Discussion Paper

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Comparative Study of the Origin, Evolution and Current State of Play of Bilateral Investment Treaties (BITs) of BRICS Countries

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BITs: An Overview

Bilateral Investment Treaties (BITs) are international agreements between countries to encourage, protect and promote investments made in each other's territories.[1] BITs impose conditions on the host state's exercise of public power in order to prevent undue interference with the rights of the foreign investor. In other words, BITs control the exercise of regulatory power of the host state. This control exists in various forms like prohibiting both direct and indirect expropriation of foreign investment unless it is in public interest, ensuring following of due process and provisions for fair and equitable compensation to the foreign investor. This helps restricting host states from discriminating against foreign investment in favour of domestic investment (national treatment obligation) or in favour of another foreign investment (most favoured nation or MFN treatment). The intent is to ensure equality of competitive conditions between foreign investors and domestic investors and between different foreign investors. This places an obligation on countries to permit transfer of funds related to investment; mandating host states to accord fair and equitable treatment and providing full protection and security to foreign investment etc.

A vast majority of BITs contain investment arbitration clauses, thus, providing for adjudication of investment disputes before an international tribunal.[2] This covers both state-state arbitration and investor-state arbitration (also known as Investment Treaty Arbitration or ITA).[3] Under the state-state arbitration, one party to the treaty can bring forward a dispute against the other party. Whereas, the investor-state dispute settlement provision allows an individual foreign investor to directly bring a claim against the host state, challenging her exercise of public power.[4] Most BITs allow foreign investors to bring claims against the host state even without exhausting local remedies.[5] In large majority of BITs, these investor-state dispute settlement clauses offer unequivocal consent to arbitration to the investors who are nationals of the other contracting state.[6] Whether the consent is unequivocal or not depends on the actual wording of the BIT.[7] For example, phrases like contracting party 'hereby consents' or where the dispute 'shall be submitted' to arbitration implies an offer of unequivocal consent to arbitration.[8] This consent to arbitration, often, covers 'any dispute

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1 Jewel W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) *The International Lawyer* 655. For a general discussion on BITs see M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2004) 204-314; R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008); A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (Kluwer: Hague, 2009) 1-73; J Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010); Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press, 2010). In this chapter, investment chapters in Free Trade Agreements (FTAs) are also included within the ambit of BITs.

2 Salacuse (2010), 380-292.

3 For full commentary on investor-state arbitration in BITs see Salacuse (2010), 380-392.

4 Id.

5 See Dolzer and Schreuer (2012), 264-267.

6 See discussion in Salacuse (2010), 384; Dolzer and Schreuer (2012), 257-259. Also see *Millicom v Senegal*, Decision on Jurisdiction, 01 October 2007, para 56-75. Christoph Schreuer, 'Consent to Arbitrate' in Peter Muchlinski *et al* (eds) *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 832 at 835-36. Also see Vandevelde, (2010), 433-39.

7 See Salacuse (2010), 384.

8 See Article 8(1) of the Agreement between the Government of United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka, February 13, 1980. Also see Dolzer and Schreuer (2012), 258; Jan Paulsson, Arbitration Without

concerning an investment', which is quite broad covering not only treaty breaches but also contractual breaches. A foreign investor might accept this offer, for example, by instituting International Centre for Settlement of Investment Disputes (ICSID) arbitral proceedings against the host state.[9]

The first BIT was signed in 1959 between Germany and Pakistan as a 'treaty for the Promotion and Protection of Investments'.[10] Since 1959 to the end of 2013, a total of 3,236 BITs have been concluded.[11] The first BIT to include an ICSID clause was the treaty between The Netherlands and Indonesia signed in 1968.[12] This mass of BITs has generated a significant volume of cases arising out of disputes between foreign investors and host states covering a wide array of regulatory measures of the host state.[13]

The Global Context – Backlash against BITs

In the past decade or so, BIT disputes between foreign investors and host states have covered a very wide array of regulatory measures, such as environmental policy;[14] sovereign decisions regarding privatisation;[15] regulatory issues related to supply of drinking water;[16] urban policy;[17] monetary policy;[18] laws and policies related to taxation;[19] policy related to re-organisation of public telephone services;[20] industrial policy related to sectors like media;[21] financial services;[22] banking;[23] energy;[24] public

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Privity (1995) 10 ICSID Review – Foreign Investment Law Journal, 235; *RosInvest v Russia*, Award on Jurisdiction, October 01, 2007, para 56-75;

9 See *Generation Ukraine v Ukraine*, Award, September 16, 2003, paras 12.2, 12.3

10 Vandevelde, *Bilateral Investment Treaties* (n 2) 1.

11 This includes 2902 stand-alone investment treaties and 334 investment Chapters in FTAs – UNCTAD, World Investment Report – Investing in the SDGs: An Action Plan (New York/Geneva: United Nations: 2014), 114

12 Salacuse (2010), 380.

13 From a negligible number in early 1990s, the total number of treaty-based cases rose to 568 by the end of 2013 - Recent Developments in Investor State Dispute Settlement, UNCTAD IIA Issue Note Number 1 (2014) available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

14 *Metalclad Corporation v. United Mexican States* 5 ICSID 236; *Methanex Corporation v United States of America* (2005) 44 ILM 1345.

15 *Eureka BV v Republic of Poland*, ICSID Case No ARB/01/11, August 19, 2005

16 *Biwater Gauff Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, 24 July 2008.

17 *MTD Equity v Republic of Chile* (2005) 44 ILM 91.

18 *CMS Gas Transmission Co v Argentina*, ICISD Case No ARB/01/8; *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8 (Annulment Proceedings); *Enron Corporation v Argentina*, ICSID Case No ARB/01/3; *Enron Creditors Recovery Corp v Argentina* ICSID Case No ARB/01/3 (Annulment Proceeding); *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16; *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16 (Annulment Proceedings); *LG&E Energy Corporation v Argentina*, ICISD Case No ARB/02/1; *Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9.

19 *Occidental Exploration and Production Co v Republic of Ecuador*, LCIA Case No UN 3467; *EnCana Corporation v Ecuador*, London Court of International Arbitration, February 03, 2006; Feldman v Mexico, ICSID Case No ARB(AF)/99/1.

20 *Telenor Mobile Communications v Republic of Hungary*, ICSID Case No ARB/04/15.

21 *CME v Czech Republic*, the United Nations Commission on Trade Law (UNCITRAL) Arbitration Proceedings, September 03, 2011; *R S Lauder v The Czech Republic*, 9 ICSID Reps 66, September 03, 2001.

22 *Fireman's Fund Insurance Company v Mexico*, ICSID Case No. ARB (AF)/02/01, July 17, 2006.

23 *Saluka Investments v The Czech Republic* (Partial Award), UNCITRAL, March 17, 2006.

24 *Duke Energy Electroquil Partners v Republic of Ecuador*, ICSID Case No. ARB/04/19, August 18, 2008.

postal services;[25] electricity services;[26] motorway construction;[27] tourism.[28] Further, there have been instances where host country's important public interest measures like health measures[29] and sovereign debt restructuring[30] have been challenged by foreign investors as potential breaches of BITs. The most sensitive have been the Investment Treaty Arbitration (ITA) cases against Argentina, [31] where foreign investors challenged Argentina's regulatory measures to safeguard its economy from a complete collapse, as violation of Argentina's obligations under different BITs. There have also been cases where ITA tribunals have adjudicated over the actions of the judiciary.[32]

Foreign investors challenging the sovereign actions of host states under BITs should not come as a surprise because that is what BITs are meant to do – to hold states accountable for the exercise of their public power while dealing with foreign investment. ITA tribunals are tasked with adjudication of potential breaches of BITs which often cover a large and wide gamut of sovereign regulatory measures. Many such violations have the potential of affecting a large part of the population of the host state for example if a health measure is found to have breached the BIT, state could remove the health measure affecting the local population This could also result in awarding of substantive damages to foreign investors,[33] and thus resulting in diversion of taxpayer's money to foreign investors. Such scenarios have generated a backlash or contestation against international investment law.[34] This backlash has been further

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25 *United Parcel Service of America v Canada*, Arbitration under Chapter 11 of NAFTA, May 24 2007.

26 *Nykomb Synergetics v Republic of Latvia*, Stockholm Chamber of Commerce, December 16, 2003.

27 *Bayindir Insaat Ticaret VeSanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29

28 *Waguih Elie George v Egypt*, ICSID Case No. ARB/05/15, June 01, 2009.

29 Philip Morris Asia Ltd. v The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12

30 *Abalcat v Argentina*.

31 *CMS v Argentina*; *CMS Gas Transmission Company v Argentina*, (Annulment Proceedings); *Enron Corporation v Argentina*; *Sempra Energy International v Argentina*; *LG&E Energy Corporation v Argentina*; *Continental Casualty Company v Argentina*.

32 *Saipem SpA v Bangladesh*, ICSID Case No ARB/05/7, June 30, 2009.

33 For example in *CME Czech Republic B.V. v. Czech Republic*, Czech Republic paid US$355mn to CME as damages for violating the IIA on account of adopting a regulatory measure. As per one study on the North American Free Trade Agreement (NAFTA) – to date, Canada has paid damages to the tune of US$CAD 157mn to NAFTA claimants; Mexico has paid damages more than US$187mn; interestingly, the US has not paid any damage as it has never lost a NAFTA case. Also all three NAFTA countries have incurred significant costs in defending their claims – Canadian Centre for Policy Alternatives (2010), NAFTA Chapter 11 Investor-State Disputes available at: *http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/11/NAFTA%20Dispute%20Table.pdf*.

34 L T Wells 'Backlash to Investment Arbitration: Three Causes' in M Waibel *et al* (*eds*) *The Backlash Against Investment Arbitration* (Hague: Kluwer Law: 2010) 341. Also see S Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Virginia Journal of International Law, 57 at 69 stating "*the extent to which investment treaties limit a state's regulatory powers and subject the exercise of such powers to liability claims by foreign investors may become the litmus test for the future viability of the system".* Also see Franck, 'The legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (n 55); Van Harten *Investment Treaty Arbitration and Public Law* (n 73), 63; 757; A Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime' (2009) 50 (2) *Harvard International Law Journal*, 491; R Howse, 'Sovereignty, Lost and Found' in W Shan *et al* (eds) *Redefining Sovereignty in International Economic Law* (Oxford: Hart Publishing: 2008), 72-73; B Choudhary, 'Recapturing Public Power' (n 75); S Spears, 'The Quest

fuelled by other instances like similar set of facts[35] or even the same provision of a BIT[36] being interpreted differently by tribunals. This contestation is reflected in the writings of academics[37] and actions of Civil Society Organisations (CSOs).[38] For example, at the World Investment Forum of United Nations Conference on Trade and Development (UNCTAD), many civil society experts pointed out that BITs expose host state to law suits and curtail their regulatory power.[39]

However, and more importantly for the purpose of this Paper, this contestation is reflected in the action of states, which is in response to their experiences with investment treaty arbitration.[40] It is surely not a coincidence that many states that have contested against international investment law have been those against whom foreign investors have brought BIT claims.[41]

Some states have adopted the most dramatic and extreme form of contestation *i.e.* terminating their BITs and thus, pulling out of international investment law.[42] One such country is Ecuador, which has witnessed the third-highest claims by foreign investors after Argentina and Venezuela.[43] In 2008, Ecuador denounced nine of its BITs.[44] In July 2009, Russian Federation terminated the provisional application of the

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for Policy Space in New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law*, 1037.

35 The most commonly stated example of this is the 'Lauders case' where two arbitration tribunals gave different decisions to essentially the same set of facts for disputes brought under two different BITs. The cases are – *CME Czech Republic BV v Czech Republic, 13 September 2001,* 14 (3) World Trade and Arbitration Material 109 and *Lauder (Ronald) v Czech Republic, 03 September 2001*, 4 World Trade and Arbitration Materials 35.

36 The Argentine cases on Article XI of the US-Argentina BIT are a good example of such inconsistency. C H Brower II (2009), 343-348.

37 In this regard, see the public statement issued by many leading academics on ITA, available at: *http://www.osgoode.yorku.ca/public-statement/documents/Public_Statement_(final)_(Dec_2013).pdf*

38 In India, CSOs are demanding that India should re-examine its existing BIT programme because ITA under BITs, in the long run, 'will have a chilling effect on the ability of different Ministries (of the Indian Government) to regulate different social and economic needs' – see Letter written by many civil society organisations to the Indian Prime Minister expressing concerns about India's BITs, <*http://donttradeourlivesaway.files.wordpress.com/2012/06/civil-society-letter-on-us-india-bit.pdf*> accessed July 02, 2014.

39 World Investment Forum (2014) 'Member States and Civil Society Call for Reform of Investor State Dispute Settlement' available at: *http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=879&Sitemap_x0020_Taxonomy=CSO*

40 O E Garcia-Bolivar 'Sovereignty vs. Investment Protection: Back to Calvo?' (2009) 24 (2) *ICSID Review: Foreign Investment Law Journal*, 464 at 470-474.

41 These countries include Bolivia, Ecuador, Venezuela, South Africa, India etc.

42 Even if a country terminates its BITs, which is the most important source of international investment law, customary international investment law will continue to apply for the protection of foreign investment.

43 Allen and Overy, *Ecuador Establishes Commission to Audit its Bilateral Investment Treaties* (November 13, 2013) <*http://www.allenovery.com/publications/en-gb/Pages/Ecuador-establishes-Commission-to-audit-its-Bilateral-Investment-Treaties.aspx> accessed 1 July 2014.*

44 World Investment Report, Global Value Chains: Investment and Trade for Development (2013) (Geneva/New York: United Nations), 108. Ecuador has also established a commission to audit its BITs – see Allen and Overy, Ecuador Establishes Commission to Audit its Bilateral Investment Treaty (November 13, 2013) <*http://www.allenovery.com/publications/en-gb/Pages/Ecuador-establishes-Commission-to-audit-its-Bilateral-Investment-Treaties.aspx*> accessed July 01, 2014.

Energy Charter Treaty.[45] Venezuela had sent a notice terminating its BIT with The Netherlands because it felt that the particular BIT came in the way of implementing policy changes in its energy sector.[46] Recently, Indonesia expressed the intention to terminate all its 67 BITs.[47]

Bolivia and Ecuador gave up their membership of ICSID,[48] and in 2012, Venezuela sent a notice to the World Bank (WB) denouncing the ICSID convention.[49] These examples are of the countries that have not only denunciated BITs but also the most important convention that provides for investor-state dispute settlement.

On the other hand, there are also instances where countries have not terminated BITs, but have decided not to have investor-state dispute resolution mechanism and only have state-state dispute settlement mechanism, such as Australia.[50] The reason for this change is that Australia has made it clear that it is against all provisions that come in the way of making laws for social, environmental and economic purposes. This is in clear response to the notice given by Philip Morris (Asia) Limited challenging Australia's tobacco regulations.[51] This dispute highlights the tension between investment protection and public health. The Australian Government adopted a regulatory measure to implement plain packaging of tobacco products.[52] An important objective of this legislation was to improve public health by discouraging people from smoking.[53] However, this public health regulatory measure was challenged by

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45 Amelia Hadfield and Adnan Amkhan-Banyo, 'From Russia with Cold Feet: EU-Russia Energy Relations, and the Energy Charter Treaty' (2013), 1(1) International Journal of Energy Security and Environmental Research, 1.

46 L E Peterson, '*Venezuela Surprises Netherlands With Termination Notice of BIT'* (2008) available at: *http://www.iareporter.com/articles/20091001_93*.

47 Termination Bilateral Investment Treaty available at: *http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html.*

48 List of Contracting States and other Signatories to the ICSID convention (as on January 07, 2010) online pdf : *http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English*. For detailed discussion on the legal effect of these denunciations see Tzanakopoulos (2011), 75; UNCTAD (2010). Bolivia has faced three ITA disputes so far – *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, 21 October 2005; *Guaracachi America, INC. (USA) and Rurelec PLC (UK) v. The Plurinational State of Bolivia,* UNCITRAL, PCA Case No.AA406, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2. Ecuador has faced 14 ITA disputes: *http://italaw.com/alphabetical_list_respondant.htm*

49 Venezuela Submits a Notice, under Article 71 of the ICSID Convention available at: *http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100*. Venezuela has faced 10 ITA disputes so far: *http://italaw.com/alphabetical_list_respondant.htm*

50 The US-Australia FTA does not contain investor-state dispute resolution. See – Gillard Government Trade Policy Statement (2011), 'Trading Our Way to more Jobs and Prosperity' available at: *http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf*

51 See Notice of Arbitration issued by Philip Morris Asia Limited under Australia-Hong Kong BIT. Available at: *http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf* (accessed September 25, 2013).

52 See Tobacco Plain Packaging Act, 2011, Parliament of Australia. Available at: *http://www.comlaw.gov.au/Details/C2011A00148/Html* (accessed September 25, 2014). Plain packaging of tobacco products means that all trademarks, graphics and logos are removed from the cigarette packs and the brand name is displayed in the standard format.

53 Ibid, Article 3.

Philip Morris (Asia) Limited, a Hong Kong-based tobacco company operating in Australia, as a violation of the Australia-Hong Kong BIT.[54] The allegation is that the Australian plain packaging legislation 'substantially deprives Philip Morris of the real value of its investment in Australia' and treats Philip Morris's investment unfairly and inequitably.[55]

Against this global and contemporary background, this Paper attempts to compare and contrast the origin, evolution and current state of play of BIT programmes in five major emerging economies i.e. Brazil, Russia, India, China and South Africa (BRICS). In recent years, there is a growing interest in these emerging economies, which are being seen as new engines of growth for the world economy.

Further, these countries have emerged as not only key destinations of foreign investment but also as a source of foreign investment.[56] This coupled with the increasing number of BITs signed by these countries, has increased the global integration of these nations with the world economy. This necessitates a study that compares and contrasts the experience of BRICS countries with respect to BITs. This Paper is divided in five parts. Part I discusses the origin of the BIT programme in BRICS economies. Part II discusses the evolution of the BIT programme in these five countries. This is followed by a discussion on, the experiences of these countries with respect to investment treaty arbitration, in Part III, while Part IV of the Paper indicates the current state of play of the BIT programme and its future in BRICS. Part V provides conclusions.

I) Origin of the BIT Programme in BRICS

Initial Approach of BRICS towards Foreign Investment

Historically, the Latin American region has been the most responsive towards liberalising the economy and protecting foreign investments.[57] Latin American countries challenged the viewpoint of western countries on customary international law of investment through their efforts to implement the Calvo doctrine.[58] Calvo doctrine was developed by Argentine Jurist Carlos Calvo in 1868. As per this doctrine, 'international rule should in effect be understood as allowing the host state to reduce protection of alien property whilst also reducing the guarantees for property held by nationals'.[59]

Brazil, a key country in the Latin American region, initially followed an economic policy-based on import substitution.[60] As part of the import substitution regime,

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54 See T Voon and A Mitchell, 'Time to quit? Assessing international investment claims against plain tobacco packaging in Australia' (2010) 14 *Journal of International Economic Law* 515-552.

55 Philip Morris Asia's Notice of Arbitration to Australia, above n 43.

56 Karl Sauvant, *New Source of FDI: The BRICs – Outward FDI from Brazil, Russia, India and China*, 6(5) J of World Investment & Trade 639 (October 2005) (describing the increase in outward foreign investment from BRICs and policy implications).

57 Leany Lemos and D Campello 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' Contexto Internacional (Forthcoming).

58 Salacuse (2010), 65.

59 Dolzer and Schreuer (2012), 1.

60 See Joel Bergsman and Arthur Candal, 'Industrialization: Past Success and Future Problems', in: The Economy of Brazil, Howard S Ellis, ed., 47 (Berkeley and Los Angeles, 1969); Werner Baer,

Brazil followed the policy of non-discrimination in regulating Foreign Direct Investment (FDI) flows.[61] The regulatory model that Brazil followed provided tariff and non-tariff protection to domestic players, which led to increased FDI flows to Brazil.[62] Market seeking foreign investors came to Brazil during this period and benefitted from the protectionist trade policy.[63] While there were certain sector-specific restrictions imposed on foreign investment in Brazil, unlike China as discussed below, there were no instances of expropriation of foreign investment. Also, Brazil's view on foreign investment, unlike China, was not based on the Marxist doctrine of rejecting private property.

From 1949, when the People's Republic of China (PRC) was established, till 1978, China resented foreign investment and its protection by international law.[64] In 1949, there were many foreign enterprises in China,[65] however, within a few years; China effectively eliminated foreign investments from the country.[66] China achieved this through nationalising foreign investments without compensation.[67] China followed the 'socialist transformation of capitalist industry and commerce' policy,[68] which is described by some as the policy of 'hostage capitalism'[69]. This was also in accordance with the Marxist ideology that rejected the notion of private property.[70] This ideology, which is reflected in China's policy on foreign investment, recognised the right to nationalise foreign property as an inherent attribute of national sovereignty without being subjected to conditions of public purpose, due process and compensation.[71] Internationally, China also aligned herself with the broader movement of developing countries to create a 'new international economic order'.[72] It has also been argued that another reason for China's resentment towards foreign investment lay in China's experience with colonial rule and foreign intervention.[73] This resentment is also explained by China's view on international law, which is described as a means '*used by the imperialists and hegemonists…to carry out aggression, oppression and exploitation*'.[74]

Import Substitution and Industrialisation in Latin America: Experiences and Interpretations, 7 (1) Latin American Research Review, 95-122.

61 Pedro da Motta Veiga (2004) Foreign Direct Investment (FDI) in Brazil: regulation, flows and contribution to development. On Import Substitution and FDI in Brazil, also see S A Morley and G W Smith (1971) Import Substitution and Foreign Investment in Brazil, 23 (1) Oxford Economic Papers, 120-135;

62 Id. Also see FDI Brazil Argentina (Edward Elgar)

63 Pedro da Motta Veiga (2004)

64 Kong (1998), 105.

65 T N Thompson (1979), China's Nationalisation of Foreign Firms: The Politics of Hostage Capitalism, 1949-1957, 6 (27) University of Maryland Law School Occasional Papers in Contemporary Asian Studies, 4; Gallagher and Shan (2008), 4.

66 Thompson (1979), 3.

67 P K Chew (1994), *Political Risk and US Investment in China: Chimera of Protection and Predictability?* 34 Virginia Journal of International Law, 615 at 625-626.

68 Id

69 Chew (1994).

70 Berger (2010), 171.

71 Kong (1998), 109.

72 Schill (2007), 78.

73 Kong (1998), 108.

74 Id.

India, like China, from 1947 till the end of 1980s followed inward looking economic policies rooted in indigenisation, self-reliance and import substitution.[75] During this period, India adopted certain laws, which had a detrimental impact on foreign investment, such as the Foreign Exchange Regulation Act (FERA),[76] which required a foreign company to convert foreign equities into minority holdings. Only if a foreign company diluted its equity to a minority holding of 40 percent, would it get national treatment. [77] This led to transnational corporations like International Business Machines (IBM) and Coca Cola exiting India.[78]

However, India did not nationalise foreign companies in a manner similar to China. Nationalisation of foreign property, in India, took place in a limited number of cases, in all of which, wherever possible, compensation including cash transfers was provided.[79] Further, unlike China, India's approach towards foreign investment was not based on the Marxist doctrine of rejecting private property. In fact, the Indian Constitution recognised the right to property as a fundamental right from 1950 to 1978 and as a legal right post 1978.[80] In other words, from 1950 to 1978, right to property was available against both, legislative and executive interference, whereas after 1978 i.e. after becoming a legal right, it was available only against executive interference.[81]

Also, India's opposition to foreign investment, in this period, was not as severe as that of China. For instance, immediately after independence, India sought FDI in mutually advantageous ways with conditions like joint ventures with local industries, local content clauses and export obligations.[82] However, FDI during this period was also subject to careful scrutiny due to India's fragile Balance of Payment (BoP) position.[83] Somewhat receptive attitude towards FDI was adopted in 1980s by introducing

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75 For more on India's economic policy of this period see A Virmani (2005), '*Policy Regimes, Growth and Poverty in India: Lessons of Government Failure and Entrepreneurial Success'* ICRIER Working Paper No 170 *http://icrier.org/pdf/WP170GrPov11.pdf;* J Bhagwati and P Desai, *India: Planning for Industrialization* (OUP London 1970).

76 S Chaudhary (1979), 'FERA: Appearance and Reality' 14 (16) Economic and Political Weekly, 734.

77 Industrial Policy, Department of Industrial Development, Ministry of Industry (23 December 1977).

78 See also Kumar above n 15, 1322; Nagaraj above n 17, 1701. See also M S Ahluwalia (1991), *Productivity and Growth in Indian Manufacturing* (OUP New York & Oxford); A Virmani (2005), '*Policy Regimes, Growth and Poverty in India: Lessons of Government Failure and Entrepreneurial Success'* ICRIER Working Paper No 170 *http://icrier.org/pdf/WP170GrPov11.pdf* (accessed November 20, 2012).

79 S Rao (2000), Bilateral Investment Protection Agreements: A Legal Framework for the Protection of Foreign Investments, 26(1) Commonwealth Law Bulletin, 623 at 624.

80 See Forty-Fourth Amendment to the Indian Constitution that inserted Article 300-A recognising right to property just as a 'legal right'. For full discussion on right to property, under Indian Constitution see M P Singh (2008) V N Shukla's Constitution of India (Eastern Book Company: Lucknow: 11th edition), 273-287. Also see S Deva (2008), Does the Right to Property Create A Constitutional Tension in Socialist Constitutions: An Analysis with Reference to India and China, 1(4) NUJS Law Review, 583; P K Tripathi, 'Right to Property after Forty-Fourth Amendment – Better Protected than Ever Before', All India Reporter Journal (1980), 49.

81 Singh (2008), 845.

82 Nagaraj (2003), 'Foreign Direct Investment in India in 1990s' 38 (17) Economic and Political Weekly, 1701; Kumar, above n 15, 1321.

83 A Palit (2009), India's Foreign Investment Policy: Achievements and Inadequacies available at *http://www.ifri.org/?page=contribution-detail&id=5569&id_provenance=97*, 8 (accessed on June 10, 2013)

flexibility in foreign ownership including exceptions to the 40 percent ceiling rule in equity contained in FERA as mentioned above.[84]

India's domestic economic policy rooted in economic nationalism explains its approach to international law on foreign investment from 1947 till the end of 1980s. India considered national law and not international law as the basis to regulate and protect foreign investment. India rejected concepts, such as 'state responsibility for injuries to aliens' and 'direct individual rights of investors to bring disputes against states under the Convention on the Settlement of Investment Disputes Between States and Individuals of Other States of 1965[85] (ICSID Convention).[86]

India and other developing countries played a pivotal role in developing a new international economic order.[87] As part of this process the United Nations General Assembly, on December 12, 1974, adopted the Charter of Economic Rights and Duties of States (CERDS).[88] India supported CERDS and took an active interest during every stage of its drafting.[89] Article 2(2) (a) of the Charter gives every state the right to regulate foreign investment in accordance with its domestic laws and national priorities. Similarly, Article 2(2) (c) of CERDS gives every state the right to nationalise and expropriate foreign investment and decide on the question of compensation as per its national laws and priorities. It further states that compensation related disputes should be determined by domestic courts applying national law. On the demand of developed countries that the question of compensation should be decided as per the principles of international law, India and other developing countries denied the existence of any such principle in international law.[90] An important point to note is that this provision does not state that no compensation shall be paid if foreign investment is expropriated; it only states that compensation disputes would be determined by domestic laws.

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84 Kumar (2003), 1323.

85 The ICSID Convention, The World Bank available at : *http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf*

86 See, Krishan (2008), 292-293. Also see Roy (1961), 863; Anand (1962).

87 See the Declaration on the Establishment of a new International Economic Order, United Nations, General Assembly, A/RES/S-6/3201, May 01, 1974. Also see K B Lall (1978), 'India and the New International Economic Order' 17 *International Studies*, 435. Also see R Khan (1978), 'The Normative Character of the New International Economic Order – A Framework of Enquiry' 18 *Indian Journal of International Law*, 294. Also see S K Agarwala (1977), 'The Emerging International Economic Order', 17 *Indian Journal of International Law*, 261; S P Shukla, (1978), 'New International Economic Order', 18 *Indian Journal of International Law*, 290.

88 Charter of Economic Rights and Duties of States, United Nations, General Assembly, A/RES/29/3281, December 12, 1974. There has often been debate on the legal character of CERDS. It has been argued that CERDS is not a legally binding instrument – see C N Bower and J B Tepe, 'The Charter of Economic Rights And Duties of States: A Reflection or Rejection of International Law', 9 International Lawyer (1975), 295, 304-7. Also see *Texaco Overseas Petroleum Company and California Asiatic Oil Company (TOPCO) v Government of the Libyan Arab Republic* (Award on the Merits) (1977) 17 ILM 1 (1978).

89 P C Rao (1975), 'Charter of Economic Duties and Rights', 15 *Indian Journal of International Law*, 351 at 369. Also see S K Chatterjee (1991), 'The Charter of Economic Rights and Duties of States: An Evaluation After 15 Years', 40 (3) *International and Comparative Law Quarterly*, 669

90 Rao (1975), 361; Agarwala (1977), 267. Also see Sornarajah (2010), 123 according to whom Article 2 (2) (c) is in effect a restatement of the Calvo Doctrine. For discussion on how contentious this article was – see White (1975), 546.

The Changed Approach towards Foreign Investment

The decade of 1990s saw profound changes in the Brazilian economy. After a long period of external constraints, which were provoked by the debt crisis at the beginning of the 1980s, new conditions of international finance led to the implementation of a series of pro-market reforms in Brazil. [91] Thus, began the process of internationalisation of the Brazilian economy, which had far-reaching effects. Specifically with regard to the treatment offered to FDI, foreign investors were allowed to have full access to the newly liberalised sectors for private investment.[92] Since then, Brazil has become one of the most important destinations for foreign investment. FDI inflows to Brazil have increased manifold in the past 10 years – from US$ 18,146mn in 2004 to US$64,045mn in 2013 (Annexures: Table I). This makes Brazil the sixth largest recipient of FDI in the world.

The Brazilian approach to protection of foreign investment began to change, under Fernando Collor de Mello, the first President popularly elected after military rule (1964-1985). [93] The reason for this changed approach to protection of foreign investment stemmed from the overall policy of Brazil to move away from import substitution to economic liberalisation in 1990s.[94] Collor de Mella's Government unleashed market-oriented reforms in order to correct the distortions in the Brazilian economy that had crept in due to many years of protectionism.[95] Under Collor de Mello, the country joined the Multilateral Investment Guarantee Agency Convention (MIGA), started an inter-ministerial Working Group (IWG) to frame a BIT model and tried to stimulate foreign investment.[96] BITs were promoted as an important tool for attracting foreign investment and to also portray a receptive attitude towards foreign investment to the international financial community.[97] As we will see later, the basic rationale behind launching BIT programmes in other BRICS economies, especially India, South Africa and China was also to signal to the outside world the country's positive outlook towards foreign investment. In an effort to adjust to international standards, the first model of a Brazilian BIT, which was restrictive, was progressively reshaped to include more realistic parameters, to get it as close as possible to the recommendations of the Organisation for Economic Cooperation and Development (OECD). [98] Brazil signed its first BIT with Portugal in 1994[99] and from then till 1999, signed BITs with 13 more countries.[100] The countries with which Brazil signed the

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91 Investment Policy in Brazil – Performance and Perceptions, *CUTS Centre for International Trade, Economics & Environment*, 2003.

92 *Pedro da Motta Veiga*, Foreign Direct Investment in Brazil: regulation, flows and contribution to development, May 2004.

93 Lemos and Campello (2014).

94 Motta Veiga (2004).

95 Raul Gouvea, 'Challenges Facing Foreign Investors in Brazil: A Risk Analysis, Problems and Perspectives in Management, 4/2004 available at: *http://businessperspectives.org/journals_free/ppm/2004/PPM_EN_2004_04_Gouvea.pdf*

96 Lemos and Campello (2014)

97 Id.

98 Lemos and Campello (2014).

99 Dan Wei (2010), Bilateral Investment Treaties: An Empirical Analysis of the Practices of Brazil and China, 33 European Journal of Law and Economics, 663 at 668.

100 Wei (2010), 668. Also see D Collins (2013) The BRIC States and Outward Foreign Direct Investment (OUP: Oxford); Mark Wu, 'The Scope and Limit of Trade's Influence in Shaping the Evolving International Investment Regime' in Z Douglas *et al* (*eds*) The Foundations of International Investment Law: Bringing Theory into Practice (Oxford: OUP), 169 at 188.

BIT included many developed countries like UK, Switzerland, Denmark, Finland, France, Germany, The Netherlands and Belgium.[101]

However, the Brazilian National Congress did not ratify any of these BITs and thus none of these BITs are in force.[102] It has been argued that the primary reason behind Brazilian National Congress not ratifying BITs was because Congressional representatives believed that these treaties were signed between unequal partners and that the 'reciprocity' of rights and duties, in these treaties, was merely a formality since, for all meaningful purposes the capital exporting country enjoyed all the rights.[103] Also, concerns were expressed in the Brazilian Congress that BITs would allow foreign investors to use investment treaty arbitration to bring claims against the Brazilian state – something that is not available to domestic investors and thus, a violation of Constitutional guarantee of equal protection.[104] Lemos and Campello have argued that the Brazilian Executive, although having signed BITs, was never fully committed to these treaties and this was the principal reason for Brazil not ratifying BITs.[105]

An interesting point to note is that FDI to Brazil increased despite this. In any case, the empirical evidence and the academic debate on the effect of BITs on foreign investment are divided and thus inconclusive.[106] There are studies that argue for a positive relationship between BITs and investment inflows. For instance, Neumayer and Spees have analysed the data of 119 countries from 1970 to 2001 to argue for a positive relationship between IIAs and FDI.[107] Another study argues that stricter BITs increase FDI whereas less strict BITs have no effect.[108] It has also been argued that although there is some positive effect of BITs on foreign investment flows, these treaties are at best complementary and not substitutes for good institutional quality and local property rights in the host state – factors, which have a more direct influence on foreign investment.[109] In case of Brazil, the reason for high foreign investment flows stems from the success of the 1994 Real Plan, which cut down inflation and brought about macroeconomic stability.[110]

The Brazilian experience in this regard is quite unique in comparison to other BRICS economies. As will be discussed below, concerns about compromises on sovereignty or issues of international arbitration being available only to foreign investors, were not important considerations while entering into BITs, for other countries, such as

[101] Lemos and Campello (2014)
[102] Wei (2010), Collins (2013), Lemos and Campello (2014)
[103] Wei (2010), 671. Also see Collins (2013).
[104] Collins (2013), 32.
[105] Lemos and Campello (2014).
[106] See Sauvant and Sachs (2009), which documents studies showing the effect of investment treaties on FDI flows. The prominent studies on this relationship are – Neumayer and Spees (2005); Tobin and Rose-Ackerman (2006); Salacuse and Sullivan (2005); Driemeyer (2003).
[107] Neumayer and Spees (2005), 1567.
[108] Salacuse and Sullivan (2005), 67.
[109] See Aisbett (2009), 395; Yackee (2010), 397; Poulsen (2010); Driemeyer (2003). Also see Vandevelde (2005), 184.
[110] Fore more on this see Christiansen, H., C. Oman and A. Charlton (2003), "Incentives-based Competition for Foreign Direct Investment: The Case of Brazil", *OECD Working Papers on International Investment*, 2003/01, OECD Publishing. http://dx.doi.org/10.1787/631632456403; JP, 'The Real Plan: The Echoes of 1994, 3 July 2014, The Economist, http://www.economist.com/blogs/americasview/2014/07/real-plan

India and South Africa. These countries primarily focussed on portraying their readiness to accept foreign investment to the outside world, in order to promote faster economic growth. They were, in return, willing to offer extensive treaty based protection for foreign investments. In China, there was some skepticism about BITs, which was evident from the first phase of the Chinese BIT programme when China entered into BITs that were restrictive in nature. They gave limited remedies to foreign investors for instance allowing investment arbitration only in cases where dispute arose on the question of compensation for expropriation and not on other issues.

The Chinese attitude towards foreign investment started to change with the adoption of the 'open-door' policy launched in 1978 by the new Chinese leadership headed by Deng Xiapong.[111] An integral part of the 'open door' policy was to attract foreign investment[112] and China developed a two-tier approach to boost FDI inflows – promulgating local laws and entering into international investment treaties.[113] As part of this, on March 29, 1982, China signed its first BIT and started its BIT programme.[114] After signing its first BIT, China entered into BITs with most of its major investment partners, such as Germany, France, UK and The Netherlands.[115] China also signed the ICSID Convention in 1990, which took effect from 01 January 1993 and the MIGA Convention in 1988.[116] Since 1982, China has entered into more than 130 BITs.[117] As Berger argues, the sheer number of BITs demonstrates China's growing acceptance of international investment treaties as legal instruments for the protection of FDI.[118] FDI inflows to China have constantly increased from US$ 60630mn in 2004 to US$123911mn in 2014 (Annexures: Table II). Also, throughout this period, China was one of the leading recipients of FDI globally. However, it has been argued that a lot of this FDI to China was because of round-tripping – a process involving firms exporting funds abroad only to bring it back, under the semblance of 'foreign' investment to enjoy special government incentives such as lower taxes.[119]

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111 Gallagher and Shan (2008), 5.

112 Id.

113 Id.

114 For exhaustive analysis on China's BIT programme see Q Kong (1998), Bilateral Investment Treaties: Chinese Approach and Practice 8 Asian Yearbook of International Law, 105; A Berger (2010) The Politics of China's Investment Treaty-Making Program in The Politics of International Economic Law T Broude *et al* (*eds*) (CUP: Cambridge), 162; N Eliason (2011), Chinese Investment Treaties: A Procedural Perspective in L Nottage and V Bath (*eds*) Foreign Investment and Dispute Resolution Law and Practice in Asia (Routledge: New York/London), 90; N Gallagher and W Shan (2008) Chinese Investment Treaties: Policies and Practice (OUP: New York/Oxford); S W Schill (2007), Tearing Down the Great Wall. The New Generation Investment Treaties of the People's Republic of China, Heidelberg: Max Planck Institute for International Law (Paper 1928).

115 Gallagher and Shan (2008), 6.

116 Id.

117 World Investment Report (2013), Global Value Chains: Investment and Trade for Development (United Nations: New York and Geneva), 230.

118 Berger (2010), 163; Schill (2007), 77.

119 For more on FDI inflows to China and round-tipping see D Sutherland and B Mathews, 'Round-Tipping or Capital Augmenting OFDI – Chinese Outward Investment and the Caribbean Tax Havens', Paper prepared for Leverhulme Centre for Research on Globalisation and Economic Policy (GEP), University of Nottingham, 2009 available at *https://asab.nottingham.ac.uk/shared/shared_levevents/conferences/Malaysia_ConferenceJan2009/D__Sutherland_OFDI_and_tax_havens.pdf;* UNCTAD Investment Brief, Rising FDI into China: The facts Behind the Numbers, 2007 available athttp://unctad.org/en/Docs/iteiiamisc20075_en.pdf

Like China, India also launched its BIT programme as part of the economic reforms programme initiated by the Indian government in 1991. Low economic growth during the four decades since independence, coupled with a severe balance of payments crisis in 1990-91, when foreign exchange reserves were worth only two weeks of imports,[120] forced India to unleash major structural adjustments and macro-economic reforms.[121] The reforms programme saw the adoption of bold measures aimed at liberalising FDI, such as the automatic approval of FDI up to 51 percent in high priority industries; setting up of a Foreign Investment Promotion Board (FIPB) to act as a single window clearance for foreign investment proposals; opening up new sectors, such as mining and telecommunications for foreign investment; amendment of the Foreign Exchange Regulation Act 1973 to treat foreign companies with more than 40 percent ownership at par with fully owned Indian companies.[122]

As a result of this policy change on foreign investment, India undertook negotiations with a number of countries to enter into international investment treaties to promote and protect foreign investment.[123] India has entered into BITs and Free Trade Agreements (FTAs) comprising a Chapter on investment protection, with about 86 countries, out of which 73 have already come into force.[124] The FERA was replaced with the Foreign Exchange Management Act (FEMA) in 1999. This new Act has undergone significant amendments pursuant to the Budget 2015-16. Although India's BIT programme is not as massive as the Chinese BIT programme, it still is one of the largest amongst developing countries.[125] Like in the case of China, the sheer number of Indian BITs demonstrates India's growing acceptance of international law as the legal instrument for the protection of foreign investments.

The Union of Soviet Socialist Republic (USSR) began signing BITs after it liberalised its foreign investment regime but before it invited foreign investors to the country in 1988.[126] The year before the Soviet Union began signing BITs, Mikhail Gorbachev, the then President of USSR in his speech in UN noted that "*[a]s the awareness of our common fate grows; every state would be genuinely interested in confining itself within the limits of international law".* [127]

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[120] See Ahluwalia, above n 22, 67; T N Srinivasan and S Tendulkar, S (2003), *Reintegrating India With the World Economy* (Institute of International Economics: Washington DC), 9; Nanda above n 20 for a different analysis.

[121] Kumar above n 15, 1323-1324; Bajpai and Sachs, 'Foreign Direct Investment in India: Issues and Problems' HIID Development Discussion Paper No. 759/2001; Nagaraj, above n 17, 1701-1702.

[122] For more details, see Kumar above n 15, 1323-1324; Bajpai and Sachs, 'Foreign Direct Investment in India: Issues and Problems' HIID Development Discussion Paper No. 759/2001; Nagaraj, above n 17, 1701-1702. C Rangarajan, 'Two Episodes in the Reform Process in S Acharya and R Mohan (*eds*), *India's Economy: Performance and Challenges* (OUP New Delhi 2010) 100; A Panagariya, 'Growth and Reforms During 1980s and 1990s' 39 (25) Economic and Political Weekly, 2581.

[123] Ministry of Finance (2011). Also see the 'Forewords' written by various Indian Finance Ministers to the Compendiums on BIPAs (New Delhi: Finance Ministry, India, 1996-2011).

[124] This figure of 73 BITs includes 69 standalone BITs and 4 FTAs containing a chapter on investment. In India, FTAs are known as Comprehensive Economic Cooperation Agreement (CECA). Full list of India's BITs is available at at Ministry of Finance, Bilateral Investment and Promotion Agreement (BIPA) - *http://finmin.nic.in/bipa/bipa_index.asp?pageid=2* (accessed on July 02, 2013)

[125] See UNCTAD (2013), World Investment Report: Global Value Chains: Investment and Trade for Development (United Nations: New York and Geneva), 230-234.

[126] *A Crevon*, "Bilateral Investment Treaty Overview – Russian Federation" (Oxford University Press, 2008). Available online at: *www.investmentclaims.com*.

[127] Quoted in Koh, op. cit., at ftn. 156

Russia has entered into a total of 72 BITs.[128] However, out of these only 56 are in force. The USSR started to negotiate BITs towards the very end of its existence and the earliest BIT was signed with Finland in 1989.[129] A total of 14 BITs were concluded by USSR, which included countries like Austria, Canada, China, France, Germany and the UK.[130] However, out of these, three BITs with China, Italy and Turkey, were later renegotiated by Russia due to the disintegration of the USSR.[131] Nevertheless, even though the state started entering into BITs in 1989, these came into force only post 1991 when USSR became Russia with respect to international treaty obligations.[132] In 1994 Russia signed the Energy Charter Treaty (ECT), which is a multilateral treaty to protect foreign investments in the energy sector, but did not ratify it.[133] Pending ratification, this treaty applied to Russia, in accordance with Article 45 of the ECT, on a provisional basis.[134] However, on August 20, 2009, Russia officially notified the ECT Depositary that it did not intend to become a Contracting Party, which resulted in termination of ECT's provisional application two months thereafter.[135]

The beginning of Putin's administration in 2000 witnessed a very important change in the Russian policy with respect to investment protection treaties.[136] The Russian Federation substantially changed the treaty text to which it was prepared to accede.[137] A new Model BIT was adopted by the Government in 2001 replacing the previous model BIT of 1992.[138] This text, adopted in 2001, did not contain provisions on Fair and Equitable Treatment (FET), National Treatment (NT) and Most Favoured Nation (MFN), which were added in 2002.[139] In its bid to attract more FDI, Russia recently diversified the geography of its BITs, which were mostly with European countries in the past.[140] In 2009, Russia ratified BITs with China, Indonesia, Jordan, Qatar, and Venezuela[141] and in 2010, with Belarus, Kazakhstan, Kyrgystan, Tajikistan, and Turkmenistan.[142] The inward FDI to Russia has increased from US$15444mn in 2004 to US$79262mn by the end of 2013 – almost five times increase, which is quite spectacular (Annexures: Table III).

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128 http://investmentpolicyhub.unctad.org/IIA/CountryBits/175#iiaInnerMenu

129 *S Ripinsky*, "Russia", in C Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013), 595.

130 Ibid.

131 Ibid.

132 Ibid.

133 Ibid, 596

134 Ibid. Alex M. Niebruegge 'Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law', 8 (1) Chicago Journal of International Law (2007), 355.

135 Ripinsky (2013), 596.

136 Noah Rubins and Azizjon Nazarov, Investment Treaties and the Russian Federation: Baiting the Bear? Business Law International Vol 9 No 02 May 2008.

137 Ibid.

138 Ibid.

139 Ripinsky (2012), 597.

140 A Kuznetsov, 'Inward FDI in Russia and its Policy Context, Columbia FDI Profiles, Vale Columbia Centre on Sustainable International Investment, 30 November 2010.

141 Ibid.

142 Ibid.

South Africa's investment regime has undergone significant transformation and liberalisation since the country's successful transition to a multiracial democratic order in April 1994. This has been in line with the global trend towards greater liberalisation of national FDI regimes.[143] After assuming political power in 1994, the African National Congress (ANC) led government, adopted a range of market-friendly economic policies.[144]

During the apartheid period, South Africa (SA) did not enter into any bilateral investment treaties.[145] However, post-Apartheid, the new government embarked upon an ambitious round of treaty-making.[146] In 1996, South Africa prepared a key policy document called Growth, Employment and Redistribution (GEAR)[147]. The GEAR strategy was based on a rapid expansion of non-traditional (non-mineral) exports and an increase in private sector investment (generated largely in the form of FDI) as engines of economic growth.[148] Thus, FDI was central to the government's medium and long-term economic goals and thus, a number of investment treaties were entered into.[149]

The new South African Government signed its first BIT with the UK in September 1994.[150] The formulation of the BITs concluded in the post-apartheid period (1994-1998), largely followed the format of the OECD model and most BITs appeared to be fairly similar in substance, format and intention.[151] This model was very different from the revised model BIT developed by the South African Development Community (SADC) in 2012.[152] The SADC model reflects new thinking about investment protection and endeavours to balance rights of investors with host state's right to regulate.[153]

Since 1994, it has signed another 31 such agreements most of which have not been ratified[154] due to certain Constitutional issues relating to the self-executing nature of

[143] *Vickers, Brendan,* Foreign Direct Investment Regime In The Republic Of South Africa, *CUTS Centre for International Trade, Economics and Environment, Jaipur, India*, February 2002.
[144] CUTS, 2003, Investment Policy in South Africa – Performance and Perceptions
[145] Peterson (2006).
[146] Luke Eric Peterson, South Africa's Bilateral Investment Treaties Implications for Development and Human Rights, *Dialogue on Globalization*, Friedrich-Ebert-Stiftung, Geneva, 2006.
[147] OECD (2001), OECD Global Forum on International Investment – New Horizons for Foreign Direct Investment.
[148] Ibid.
[149] Jensen, Olivia, Foreign Direct Investment in India and South Africa: A Comparison of Performance and Policy, *CUTS Centre for International Trade, Economics & Environment*, 2002; Peterson (2006).
[150] Ibid.
[151] Ibid.
[152] Sean Woolfrey, 'The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa', TRALAC, Trade Brief No. D14TB03/2014 available at *http://www.tralac.org/images/docs/6771/d14tb032014-woolfrey-sadc-model-bit-20141210-fin.pdf*
[153] Ibid. Also see SADC Model Bilateral Investment Treaty with Commentary, 2012 available at *http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf*
[154] *Carim, Xavier (Deputy Director General, Department of Trade and Industry),* South Africa and Bilateral Investment Treaties, Presentation made at *SAIIA Event 'How Should Foreign Investments Into South And Southern Africa Be Regulated And Protected?'* September 2013.

these treaties in South Africa as per the constitution.[155] Out of 46 total BITs only 23 BITs are in force.[156] Further, none of the BITs signed after 1998 have been enforced.

From the above discussion, one can conclude that one of the main reasons for all BRICS economies entering into BITs was to attract foreign investment. Indeed, FDI to all these economies has increased manifold in past ten years. However, one is unsure of the contribution of BITs to this increase in foreign investment. The case of Brazil is very interesting, where foreign investment flows have increased manifold without Brazil ratifying any of its signed BITs. We now turn our attention to comparing and contrasting the basic features of BITs signed by all the BRICS economies.

II) Evolution of BITs in BRICS

Although Brazil has not ratified any of the BITs that it has signed, we will begin this section with a discussion of the key features of the Brazilian BITs. All the Brazilian BITs contain broad provisions, such as the definition of investment includes 'as every type of asset' followed by several groups of illustrative categories.[157] Brazilian BITs also guarantee national treatment and Most Favoured Nation (MFN) status provided that investors are in the same circumstances, a concept, which has not been explained clearly.[158] Exceptions to MFN guarantee are regional integration agreements and international taxation agreements.[159] BITs signed by Brazil cover expropriations, both direct and indirect, unless it is done in a non-discriminatory manner, for public purpose and with the payment of compensation.[160] Certain Brazilian BITs also provide for requirements, such as public necessity and due process of law for expropriation, and thus invoke a higher threshold.[161] The provision on compensation states that it must be adequate, prompt as well as effective and must be determined in accordance to the laws of the host state, thus, embodying the Calvo Doctrine.[162]

It is interesting to note that although one of the primary reasons for Brazilian legislature not to ratify BITs was the potential adverse impact on sovereignty, yet the BITs signed by the executive contained many investor-friendly provisions as briefly mentioned above, with the exception of the reference to Calvo doctrine. In other words, given Brazil's stand on protection of foreign investment in the past and notwithstanding the liberalisation of foreign investment regime, one would have expected the Brazilian Government to enter into BITs that were more restrictive in terms of the rights provided to foreign investors or be like the initial BITs of China.

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155 Republic of South Africa, Bilateral Investment Treaty Policy Framework Review: Government Position Paper (2009), 32-33.

156 Peterson (2006). Also see Xavier Carim, Lessons from South Africa's BIT Review, Columbia FDI Perspectives, Number 109/2013 available at http://ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf

157 Collins (2013). For more on this braod asset-based defintion of investment, see Dolzer and Schreuer supra note 2, 63; K Yannaca-Small, 'Definition of Investment: An Open-ended Search for a Balanced Approach' in K Yannaca-Small (*ed*) Arbitration Under International Investment Agreements (Oxford University Press: Oxford: 2010), 243 at 245.

158 Ibid

159 Ibid.

160 Ibid.

161 Ibid.

162 Ibid.

Scholars divide China's BITs into two phases – the first and second generation BITs.[163] Chinese BITs from 1982 to 1997 are described as the first-generation BITs[164] and these contain limited substantive and procedural protection.[165] An example of inadequate substantive protection to foreign investment is the presence of limited national treatment provision in these BITs.[166] For example, Article 3(3) of the Chinese BIT with the UK provides that 'either Contracting Party shall to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investment of nationals or companies of the other Contracting Party the same treatment as that accorded to its own nationals or companies'. Similar sort of national treatment provisions are present in other Chinese BITs of this phase.[167] The reference to 'domestic law' and the presence of phrases like 'to the extent possible', in these Chinese BITs, limit the substantive protection of national treatment to foreign investment.[168]

The limited procedural protection in these first generation Chinese BITs is best embodied in the absence of investor-state dispute settlement mechanism or covering disputes limited to the *amount of compensation payable following an expropriation*.[169] As a result, the first-generation Chinese BITs severely restrict the protection that foreign investors could enjoy under BITs.

Thus, though China initiated the BIT programme in 1982 as part of her 'open-door' policy, it did not fully embrace international law as the basis for protection of foreign investment. In other words, even after the adoption of the 'open door' policy, China's traditional skepticism *vis-à-vis* international law was still evident.[170] However, from 1998 onwards, China's BIT practice started to change and scholars describe the post 1998 phase as the second generation BITs. The post 1998 BITs reflect a more liberal Chinese approach to foreign investment protection.[171] For instance, post 1998 Chinese BITs include post-establishment national treatment (NT) provision though with a 'grandfather' clause (allows existing legislation that is inconsistent with the NT obligation).[172] Despite the presence of the 'grandfather' clause, these national treatment provisions are more liberal than the past provisions, which are subject to domestic laws, because new non-conforming measures cannot be imposed.[173] There are also some Chinese BITs that contain full post admission national treatment without any reservations and exceptions.[174]

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163 Gallagher and Shan (2008); Schill (2007); Eliason (2011); Heymann (2008), 524.

164 Eliason (2011), 92

165 Eliason (2011), 92.

166 Wenhua Shan, Norah Gallagher, Sheng Zhang, N*ational Treatment and Foreign Investment in China: A Changing Landscape*, ICSID Review: Foreign Investment Law Journal, Spring 2012.

167 See Article 3(2) of the China-Iceland BIT; Article 3(2) of the China-Slovenia BIT.

168 See Shan and Gallagher (2008), 167; Shan et al (2012); Schill (2007), 94-96.

169 Eliason (2011); Heymann (2008), 515. Also see G Smith (2010), Chinese Bilateral Investment Treaties: Restrictions on International Arbitration, 76 Arbitration, 58 at 58.

170 Schill (2007), Eliason (2011). Also see Jian Zhou (2000), *National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective*, 10 Touro International Law Review, 39.

171 Schill (2007).

172 Gallagher and Shan (2008), 169. See the national treatment provision in the China-Germany BIT, which contains a 'grandfather' provision.

173 Ibid.

174 See Article 5 of the China-Seychelles BIT. Also see the discussion in Shan *et al* (2012) and W Shen (2010), Leaning towards a More Liberal Stance? – An Evaluation of Substantive Protection

Post 1998, China also started accepting full-fledged investor-state dispute settlement mechanism in its BITs.[175] It has been argued that China's ratification of the ICSID Convention in 1993 and shift in policy towards international arbitration played a role in China accepting broad investor-state dispute settlement provisions in her BITs.[176] Scholars also argue that emergence of China as a capital exporting country has also played a role in bringing about a transition in China's BIT practice.[177]

Like China, the initial BITs signed by Russia were also restrictive.[178] In other words, although these initial BITs contained all the key substantive provisions on protection of foreign investment like MFN, FET and expropriation, the restrictive aspect, like initial Chinese BITs, was with respect to investor-state arbitration clauses. For example, Russia's BITs with Austria, Belgium-Luxembourg and Finland, all signed in 1991; restricted the scope of arbitration clause to the 'amount or mode of payment of compensation for expropriation'.[179] Similarly, other Russian BITs signed in 1991 with the following countries: Spain, UK, Korea, Netherlands and Switzerland, restricted the scope of arbitration clause to the issue pertaining to breach of the monetary transfer provision and the issue of amount and procedure of payment of compensation for expropriation.[180] However, later BITs signed by Russia do not contain a restrictive arbitration clause and extend to all breaches of the BIT provisions. This change in treaty practice, again, is similar to the change in Chinese practice. However, the difference was that China followed the practice of restrictive arbitration clauses for more than a decade whereas this was not the case with Russia. Nevertheless, Russia and China's initial treaty practice was very different from that of Brazil, which did not agree for restrictive arbitration clauses.

In comparison to China and to some extent Russia, Indian BITs cannot be classified into different generations based on the substantive and procedural protection offered to foreign investment. This is not to state that Indian BIT practice has been uniform. However, India's BIT practice has remained broadly the same, since 1994 when India entered into its first BIT with the UK. Unlike China, which changed its BIT practice as per its needs and requirements, the Indian BIT practice has evolved independent of India's needs and requirements. Thus, India's BIT practice has not changed much from mid 1990s when India was essentially a capital importing country and thus should have favoured a BIT that safeguarded its regulatory latitude, to late 2000 when India also started to emerge as a capital exporting country and thus should have favoured investor-friendly investment treaties signifying its position as an outward investor of capital.

Provisions under the new ASEAN-China Investment Agreement in Light of Chinese BIT Jurisprudence, 26(4) Arbitration International, 549 at 555-561.

175 Gallagher and Shan (2008), 320. Also see J Willems (2011), The Settlement of Investor-State Disputes and China: New Developments on ICSID Jurisdiction, 8 (1) South Carolina Journal of International Law and Business, Article 2.

176 Ibid.

177 Eliason (2011); Schill (2007); Shen (2010).

178 See N Rubins and E Rubinina, Russia (2014) Global Arbitration Review available at: *http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/26/russia/#ftn_13*

179 Ibid.

180 Ibid.

Unlike initial Chinese and Russian BITs, which contained limited investor-state dispute settlement provisions, Indian BITs, right from the beginning, contained broad investor-state dispute settlement provisions recognising the adjudication of all regulatory measures.[181] Also, Indian BITs, contained broad national treatment provisions, which did not subject the treatment to national laws or contained a 'grandfather' provision.[182]

South African BIT practice is close to India i.e. unlike China and Russia; South Africa's initial BITs did not contain a restrictive arbitration clause. SA follows the 'admission' approach to investment and does not provide any pre-establishment rights, which means that the investment treaty obligations apply only once investment has entered the country and not before.[183] Thus, MFN treatment only becomes applicable once an investment has been 'admitted' into the territory of SA. Further, a substantial number of SA BITs seem to grant MFN treatment to both investors and their investment.

In South African BITs, all investments, returns of investors, and activities related to the investment are protected by MFN and NT standards.[184] There are, however, important exceptions to these standards. These include special privileges or advantages accorded by virtue of a contracting party's membership to regional economic integration organisations or any advantage granted to a third country, under a Double-taxation Treaty (DTT).[185] Another exception to MFN and NT clause is that, preference could be granted by one contracting party to development finance institutions, even though they might have foreign participation, which operate with the sole purpose of providing development assistance through non-profit activities, and these need not be extended to the investors or development finance institutions of the other contracting party to the BIT.[186]

III) Investment Treaty Arbitration and BRICS

In this part of the paper we discuss briefly, the cases that have been brought by foreign investors under different BITs against the BRICS economies. Brazil is not discussed here because none of the Brazilian BITs have been ratified and thus there are no investor-state BIT disputes against Brazil. Amongst BRICS economies, Russia has had the maximum involvement with investment treaty arbitration (See Annexures: Table V). The disputes against Russia have involved a host of legal issues including expropriation of foreign property, covering many Russian BITs where final arbitral awards have been issued. According to Rubins and Rubinina, Russia has failed to honour all of the awards issued against it, which are available in the public domain.[187]

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[181] See Prabhash Ranjan, 'India and Bilateral Investment Treaties – A Changing Landscape', 29(2) ICSID Review – Foreign Investment Law Journal, 419.

[182] Ibid.

[183] If a BIT recognises 'pre-establishment' rights, then it will limit the regulatory power of the host country, as treaty provisions will apply even before investment has entered the country – for full discussion on post-entry model BITs See A Newcombe and L Paradell (2009) Law and Practice of Investment Treaties (Kluwer International: Hague), 133.

[184] CUTS, 2003, Investment Policy in South Africa – Performance and Perceptions

[185] Ibid.

[186] Ibid. See Article IV (4) of the South Africa-Chile BIT

[187] Rubins and Rubinina (2014).

These awards include[188] – *RosInvestCo v Russian Federation;*[189] *Sedelmayer v Russian Federation;*[190] three parallel *Yukos* arbitrations against Russia brought under the Energy Charter Treaty (totalling US$50.2bn in damages).[191]

On the other hand, China's experience with investment treaty arbitration has been very different. Till date there is only one known instance of a foreign investor initiating a case against China – *Ekran Berhad v People's Republic of China.*[192] On the other hand, there have been instances where Chinese investors have brought cases against other countries using the Chinese BITs – for example, a Chinese investor invoked the China-Peru BIT to bring a case against Peru to claim damages for expropriation by Peru.[193]

India's experience in investment treaty arbitration comes close to Russia's in terms of investor-state dispute initiated against India. However, a critical difference is that in case of India, unlike Russia, only one adverse ITA tribunal ruling exists (see Annexures: Table VII). India's experience has been very different from China, because a large number of foreign investors have issued arbitral notices to the Indian government, which is not the case with China.

Towards the end of 2011, the first ITA award in the form of *White Industries v Republic of India*[194] was issued against India which the country lost to an Australian company, White Industries. Considerable material has already been written about this case[195] and hence will be briefly discussed here. This case originated from *White Industries* challenging the inordinate delay by Indian courts, to enforce an international commercial award that *White Industries* had obtained against an Indian company, Coal India.[196] The ITA tribunal held India guilty of not providing *White industries* with 'effective means' of asserting claims and enforcing rights, despite the fact that the India-Australia BIT does not mention or include such a duty for host states. The tribunal got around that by holding that *White Industries* could borrow the

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188 Ibid.

189 *Russian Federation v. RosInvestCo Ltd.*, SVEA Court Ruling, 05 September 2013.

190 *Sedelmayer v Russian Federation*, Decision of the Supreme Court of Sweden, 1 July 2011; *Sedelmayer v Russian Federation*, Decision of the Supreme Court of Germany, 4 October 2005.

191 See *Yukos Universal Ltd. v Russian Federation*, PCA Case No. AA 227, UNCITRAL *ad hoc* arbitration, Final Award, July 18, 2014; *Veteran Petroleum Ltd. v. Russian Federation*, PCA Case No. AA 228, UNCITRAL *ad hoc* arbitration, Final Award, July 18, 2014; *Hulley Enterprises Ltd. v Russian Federation*, PCA Case No. AA 226, UNCITRAL *ad hoc* arbitration, Final Award, 18 July 2014.

192 Ekran Berhad *v* People's Republic of China ICSID Case No. ARB/11/15

193 Tza Yap Shum *v* The Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Feb. 12, 2007), summary available at: *http://www.italaw.com/documents/ TzaYapShumAwardIACLSummary.pdf.*

194 *White Industries Australia Limited v Republic of India,* Final Award UNCITRAL (30 November 2011).

195 Nacimiento and Lange, above n 17; Sumeet Kachwaha, The White Industries Australia Limited – Indian BIT Award – A Critical Assessment (2013) 29 Arbitration International, 275-293; A Ray, White Industries Australia Limited v Republic of India (2012) 29 Journal of International Arbitration, 623-635; Sanan above n 17.

196 See above n 133.

'effective means' provision present in the India-Kuwait BIT[197] by relying on the MFN provision[198] of the India-Australia BIT.[199]

In determining the content of the 'effective means' standard, the tribunal relied heavily on *Chevron-Texaco v Ecuador.*[200] The tribunal in *Chevron v Ecuador* held that under the 'effective means' standard, a distinct and potentially less demanding test is applicable in comparison to denial of justice under customary international law.[201] The tribunal then applied the 'effective means' standard to *White Industries' s* claim and came to the conclusion that the inability of the Indian Judiciary to decide its jurisdictional claim (*i.e.* the Calcutta High Court lacked jurisdiction to entertain Coal India's application to set aside the commercial arbitral award) in over nine years amounts to undue delay.[202] This undue delay, according to the tribunal, breached India's treaty obligation to provide to foreign investors 'effective means' of asserting rights and enforcing claims.[203]

Whether the *White Industries* tribunal correctly interpreted the MFN provision in India-Australia BIT or whether they applied the content of the 'effective means' standard as developed by the *Chevron* tribunal, are moot issues, which have been critically examined by other authors,[204] and hence, are not discussed here. However, it is important to mention that this case, for the first time, confirmed the broad meaning of provisions like MFN in Indian BITs and was an eye opener for Indian BIT policy-makers. Another major practical consequence of this case is the possibility that it might result in more BIT claims against India for judicial delays involving foreign corporations. Furthermore, the instances of judicial delays that could be challenged need not be restricted to enforcement of commercial arbitral awards, as was the case in *White Industries*. It could also include other matters like delay in hearing regulatory disputes involving foreign corporations and the Indian state.

Subsequent to this case, in 2012, there have been a plethora of ITA notices that have been slapped against India by different foreign corporations under different Indian BITs (Annexures: Table VII). Four different foreign telecom companies, such as the Norwegian company, *Telenor*, and the Russian company, *Sistema*, have issued ITA

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197 Article 4(5) of the India-Kuwait BIT provides that '*each contracting party shall...provide effective means of asserting claims and enforcing rights with respect to investments*'.

198 The usage of the MFN provision has been controversial. It has been applied broadly in some cases like *Suez Sociedad General v. Argentine Republic* ICSID Case No ARB/03/19 (August 03, 2006), para 60; *Mafezini v Spain*, para 56; Siemens AG *v* The Argentine Republic, para 102. Moreover, some cases have not given the MFN provision a very broad meaning - *Plama Consortium Ltd. v. The Republic of Bulgaria* ICSID Case No. ARB/03/24, Award (February 08, 2005), paras 198 to 224; *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/04/14, Award, (December 08, 2008), para 92 to 107.

199 Article 4(2) of the India-Australia BIT provides the MFN provision according to which, '*a contracting party shall at all times treat investments in its territory on a basis no less favourable than that accorded to investments or investors of any third country*'.

200 *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, UNCITRAL, Partial Award on Merits (March 30, 2010).

201 Id, para 244. ,

202 *White Industries v India*, paras 11.4.16 to 11.4.20.

203 Id.

204 Kachwaha above n 134; Sanan above n 17.

notices to India for cancellation of telecom licenses by the Indian Supreme Court.[205] The same year also saw another global telecom giant, *Vodafone* serving notice to the Indian Government,[206] after India introduced amendments to the tax laws[207]. The Supreme Court overruled the judgement of the High Court in favour of *Vodafone*.[208]

In case of South Africa, there have been two instances where foreign investors have issued arbitral notices to the South African government (Annexure: Table VIII). One of the cases that triggered a review of the BIT programme in South Africa was related to an Italian investor challenging the Black empowerment legislation of South Africa – *Piero Foresti, Laura de Carli & Others v The Republic of South Africa*.[209] The investors discontinued this case[210] although it did bring to light the potential reach of BITs in terms of impact on host state's regulatory power.

IV) Current State of Play and Future of the BIT Programme in BRICS economies

In case of Brazil, it has been argued that as Brazilian companies start to invest abroad and the country becomes an important source of outward FDI as well, it should re-visit her BIT programme and enter into BITs to safeguard the interests of its companies investing abroad.[211] In other words, Brazil's growing status as a capital exporter may compel a change in her BIT policy as Brazilian firms overseas might

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[205] Siddharth, 'Telenor Seeks Arbitration, Claims Damages of US$14bn from Government in 2G Case' Times of India, (2012) *http://timesofindia.indiatimes.com/business/india-business/Telenor-seeks-arbitration-claims-damages-of-14bn-from-govt-in-2G-case/articleshow/12420404.cms* accessed on February 10, 2013; Arun S & Thomas K Thomas, '2G Mess: Telenor May Invoke India-Singapore Bilateral Pact' The Hindu Business Line (March 22, 2012), http://www.thehindubusinessline.com/industry-and-economy/info-tech/article3155481.ece accessed December 27, 2012; 'Sistema Sends a Notice to Republic of India to Settle Dispute Relating to the Revocation of SSTL's Licenses' (February 28, 2012) *http://www.sistema.com/press/press-releases/2012/02/sistema-sends-a-notice-to-the-republic-of-india-to-settle-dispute-relating-to-the-revocation-of-sstl's-licenses.aspx*
Also see *Centre for Public Interest Litigation and Others v Union of India and others* (2010) Writ Petition Civil No. 423/2010 in the Supreme Court of India.

[206] Vodafone Serves Notice against Indian Government under International Bilateral Investment Treaty', News Release (April 17, 2012) *http://www.vodafone.com/content/index/media/group_press_releases/2012/bit.html* accessed on January 10, 2013.

[207] See the newly inserted Explanation 2 to Section 2(47) of the Income Tax Act, 1961 that defines 'transfer'. Also see the Draft Report on Retrospective Amendments Relating to Indirect Transfer, Expert Committee (2012) for the implications of this newly inserted Explanation for the purpose of Vodafone-like commercial transactions. Also see the newly inserted Explanation 5 to Section 9(1)(i) (made applicable retrospectively from 1 April 1962) of the Income Tax Act, which brings *capital gains on account of transfer of a capital asset, which has underlying assets in India under the category of capital gains as taxable income.*

[208] Supreme Court of India decided that imposition of retrospective taxes on Vodafone is illegal – See '*Vodafone International Holdings BV v Union of India*, (2012) Civil Appeal No. 733/2012 in the Supreme Court of India.

[209] Piero Foresti, Laura de Carli & Others v The Republic of South Africa ICSID Case No. ARB(AF)/07/01

[210] Piero Foresti, Laura de Carli & Others v The Republic of South Africa ICSID Case No. ARB(AF)/07/01, Award, August 04, 2010.

[211] Lucas Bento, 'Time to Join the 'BIT Club' Promoting and Protecting Brazilian Investments Abroad' (2013), 24 (2) American Review of International Arbitration; Collins (2013).

find themselves in need of protection of their investments from the actions of other countries.

Russia, given the fact that it has found itself at the receiving end of numerous BIT claims, has started citing sovereign immunity as the ground to condemn the enforcement of such awards against Russian state assets.[212] Most recently, the Russian Government has criticised the ITA awards against it, in the *Yukos* arbitration, as politically motivated.[213] Russia has refused to ratify Russia-Cyprus BIT as well as the Energy Charter Treaty.[214] Notwithstanding these reactions due to the adverse BIT arbitral awards, it is unlikely that Russia will completely give up its BIT programme as the nation also has to keep in mind the interests of Russian investors abroad.[215]

Like Russia, the numerous arbitral claims initiated against India, have forced a fundamental re-think of the BIT programme. In wake of these ITA notices, concerns have been raised regarding the impact of BITs on India's right to regulate in public interest.[216] For example, a letter, written by many CSOs to the Indian Prime Minister, in 2012, states that ITA under BITs, in the long run, "*will have a chilling effect on the ability of different ministries (of the Indian government) to regulate different social and economic needs".*[217] Thus, the letter says, India should re-examine its existing BIT programme.[218]

Amidst these concerns and increasing calls to re-examine BITs, India has decided to put all its on-going BIT negotiations on hold and to review not only the existing BITs[219] but also the model BIT.[220] The objective of the review is to examine whether BITs unduly encroach upon India's ability to exercise its sovereign regulatory

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[212] Rubins and Rubinina - See for example, Russian Government's reaction to Sedelmayer attaching Russian Government assets in Germany and Sweden: The Ministry of Foreign Affairs of the Russian Federation, Press Release, *Russian MFA Spokesman Andrei Nesterenko Response to Media Query on Situation around Russian House Building in Berlin*, 22 September 2009; The Ministry of Foreign Affairs of the Russian Federation, Press Release, *Swedish Charge d'Affaires Summoned to the Foreign Ministry*, 07 July 2011; The Ministry of Foreign Affairs of the Russian Federation, Press Release, *On call of the Swedish Ambassador to the Russian Federation to the Russian Ministry of Foreign Affairs*, April 20, 2012.

[213] Rubins and Rubinina

[214] Ibid.

[215] See for example, Press Release by the Ministry of Economic Development, 26 January 2012 (in relation to the signing of a BIT with Nicaragua); "Protective measures in foreign trade discussed in the Ministry of Economic Development", July 28, 2009, available at: <*http://vneshmarket.ru/NewsAM/NewsAMShow.asp?ID=305620*>.

[216] See B Dhar, R Joseph and T C James, 'India's Bilateral Investment Agreements: Time To Review' (2012) XLVII Economic and Political Weekly, 113; S Francis and M Kallummal, 'India's Comprehensive Trade Agreements: Implications for Development Trajectory' (2013) 48 (31) Economic and Political Weekly; P Ranjan, 'More than BIT of a Problem' *The Financial Express* (27 April 2013) < *http://www.financialexpress.com/news/column-more-than-a-bit-of-a-problem/1108228*> accessed 31 August 2014.

[217] Letter written by many civil society organisations to the Indian Prime Minister expressing concerns about India's BITs, <*http://donttradeourlivesaway.files.wordpress.com/2012/06/civil-society-letter-on-us-india-bit.pdf*> accessed 2 July 2014.

[218] Ibid. Also see another open letter to the Indian Prime Minister on the proposed India-US BIT <*http://www.madhyam.org.in/admin/tender/August_7_Letter_to_PM%20(1).html*> accessed August 26, 2013.

[219] One of the authors also served on Ministry of Finance's Committee to Review the BITS

[220] Press Information Bureau Press Release, 'Bilateral Investment Treaties' (May 06, 2013) <*http://pib.nic.in/newsite/erelease.aspx?relid=95593*> accessed August 21, 2014.

power.[221] Additionally, the review exercise would also provide a roadmap for re-negotiation of all the Indian BITs.[222] Thus, while, India might not terminate its BITs, it appears that it is quite keen to re-negotiate its BITs. Review of India's BITs and efforts to develop a new model BIT could see India transforming from a rule-taker to a rule-maker in international investment law.

In 2009, South Africa began a review of its entire BIT programme partly necessitated by various arbitral claims made against it.[223] The South African Government admits that in its endeavour to make the country an attractive destination for foreign investment, it entered into IIAs without critically evaluating their impact on policy-making in critical areas.[224] This, according to the South African Government, happened because of the inexperience of their negotiators and their lack of knowledge about investment law.[225]

South Africa started terminating its BITs and in September 2012, when it terminated its BIT with Belgium and Luxembourg followed by Spain and Germany in 2013.[226] This decision was taken after reviewing its entire BIT programme in light of an investment treaty arbitration claim, in 2007, filed by several Italian citizens and a Luxembourg corporation under South Africa-Belgium-Luxembourg BIT.[227] The claimants alleged that the 2004 Mineral and Petroleum Resources Development Act (MPRDA) of South Africa, which was part of South Africa's efforts to increase participation of the historically disadvantaged South Africans in the mining industry, amounted to the expropriation of their mineral rights.[228] This challenge prompted South Africa to review its BIT programme and conclude that it would prefer to have a single domestic legislation aimed at simultaneously protecting foreign investment and South Africa's right to regulate, instead of BITs.[229]

In case of China, there is no evidence to suggest that China is planning to re-think its BIT programme in light of its expereicnes with investment treaty arbitration. This

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[221] S Mehdudia, 'BIPA Talks Put on Hold' *The Hindu* (21 January 2013) <http://www.thehindu.com/business/Economy/bipa-talks-put-on-hold/article4329332.ece> accessed February 11, 2013. Also see – 'An Indian Government official quoted by Surabhi, Govt to Review Bilateral Treaties To Avoid Legal Battle with Telcos' *The Indian Express* (April 13, 2012); V Beniwal, 'Centre Mulls Renegotiating Bilateral Investment Pacts' *The Business Standard* (23 July 2012) <*http://www.business-standard.com/article/economy-policy/centre-mulls-renegotiating-bilateral-investment-pacts-112072302017_1.html*> accessed 31 August 2014.

[222] Government of India, Ministry of Finance, Office Memorandum, 26 March 2013 – accessed under the Right to Information Act, 2005.

[223] Department of Trade and Industry, Republic of South Africa, Notice 961 of 2009, online *http://www.info.gov.za/view/DownloadFileAction?id=103768*.

[224] Ibid.

[225] Ibid. See Poulsen (2011), 300-322, which undertakes a detailed historical analysis of the South African IIA programme and confirms this point. Also see Muchlinski (2009), 41

[226] Sean Woolfrey, Another BIT Bites the Dust (October 30, 2013) <http://www.tralac.org/2013/10/30/another-bit-bites-the-dust/> accessed July 01, 2014.

[227] Piero Foresti, Laura de Carli & Others *v* The Republic of South Africa, ICSID Case No. ARB (AF)/07/01.

[228] Id. Also see IISD (2012), South Africa Begins Withdrawing from EU-member BITs available at: *http://www.iisd.org/itn/2012/10/30/news-in-brief-9*

[229] Woolfrey (n 121). Also see Mustaqeemde Gama (2014) Draft Bill No Threat to Foreign Investors in South Africa, Business Day available at: *http://www.bdlive.co.za/opinion/2014/04/01/draft-bill-no-threat-to-foreign-investors-in-south-africa*

puts China in a different category, as compared to India, Russia and South Africa where the investment treaty arbitration experiences have acted as a trigger to reform the BIT programme.

V) Conclusion

The Paper observed that the original motivation to enter into BITs for all BRICS economies was the need and eagerness to attract foreign investment in view of domestic constraints of availability of capital. However, barring Brazil, in no other BRICS economy, the potential impact of BITs on sovereignty resulted in any of these countries not ratifying BITs. In case of China and, to some extent, Russia, concerns with respect to sovereignty of host country, resulted in these countries entering into BITs, in the initial phase, with limited or restricted investor-state dispute settlement. This restricted investor-state dispute settlement provision did not allow foreign investors to bring claims against host states except for disputes related to compensation for expropriation. This treaty practice changed later once these countries, especially China started looking at BITs as an important tool to safeguard their foreign investment abroad. In fact, protection of foreign investment abroad is now becoming a major factor for Brazil to re-visit its BIT programme. However, countries like India and South Africa, more or less followed a uniform treaty practice without adjusting it to the needs of capital importing or capital exporting. In the case of India, which too is exporting capital, it has become imperative to review its policy towards BITs.

Further, a very interesting observation, which is responsible for the current state of play in three of the five BRICS economies – Russia, India and South Africa is that their experience with investment treaty arbitration has triggered concerns related to BITs unduly encroaching on their sovereign right to regulate in these countries. This has forced them to re-think their BIT programmes, which might result in a new treaty practice in future. There are very few instances of investors from BRICS countries using BITs to enforce their rights, though this might change in future as these countries emerge as major exporters of capital.

This changing treaty practice could result in these countries emerging as rule-makers in investment treaties. This will be a departure from their current position where these countries have generally been rule-takers in investment treaties i.e. merely following the rules made by Western Europe and the US. Also, considering the widespread backlash generated by BITs in BRICS economies and also in developed countries, there is now a better understanding of the importance of a balanced framework. This could be leveraged for negotiating a framework that balances the investment protection objective with that of retaining policy space for pursuing development objectives by emerging BRICS economies. This would also limit the possibility of abuse of the provisions by investors as has been demonstrated by the BITs cases, at the multilateral level. Whether the World Trade Organisation (WTO) is the right forum for negotiating a multilateral agreement on investment is a difficult question to answer. An effort was made by the Organisation of Economic Cooperation and Development (OECD) to draft a Multilateral Agreement on Investment (MAI) but was aborted due to difficulties faced by some of their member states.

One of the major concerns in the review of BITs is the issue of investor-state arbitration. The question is whether BITs should allow private foreign investors to challenge sovereign actions of host states or should this be restricted only to the government of home states like is the case at the WTO. Also, important to note is that while foreign investors, under BITs, can directly bring claims against the host state at an international arbitral forum, the same right is not available to domestic investors, which arguably places domestic investors in a disadvantageous position.

Comparing and contrasting, the origin, evolution, current state of play and future of the BIT programme of the five BRICS countries, which are quite diverse from each other, is not an easy job. This Paper is a modest attempt at this, with the hope that this would encourage more research on the BITs of BRICS economies. It is important that BRICS economies take well-informed decisions on BITs after widely consulting with all stakeholders, such as industry, civil society, academia etc. and knee-jerk reactions should be avoided.

VI) Annexures

Table I: Flow of Foreign Investment in Brazil[230]

S. No	Year	FDI Inflow		FDI Outflow	
		Figure in US$mn	Rank	Figure US$mn	Rank
1.	2004	18 146	12	9 807	17
2.	2005	15 066	12	2 517	38
3.	2006	18 822	21	28 202	13
4.	2007	34 585	17	7 067	36
5.	2008	45 058	13	20 457	19
6.	2009	25 949	13	-10 084	164
7.	2010	48 506	9	11 588	27
8.	2011	66 660	5	-1 029	161
9.	2012	65 272	5	-2 821	165
10.	2013	64 045	6	-3 496	164

Explanation: FDI flows with a negative sign indicate that at least one of the three components of FDI (equity capital, reinvested earnings or intra-company loans) is negative and not offset by positive amounts of the remaining components. These are instances of reverse investment or disinvestment.

Table II: Flow of Foreign Investment in China[231]

S. No	Year	FDI Inflow		FDI Outflow	
		Figure in US$mn	Rank	Figure in US$mn	Rank
1.	2004	60 630	2	5 498	23
2.	2005	72 406	4	12 261	18
3.	2006	72 715	3	21 160	18
4.	2007	83 521	7	22 469	19
5.	2008	108 312	3	55 910	12
6.	2009	95 000	2	56 530	6
7.	2010	114 734	2	68 811	5
8.	2011	123 985	2	74 654	7
9.	2012	121 080	2	87 804	4
10.	2013	123 911	2	101 000	3

[230] World Investment Reports 2004-2013, UNCTAD, available at: http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx

[231] World Investment Reports 2004-2013, UNCTAD, available at: http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx

Table III: Flow of Foreign Investment in Russia[232]

S. No	Year	FDI Inflow		FDI Outflow	
		Figure in US$mn	Rank	Figure in US$mn	Rank
1.	2004	15444	14	13782	15
2.	2005	12886	15	12767	18
3.	2006	29701	11	23151	16
4.	2007	56996	11	45879	13
5.	2008	74783	6	55663	12
6.	2009	36583	6	43281	6
7.	2010	43168	9	52616	8
8.	2011	55084	7	66851	6
9.	2012	50588	7	48822	7
10.	2013	79262	4	94907	4

Table IV: Flow of Foreign Investment in South Africa[233]

S. No	Year	FDI Inflow		FDI Outflow	
		Figure in US$mn	Rank	Figure in US$mn	Rank
1.	2004	799	74	1 352	39
2.	2005	6 644	31	930	48
3.	2006	- 527	190	6 067	32
4.	2007	5 695	50	2 962	46
5.	2008	9 209	38	- 3 134	170
6.	2009	7 502	36	1 151	51
7.	2010	3 636	44	- 76	160
8.	2011	4 243	46	- 257	158
9.	2012	4 559	45	2 988	35
10.	2013	8 188	34	5 620	31

Explanation: FDI flows with a negative sign indicate that at least one of the three components of FDI (equity capital, reinvested earnings or intra-company loans) is negative and not offset by positive amounts of the remaining components. These are instances of reverse investment or disinvestment.

[232] World Investment Reports 2004-2013, UNCTAD, available at *http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx*
[233] World Investment Reports 2004-2013, UNCTAD, available at *http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx*

Table V: Awards and Cases against Russia

S. No	Case	State of Pendency	Legal Basis for Arbitral Jurisdiction	Main Legal Issue	Year of Award	Date of Initiation of Dispute
1.	Sedelmayer *v* Russian Federation[234]	Awarded by Stockholm Chamber of Commerce in 1998. In July 2011, the Swedish Supreme Court refused to stay the execution.	Germany-Russian Federation BIT	Sedelmayer was a German citizen and sole owner of Sedelmayer Group of. Companies International Inc. (SGC), an American company. In 1990, SGC entered into an agreement with the Police Department concerning the delivery of law enforcement equipment. The police department's contribution consisted of certain buildings, which were to be used by the company as well as by Sedelmayer and his family for personal living. In December 1994, the President of the Russian Federation issued a Directive, ordering transfer of the Premises to a state agency for use in entertaining foreign delegations visiting Russia as guests of the President. The Premises, as well as movable assets, such as furniture and office equipment, were seized in January 1996. Thus, the legal issue involved was that the Claimant's property had been expropriated by the Respondent but no compensation was given, which he was entitled to under the BIT as well as under Russian municipal law.	1998	January 15, 1996
2.	Berschader and Berschader *v* Russian Federation[235]	Award by Stockholm Chamber of Commerce in 2006.	Belgium-Russian Federation BIT	In 1994, Berschader International S.A. (BI), won the tender issued the Supreme Court of Russia for the construction of new court facilities According to the Claimants; BI fulfilled its obligations under the Contract, including the completion of all constructions works, to the	2006	August 26, 2004

[234] Ad hoc arbitration, Award July 07, 1998.
[235] SCC Case No 080/2004, Award, April 21, 2006.

S. No	Case	State of Pendency	Legal Basis for Arbitral Jurisdiction	Main Legal Issue	Year of Award	Date of Initiation of Dispute
				satisfaction of the Respondent. The Claimants alleged that the Supreme Court accumulated substantial late payments, under the Contract resulting in delays in the completion of the project and that it failed to pay BI upon the completion of the construction works. BI then exercised its right of retention, under the Russian Civil Code to retain possession of the Buildings until outstanding sums had been paid in full. Further, the Administration of the President of the Russian Federation annulled the Contract on the grounds of delays to the completion of the construction works. The Tribunal held that the types of indirect Investments relied upon by the Claimants do not fall within the scope of the Treaty. Moreover, the Claimants' shares in Bl do not constitute an investment in the territory of the Russian Federation, thus, it was held that the investments by the Claimants in these proceedings do not constitute qualifying investments within the terms of the Treaty.		
3.	RosInvestCo UK Ltd *v* Russian Federation[236]	Award by Stockholm Chamber of Commerce in 2010.	Russian Federation-UK BIT	Beginning in December 2003, Russian tax authorities began re-assessing Yukos Oil Corporation's tax liabilities, eventually claiming billions of dollars in back taxes and penalties against the company. By November 16, 2004, those tax assessments amounted to roughly US$15bn, and the Government had taken steps to collect that sum. As Yukos' shares plummeted in value, RosInvestCo, an English corporation, purchased a total of seven million shares in the	2010	October 28, 2005

[236] SCC Case No. Abr. V 079/2005, Final Award, September 12, 2010

S. No	Case	State of Pendency	Legal Basis for Arbitral Jurisdiction	Main Legal Issue	Year of Award	Date of Initiation of Dispute
				company in late 2004, allegedly on the basis that the market had overestimated the risks to Yukos. However, Russia proceeded with its efforts to collect the taxes and associated penalties, which by the middle of December 2004 had grown to an amount of roughly US$20bn. Russia, began by auctioning a key part of Yukos' business on December 19, 2004. Yukos' remaining assets were then liquidated in a series of auctions, with the final auction held on August 15, 2007. RosInvestCo submitted a request for arbitration in October 2005, asserting that the tax assessments, penalties, and enforcement actions expropriated RosInvestCo's property in violation of the governing UK-Soviet BIT. On the merits, Russia defended the claim on various grounds, including that the measures were not expropriatory because they were legitimate exercises of its police and taxation powers; and that the Government's actions had not caused the investor any substantial or permanent losses, nor interfered with any legitimate expectations. The issue of the scope of the MFN provision first arose in the tribunal's October 2007 decision on jurisdiction. In that decision the tribunal determined that the governing UK-Soviet BIT alone did not grant it the power to hear the dispute. However, the tribunal concluded that RosInvestCo could use the MFN provision in the UK-Soviet treaty to incorporate a broader dispute settlement provision found in the BIT between Denmark and Russia.		

S. No	Case	State of Pendency	Legal Basis for Arbitral Jurisdiction	Main Legal Issue	Year of Award	Date of Initiation of Dispute
				The tribunal in issued an award in which it found that the Russian Federation had unlawfully expropriated RosInvestCo's property, but muted the claimant's victory by awarding it only US$3.5mn of its US$232.7mn claim.		
4.	Yukos Universal Ltd. *v* Russian Federation[237] and Veteran Petroleum Ltd. *v* Russian Federation[238] and Hulley Enterprises Ltd. *v* Russian Federation[239]	Decision on Tribunal constituted In accordance with article 26 of the Energy Charter Treaty and the UNCITRAL Arbitration Rules 1976 in 2009.	Energy Charter Treaty (ECT)	The disputes between the Parties arose during the period between July 2003 and August 2006, after Yukos had emerged following the collapse of the Soviet Union to become the largest oil company in the Russian Federation. In essence, the disputes between the Parties involve various measures taken by the Russian Federation against Yukos and associated companies that culminated in the bankruptcy of Yukos in August 2006, thereby allegedly adversely affecting Claimants' investments in Yukos. Such acts include both criminal prosecutions and other measures that Claimants allege to be in violation of the ECT. The issues were regarding the temporal scope of application of the Energy Charter Treaty which despite the termination of provisional application has still produced legal effects. The other question is related with the legal nature of 'Limitation Clause' which identifies the legal nature of relation between the provisional application of ECT and the Russian law. The next question is related to the 'Denial-of-Benefits' clause, which	2009	February 03, 2005

[237] PCA Case No. AA 227, UNCITRAL ad hoc arbitration, Interim Award on Jurisdiction and Admissibility, 30 November 2009.
[238] PCA Case No. AA 228, UNCITRAL ad hoc arbitration, Interim Award on Jurisdiction and Admissibility, 30 November 2009.
[239] PCA Case No. AA 226, UNCITRAL ad hoc arbitration, Interim Award on Jurisdiction and Admissibility, 30 November 2009

S. No	Case	State of Pendency	Legal Basis for Arbitral Jurisdiction	Main Legal Issue	Year of Award	Date of Initiation of Dispute
				incorporates the principle of reciprocity to investment treaties. The final problem is related to the 'Fork-in-the-Road' provision, which bars parties to bring claims in a situation when the same case is already an object of dispute settlement procedure before an another organ. The tribunal held that the dispute is admissible and within its jurisdiction, and that the Tribunal has jurisdiction, over the Russian Federation.		
5.	Renta 4 SVSA and ors *v* Russian Federation[240]	Award by Stockholm Chamber of Commerce in 2012.	Russian Federation-Spain BIT	The Claimants allege that the Respondent unlawfully dispossessed Yukos of its assets and expropriated its shareholders by means of a variety of abuses of executive and judicial power. The Claimants were the owners of Yukos ADRs and demanded compensation for their loss.	2012	November 20, 2009
6.	Cesare Galdabini Spa *v* Russian Federation[241]	United Nations Commission on International Trade Law (UNCITRAL) gave award in 2011	Italy-Russian Federation BIT	UNCITRAL tribunal sitting in Stockholm held that it had no jurisdiction, over a case submitted by Italian company Cesare Galdabini, under Italy-Russian Federation BIT. According to media reports the claim arose out Russian Federation refusal to settle a debt owed for EUR 278'000 worth of equipment, which Galdabini supplied in the end of 80s to one of Soviet foreign trading enterprises for the ultimate benefit of VAZ. The award was not made public. However, the tribunal held that Galdabini's account receivable did not qualify as an investment. [242]	2011	NA as the Award is not public.

[240] SCC Case No 24/2007, Award on Preliminary Objections, March 20, 2009.

[241] Cesare Galdabini SpA *v* Russian Federation, UNCITRAL, Ad hoc Arbitration Award, May 2011 available at *http://www.italaw.com/cases/236*

[242] *http://www.cisarbitration.com/2011/11/15/russian-federation-defeats-investment-arbitration-claim-arising-out-soviet-time-trade-debts/*

S. No	Case	State of Pendency	Legal Basis for Arbitral Jurisdiction	Main Legal Issue	Year of Award	Date of Initiation of Dispute
7.	Yukos Universal Ltd. v Russian Federation[243]	Pending	Energy Charter Treaty (ECT)	The award on merits is pending before the Tribunal after it has held in 2009 that the dispute is admissible and within its jurisdiction.	–	February 03, 2005.
8.	Veteran Petroleum Ltd v Russian Federation[244]					
9.	Hulley Enterprises Ltd v Russian Federation[245]					

[243] Yukos Universal Limited (Isle of Man) *v* The Russian Federation, PCA Case No. AA 227, UNCITRAL ad hoc arbitration available at *http://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf*

[244] Veteran Petroleum Limited (Cyprus) *v* The Russian PCA Case No. AA 228, UNCITRAL ad hoc arbitration available at *http://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf*

[245] Hulley Enterprises Limited (Cyprus) *v* The Russian Federation PCA Case No. AA 226, UNCITRAL ad hoc arbitration available at: *http://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf*

Table VI: Awards and Cases against China

S. No	Case	State of Pendency	Legal Basis for Arbitral Jurisdiction	Main legal Issue	Year of Award	Date of Initiation of Dispute
1.	Ekran Berhad *v* People's Republic of China[246]	Proceedings suspended pursuant to the parties' agreement after two months	China-Malaysia BIT	Malaysian construction company filed a claim. The ICSID website lists the subject matter as 'arts and culture facilities'. No other information is available.	–	May 24, 2011

[246] ICSID Case No. ARB/11/15

Table VII: Investment Treaty Arbitration Notices Issued to India in 2012

S. No.	Foreign Investor	BIT	Reason for the Dispute/Notice	Whether Tribunal Constituted
1.	White Industries	India-Australia	Judicial delays in enforcing an award issued in favour of White Industries against Coal India	The Tribunal issued an award against India indicting India for violating the India-Australia BIT
2.	Sistema Joint Stock Financial Corporation	India-Russia	Cancellation of 2G Telecom Licenses by the Supreme Court of India	No
3.	Telenor Asia	India-Singapore	Cancellation of Telecom Licenses by the Supreme Court of India	No
4.	Capital Global and Kaif Investment	India-Mauritius	Cancellation of Telecom Licenses by the Supreme Court of India	No
5.	Axiata Group	India-Mauritius	Cancellation of Telecom Licenses by the Supreme Court of India	No
6.	Vodafone	India-Netherlands	Imposition of Retrospective Taxation	No
7.	Children's Investment Fund	India-Cyprus	Alleged mismanagement of state-owned Coal India Ltd by the Indian Government, which owns 90 percent stake. Children's Investment Fund has a minority stake in Coal India Ltd.	No
8.	Bycell	India-Cyprus and India-Russia	Withdrawal of certain security clearances given by the FIPB granted earlier to the investor.	Yes
9.	Columbia Capital and Telcom Ventures & Devas Multimedia	India-Mauritius	Cancellation of contract by the Indian Government for the launch of two satellites	Yes

Source: Compiled from various sources

Table VIII: Awards and Cases: South Africa

S. No	Case	State of Pendency	Legal Basis for Arbitral Jurisdiction	Main Legal Issue	Year of Award	Date of Initiation of Dispute
1.	Piero Foresti, Laura de Carli & Others *v* The Republic of South Africa[247]	Awarded under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes in 2006.	Italy-South Africa BIT Belgium-Luxembourg-South Africa BIT	The issue was that the claimants' mineral rights were directly expropriated on the passage of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA). Here the foreign investor brought an ICSID claim for compensation on the basis that its assets had been appropriated as a consequence of new provisions in national mining legislation requiring all corporations in the sector, both local and foreign, to relinquish their 'old order' mining rights in favour of 'new order' rights. A condition of the grant of new rights by the state was the relevant corporation's compliance with and commitment to provisions of the new legislation and the industry based Mining Charter, both of which promoted the advancement of black business and employees through specified minimum procurement, employment and corporate governance arrangements. While most mining companies, both domestic and foreign, applied for and were granted new order rights, Foresti's compensation claim was based on the alleged loss of value in its investment assets. The matter progressed along the arbitration route but a settlement between the foreign investor and host country led to the proceedings being discontinued. There was, however, an ICSID arbitral decision on the question of the costs of the proceedings, resulting in some monetary recovery for the host country.	2010	November 08, 2006
2.	*Swiss Investor v Republic of South Africa*[248]	UNCITRAL award rendered in 2003.	Switzerland-South Africa BIT	In July of 2003, an arbitration ruling held South Africa liable to pay damages of 6.6mn South African Rand, plus interest due to failure to offer sufficient police protection and security to the Swiss owner of a proposed conference centre	2003	

[247] ICSID Case No. ARB(AF)/07/01
[248] UNCITRAL Award, July 2003 (not public).

S. No	Case	State of Pendency	Legal Basis for Arbitral Jurisdiction	Main Legal Issue	Year of Award	Date of Initiation of Dispute
				and game farm located in the north-east of the country. At the centre of the arbitration claim were two allegations: that South African police turned a blind-eye to the series of incursions visited upon the Swiss-owned property, and that the investment was subjected to an expropriation either by virtue of the cumulative destruction inflicted upon the property or, in the alternative, due to a domestic land-claims process. Observing that South Africa was obliged, under the Swiss-SA treaty to provide for 'full protection and security' of foreign investments, and that this standard imposed a duty of due diligence or reasonable care by state authorities, the tribunal held South Africa to have breached this obligation *vis a vis* the Swiss claimant.		