



# STUDY ON INVESTOR PERCEPTIONS TOWARDS INDIA'S INVESTMENT TREATIES

*Centre for Trade & Investment Law  
Report*

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## About the Centre for Trade and Investment Law

Centre for Trade and Investment Law (**CTIL**) was established by the Ministry of Commerce and Industry, Government of India, at the Indian Institute of Foreign Trade (**IIFT**) in 2016. CTIL's primary objective is to provide sound and rigorous analysis of legal issues pertaining to international trade and investment law to the Government of India and other governmental agencies. It aims to create a dedicated pool of legal experts who can provide technical inputs for enhancing India's participation in international trade and investment negotiations and dispute settlement.

CTIL engages on a regular basis with different stakeholders including central and state governments, think-tanks, research centres, national law schools and other institutions rendering legal education in international economic law, independent legal professionals, industry organizations and the private sector. CTIL is also conceived as a ready repository of trade and investment related information including updates on ongoing trade negotiations and disputes.

## Disclaimer

The views expressed in this Report represent the views of the contributors and is a product of professional research conducted at the Centre for Trade and Investment Law, Indian Institute of Foreign Trade. These views cannot be attributed to the Government of India or any of its officials.

## Foreword

The last three decades saw an exponential growth in foreign direct investment and a corresponding rise in the number of investment treaties. Countries sign investment treaties purportedly to provide stability and certainty to potential investors and to allow them to hedge against risks that may arise out of investments in long-term ventures. Though academic scholarship on Bilateral Investment Treaties (BITs) is substantial, the focus has routinely been on the substantive rights that are accorded by BITs and the related jurisprudence. Empirical studies on the influence of BITs in determining investment flows are few. In fact the existence of a causal connection between and BITs and investment flows is a relatively understudied topic. Even in cases where studies are available with respect to specific countries and geographical locations, the results have been mixed and varied. In addition, no two studies can come out with the same finding in view of the country specific facts and determinants.

CTIL's study is to bridge this information gap at least in the context of India. India is a growing economy and investment plays a key role in India's economic development. However, what role can be attributed to BITs in influencing inbound and outbound investment flows? This question is not an easy one to answer, at least in India's case. This study aims to answer some of the questions surrounding the BITs by conducting a qualitative analysis primarily based on surveys and interviews with corporate decision-makers, policy makers and corporate transaction lawyers, among others. This study is a result of work spanning over two years, where the researchers interviewed and sought inputs from a large number of respondents from multiple jurisdictions who have had experience of either investing or facilitating investment into India. Looked at from this perspective, this study provides perhaps the most well-informed view from a cross-section of extremely knowledgeable individuals familiar with investment patterns. We have attempted to avoid the possibility of any bias from the investment community by carefully choosing the respondents and the questions.

A primary findings of this study is that, a majority of key decision makers, despite being very intimately associated with investment decisions into India, were not overly concerned about the availability of BITs. A large majority of respondents stated that they would not refrain from making an investment simply due to the lack of a BIT, vindicating that BITs may in-fact have a limited role in impacting investment flows. Rather, the study highlights a number of domestic issues including lack of transparency in domestic regulatory regimes and infrastructural concerns. At the same time, it is an acknowledged fact that a vast number of BITs provide protection against unexpected regulatory changes. Some of the responses may sound a bit puzzling, but the reality is that BITs remain as a fairly inconsequential consideration in influencing investment decisions. Some of the recent investment treaty awards might have gained some public attention within the investment community; nonetheless, their role remains limited.

We are grateful to Dr. Rishabh Gupta for leading this meticulous study and to Smrithi Bhaskar and Rishabha Meena of CTIL for their valuable research help. We are also grateful to two anonymous referees for their critical feedback. In addition, we would also like to place our gratitude to Mr. R. Rajaraman, Additional Secretary, DEA and Mr. Anwar Shaik, formerly Director, DEA and a host of other experts for their excellent comments. We would also like to place our gratitude to Dr. Anup Wadhawan, Commerce Secretary and Professor Manoj Pant, Director, IIFT for their guidance.

Sincerely,

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## List of Abbreviations

<b>ASEAN</b>	Association of Southeast Asian Nations
<b>BITs</b>	Bilateral Investment Treaties
<b>CTIL</b>	Centre for Trade and Investment Law
<b>ECT</b>	Energy Charter Treaty
<b>FDI</b>	Foreign Direct Investment
<b>FTAs</b>	Free Trade Agreements
<b>FCN Treaty</b>	Friendship, Commerce and Navigation Treaty
<b>ICC</b>	International Chamber of Commerce
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>IAs</b>	International Investment Agreements
<b>IIFT</b>	Institute of Foreign Trade
<b>ISDS</b>	Investor-State Dispute Settlement
<b>MITs</b>	Multilateral Investment Treaties
<b>MIGA</b>	Multilateral Investment Guarantee Agency
<b>NAFTA</b>	North American Free Trade Agreement
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>SCC</b>	Stockholm Chamber of Commerce
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>WTO</b>	World Trade Organization



## 1. INTRODUCTION AND EXECUTIVE SUMMARY

Every year, more than US\$ 1 trillion in FDI flows across countries worldwide. These investment flows are governed by a vast network of thousands of bilateral investment treaties (“**BITs**”) and International Investment Agreements (“**IAs**”). IAs refer to both BITs, as well as investment chapters of Free Trade Agreements. Most BITs grant investors a common set of protections, including guarantees of compensation in case of expropriation, fair and equitable treatment and non-discriminatory treatment. These protections are usually enforceable directly against the host state government in an international arbitration.

Investors are increasingly using BITs to sue host state governments for alleged violations of treaty protections. For instance, the International Centre for Settlement of Investment Disputes (“**ICSID**”), which was created specifically for administering investor-state disputes, has seen its caseload increase from only 35 cases in its first thirty-years of operations (1966-96) to nearly 670 registered cases as of mid-2018. Surge in the number of investor-state claims has resulted in a significant backlash from states against the investment treaty regime, in the form of premature termination of BITs, denunciation of international institutional mechanisms, halt on the negotiations of new treaties and, most commonly, negotiation of new treaties that are more prescriptive and less protective of investors’ rights.

India is no stranger to this trend. Before 2016 – the year in which India began to terminate its investment treaties – it had one of the world’s largest treaty network. Around the same time, India had also become one of the most frequent respondents in investor-state arbitrations. The frequency with which claims were brought by foreign investors, the large amounts claimed, the high costs of defending

such claims and, most significantly, the sensitive governance-related issues raised by these claims, have prompted the Indian government to put a halt on the negotiation of all new BITs, terminate majority of the existing BITs and seek replacement BITs based on a radically different treaty template. One event in particular – an adverse award in 2011 by an international tribunal in favour of an Australian investor under the India-Australia BIT – became the focal point of the Indian government’s dissatisfaction with the investment treaty regime. This particular award and other investment treaty claims against India are discussed in more detail in this report.

It is widely understood that BITs are risk-mitigation tools which are supposed to protect and encourage investment flows. However, do the treaties really encourage inward FDI? Scholars have carried out multiple studies to examine this question. Most of these studies follow a similar research design: the total number of BITs signed by a state is regressed against country-level FDI flow data. Despite the similarity in the research design, the results of these studies have not been consistent. While most of the studies show a positive impact of BITs on FDI, there are also studies which show no impact at all or even a negative impact. These differences in the studies are a result of various factors, including choice of methodological tools, quality of FDI data, the text of investment treaties and the prevailing investment climate in the host country.

There is another – arguably less sophisticated – way to examine the relationship between BITs and FDI. Through surveys and interviews, investors and their legal advisors can be asked directly about their perceptions of BITs. If BITs do in fact impact FDI, it is reasonable to expect that corporate decisions makers are aware of these treaties and appreciate their value as risk-mitigation tools.

There are a few scholars that have previously done a survey-based study in this area;<sup>1</sup> however, none of those studies were focused on India. This is the first occasion on which a survey-based empirical study has been carried out in order to examine investor perceptions towards India's BITs. The purpose of this study is to not only examine the impact of India's BITs on FDI inflows alone, but also FDI outflows. The latter aspect of the study is important because, today, India is not only a large capital importer, but also an important capital exporter. It is therefore important to understand the extent to which BITs influence the decision making of Indian investors when they are investing abroad.

The study was conducted in two phases. The first phase comprised an online questionnaire. The questionnaire was completed by 213 respondents between 20 September 2018 and 30 November 2018. The respondent sample

was drawn from a pool of corporate executives, corporate lawyers, government officials, academics and policymakers. 49% of the respondents were based in India, while the remaining 51% were based outside India. The respondents came from organisations in a wide variety of industries though the majority of responses were received from executives in the manufacturing, financial services, information technology, energy and natural resources sectors.

The second phase of the study comprised 15 face-to-face and telephone interviews with interviewees who had a similar demographic profile as the respondents who completed the questionnaire. Interviews were conducted both before and during the time the online questionnaire was open to respondents. Information received from the interviews was used to both design the questionnaire and interpret the questionnaire data.

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<sup>1</sup> See, e.g., *Risk and Return: Foreign direct investment and the rule of law* (Economist Intelligence Unit, Hogan Lovells and the Bingham Centre for the Rule of Law and Investment Treaty Forum of the British Institute of International Comparative Law, London), 2015, [http://www.bicil.org/documents/625\\_d4\\_fdi\\_main\\_report.pdf](http://www.bicil.org/documents/625_d4_fdi_main_report.pdf) (last visited 12 Dec. 2020), assessing the relationship between corporate FDI decision-making and the rule of law; *Impact Investment Report on the EU-China Investment Relations* (European Commission, COM(2013) 297 final, SWD(2013) 184 final, Brussels), 23 May 2013, [https://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/docs/ia\\_2013/swd\\_2013\\_0185\\_en.pdf](https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/swd_2013_0185_en.pdf) (last visited 12 Dec. 2020), assessing the economic impacts of EU entering into an investment

agreement with China and Development Solutions; *Sustainability impact assessment (SLA) in support of an investment protection agreement between the European Union and the People's Republic of China* (European Commission, Ecorys Nederland, Oxford Intelligence, TNO, Reichwein China Consult), Nov. 2017, <https://op.europa.eu/en/publication-detail/-/publication/f3fea75d-5333-11e8-bc1d-01aa75ed71a1> (last visited 12 Dec. 2020). It assesses the economic impacts of the EU entering into an investment agreement with China; Jason Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VIRGINIA JIL 397 (2010).

## 2. KEY FINDINGS AND RECOMMENDATIONS

Study findings are discussed in detail in the remainder of this report. Broadly, the study shows that:

- Political risk is one of the key constraints to FDI flows (both inward and outward).
- Of all the political risks, investors are most wary of unexpected regulatory changes, breach of contract and transfer/ currency restrictions.
- BITs are among the top three most commonly used tools for the mitigation of political risk. ‘Seeking additional protections under contract’ and ‘political/ economic risk analysis’ are the other two most commonly used tools.
- Many interviewees talked about the importance of political risk insurance as a way to protect investments; however, survey results suggest that not many respondents use political risk insurance to cover their India bound investments. None of the Indian companies we spoke to had ever used political risk insurance, although they were aware that such coverage is available in the market.
- Awareness of BITs was relatively low among the respondents, with only 10% of the respondents saying that they are ‘extremely familiar’ with India’s BITs. A few respondents (only 18%) said that they check BITs prior to making an investment decision and only 14% have ever denied making an investment due to lack of a BIT.
- The above two findings seem somewhat contradictory and this was explored further during interviews. It appears that, while investors and their legal advisors do not view BITs as a necessary condition for investing in India, BITs tend to appear on their ‘FDI checklist’ and are therefore relevant to an investor’s decision to make investments in India. Many

interviewees also said that BITs send the correct ‘signals’ to foreign investors; as a corollary, some interviewees said that terminating BITs send the ‘wrong’ signals to foreign investors.

- None of the Indian corporates have ever declined to make an investment on this basis, suggesting that BITs have a limited role in encouraging Indian companies to invest abroad.
- Foreign investors and their advisers criticized the lack of transparency in India’s investment policies.
- Awareness of India’s model BIT, which was introduced in 2016, is relatively low, though the majority of those who were aware of the model thought it was a ‘positive development’.
- Interviewees criticized stand-alone BITs for not having any liberalizing effect. Free Trade Agreements (“FTAs”) containing investment chapters, on the other hand, were cited as examples of comprehensive treaties that have a liberalizing effect on flows of goods, services and investments.

### 2.1 RECOMMENDATIONS TO GOVERNMENT OF INDIA

- Enhance predictability of regulatory environment.
- Inform government officials at all levels (central, state and local) and across all branches (legislature, executive and judiciary) of India’s obligations under investment treaties.
- Promote accessibility and transparency in investment policies. In particular, there should be an online portal where foreign investors can easily track the current status of India’s investment treaties. Many countries already have such online portals.<sup>2</sup>

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<sup>2</sup> See, UNITED STATES BILATERAL INVESTMENT TREATIES, <https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related->

[agreements/united-states-bilateral-investment-treaties/](https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-) (last visited 12 Dec. 2020).

- Improve the efficiency of investment administrative procedures by identifying a nodal agency that is responsible for investment facilitation and protection.
- Build stakeholder consensus before amending investment treaties or negotiating new treaties.
- Involve experts in the drafting and negotiation of investment treaties.
- Undertake investment law-related capacity building activities across the country and across various sectors (both public and

private sectors).

- Promote the study of international investment law in the universities.
- Negotiate new treaties with other developing countries where Indian investors often make investments (e.g. countries in Africa and South-East Asia).
- Wherever possible, preference should be given to concluding FTAs with investment chapters, rather than stand-alone BITs.

### 3. INTRODUCTION TO INTERNATIONAL INVESTMENT AGREEMENTS

Fundamental principles of international investment law can be traced back to 19<sup>th</sup> century Friendship, Commerce and Navigation treaties. These treaties were used to promote international trade by facilitating a framework within which the parties functioned. They governed navigation, inter-state trading rights and rights over property by foreign individuals.<sup>3</sup>

The mid-nineteenth century saw a growth of corporations and technology and in turn foreign investment. This increase in foreign investment was muddled by an increase in the expropriation of foreign investments.<sup>4</sup> When a host country expropriated a foreign investor's property, the relevant rule of customary international law ('CIL'), known as the Hull Rule, required "*prompt, adequate, and effective*" compensation.<sup>5</sup> Post World War II, developing countries questioned the legitimacy of the Hull Rule. These newly sovereign countries claimed that they had the right to determine how to treat the investors and the standard of compensation that would be applicable if the investors have been harmed. As a result, the Hull Rule ceased to reflect CIL. Around this time, countries started signing International Investment Agreements (IIAs), which contained binding standards on the treatment of FDI and, most importantly, provided the foreign investor with direct recourse against the host state in case of breach of those standards.<sup>6</sup>

#### 3.1 HISTORICAL EVOLUTION OF INTERNATIONAL INVESTMENT AGREEMENTS

The evolution of International Investment Agreement (IIAs) took place in three distinct waves across modern international history. The first wave began in the late eighteenth century and continued up until 1945. The second wave spanned the 45 years following the Second World War, ending in the 1990s. Developments during the 1990s and the following decades mark the third wave of evolution of IIAs, that is, the present Global Era of BITs.

IIAs are considered a remarkable phenomenon in international law, especially given the exponential increase in the number of concluded agreements relating to either the protection or liberalization of foreign investment. Similar to how the twentieth century was characterized by the establishment of a multilateral international trade law system, it may be that the twenty-first century comes to be characterized by the establishment of an international investment law system.

##### 3.1.1 First wave of IIAs: Pre-1945

Prior to World War II, foreign investment was primarily governed and protected under the domestic laws of the host state. In addition,

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<sup>3</sup> RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 17 (Oxford University Press, 2012) (hereinafter DOLZER & SCHREUER); See also, A. NEWCOMBE & L. PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES* (Kluwer Law International BV, 2009).

<sup>4</sup> Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* 6 (Karl P. Sauvant

and Lisa E. Sachs eds., 2009) (hereinafter SAUVANT & SACHS).

<sup>5</sup> Dr Rimantas Daujotas, *Prompt, Adequate and Effective Compensation*, *JUS MUNDI*, 1 Dec. 2020, <https://jusmundi.com/en/document/wiki/en-prompt-adequate-and-effective-compensation> (last visited Dec. 12, 2020).

<sup>6</sup> Andrew T. Guzman, *Explaining the Popularity of Bilateral Investment Treaties*, in SAUVANT & SACHS, *supra* note 4, at 74.

protection was provided only under customary international law. CIL sets certain principles and standards of treatment, which obliged host states to act in a particular manner towards foreign investments, regardless of their domestic laws. In *Neer v. Mexico*, it was held that international minimum standard is violated when actions of the State *amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*.<sup>7</sup> However, these standards were inadequate to protect foreign investment for a multitude of reasons. One of the reasons was that some countries disputed the existence of an international minimum standard on the manner in which foreign investment was to be treated and managed.<sup>8</sup> For instance, many Latin American countries adhered to the Calvo Doctrine,<sup>9</sup> a foreign policy doctrine that holds that jurisdiction in an international investment dispute lies with the country in which the investment is located. This meant that foreign investors were only entitled to the treatment that the host country offered to its investors. There was no provision for the application of minimum standards of treatment set under CIL, nor was there scope for external adjudication of disputes, or intervention by the home state. Further, the international minimum standards that were set for the treatment of investments were ambiguous and

was a source of multiple disputes between nation-states.<sup>10</sup> In the absence of an agreement to submit the dispute to arbitration, the only mechanism offered by CIL for enforcement was through nonlegal routes of military force or diplomacy, by way of the espousal of claims.<sup>11</sup>

Espousal is a mechanism through which an injured national's country assumes the national's claim as its own and presents the claim against the country that has injured the national.<sup>12</sup> The exercise of diplomatic protection converts a national's claim, into an international claim which is asserted by the home state against the host state.<sup>13</sup> Espousal is generally an unsatisfactory and inadequate remedy for a number of reasons as Kenneth Vandeveld points out.<sup>14</sup> First, a home state may espouse a claim only after the national has exhausted their remedies under the law of the host state, which is often a lengthy and expensive process without a satisfactory outcome.<sup>15</sup> Second, the national's country is under no obligation to espouse a claim and often may be hesitant to espouse claims against countries with which it does not wish to disrupt diplomatic relations.<sup>16</sup> Lastly, once local remedies have been exhausted and the home state has espoused the claim, the investor often loses control over the claim and its outcome.<sup>17</sup>

Certain features characterized the international

<sup>7</sup> L.F.H. *Neer v. United Mexican States* (1926) IV Reports of International Arbitral Awards 60, 61-62.

<sup>8</sup> Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12(1) U.C. DAVIS J. OF INT'L L. & POL'Y, 157, 159 (2005) (hereinafter Vandeveld).

<sup>9</sup> The doctrine sought to regulate the jurisdiction of governments over aliens and the scope of their protection by their home states, as well as the use of force in collecting indemnity. The effect of Calvo Doctrine in a contract between the government of a Latin American nation state and an alien stipulates that the latter unconditionally agrees to the adjudication within the state concerned of any dispute between the contracting parties. In other words, it proposed to prohibit diplomatic protection or armed intervention before local resources were exhausted.

<sup>10</sup> Srividya Jandhyala, Witold J. Henisz and Edward D. Mansfield, *Three Waves of BITs: The Global Diffusion of Foreign Investment Policy*, 55 J. OF CONFLICT RESOLUTION 1047 (2011).

<sup>11</sup> Vandeveld, *supra* note 8, at 159.

<sup>12</sup> MARJORIE MILLACE WHITEMAN, *DIGEST OF INTERNATIONAL LAW*, 1216-19 (U.S. Government Printing Office 1967).

<sup>13</sup> See JOHN H. CURRIE, *PUBLIC INTERNATIONAL LAW* (Irwin Law 2008).

<sup>14</sup> Vandeveld, *supra* note 8, at 160.

<sup>15</sup> *Id.*

<sup>16</sup> KENNETH J. VANDEVELDE, *UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE*, 10, 23 (Oxford University Press 1992).

<sup>17</sup> Vandeveld, *supra* note 8, at 161.



investment regime of the pre-1945 era. During the colonial period which prevailed during this period, countries did not negotiate separate agreements on property and investment. Instead, these often appeared under the same agreements.<sup>18</sup> The primary focus of the negotiations was to establish commercial relations, which became the basis of bilateral treaties. However, the focus was on protecting property, and not investments. These treaties were often limited in scope, and the protection under these treaties was weak, without means of enforcement.<sup>19</sup> This left investors with little choice as to the means to protect foreign investment, and espousal of claims was the only way to ensure the protection of foreign investments.

### ***3.1.2 Second wave of IIAs: 1945-1990***

The Great Depression, beginning in the US and mostly spanning through the 1930s is regarded as one of the worst economic downturns in the history of the industrialized world. It was characterized by a rapid decline in production and a sharp rise in unemployment. Wages were at an all-time low, the agricultural sector was struggling due to drought and falling food prices, consumer debt was proliferating, and banks had an excess of large loans that could not be liquidated. In this backdrop, the turning point in aiding economic recovery was President Roosevelt's New Deal<sup>20</sup> policies. These policies provided support for farmers, the youth, the unemployed, and the elderly. It also included constraints and safeguards on the banking industry with the

aim to re-inflate the economy. These policies were based on the assumption that the economic downturn was caused by instability in the market and therefore, the aim of these policies was government intervention to stabilise the economy. The policies attempted to balance the varied interests of labourers, farmers, businesses and other groups.

It is widely regarded that the Smoot-Hawley Tariff Act of 1930 (Tariff Act)<sup>21</sup> worsened the economic depression in the US. The Act implemented protectionist trade policies and raised the US tariffs on thousands of imported goods. This led to America's trade partners levying retaliatory tariffs, which further reduced American imports and exports during the years of the Great Depression.<sup>22</sup> While it may be difficult to quantify the exact extent of the effect of the Tariff Act on the Great Depression, economists agree that it certainly exacerbated its effects.<sup>23</sup> Economists and politicians soon realized that trade liberalization was the more favourable mechanism to revitalize the economy, as compared to protectionist measures. In that vein, the Reciprocal Tariff Act of 1934 (RTA)<sup>24</sup> was enacted, providing for bilateral negotiation of tariff agreements. The RTA enabled the government to liberalize American trade policy and is widely credited with ushering in the era of a liberal trade policy.

Similar to the manner in which trade liberalization aided in the economic recovery of the United States, it aided Europe in the aftermath of World War II. Economic

<sup>18</sup> *Id.*

<sup>19</sup> Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 68 (2005).

<sup>20</sup> The New Deal was a series of public work projects, financial reforms and regulations enacted by President Roosevelt in the US between the years 1933 and 1939, which helped accelerate the economy's recovery.

<sup>21</sup> Tariff Act, Pub. L. 71-361 (1930) (codified as amended at 9 U.S.C. § 4).

<sup>22</sup> ALFRED E. ECKES, JR., *OPENING AMERICA'S MARKET: U.S. FOREIGN TRADE POLICY SINCE 1776*, 100 (University of North Carolina Press 1995).

<sup>23</sup> Whapes Robert, *Where is There Consensus Among American Economic Historians? The Results of a Survey on Forty Propositions*, 55(1) THE J. OF ECON. HIST. 139, 144 (1995).

<sup>24</sup> Foreign Trade Agreements, Pub. L. 85-686, Pub. L. 87-456, Pub. L. 87-794, Pub. L. 89-554, Pub. L. 96-39 (2011) (codified as amended at 19 U.S.C. § 1351).

recovery efforts began with the liberalization of European economic policy under the Marshall Plan.<sup>25</sup> The Plan was an American initiative passed in 1948 to aid Western Europe in rebuilding and rehabilitating their economy after the end of World War II, and to create stable conditions in which democratic institutions could survive and to halt the spread of communism in the European continent. The Marshall Plan provided aid to the recipients on a per capita basis. A larger amount was given to the major industrial powers. This was based on the understanding that the recovery of these larger nations was essential to the overall revival of the continent.<sup>26</sup>

In the aftermath of World War II, several developing and newly independent countries adopted socialist economic policies, including nationalization projects on a large scale. Post-World War II, there was a push towards multilateral trade agreements that would prevent a reduction of trade going forward. As academics like Vandavelde propound, as a reaction to the economic depression exacerbated by the protectionist policies of the 1920s, the victorious Allied Powers forged a consensus in favour of liberalization of trade.<sup>27</sup> This consensus led to the conclusion of the General Agreement on Tariffs and Trade (GATT)<sup>28</sup> in 1947. The GATT's purpose was

to promote international trade by reducing or eliminating trade barriers such as tariffs or quotas. The conclusion of the GATT in 1947 orchestrated a shift in the framework from bilateral to multilateral agreements and set in motion negotiations aimed at trade liberalization.<sup>29</sup> This resulted in an organization that had competence over issues of trade, but not investment, since investment issues fell squarely outside of the GATT framework.<sup>30</sup>

During this time period, the United States sought to encourage and facilitate private international investment by negotiating Friendship, Commerce, and Navigation ("FCN") Treaties with numerous countries.<sup>31</sup> These treaties deal with commercial matters concerned with the protection of natural and juridical persons, their property and interests.<sup>32</sup> The FCN treaties ratified post World War II were heavily influenced by the inability of previous treaties to protect businesses from discriminatory treatment in foreign markets, which often inhibited foreign investment.<sup>33</sup> These treaties sought to govern everyday relations between the signatories, and to protect citizens and their property while in another country. Consequently, multiple provisions were added to safeguard investors from non-business hazards of operating in a foreign country.<sup>34</sup> The United States signed a variety of FCN treaties for about two decades,

<sup>25</sup> The Marshall Plan was officially called the European Recovery Program (hereinafter ERP).

<sup>26</sup> *Marshall Plan*, HISTORY, 5 Jun. 2020, <https://www.history.com/topics/world-war-ii/marshall-plan-1#:~:text=The%20Marshall%20Plan%20provided%20aid,Germany%2C%20France%20and%20Great%20Britain;MarshallPlan,NEWWORLDENCYCLOPEDIA,https://www.newworldencyclopedia.org/entry/MarshallPlan>.

<sup>27</sup> Vandavelde, *supra* note 8, at 162. See also RONDO CAMERON, A CONCISE ECONOMIC HISTORY OF THE WORLD 370 (Oxford University Press 3rd ed., 1997).

<sup>28</sup> GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153.

<sup>29</sup> Vandavelde, *supra* note 8, at 162.

<sup>30</sup> *Id.* at 166.

<sup>31</sup> Treaty of Good-Neighborliness and Friendly Cooperation Between the People's Republic of China and the Russian Federation, China-Russia, July 16, 2001; Treaty of friendship, cooperation and mutual aid between the Russian Federation and the Republic of Tajikistan, Russia- Tajikistan, May 25, 1993; Treaty of Peace and Friendship, Chile-Argentina, Nov. 29, 1984; Herman Walker, Jr., *Modern Treaties of Friendship, Commerce, and Navigation* 42 MINN. L. REV. 805, 805 (1958).

<sup>32</sup> See Gerald D. Silver, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives 'Of Their Choice'* 57 FORDHAM L. REV., 5, 765, 768 (1989).

<sup>33</sup> *Id.*, at 767.

<sup>34</sup> Robert R. Wilson, *Postwar Commercial Treaties of the United States* 43 AMJ. INT'L L. 262 (1949).



starting in 1946. However, the focus was on protecting property on foreign soil rather than protecting the investment in itself. The post-War FCNs guaranteed equitable treatment and the ‘most constant protection and security’ to the property of foreign nationals and companies.<sup>35</sup>

One of the primary goals of post-War FCN treaties was investment protection.<sup>36</sup> However, these were limited in scope, and there was a growing recognition of a need for specialised bilateral treaties providing for investment protection. This led to a decline in the number of FCN treaties. Since FCN treaties were primarily trade agreements, and since trade relations were now being governed under the GATT, FCN treaties were no longer an ideal bilateral treaty. In addition, after decolonization, developing and newly independent countries were reluctant to trade with their former colonizers and developed countries, and began forming economic relations with other developing countries.<sup>37</sup> The newly independent countries were protective of their independence and came to regard foreign investment as a tool for neo-colonialism as it involved foreign control over means of production.<sup>38</sup> FDI was unwelcomed in developing countries as it involved a foreign presence in their territories, at a time when even trade with developed countries was not viewed favourably. Many developing countries closed their economies to new foreign

investment as there was a longstanding fear that open trade between developed and developing countries would result in the exploitation of the latter.<sup>39</sup> As John Rapley points out, many countries started adopting import substitution policies, under which they would produce needed goods and services locally rather than importing them (in particular from developed countries).<sup>40</sup>

During the emergence of the socialist bloc led by the Soviet Union, socialist countries undertook large-scale expropriation of private assets, including foreign-held assets.<sup>41</sup> In the 1970s, developing and socialist countries, through the United Nations General Assembly, advocated for the New International Economic Order (NIEO)<sup>42</sup>, which was a set of proposals to promote their interests by improving terms of trade, tariff reductions by developed countries, and increasing development assistance amongst others. NIEO propounded that states have full sovereignty over their natural resources and economic activities. However, the declaration did not specify any obligation to pay compensation for any expropriated asset. Developed countries responded to the threat of uncompensated expropriation by entering into BITs to ensure adequate compensation for expropriations.<sup>43</sup>

Germany was the first country to conclude such an agreement, by signing a BIT with

<sup>35</sup> Treaty of Friendship Between the United States of America and the Republic of Kiribati, United States-Kiribati, September 20, 1979, Article 2; Indo-Bangla Treaty of Friendship, Cooperation and Peace, India-Bangladesh, March 19, 1972, Article 3, Article 9; Vandevelde, *supra* note 8, at 162-164.

<sup>36</sup> *Id.* at 165-166.

<sup>37</sup> DAVID S. LANDES, THE WEALTH AND POVERTY OF NATIONS 431 (W.W. Norton & Co. Ltd. 1999).

<sup>38</sup> Vandevelde, *supra* note 8; DEAN HANINK, THE INTERNATIONAL ECONOMY: A GEOGRAPHIC PERSPECTIVE 234 (Wiley 1994).

<sup>39</sup> BARRY W. POULSON, ECONOMIC DEVELOPMENT: PRIVATE AND PUBLIC CHOICE 39 (West Publishing Company 1994).

<sup>40</sup> JOHN RAPLEY, UNDERSTANDING DEVELOPMENT: THEORY AND PRACTICE IN THE THIRD WORLD 22 (Routledge 1996).

<sup>41</sup> MICHAEL BARRETT BROWN, MODELS IN POLITICAL ECONOMY 193 (Penguin Books 1995).

<sup>42</sup> Declaration on the Establishment of a New Economic Order, G.A. Res. 3201 (S-VI), UN GAOR, 6th Special Sess., 2229th plenary meeting., UN Doc. A/RES/3201(S-VI) (May 1, 1974).

<sup>43</sup> See RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (Martinus Nijhoff Publishers 1995); Vandevelde, *supra* note 8; Eileen Denza & Shelagh Brooks, *Investment Protection Treaties: United Kingdom Experience* 36 INT’L & COMP. L.Q. 908, 910 (1987).

Pakistan in 1959.<sup>44</sup> Germany was particularly sensitive to the political risks to which foreign investment could be exposed, after having lost all of its foreign investment as a result of its defeat in the second World War. Many developed countries followed the footsteps of Germany, including the US, where FCN treaties were considered to be the forerunner to the BITs. These BITs usually dealt solely with investment, and most were negotiated principally between a developed and a developing country. Developing countries were motivated to sign BITs to attract foreign investment for local growth and development. These BITs also had provisions on broad protection of investments, including a guarantee against discriminatory treatment, and a commitment to pay prompt, adequate and effective compensation for expropriations.<sup>45</sup>

A major difference in the treatment of investments pre-1945 and post-1945 is the inclusion of arbitration provisions wherein the host states consented to arbitration of certain investment disputes. This was a move away from the traditional mechanisms of seeking a remedy through espousal of claims. Hence, for the first time, investors had an effective and adequate remedy for unlawful actions by host states that injured their investments. Moreover, unlike the pre-1945 era, BITs did not require an investor to exhaust local remedies in the host state before initiating international arbitration.<sup>46</sup> Thus, by getting rid of espousal as a legal remedy and providing the investor with an alternate legal route which was more efficient, BITs arguably succeeded in depoliticising investment disputes.<sup>47</sup>

<sup>44</sup> Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries* 24 THE INT'L LAWYER 655, 655 (1990) (hereinafter Salacuse).

<sup>45</sup> Vandevelde, *supra* note 8, at 169; Salacuse, *Id.* at 661.

<sup>46</sup> Mohamed I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties* 7 ICSID REV. 339, 377 (1992).

<sup>47</sup> Ibrahim Shihata, *Towards a greater de-politicisation of investment disputes: the roles of ICSID and MIGA* 1(1) ICSID

### **3.1.3 Third wave of IIAs: Post-1990**

The conclusion of the Uruguay Round of negotiations in 1995 with the creation of the World Trade Organisation (WTO) is considered as the biggest reform in the multilateral trading system since the creation of GATT. The WTO replaced GATT as an international organization dealing with regulation of trade in goods, services, and intellectual property at a multilateral level, providing a framework for trade agreements and dispute resolution. Post-1995, the WTO obtained jurisdiction over certain aspects of foreign investment. The most important multilateral instruments expressing the new trends of the 1990s are those of the Uruguay Round agreements which addressed investments, namely, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMs), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

A series of national and international developments led to a radical reversal of the prevailing policy trends. This era witnessed an explosion in the number of BITs given the success of high rates of private investment combined with the promotion of the production of goods for export purposes.<sup>48</sup>

By 1990s, developing countries were turning their backs to the hostility surrounding foreign investment and were becoming increasingly open to attract foreign investment by creating a favourable economic environment at home.<sup>49</sup>

REV FOREIGN INVEST LAW J 1–32 (1986); Ursula Kriebaum, *Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes*, 33(1) ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 14–28 (2018).

<sup>48</sup> Vandevelde, *supra* note 8, at 177.

<sup>49</sup> Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties* 36 COLUM. J. TRANSN'T'L L. 501 (1998).

On the international political level, the relative cohesion and unity of developing countries considerably decreased, and the eventual collapse of the Soviet Bloc contributed to the strengthening of market-oriented attitudes and forces. Therefore, the falling of the socialist development model and a recital of Asian countries strengthened the argument in favour of liberalisation. An important step in progressing towards liberalisation was the signing of BITs. Policies of import substitution and hostility towards foreign investment which were prevalent in the post-colonial era were seen as errors. Latin American countries abandoned the Calvo Doctrine by entering into BITs, in which they agreed to certain standards for the treatment of foreign investment and to the submission of disputes with investors to binding arbitration. The Calvo Doctrine was replaced by the adoption of international minimum standards for the protection of foreign investment.<sup>50</sup>

In India's case, up until 1991, Indian policy was restrictive to foreign investment. The beginning of economic reforms and welcoming liberalization brought a change in India's perception towards foreign investments. After worldwide adoption of liberalisation and a strive to move forwards during the time of global recession, balancing investment risks by investing in developing and emerging countries was seen as an important tool.<sup>51</sup> Consequently, India has emerged as one of the most important destinations of foreign investment. India, in its overall strategy of liberalisation, had signed multiple BITs with

other countries to attract foreign investments. The pretext was to offer favourable conditions and strong treaty-based protection to foreign investors.<sup>52</sup> India signed its first BIT in 1994 with the United Kingdom. Since 1994, India had consistently signed numerous BITs. This gigantic and profound bilateral regulatory framework was significant in terms of its effects on the domestic regulatory behaviour of India towards investment inflows from its treaty partners.<sup>53</sup> However, in 2017, India terminated most of the BITs it had entered into. This is largely understood to be a result of the rising number of claims against India by investors, and adverse decisions in investment arbitrations. Further, the model BIT was released by India in 2016 with a change in its approach towards investment treaty obligations and investment protections. India remains keen to enter into new BITs based on its model BIT of 2016.<sup>54</sup>

In the beginning, the initiative for the conclusion of BITs was taken by the major capital-exporting developed countries, and most of these countries are now at the core of BIT networks with developing countries or economies in transition. In recent years, however, a considerable number of such treaties have also been concluded by smaller capital-exporting countries, by countries with economies in transition and between developing countries as they shift towards exporting capital, often to other developing countries.<sup>55</sup> This goes on to show the dramatic change in the way BITs have been treated over the years.

<sup>50</sup> Vandeveld, *supra* note 8, at 178-179.

<sup>51</sup> Prabhakar Ranjan, *Indian Investment Treaty Programme in the Light of Global Experiences* 45 ECON. & POL. WEEKLY, 68 (2010).

<sup>52</sup> For example, the India-Singapore Comprehensive Economic Cooperation Agreement provides for exemption on import duties for investment in infrastructure sector, which would attract foreign investors and promote investment flows.

<sup>53</sup> Prabhakar Ranjan, *International Investment Agreements and Regulatory Discretion: A Study of India*, 9(2) J. OF WORLD

INVESTMENT & TRADE 209, 212 (2008)

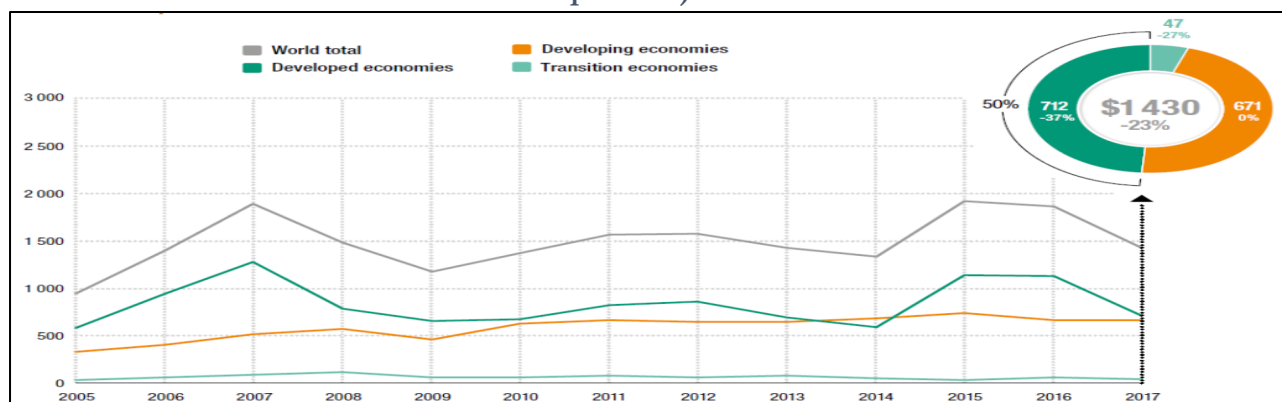
<sup>54</sup> Asit Ranjan Mishra, *India to trade partners: Sign new bilateral investment treaties by 31 March*, LIVEMINT, (11 January 2017), <https://www.livemint.com/Politics/8IRq2uiGhDAXjiO2IEJ3K/India-asks-trade-partners-to-sign-new-BIT-pact.html> (last visited Dec. 12, 2020).

<sup>55</sup> United Nations Conference on Trade and Development, "International Investment Agreements: Key Issues", Volume 1 (2004), UNCTAD/ITE/IIT/2004/10.

Most importantly, the impetus behind IIAs is shifting. Between 1945 and 1990, investment agreements were looked at as a means of protecting the investments of developed countries in developing countries. However, in the contemporary era, investment agreements are intended to liberalize investment flows.<sup>56</sup> With the explosion of BITs in recent years,<sup>57</sup> IIAs have helped facilitate trade, boost investment, removed barriers to trade and investment, and ushered in an era of globalization with the ultimate goal of strengthening commercial relations between countries. IIAs have also helped create a more conducive environment for sustainable development and growth with international investment taking place at the bilateral, plurilateral, multilateral, regional and interregional levels.

Simultaneously, there has been a remarkable growth in global FDI flows. From an average of \$50 billion per year in 1980-85, global FDI flows had increased by more than 20 times, to \$1.43 trillion in 2017<sup>58</sup> (see figure 1 below).<sup>59</sup> Yet, FDI flows face significant constraints. In particular, when it comes to developing countries, political risk is one of the most significant constraints faced by foreign investors.<sup>60</sup> Put simply, political risk is “*the probability of disruption of the operations of companies by political forces and events*”.<sup>61</sup> The range of political risks faced by investors include breach of contract, adverse regulatory changes, and restrictions on currency transfers, expropriation and political violence.<sup>62</sup>

**Figure 1 – FDI inflows, global and by group of economies, 2005-2017 (Billions of dollars and per cent)**



<sup>56</sup> Vandevelde, *supra* note 8, at 183.

<sup>57</sup> The United Nations Conference on Trade and Development, which contains the most extensive and comprehensive BIT database on its website states that there are a total of 2900 BITs with 2342 of them in force. See <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> (last visited Dec. 12, 2020).

<sup>58</sup> *World Investment Report on Investor Nationality: Policy Challenges* (UNCTAD) 101, (2016), [https://unctad.org/system/files/official-document/wir2016\\_en.pdf](https://unctad.org/system/files/official-document/wir2016_en.pdf) (last visited Dec. 12, 2020); See UNCTAD, Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement> (last visited Dec. 12, 2020).

<sup>59</sup> UNCTAD, *World Investment Report: Investment and New*

*Industrial Policy* (UNCTAD), Figure I.1, 2 (2018), [https://unctad.org/system/files/official-document/wir2018\\_en.pdf](https://unctad.org/system/files/official-document/wir2018_en.pdf) (hereinafter UNCTAD Report 2018).

<sup>60</sup> *World Investment and Political Risk* (Multilateral Investment Guarantee Agency (MIGA), World Bank Group) 5, 2013, figure 1.6, <https://www.miga.org/sites/default/files/archive/Documents/WIPR13.pdf> (last visited Dec. 12, 2020) (hereinafter MIGA Report 2013).

<sup>61</sup> *World Investment and Political Risk* (Multilateral Investment Guarantee Agency (MIGA), World Bank Group), 21, 2011, <https://www.miga.org/documents/WIPR11.pdf> (last visited Dec. 12, 2020) (hereinafter MIGA Report 2011).

<sup>62</sup> MIGA Report 2013, *supra* note 60.

Given the significant impact that political risk can have on foreign investment, it is not surprising that many investors employ a large variety of risk-mitigation tools before investing abroad.<sup>63</sup> Such tools range from market-testing smaller investments, joint ventures with local partners, risk analysis and engagement with the local government, to purchasing political risk insurance and structuring investments to gain protections IIAs.<sup>64</sup>

### 3.2 INTERNATIONAL INVESTMENT AGREEMENTS

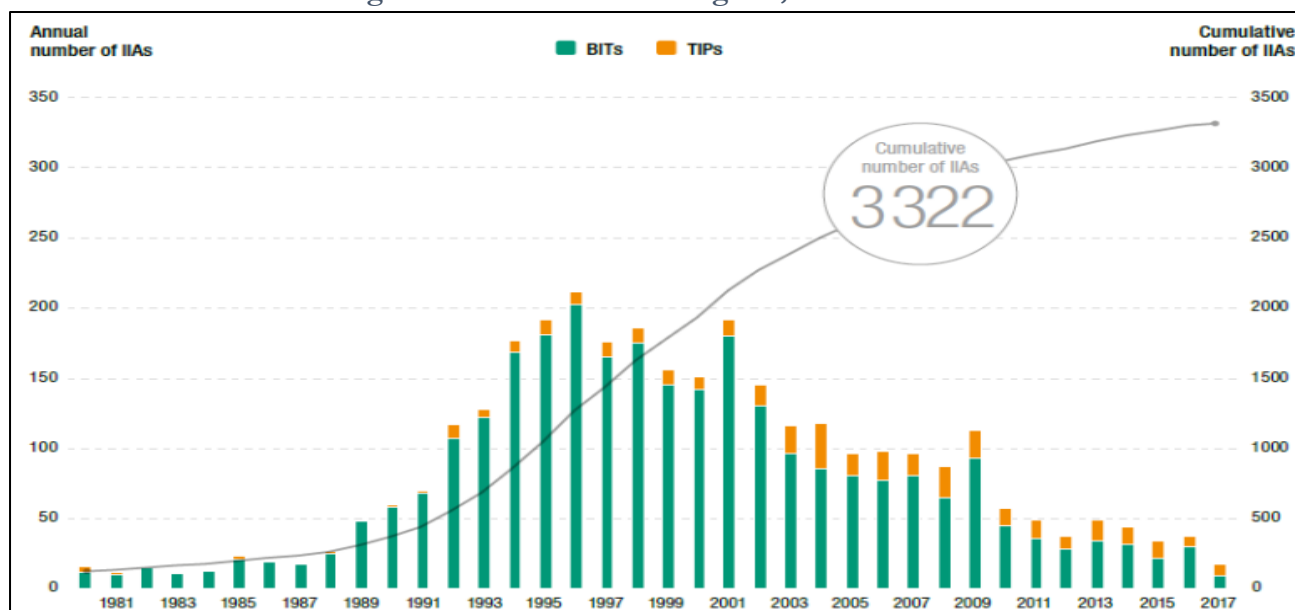
IIAs are treaties for the protection and promotion of foreign investment. IIAs typically provide reciprocal substantive guarantees, as well as a procedural mechanism pursuant to which the investor is able to initiate binding arbitration against the host state for alleged treaty breaches.

The most dominant type of IIAs are BITs and the investment chapters in the Free FTAs. BITs are treaties entered into between two states with the aim of promoting and protecting investment flows between their economies. Since 1959, states have signed over 3300 IIAs, including more than 2900 BITs, with the bulk of those treaties signed from 1990 onwards (see figure 2 below).<sup>65</sup>

Multilateral Investment Treaties (“MITs”) are treaties between three or more states, often within a geographic region, and create rights like those under BITs. Well-known MITs include:

- The Energy Charter Treaty, or ECT: 52 States are signatories to the ECT, spanning Europe, the CIS, Central Asia and Japan.<sup>66</sup>
- The North American Free Trade Agreement, or NAFTA: Member States are Canada, Mexico and the USA.<sup>67</sup>

Figure 2 – Trends in IIAs signed, 1980-2017



<sup>63</sup> India-Japan Comprehensive Economic Partnership Agreement, Article 3(i); India- Malaysia Comprehensive Economic Cooperation Agreement, Article 48; India-Korea Comprehensive Economic Cooperation Agreement, Article 10.1; India-Singapore Comprehensive Economic Cooperation Agreement (CECA), Article 6.1(1).

<sup>64</sup> MIGA Report 2013, *supra* note 60.

<sup>65</sup> UNCTAD Report 2018, *supra* note 59, p. 89, figure III.3.

<sup>66</sup> The Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S 95 (hereinafter ECT).

<sup>67</sup> The North American Free Trade Agreement, Jan. 1, 1994, 32 I.L.M. 289 (hereinafter NAFTA).



- The Southern Common Market or MERCOSUR Treaty: Member States are Argentina, Brazil, Paraguay, Uruguay and Venezuela.<sup>68</sup>
- The Association of Southeast Asian Nations or ASEAN Treaty: Member States are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.<sup>69</sup>

### 3.3 SUBSTANTIVE RIGHTS UNDER INTERNATIONAL INVESTMENT AGREEMENTS<sup>70</sup>

Although there are often important differences between the texts of various investment treaties, certain standards of protection are common to most treaties. Some common protections found in investment treaties are set out below.

#### 3.3.1 Protection from expropriation or nationalisation without compensation

<sup>68</sup> The Treaty Establishing A Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Treaty of Asuncion), Mar. 26, 1991, 2140 U.N.T.S 257.

<sup>69</sup> The Charter of the Association of Southeast Asian Nations (ASEAN Treaty), Nov. 20, 2007, 2624 U.N.T.S 233.

<sup>70</sup> DOLZER & SCHREUER, *supra* note 3, at 259; See, M.C. Porterfield, *An International Common Law of Investors Rights* 27 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 99 (2014).

<sup>71</sup> DOLZER & SCHREUER, *supra* note 3, at 91; NAFTA, Article, 1110(1)(a); Agreement for the Promotion and Protection of Investments, Austria – Egypt, April 12, 2001, Article 4(1); Agreement Concerning the Reciprocal Promotion and Protection of Investments, Afghanistan-Turkey, July 10, 2004, Article 4(1).

<sup>72</sup> Agreement for the Promotion and Protection of Investments, Turkey-United Kingdom, March 15, 1991, Article 5(1); Agreement for the Promotion and Protection of Investments, Austria-Azerbaijan, July 4, 2000, Article 5(1), (2000); Agreement on the Promotion and Protection of Investments, Bosnia and Herzegovina

Almost all IIAs promise investors market value compensation in the event of expropriation or nationalisation of their investment. Generally, expropriation is not prohibited, provided that it is:

- for a public purpose;<sup>71</sup>
- non-discriminatory;<sup>72</sup>
- in accordance with due process;<sup>73</sup> and
- subject to prompt, adequate and effective compensation.<sup>74</sup>

#### 3.3.2 Protection from 'indirect' or 'regulatory' expropriation without appropriate compensation

Abusive regulatory or taxation measures may also amount to an indirect or 'creeping' expropriation if they erode the economic value of an investment to such an extent that it effectively becomes worthless, notwithstanding that the state may not have actually deprived an investor of its property rights. In such cases, the host state is obliged to compensate the investor.<sup>75</sup>

- Sweden, October 31, 2000, Article 4(1).

<sup>73</sup> UNCTAD, *Bilateral Investment Treaties in Mid-1990s* (New York and Geneva: United Nations, 1998) (Doc. No. UNCTAD/ITE/IIT/7); UNCTAD, *Bilateral Investment Treaties 1995-2006* (New York and Geneva: United Nations, 2007) (Doc. No. UNCTAD/ITE/IIT/2006/5); UNCTAD series on issues in International Investment Agreements (New York and Geneva: United Nations, 2000) (Doc. No. UNCTAD/ITE/IIT/15).

<sup>74</sup> Agreement on the Promotion and Reciprocal Protection of Investments, Ethiopia – Spain, March 17, 2009, Article 5(5); Agreement for the Promotion and Protection of Investments, Canada-Slovakia, December, 15, 1990, Article VI; Agreement for the Liberalisation, Promotion and Protection of Investments, Japan-Lao People's Democratic Republic, January, 16, 2008, Article 12.

<sup>75</sup> NAFTA, Article 1110(2); Agreement between the Slovak Republic and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments, Slovakia - United Arab Emirates, September 22, 2016, Article 7(1)-(2); P.M Norton, *A Law of future or a Law of Past? Modern Tribunals and International Law of Expropriation*

### 3.3.3 Fair and equitable treatment

Host states must not take any arbitrary, grossly unfair or discriminatory measures against foreign investments. They must provide a transparent and predictable regulatory framework for the investment and respect the legitimate expectations which the investors relied upon when they made their investment.<sup>76</sup>

### 3.3.4 National treatment

Foreign investors must be treated equally with the local competitors. Host states cannot offer more favourable conditions to their own nationals or companies, or place more onerous conditions on foreign investors.<sup>77</sup>

### 3.3.5 Most favoured nation treatment

Host states often promise not to treat investors of any third state better than investors of the home state. The practical effect of this is that, while enforcing their rights, investors may be able to rely upon more favourable

commitments in other treaties entered into by the host state. Investors are also sometimes able to benefit from more favourable dispute settlement procedures in other treaties,<sup>78</sup> though this interpretation has been the subject of criticism in recent times.<sup>79</sup>

### 3.3.6 Protection against breach of a legal obligation

Host states sometimes confirm in their treaties that they will observe all legal obligations that they have entered into with foreign investors or in relation to their investments. While these remain controversial, a number of tribunals have confirmed that the effect of the so-called ‘umbrella’ clauses<sup>80</sup> is that a breach by the state of a contract or licence entered into with a foreign investor may also amount to a breach of an IIA, attracting international law remedies and procedures.<sup>81</sup>

### 3.3.7 Right to repatriate investment and return

Treaties typically contain a commitment not to restrict investors’ freedom to transfer both the capital and returns from an investment out of the host state and into another currency.<sup>82</sup>

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85 AMERICAN JOURNAL OF INTERNATIONAL LAW 474 (1991); .

<sup>76</sup> Agreement on the Reciprocal Promotion and Protection of Investments, Belgium-Luxembourg Economic Union-Tajikistan, February, 12, 2009, Article 3; Agreement on the Promotion and Reciprocal Protection of Investments, China-Switzerland, January 27, 2009, Article 4; Agreement on the Promotion and Reciprocal Protection of Investments, Croatia-Oman, May 4, 2004, Article 3(2).

<sup>77</sup> Treaty concerning the Encouragement and Reciprocal Protection of Investment, US – Ecuador, January 27, 1993, Article II(1); NAFTA, Article 1102(1).

<sup>78</sup> Benin - China BIT, February 18, 2004, Article 3.2; Burkina Faso - Netherlands BIT, November 10, 2000, Article 3.2; The Comprehensive Economic and Trade Agreement is a free-trade agreement between Canada and the European Union, October 30, 2016, Article 8.7.1.

<sup>79</sup> Amit K. Sinha, *An Inquiry into the Scope of MFN Provisions in Bilateral Investment Treaties*, 45 BROOK. J. INT’L

L. 679 (2020).

<sup>80</sup> Thomas W. Walde, *The ‘Umbrella’ Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases* 6 JOURNAL OF WORLD INVESTMENT AND TRADE 183 (2005).

<sup>81</sup> *Id.*; Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments, Netherlands-Poland, SEPTEMBER 7, 1992, Art. 5; Treaty between the Government of the United States of America and the Government of Romania concerning the Reciprocal Encouragement and Protection of Investment, US-Romania, May 28, 1992, Art. 2(c).

<sup>82</sup> Agreement between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Canada-Argentina, 5 November 1991, Article VII; AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS AND THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE for the Promotion and Protection of

### 3.3.8 Compensation for losses due to war or riot

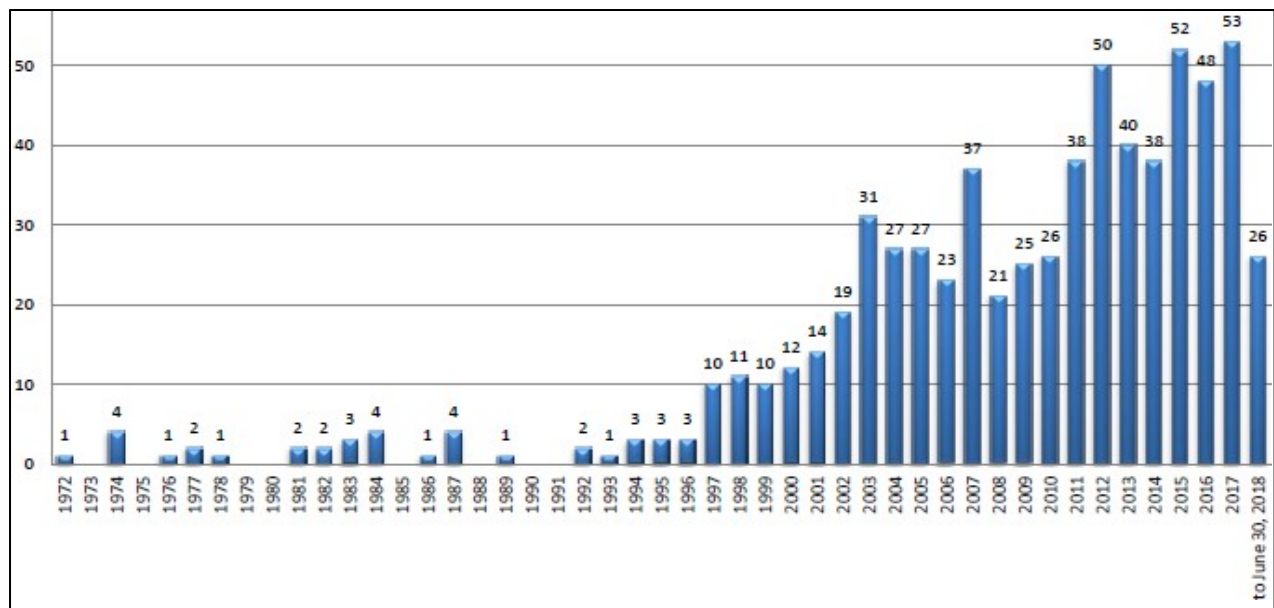
Investors are normally entitled to compensation for harm done to their investments during war, national emergency or civil unrest.<sup>83</sup>

## 3.4 ENFORCEMENT OF INVESTMENT TREATY RIGHTS

BITs couple the above discussed substantive rights with an important procedural guarantee:

the right of the investor to initiate binding arbitration against the host state for alleged treaty breaches. Most BITs allow investors to refer disputes with the host state directly to binding international arbitration different to ICSID – an arbitration institution created specifically for administering investor-state disputes. However, some BITs have also incorporated State-State dispute settlement clauses for the dispute resolution pertaining to the violation of the BIT.<sup>84</sup> ICSID caseload has seen an increase from only 35 cases in its first thirty-year of operations (1966-96) to nearly 670 registered cases as of mid-2018 (see figure 3 below).<sup>85</sup>

Figure 3 – Total Number of ICSID Cases Registered, by Calendar Year



Investments, Mauritius – Singapore, 4 March 2000, Article 8(1); JESWALD SALACUSE, *THE LAW OF INVESTMENT TREATIES* (Oxford University Press, 1<sup>st</sup> ed., 2010); Thomas Walde & Abba Kolo, *Investor-State Disputes: The Interface between Treaty Based International Investment Protection and Fiscal Sovereignty* 35 *INTERTAX* 424-449 (2007).

<sup>83</sup> Agreement concerning the Promotion and Protection of Investment, Bangladesh-Japan, November 10, 1998, Article 6; Agreement on promotion, encouragement and reciprocal protection of investments, Mexico-Netherlands, May 13, 1998, Article 6; Agreement on the Promotion and Protection of Investments, Australia-Egypt, May 3, 2001, Article 8.

<sup>84</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of Cambodia and the Kingdom of the Netherlands, Cambodia-Netherlands, June 23, 2003, Article 12; Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, Brazil-India, January 25, 2020.

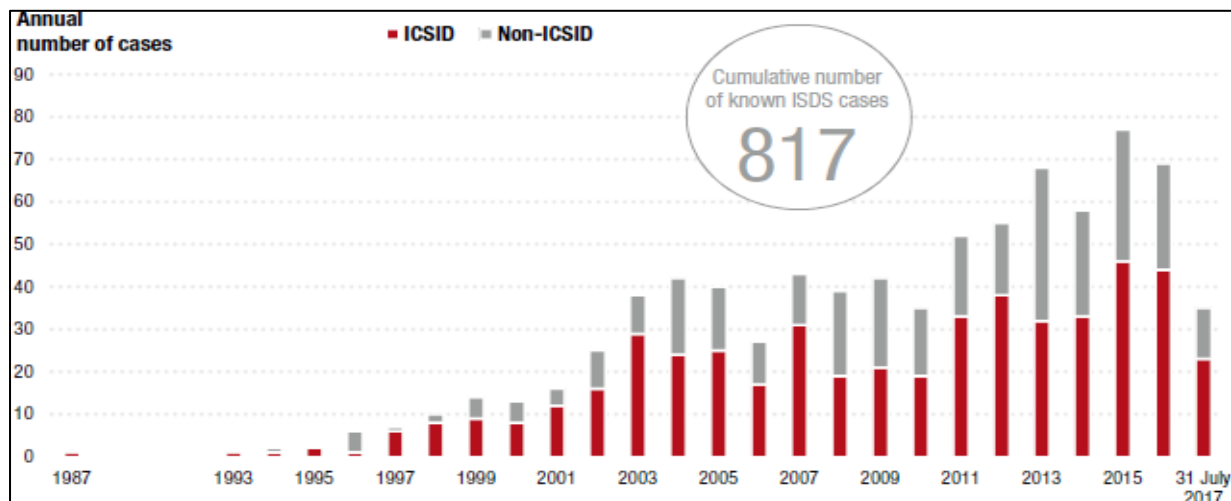
<sup>85</sup> *The ICSID Caseload – Statistics* (Issue 2018-2), 7 (ICSID), <https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/ICSID%20Web%20Stats%202018-2%20%28English%29.pdf> (last visited 12 Dec. 2020).



In addition to ICSID, a large number of investment claims are brought at other institutions or on an ad hoc basis under the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules. Sometimes, however, other options also exist, including arbitration under the rules of the

International Chamber of Commerce (“**ICC**”) or the Arbitration Institute of the Stockholm Chamber of Commerce (“**SCC**”). As of 31 July 2017, the total number of publicly known investor-state dispute settlement (“**ISDS**”) claims had reached 817 (see figure 4 below).<sup>86</sup>

Figure 4 – Trends in known treaty-based ISDS cases, 1987-31 July 2017



<sup>86</sup> *Special Update on Investor-State Dispute Settlement Facts And Figures* (IIA Issue Note, No. 3, 2017), (UNCTAD/DIAE/PCB/2017/7), 2,

[http://unctad.org/en/PublicationsLibrary/diaepcb2017d7\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf) (last visited 12 Dec. 2020).

## 4. STUDIES ON THE RELATIONSHIP BETWEEN INTERNATIONAL INVESTMENT AGREEMENTS AND FOREIGN INVESTMENT

Given the principal purpose of BITs is to protect and encourage investment flows, the obvious question that arises is whether BITs do in fact lead to higher investment flows. There are multiple studies that have been conducted in this area, primarily by economists. However, the results of these studies have not been uniform. Indeed, an UNCTAD review of 35 published and unpublished studies on the impact of investment treaties found significant differences in the studies' conclusions.<sup>87</sup> The majority of the studies reviewed by UNCTAD found a positive correlation between BITs and FDI. However, a small number of studies found little or no effect of BITs on FDI.<sup>88</sup> These differences are primarily because, from a methodological standpoint, assessing the effects of BITs on FDI flows is not an easy task. There are several challenges, including choice of the correct econometric model, problems with the quality of FDI data, identifying and accounting for differences in the text of investment treaties (some treaties provide stronger protections to investors than others) and controlling of various variables that also have an impact on investment flows such as the investment climate in the host state.<sup>89</sup>

Some of the well-known empirical studies on this subject include:

- **Hallward-Driemeier (2003):** this study tested the impact of BITs on bilateral FDI flows between 20 OECD countries and 31 developing countries between 1980 and 2000, and concluded that there was no significant effect of BITs on FDI.<sup>90</sup>
- **Tobin and Rose-Ackerman (2003):** this study tested the impact of BITs on total FDI flows to 45 states over the period 1975 to 2000. The study reached substantially similar conclusions as Hallward- Driemeier (2003) study.<sup>91</sup>
- **Egger and Pfaffermayr (2004):** this study tested FDI flows between 19 OECD countries and 57 partner countries (including other OECD countries) between 1982 and 1997, and concluded that there was a significant positive effect of ratified BITs, as opposed to BITs that had been signed but not ratified, on FDI.<sup>92</sup>
- **Büthe and Milner (2004):** this study used data for 122 developing countries over

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<sup>87</sup> *The impact of international investment agreements on foreign direct investment: An Overview of empirical studies 1998–2014* (UNCTAD, 20) cited in J. Bonnitcha, *Assessing the Impacts of Investment Treaties: Overview of the evidence* (IISD Report, Sept. 2017), 3, <https://www.iisd.org/system/files/publications/assessing-impacts-investment-treaties.pdf> (last visited 12 Dec. 2020).

<sup>88</sup> *Id.*, at 3.

<sup>89</sup> *Id.*; See also, Jason Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties* 33 BROOK. J. INT'L L. 405 (2008); See Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*, in SAUVANT & SACHS, *supra* note 4.

<sup>90</sup> See Hallward-Driemeier, M., *Do Bilateral Investment Treaties Attract FDI? Only a Bit and They Could Bite*, (World

Bank Policy Research Paper, WPS 3121, June 2003), <https://openknowledge.worldbank.org/bitstream/handle/10986/18118/multi0page.pdf?sequence=1&isAllowed=y> (last visited 12 Dec. 2020).

<sup>91</sup> See Tobin, J. & S. Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* (William Davidson Institute, Working Paper No. 587, 2003), <https://deepblue.lib.umich.edu/bitstream/handle/202.7.42/39973/wp587.pdf?sessionid=F74AF029D8BE7FC8F1F8609285AD336D?sequence=3> (last visited 12 Dec. 2020).

<sup>92</sup> Egger, P. & M. Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment* 32(4) JOURNAL OF COMPARATIVE ECONOMICS-ELSEVIER 788– 804 (2004).

the period 1970 to 2000 and found a positive correlation between BITs and subsequent inward FDI into developing countries.<sup>93</sup>

- **Salacuse and Sullivan (2005):** this study focused on U.S. BITs and concluded that U.S. BITs are more likely to induce foreign investment, than BITs concluded by other OECD countries.<sup>94</sup>

- **Neumayer and Spess (2005):** the authors used panel data for 119 countries over the period 1970 to 2001 and found that BITs have a positive effect on FDI inflows.<sup>95</sup>

- **Yackee (2007):** the author made certain ‘improvements’ in the methodologies followed by the studies of Hallward-Driemeier (2003) and Neumayer and Spess (2005) and concluded that BITs do not have any positive impact on FDI flows.<sup>96</sup>

- **Banga (2008):** this study tested the impact of BITs on FDI inflows for 15 developing economies of South Asia, East Asia, and South- East Asia. The author concluded that BITs with other developing countries did not have a significant impact on aggregate FDI inflows, but those with developed countries had a significant impact on FDI inflows.<sup>97</sup>

- **Aisbett (2009):** the author notes that previous studies that found a positive correlation between BITs and FDI ignored reverse causality, and on that basis, he reached the same conclusion as Yackee (2007).<sup>98</sup>

- **Busse, Kröninger, Nunnenkamp (2010):** the authors applied a ‘gravity model framework’ in order to capture the attractiveness of a developing country to a foreign investor and, on that basis, they concluded that the BITs have a positive impact on FDI flows.<sup>99</sup>

- **Pinto et al. (2010):** the authors note that ratified BITs have a significant and sizable effect on FDI flows but the impact only last during the initial years and reduces over time.<sup>100</sup>

- **Allee and Peinhardt (2011):** the authors highlight the negative effect of BITs on FDI in cases where host countries are challenged under BITs.<sup>101</sup>

- **Tobin and Rose-Ackerman (2011):** this study concluded that there is a positive impact of BITs on FDI in developing countries. However, this positive impact is subject to the investment environment of the host country.<sup>102</sup>

- **Tortian (2012):** the study tested the FDI inflows into 20 Southeast European and

<sup>93</sup> Büthe, T. and H.V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, in SAUVANT & SACHS, *supra* note 4.

<sup>94</sup> Salacuse, J.W. & N.P. Sullivan, *Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain* 46(1) HARV. INT’L L.J. 67–130 (2005).

<sup>95</sup> Neumayer, E. & L. Spess *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?* 33(10) WORLD DEVELOPMENT 1567–1585 (2005).

<sup>96</sup> Jason Yackee, *Do Bits Really Work? Revisiting the Empirical Link Between Investment Treaties and Foreign Direct Investment* (Legal Studies Research Paper Series Paper No. 1054, University of Wisconsin Law School, 2007).

<sup>97</sup> R. Banga, *Government Policies and FDI Inflows of Asian Developing Countries: Empirical Evidence*, in, ECONOMIC REFORM IN DEVELOPING COUNTRIES 117-146 (J.M. Fanelli & L. Squire eds., Cheltenham and Northampton:

Edward Elgar Publisher Limited, 2008).

<sup>98</sup> Aisbett, *supra* note 89.

<sup>99</sup> M Busse, J. Königer & P. Nunnenkamp, *FDI Promotion through Bilateral Investment Treaties: More Than a Bit?* 146(1) REV WORLD ECON. 147–177 (2010).

<sup>100</sup> M.P. Pinto, S.M. Pinto and N. Stier-Moses, *Regulating Foreign Investment: A Study of the Properties of Bilateral Investment Regimes*, The American Political Science Association Annual Conference (2010).

<sup>101</sup> See Allee, T. & C. Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65(3) INTERNATIONAL ORGANIZATION 401–432 (2011).

<sup>102</sup> See Tobin, J. & S. Rose-Ackerman, *When BITs Have Some Bite: The Political Economic Environment for Bilateral Investment Treaties?* 6(1) THE REVIEW OF INTERNATIONAL ORGANIZATIONS 1-32 (2011).

Central Asian countries. It concluded that BITs do not have a positive impact on FDI in countries with advanced financial structures.<sup>103</sup>

- **Berger et al. (2013):** using a gravity model, covering the 1978-2004 period and 28 home and 83 host countries, the study concluded that BITs do promote FDI flows.<sup>104</sup>
- **Bhasin and Manocha (2016):** using augmented gravity model, this study examined whether BITs were achieving the intended objective of higher FDI inflows to India, and concluded that BITs play their desired role in attracting FDI in India.<sup>105</sup>
- **Nottage and Singh (2016):** concluded that ISDS-backed provisions in the IIAs which leads liberalisation and protection of the FDI

have significant impact in promoting FDI, but in complex and evolving ways.<sup>106</sup>

Given the limitations of econometric studies and the lack of consensus among economists, CTIL and the author of this study decided that it would not make sense to conduct another econometric study. Instead, it was felt that a better approach would be to conduct a qualitative study where investors are directly asked about BITs and their usefulness. Indeed, this approach has been suggested by other authors as well<sup>107</sup> and, to some extent, has been applied in a handful of studies.<sup>108</sup> However, none of the other studies that apply a qualitative methodology to understand the impact of BITs on FDI inflows consider the case of India specifically.

<sup>103</sup> See A. Tortian, *The Impact of Bilateral Investment Treaties and Financial Development on Foreign Direct Investment: Evidence from Eurasia*, Paper Submission for Armenian Economic Association Conference 13-14 October, 2012, Yerevan, Armenia, <http://www.aea.am/files/papers/w1213.pdf> (last visited 12 Dec. 2020).

<sup>104</sup> A. Berger, M. Busse, P. Nunnenkamp and M. Roy, *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box* 10(2) INTERNATIONAL ECONOMICS AND ECONOMIC POLICY 247-275 (2013).

<sup>105</sup> Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence*

from India, 41(4) VIKALPA: J. DECISION MAKERS 275-287 (2016).

<sup>106</sup> Luke Nottage and Jaivir Singh, *Does ISDS Promote FDI, Asia Pacific Insights from and for Australia and India*, ILA Report, Nov. 2016, <http://ilareporter.org.au/2016/12/does-isds-promote-fdi-asia-pacific-insights-from-and-for-australia-and-india-luke-nottage-jaivir-singh/> (last visited 12 Dec. 2020).

<sup>107</sup> Lauge Poulsen, *Book Review: Karl P Sauvant and Lisa E Sachs (eds). The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* 20 EUR. J. INT'L L. 935-937 (2009).

<sup>108</sup> *Supra* note 88.

## 5. INDIA'S EXPERIENCE OF INTERNATIONAL INVESTMENT AGREEMENTS

India signed its first BIT with the United Kingdom in 1994.<sup>109</sup> The 1994 BIT – like BITs of other countries at the time – contained broad protections for investors and unhindered access to investor-state arbitration. The 1994 BIT became the template for India to negotiate further BITs.<sup>110</sup> It also served as the basis for the drafting of a 2003 model investment treaty.<sup>111</sup>

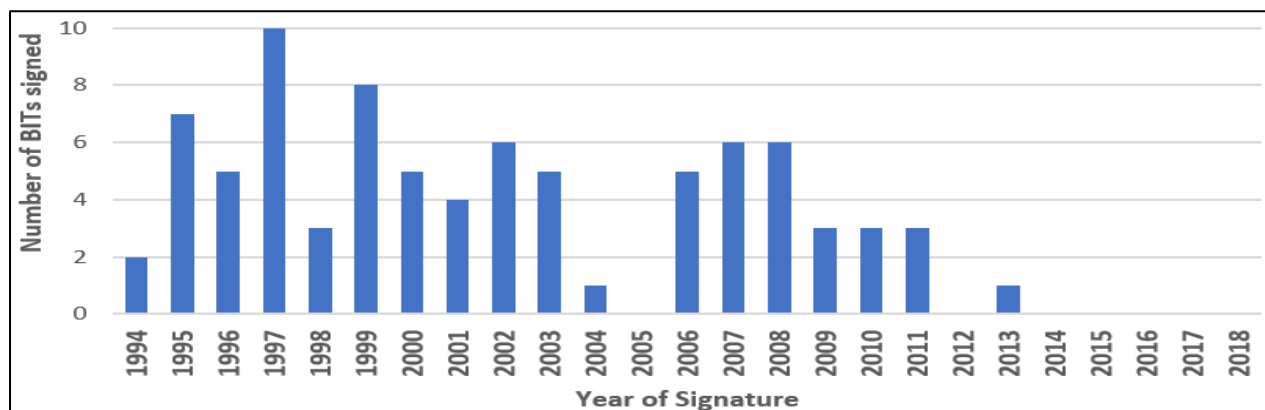
By 2016, India had signed 83 BITs, of which 74 were ratified.<sup>112</sup> Figure 5<sup>113</sup> below shows the number of BITs signed by India on a year-by-year basis since 1994. Aside from BITs, India has also entered into Free Trade Agreements, which have dedicated chapters on investments. There are 11 such FTAs currently in force.<sup>114</sup> The investment chapters in India's FTAs tend

to differ materially from the text of the stand-alone BITs.

Broadly speaking, investment chapters in India's FTAs are less protective of investor rights than stand-alone BITs.

As is evident from the figure below, India's last BIT was signed in 2013 – it was with the United Arab Emirates. Whilst the reasons for India's decision to put a halt on negotiation of further BITs will be discussed later in this section, it is worth noting that, with 83 signed BITs (as of 2016), India had one of the world's largest BIT network.

Figure 5 – BITs signed by India Over Time



<sup>109</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, United Kingdom-India, 6 January 1995.

<sup>110</sup> D. Krishan, *India and International Investment Law*, in *INDIA AND INTERNATIONAL LAW* 277 (Bimal Patel ed., 2008).

<sup>111</sup> Prabhaskar Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction* 38 NW. J. INT'L L. & BUS. 1 (2017) (hereinafter Ranjan & Anand).

<sup>112</sup> *Analysis of the 2015 Draft Model Indian Bilateral*

*Investment Treaty*, (Law Commission of India Report No. 260, August 2015), ¶1.2, <http://lawcommissionofindia.nic.in/reports/Report260.pdf> (last visited 12 Dec. 2020) (hereinafter Law Commission Report). See also, Appendix A which contains a list of BITs concluded by India (pre-termination).

<sup>113</sup> Figure 5 has been prepared from the data available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india> (last visited 12 Dec. 2020).

<sup>114</sup> See, Appendix B which contains a list of FTAs concluded by India.

Between 1993 and 2011 India's investment treaty regime received little attention.<sup>115</sup> The only instance on which foreign investors invoked their BIT rights was when, in 1995, General Electric Corporation and Bechtel Enterprises filed a request for arbitration against India under the India- Mauritius BIT. The dispute related to the cancellation of a power purchase agreement between Maharashtra State Electricity Board and Dabhol Power Company (a joint venture of Enron Corporation, General Electric Corporation and Bechtel Enterprises). Ultimately, the case was settled and no award was issued in the investment treaty arbitration.<sup>116</sup>

However, India's approach to BITs began to change from 2011. That is the year in which an UNCITRAL tribunal in the case of *White Industries v. India*, established under the India-Australia BIT, found that the delays in the enforcement of a commercial arbitration award amounted to a breach of India's international law obligations.<sup>117</sup> In *White Industries*, the tribunal awarded approximately USD 4 million (plus interest) to the investor<sup>118</sup> – a relatively small amount, given that the average award amount in investment arbitrations tends

to be in the region of USD 81 million.<sup>119</sup> Yet, the underlying issue – delays in the Indian judicial system and, by extension, an international tribunal's competence to review whether those delays can constitute a breach of India's international law obligations – was controversial and became the subject of debate, both in India and abroad.<sup>120</sup>

Subsequently, further treaty claims were brought against India, under different BITs. The claims related to a wide variety of issues, although two events in particular contributed to the surge in investment claims. First, in 2012, the Indian legislature retrospectively amended the Indian Income Tax Act.<sup>121</sup> The retrospective amendments led the Indian tax authorities to raise very large tax demands against several companies including few foreign investors, some of whom decided to commence investment treaty arbitrations.<sup>122</sup> Second, in the same year, the Supreme Court cancelled 122 telecom licenses issued to various companies on grounds of certain irregularities in the original allocation process.<sup>123</sup> Cancellation of licenses caused severe losses to many foreign investors and led to a spate of BIT arbitrations against India.<sup>124</sup>

<sup>115</sup> Law Commission Report, *supra* note 112, at ¶1.4.

<sup>116</sup> *Id.*

<sup>117</sup> *White Industries Australia Ltd v India* (UNCITRAL), Final Award, 30 November 2011, <https://investmentpolicyhub.unctad.org/ISDS/Details/378>.

<sup>118</sup> *Id.*

<sup>119</sup> Diana Rosert, *The Stakes are High: Review of the Financial Costs of Investment Treaty Arbitration*, 3 (IISD Report, July 2014), <https://www.iisd.org/system/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf> (last accessed Dec. 12, 2020).

<sup>120</sup> Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Programme* 2(3) INVESTMENT TREATY NEWS 13-14 (April 2012); Manu Sanan, *The White Industries Award: Shades of Grey* 13(4) J. WORLD INVESTMENT AND TRADE 661 (2012); Patricia Nacimiento & Sven Lange, *White Industries Australia Limited v Republic of India*, 27(2) ICSID REVIEW 274-280 (Fall 2012).

<sup>121</sup> Finance Act, 2013 (Act No. 23 of 2012).

<sup>122</sup> See, e.g., *Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v. India* (UNCITRAL), Pending, 2012, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/491/naumchenko-and-others-v-india> (last visited 12 Dec. 2020); For an analysis of the Indian's judiciaries response to investment disputes, see James J Nedumpara, Aditya Laddha and Sparsha Janardhan, *Mapping Indian Judiciary's Approach to Investment Treaty Arbitration* 1 NATIONAL LAW UNIVERSITY DELHI JOURNAL OF LEGAL STUDIES 21-37 (2019).

<sup>123</sup> *Centre for Public Interest Litigation v Union of India*, (2012) 3 SCC 104.

<sup>124</sup> See, e.g., *Vodafone v. India (I)* (UNCITRAL), Pending, 2014, available at: <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/581/vodafone-v-india-i> (last visited 12 Dec. 2020); *Cairn v. India* (UNCITRAL), Pending, 2015, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/691/cairn-v-india> (last visited

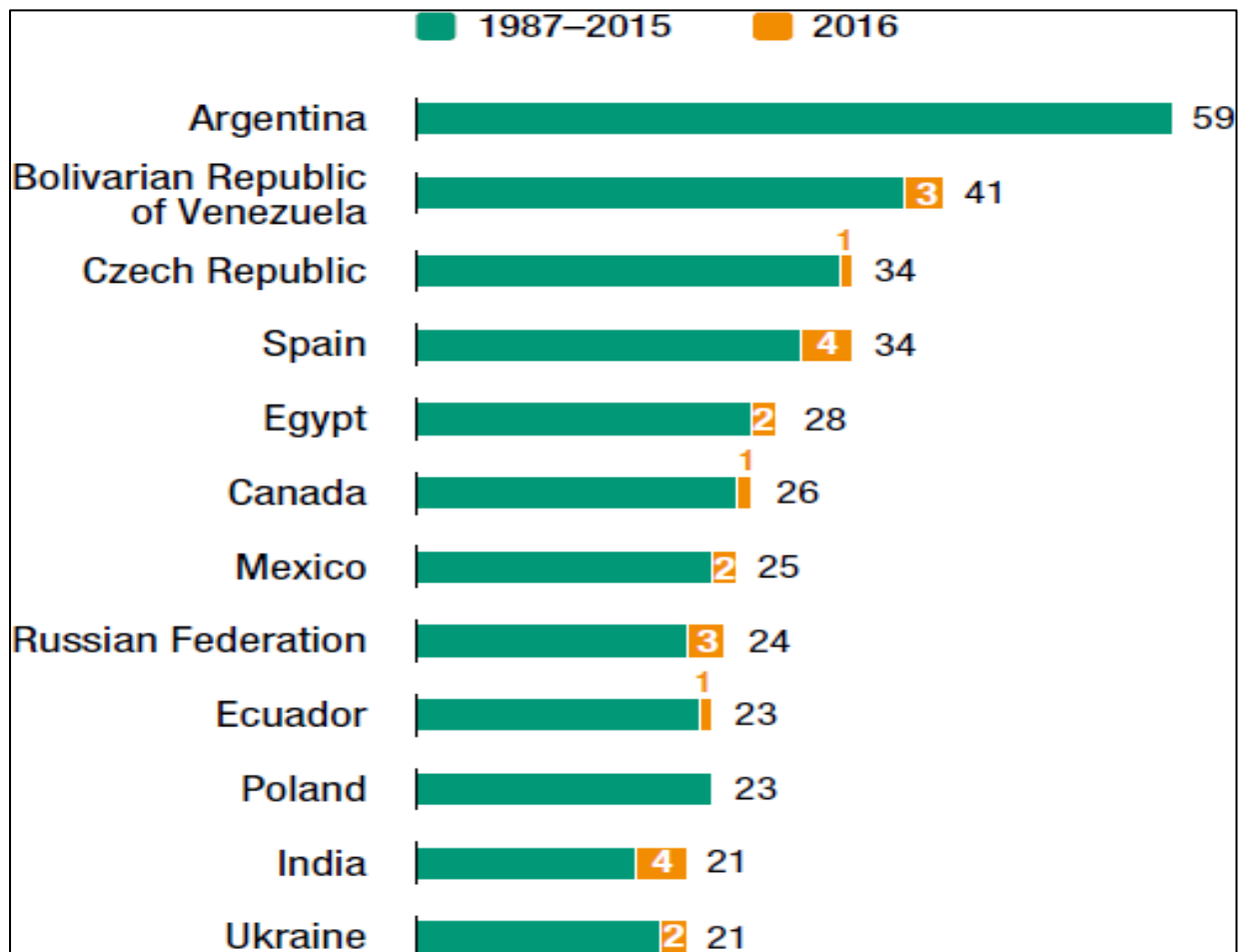


Indeed, in 2016, India was one of the most frequently-named respondent states in BIT proceedings (see figure 6 below).<sup>125</sup>

In light of the adverse award in *White Industries* and the surge in investment treaty claims, in 2015, India decided to revisit its BIT program. It halted all further negotiations of BITs and decided to review its 2003 Model BIT.<sup>126</sup> In

March 2015, the Government made public a new draft model Indian Bilateral Investment Treaty (“**Draft Model BIT**”).<sup>127</sup> The objective of the Draft Model BIT, as stated on the Government’s website, was “*to provide appropriate protection to foreign investors in India and Indian investors in the foreign country, in the light of the relevant international precedents and practices, while maintaining a balance between the investor’s rights.*”

Figure 6 – Most frequent respondent states, 1987–2016 (Number of known case)



12 Dec. 2020); *Nokia v. India*, <https://www.italaw.com/cases/2546> (last visited 12 Dec. 2020).

<sup>125</sup> *World Investment Report: Investment and the Digital Economy* (UNCTAD, 2017), 115, figure III.13, [https://unctad.org/system/files/official-document/wir2017\\_en.pdf](https://unctad.org/system/files/official-document/wir2017_en.pdf) (last visited 12 Dec. 2020).

<sup>126</sup> Law Commission Report, *supra* 112, ¶1.8; See also,

Jarrold Hepburn and Ridhi Kabra, *India’s New Model Investment Treaty: Fit for Purpose* 1 *INDIAN LAW REVIEW* (2017) (hereinafter Hepburn & Kabra).

<sup>127</sup> *Model Text for the Indian Bilateral Investment Treaty* (2015), [https://dea.gov.in/sites/default/files/ModelBIT\\_Annex\\_0.pdf](https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf) (last visited 12 Dec. 2020).

Thereafter, public consultations were held and a report was prepared by the Law Commission of India.<sup>128</sup> Based on the Law Commission report, the text of the Draft Model BIT was amended and the final model was released in December 2015 (“**Model BIT**”).

An analysis of the Model BIT is beyond the scope of this report, although it has been analysed by various academics in scholarly publications.<sup>129</sup> Suffice to say that the Model BIT seems intended to reduce the exposure of India to future claims by, for example, restricting the definitions of ‘investor’ and ‘investment’, excluding certain types of measures from the scope of treaty protections and removing or qualifying the most-favoured-nation and fair-and-equitable-treatment protections. Further, while the Model BIT preserves recourse to investor-state dispute settlement, it requires exhaustion of local remedies prior to initiating arbitration under the BIT.

Shortly after the Model BIT was unveiled, India began sending notices to treaty partners in order to terminate BITs. In 2016, India sent termination notices to 58 of its 83 BIT partners.<sup>130</sup> In relation to another 25 BITs, which have not completed their initial term and therefore cannot be terminated, India sent a proposed joint interpretative statement to

counterparty states, seeking to align those treaties with the Model BIT.<sup>131</sup>

The date on which the termination takes effect depends on the notice period in the treaty and the date on which the termination notice was received by the treaty partner. Most of India’s BITs have a 12-month notice period and, therefore, it was expected that for the most part termination of BITs would begin in 2017. However, a small number of India’s BITs have shorter notice periods. For example, India-Netherlands BIT has a 6-month notice period and, therefore, that treaty was terminated on 30 November 2016.<sup>132</sup>

It is understood that, after the current generation of BITs have been terminated, India intends to negotiate replacement BITs based on the Model BIT. Until new arrangements are agreed between India and those states, new investments by foreign investors into India, and by Indian investors into those countries, will cease to receive BIT protections. Existing investments made before the relevant BIT is terminated may continue to be protected; for example, the India–Netherlands BIT provides that the substantive protections will continue to apply for fifteen years after termination for investments made prior to termination. Many of India’s other treaties, such as those with the

<sup>128</sup> Law Commission Report, *supra* note 111.

<sup>129</sup> See, e.g., Ranjan & Anand, *supra* note 111; Hepburn & Kabra, *supra* note 126; James J. Nedumpara, Rodrigo Polanco Lazo, *Does India need a model BIT?* 7 JINDAL GLOBAL LAW REVIEW 117–125 (2016); James J. Nedumpara, *India's Trade and Investment Agreements*, in RECONCEPTUALISING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH 146 – 187 (Fabio Morosini, Michelle Ratton eds., CUP, 2017).

<sup>130</sup> Ministry of Commerce & Industry, Govt of India, *Bilateral Investment Treaties*, 1 (25 July 2016), <https://dipp.gov.in/sites/default/files/lu1290.pdf> (last visited 12 Dec. 2020).

<sup>131</sup> *Joint Interpretative Statement - India in Business* (2016), <http://indiaibusiness.nic.in/newdesign/upload/Consolidated-Interpretive-Statement.pdf> (last visited 12 Dec. 2020) as cited in Sarthak Malhotra, *India's Joint Interpretive Statement for BITs: An Attempt to Slay Ghosts of the Past*, Investment Treaty News (12 Dec. 2016), <https://www.iisd.org/itn/en/2016/12/12/indias-joint-interpretive-statement-for-bits-an-attempt-to-slay-the-ghosts-of-the-past-sarthak-malhotra/> (last visited 12 Dec. 2020).

<sup>132</sup> VNO-NCW, *ECHO No 51: Termination of Investment Protection Agreement (IBO) by India*, as cited in *Arbitration in India – Dispute Resolution in the World's Largest Democracy*, Herbert Smith and Freehills Legal Briefings (11 July 2017), <https://www.herbertsmithfreehills.com/latest-thinking/arbitration-in-india-dispute-resolution-in-the-worlds-largest-democracy> (last visited 12 Dec. 2020).



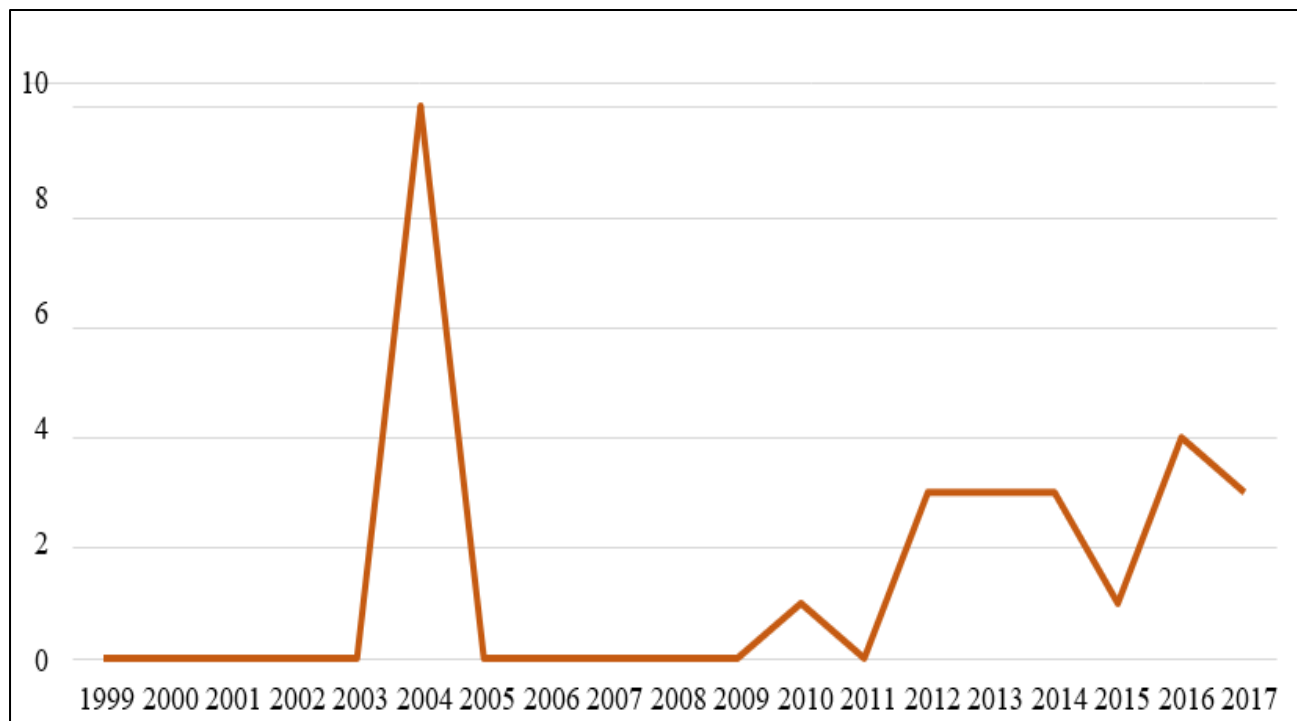
UK, Germany and Mauritius, contain similar ‘sunset’ clauses.

That said, the Government has not yet released an official list of countries to whom it has sent a termination notice, nor has the Government confirmed the list of treaties that have been terminated. This is an unsatisfactory state of affairs. At the very minimum, foreign and Indian investors need to know which treaties are in force and whether their investments are protected.

Further, the approach to termination of BITs seems to be motivated solely by an intention to reduce exposure to further claims against India. However, BITs contain reciprocal protections. In other words, BITs benefit foreign investors making investments in India, as much as they

benefit Indian investors investing abroad. The effect of terminating BITs – even before a new arrangement has been agreed with the counterparty state – is that new investments made by Indian investors in those states will receive no protection. Today, India is not only a capital importer, but also a large capital exporter. It is likely that, going forward, Indian investors will demand investor protections. Whilst it is true that the number of reported BIT claims against India far exceed reported BIT claims brought by Indian investors against other countries (see figures 7 and 8 below)<sup>133</sup>, it is important that any approach towards BITs takes into account, not only India’s interest in reducing exposure to claims, but also protecting the interests of Indian investors investing abroad.

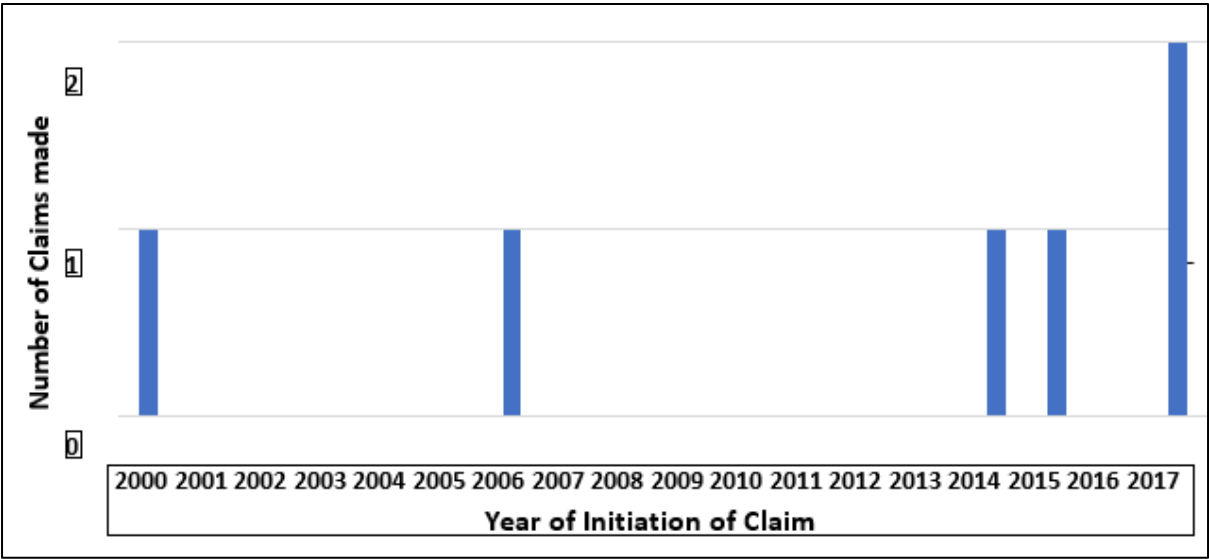
**Figure 7 - International Investment Arbitrations initiated against India**



<sup>133</sup> See also, Appendix C and D which contains list of investment treaty arbitrations against India and brought by Indian investors respectively. Figure 7 and Figure 8 have been prepared from the data available at

<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india> (last visited 12 Dec. 2020).

Figure 8 – International Investment Arbitration initiated by Indian Investors



## 6. METHODOLOGY

The impact of BITs on FDI has been the subject of empirical analysis for a number of years. Most of the studies carried out in this area have taken an econometric approach, testing the correlation between BITs and investment flows. Some of these studies have been identified in section 3 above. The results from these studies are mixed: some studies show a positive impact on investment inflows, whereas other studies show that there is no impact at all. The differences in results point to certain inherent limitations in a quantitative study: there is no consensus on the correct methodology, the quality of FDI data differs and it is very difficult to control for the various variables that impact investment flows.<sup>134</sup>

There is an alternative way to study the relationship between BITs and FDI. Those who make investment decisions – and those who advise decision-makers – can be asked directly whether they rely on BITs at the time of making such decisions. If BITs are meant to encourage foreign investment and the protections contained in BITs are genuinely as valuable as they are widely believed to be, one might reasonably expect that the investment decision-makers and their advisers would be aware of the treaty protections. Accordingly, this study adopts a survey-based approach in order to understand and evaluate investors' perceptions towards India's BITs.

This is not the first time that a survey of investor attitudes towards, and knowledge of, BITs is being undertaken. Others have previously conducted similar studies.<sup>135</sup> However, none of those studies have been focused on any specific country's BITs, let alone India's BITs. To the author's knowledge, this is the first time that an attempt has been made to understand – by applying a survey-based approach – the extent to which Indian

investors and foreign investors take into account India's BITs when making their investment-related decisions.

The study was conducted in two phases. The first phase comprised an online questionnaire designed to measure investors' perceptions towards India's BITs. The questionnaire was completed by around 225 respondents between 20 September 2018 and 30 November 2018. The second phase comprised 15 face-to-face and telephone interviews with interviewees drawn from a diverse group including senior executives at Indian and foreign companies, lawyers working at Indian and foreign laws firms, Indian government departments and academia. Some of the interviews were conducted before the questionnaire was sent and were helpful in designing the questionnaire. Remaining interviews were conducted after some of the data from the questionnaire had been received; the information gathered from these interviews has been used to supplement the questionnaire data and explain findings covered in this report.

### 6.1. QUESTIONNAIRE

An online questionnaire was designed in order to assess the impact of investment treaties on investment flows. The questionnaire was tailor-made for each category of respondents. It contained 12 – 15 questions depending on the respondent type and was divided into four parts.

- The first part was designed to understand the background of the respondent.
- The second and third parts consisted of questions that were drafted specifically to measure investors' knowledge, and attitude

studies.

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<sup>134</sup> See, Section 4 above.

<sup>135</sup> See, *supra* note 1 above identifying a few survey-based

towards, India's BITs generally and particular treaty protections. Few questions were added to also understand which political risks investors are most wary of and the tools that they employ to mitigate those risks.

- Finally, the fourth part of the questionnaire consisted of questions on India's Model BIT. As mentioned in section 4 above, the Model BIT has been the subject of intense academic debate. However, very little is known about investors' knowledge of the Model BIT, a gap that this study intends to address.

The respondents were required to answer all questions included in the questionnaire and there was no option to skip the questions. However, if the respondent displayed lack of knowledge on a topic, such as knowledge about protections contained in BITs, further questions on that topic were not put to that respondent.

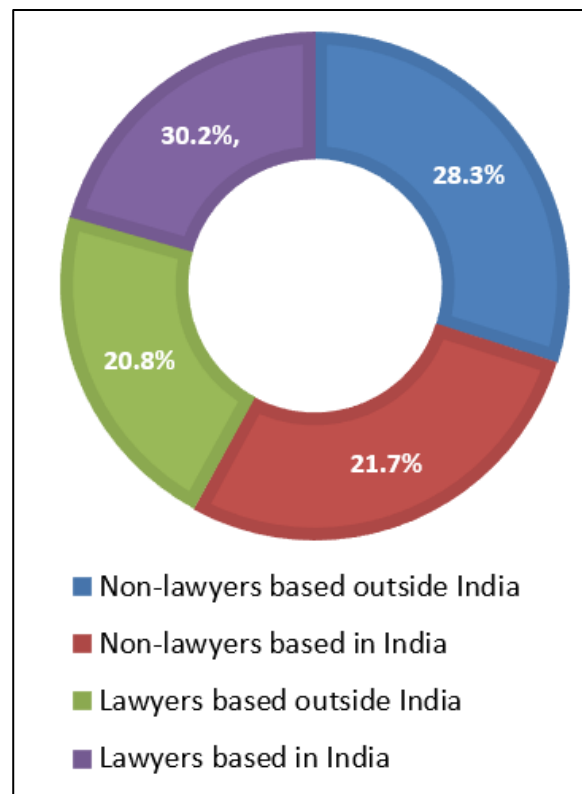
The questionnaire was hosted on an independent survey site and was sent to a large number of potential respondents via email. Assistance was solicited from CTIL, Indian and foreign law firms, and arbitration institutions in sending the questionnaire. The questionnaire remained open to respondents between 20 September 2018 and 30 November 2018, and was completed by around 225 respondents.

The survey sought views from a wide variety of stakeholders. The respondent group consisted primarily of non-lawyers. Those based outside India comprised 30.2% while those based in India made 28.3% of the respondent pool. Private law practitioners were the remaining 41.5% of the respondents (21.7% of whom were based outside India) (See figure 9).

The questions included in the questionnaire differed depending on the respondent type: all questionnaires that were sent to the respondents are appended to this report at Appendix E.

As far non-lawyers are concerned, they are an obvious target for this survey because, ultimately, they are responsible for making FDI related decisions. 28.3% of non-lawyers who participated in the survey were from India, while the remaining 30.2% were from abroad.

**Figure 9 - Overview of the respondents**

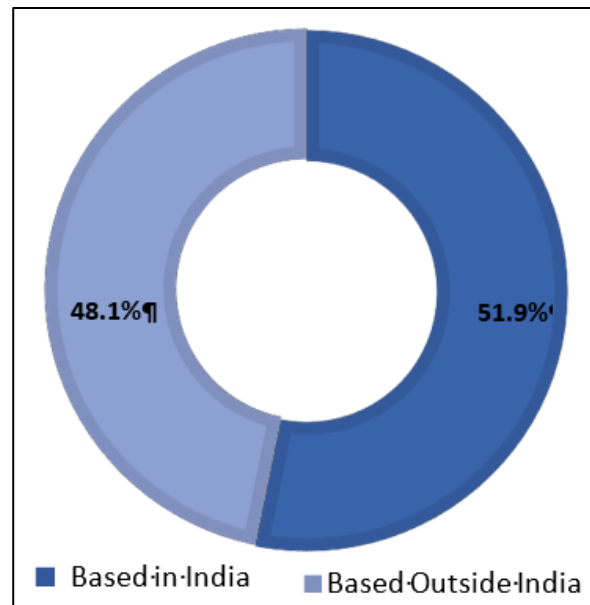


Broadly speaking, executives based in India were asked about the risks they face when they are investing abroad and the extent to which BITs are perceived to be useful in mitigating those risks. Executives based abroad were asked identical questions but from an in-bound investment perspective, i.e. the risks that they face when they are investing in India and the tools that they use to mitigate those risks. The executives who participated in the survey came from organisations in a wide variety of industries.

Although corporate executives are most closely

involved in FDI related decisions, external lawyers are often consulted at the time of making such decisions. In addition, external lawyers are almost always involved in arbitrations under BITs. Therefore, it was considered necessary to also seek responses from private practitioners. 19.8% of private practitioners who participated in the survey were from India, while the remaining 21.7% were from abroad, mostly from Europe. In total, 48.1% of the responses were received from respondents based in India and 51.9% were from abroad (see figure 10).

**Figure 10 - Location of the Respondents**



## 7. SURVEY FINDINGS

This section analyses responses to the online questionnaire. The questionnaire had three parts. Results from the first part, which focussed on the background of the respondents, have already been discussed in section 6 above. Part 2 of the questionnaire dealt with investors' perceptions of the investment climate in the host country: questions were focussed on understanding the main constraints to investment flows and tools used to address those constraints. Finally, Part 3 directly asked questions regarding BITs: the extent of investors' knowledge of BITs and the specific protections contained in those treaties.

### 7.1 INVESTORS' PERCEPTIONS OF THE INVESTMENT CLIMATE

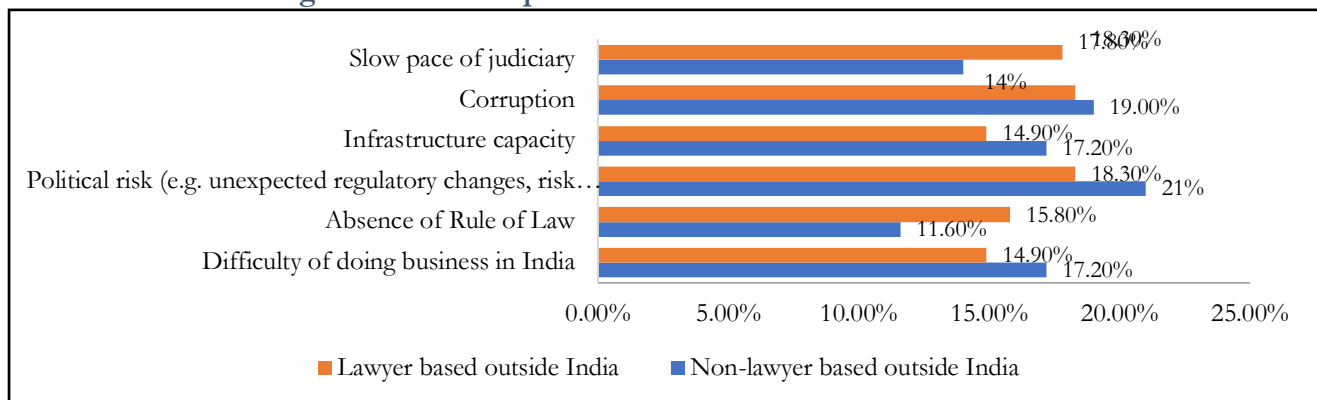
As a preliminary question, respondents were asked about their involvement in an FDI-related decision. Only 43.6% of the foreign based respondents said they have been involved in or are likely to be involved in an India-bound FDI decision. Similarly, only 40.2% of the India based respondents said they have been involved in or are likely to be involved in an FDI-related decision. Those respondents who said they did not have any relevant FDI experience were not asked to answer the remaining questions analysed in this

section.

#### 7.1.1. Main constraints to FDI

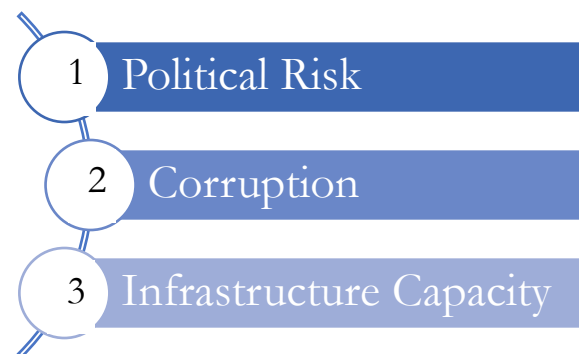
With a view to ascertaining the principal constraints to investment flows, respondents were asked to indicate the significance of various risks to their FDI decisions. The questionnaire required respondents to rank each risk on a scale from 1 to 4, with 1 being 'no constraint at all' to 4 being 'most significant constraint'. The data in Figure 11 below shows that for non-lawyers based outside India, political risk (of unexpected regulatory changes and expropriation among others) is the most significant constraint to making an investment in India, followed by corruption. This is followed by the lack of infrastructure capacity and difficulty of doing of business in India. The absence of the Rule of Law is a risk about which foreign investors were least concerned. On the other hand, for lawyers based outside India who regularly give advice on India-bound investments, political risk and corruption are the most significant constraints. Differences in the attitude of corporate executives and their legal advisers towards the pace of the Indian judiciary may be a factor of their respective experience: foreign lawyers are more likely to have been exposed to the Indian judicial system than foreign company executives.

**Figure 11: Most important constraints to FDI in India**



For the purposes of this study, the most important constraint is political risk as, ultimately, that is the risk that BITs aim to mitigate. Political risk, put simply, is the risk that the government of the host state will take certain actions that will adversely affect the viability of the investment.<sup>136</sup> At the time of completing the questionnaire, respondents were informed that the typical types of political risks include unexpected regulatory changes and risk of expropriation. As Figure 12 right shows, foreign investors and their legal advisors rank political risk as the first most significant constraint to investments in India, just ahead of corruption. This finding is consistent with studies conducted by the World Bank's Multilateral Investment Guarantee Agency ("MIGA"), which have consistently found that, globally, investors rank political risk as a key obstacle to investing in developing countries.<sup>137</sup>

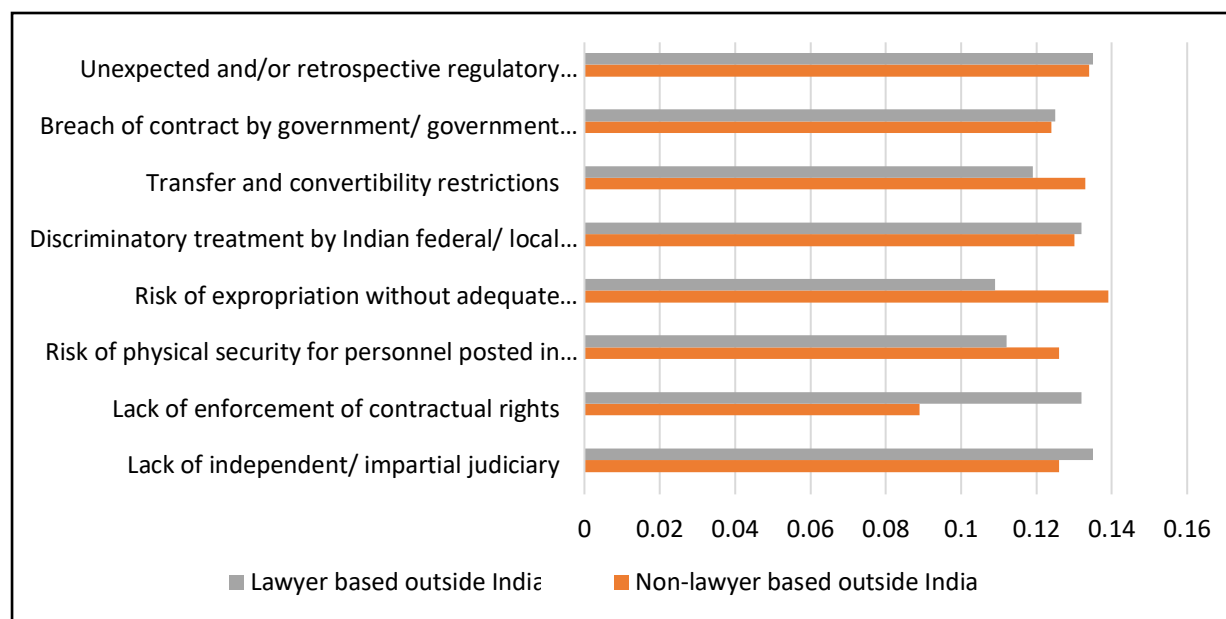
Figure 12 - Top 3 constraints to FDI in India



## 7.2 POLITICAL RISKS

The respondents were also asked to identify the political risks that are of most concern to them. Seven types of political risks were included in the questionnaire and, again, investors were asked to rate those risks on a scale of 1 to 4, with 1 signifying that the political risk was 'no concern at all' and 4 signifying that the political risk was of 'most significant concern'.

Figure 13 - Most important political risks according to foreign investors



<sup>136</sup> Heinrich Matthee, *Political risk analysis*, ENCYCLOPÆDIA BRITANNICA, 5 Oct. 2017, <https://www.britannica.com/topic/political-risk->

[analysis](#) (Last visited on 12 December 2020).

<sup>137</sup> MIGA Report 2013, *supra* note 61.

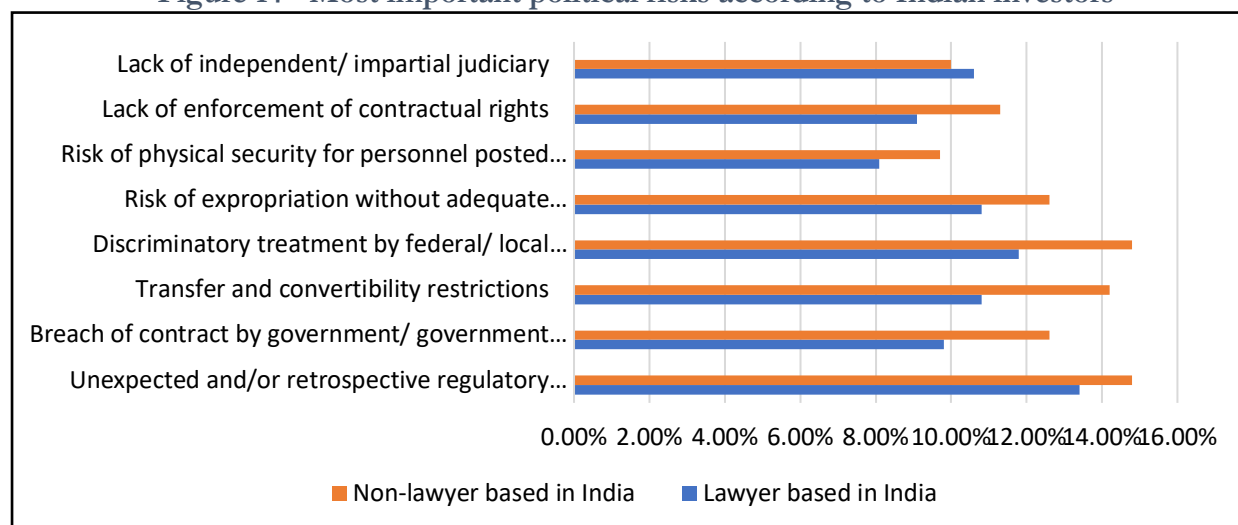
As Figure 13 above shows, the most significant political risk according to lawyers based outside India is unexpected and/or retrospective regulatory changes. This risk comes a close second to corporate executives based outside India. This is not surprising. In studies conducted by MIGA, the risk of adverse regulatory change has consistently ranked as a top investor concern globally.<sup>138</sup> In India specifically, regulatory changes have been the cause for the majority of the BIT claims. As noted in Section 4 above, retrospective amendment to the Indian Income Tax Act and the sudden cancellation of telecom licensees in 2012 have been responsible for several BIT claims.

In investors' ranking of most significant constraints, the risk of unexpected regulatory changes was closely followed by the lack of independent judiciary enforcement in India. This is an area where India has consistently ranked very low in global rankings. For example, among the 190 countries surveyed by the World Bank for its 2018 version of the Doing Business report, India was ranked at 164 for 'enforcing contracts'.<sup>139</sup>

A striking outcome of the survey is that there is one political risk on which there seem to be divergent views between the corporates and the lawyers – the lack of enforcement of contractual rights. Surprisingly, this is a risk that has been marked as much more significant by the lawyers and of much lesser concern by the corporates. Barring this particular risk, there is not too much divergence between the views of the corporates and those of the lawyers.

Figure 14 below reveals the political risks considered to be of most concern by Indian corporate executives and lawyers when investing abroad. Like their foreign counterparts, Indian respondents also rank the risk of unexpected and/or retrospective regulatory changes as their top concern. Coming in at a close second for non-lawyers was discriminatory treatment by federal or local government. The concern that was viewed as the least significant by both corporates as well as lawyers cumulatively was the physical security for personnel posted abroad.

**Figure 14 - Most important political risks according to Indian investors**



<sup>138</sup> MIGA Report 2013, *supra* note 61, at 61.

<sup>139</sup> *Doing Business 2018 – Reforming to Create Jobs* 167 (World Bank Group (Flagship Report, 2018), <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2018->

[Full-Report.pdf](#) (last visited 12 Dec. 2020). In the World Bank Report, 'enforcing contracts' is an indicator for "time and cost to resolve a commercial dispute and the quality of judicial processes.



Overall, the results from the survey show that investors, both Indian and foreign, are consistent in their attitude towards political risks about which they are most concerned and those about which they are least concerned. As Table 1 below shows, aside from adverse regulatory changes and breach of contract by government entities; for both Indian and foreign investors, the risk of transfer and convertibility restrictions is significant. The political risks considered to be the least significant are physical security for personnel, and enforcement of contractual rights.

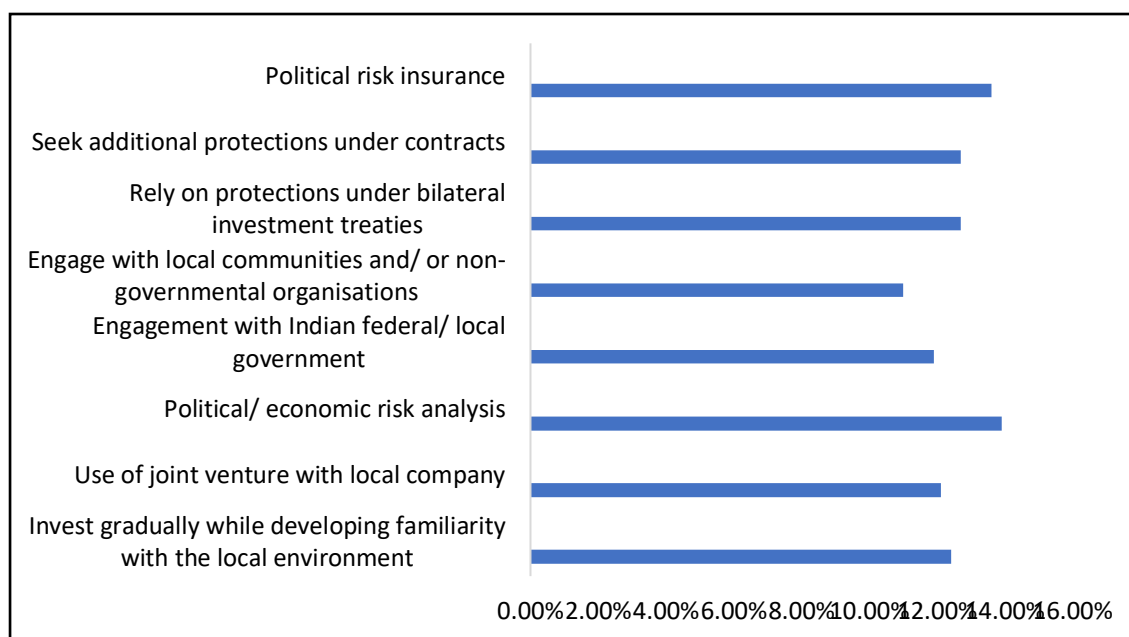
### 7.3 TOOLS/MECHANISMS USED TO MITIGATE POLITICAL RISKS

The next question in the questionnaire was

aimed at understanding the risk-mitigation tools used by investors. As Figure 15 below shows, 12.7% of the foreign investors and their legal advisers recognise BITs as their key risk-mitigation strategy for India-bound investments, compared to political risk insurance (13.6%), political risk analysis (13.9%) and joint ventures with a local investor (12%).

By contrast, Indian companies and their legal advisers regard contractual protections and pre-investment risk analysis as their key risk-mitigation tools when investing abroad (see Figure 16 below). Notably, BITs are not one of the main tools that Indian investors tend to rely on, with only 12.10% of the respondents identifying it as their key risk-mitigation strategy.

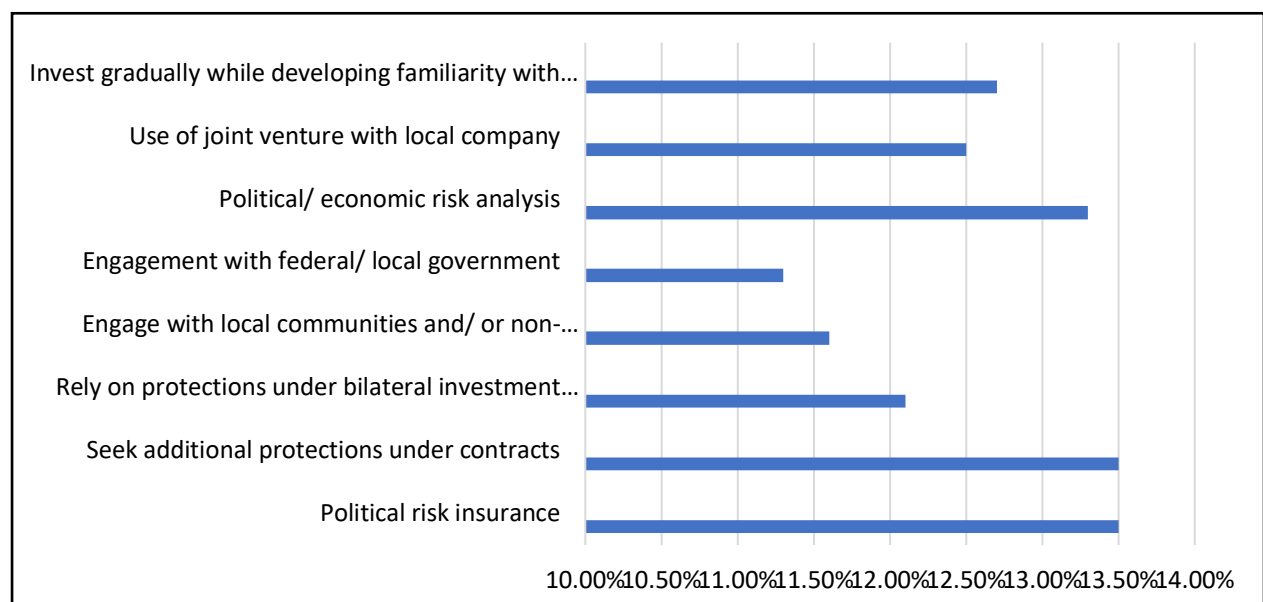
**Figure 15 - Risk-mitigation tools used by foreign investors when investing in India**



**Table 1 - Ranking of political risks faced by foreign and Indian investors**

Rank	Foreign Investors	Indian Investors
1.	Risk of expropriation without adequate compensation	Discriminatory treatment by federal/local government
2.	Unexpected and/or retrospective regulatory changes	Unexpected and/or retrospective regulatory changes
3.	Lack of an independent/impartial judiciary	Transfer and convertibility restrictions
4.	Breach of contract by government/government owned agencies	Risk of expropriation without adequate compensation
5.	Transfer and convertibility restrictions	Breach of contract by government/government owned agencies
6.	Discriminatory treatment by federal/local government	Lack of an independent/impartial judiciary
7.	Risk of physical security for personnel posted in India	Lack of enforcement of contractual rights
8.	Lack of enforcement of contractual rights	Risk of physical security for personnel posted outside India

**Figure 16 - Risk-mitigation tools used by Indian investors when investing abroad**



## 7.4 BIT SPECIFIC QUESTIONS

The next set of questions to the respondents were specifically on BITs. The overall purpose of these questions was to gauge the respondents' awareness of protections contained in BITs.

### 7.4.1 Whether BITs appear in investors' pre-investment checklist

As a preliminary question, respondents were asked whether, before making an FDI-related decision, they check that there is a BIT in force with the host country. This question was location agnostic and was meant to assess investors' perceptions of BITs globally. Overall, an overwhelming majority of the respondents stated that they check whether there is a BIT in force: an encouraging statistic that suggests that BITs have now become a standard tool in the tool-kit of investors and their legal advisers (see Figure 17).

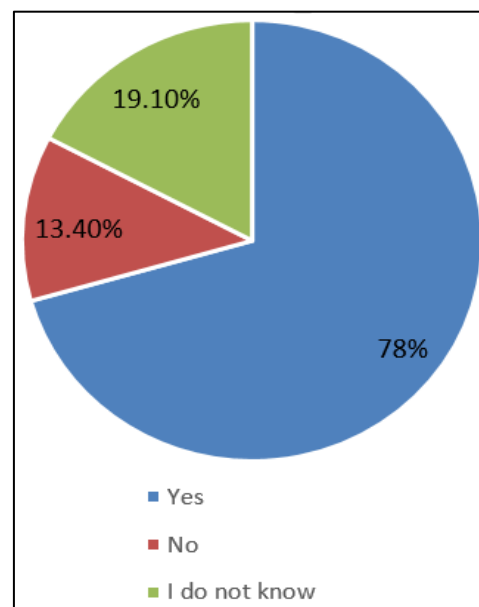
Notably, there was very little difference between non-lawyers based in India and abroad: 86.2% of the Indian non-lawyers and 77.8% of the foreign non-lawyers said that they check for the existence of BITs. The difference was greater among the lawyers: 87.2% of the foreign lawyers look for BITs before advising on the locations of a foreign investment, as compared to 56.1% of the Indian lawyers.

### 7.4.2 Familiarity with India's BITs

Next, the respondents were asked about their familiarity with India's BITs specifically. The question required an answer on a scale of 1 to 4, where 1 stood for 'not at all familiar' and 4 stood for 'extremely familiar'.<sup>140</sup> The results, as indicated in Table 2, show that lawyers based in India and abroad are equally familiar with India's BITs (median response of 3 each), while

corporate executives based abroad are least familiar with India's BITs (median response of 1.5)

**Figure 17 - Respondents who check for a BIT prior to making an investment**



**Table 2 - Familiarity with India's BITs (median response)**

Lawyers based in India	3
Lawyers based abroad	3
Corporates based in India	2
Corporates based abroad	1.5

The respondents were also asked questions about the effectiveness of India's BITs in respect of some of the commonly faced political risks. Again, the question had to be answered on a scale of 1 to 4, where 1 stood for 'not at all familiar' and 4 stood for 'extremely familiar'. Table 3 below presents the results in summary format.

- Corporate executives based outside India

the questions. "Don't know" responses were removed when analysing the data.

<sup>140</sup> A "Don't know" option was also added in order to avoid receiving distorted responses, especially given that it was mandatory for the respondents to answer all

consider BITs to be most effective against the risk of adverse regulatory changes, discrimination and breach of contract (median response of 2 each).

- Lawyers based outside India consider BITs to be most effective against the risk of discrimination and expropriation (median response of 3 each).
- Corporate executives based in India consider BITs to be most effective against risk of expropriation and breach of contract (median response of 3 each).
- Lawyers based in India consider BITs to be most effective against the risks of breach of contract, expropriation and currency restrictions (median response of 3 each).

Overall, the results suggest that India's BITs are most effective in protecting against the

risks of breach of contract, expropriation and currency restrictions and less effective in protecting against the risks of adverse regulatory changes and discrimination.

#### 4.1.1 BITs role in FDI decision making

Finally, respondents were asked questions about the importance of BITs to their FDI decisions. The question had to be answered on a scale of 1 to 4, where 1 stood for 'not at all important' and 4 stood for 'extremely important'. The results in Table 4 below show that lawyers based in India give most importance to India's BITs at the time of making foreign investment related decisions (median response of 3.5), followed by the remaining categories of respondents who all tend to accord the same level of importance to BITs (median response of 3 each).

**Table 3 – Effectiveness of BITs in protecting investments from commonly faced political risks (median response)**

	Corporates (in India)	Corporates (outside India)	Lawyers (in India)	Lawyers (outside India)
Adverse/unexpected regulatory change	2	2	2	2
Discrimination	2	2	2	3
Expropriation	3	1	3	3
Breach of contract	3	2	3	2
Currency restriction risks	2	1	3	2

**Table 4 - Role of BITs in FDI Decisions**

Categories	Median response
Lawyers based in India	3.5
Lawyers based outside India	3
Corporates based in India	3
Corporates based outside India	3

Respondents were also asked if they have declined or advised their client to not make a foreign investment in the absence of a BIT. Interestingly, corporate executives based in India had never declined an investment opportunity specifically because of the absence of a BIT. A minority of corporate executives based outside India (41.3%) had declined investments on account of lack of BIT protections, a finding which was consistent with the percentage of lawyers based abroad (42.2%) who had taken similar decisions.

**Table 5 – Respondents who declined investment opportunities in the absence of a BIT**

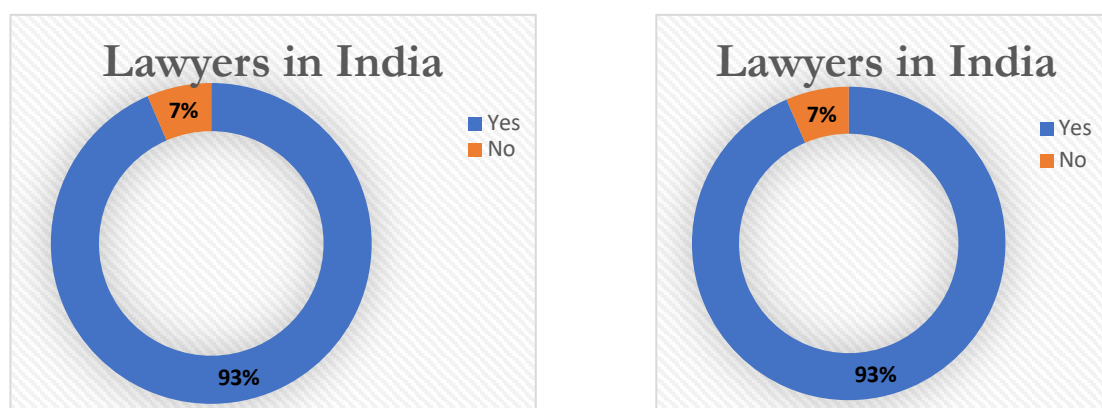
Categories	Percentage Response
Lawyers based in India	68.3%
Lawyers based outside India	42.2%
Corporates based in India	37.9%
Corporates based outside India	41.3%

## 7.5 MODEL BIT

In the last part of the questionnaire, respondents were asked questions regarding the Model BIT. As Figure 18 below shows, familiarity with India's Model BIT was highest amongst government officials, academics and policymakers, followed by lawyers based in India and lawyers based abroad. Not surprisingly, corporates are largely unaware of the Model BIT, with foreign corporate executives stating that they have never come across the Model BIT.

Those respondents that answered that they are familiar with the Model BIT were then asked whether they considered it to be a 'positive development' (see Figure 19 below). Majority of the lawyers based in India who answered this question seem to be in favour of the Model BIT. The Model BIT is similarly popular amongst government officials, academics and policy makers, as well as corporates based in India; however, close to double the lawyers based outside India responded negatively to this question, compared to lawyers based in India.

**Figure 18 - Familiarity with India's Model BIT**



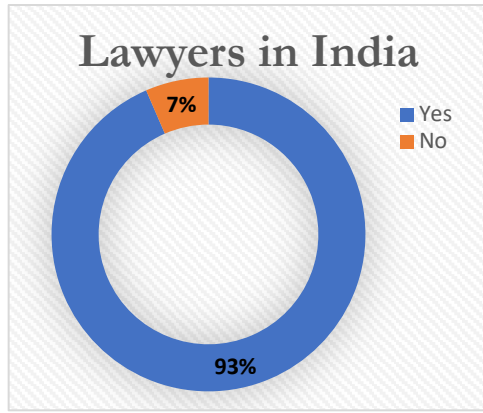
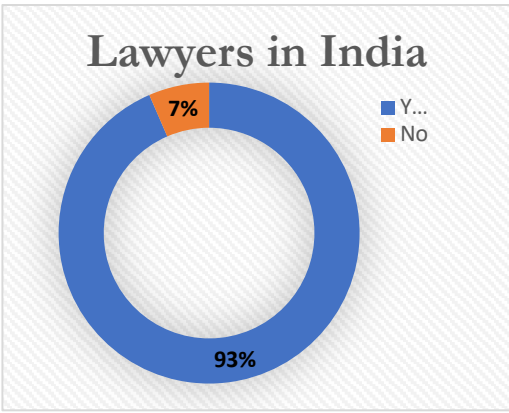
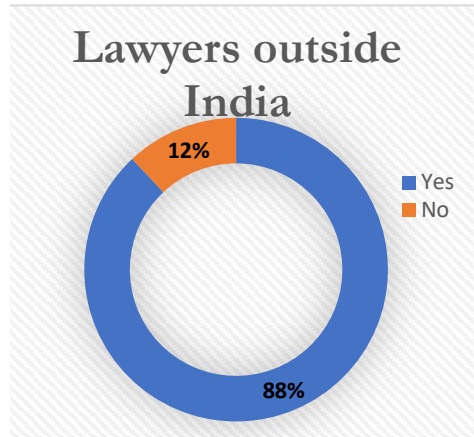
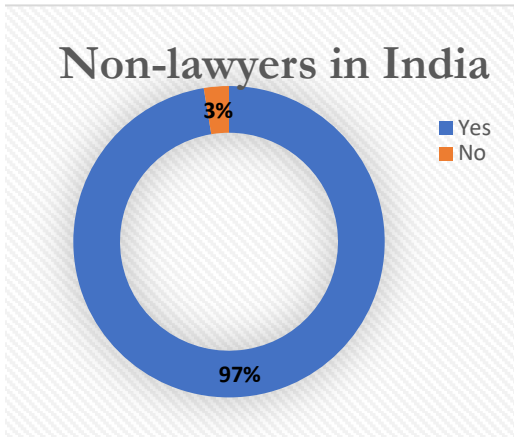
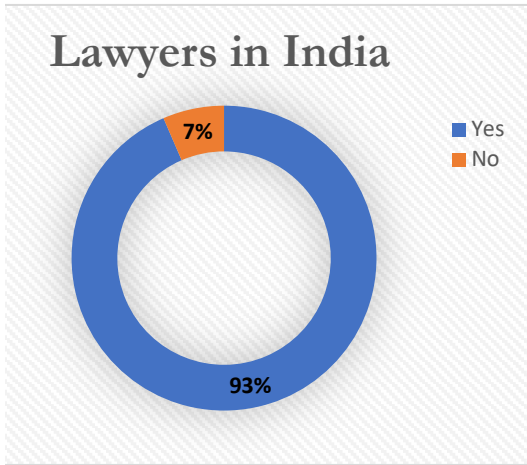


Figure 19 – Whether India's Model BIT is a positive development?



## 8. CONCLUSION

The results of this study show that, while both Indian and foreign investors are largely aware of India's BITs and view them as important risk-mitigation tools, they do not consider them important enough to make their FDI decisions on the basis of those BITs. In particular, very few investors consider BITs to be so critical that they would decline an investment opportunity because of lack of a BIT. In that sense, this study confirms the results that some of the earlier econometric and survey-based studies had reached, i.e. BITs do not, by themselves, spur investment flows. However, that may not be a complete answer for multiple reasons.

First, the decision to make a certain investment is influenced by several factors, legal and non-legal. It is unlikely that any single factor would be important enough to completely change the decision. In other words, while BITs may be an important factor in the decision making, their absence is not a 'deal-breaker' for most investors. Secondly, investors possess other ways to mitigate the risks against which BITs provide protection. So, for example, post-termination of the India-Netherlands BIT, a Dutch investor who is concerned about the risk of expropriation can still protect itself by buying a political risk insurance against that risk. Alternatively, the investor could seek more protections under its contract with the

government/ government agency. Finally, and most pertinently, it is difficult to make general statements about the utility of a legal instrument based on a short survey answered by a relatively small number of respondents.

Still, at a practical level, the Government of India could view this study as largely re-affirming its strategy that in order to continue attracting foreign investment it does not need to sign more BITs, and especially not BITs which are so protective of investor rights that it opens up India to multiple claims or restricts the Government's regulatory space. Further, while the study asked the respondents very few questions on the Model BIT, those who were aware of it considered it to be a positive development. Again, that finding supports the Government's efforts in this area. Finally, the study also considered perceptions of Indian investors towards BITs: the results suggest that the Indian investors are largely unaware of their BIT rights and do not take them into account when making their investment decisions. It is important that the Government supports initiatives to disseminate information about BITs amongst Indian companies. However, if after becoming aware of their treaty rights Indian investors continue to ignore them, then that is yet another indication that India's BITs are not really living up to expectations.



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## APPENDICES

### APPENDIX A: INDIA'S INVESTMENT TREATIES (PRE-TERMINATION)<sup>141</sup>

Sr. No.	Treaty Partner	Date of signature	Date of entry into force
1.	Argentina	20/08/1999	12/08/2002
2.	Armenia	23/05/2003	30/05/2006
3.	Australia	26/02/1999	04/05/2000
4.	Austria	08/11/1999	01/03/2001
5.	Bahrain	13/01/2004	05/12/2007
6.	Bangladesh	09/02/2009	07/07/2011
7.	Belarus	27/11/2002	23/11/2003
8.	BLEU (Belgium-Luxembourg Economic Union)	31/10/1997	08/01/2001
9.	Bosnia and Herzegovina	12/09/2006	13/02/2008
10.	Brunei Darussalam	22/05/2008	18/01/2009
11.	Bulgaria	29/10/1998	23/09/1999
12.	China	21/11/2006	01/08/2007
13.	Colombia	10/11/2009	02/07/2012
14.	Congo, Democratic Republic	13/04/2010	Not in force
15.	Croatia	04/05/2001	19/01/2002
16.	Cyprus	09/04/2002	12/01/2004
17.	Czech Republic	11/10/1996	06/02/1998
18.	Denmark	06/09/1995	28/08/1996
19.	Djibouti	19/05/2003	Not in force
20.	Egypt	09/04/1997	22/11/2000
21.	Ethiopia	05/07/2007	Not in force
22.	Finland	07/11/2002	09/04/2003
23.	France	02/09/1997	17/05/2000

<sup>141</sup> *International Investment Agreements Navigator, India* (Investment Policy Hub) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india>. The data has been procured as of 9 Dec. 2018; See also, Gourab Banerji, *Investment Treaty Know-How, India*, in GLOBAL ARBITRATION REVIEW IN 2016 AND 2017 (2015) cited in Law Commission Report, *supra* note 112, ¶1.2. (hereinafter Gourab Banerji).

24.	Germany	10/07/1995	13/07/1998
25.	Ghana	05/08/2002	Not in force
26.	Greece	26/04/2007	10/04/2008
27.	Hungary	03/11/2003	02/01/2006
28.	Iceland	29/06/2007	16/12/2008
29.	Indonesia	10/02/1999	22/01/2004
30.	Israel	29/01/1996	18/02/1997
31.	Italy	23/11/1995	26/03/1998
32.	Jordan	30/11/2006	22/01/2009
33.	Kazakhstan	09/12/1996	26/07/2001
34.	Korea, Republic of	26/02/1996	07/05/1996
35.	Kuwait	27/11/2001	28/06/2003
36.	Kyrgyzstan	16/05/1997	12/05/2000
37.	Lao People's Democratic Republic	09/11/2000	05/01/2003
38.	Latvia	18/02/2010	27/11/2010
39.	Libya	26/05/2007	23/03/2009
40.	Lithuania	31/03/2011	01/12/2011
41.	Macedonia, The former Yugoslav Republic	17/03/2008	17/11/2008
42.	Malaysia	03/08/1995	12/04/1997
43.	Mauritius	04/09/1998	20/06/2000
44.	Mexico	21/05/2007	23/02/2008
45.	Mongolia	03/01/2001	29/04/2002
46.	Morocco	13/02/1999	22/02/2001
47.	Mozambique	19/02/2009	23/09/2009
48.	Myanmar	24/06/2008	08/02/2009
49.	Nepal	21/10/2011	Not in force
50.	Netherlands	06/11/1995	01/12/1996
51.	Oman	02/04/1997	13/10/2000
52.	Philippines	28/01/2000	29/01/2001
53.	Poland	07/10/1996	31/12/1997
54.	Portugal	28/06/2000	19/07/2002



55.	Qatar	07/04/1999	15/12/1999
56.	Romania	17/11/1997	09/12/1999
57.	Russian Federation	23/12/1994	05/08/1996
58.	Saudi Arabia	25/01/2006	20/05/2008
59.	Senegal	03/07/2008	17/10/2009
60.	Serbia (Yugoslavia)	31/01/2003	24/02/2009
61.	Seychelles	02/06/2010	Not in force
62.	Slovakia	25/09/2006	27/09/2007
63.	Slovenia	14/06/2011	Not in force
64.	Spain	30/09/1997	15/12/1998
65.	Sri Lanka	22/01/1997	13/02/1998
66.	Sudan	22/10/2003	18/10/2010
67.	Sweden	04/07/2000	01/04/2001
68.	Switzerland	04/04/1997	16/02/2000
69.	Syrian Arab Republic	18/06/2008	22/01/2009
70.	Taiwan Province of China	17/10/2002	28/11/2002
71.	Tajikistan	13/12/1995	14/11/2003
72.	Thailand	10/07/2000	13/07/2001
73.	Trinidad and Tobago	12/03/2007	07/10/2007
74.	Turkey	17/09/1998	18/10/2007
75.	Turkmenistan	20/09/1995	27/02/2006
76.	Ukraine	01/12/2001	12/08/2003
77.	United Arab Emirates	12/12/2013	21/08/2014
78.	United Kingdom	14/03/1994	06/01/1995
79.	Uruguay	11/02/2008	Not in force
80.	Uzbekistan	18/05/1999	28/07/2000
81.	Viet Nam	08/03/1997	01/12/1999
82.	Yemen	01/10/2002	10/02/2004
83.	Zimbabwe	10/02/1999	Not in force

## APPENDIX B: INDIA'S FTAs<sup>142</sup>

1. India-ASEAN FTA
2. SAFTA (Agreement On South Asian Free Trade Area)
3. Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC)
4. Chile (Framework Agreement to promote economic cooperation between The Republic of Chile And The Republic of India)
5. Singapore (Comprehensive Economic Cooperation Agreement between The republic of Singapore and The Republic of India)
6. Japan (Comprehensive Economic Partnership Agreement between the Japan Republic of India)
7. Korea (Comprehensive Economic Partnership Agreement between the Republic of India and the Republic of Korea)
8. Malaysia (Comprehensive Economic Cooperation Agreement between the Government of Malaysia and the Government of the Republic of India)
9. GCC (Framework Agreement on Economic Cooperation Between The Republic of India and the Member States of the Cooperation Council for the Arab States of the Gulf)
10. MERCOSUR (Framework Agreement between the MERCOSUR and the Republic of India)
- Thailand (Framework Agreement for Establishing Free Trade Area between the Republic of India and the kingdom of Thailand)

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<sup>142</sup> Gourab Banerji, *supra* note 142 cited in Law Commission Report, *supra* note 112, ¶1.2.

## APPENDIX C: REPORTED INVESTMENT TREATY ARBITRATIONS AGAINST INDIA<sup>143</sup>

Sr. No	Case	Year of Initiation of Arbitration/ Award	Status
1.	Bechtell v. India	2004	Settled
2.	Offshore Power v. India	2004	Settled
3.	Standard Chartered Bank v. India	2004	Settled
4.	Erste Bank v. India	2004	Settled
5.	Credit Suisse v. India	2004	Settled
6.	Credit Lyonnais v. India	2004	Settled
7.	BNP Paribas v. India	2004	Settled
8.	ANZEF v. India	2004	Settled
9.	ABN AMRO N.V. v. India	2004	Settled
10.	Capital India Power Mauritius I v. Maharashtra Power Dev. Corp	2004	Settled
11.	White Industries v. India (Final Award, 30th November, 2011)	2011	Award in favor of Claimant
12.	Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v. India	2012	Pending
13.	Axiata Group v. India	2012	Pending
14.	CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India	2012	Award in favor of claimant (not public)
15.	Khaitan Holdings Mauritius Limited v. India	2013	Pending
16.	Deutsche Telekom v. India	2013	Pending

<sup>143</sup> *Bilateral Investment Treaty Arbitration and India – With special focus on India Model BIT, 2016* (Nishith Desai and Associates, 2018) [https://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/Bilateral\\_Investment\\_Treaty\\_Arbitration\\_and\\_India-PRINT-2.pdf](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf) (last visited on 12 Dec. 2020); See also, *India - as Respondent State*, INVESTMENT DISPUTE SETTLEMENT NAVIGATOR, INVESTMENT POLICY HUB (UNCTAD), <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india/investor> (last visited on 12 Dec. 2020).

17.	Capital Global and Kaif Investment v. India	2013	Pending
18.	Nokia v. India	2014	Pending
19.	Vodafone v. India (I)	2014	Pending

**APPENDIX D: REPORTED INVESTMENT TREATY ARBITRATIONS BROUGHT BY INDIAN INVESTORS<sup>144</sup>**

Sr. No	Case	Year of Initiation of Arbitration/ Award	Status
1.	Sancheti v. Germany	2000	Settled
2.	Sancheti v. United Kingdom	2006	Data not available
3.	Flemingo Duty Free v. Poland	2014	Decided in favour of Investor
4.	Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia (UNCITRAL)	2015	Pending
5.	Aggarwal & Ors. v. Bosnia and Herzegovina (UNCITRAL)	2017	Pending
6.	Binani v. The Republic of Macedonia	2017	Pending

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<sup>144</sup> UNCTAD, *Cases as Home State of Claimant*, INVESTMENT DISPUTE SETTLEMENT NAVIGATOR, INVESTMENT POLICY HUB (UNCTAD), <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india/investor> (Last visited on 12 Dec. 2020).

## APPENDIX E: QUESTIONNAIRE

### APPENDIX E1: Non-lawyer based outside India

No.	BACKGROUND QUESTIONS
Q1	<p>In which country are you presently located?</p> <p>_____</p> <p>(The respondent has been provided with a list of countries)</p>
Q2	<p>Has your company previously made an investment in India or is planning to make any investment in India in the future?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p>
Sl. No.	INVESTMENT EXPERIENCE IN INDIA
Q3	<p>In which <u>sector(s)</u> in India, has your company made an investment or is considering making an investment in the future?</p> <p>(can choose multiple options)</p> <p><input type="checkbox"/> Agriculture and agribusiness</p> <p><input type="checkbox"/> Automotive</p> <p><input type="checkbox"/> Chemicals</p> <p><input type="checkbox"/> Construction and real estate</p> <p><input type="checkbox"/> Consumer goods</p> <p><input type="checkbox"/> Education</p> <p><input type="checkbox"/> Energy and natural resources</p> <p><input type="checkbox"/> Entertainment/media and publishing</p> <p><input type="checkbox"/> Financial services</p> <p><input type="checkbox"/> Government/public sector</p> <p><input type="checkbox"/> Healthcare, pharmaceuticals and biotechnology</p> <p><input type="checkbox"/> Information technology</p> <p><input type="checkbox"/> Infrastructure</p> <p><input type="checkbox"/> Manufacturing</p> <p><input type="checkbox"/> Mining</p> <p><input type="checkbox"/> Professional services</p> <p><input type="checkbox"/> Railways</p> <p><input type="checkbox"/> Retailing</p> <p><input type="checkbox"/> Telecoms</p> <p><input type="checkbox"/> Textile</p> <p><input type="checkbox"/> Transportation, travel and tourism</p> <p>Other, please specify _____</p>

Q4	<p>In your view, which of the following factors pose a constraint on investments made by your company in India? (Please note that 1 indicates “no constraint” while 4 indicates “most significant constraint”)</p> <table border="0"> <thead> <tr> <th></th><th>1</th><th>2</th><th>3</th><th>4</th></tr> </thead> <tbody> <tr> <td>i) Difficulty of doing business</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr> <td>ii) Absence of Rule of Law</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr> <td>iii) Political risk (e.g. unexpected regulatory changes, risk of expropriation, etc)</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr> <td>iv) Infrastructure capacity</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr> <td>v) Corruption</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr> <td>vi) Slow pace of judiciary</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> </tbody> </table>		1	2	3	4	i) Difficulty of doing business	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	ii) Absence of Rule of Law	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	iii) Political risk (e.g. unexpected regulatory changes, risk of expropriation, etc)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	iv) Infrastructure capacity	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	v) Corruption	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	vi) Slow pace of judiciary	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>										
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v) Corruption	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																																										
vi) Slow pace of judiciary	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																																										
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Q7	Before making a foreign investment (whether in India or anywhere else), does your company check whether there is a Bilateral Investment Treaty in force which protects such investment? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know																														
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Q9	In your view, how effective are India's Bilateral Investment Treaties in protecting investments from the following risks: (Please note that 1 indicates "not at all effective"; 2 indicates "slightly effective"; 3 indicates "adequately effective"; 4 indicates "extremely effective"; and 5 indicates "don't know") <table border="0" style="width: 100%; margin-top: 10px;"> <thead> <tr> <th></th><th style="text-align: center;">1</th><th style="text-align: center;">2</th><th style="text-align: center;">3</th><th style="text-align: center;">4</th></tr> </thead> <tbody> <tr> <td>i) Adverse and unexpected regulatory change</td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td></tr> <tr> <td>ii) Discrimination</td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td></tr> <tr> <td>iii) Expropriation</td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td></tr> <tr> <td>iv) Breach of contract</td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td></tr> <tr> <td>v) Currency restriction risks</td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td></tr> </tbody> </table>		1	2	3	4	i) Adverse and unexpected regulatory change	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	ii) Discrimination	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	iii) Expropriation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	iv) Breach of contract	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	v) Currency restriction risks	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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Q10	In your view, to what extent are the protections under Bilateral Investment Treaties important in making foreign investment related decisions for India? <input type="checkbox"/> Not at all important <input type="checkbox"/> Slightly important <input type="checkbox"/> Adequately important <input type="checkbox"/> Extremely important <input type="checkbox"/> Don't know																														
Q11	Has your company ever declined to invest in India due to the absence of a Bilateral Investment Treaty with India? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know																														
Q12	Have you come across India's Model Bilateral Investment Treaty? <input type="checkbox"/> Yes <input type="checkbox"/> No (If "yes", go to Q18; if "no", kindly exit the survey)																														
Q13	Do you think India's Model Bilateral Investment Treaty is a positive development? <input type="checkbox"/> Yes <input type="checkbox"/> No																														

**APPENDIX E2: Non-lawyer based in India**

Sl. No.	BACKGROUND QUESTIONS										
Q1	Has your company previously made an investment outside India or is planning to make any investment outside India in the future? <input type="checkbox"/> Yes <input type="checkbox"/> No										
Sl. No.	INVESTMENT EXPERIENCE IN INDIA										
Q2	In which <u>countries</u> outside India has your company made or propose to make investments?  _____ (The respondent has been provided with a list of countries)										
Q3	In which <u>sector(s)</u> has your company made an investment or is considering making an investment in the future outside India? (can choose multiple options) <input type="checkbox"/> Agriculture and agribusiness <input type="checkbox"/> Automotive <input type="checkbox"/> Chemicals <input type="checkbox"/> Construction and real estate <input type="checkbox"/> Consumer goods <input type="checkbox"/> Education <input type="checkbox"/> Energy and natural resources <input type="checkbox"/> Entertainment/media and publishing <input type="checkbox"/> Financial services <input type="checkbox"/> Government/public sector <input type="checkbox"/> Healthcare, pharmaceuticals and biotechnology <input type="checkbox"/> Information technology <input type="checkbox"/> Infrastructure <input type="checkbox"/> Manufacturing <input type="checkbox"/> Mining <input type="checkbox"/> Professional services <input type="checkbox"/> Railways <input type="checkbox"/> Retailing <input type="checkbox"/> Telecoms <input type="checkbox"/> Textile <input type="checkbox"/> Transportation, travel and tourism Other, please specify _____										
Q4	In your view, which of the following factors pose a constraint on investments made by your company outside India? (Please note that 1 indicates “no constraint” while 4 indicates “most significant constraint”)  <table border="0"> <tr> <td></td><td align="center">1</td><td align="center">2</td><td align="center">3</td><td align="center">4</td></tr> <tr> <td>i) Difficulty of doing business</td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td></tr> </table>		1	2	3	4	i) Difficulty of doing business	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	1	2	3	4							
i) Difficulty of doing business	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>							

	ii) Absence of Rule of Law <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> iii) Political risk (e.g. unexpected regulatory changes, risk of expropriation, etc) <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> iv) Infrastructure capacity <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> v) Corruption <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> vi) Slow pace of judiciary <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
Q5	Which types of <u>political risks</u> are of concern to your company when investing outside India? (Please note that 1 indicates “no concern” while 4 indicates “most significant concern”) <div style="text-align: center;">           1      2      3      4         </div> i) Unexpected and/or retrospective regulatory changes <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> ii) Breach of contract by government/ government owned agencies <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> iii) Transfer and convertibility restrictions <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> iv) Discriminatory treatment by federal/ local government <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> v) Risk of expropriation without adequate compensation <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> vi) Risk of physical security for personnel posted in India <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> vii) Lack of enforcement of contractual rights <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> viii) Lack of independent/impartial judiciary <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
Q6	What tools/ mechanisms does your company use to mitigate <u>political risks</u> when investing outside India? (Please note that 1 indicates “never”; 2 indicates “occasionally”; 3 indicates “always” and 4 indicates “don’t know”) <div style="text-align: center;">           1      2      3      4         </div> i) Invest gradually while developing familiarity with the local environment <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> ii) Use of joint venture with local company <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> iii) Political/economic risk analysis <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> iv) Engage with federal/local government <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> v) Rely on protections under bilateral investment treaties <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> vi) Seek additional protections under contracts <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> vii) Political risk insurance <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
<b>Sl. No.</b>	<b>BIT-SPECIFIC QUESTIONS</b>
Q7	Before making a foreign investment, does your company check whether there is a Bilateral Investment Treaty in force which protects such investment? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don’t know

Q8	<p>How familiar are you with provisions of Bilateral Investment Treaties concluded by India with other countries?</p> <p> <input type="checkbox"/> Not at all familiar  <input type="checkbox"/> Slightly familiar  <input type="checkbox"/> Adequately familiar  <input type="checkbox"/> Extremely familiar         </p> <p>(If familiar, continue; if not, go to Q10)</p>																																	
Q9	<p>In your view, how effective are India's Bilateral Investment Treaties in protecting investments from the following risks:          (Please note that 1 indicates "not at all effective"; 2 indicates "slightly effective"; 3 indicates "adequately effective"; 4 indicates "extremely effective"; and 5 indicates "don't know")</p> <table border="0"> <thead> <tr> <th></th> <th>1</th> <th>2</th> <th>3</th> <th>4</th> </tr> </thead> <tbody> <tr> <td>i) Adverse and unexpected regulatory change</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>ii) Discrimination</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>iii) Expropriation</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>iv) Breach of contract</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>v) Currency restriction risks</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> </tbody> </table>					1	2	3	4	i) Adverse and unexpected regulatory change	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	ii) Discrimination	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	iii) Expropriation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	iv) Breach of contract	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	v) Currency restriction risks	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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Q12	<p>Have you come across India's Model Bilateral Investment Treaty?</p> <p> <input type="checkbox"/> Yes  <input type="checkbox"/> No         </p> <p>(If "no", kindly exit the survey)</p>																																	
Q13	<p>Do you think India's Model Bilateral Investment Treaty is a positive development?</p> <p> <input type="checkbox"/> Yes  <input type="checkbox"/> No         </p>																																	

**APPENDIX E3: Lawyers based outside India**

Sl. No.	BACKGROUND QUESTIONS															
Q1	<p>In which country are you presently located?</p> <p>_____</p> <p>(The respondent has been provided with a list of countries)</p>															
Q2	<p>Have you advised clients in respect of their actual / proposed investments in <u>India</u>?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p>(If “no”, go to Q7)</p>															
Sl. No.	INVESTMENT EXPERIENCE IN INDIA															
Q3	<p>In which <u>sector(s)</u> have your clients made or propose to make investment in India? (can choose multiple options)</p> <p><input type="checkbox"/> Agriculture and agribusiness</p> <p><input type="checkbox"/> Automotive</p> <p><input type="checkbox"/> Chemicals</p> <p><input type="checkbox"/> Construction and real estate</p> <p><input type="checkbox"/> Consumer goods</p> <p><input type="checkbox"/> Education</p> <p><input type="checkbox"/> Energy and natural resources</p> <p><input type="checkbox"/> Entertainment/media and publishing</p> <p><input type="checkbox"/> Financial services</p> <p><input type="checkbox"/> Government/public sector</p> <p><input type="checkbox"/> Healthcare, pharmaceuticals and biotechnology</p> <p><input type="checkbox"/> Information technology</p> <p><input type="checkbox"/> Infrastructure</p> <p><input type="checkbox"/> Manufacturing</p> <p><input type="checkbox"/> Mining</p> <p><input type="checkbox"/> Professional services</p> <p><input type="checkbox"/> Railways</p> <p><input type="checkbox"/> Retailing</p> <p><input type="checkbox"/> Telecoms</p> <p><input type="checkbox"/> Textile</p> <p><input type="checkbox"/> Transportation, travel and tourism</p> <p>Other, please specify _____</p>															
Q4	<p>In your view, which of the following factors pose a constraint on investments made by your clients in India? (Please note that 1 indicates “no constraint” while 4 indicates “most significant constraint”)</p> <table border="0"> <tr> <td></td><td align="center">1</td><td align="center">2</td><td align="center">3</td><td align="center">4</td></tr> <tr> <td>i) Difficulty of doing business</td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td></tr> <tr> <td>ii) Absence of Rule of Law</td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td></tr> </table>		1	2	3	4	i) Difficulty of doing business	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	ii) Absence of Rule of Law	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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Q10	<p>In your view, to what extent are the protections under Bilateral Investment Treaties important in making foreign investment decisions for India?</p> <p> <input type="checkbox"/> Not at all important  <input type="checkbox"/> Slightly important  <input type="checkbox"/> Adequately important  <input type="checkbox"/> Extremely important         </p>																														
Q11	<p>Has your client ever declined to make an investment in India due to the absence of a Bilateral Investment Treaty with India?</p> <p> <input type="checkbox"/> Yes  <input type="checkbox"/> No  <input type="checkbox"/> Don't know         </p>																														
Q12	<p>Have you come across India's Model Bilateral Investment Treaty?</p> <p> <input type="checkbox"/> Yes  <input type="checkbox"/> No         </p> <p>(If "no", kindly exit the survey)</p>																														
Q13	<p>Do you think India's Model Bilateral Investment Treaty is a positive development?</p> <p> <input type="checkbox"/> Yes  <input type="checkbox"/> No         </p>																														



**APPENDIX E4: Lawyers based in India**

Sl. No.	BACKGROUND QUESTIONS															
Q1	<p>Have you advised clients in respect of their actual / proposed investments made outside <u>India</u>?</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p>(If “no”, go to Q7)</p>															
Sl. No.	INVESTMENT EXPERIENCE IN INDIA															
Q2	<p>In which countries do your clients make or propose to make investments?</p> <p>_____</p> <p>(The respondent has been provided with a list of countries)</p>															
Q3	<p>In which <u>sector(s)</u> have your clients made or propose to make investment outside India? (can choose multiple options)</p> <p><input type="checkbox"/> Agriculture and agribusiness</p> <p><input type="checkbox"/> Automotive</p> <p><input type="checkbox"/> Chemicals</p> <p><input type="checkbox"/> Construction and real estate</p> <p><input type="checkbox"/> Consumer goods</p> <p><input type="checkbox"/> Education</p> <p><input type="checkbox"/> Energy and natural resources</p> <p><input type="checkbox"/> Entertainment/media and publishing</p> <p><input type="checkbox"/> Financial services</p> <p><input type="checkbox"/> Government/public sector</p> <p><input type="checkbox"/> Healthcare, pharmaceuticals and biotechnology</p> <p><input type="checkbox"/> Information technology</p> <p><input type="checkbox"/> Infrastructure</p> <p><input type="checkbox"/> Manufacturing</p> <p><input type="checkbox"/> Mining</p> <p><input type="checkbox"/> Professional services</p> <p><input type="checkbox"/> Railways</p> <p><input type="checkbox"/> Retailing</p> <p><input type="checkbox"/> Telecoms</p> <p><input type="checkbox"/> Textile</p> <p><input type="checkbox"/> Transportation, travel and tourism</p> <p>Other, please specify _____</p>															
Q4	<p>In your view, which of the following factors pose a constraint on investments made by your clients outside India? (Please note that 1 indicates “no constraint” while 4 indicates “most significant constraint”)</p> <table border="0"> <tr> <td></td><td align="center">1</td><td align="center">2</td><td align="center">3</td><td align="center">4</td></tr> <tr> <td>i) Difficulty of doing business</td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td></tr> <tr> <td>ii) Absence of Rule of Law</td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td><td align="center"><input type="checkbox"/></td></tr> </table>		1	2	3	4	i) Difficulty of doing business	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	ii) Absence of Rule of Law	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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	iii) Political risk (e.g. unexpected regulatory changes, risk of expropriation, etc) <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> iv) Infrastructure capacity <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> v) Corruption <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> vi) Limited market opportunities <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>																																													
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i) Adverse and unexpected regulatory change	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																														
ii) Discrimination	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																														
iii) Expropriation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																														
iv) Breach of contract	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																														
v) Currency restriction risks	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																														
Q10	<p>In your view, to what extent are the protections under Bilateral Investment Treaties important to your clients in making foreign investment decisions for India?</p> <p> <input type="checkbox"/> Not at all important  <input type="checkbox"/> Slightly important  <input type="checkbox"/> Adequately important  <input type="checkbox"/> Extremely important         </p>																																	
Q11	<p>Has your client ever declined to make an investment due to the absence of a Bilateral Investment Treaty with that country?</p> <p> <input type="checkbox"/> Yes  <input type="checkbox"/> No  <input type="checkbox"/> Don't know         </p>																																	
Q12	<p>Have you come across India's Model Bilateral Investment Treaty?</p> <p> <input type="checkbox"/> Yes  <input type="checkbox"/> No         </p> <p>(If "no", kindly exit the survey)</p>																																	
Q13	<p>Do you think India's Model Bilateral Investment Treaty is a positive development?</p> <p> <input type="checkbox"/> Yes  <input type="checkbox"/> No         </p>																																	