and environmental licenses and certifications", and institutional cooperation, including visa facilitation and regularity of flights.¹¹⁸ These market access issues are of particular concern to investors in developing countries, who do not have the same level of institutional support as investors in developed countries. In fact, it has been suggested that the inclusion of thematic agendas may "turn the ACFIs into dynamic agreements that may evolve along with the bilateral investment relations".¹¹⁹ In this sense, at least, the Model ACFI appears to go beyond the scope of matters covered by traditional BIT practice. Put differently, by broadening the scope of issues considered relevant to investment from a

¹¹¹ See Paulo Rage, *New Agreement for Cooperation and Facilitation of Investments (ACFI) between Brazil and Mozambique*, MAYER BROWN, (Apr. 2, 2015), <https://m.mayerbrown.com/new-agreement-for-cooperation-and-facilitation-of-investments-acfi-between-brazil-and-mozambique-04-02-2015/>.

¹¹² *Supra* note 1.

¹¹³ Morosini & Badin, *supra* note 106, at 17.

¹¹⁴ See, e.g., Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi, Braz.-Malawi, arts 10(2) & 10(3), June 25, 2015 [*hereinafter* "Brazil-Malawi ACFI"].

¹¹⁵ See, e.g., Cooperation and Investment Facilitation Agreement, Braz.-Mozam., art. 9, Mar. 30, 2015 translated in Martin Dietrich Brauch, *Side-by-side Comparison of the Brazil-Mozambique and Brazil-Angola Cooperation and Investment Facilitation Agreements*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (June, 2015) [*hereinafter* "Brazil-Mozambique ACFI"]. See also Cooperation and Investment Facilitation Agreement, Braz.-Angl., art. 9, Apr. 1, 2015 translated in Martin Dietrich Brauch, *Side-by-side Comparison of the Brazil-Mozambique and Brazil-Angola Cooperation and Investment Facilitation Agreements*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (June, 2015) [*hereinafter* the "Brazil-Angola ACFI"].

¹¹⁶ Morosini & Badin, *supra* note 104, at 33.

¹¹⁷ See, e.g., Brazil-Mozambique ACFI, annex 1; Brazil-Angola ACFI, annex 1.

¹¹⁸ Morosini & Badin, *supra* note 106, at 17.

¹¹⁹ *Id.* at 20.

developing country perspective, the Model ACFI reflects matters that generally concern developing countries in global treaty-making, e.g., technology transfer and capacity building.¹²⁰ For example, one of the thematic agendas provides that “the parties agree that the access to and the eventual transfer of technology shall be carried out, whenever possible”¹²¹ and “the parties shall strive to foster, coordinate and implement cooperation activities to train workers by means of increased interaction between the competent national institutions”.¹²²

From the point of view of a potential investor, however, broad, aspirational notions of cooperation by governmental agencies are unlikely to be satisfactory. Often, one of the key concerns for would-be investors in developing countries revolves around the level of legal and governmental stability they can expect. Anything less than complete certainty about legal and governmental stability will not allay those fears. Nonetheless, the Model ACFI seems to be an exercise in recalibrating the level of control held by the host State vis-à-vis the investor, ultimately preferring to focus directly on the State-State level.

ii. *Co-operative dispute prevention*

As alluded to above, one of the other key innovations in the ACFIs is their dispute resolution mechanisms, which focuses on dispute prevention through cooperative and diplomatic processes. The ACFIs establish both a “Joint Committee” and “Focal Point” (or “ombudsmen”).¹²³ The former is “composed of government representatives from each of the parties and they will meet annually”.¹²⁴ Morosini and Badin identify the functions of the latter as follows:

*“[m]aking efforts to adopt the recommendations of the Joint Committee and interacting with the counterpart’s focal point; dialoguing with its government to deal with the suggestions and complaints from the other party’s government and investors; acting, along with government authorities and the private sector, to avoid disputes and facilitate its settlement; promptly provide information to the parties concerning regulatory issues related to investments, and reporting its activities to the Joint Committee.”*¹²⁵

The apparent aim of these two bodies created by the Model ACFI, properly viewed, is to prevent the escalation of disputes, rather than to provide for a formal dispute resolution mechanism. In other words, if a dispute does arise, whether in the State-State or the investor-State context, it is to be resolved by consultations, negotiations and mediation.¹²⁶ While there is no reference to investor-State arbitration, there is at least a reference to the possibility of State-State arbitration, to the exclusion of the investor.¹²⁷ Plainly, Brazil wholly seeks to avoid becoming involved in formal dispute resolution proceedings, whether through the ICSID or through other arbitral fora. Of course, irrespective of whether this approach is an innovation or merely a return to the state of play

¹²⁰ *Id.* at 17.

¹²¹ *See, e.g.*, Brazil-Mozambique ACFI, annex 1, §4(ii); Brazil-Angola ACFI, annex I, § 4(iii).

¹²² *See, e.g.*, Brazil-Mozambique ACFI, annex 1, § 4(iii); Brazil-Angola ACFI, annex I, § 4(iv).

¹²³ *See, e.g.*, Brazil-Mozambique ACFI, arts. 4 & 5; Brazil-Angola ACFI, arts. 4 & 5; Brazil-Malawi ACFI, arts. 3 & 4.

¹²⁴ *See, e.g.*, Brazil-Mozambique ACFI, art. 4; Brazil-Angola ACFI, art. 4; Brazil-Malawi ACFI, art. 3.

¹²⁵ Morosini & Badin, *supra* note 106, at 20.

¹²⁶ *See, e.g.*, Brazil-Mozambique ACFI, art. 15; Brazil-Angola ACFI, art. 15.

¹²⁷ *See, e.g.*, Brazil-Malawi ACFI, art. 13(6); Brazil-Mozambique ACFI, art. 15(6); Brazil-Angola ACFI, art. 15(6).

before investor-State dispute resolution through arbitration became more commonplace, this soft approach to dispute resolution is likely to be regarded as less than ideal from an investor's point of view. That said, it may be even more alarming to investors that not even the nods to State-State arbitration procedures result in precisely prescribed procedures in the Model ACFI. For example, the recent ACFI signed between Brazil and Mozambique provides that:

“If it is not possible to resolve the dispute, the parties may resort to mechanisms of arbitration between States to be developed by the Joint Committee, *when the parties deem it convenient.*”¹²⁸

Ostensibly, with no clear process, much less a detailed roadmap, for the resolution of a dispute through the traditional avenue of arbitration, the investor is left with little or no influence.

Finally, a third claimed innovation of the Model ACFI relates to the transparency of host State laws and measures. Rather than establishing transparency standards, the ACFIs take a decidedly softer approach, providing that “each Party shall employ its best efforts to allow a reasonable opportunity for those interested to voice their opinion about proposed measures”.¹²⁹ On any view, that kind of terminology is ripe for different subjective interpretations that could easily engender myriad disputes in the future.

C. The India–Brazil BIT

Against the backdrop of the Revised Model BIT and Brazil's ACFIs, India and Brazil concluded a new BIT, which was announced at the annual BRICS conference held in Goa in October 2016.¹³⁰ At that conference, India's Prime Minister, Mr. Narendra Modi, spoke as follows of the new BIT:

“President Temer and I have reviewed the full range of bilateral cooperation. Noting the potential for much more, we have agreed to scale up our engagement. This is in line with our mutual desire for a reinforced strategic partnership.”¹³¹

The strengthening of India-Brazil relations does not appear limited to trade and investment opportunities, with Mr. Modi also stating that “*there is much that is common in our approach and positions. We will work closely at the United Nations, the G-20, G-4, WTO, BRICS, IBSA and other important platforms.*”¹³² Although the actual text of the BIT has not been made public,¹³³ the terms of the India-Brazil BIT that have been publicly reported suggest that the BIT takes a very different approach when compared to India and Brazil's past BIT practice. As such, this development could be taken as an endorsement of a ‘new generation’ of international investment agreements [“**IAs**”] and signal a new direction in treaty-making practice by certain States.

¹²⁸ Brazil-Mozambique ACFI, art. 15(6) (emphasis added).

¹²⁹ Morosini & Badin, *supra* note 106, at 21.

¹³⁰ *India, Brazil finalise text of bilateral investment pact*, THE INDIAN EXPRESS, Oct. 17, 2016, <http://indianexpress.com/article/india/india-news-india/india-brazil-finalise-text-of-bilateral-investment-pact-3088269/>.

¹³¹ Press Statement by Prime Minister during the visit of President of Brazil to India, Press Information Bureau Government of India, Prime Minister's Office, Oct. 17, 2016.

¹³² *Supra* note 130.

¹³³ As of June 1, 2017.

Most obviously, the change of direction in the India-Brazil BIT is evidenced by the complete absence of ITA provisions. In its place, the India-Brazil BIT contains a three-stage procedure which variously references the possibility of using an ombudsman, State-State arbitration and “dispute prevention procedures”. An additional innovation – proposed by Brazil – is the establishment of a “joint committee”, which is intended to encourage direct discourse between the host State and investors. Reflecting the approach taken in India’s Revised Model BIT, the India-Brazil BIT excludes both MFN and FET. In that context, the India-Brazil BIT reportedly contains more restrictive language tied to the customary international law standard and purports to impose greater obligations on investors.¹³⁴

On the whole, and based on publicly available information, the India-Brazil BIT seems to contain a combination of features from India’s Revised Model BIT and Brazil’s Model ACFI. For example, both the Revised Model BIT and the Model ACFI impose obligations on investors relating to corporate social responsibility. In relation to Brazil’s ACFIs, it has been noted that:

*“Even though the agreements are ambiguous regarding the binding force of these CSR obligations and even more so regarding mechanisms to enforce them, they do innovate by addressing the protection of interests of the host State and its citizens within an international investment regulation.”*¹³⁵

Indeed, the India-Brazil BIT reportedly contains similar exclusions relating to taxation, labour, health, security, human, animal and plant life, as well as “national archaeological treasures”.¹³⁶

V. Potential Influence on Investment Treaty-making Practice

A. From Rule-Takers to Rule-Makers

In the end, any more systematic efforts at realignment, or recalibration, in international investment treaty-making towards increased host State control will look to, and depend upon, the success of India and Brazil in concluding new BITs or investment chapters conforming to their recently articulated, now-preferred models. In other words, the extent to which India and Brazil will be successful in evolving from rule-takers to rule-makers likely will determine the future prevalence (and impact) of this ‘new generation’ of IIAs.¹³⁷ It stands to reason that India’s Revised Model BIT and Brazil’s ACFIs will have the greatest field of influence over the treaty-making practice of developing States. Since March 2015, Brazil has successfully signed six ACFIs, with Angola, Chile, Colombia, Malawi, Mexico and Mozambique.¹³⁸ Brazil is also reportedly negotiating an additional six with Algeria, Morocco, Nigeria, Peru, South Africa and Tunisia.¹³⁹ Notably, Brazil has negotiated all of these new ACFIs with developing countries, primarily in Africa and Latin America.

¹³⁴ See generally Dahlquist, *supra* note 3.

¹³⁵ Morosini & Badin, *supra* note 106, at 24.

¹³⁶ *Supra* note 130.

¹³⁷ For a discussion on whether India is transitioning from rule-taker to rule-maker, see generally Ranjan & Anand, *supra* note 92.

¹³⁸ See Brazil, *Bilateral Investment Treaties, International Investment Agreements by Economy*, INV. POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu> (last accessed July 26, 2017).

¹³⁹ See Martin Dietrich Brauch, *The Brazil-Mozambique and Brazil-Angola Co-operation and Investment Facilitation Agreements (CIFA’s): A Descriptive Overview*, INT’L INST. FOR SUSTAINABLE DEVELOPMENT (May 21, 2015),

It is worth noting that, even though Brazil's ACFIs broadly reflect its preferred approach, not all of Brazil's ACFIs contain identical terminology. As one might expect, each ACFI (more or less) reflects and caters to (as necessary) a particular set of negotiating circumstances relevant to the counterparty. For example, even though, on the whole, the Brazil-Mozambique ACFI and the Brazil-Angola ACFI mirror each other's language, the former contains detailed definitions of 'investment' and 'investor',¹⁴⁰ whereas the latter provides that "the definitions of investment, investor and other definitions inherent to this subject matter will be regulated by the respective laws of the Parties".¹⁴¹ Equally, the Brazil-Angola ACFI allows for the Joint Committee to invite NGO representatives to present studies on matters of interest to the parties,¹⁴² whereas the Brazil-Mozambique ACFI is silent on NGO participation. Nevertheless, the broad-brush similarity of language across the various instruments provides some evidence of the fact that, in its recent investment treaty negotiations, Brazil has sought to shed any vestigial rule-taking tendencies in favour of becoming more of a rule-maker. That being said, it remains to be seen whether Brazil will be able to impose its preferred language and the attendant provisions enshrined in its so-called Model ACFI on countries that may have a stronger negotiating position. The absence of an ITA provision may prove particularly delicate.

In the same vein, it remains to be seen whether India's attempts to terminate a large number of its BITs and to renegotiate them based on its Revised Model BIT will prove successful. To date, the only new BIT that India reportedly has entered into since the release of its Revised Model BIT is the India-Brazil BIT. As detailed above, the Revised Model BIT contains some ambitious changes, but in light of recent developments, and more or less perceptible and/or incremental policy shifts around the world, there actually may be an appetite for change. A growing number of States might well be open to re-thinking their approach to IIAs in the way India hopes to be able to do.

Indeed, given the burgeoning economic power of India and Brazil, future IIA programmes – albeit to varying degrees, and in line with the applicable political reality in each State – will look to, and learn from, the approach taken by these BRICS powers. This will increasingly be the case if, as has been suggested:

*"[r]ising powers are not rejecting international law...but are instead articulating distinct preferences within the existing system that challenge aspects of the transatlantic vision of international law, often through a reassertion of the role of the State."*¹⁴³

Arguably, a redistribution of power – away from traditional reliance on the West and towards developing economic powers like India, Brazil and China – is likely to result in changes, even

<https://www.iisd.org/itn/2015/05/21/the-brazil-mozambique-and-brazil-angola-cooperation-and-investment-facilitation-agreements-cifas-a-descriptive-overview/>.

¹⁴⁰ See Brazil-Mozambique ACFI, art. 3.

¹⁴¹ See Brazil-Angola ACFI, art. 3. The differences likely stem from the different levels of development of the legal and regulatory frameworks in Angola and Mozambique.

¹⁴² See Brazil-Angola ACFI, art. 4(7).

¹⁴³ William W. Burke-White, *Power Shifts in International Law: Structural realignment and substantive pluralism*, 56(1) HARV. INT'L. L. J. 5 (2015).

foundational changes, to the substance of IIAs. Those changes may well be moulded by the future negotiating stances and preferences of those States and reflect their concerns.

B. Potential Shifts in IIA Policy around the Globe

India and Brazil are not necessarily alone in their perception of a need to reduce exposure to ITA, or at least to rethink the ways in which to access it. In this uncertain environment, it is a fact that an increasing number of States, including original rule-makers like the United Kingdom and the United States, may be re-evaluating their IIA arrangements, seemingly motivated by a growing wariness towards ITA. The voices of free trade opponents (who have long rallied against the “secret” nature of ITA proceedings and articulated the concern that corporations have increasing power to influence domestic policies without transparency to the public) are coming to the fore with greater frequency.¹⁴⁴

A key illustration in this context is that of Australia, which is approaching ITA with more caution following its experience in the tobacco ‘plain-packaging’ arbitrations brought by Philip Morris under the Australia-Hong Kong BIT.¹⁴⁵ Indeed, a parliamentary hearing regarding Australia’s entry into the Trans-Pacific Partnership [“TPP”] engendered heated debate about the potential costs of ITA, with one politician commenting as follows:

*“In my view, ITA represents an unconscionable risk and at the very least should be excluded between Australia and the US, Japan, and Canada, just as we have already excluded it between Australia and New Zealand.”*¹⁴⁶

Ultimately, when the TPP was signed on February 4, 2016, the ITA provisions of the TPP were agreed to by all involved States. Thus, even though a radical departure from ITA appears unlikely in the near future, because of the important benefits accruing to investors of the home State that are enshrined in the extant ITA provisions of many instruments in force, a wake-up call has been sounded.

VI. Conclusion

Where does this quick *excursus* through India and Brazil’s recent developments leave us? What lessons can be drawn? Certainly, at this point, the efforts of India and Brazil to shift the pendulum towards greater host State control suggest that a number of increasingly influential States from the developing world are no longer keen to sign up for traditional-form BITs. Equally, the fact that capital-exporting States that traditionally championed such BITs are adopting increasingly protectionist rhetoric means that the onset of a new generation of IIAs favouring stronger host State control is far from inconceivable. States that are (re)drafting their BITs, or other IIAs, generally

¹⁴⁴ Anthony Depalma, *NAFTA’s powerful little secret; Obscure tribunals settle disputes, but go too far, critics say*, THE N.Y. TIMES, Mar. 11, 2001, <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>. Consider also the increasingly frequent calls for an investment court system as a way of resolving disputes between investors and States, including by the European Commission. See, e.g., Press release, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

¹⁴⁵ Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015).

¹⁴⁶ Katharine Murphy, *TPP trade deal: plain packaging challenge triggered ‘hysteria’, lawyer tells MPs*, THE GUARDIAN, Oct. 9, 2016.

share at least two characteristics: (1) they are reaching new understandings of their best interests based on recent investment claims and from the ways in which arbitration tribunals are interpreting what are arguably imprecisions in typical BIT language; and (2) they are dedicating resources to devising new, possibly more restrictive, treaty language and approaches.

Some aspects of this ‘new generation’ of BIT-drafting have the potential to spill over into and influence international investment treaty-making practice generally. This is not only with respect to the standards of investor protection and IIA mechanisms, but also with respect to provocative exhaustion of local remedies and denial of benefits provisions.

As ever, the true barometer of these efforts will be how they fare against the political realities in which these States will be negotiating. What is clear, however, is that India’s Revised Model BIT and Brazil’s ACFIs are neither necessarily an affront to IIA *tout court* nor harbingers of isolationism and a refusal to enter into new investment protection instruments. They represent recent steps towards greater host State control in the investment treaty dispute resolution paradigm, driven by perceived imbalances (favouring investors over host States) in existing BIT and IIA programmes. Ultimately, there is little point in wasting time and effort to devise new BITs, if the only result is that there are no meaningful protections for foreign investors. Such a paradigm would provide no added incentives to foreign investors to invest in another State. Although it is too early to reach any conclusions, it seems that the Indian and Brazilian efforts are mindful of this. In the end, we simply may be going back to the future, breathing new life into Professor Reisman’s “great compact”.¹⁴⁷

¹⁴⁷ See Alison Ross, *The end of ‘the great compact’? Reisman declares investment law at a crossroads*, GLOBAL ARB. REV. (Feb. 16, 2017). According to Professor Reisman, “the great compact” is “*the foundational arrangement that underscores the contemporary international investment system, whereby traditionally powerful investor states waived the deployment of their superior power to protect their investors in return for host states agreeing to submit disputes to international arbitration*”.