Government of India

LAW COMMISSION OF INDIA

Report No.260

Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty

August 2015

न्यायमूर्ति अजित प्रकाश शहा
भूतपूर्व मुख्य न्यायाधीश, दिल्ली उच्च न्यायालय
अध्यक्ष
भारत का विधि आयोग
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कस्तूरबा गाँधी मार्ग
नई दिल्ली–110 001

सत्यमेव जयते

Justice Ajit Prakash Shah
Former Chief Justice of Delhi High court
Chairman
Law Commission of India
Government of India
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New Delhi – 110 001

D.O. No.6(3)/278/2015-LC(LS) 27 August, 2015

Dear Shri Sadananda Gowda ji,

The Law Commission of India, while finalizing its Report No.246 on Amendments to the Arbitration and Conciliation Act, 1996, in August 2014, recognized the risks to international investment treaties in the absence of clear legal position on the issue. Meanwhile, the Government of India put up a Draft Indian Model Bilateral Investment Treaty in March this year for comments and suggestions. The Commission found that the draft model text had certain concerns. Therefore, the Commission decided to take up the Draft Model Text for study. For this purpose, a Sub-Committee was constituted which, after several rounds of discussions and deliberations, came up with several suggestions on specific clauses, in line with Government's objective to encourage "doing business" in India. These suggestions have been put together in the form of **Report No.260** titled "***Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty***" for consideration by the Government. The Report is more in the form of article-wise analysis and comment, restricted to those articles where the Commission believed there could be changes made to the Draft Model Text. I am sending a copy of this Report to the Hon'ble Finance Minister.

I would like to place on record that while the Report has been signed by the Members, one Ex-Officio Member, viz., Shri P K Malhotra, chose not to sign, as he, in his capacity as the Law Secretary has already communicated his views on the Draft Model Text, to the Ministry of Finance.

With warm regards,

Yours sincerely,

Sd/-
[Ajit Prakash Shah]

Shri D.V. Sadananda Gowda
Hon'ble Minister for Law and Justice
Government of India
Shastri Bhawan
New Delhi

Report No.260

Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty

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CHAPTER-I

BACKGROUND TO THE REPORT

1.1 India's bilateral investment treaty (BIT) programme[1] is part of a larger trade and investment agenda of the Indian government to boost investor confidence and increase investment flows into and out of the country. India launched the programme by signing its first BIT with the United Kingdom (UK) in 1994, signing nearly 50 BITs over the next decade or so. Around 2003, India decided to review its BIT programme, and created a Model BIT[2] (referred to as the '2003 Model' in this Report). The 2003 Model formed the basis for conducting subsequent BIT negotiations between India and other countries.

1.2 India has signed 83 BITs till date,[3] of which 74 are in force. India has also entered into Free Trade Agreements which have a dedicated chapter on investment, that are substantially similar to the standalone BITs. Eleven such FTAs with a chapter on investment are in force as on date.[4]

1.3 At present, India is negotiating FTAs containing investment chapters with Indonesia, Australia, Mauritius, New Zealand,[5] and the European Union.[6] It is also negotiating a BIT with Canada.[7] An

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[1] Bilateral Investment Treaties (BITs) are sometimes also referred to as Bilateral Investment Promotion and Protection Agreements (BIPAs) by the Indian finance ministry (see http://finmin.nic.in/bipa/bipa_index.asp). For the sake of consistency, this Report maintains the term 'BIT' or 'BITs' throughout.

[2] India 2003 Model BIT, available at: http://www.italaw.com/investment-treaties . The reference to 2003 is based on the date provided by the ITA law website, i.e., the source for the model text.

[3] Gourab Banerji; GAR Investment Treaty Know-How, India (Adwaita Sharma, George Pothan and Sriharsha Peechara), 2015.

[4] Gourab Banerji; GAR Investment Treaty Know-How, India (Adwaita Sharma, George Pothan and Sriharsha Peechara), 2015.

[5] Ministry of Commerce and Industry, 'India's Current Engagements in RTAs', Government of India, available at: http://commerce.nic.in/trade/international_ta_current.asp

[6] Luxembourg for Early Conclusion of India-EU FTA, Economic Times, 16 October 2012, available at: http://articles.economictimes.indiatimes.com/2012-10-16/news/34498965_1

ongoing negotiation with the United States on a BIT began in 2009, but is yet to conclude; although a 2013 summit meeting of the US President and the Prime Minister of India saw the two leaders reaffirming their commitment to conclude a high-end BIT aimed at fostering openness to invest.[8]

1.4 From 1994, when India started its BIT programme, until the end of 2010, BITs in India did not attract much attention. India also had only marginal involvement with Investment Treaty Arbitration (ITA), which refers to the dispute resolution mechanism available under BITs.[9] During this period, India was involved in only one ITA dispute, and even this dispute did not result in an ITA award (there are, however, a few non-ITA arbitral awards).[10]

1.5 The period after 2010 saw a surge in India's involvement with ITA.[11] Towards the end of 2011, India received its first adverse award in relation to a BIT in the *White Industries Australia Limited V. Republic of India Case.*[12] The tribunal found that India had violated its obligations to the investor under the India-

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[7] Canada-India Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/india-inde.aspx?lang=eng

[8] Joint Statement on Prime Minister's Summit Meeting with President Barack Obama in Washington D.C, Minsistry of External Affairs, Government of India, 27 September 2013, available at: http://www.mea.gov.in/bilateral-documents.htm?dtl/22265

[9] Deepak Raju and Prabhash Ranjan, 'BIT of a problem down under', Indian Express, 17 October 2011, available at: http://archive.indianexpress.com/news/bit-of-a-problemdown-under/860705/

[10] Capital India Power Mauritius I v. Maharastra Power Dev. Corp., Case No. 12913/MS, Award (ICC Int'l Ct. Arb. 2005), available at: http://italaw.com/documents/Dabhol_award_050305.pdf; Expropriation Claim of Bank of America (Trustee), Contract of Insurance No. F041, Memorandum of Determinations at 25 (OPIC 2003), available at: http://www.opic.gov/sites/default/files/docs/BankofAmericaColumbia032404.pdf

[11] Prabhash Ranjan, Can BIT Claims Be Made Against India for the Actions of the Indian Judiciary?, National Law University of Jodhpur Law Review, Volume 1, 2013, pp 87–92.

[12] In the Matter of an UNCITRAL Arbitration in Singapore under the Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments between White Industries Australia Limited and the Republic of India, available at: http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf

Australia BIT. This Award holds significance as the first known ITA Award against India.[13]

1.6 Besides the *White Industries* award, India has received numerous ITA notices from various investors and under various BITs. Claims by foreign investors against India have included challenges to various regulatory measures such as cancellation of telecom licences and imposition of retrospective taxes. As on date, there are fourteen known pending proceedings of claims brought against India.[14]

1.7 As a result of the adverse *White Industries* award and the ITA notices under different BITs,[15] there is renewed focus on India's BIT programme. For instance, questions have been raised about balancing investment protection with India's regulatory power, compelling India to re-think its BIT programme.[16]

1.8 Subsequently, the Government undertook a review of the text of its 2003 Model. In March 2015, the Government made public a new draft Model Indian Bilateral Investment Treaty (referred to as the '2015 Model' in this Report).[17] The objective of the 2015 Model, as stated on the Government's website, was "to provide appropriate protection to foreign investors in

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[13] For more on this award, see Prabhash Ranjan, 'The White Industries Arbitration: Implications for India's Investment Treaty Programme', Investment Treaty News, April 2012, Volume 2, Issue 3, pp 13-14, available at: http://www.iisd.org/pdf/2012/iisd_itn_april_2012_en.pdf; Manu Sanan, 'The White Industries Award: Shades of Grey', Journal of World Investment and Trade, 2012, Volume 13, Issue 4, pp 661; Patricia Nacimiento and Sven Lange, 'White Industries Australia Limited v Republic of India', ICSID Review, Fall 2012, Volume 27, Issue 2, pp 274-280.

[14] Gourab Banerji; GAR Investment Treaty Know-How, India. (Adwaita Sharma, George Pothan and Sriharsha Peechara), 2015; Indian Tax Dispute, 10 April 2015, available at: http://www.cairnenergy.com/index.asp?pageid=27&newsid=471; Business Standard, 'Cairn Energy files arbitration notice in Indian tax dispute', 12 March 2015, available at: http://www.business-standard.com/article/companies/cairn-energy-files-arbitration-notice-in-indian-tax-dispute-115031100955_1.html

[15] Gourab Banerji; GAR Investment Treaty Know-How, India. (Adwaita Sharma, George Pothan and Sriharsha Peechara), 2015.

[16] Prabhash Ranjan, 'India and Bilateral Investment Treaties - A Changing Landscape', 2014, ICSID Review, pp 1-32.

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

India and Indian investors in the foreign country, in the light of the relevant international precedents and practices, while maintaining a balance between the investor's rights and the Government obligations." The Government added that the 2015 Model would form the basis for negotiations with other countries.[18]

1.9 The Law Commission of India (the Commission) undertook an initial study of the 2015 Model, and found that the text has some concerns that could be addressed before it is finalised. The Commission communicated the same to the Finance Minister in its letter dated 8 April 2015. Thereafter, the Commission set up a Sub-Committee of experts to study the 2015 Model in greater detail. The experts included practitioners and academicians with experience in investment treaty law and investment arbitration. The members of the Sub-Committee were:

1. Justice Ajit Prakash Shah, Chairman
2. Justice Usha Mehra, Full-time member
3. Justice S N Kapoor, Full-time member
4. Prof. Mool Chand Sharma, Full-time member
5. Prof. Yogesh Tyagi, Part-time member and Dean, Faculty of Legal Studies – South Asian University
6. Mr. Shishir Dholakia, Senior Advocate
7. Mr. Gourab Banerji, Senior Advocate & Barrister, Overseas Associate – Essex Court Chambers, London
8. Dr. Prabhash Ranjan, Assistant Professor – South Asian University
9. Mr. Anirudh Wadhwa, Advocate
10. Mr. Anirudh Krishnan, Advocate
11. Ms. Manisha Singh, Advocate
12. Mr. Aniruddha Rajput, Advocate
13. Mr. Vyom D Shah, Advocate

[18] Call for comments on the 2015 Model available at: https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/

14. Mr. Sriharsha Peechara, Advocate
15. Ms. Adwaita Sharma, Advocate
16. Ms. Smriti Parsheera, Advocate
17. Mr. Ashutosh Ray
18. Mr. George Pothan Poothicote, Advocate and Consultant (Legal & Treaties) – Ministry of External Affairs
19. Ms. Sumathi Chandrashekaran, Advocate and Consultant, Law Commission

<u>Researchers:</u>

1. Mr. Pranay Lekhi
2. Mr. Sanjeevi Seshadri

1.10 The Sub-Committee received valuable guidance from Mr. Fali Sam Nariman, Senior Advocate.

1.11 The Sub-Committee met several times and discussed the 2015 Model in great detail, also studying existing BITs and model BITs from other jurisdictions, and undertaking an extensive review of the subject.

1.12 Based on the study submitted by the Sub-Committee, the Commission has made certain suggestions on specific clauses of the 2015 Model in the form of the present Report. The Report is presented with a view to assist the Government in achieving a balanced negotiating text, that takes into consideration the protection of Indian investors investing abroad, as well as safeguarding the regulatory powers of the State. This Report is divided into chapters that are aligned with the chapters of the 2015 Model. It provides an article-wise analysis and comment, but restricts its commentary to only on those articles where the Commission believed there could be changes made to the text. The analysis and comment for each article is accompanied by a suggested draft, which provide either precise treaty language as optional alternatives to the existing draft text, or general suggestions.

CHAPTER-II

PRELIMINARY

A. Preamble

(i) Analysis and comment:

2.1.1 As the preface to a treaty, a preamble sets out the objectives for which the agreement is being entered into. The language of the preamble can influence the interpretation of treaties, especially at the time of dispute resolution. It can alter the extent of obligations upon a State Party to the treaty, as well as the degree of broadness or narrowness that a tribunal would adopt while interpreting the provisions of the treaty.

2.1.2 The preamble to the 2015 Model contains three paragraphs, the first being a general statement of purpose, i.e., "to promote bilateral cooperation … with respect to foreign investments".

2.1.3 The second paragraph reaffirms rights of State Parties to regulate investments in their territories in accordance with their law and policy objectives, while retaining the right to change conditions applicable to such investments. The underlying intent of this paragraph is arguably to reaffirm the sovereign right of a State Party to modify the conditions for investment prevalent in its territory. However, the expression of such intent must be appropriately tempered with the assurance that there will be no compromise on certainty and transparency in domestic law.

2.1.4 Certainty and transparency are two aspects that are key to ensuring potential investors remain interested in a country. Here, it is important for Indian investors venturing abroad to have the confidence that relevant laws in foreign countries will not be abruptly changed, while offering the same assurance to foreign investors entering India. These concepts have been adopted by many countries in their treaties, including, for example, Norway ("[d]esiring to encourage, create and maintain stable, equitable, favourable and transparent conditions for investors of one Party and their investments in the territory of the other Party on the basis of equality and mutual benefit"), and the United States ("[a]greeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards").[19] This must be balanced by the requirement that investors can enter and operate only in accordance with the laws of the Host State.

2.1.5 Some countries have expressly included a reference to the right to adopt laws to protect health, environment and labour standards.[20] Incorporating a statement of this nature in India's Model BIT may help defend legitimate social welfare laws adopted by India in public interest.

2.1.6 The third paragraph of the preamble seeks to "align the objectives of Investment with sustainable development and inclusive growth of the Parties". 'Sustainable development' and 'inclusive growth' are a sign of "new generation" investment policies, and may have been borrowed from the Investment Policy Framework for Sustainable Development issued by the United Nations Conference on Trade and Development (UNCTAD).[21] Some Model BITs use 'sustainable development' in their preamble.[22] In the 2015 Model, the terms are used only in Article 8.1. The 2015 Model does not, however, at any stage, lay

[19] Norway Model BIT; US Model BIT 2012; BIT between the United States and Uruguay (2005).
[20] Preamble, Norway Model BIT; Preamble, US Model BIT 2012.
[21] UNCTAD, Investment Policy Framework for Sustainable Development, UNCTAD/DIAE/PCB/2012/5, Geneva, 2012, available at http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf
[22] UNCTAD, 'Recent trends in IIAS and ISDS', 25-27 February 2015, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

down what “inclusive growth” or “sustainable development” entails, nor does it impose any related independent obligations on the investor. Even as used in Article 8.1, the terms have no substantive value. Through the preamble, the terms can, at best, indicate treaty intent, and in this regard, the terms may remain as they are.

(ii) Suggested draft:

2.1.7 A revised Preamble is as follows:

> The Government of the Republic of India and the Government of the ________ (“the Party” individually or “the Parties" collectively);
>
> Desiring to promote bilateral cooperation between the Parties with respect to foreign investments; and
>
> Agreeing to maintain a stable and transparent environment for investments without disturbing the right of a Party allow investments to enter and operate according to the laws of a Party; and
>
> Reaffirming the right of the Parties to adopt laws in public interest generally, and specifically, for the protection of environment, human health and labour standards; and
>
> Seeking to align the objectives of Investment with sustainable development and inclusive growth of the Parties;
>
> Have agreed as follows:

B. Article 1. Definitions

(i) Analysis and comment:

(a) Enterprise (Article 1.2) and Investment (Articles 1.6 and 1.7):

2.2.1 The 2015 Model introduces an ‘enterprise-based’ definition of investment, not used previously by

India. This definition limits protection to only those investors who have established an enterprise in India, i.e., they have substantial and real business presence in India and are under actual control of foreign investors. In contrast, the 2003 Model used an 'open-ended asset-based' definition of investment, enumerating the categories of assets that may be regarded as investments. However, there have been concerns that an open-ended asset based definition may impose excessive strain on the regulatory space of a State. There is also an apprehension that the State is likely to be under constant threat of a claim being filed by the holder of an asset that is an investment.[23] Therefore an 'enterprise-based' definition may be relatively more appropriate for the current Indian context, as it is both a capital-exporting and capital-importing State. However, the language of some of the provisions in this regard needs to be streamlined.

2.2.2 Article 1.2.1 provides an exhaustive list of the elements that constitute "real and substantial business operations". Article 1.2.2 excludes certain types of "business operations" from "real and substantial business operations". This clause, while clarificatory, is also unnecessary, as the test for real and substantial business is already provided in Article 1.2.1. It may also be used to narrowly interpret "real

[23] Following examples show the potential claims that an open-ended asset based definition may result into: Goetz v. Burundi, ICSID Case No. ARB/95/3: BIT claim of six individual Belgian shareholders in a Burundian company; Suez et al. v. Argentina, ICSID Case No. ARB/03/17: Claim under two BITs of one French and two Spanish shareholders in an Argentine water company; Urbaser et al. v. Argentina, ICSID Case No. ARB/07/26:BIT claim of two Spanish shareholders in an Argentine water company; OKO Pankki Oyj et al. v. Estonia, ICSID Case No. ARB/04/6: Claim under two BITs of one German and two Finnish banks, lenders under a loan agreement; Funnekotter et al. v. Zimbabwe, ICSID Case No. ARB/05/6: BIT claim of 14 unaffiliated Dutch investors in different farms in Zimbabwe; Anderson et al. v. Costa Rica, ICSID Case No. ARB(AF)/07/3 :BIT claim of 137 investors in Ponzi scheme; Jurisdiction declined for lack of investments "owned in accordance with the laws" of Costa Rica; Canadian Cattlemen for Free Trade v. United States, NAFTA/UNCITRAL :NAFTA Chapter 11 claim of 109 claimants concerning US ban of Canadian cattle and beef after discovery of bovine spongiform encephalopathy (BSE); Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, pp 489-492 : 60,000 Italian holders of Argentine sovereign bonds; Ambiente Ufficio S.p.A. et al. v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, p 141. See Carolyn Lamm, The Future of Large-Scale Claims in Investment Treaty Arbitration, available at http://www.arbitration-icca.org/media/3/14246914330120/lamm_ita-asil_keynote_large_scale_claims.pdf

and substantial business operations".[24] It is suggested that Article 1.2.2 be removed.

2.2.3 Article 1.6.1(i) defines 'control', among other things, as a situation where the investor can appoint majority of directors or senior management, or to control management or policy decisions. This interferes deeply with corporate freedom, and investors may not be comfortable with such a provision. It may be appropriate to retain only a general reference to ownership and control in good faith. Similarly, Article 1.6.1(ii) defines 'owned' as where an investor owns more than 50% of capital or funds or contribution into the company. Besides being disadvantageous to Indian investors abroad, this would also conflict with existing capital requirements under India's foreign investment policy, where foreign investment of less than 50% (as capped under policy) would automatically become excluded from the purview of protection under a BIT. It is suggested that Article 1.6.1 be removed.

2.2.4 Article 1.7 excludes certain assets from the definition of 'enterprise'. However, assets such as "Goodwill, brand value, market share or similar intangible rights" (Article 1.7(v)) are inherently connected with an industry, and should not be excluded. It is suggested that Article 1.7(v) may be removed, while retaining the rest of the provision.

2.2.5 As an alternative to the closed 'enterprise-based' definition adopted in the present version of the 2015 Model, a closed 'asset-based' definition may also be considered. While retaining the test for "real and substantial business operations" as presently contained in Article 1.2.1. This will address circumstances where States are not willing to enter into a BIT with an 'enterprise-based' definition. This will also address India's concerns of treaty shopping

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[24] See a discussion on the rule of *ejusdem generis*, for example, in Robert Jennings and Arthur Watts, *Oppenheim's International Law (*9th edn: vol. I), Oxford University Press: Oxford, 2008, pp. 1279-80; Also see footnote 20 at p. 1280; Richard Gardiner, *Treaty Interpretation,* Oxford University Press: Oxford, 2010, pp. 311-2.

and multiple claims being filed based on the same cause of action.[25] Option 2 below offers an alternative.

(ii) Suggested draft:

2.2.6 Option 1: In the 2015 Model, in order to retain the closed enterprise-based definition, Articles 1.2.2, 1.6 and 1.7(v) should be removed.

2.2.7 Option 2: As an alternative to a closed 'enterprise-based' definition, and in place of Articles 1.2, 1.6 and 1.7, the following closed 'asset-based' definition may be adopted:

> "Investment" means every kind of asset invested by the investors of one Party in the territory of the other Party in accordance with the laws, and regulations of the Party in whose territory the Investment is made and in particular, in one of the following forms:
>
> i) movable and immovable property and other property rights such as mortgages, liens or pledges;
> ii) shares, stocks, bonds and debentures and any other similar forms of participation in a company;
> iii) intellectual property rights;
> iv) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;
> v) rights under contracts, including turnkey, construction, management, production or revenue sharing contracts;
> vi) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search,

[25] It is relevant to note that adopting a closed list is also recommended by UNCTAD, in UNCTAD, Scope and Definition: UNCTAD Series on Issues in International Investment Agreements II, p. 114.

cultivate, extract or exploit natural resources; and

vii) any change of the form in which assets are invested or reinvested:

Provided that each of the kind of assets mentioned in (i) to (vii) shall satisfy the following conditions individually and collectively:

a. it has made a substantial and long term commitment of capital in the Host State;
b. it has engaged a substantial number of employees in the territory of the Host State;
c. it has assumed entrepreneurial risk;
d. it has made a substantial contribution to the development of the Host State through its operations alongwith transfer of technological knowhow, where applicable; and
e. it has carried out all its operations in accordance with the Law of the Host State.

C. Article 2. Scope and General Provisions

(i) Analysis and comment:

2.3.1 Article 2.1 is a standard 'non-retroactivity of treaties' clause. Besides clarifying that those investments made on or after the date of entering into the BIT would be protected, it provides that measures adopted by the Home State prior to the treaty shall not be challengeable. The scope also extends to "any subsequent modifications" of any measure or law that existed in a Host State before entering into the treaty. This phrase could be used by a Host State to change laws at any point in time, and may, in turn, prejudicially affect investors and could also have an adverse impact on Indians investing abroad. It is suggested that this phrase may be removed.

2.3.2 The first part of Article 2.4 ("Nothing in this Treaty shall be interpreted to restrict the rights of either Party to formulate, modify, amend, apply or revoke its Law in good faith") seeks to protect the sanctity of legitimate laws made by a State under a treaty, but this concern is unfounded, as it is addressed under customary international law.[26] The second part of Article 2.4 ("Each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, including discretion regarding allocation of resources and establishment of penalties") is unnecessary and may make investors vulnerable to State action. According to precedent, provisions granting freedom of investigation and prosecution are prone to abuse.[27] It is suggested that Article 2.4 be removed.

2.3.3 Article 2.5 appears to repeat Article 2.1. It is suggested that Article 2.5 be removed.

2.3.4 Article 2.6 lists the circumstances in which the treaty will not apply. Article 2.6(i) excludes government procurement from treaty protection. However, foreign investors enter a country through the government procurement process, for example, through infrastructure projects. Excluding public procurement could lead to the exclusion of many activities that would otherwise meet treaty objectives of contributing substantially to the Host State's development (as provided in the test for "real and substantial business operations"). Absence of treaty protection could lead to an exodus of foreign investors which may not be desirable in the long term. It is suggested that Article 2.6(i) be removed.

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[26] See, for example, discussions on regulatory freedom in Saluka Investments BV (The Netherlands) v The Czech Republic, Permanent Court of Arbitration, Partial Award, 17 March 2006, followed subsequently in innumerable cases such as Marvin Feldman v Mexico, Award, ICSID Case No. ARB (AF)/99/1, 16 December 2002.

[27] This was an integral factor in most of the cases relating to expropriation decided by the Iran-US Claims Tribunal. Other examples of such abuse are Antoine Biloune v. Ghana, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 5 ILR 189; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), 2010, ICJ Reports 639.

2.3.5 Article 2.6(iv) excludes taxation measures from the purview of the treaty. However, including taxation measures here is not necessary, and may, in fact, suggest an anti-investor bias. The power to tax is an integral part of the State's police powers in international law. The power to tax exists independent of a treaty, unless the tax itself is arbitrarily imposed to destroy the State's regulatory freedom.[28] The absence of this clause will not affect India's taxing power. It is suggested that Article 2.6(iv) be removed.

(ii) Suggested draft:

2.3.6 Article 2.1 may be redrafted to remove the last phrase, as follows:

> 2.1 This Treaty applies to Investments in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter that have been admitted by a Party in accordance with its Laws applicable from time to time. Nothing in this Treaty shall apply to either Party in relation to any act or Measure or Law that existed before the date of entry into force of this Treaty.

2.3.7 Articles 2.4, 2.5, 2.6(i) and 2.6(iv) may be removed.

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[28] Third Restatement of American Law; Also see FA Mann, *The Legal Aspects of Money* (5th edn), Oxford University Press: Oxford, 1992; Marvin Feldman v Mexico, Award, ICSID Case No. ARB (AF)/99/1, 16 December 2002, paras 103-6; Link-Trading Joint Stock Company v Department for Customs Control of Moldova, Final Award, 18 April 2002, para 69, 72.

Chapter III

OBLIGATIONS OF PARTIES

A. Article 3: Standard of Treatment

(i) Analysis and comment:

3.1.1 Fair and equitable treatment (FET) has emerged as the most important standard of treatment in BITs,[29] and FET provisions occur in most BITs, but with little guidance about meaning and content.[30] This has made the interpretation of FET provision expandable, evidenced by the fact that tribunals have made legitimate expectations an integral part of this provision,[31] often without providing much doctrinal basis.[32] Further, tribunals are inconsistent in what constitutes legitimate expectations of investors under FET.[33] As a result, the content of the FET provision, to a great extent, depends on the individual approach of a tribunal entrusted with the task of finding its content. Indeed, FET has become a catch-all provision capable of sanctioning many legislative, regulatory and administrative actions of the Host State.[34] In other words, the broad and undefined content of the FET provision has proved to be problematic for countries exercising their right to regulate.

3.1.2 The 2015 Model does not contain an FET provision. Instead, it contains a 'Standard of

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[29] FET is the *grundnorm* or basic norm of the investment treaty system, according to J Salacuse, *The Law of Investment Treaties*, Oxford University Press, 2010.

[30] Scholars have described FET as wide, tenuous and imprecise. See M. Sornarajah, *The International Law on Foreign Investment* (2nd edn), Cambridge University Press, 2004, p 332; V. Lowe, 'Regulation or Expropriation', Current Legal Problems, 2002, volume 55, p 447.

[31] Newcombe and Paradell, *The Law and Practice of Investment Treaties,* Kluwer, 2009, p 279.

[32] Michele Potesta, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of a Controversial Concept', ICSID Review, Volume 28, Issue 1, pp 88-122. Also see Separate Opinion of Arbitrator Pedro Nikken in AWG v Argentina, ICSID Case No ARB/03/19, available at: http://www.italaw.com/sites/default/files/case-documents/ita0056.pdf

[33] For example, see the approach of tribunals in CMS v Argentina and LG&E v Argentina with the approach of tribunals in Total v Argentina and El Paso v Argentina.

[34] J.R. Picherack, 'Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?', Journal of World Investment and Trade, 2008, Volume 9, Issue 4, p 255; G. Mayeda, 'Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties', Journal of World Trade, 2007, Volume 41, p 273, 291.

Treatment' (Article 3) which puts the Host State under an obligation not to subject foreign investment to measures which constitute denial of justice under customary international law, unremedied and egregious violations of due process, or 'manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment'.

3.1.3 The absence of the FET provision will safeguard India's right to regulate by minimising the possibilities of unexpected restrictions on its regulatory power that broad interpretations of an undefined FET may bring. At the same time, by providing that foreign investors can challenge a State's regulatory measures when it amounts to denial of justice or violation of due process or harassment, the 2015 Model ensures that foreign investment continues to get protection from abusive regulatory behaviour of the Host State. This provision aims at balancing investment protection with regulation. It takes care of concerns that have often been expressed about the expansive interpretation of the FET provision.

3.1.4 However, the threshold to prove violation of due process and harassment by State has been set at very high levels, indicated by words like 'egregious', 'manifestly abusive', 'outrageous', reminiscent of the *Neer* standard laid down in 1926. India could consider lowering this threshold by deleting words such as 'outrageous' or 'manifestly abusive'. Also Article 3.1(iii) recognises the possibility of coercion being 'justified'. A society that adheres to the rule of law cannot have something like 'justified' coercion. It is suggested that Articles 3.1(ii) and (iii) be redrafted appropriately.

(ii) Suggested draft:

3.1.5 Each Party shall not subject Investments of Investors of the other Party to Measures which constitute:

(i) Denial of justice under customary international law;
(ii) Un-remedied violations of due process; or
(iii) Treatment involving continuous coercion or harassment.

B. Article 5. Expropriation

(i) Analysis and comment:

3.2.1 The 2015 draft Model BIT on expropriation provides that an indirect expropriation requires evidence that there has been permanent and complete, or near complete, deprivation of the value of the foreign investment and of the investor's right of management and control over investment (Article 5(2)(i) and (ii)). Thus, the treaty not only provides for the 'substantial deprivation'-test to determine indirect expropriation, but also requires in Articles 5.2 (i) and (ii) that this deprivation should be both economic and legal.[35] Arbitration tribunals have used different approaches to answer the question of whether 'substantial deprivation' should be understood in a legal sense or an economic sense. Some tribunals favour the so-called 'legal approach' to determine substantial deprivation where 'control over investment' is the key indicator to determine indirect expropriation.[36] Other arbitral tribunals, by contrast, have focused on the economic approach emphasising the substantial deprivation of the value of the investment.[37] However, requiring both legal and economic deprivation might be problematic from the perspective of foreign investor. For example, in a situation where there is substantial economic deprivation, separately proving legal deprivation will be difficult. Legal deprivation must be

[35] Chemtura Corp. v Government of Canada, UNCITRAL, Award, 2 August 2010, para 247.
[36] Enron Corp. v Argentina, ICSID Case No ARB/01/3, Award, 22 May 2007, para 245; CMS v Argentina, para 263.
[37] Telenor Mobile Communications AS v The Republic of Hungary, ICSID Case No ARB/04/15, Award, 13 September 2006, para 64; Parkerings Compagniet v Republic of Lithuania, ICSID Case No ARB/05/8, Award, 11 September 2007, para 455.

presumed. Similarly, if there is legal deprivation, economic deprivation must be presumed. Thus, it is suggested that the word 'and' in Article 5.2 (i) should be replaced with the word 'or'.

3.2.2 Another related problem – the question of a 'substantial deprivation' of *which* 'investment' – has not been answered. Should it be the 'investment as a whole' or will 'substantial deprivation' of even a 'single asset' owned or controlled by the foreign investor suffice to amount to expropriation? This is important because foreign investment (say a manufacturing company) usually constitutes a bundle of individual assets (licenses, permits, intellectual property rights etc) with each such investment being capable of expropriation. Arbitral tribunals have followed different approaches – some have focussed on an 'individual asset'-approach, ruling that 'substantial deprivation' of even an 'individual asset' could constitute expropriation[38] (which will limit State's regulatory power), whereas some have followed the 'investment as a whole' approach'[39] (which provides greater regulatory latitude to the Host State). In the present formulation, tribunals are free to adopt the 'investment as a whole'-approach or an 'individual asset'-approach.

3.2.3 Further, the balance struck between investment protection and regulatory space in Articles 5.2 (i) and (ii) is tilted in favour of the Host State by article 5.2 (iii). This Article provides that determination of an indirect expropriation also requires an appropriation of the investment by the Host State. This requires a transfer of complete or near complete value of the investment to the Host State or any agency or instrumentality of the Host State. In other words, even if the entire investment is 'substantially or totally

[38] Eureko BV v Republic of Poland, Ad Hoc Arbitration, Partial Award, 19 August 2005, paras 239-42; En Cana Corporation v The Republic of Ecuador, LCIA Case No UN3481, UNCITRAL, Final Award, 3 February 2006, paras 183, 188, 189 and 193; See Santiago Montt, State Liability in Investment Treaty Arbitration (Hart 2009) 269; Ursula Kriebaum, 'Partial Expropriation', Journal of World Investment and Trade, 2007, volume 8, p 69.
[39] Telenor Mobile Communications AS v The Republic of Hungary, ICSID Case No ARB/04/15, Award, 13 September 2006, para 67.

deprived' in both a legal and an economic sense it will not constitute an indirect expropriation if the value of investment is not transferred to the Host State. Thus, it is suggested that Article 5.2 (iii) be deleted.

(ii) Suggested draft:

5.2 The determination of whether a Measure or a series of Measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and usually requires evidence that there has been:

(i) permanent and complete or near complete deprivation of the value of Investment; or
(ii) permanent and complete or near complete deprivation of the Investor's right of management and control over the Investment.

C. Article 6. Transfers (Monetary Transfer Provisions)

(i) Analysis and comment:

3.3.1 A foreign investor would like to have as much freedom as possible in transferring funds in and out of the Host State for a number of business-related needs, like repatriating profits or servicing debts. On the other hand, transfer of funds in and out of the Host State could impact the host country's capital account and balance of payments (BoP).[40] In order to mitigate the adverse impacts of inflow and outflow of funds, countries at times impose capital-flow management measures (CFM measures).[41] In simple terms, CFM measures refer to controls adopted by the Host State to regulate inflow and outflow of funds, which is widely recognised as an integral component of

[40] For more discussion on this see Kenneth J Vandevelde, *Bilateral Investment Treaties*, Oxford University Press, 2010, p 316.
[41] This term is borrowed from Kristin Forbes and others, 'Capital Controls and Macroprudential Measures: What are they Good For?', Discussion Paper 1343, DIW Berlin, 2013, available at: http://www.diw.de/documents/publikationen/73/diw_01.c.433707.de/dp1343.pdf

a country's monetary sovereignty, which is crucial for responding to various macroeconomic challenges.[42] From the point of view of the Host State's regulatory power, countries will like to have as much freedom as possible in imposing CFM measures.

3.3.2 This brings the interests of foreign investors and the regulatory power of Host States face to face. Monetary Transfer Provisions (MTPs) in BITs regulate the transfer of funds related to investment in and out of the host country.[43] The manner in which interests of foreign investors will be balanced with interests of Host States depends on the formulation of MTPs in BITs.

3.3.3 Many existing Indian stand-alone BITs provide an unqualified right to foreign investors to transfer 'all funds related to investment', i.e., the MTPs in these stand-alone BITs do not subject investor's right to transfer funds to any exceptions.[44]

3.3.4 Yet, domestic Indian law allows the imposition of CFM measures, including capital controls.[45] Also, even under the IMF Articles, India retains the right to impose restrictions on capital account transactions.[46] Thus, the relevant question from the perspective of India's regulatory power is whether a foreign investor can successfully pursue a claim for MTP violation against India if this investor is prohibited to freely transfer capital abroad? India may argue that despite the MTP in the BIT, that customary international law and treaty norms (such as the IMF Articles) that recognise the right of countries to impose

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[42] For more on capital controls, see IMF, The Liberalization and Management of Capital Flows: An Institutional View, 14 November 2012, available at: http://www.imf.org/external/np/pp/eng/2012/111412.pdf

[43] Kenneth J Vandevelde, *Bilateral Investment Treaties*, Oxford University Press, 2010, p 316-33; J Salacuse, *The Law of Investment Treaties*, Oxford University Press, 2010, 256-71.

[44] See India-Germany BIT Art. 7; India-Denmark BIT Art. 7; India-Turkmenistan BIT Art. 7; India-Netherlands BIT Art. 7; India-Tajikistan BIT Art. 7; India-Poland BIT Art. 7; India-Sri Lanka Art. 7; India-Vietnam BIT Art. 7; India-Austria BIT Art. 6.

[45] See Foreign Exchange Management Act 1999 (India) ss 6(2)(b) and 6(3), (a)-(j).

[46] IMF, 'India Cannot Impose Restrictions on Current Account Transactions After it Became an Article VIII Member Country in 1994', IMF Country Report No 11/50, February 2011, available at: http://www.imf.org/external/pubs/ft/scr/2011/cr1150.pdf. Also see Articles of Agreement of the International Monetary Fund, adopted 22 July 1944, entered into force 27 December 1945, art VI(3), available at: http://www.imf.org/External/Pubs/FT/AA/pdf/aa.pdf

capital controls in situations of balance of payment crisis, should be read into the BIT.[47] On the other hand, a foreign investor may argue that the BIT is *lexspecialis* vis-à-vis the IMF Articles and should therefore trump.[48] Given the lack of precedent, it is not clear how an ITA tribunal would resolve this question. Thus, the formulation of MTPs in stand-alone BITs points to the wide discretion that an ITA tribunal will enjoy in balancing investment protection with India's regulatory power in the area of capital controls.

3.3.5 The 2015 Model recognises the investor's right to transfer all funds related to investment such as contributions to capital, profits, dividends, interest payments, etc. (Article 6.1). However, the investor's right to transfer funds is subject to three restrictions. First, Article 6.1 subjects the transfer of funds to the domestic laws of the Host State. Second, Article 6.3 provides that 'nothing in this treaty shall prevent' the good faith application, by the Host State, of its laws, including actions relating to bankruptcy, insolvency, compliance with judicial decisions, labour obligations and laws on taxation, etc. Third, Article 6.4 provides that the Host State may temporarily restrict the investor's right to transfer funds in the event of serious BoP difficulties or in situations where movement of capital could cause or threaten to cause 'serious difficulties of macroeconomic management'.

3.3.6 The same exception for serious BoP difficulties and external financial difficulties is found in the general exceptions, Article 16 of the 2015 draft Model BIT (discussed later in this Report). This will allow India to deviate from all substantive obligations (including MTPs) in order to remedy serious BoP problems, exchange-rate difficulties and external financial difficulties. The general exception clause is

[47] Alejandro Turyn and Facundo Perez Aznar, 'Drawing the Limits of Free Transfer Provision' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration,* Kluwer, 2010, p 51.
[48] Peter Muchlinski, 'Trends in International Investment Agreements: Balancing Investors Right and the Right to Regulate: The Issue of National Security' Yearbook of International Investment Law and Policy, 2009, volume 1, p 60. See also *Continental Casualty v Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008, paras 243-44.

self-judging.[49] This might encourage the Host State to invoke the general exception clause in order to remedy BoP difficulties and not invoke the defence given in Article 6.4 discussed before. This tilts the balance towards the Host State's regulatory power. Thus, it is suggested that should delete the provision of remedying BoP related difficulties in Article 16 since it is already covered in Article 6.

D. Most Favoured Nation (Absent provision)

(i) Analysis and comment:

3.4.1 The meaning of Most Favoured Nation (MFN) clauses in international law can be understood with the help of a simple example: let us assume three States: A (the granting State), B (the beneficiary State) and C (the third State). Further assume that States A and B have entered into a treaty containing the MFN clause. Now, if State A extends certain benefits to State C, State B can invoke the MFN clause in the treaty to ensure that State A extends the same benefits to her provided the granted benefits to State C falls within the scope of application of the MFN clause of the treaty between A and B.[50] MFN treatment in international investment law aims to create a level-playing field for all foreign investors by prohibiting Host State from discriminating between investors from different countries.[51] In context of BITs, it has been argued that one of the key roles played by MFN clauses is 'to import more favourable conditions from third-country

[49] Self-judging means that the clause in the BIT grants discretion to States to deviate unilaterally from their BIT obligation to protect 'security interests' based on their assessment. See further Stephan Schill and Robyn Briese, 'If the State Considers: Self-Judging Clauses in International Dispute Settlement', Max Planck Yearbook of United Nations Law, 2009, volume 13, p 61.

[50] E Ustor, 'Most Favoured Nation Clause', in R Bernhardt and P Macalister-Smith (eds.), Encyclopedia of Public International Law, Volume III, 1997, p 468. Also see International Law Commission, Report of the International Law Commission on the Work of its Thirtieth Session 8 May-28 July 1978, 30 ILC Yearbook., vol. II, Part Two, 1978, p 11.

[51] OECD, 'Most-Favoured-Nation Treatment in International Investment Law', 2004/02 OECD Working Papers on International Investment, September 2004, available at: http://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf ; Okezic Chukwumerije, 'Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations', Journal of World Investment and Tradevol. 2007, volume 8, p 608; Jurgen Kurtz, 'The MFN Standard and Foreign Investment: An Uneasy Fit?', Journal of World Investment and Trade, 2004, vol. 5, p 873.

BITs'.[52] Arbitration tribunals frequently have to determine with respect to the MFN provision in BITs is whether a foreign investor can use the MFN provision in the treaty to be interpreted (primary BIT) to borrow a beneficial provision in another BIT signed by host country (secondary BIT). The beneficial provision could be a substantive provision like fair and equitable treatment (FET), full protection and security, or provision on expropriation. The beneficial provision that the foreign investor wishes to borrow by relying on the MFN provision could also be a procedural provision like a dispute resolution clause.

3.4.2 The use of the MFN provision to borrow beneficial substantive and procedural provisions from other BITs has been a matter of concern. In *White Industries v India* case, the Australian investor, relying on the MFN provision of India-Australia BIT, argued for the importation of a favourable substantive provision related to 'effective means of asserting claims and enforcing rights' given in the India-Kuwait BIT into the India-Australia BIT.[53] The MFN provision in India-Australia BIT is as follows: 'A Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments or investors of any third country.'

3.4.3 India contended this on two grounds – first, such importation would 'fundamentally subvert the carefully negotiated balance of the BIT'; and second, 'it would 'be contrary to the emphasis in the BIT on domestic law'.[54] However, the tribunal did not agree with India's stance.[55] The tribunal also held that an importation of the substantive provision into the primary BIT would serve the purpose for which

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[52] Stephan Schill, *Multilateralization of International Investment Law,* Cambridge University Press, 2009, p 140. Also see Vladimir Berschader v Russia, Award, 21 April 2006, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 080/2004, para 179. It has been argued that the MFN provision has the potential to multilateralize international investment law, by Schill (2009).

[53] White Industries vs India, available at: http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf, p 11.1.1—11.1.5.

[54] White Industries vs India, available at: http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf, p 11.2.1.

[55] White Industries vs India, available at: http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf, p 11.2.2 —11.2.8.

countries have incorporated the MFN provision in the BIT.[56] Thus, the tribunal allowed Australia to import a beneficial substantive provision from another BIT into the primary BIT, which did not have this provision.

3.4.4 The 2015 Model does not contain an MFN provision. The Indian government has not provided any detailed explanation for its absence. It appears that the purpose behind not having an MFN provision is to ensure that foreign investors are not able to borrow beneficial provisions from other Indian BITs (Treaty Shopping). India's major concern with the MFN is the use of this provision by foreign investors to borrow beneficial substantive and procedural provisions from third-country BITs. The absence of an MFN provision will surely prevent the foreign investor from indulging in such borrowing. However, foreign investors will be exposed to the risk of discriminatory treatment by the Host State in application of domestic measures. Thus, absence of an MFN provision does not balance investment protection with regulation. In order to achieve this balance, India could consider having an MFN provision whose scope is restricted to the application of domestic measures. This will ensure non-discriminatory treatment to foreign investor, and, at the same time, will not allow a foreign investor to indulge in 'treaty shopping'.[57]

[56] White Industries vs India, available at: http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf, p 11.2.4.

[57] UNCTAD, Most Favoured Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II, 2010, p 60, 111.

CHAPTER IV

INVESTOR, INVESTMENT AND HOME STATE OBLIGATIONS

A. General comment:

4.1.1 Conventionally, BITs tend to guarantee foreign investors a certain quality and standard of treatment when they enter a Host State, without placing any obligations on the investors themselves. In the recent years, there has been a trend towards rebalancing rights and obligations of Host States and investors, through the inclusion of provisions that seek to preserve the Host State's discretion on matters of public policy. India, too, has officially acknowledged that in future BITS, 'the rights and obligations of investors vis-a-vis India should be rebalanced and economic and public policy objectives like security, public health, and environment protection should be introduced into these agreements'.[58]

4.1.2 India has in the past signed a few BITs that guarantee investors certain rights (such as the right to repatriate investments or returns) only if the investors comply with certain defined obligations (such as 'fiscal', 'tax', or 'financial' obligations)[592] or general obligations 'in accordance with all laws'.[60] An equivalent of Chapter III of the 2015 Model, which imposes direct obligations on investors and sets out consequences of the non-compliance in relation to the investor-State dispute resolution process, was however not present in India's 2003 Model. This has

[58] Ministry of Commerce, 'International Investment Agreements between India and Other Countries' (document on file with the author), as cited in Prabhash Ranjan, 'India and Bilateral Investment Treaties - A Changing Landscape', 2014, ICSID Review, pp 1-32

[59] See, for example, BITs with Belarus, Bulgaria, Israel, Kazakhstan, Kyrgyz Republic, Macedonia, Morocco, Slovak Republic, Uzbekistan

[60] See, for example, BITs with Argentina, China

presumably been included in light of this above policy position articulated by the Indian government.

4.1.3 Model BITs prepared by bodies such as the Southern African Development Community (SADC)[61] and the International Institute for Sustainable Development (IISD)[62] suggest a deviation from the current international practice by including specific obligations for investors. Some of the text in Chapter III of the 2015 Model appears to have been borrowed from those models. The Model BIT adopted by Ghana in 2008 also contains a provision requiring investors to be bound by the laws of the Host State, including labour, health and environment laws; assist in human capital formation and capacity building; and behave in accordance with internationally accepted standards applicable to foreign investors.[63]

4.1.4 As noted above, provisions of this nature are not commonly seen in actual treaty practice. Examples found in regional cooperation agreements and free trade agreements are listed in the table below. Most treaties either tend to remain silent on the obligations of investors or provide for a general obligation to act in accordance with the laws of the Host State. In instances where specific investors are expected to comply with specific requirements, the practice seems to be, to make the State Parties responsible for ensuring that such expectations are met rather than casting direct obligations on investors themselves.

[61] SADC is an inter-governmental organisation whose goal is to promote sustainable and equitable economic growth and socio-economic development. Its 15 member States belong to the Southern African region. See SADC Model Bilateral Investment Treaty, 2012, available at: http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bittemplate-final.pdf

[62] IISD, a Canada-based charitable organization, seeks to promote human development and environmental sustainability through innovative research, communication and partnerships. See IISD Model International Agreement on Investment for Sustainable Development, 2006, available at: https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf

[63] Article 12, Ghana Model BIT, 2008, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2866

	Treaty	Relevant provision
1.	SADC Protocol on Finance and Investment, 2006[64]	Article 10 – Corporate responsibility Foreign investors shall abide by the laws, regulations, administrative guidelines and policies of the Host State.
2.	Investment Agreement for the Common Market for Eastern and Southern Africa[65]	Article 13 - Investor Obligation COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.
3.	Economic Partnership Agreement between the Forum of the Caribbean Group of African, Caribbean and Pacific (CARIFORUM) States and the European Community (EC), 2008[66]	Article 72 - Behaviour of investors The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure that: (a) Investors be forbidden from, and held liable for, offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to any public official or member of his or her family or business associates or other person in close proximity to the official, for that person or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, or in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment. (b) Investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties.[67] (c) Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties. (d) Investors establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities, in so far that they do not nullify or

[64] SADC Protocol on Finance and Investment, 2006, available at http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf

[65] Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA), 2007, available at: http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf

[66] Economic Partnership Agreement between the Forum of the Caribbean Group of African, Caribbean and Pacific (CARIFORUM) States and the European Community, 2008, available at: http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf

[67] These core labour standards are further elaborated, in accordance with the Declaration, in ILO Conventions concerning freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in the work place.

		impair the benefits accruing to the other Party under the terms of a specific commitment.
4.	Canada-Columbia Free Trade Agreement[68]	Article 816: Corporate Social Responsibility Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.

4.1.5 Chapter III of the 2015 Model also introduces a new provision on "Home State obligations" requiring courts in the Home State to recognize foreign direct liability in situations where an investment causes damages or loss of life in the Host State. The Home State is required to ensure that its legal system does not bar such actions.

B. Article 8. Scope of this Chapter

(i) Analysis and comment:

4.2.1 Article 8.1 sets out the objective of including this Chapter in the 2015 Model, i.e., to ensure that investments are in compliance with local laws and enhance their contribution to inclusive growth and sustainable development. Article 8.1 appears to have merely interpretive value, because the remainder of the Article and the Chapter do not, at any stage, lay down what "inclusive growth" or "sustainable development" entail, nor do they impose any independent obligations relating to these two concepts on the investor.

[68] Canada-Columbia Free Trade Agreement (last modified: 2013), available at: http://www.international.gc.ca/tradeagreements-accords-commerciaux/agr-acc/colombia-colombie/chapter8-chapitre8.aspx?lang=eng

4.2.2 The terms “inclusive growth” and “sustainable development” are a signature of “new generation” investment policies and are also used in the preamble of the 2015 Model. However, the terms are not used again in the 2015 Model except in Article 8.1. Even in Article 8.1, the terms have litte substantive value, and can be used, at best, to indicate the treaty’s intent, which has already been done through the use of these terms in the preamble. As the intent of the Chapter appears to be to impose certain standards of responsible behaviour on the part of the investors (for instance, the rest of the Chapter refers to obligations against corruption, disclosures compliance with the laws of the Host State, and so on), Article 8.2 provides relatively better guidance for an investor regarding the objective of the chapter, in context of the Articles that follow. Thus, it may be appropriate to redraft Articles 8.1 and 8.2 to a single clause.

(ii) Suggested draft:

8.1 The objective of this Chapter is to prescribe the minimum obligations for Investors and their Investments for responsible business conduct, taking into account the principles set out in the preamble to this Treaty.

Article 8.2 may be deleted.

C. Article 9. Obligation against Corruption

(i) Analysis and comment:

4.3.1 This obligation to prevent anti-corrupt practices appears to have been derived from existing requirements under Indian laws on corruption[69] and India’s obligations[70] under the 2003 United Nations

[69] Prevention of Corruption Act, 1988

[70] United Nations Convention against Corruption, Signature and Ratification Status as of 1 April 2015, available at http://www.unodc.org/unodc/en/treaties/CAC/signatories.html

Convention Against Corruption,[71] as well as provisions relating to foreign contributions to political parties and candidates.[72] It is similar to the SADC Model (Article 10), and the IISD Model (Article 13), with the exception of disclosures relating to political funding.

4.3.2 Arbitral tribunals have in the past allowed[73] corruption by the investor to be raised as a ground for denial of benefits to the investor by holding that investment must be lawful even when there is no express provision requiring so in the contract.[74]

4.3.3 India's interests as a Host State can be protected by requiring that the investment has to be made and maintained in accordance with its laws, as already done at several places in the 2015 Model. This is because all the requirements stipulated under Article 9 are already covered under various domestic Indian laws. However, the implications of this provision should also be considered from the perspective of Indian investors investing abroad. An obligation against corruption is toothless without complementary obligations upon the Host State, such as the requirement of transparency and competition in public procurement and decision-making. Some of these obligations are already imposed on States Parties to the UN Convention Against Corruption (Article 9). The

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[71] UNODC, United Nations Convention Against Corruption, available at: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

[72] Sec 29B, Representation of the People Act, 1951, and Sec 3, Foreign Contribution Regulation Act, 2010

[73] For example, In World Duty Free vs. Republic of Kenya, the tribunal held that no claim could be brought under an agreement that was procured by the investor through corrupt means. The tribunal held that bribery is contrary to the international public policy of most, if not all, States and Kenya was entitled to avoid the contract under the applicable laws, namely the laws of England and Kenya. See, ICSID Case No. Arb./00/7, Award, 5 September 2006, available at: http://www.italaw.com/documents/WDFv.KenyaAward.pdf . In Metal-Tech Ltd vs. Republic of Uzbekistan, the tribunal relied on the legality requirement contained in the definition of "investment" under the Israel-Uzbekistan BIT to hold that an investment made through corrupt means would not be entitled to the benefits of the dispute settlement provisions in the treaty. The Israel-Uzbekistan BIT defined "Investment" in Article 1(1): "The term 'investments' shall comprise any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made, including, but not limited to…"

[74] Vicente Yu and Fiona Marshal, 'Investors' Obligations and Host State Policy Space', 2nd Annual Forum for Developing Country Investment Negotiators, held in Marrakech, Morocco, 2–4 November 2008, available at: https://www.iisd.org/pdf/2008/dci_inv_obligations.pdf

issue of transparency requirements is discussed in more detail in the comments on Article 11.

(ii) Suggested draft:

4.3.4 Specific drafting language is not provided. However, India may consider incorporating Host State obligations, such as transparency and competition in public procurement and decision-making.

D. Article 10. Disclosures

(i) Analysis and comment:

4.4.1 Disclosure requirements imposed on investors are routine in BITs.[75] Prior to establishing an investment in a State, certain disclosures may be sought to enable the potential Host State to make appropriate decisions regarding the investment, or for statistical purposes.[76] Once an investment has been established in a Host State, disclosures must usually follow standard and accepted principles of corporate governance, as prevalent in the Host State.

4.4.2 Article 10.6 requires certain disclosures to be made by the investor or investment on demand by the Host State. Investors and Investments have been specifically mandated to develop and follow policies for timely disclosure of material information "even where not required to do so by law of the Host State." These requirements appear to be vague in nature and impose unreasonable obligation to maintain records or make disclosures that are not clearly known to the investor in advance. Provisions such as these can send negative signals to prospective investors, and it is suggested that open-ended requirements of this nature be avoided entirely. If a BIT requires disclosures over and above those required under the laws of the Host State, this list of disclosures should either be clearly delineated in the BIT itself or there should be a

[75] Art 11(D), IISD Model, Commentary, p 22.
[76] Art 11(D), IISD Model, and Art 12, SADC Model.

definitive provision stating that any such requirement will be applicable only if it has been clearly communicated in advance by the Host State. Any disclosure requirement, or in fact, any obligations imposed under a BIT, upon investors, must take into consideration the National Treatment obligations that are provided for through the same treaty.

4.4.3 It is suggested that disclosure obligations should also be accompanied by the manner in which the Host State will use the information (e.g., will the information thus provided be disclosed to the public), and the assurance that disclosures will protect confidential business information, and will not compromise the business interests or the competitive position of the investor or the investment.[77] For example, the Canada-Colombia FTA allows the Host State to require an investor or its investment to provide routine information concerning the investment "solely for informational or statistical purposes". It then requires that the party collecting such information should "protect any confidential information from any disclosure that would prejudice the competitive position of the investor or the covered investment". It also clarifies that the Host State is not prevented from obtaining or disclosing information in connection with the equitable and good faith application of its laws.[78]

(ii) Suggested draft:

4.4.4 Specific drafting language is not provided. However, the following suggestions are made:

1. Open-ended disclosure requirements such as those in Article 10.6 should be avoided. Instead, an exhaustive list of disclosures should be clearly delineated in the BIT, or the provision should state that any such disclosure requirement will be

[77] Art 12, SADC Model.
[78] Article 813, Chapter 8 of the Canada-Columbia FTA, http://www.international.gc.ca/trade-agreements-accordscommerciaux/agr-acc/colombia-colombie/chapter8-chapitre8.aspx?lang=eng

applicable only if it has been clearly communicated in advance by the Host State.

2. A provision stating the manner in which the Host State will use the information disclosed by the investor/investment may be added. It should also clarify that the Host State will protect confidential business information, and will not compromise business interests or the competitive position of the investor or the investment.
3. Any obligations imposed upon investors under the BIT must take into consideration the National Treatment obligations that are provided for through the same treaty.

E. Articles 11 and 12. Taxation and Compliance with Laws of Host State

(i) Analysis and comment:

4.5.1 The 2015 Model has a general exclusion that states the treaty does not apply to any taxation measure (Article 2.6(iv)). The 2015 Model also asserts the supremacy of the Host State in determining whether or not any conduct on its part is a subject matter of taxation and therefore excluded from the scope of the treaty. Taxation also appears in Article 6.3 that lists accepted interventions by the Host State to restrict the general right of an investor to freely transfer funds relating to an investment. As per Article 6.3(vi), a party may condition or prevent a transfer of funds by the investor through a good faith application of its laws on taxation.

4.5.2 Articles 11 and 12 deal with the investor's obligation to comply with the Host State's laws. Article 11 adopts the tax responsibility model[79] by requiring investors and their investments to comply with taxation provisions, including by making timely

[79] UNCTAD Series on issues in international investment agreements, Taxation, p. 45, available at: http://unctad.org/en/Docs/iteiit16_en.pdf

payment of their tax liabilities.[80] Article 12 is broader, requiring investors and investments to comply with the laws of the Host State, and then lists the various types of laws. It also requires investors and investments to "strive ... to contribute to the development objectives of the Host State", particularly by recognizing rights of local communities and indigenous peoples.

4.5.3 The 2003 Model also contained a similar provision on "Applicable Laws" (Article 12.1), but the 2015 Model deviates in that compliance with these provisions is mandatory for the investor to claim the benefit of the treaty provisions (Article 8.3). When issuing a notice of dispute under Article 14.3(iii) the investor must furnish a self-certified statement "demonstrating compliance with Articles 9, 10, 11 and 12", and any breach can adversely impact the compensation recoverable by the investor (Article 14.10(ii)) or expose it to a potential counter claim from the Host State (Article 14.11(i)).

4.5.4 This leads to an interpretation where even minor non-compliance with any law could lead to the investor being denied the benefit of the treaty. It is suggested that Articles 11 and 12 may be redrafted to firstly, specify a general requirement of compliance with laws; and secondly, lay down an exhaustive list of areas in which noncompliance of laws would attract the consequences under Article 14.10 and 14.11. Further, the obligation to "contribute to the development objectives of the Host State" given under Article 12.2 is slightly vague, and may not be sustainable unless the state clearly articulates and documents its development objectives in a form known to the investor. It is suggested that such a provision may be treated as a general requirement, rather than one linked to Article 14.

[80] The requirement for investors to make timely payments of their tax liabilities is closely linked to the clarity in the tax demand. See, for example, Shefali Anand and Kenan Machado (2015), 'India's Minimum Alternate Tax', The Wall Street Journal, available at: http://blogs.wsj.com/briefly/2015/04/17/indias-minimum-alternate-tax-the-short-answer/

4.5.5 A tribunal must take into account any breach of laws while awarding compensation under Article 14, but it is unclear if the tribunal must determine whether the investor has complied with the Host State's laws and can therefore claim treaty benefits. This interpretation would significantly enlarge the scope of the tribunal's responsibilities. Therefore, instead of requiring the investor to demonstrate compliance with laws, it may be sufficient to allow the Host State to raise this issue in its response/counter-claim and to prove the same before the tribunal. The IISD Model provides guidance in this regard.[81]

4.5.6 The 2015 Model imposes specific obligations on investors, and it is suggested that the Host State should be equally required to make information publicly available, including information relating to laws and regulations, administrative procedures, rulings, judicial decisions, and international agreements, as well as draft or proposed rules.[82]

(ii) Suggested draft:

4.5.7 Specific drafting language is not provided. However, the following suggestions are made:

1. Articles 11 and 12 may be redrafted to firstly, specify a general requirement of compliance with laws; and secondly, lay down an exhaustive list of areas in which noncompliance of laws would

[81] While the IISD model also requires investments to be subject to the laws and regulations of the Host State (Article 11), no general consequences of non-compliance have been provided. In contrast, that model identifies certain specific obligations relating to pre-investment impact assessment; anticorruption obligations; post-establishment obligations; and corporate governance norms and separately provides for the consequences of non-compliance of each requirement. For instance in the context of post establishment obligations and corporate governance norms the IISD model specifies that there should have been a "persistent failure to comply" (rather than an isolated incident) and the tribunal hearing such dispute should consider whether the breach, if proven, is "materially relevant to the issues before it", and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any award of damages (Article 18). The IISD Model is available at: https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf

[82] For discussion on transparency in BITs, see UNCTAD, Transparency, UNCTAD/DIAE/IA/2011/6, available at: http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf

attract the consequences under Article 14.10 and 14.11.

2. The obligation under Article 12.2. to "contribute to the development objectives of the Host State" may be treated as a general requirement, rather than one linked to Article 14.
3. Under Article 14, instead of requiring the investor to demonstrate compliance with laws, it may be sufficient to allow the Host State to raise this issue in its response/ counter-claim and to prove the same before the tribunal.
4. Certain transparency requirements may be clearly imposed on the Host State, such as making certain types of information publicly available, including information relating to laws and regulations, administrative procedures, rulings, judicial decisions, and international agreements, as well as draft or proposed rules.

F. Article 13 - Home State Obligations

(i) Analysis and comment:

4.6.1 Article 13 recognizes the right of the Home State to take judicial action against anything done in the Home State in relation to an investment that lead to significant damage, personal injuries or loss of life in the Host State. The provision further compels the Home State to ensure that its legal system does not bar the bringing of such actions before its courts.

4.6.2 Article 13 is modelled on Article 17 of the SADC model BIT[83] and Article 31 in the IISD model. This provision seeks to remove jurisdictional constraints, such as the *forum non conveniens* rule, that might restrict the hearing of such cases in the Home State on grounds that there is a more suitable forum to hear the case.[84] Such a provision has come

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[83] SADC Model, available at http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf

[84] IISD Model, available at http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf

up in context of 'foreign direct liability cases' such as the Bhopal case filed in the United States and the Cape litigation in United Kingdom. [85] According to the commentary on the IISD Mode, the provision seeks to reverse "one of the great asymmetries of international law today", i.e., that foreign investors have special rights under BITs but no liabilities as they are beyond the scope of Host State courts, as they operate through a separate enterprise set up in that State, and are also not subject to the jurisdiction of courts in Home States for damages occurring elsewhere.[86]

4.6.3 The SADC drafting committee noted that while adopting such a provision, attention must be paid to the national implementation of this obligation. It may require adopting new laws to clarify the jurisdiction of domestic courts and specific training may also need to be provided to the concerned governments. The US Alien Tort Claims Act, 1789 is an example of such a law, which entitles US district courts to have original jurisdiction of civil action for torts committed by an alien in violation of the law of nations or a treaty of the United States.

4.6.4 Article 13.2 suggests that Home States may have to modify their substantive law to allow civil liability claims against investors investing abroad. However, this provision should focus on preventing jurisdictional bars in civil liability claims that would otherwise be maintainable in courts of the Host State if not for jurisdictional constraints.

(ii) Suggested draft:

> 13.2 The Home State shall ensure that their domestic courts are not prevented or unduly restricted from hearing cases relating to the civil

[85] See Liesbeth Enneking, Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability, Eleven International Publishing, 2012, p. 92-100, available at: http://dspace.library.uu.nl/handle/1874/243592

[86] IISD Model International Agreement on Investment for Sustainable Development for Sustainable Negotiators' Handbook Second Edition, available at: https://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf

liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investments or Investors in relation to their Investments in the territory of the Host State.

CHAPTER V

DISPUTE SETTLEMENT

A. General comment:

5.1.1 At the outset, it is relevant to note certain issues relating to the dispute settlement mechanism in investment treaty disputes. One concern is that it is believed that arbitrators in the field have strongly polarized views, and are either strongly pro-State or strongly pro-investor.[87] As a result, there is a risk, which is heightened due to the lack of appellate scrutiny, that the outcome of an arbitration is determined by the constitution of the Tribunal. The International Centre for Settlement of Investment Dispute (ICSID) provides an appellate mechanism, but India is not a signatory to the ICSID mechanism, and therefore, no such appellate mechanism will apply to Indian BIT disputes. However, some courts have held that awards arising out of BITs disputes can be challenged before the Courts at the seat (see judgments of the House of Lords in *Republic of Ecuador V. Occidental Exploration & Production Co* and the US Supreme Court in *BG Group PLC V. Republic of Argentina*).[88] Therefore, it is important that India should have a say while choosing the seat in disputes involving the country, and that the seat should be carefully selected keeping in mind the consequences for appeal, etc., as a result.

[87] Gus Van Harten, 'Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern', Investment Treaty News, 13 April 2012, available at: https://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/

[88] The Republic Of Ecuador V. Occidental Exploration & Production Co. Initial application under S.67, available at: http://www.italaw.com/sites/default/files/case-documents/ita0572.pdf; Appeal of this order available at: http://www.italaw.com/sites/default/files/case-documents/ita0573.pdf; Substantive judgement available at: http://www.italaw.com/documents/OxyEcuadorHCJChallenge.pdf; Appeal of this order: http://www.italaw.com/sites/default/files/case-documents/ita0575.pdf]; Summary: http://www.olswang.com/pdfs/ecuador_occidental_apr06.pdf; BG Group PLC V. Republic of Argentina [Majority available at: http://www.italaw.com/sites/default/files/case-documents/italaw3115.pdf; Concurring: http://www.italaw.com/sites/default/files/case-documents/italaw3116.pdf; Dissent: http://www.italaw.com/sites/default/files/case-documents/italaw3117.pdf; Summary http://www.jonesday.com/files/Publication/9db71b6c-742a-486b-9931-8ead6add2500/Presentation/PublicationAttachment/33bde14d-9108-4afb-9a6a-91808b6f7338/US%20Supreme%20Court%20Gives%20Deference.pdf

5.1.2 The 2015 Model provides for only ad-hoc international arbitration, and avoids reference to other fora like International Centre for Settlement of Investment Disputes (ICSID) (for States that are parties to ICSID), as well as the ICSID Additional Facility, which could be used to bring a claim against States that are not party to the ICSID. Even though India is not a party to ICSID, reference to these alternate dispute resolution methods might benefit Indian investors abroad seeking to bring a claim against other States. Thus, by limiting the forum for dispute resolution, the 2015 Model might deny available remedies to Indian investors abroad. The India-Saudi Arabia BIT provides some guidance in this regard.[89] However, since the choice of dispute resolution fora is a policy decision, the remainder of the comment in this chapter does not venture into details in this regard.

B. Article 14.1. Purpose

(i) Analysis and comment:

5.2.1 The provision may be construed as vague because it prohibits the use of the Investor-State Dispute Settlement (ISDS) mechanism to 'obtain money, property, or any other thing of value from the Host State, or otherwise compel the Host State to act or refrain from acting. The provision may also potentially cover the enforcement of awards that may penalize the Respondent State for violating a substantive provision, which would lead to a monetary award, and therefore violate this provision. It is likely that this provision may not be acceptable to countries on the other side of the negotiating table.

(ii) Suggested draft:

5.2.2 It is suggested that Article 14.1 be removed.

C. Article 14.2(ii). Instances where ISDS mechanism is not applicable

(i) Analysis and comment:

5.3.1 Articles 14.2(ii)(a) and (b) preclude a Tribunal's jurisdiction to review 'any legal issue which

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[89] Article 12.4 (a) of India – Saudi Arabia BIT

has been finally settled by any judicial authority of the Host State' and the merits of a decision made by a judicial authority of the State. This appears to have been introduced to ensure that the tribunal does not sit on appeal over the decisions of Indian Courts.

5.3.2 However, this provision renders the entire BIT unworkable. Article 14.3 requires that prior to issuing a notice of dispute, the investor must have pursued domestic remedies. Article 14.3(ii) provides that a notice of dispute can be issued only where local remedies have been 'exhausted' to the dissatisfaction of the investor or the investor is capable of proving that continued pursuit of domestic relief would be futile for specific reasons. Pursuing domestic remedies would entail an interaction with the judicial authorities of the Host State, which would result in judgments or orders, which would in turn be decisions on merits. However, the 2015 Model contemplates that all issues on merits must first be tested before a local forum, while, at the same time, providing that any finding by a local Court shall act as a jurisdictional bar in so far as the Arbitral Tribunal is concerned. It is hard to contemplate too many scenarios where an investor would comply with the provision for exhaustion of local remedies and yet overcome the jurisdictional bar imposed by Article 14.2(2).

5.3.3 For instance, assume that Company X takes objection to a Taxation Amendment passed by the Legislature and places the matter before a High Court or Supreme Court, requesting it to be tested for constitutionality. If the Court renders a decision or dismisses the claim, these clauses would prevent the same from being agitated before a tribunal despite it being brought before the Tribunal on the grounds of being a violation of the substantive protections afforded under the BIT (e.g., Fair and Equitable Treatment, National Treatment, etc.)

5.3.4 Article 14.2(ii)(a) is problematic to the extent that it precludes the re-examining of any legal issue that has been decided by a judicial authority. Thus, it is suggested that Article 14.2.(ii)(a) be removed. However Article 14.2(ii)(b) is in consonance with ordinarily accepted tribunal jurisdictions, where tribunals are precluded from reconsidering the merits of a matter and are limited to considering it within the context of treaty protections.

5.3.5 Article 14.2(ii)(d) places decisions taken by the State under Articles 16.1(ii) and (iii) and Article 17 on a pedestal and makes such decisions non-justiciable. While such treatment of Article 17 (which relates to security of the nation) may be justified, such treatment of decisions taken under Articles 16.1(ii) and (iii), which relate to the financial stability of the Host State could be problematic, and may be used as an arbitrary mechanism by States to renege from BIT obligations. Article 14.2(ii)(d) may be reconsidered on this basis so as to restrict its applicability to Article 17.

(ii) Suggested draft:

5.3.6 The following suggestions are made:

1. Article 14.2(ii)(a) may be removed.
2. Article 14.2(ii)(d) may be reconsidered and its applicability may be restricted to Article 17 only.

D. Article 14.3. Exhaustion of local remedies, Notice and Consultation.

(i) Analysis and comment:

5.4.1 Article 14(3)(iv) provides that at least one year must elapse from the issuance of a notice of dispute during which the investor and the respondent State must use their best efforts to try to resolve the dispute amicably through meaningful consultation, negotiation or continued pursuit of any available domestic remedies or solutions. There is a risk that tribunals may treat this as only a procedural/admissibility requirement. In some cases, the tribunals have either ignored waiting periods or have permitted non-compliance with them or suspended proceedings in order to permit the parties to reach an amicable settlement.[90] However there is a divergence in the jurisprudence.[91]

5.4.2 Article 14(3) (v) has been included for this reason, to provide that exhaustion of domestic remedies, providing a proper notice of dispute, and the use of best efforts to resolve the dispute amicably are mandatory and conditions precedent to the submission of the dispute to arbitration. While the language of this provision, by itself, clearly brings out the intention of parties, considering the amount of unnecessary litigation on this issue of whether the pre-arbitration procedures are merely directory, the provision may be slightly redrafted by way of clarification.

(ii) Suggested draft:

> 14.3(v). The Parties agree that the requirements under this Article regarding exhaustion of domestic remedies, providing a proper Notice of Dispute, and the use of best efforts to resolve the dispute amicably are mandatory and conditions precedent to the submission of the dispute to arbitration. Non-compliance with any subparagraph of Article 14.3 bars the Disputing Investor from taking subsequent steps to pursue

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[90] See, for example, SGS Sociedt 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, available at: http://www.italaw.com/sites/default/files/case-documents/ita0779.pdf. Similarly in Ronald S Lauder v The Czech Republic (UNCITRAL, Final Award, 3 September 2001, p 190 [available at: http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf), the tribunal was of the opinion that 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'. The tribunal in Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan (ICSID Case No ARB/03/29, Decision on Jurisdiction (Nov 14, 2005), p 100, available at: http://www.italaw.com/sites/default/files/case-documents/ita0075.pdf), gave the policy reason for not insisting on the expiry of a waiting period by stating that it 'would simply mean that [an investor] would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage'.

[91] For instance, the tribunal in Murphy Exploration and Prod Co Int' v Republic of Ecuador (ICSID Case No ARB/08/4, Award on Jurisdiction (Dec 15, 2010), p 149, available at: http://www.italaw.com/sites/default/files/case-documents/ita0547.pdf), held that 'the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six month period does not constitute, as Claimant and some arbitral tribunals have stated, a procedural rule' or a 'directory and procedural' rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules'.

arbitration under Article 14. Non-compliance with these requirements would constitute a jurisdictional bar, precluding any Tribunal setup in pursuance to this Treaty from exercising jurisdiction over the claim.

E. Article 14.4(4). Additional conditions precedent for submission of dispute to arbitration.

(i) Analysis and comment:

5.5.1 Article 14.4(i)A(b) gives a party a maximum of 18 months from the completion of domestic remedies to negotiate and amicably resolve the dispute. This period would also include the mandatory minimum of a one-year period for negotiation. If respondent parties wish for there to be an actual possibility of negotiation, the same must not be time-barred, and instead the limitation for arbitration must be calculated from the breakdown of negotiations.

(ii) Suggested draft:

> 14.4(i)A(b). 6 months have elapsed from the conclusion of negotiations or other attempts to amicably settle the dispute pursuant to Article 14.3 (iv).

5.5.2 The language in Article 14.4(ii) may also require reconsideration. It specifies that if an investment dispute cannot be settled amicably, and provided there has been full compliance with the conditions under Article 14.3 and 14.4(i), including 'written consent for the submission of the claim to arbitration by the Parties', the matter maybe referred to arbitration. This seems to suggest that there is a further requirement, besides this treaty, where the parties must consent in writing to the reference to arbitration.

5.5.3 However, the purpose of a BIT and the ISDS mechanism contained in the treaty, is to provide for a neutral mechanism such as arbitration in case a dispute arises. Under the 2015 Model, either party may deny a written consent to refer the matter to arbitration thus making the ISDS mechanism in the BIT redundant. This provision appears to have been derived from the general principle evolved from ICSID jurisprudence that an arbitration clause in an investment dispute is a standing offer to arbitrate on behalf of the State which the investor may or may not accept.[92] It appears that the intention has been to use this position as the starting point but dilute it so as to not bind the State as well. Such an amendment converts the arbitration clause into an agreement to agree. States on the other end of the negotiating table might not find such a formulation acceptable.

(iii) Suggested draft:

It is suggested the Article 14.4(ii) be redrafted to omit the line requiring written consent from the submission of the claim to arbitration to read as follows:

14.4(ii) In the event the Investment Dispute cannot be settled amicably, and provided there has been full compliance with the conditions set forth in Article 14.3 and 14.4 (i),the Investor, on behalf of an Investment that the Investor directly owns or controls, may submit to arbitration under this Article a claim ("Claim"):
a. …
b. …

F. Article 14.5. Appointment of arbitrators.

(i) Analysis and comment:

5.6.1 This is a standard provision outlining the procedure for appointment of arbitrators. It has been a unique but consistent feature in India's BIT programme as is noted by its inclusion in the 2003

[92] Alan Redfern, Law and Practice of International Commercial Arbitration; http://caselaw.findlaw.com/us-2nd-circuit/1559739.html [in Republic of Ecuador *v.* Chevron, the US Circuit Judge says that a BIT is a standing offer to arbitrate]; Zachary Douglas, The International Law of Investment Claims

Model, to have the appointment of the Presiding arbitrator done by the International Court of Justice, in case consensus may not be evolved by the parties. However, it may be clarified in Article 14.5 that the third arbitrator or Presiding Arbitrator will not be a citizen of either the Home State or the Host State, as was the practice in the 2003 Model.

(ii) Suggested draft:

14.5(i) The arbitral tribunal shall consist of three arbitrators with relevant expertise or experience in public international law, international trade and international investment law, or the resolution of disputes arising under international trade or international investment agreements. One arbitrator shall be appointed by each of the disputing parties and the third arbitrator ("Presiding Arbitrator") shall be appointed by agreement of the co-arbitrators and the Parties. The Presiding Arbitrator shall not be a citizen of either the Host State or the Home State.

14.5(ii) If arbitrators are not appointed within one hundred twenty days (*120*) days from the date a Claim is submitted to arbitration under this Article, the appointing authority under Article 7 of the UNCITRAL Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice; the appointing authority under this sub-clause shall not be a national of either Contracting Party or a national of a country with which either Contracting Party does not have diplomatic or consular relations.

G. Article 14.6. Prevention of conflict of interest of arbitrators and challenges.

(i) Analysis and comment:

5.7 Considering the public interest involved in BIT arbitrations, it may be advisable to incorporate a more exhaustive standard than what has been provided in Article 14.6(x) to ensure neutrality of the arbitrators. As an option, the International Bar Association (IBA) Guidelines in Conflicts of Interest in International Arbitration may be incorporated. However, due to the constant revision of the IBA guidelines, the incorporation may be made through reference.

(ii) Suggested draft:

> 14.6(ii) Upon nomination and, if appointed, every arbitrator shall, on an ongoing basis, disclose in writing any circumstances that may, in the eyes of the Parties, give rise to doubts as to her/his independence, impartiality, or freedom from conflicts of interest. This includes any grounds provided for in the IBA Guidelines on Conflicts of Interest in International Arbitrations, as applicable on the date of occurrence of the dispute, and any other relevant circumstances pertaining to the subject matter of the dispute, and to existing or past, direct or indirect, financial, personal, business, or professional relationships with any of the parties, legal counsel, representatives, witnesses, or co-arbitrators. Such disclosure shall be made immediately upon the arbitrator acquiring knowledge of such circumstances, and shall be made to the co-arbitrators, the parties to the arbitration and the appointing authority, if any, making an appointment. Neither the ability of those individuals or entities to access this information independently, nor the availability of that information in the public domain, will relieve any arbitrator of his or her affirmative duty to make these disclosures. Doubts regarding whether disclosure is required shall be resolved in favor of such disclosure.

H. Article 14.8. Transparency in arbitral proceedings.

(i) Analysis and comment:

5.8.1 The United Nations Commission on International Trade Law (UNCITRAL) Rules on

Transparency in Treaty–based Investor-State Arbitration came into effect on 1 April 2014. Indian treaty arbitrations are subject to UNCITRAL arbitration rules as per Article 14.7(i) and consequentially, this Article appears to have been included to bring Indian treaty arbitrations in consonance with internationally acceptable rules.[93] This is a most welcome change as investment treaty arbitrations are usually concluded in secrecy with little information.

5.8.2 However, it is recognized that the disclosure of certain documents especially during the pendency of the dispute might prejudice the legal rights of the parties. This is particularly relevant in the context of 14.8(i)(b), which requires that pleadings and other written submissions on jurisdiction and the merits submitted to the tribunal, including submissions by a Non-disputing Party under Article 14.8(iv), must be made available to the public.

5.8.3 Article 14(8)(iv) provides that a non-disputing Party may make oral and written submissions to the tribunal regarding treaty interpretation. However, if there is a dispute between Parties on treaty interpretation or application, it maybe referred to arbitration if it cannot be settled within 6 months, according to Article 15.1(i). Thus, there is a conflict between these provisions, and if there exists a conflict in the interpretations provided by the States, presumably the Investor-State arbitration will have to be paused until it is resolved under Article 15. The capacity to submit such interpretations therefore causes confusion and may be used as a means of exercising soft diplomatic protection. It is suggested

[93] Even though this transparency requirement has been included in the 2015 Model, apparently in consonance with the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('the Mauritius Convention'), it is relevant to note that India is not as yet a signatory to this treaty. (UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014, available at: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf)

that Article 14.8(iv) be removed, and Article 14.8(ii)(b) be amended appropriately.

5.8.4 Certain other concerns regarding transparency in arbitral proceedings may require to be considered. For instance, there is ambiguity as to the stage at which documents relating to the investment dispute are to be made public. Further, it is suggested that there may be clarity as to whether the obligation on the Respondent Party to make public *all* the documents relating to the dispute includes any submitted by the other Party. The responsibility of making logistical arrangements to facilitate public access to the hearings is placed upon the arbitral tribunal according to Article 14.8(ii)(b). However, there might be challenges in the practical execution of this provision, as the tribunal envisioned under the 2015 Model is an ad hoc tribunal, which need not necessarily have the administrative capacity to make such arrangements.

(ii) Suggested draft:

14.8 (i) Subject to applicable Law regarding protection of confidential information, the Respondent Party shall make available to the public the following documents relating to Investment Disputes:

a. ...

b. Pleadings and other written submissions on jurisdiction and the merits submitted to the tribunal;

c. ...

d. ...

14.8(iv) may be removed.

Specific drafting language is not provided. However, it is further suggested that:

1. It may be clarified as to the stage at which documents relating to the investment dispute are to be made public.
2. It may be clarified as to whether the obligation on the Respondent Party to make public *all* the

documents relating to the dispute includes any submitted by the other Party.

3. The concerns of the capability of a tribunal to make logistical arrangements to facilitate public access to the hearings may need to be addressed appropriately.

I. Article 14.9. Burden of proof and governing law.

(i) Analysis and comment:

5.9.1 Article 14.9 specifies that the treaty shall be interpreted in context of, among other things, the Vienna Convention of the Law of Treaties, 1969 (VCLT). India is not a signatory to the VCLT and has not ratified the same. Therefore the VCLT in its entirety is inapplicable except in instances where it codifies customary international law, thus it is suggested that the reference to VCLT be removed from Article. 14.9.

5.9.2 However, rules of interpretation under Articles 31 and 32 of the VCLT are recognized as codification of customary law,[94] and are applicable in the interpretation of this BIT. Article 31(1) is regarded as the golden rule of interpretation requires that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Further Article 31(2) provides that the context shall include, besides the preamble, any agreement concluded between the parties. In the 2015 Model, clearly, this context will be as per Article 14.9(1). Article 14.9(v) also specifies that subsequent agreement and practice regarding interpretation or application of this Treaty shall constitute authoritative interpretations of this Treaty. This is in accordance with Article 31(3)(a) and (b), which have been regarded

[94] Legality of Use of Force (Serbia and Montenegro/Belgium)(Preliminary Objections) Case, ICJ Reports 2004 318, para. 100; LaGrand (Germany/USA) Case, ICJ Reports 2001 501, p 99; Kasikili/Sedudu Island(Botswana/Namibia) Case, ibid. 1999 1059, p 18; Arbitral Award of 31 July1989 (Guinea-Bissau/Senegal) Case,1991 69 f, p 48

as a codification of customary international law and is therefore applicable to the 2015 Model.[95]

5.9.3 Article 14(9)(iv) makes Party interpretations of the treaty, binding upon Tribunals that pass decisions subsequently. The fundamental purpose of any interpretative exercise is in order to ascertain party intention, therefore this provision is in consonance with generally accepted international law.

(ii) Suggested draft:

Specific drafting language is not provided. However, reference to the Vienna Convention of the Law of Treaties, 1969 may be removed from Article. 14.9.

J. Article 14.10. Award.

(i) Analysis and comment:

5.10.1 There is a contradiction between Articles 14.10 and 14.11. Article 14.10 suggests that an award for compensation can be passed only upon a breach of Chapter II, while Article 14.11 provides that compensation can be awarded even when there is a breach of Chapter III obligations by the investor. Article 14.11 is relatively clear, but it is suggested that a reference may be made in Article 14.10 itself to the compensation awarded under Article 14.11.

5.10.2 Article 14.10 is also unclear as to when breaches of obligations become relevant. It is suggested that the discretion of tribunals while calculating compensation should be limited and as clarification, therefore, breaches of Chapter III should

[95] Case concerning Kasikili/Sedudu Island (Botswana v. Namibia) [1999], I.C.J. Reports 1999, p. 1076, para. 50; Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece) (Judgment) [5 December 2011], para. 99

only become relevant in calculating compensation in instances where counterclaims have been made.

(ii) Suggested draft:

Article 14.10(ii) Subject to Article 14.11, a tribunal can only award monetary compensation for a breach of the obligations under Chapter II of the Treaty. In awarding any compensation under this Treaty, a tribunal constituted under this Article shall take into account any breach of the obligations contained in Articles 9, 10, 11 and 12 of Chapter III of this Treaty by the Investor and its Investment, only in instances where a counterclaim has been raised for the purposes of Article 14.11.

CHAPTER VI

EXCEPTIONS

A. Article 16. General exceptions.

(i) Analysis and comment:

6.1.1 The 2015 Model contains a separate chapter on exceptions covering both general and security exceptions. Article 16 contains general exceptions with a long list of permissible objectives, which includes not just health, environment, public order, public morals but also measures 'improving working conditions' (Article 16.1(vi)) and 'ensuring the integrity and stability of its financial system, banks and financial institutions' (Article 16.1(ii)). The inclusion of such a large number of permissible objectives is an example of India being a 'rule-maker' in formulating general exceptions to balance investment protection with the Host State's right to regulate.

6.1.2 However, other features of this provision tilt the balance towards the Host State's regulatory power. For example, the general exception clause is self-judging. Article 16.1 states that 'nothing in this Treaty precludes the Host State from taking actions or measures…which it considers necessary'… The result is limited scrutiny of the regulatory measure by an ITA tribunal.

6.1.3 Having a self-judging general exception is surely an example of India being a 'rule-maker' though this rule does not meet the objective of balancing investment protection with the Host State's regulatory power. While a self-judging security exception is a common feature, a self-judging general exception measure could result in possible abuse by the Host State.

6.1.4 Article 16 also does not contain any chapeau of the kind found in Article XX GATT or in the FTA investment chapters. As a result, it will be difficult to check the abusive application of 'general exception' measures by the Host State.[96]

6.1.5 Further, Article 16.3 exempts the application of the treaty to regulatory measures adopted by local bodies or authorities. Thus, foreign investors have no protection from regulatory measures of local governments, which again means giving precedence to the Host State's regulatory power over protection of foreign investment.

(ii) Suggested draft:

6.1.6 Specific drafting language is not provided. However, the following suggestions are made:

1. A chapeau of the kind that exists in Article XX of GATT and also in the general exception clauses in the investment chapters in India's FTAs may be added to Article 16.
2. Article 16 may be redrafted so as not to be self-judging
3. Article 16.3 may be removed.

[96] It is important to recall that the Appellate Body has held that the purpose of the chapeau is to prevent the abuse of Article XX GATT. See WTO, United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body (29 April 1996) WT/DS2/AB/R, 22.

CHAPTER VII

FINAL PROVISIONS

A. Article 19. Relationship with other Treaties.

(i) Analysis and comment:

7.1.1 Article 19.2 is drafted with a double negative ('nothing in this treaty...not contrary to', which suggests that a party is precluded from entering into international agreements contrary to this treaty. Such limitations on sovereign rights are contrary to international law.[97] However, a redrafted provision without the double negative would only specify that a party *can* enter into international agreements. It is suggested that Article 19.2 be removed.

7.1.2 The term 'inconsistency' is captured by the term 'question' that follows. Further, the word 'inconsistency' is followed by a comma and an 'or', before 'question', which may need tobe corrected. Reference to the Vienna Convention on the Law of Treaties, 1969 (VCLT) should also be removed, as India is not a party (see comment on Article 14.9).

(ii) Suggested draft:

Article 19. Relationship with other Treaties.

19.1 This Treaty or any action taken hereunder shall not affect the rights and obligations of the parties under existing Agreements to which they are Parties.
19.2 Any question regarding the relationship between this Treaty and another bilateral agreement between the Parties, or a multilateral agreement to which both parties are a Party, shall be resolved in accordance with the rules of customary international law.

[97] Article I of the Montevideo Convention on Rights and Duties of States of 1933 provides that, "The State as a person of international law should possess the following qualifications: […] capacity to enter into relations with other States". (1934) 165 League of Nations Treaty Series, at 19.

B. Article 20. Denial of Benefits.

(i) Analysis and comment:

7.2.1 "Denial of benefits" clauses, which exclude certain investors from treaty benefits,[98] are included to avoid claims from these entities[99] for policy reasons, e.g., security or diplomatic concerns, to prevent treaty shopping, etc. Security and diplomatic concerns are accepted reasons to exclude treaty benefits. Treaty shopping is not prohibited under international investment law, as BITs seek to encourage investment,[100] but there are concerns on the issue.

7.2.2 In response to the Australian Tobacco Plain Packaging Act, 2011, US-based tobacco major Phillip-Morris said that prohibiting the use of their intellectual property on tobacco packages was expropriation, to which they ought to be compensated by Australia under international investment commitments. Phillip-Morris Asia (incorporated in Hong Kong) brought this claim under the Australian-Hong Kong BIT, as the Australia-USA BIT did not contain necessary clauses on investor-State disputes, and expropriation linked to intellectual property rights. Phillip-Morris therefore chose to bring its claims under a treaty where it would have greater chances of success.

7.2.3 Similarly, in India, most notices of dispute have been issued by subsidiaries of affected parent companies, either because investments were routed through the subsidiaries, or to use more liberal provisions of certain BITs. For instance, after the Supreme Court cancelled 2G telecom licenses, Norway-based Telenor issued notice through its subsidiary Telenor Asia under the India-Singapore Comprehensive Economic Cooperation Agreement. Similarly, the notice by UK-based Children's Investment Fund alleging mismanagement of Coal India Ltd. was issued under

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[98] OECD Directorate for Financial and Enterprise Affairs, International Investment Law: Understanding Concepts and Tracking Innovations, 2008, p. 18.

[99] OECD Directorate for Financial and Enterprise Affairs, International Investment Law: Understanding Concepts and Tracking Innovations, OECD, 2008, p. 28.

[100] CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, Partial Award of 13 September 2001 (UNCITRAL Arbitration Proceedings) at p 419.

the India-Cyprus BIT. With incomplete facts, it is difficult to assess as to why these specific subsidiaries issued notices. It could be that investments were structured through those subsidiaries for reasons completely independent of benefits of specific BITs.

7.2.4 Indian investors are also affected. For instance, the Indian company Spentex Co. used its subsidiary to bring a claim under the Netherlands-Uzbekistan BIT, instead of the India-Uzbekistan BIT. It is suggested that India must carefully balance its domestic regulatory interests with the interests of Indian investors abroad, and while shielding itself from claims by foreign investors, Indian investors should not be deprived of benefits promised by BITs.

7.2.5 The words “for greater certainty” in Article 20.1 do not add much since the provision is not “clarificatory”. Article 20 in fact prescribes a *distinct* exception on to deny treaty benefits to a party. It is suggested that these words may be deleted.

7.2.6 The phrases “the Host State may” and “at any time” in the 2015 Model suggests that it is both the *discretion* and *decision* of the “Host State” to deny treaty benefits. Further, this “includes” situations even “after the institution of the arbitration proceedings”. This raises issues as to whether the exercise of discretion/decision is procedurally sound, whether it relates back to the time of entering into of the BIT or making of the investment (retrospective), etc. Even if this discretion/decision is valid, its exercise would be arbitrable and the tribunal would have to decide whether, besides substantive breach allegations, the exercise of discretion/decision to deny treaty benefits constitutes (another) breach. Therefore, it is suggested that the language be modified to deny treaty benefits to investments/investors without requiring any specific *exercise* of the clause by the Host State.

7.2.7 Article 20.1(ii) raises a host of issues. Theoretically, States enter into BITs so that investors of the Home State have a minimum level of protection and the Host State can attract investments on the strength of the offer of such protection. Therefore, the investor who gets minimum protection is one who makes the investment "with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty." A clause where a Host State can deny treaty benefits to such investors goes against the theoretical foundation of BITs.

7.2.8 While Article 20 is broad in some respects, it is also narrow by not catering to situations where investor-protection would go against foreign policy, for instance, where doing so would go against measures like trade sanctions, diplomatic blacklisting, etc., adopted by the Host State. India's earlier BITs have such denial-of-benefits clauses.

(ii) Suggested draft:

20.1 The benefits of this Treaty will not extend to:-

(i) an Investment or Investor owned or controlled, directly or indirectly, by persons of a non-Party or of the Host State; or

(ii) an Investment or Investor, if persons of a non-Party own or control, directly or indirectly, such Investment or Investor and the Host State:

a. does not maintain diplomatic relations with such non-Party; or
b. adopts or maintains measures with respect to such non-Party that prohibit transactions with the Investor or that would be violated or circumvented if the benefits of this Treaty were accorded to the Investor or Investment.

C. Article 21. Consultations and Periodic Review

(i) Analysis and comment:

7.3.1 The requirement of consultation under Article 21.1 should be independent and not subject to or by way of an exception to the diplomatic exchange measures under Article 14.13, since both can be implemented independently. The consultation under Article 14.13(ii) (presently an exception to Article 14) may be modified to be in accordance with the procedure under Article 21, rather Article 21.1(iv) being subject to Article 14.13 (the specific provision).

(ii) Suggested draft:

21.1 Either Party may request, and the other Party shall promptly agree to, consultations in good faith on any issue regarding the interpretation, application, implementation, execution or any other matter including, but not limited to:

(i) reviewing the implementation of this Treaty;
(ii) reviewing the interpretation or application of this Treaty;
(iii) exchanging legal information; and
(iv) addressing Investment Disputes or other disputes arising out of investment.

D. Article 22: Amendments.

(i) Analysis and comment:

7.4.1 There is little uniformity in the amendment clauses in India's earlier BITs, and most, including the 2003 Model, do not have amendment clauses. Indian BITs that provide for amendments (e.g., India-Colombia BIT)[101] do so in broad and general language. The 2015 Model captures the power to amend with greater specificity. It is suggested that certain additional factors may be included, such as the requirement of mutual consent, when an amendment can take place, the procedure for obtaining an agreement, the form of the amendment, the procedures required to make the amendment effective, and the date on which the amendment becomes effective.

7.4.2 Requirements for amendment should be in consonance with terms for entry into force (Article 23), and should conform to internal legal requirements.

[101] For instance, Article 17(3), of the India-Colombia Bilateral Investment Agreement provides that "This treaty may at any time after its entry into force be amended by mutual consent". See, Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India, 2009, Article 17.3.

7.4.3 Under Article 22.1, "a tribunal award must be consistent with all amendments to this Treaty", and the treaty shall stand amended "at all times" to the extent that the parties agree. This raises issues of the date from which the amendments become effective. Article 22 is inconclusive as to whether the revised provisions apply to disputes already settled (retrospective application) as well as those pending (i.e. whether there is retroactive extinguishment of exercised rights). Also, it does not address the issue of whether revised provisions can be applied to a cause of action that arose before amendment (but where no resolution has been sought).

7.4.4 Retrospective application of amendments also goes against principles of estoppel and legitimate expectations.[102] International investment law also does not endorse retroactive application of amendments with respect to exercised rights, i.e. where an investor has initiated a claim. International law jurisprudence suggests that, once invoked, jurisdiction cannot be annulled by a subsequent 'extrinsic fact' such as amendment or termination of a treaty.[103]

7.4.5 Further, Investor-State tribunals recognise the doctrine of estoppel in public international law,[104] the essential features of which were established in the *Temple of Preah Vihear* case.[105] Although no precedent or jurisprudence provides guidance on this question,

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102 Article 28, VCLT, provides that unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. This is more the case where rights under the unamended treaty have been exercised and they stand crystallised in terms of an award of the tribunal.

103 See Nottebohm Case (Lichtenstein v Guatemala) (Preliminary Objection) [1953] ICJ Rep 111, 123; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Preliminary Objections) (Libyan Arab Jamahiriya v United Kingdom) [1998] ICJ Rep 9, 23–24.

104 RSM Production Corporation and others v Grenada, ICSID Case No ARB/10/16, Award (10 December 2010) para7.1.2; Petrobart Limited v Kyrgyz Republic, SCC Case No 126/2003, Award (29 March 2009) 67; Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic, ICSID Case No ARB/03/13, Decision on Preliminary Objections (27 July 2006) para 159; Pope & Talbot Inc v Canada, UNCITRAL (26 June 2000) p 111.

105 Merits, Judgment, [1962] ICJ Rep 6, ICGJ 160 (ICJ 1962), 15 June 1962, International Court of Justice.

tribunals have been willing to accept jurisdictional arguments based on estoppel and good faith.[106]

7.4.6 Tribunals have also held that denial-of-benefits clauses can operate only prospectively,[107] as to hold otherwise would undermine the treaty's object to create a 'long-term' framework for investment protection, and could lure putative investors with legitimate expectations only to have those expectations made retrospectively false much later.[108]

7.4.7 This is also consistent with Article 2.5 (2015 Model) under which "this Treaty shall not apply to claims…raised prior to [its] entry into force" and which should, by corollary, also be the applicable test even as regards *amendments* to the treaty.

7.4.8 Under international law, in the absence of a specific clause, amendments should not have retroactive application, thus absolving State responsibility for past treaty breaches for which an investor has not yet made a claim.[109] This is also consistent with Article 2.5 (2015 Model).

7.4.9 It is suggested that Article 22, for consistency with international law and Article 2.5, may state that amendments will not apply retroactively for claims arising out of events which occurred, or claims raised, prior to the amendment's entry into force.

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[106] See Government of East Kalimantan v PT Kaltim Prima Coal and Others, ICSID Case No ARB/ 07/3, Award (28 December 2009) paras 211–17; Phoenix Action Ltd v Czech Republic, ICSID Case No ARB/06/5, Award (15 April 2009) paras 94–5; RSM v Grenada (n 97) para 7.1.2.

[107] Plama v Bulgaria (n 29) paras 159–65; Veteran Petroleum Ltd v Russia, PCA Case No AA 228, Interim Award on Jurisdiction and Admissibility (30 November 2009) paras 514–5. See also Philip Morris Asia Ltd v Australia, UNCITRAL, PCA Case No 2012-12, Procedural Order No 4 (26 October 2012) paras 38, 58; Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan, ICISD Case No ARB/07/14, Award (22 June 2010) p 225.

[108] Plama v Bulgaria (ICJ) p. 162.

[109] The International Court of Justice (ICJ) in Ambatielos (Jurisdiction) (Greece v United Kingdom) stated that a provision bringing a 1926 treaty into force 'might, in the absence of any saving clause, have been regarded as putting the Treaty into full operation so as to completely to wipe out' an earlier 1886 treaty 'and all its provisions, including its remedial provisions, and any claims based thereon'. That conclusion was avoided in Ambatielos because of a declaration attached to (and, as determined by the court, forming part of) the 1926 treaty. The declaration specifically provided that the 1926 treaty 'does not prejudice claims on behalf of private persons based on the provisions of the [1886 treaty]', which could continue to be referred to arbitration pursuant to the dispute settlement provisions of the 1886 treaty. Although the Court declined to give retrospective effect to the particular provision at issue in the Ambatielos case, it acknowledge that '[s]uch a conclusion might have been rebutted if there had been any special or any special object necessitating retroactive interpretation'.

7.4.10 If these concerns are addressed, there is no requirement to specify that amendments "shall be binding on the tribunals…", for the binding nature of the amendment upon the tribunals (to the extent applicable) follows from the amendment.

(ii) Suggested draft:

22.1 This Treaty may be amended at any time at the request of either Party. The requesting Party must submit its request in written form explaining the grounds on which the amendment shall be made. The other Party shall consult with the requesting Party regarding the proposed amendment and must also respond to the request in writing.
22.2 Any agreement to amend the treaty pursuant to this Article must be expressed in writing, whether in a single written instrument or through an exchange of diplomatic notes.
22.3 Such amendments shall enter in force when the concerned Parties have notified each other that the necessary constitutional requirements for the entry into force have been fulfilled.
22.4 The amended provisions of this treaty shall not apply to claims arising out of events which occurred, or claims which have been raised prior to the entry into force of the amendment.

E. Article 23: Entry into Force

(i) Analysis and comment:

7.5 Article 23 could be clarified to explain ratification. In Canada's Model BIT,[110] ratification means the written notification of "the completion of the procedures required in [the parties'] territory". Others also refer to complying with internal,[111] legal (India-Nepal BIT), or constitutional[112] requirements.

[110] Agreement Between Canada and (…) for the Promotion and Protection of Investments, Article 52(2).
[111] Colombian Model August 2007, Article XIII(1).
[112] Draft Agreement Between the Government of the Republic of France and the Government of the Republic of (…) on the Reciprocal Promotion and Protection of Investments, Article 11.

(ii) Suggested draft:

23. Each Party shall notify the other that its respective internal legal procedures for the entry into force for this Treaty have been fulfilled, and the Treaty shall enter into force on the day after the date of receipt of the latter notification.

F. Article 24: Duration and Termination

(i) Analysis and comment:

7.6.1 This clause requires express agreement every ten years to prevent automatic lapse of the treaty. The 2003 Model states that the treaty will be in force for ten years, and will be automatically extended unless a party gives notice of intention to terminate.

7.6.2 Both types of clauses achieve the same legal effect but in different ways. The 2015 Model treats termination as the norm and renewal as the exception. This could lead to inconvenience regarding the continued subsistence of the treaty, as it would require re-drafting fresh written renewals periodically. The Organisation for Economic Cooperation and Development (OECD) has also acknowledged that automatic renewal clauses are the norm, and that automatic lapsing (with an option to renew) in such a treaty is an "unusual policy choice".[113] The version of the clause in the 2003 Model may be retained.

7.6.3 Article 24 suggests that treaty may be terminated even during the initial ten-year period of its subsistence, which is inconsistent with international practice. Further, an intention to not even make mandatory the first ten-year period following the treaty's entry into force sends incorrect signals to the international community. Further, it is unclear as to when the treaty will be terminated. For example, if a notice to terminate is received by a Party on the same day as it is served by the other Party, the treaty would

[113] Pohl, J. (2013), "Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions", OECD Working Papers on International Investment, 2013/04, OECD Publishing, p. 30.

be terminated in 60 days from that date, which would be 4 months before the "6 months" previously specified. This provision therefore does not provide sufficient clarity regarding when the treaty would be terminated subsequent to the notice being served.

7.6.4 Article 24.2 (the "survival clause") specifies the duration for which the treaty will be in force for existing investments following termination. This clause reduces the survival period to 5 years, from the 15 years in the 2003 Model. It is suggested that in the interest of promoting long-term investments, and creating incentives for investors, this duration should be raised to not less than 10 years. A 10-15 year term is accepted across various model BITs,[114] with some extending this period to even twenty years.[115]

7.6.5 There are also ambiguities regarding the time period from when the survival clause is invoked. Article 24.2 specifies this cause of action only in cases of termination of the BIT and not in cases of lapse, despite the fact that Article 24.1 deals with instances of termination and lapse. This clause also does not specify from which date this five-year survival clause will begin to subsist and only states that the treaty will remain in force "for a period of five years" with respect to investments made before the treaty was terminated.

7.6.6 In light of suggestions for Article 24.1, where only termination should occur by notice, 'lapse' need not be mentioned. This is because no situation of lapse would arise where parties can only opt out to effect termination, and the period of survival can be linked to start "from the date of termination of the treaty".

(ii) Suggested draft:

> 24.1 This Treaty shall remain in force for a period of ten years and thereafter it shall be deemed to

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[114] 2012 U.S. Model Bilateral Investment Treaty, Article 22(3); Colombian Model August 2007, Article XIII(3); Agreement Between Canada and (…) for the Promotion and Protection of Investments, Article 52(3).

[115] German Model Treaty - 2008, Article 13(3); Draft Agreement Between the Government of the Republic of France and the Government of the Republic of (…) on the Reciprocal Promotion and Protection of Investments, Article 11.

have been automatically extended unless either Party gives to the other Party a written notice of its intention to terminate the Treaty. The Treaty shall stand terminated one year from the date of receipt of such written notice.

24.2 In respect of investments made prior to the date when the termination of this Treaty becomes effective, the provisions of this Treaty shall remain in force for a period of ten years from the date that the termination of this Treaty becomes effective from the date that the Treaty lapses, whichever is earlier.

Sd/-
[Justice A.P. Shah]
Chairman

Sd/-
[Justice S.N. Kapoor]
Member

Sd/-
[Prof. (Dr.) Mool Chand Sharma]
Member

Sd/-
[Justice Usha Mehra]
Member

[P.K. Malhotra]
Member (Ex-officio)

Sd/-
[Dr. Sanjay Singh]
Member (Ex-officio)

Sd/-
[Dr. G. Narayana Raju]
Member-Secretary