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INDIA'S TWIN CONCERNS OVER ENERGY SECURITY AND CLIMATE CHANGE: REVISITING INDIA'S INVESTMENT TREATIES THROUGH A SUSTAINABLE DEVELOPMENT LENS

VYOMA JHA*

With twin concerns over traditional energy security and climate change shaping the current Indian energy narrative, India has a dual responsibility of ensuring energy supply and adopting a low carbon pathway. In addition, there is a new narrative emerging around India's dual investment role – India is no longer just a host State for foreign investment, but also an outward investor. Subsequently, the article throws light on the Indian investment treaty programme and the rise of investor-State dispute settlement [ISDS] cases against India. Given India's extensive investment treaty commitments, and the growing nexus between the energy sector and international investment law – this article attempts to explore the implications of India's investment treaties and recent ISDS cases for any domestic energy-related regulatory action or policy decision, as well as for Indian energy-related investment abroad. In light of the increased calls for review or renegotiation of Indian investment treaties along with India's twin concerns and dual role in the energy sector, this article argues for weaving in sustainable development concerns in existing Indian investment treaties to ensure a more flexible regulatory space, while ensuring that the investment treaty provisions are also sufficient to protect the interests of Indian investments abroad.

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I. INTRODUCTION

As industrialization in developing countries continues in the twenty first century, energy supply and security will be of paramount importance for sustained economic growth. The traditional narrative of energy security led many governments to secure traditional fossil fuel energy resources, such as oil, coal and natural gas. The turn of the new century, however, has altered this narrative in an attempt to move world energy supply away from fossil fuels and highlighted the importance of adopting a low-carbon pathway, largely in view of climate change concerns. Although these concerns have failed to entirely reorient the energy sector away from fossil fuels,¹ the impasse in international climate change negotiations has led to a surge in unilateral action on climate change mitigation by raising the profile of investment in the renewable energy sector.

The Indian energy narrative, too, is complicated with such twin concerns of energy security and climate change. With the country facing acute coal shortages, on one hand, several Indian companies are now acquiring coal mines overseas in an aggressive manner to meet energy requirements;² while on the other hand,

¹ Ann Florini & Navroz K. Dubash, *Introduction to the Special Issue: Governing Energy in a Fragmented World*, 2(1) GLOBAL POLICY 1 (2011) [hereinafter Florini-Dubash].

² See, *Indian company investments in overseas coal mines*, (Apr. 12, 2013) available at:

domestic policies on coal continue to ensure that there is affordable access to energy. In addition, the government is providing an impetus to investment in the renewable energy sector, particularly solar energy, under the broad mandate of India's National Action Plan on Climate Change [NAPCC].³

Energy-focused regimes such as those for oil, coal, nuclear or renewable energy sources could interface with trade and investment institutions that strongly shape energy in an uncoordinated and often inchoate manner.⁴ Interestingly, India now occupies the dual position of being an investment destination, as well as an outward investor.⁵ Given India's extensive investment treaty programme,⁶ its investment treaty commitments could have clear implications for any energy-related regulatory action or policy making at home, and also for Indian energy-related investment abroad.

Investment treaties, the most common form of which are bilateral investment treaties [BITs], were signed to increase the confidence of foreign investors in the host country by assuring them of certain host country behaviour and providing them with the opportunity to take legal action against the State through investor-State dispute settlement [ISDS] before an arbitral tribunal.⁷ They are, however, giving rise to a greater concern – increased investor-State arbitration – since most investment treaties provide foreign investors with the right to subject host country regulations directly to international investment arbitration.⁸

Moreover, the nexus between the energy sector and investment treaty

http://www.sourcewatch.org/index.php/Indian_company_investments_in_overseas_coal_mines; *Acquisition of overseas coal mines gaining momentum* (Apr. 12, 2013), available at: <http://www.infraline.com/displayplus.aspx?id=37>; *Coal India set to acquire overseas mines*, THE HINDUSTAN TIMES (Feb. 27, 2013), available at: <http://www.hindustantimes.com/India-news/NewDelhi/Coal-India-set-to-acquire-overseas-mines/Article1-1018244.aspx>.

³ Government of India, *National Action Plan on Climate Change*, Prime Minister's Council on Climate Change (2008), available at: http://pmindia.gov.in/climate_change_english.pdf.

⁴ *Id.* at 2.

⁵ India, along with the other BRICS nations, is an important outward investor among developing and transition economies. See, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT – GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT* 4 (Jul. 2013), available at: http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

⁶ *Infra* Part III.

⁷ LUKE ERIC PETERSON, *BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING* 1 (Nov. 2004), available at: http://www.iisd.org/pdf/2004/trade_bits.pdf (hereinafter PETERSON); Mahnaz Malik, *The legal monster that lets companies sue countries*, THE GUARDIAN (Nov. 4, 2011), available at: <http://www.guardian.co.uk/commentisfree/2011/nov/04/bilateral-investment-treaties> [hereinafter Malik].

⁸ See, Malik, *supra* note 7.

arbitration is gradually increasing as ISDS cases in the energy sector are on the rise. About one-third of all ISDS cases ever registered under the International Centre for Settlement of Investment Disputes [ICSID] are related to the energy sector,⁹ while 30% of the ISDS cases that commenced in 2013 are also related to the energy sector.¹⁰ This could be a challenging development for the sovereign rule-making ability of host States as potential investor challenges to the host State's energy-related policies cannot be ignored, even if such policies are legitimately enacted in light of energy security or climate change concerns.

With the issues surrounding investment treaty arbitration in the energy sector set to become more complex, there is a need to explore the implications of investment treaties for any energy-related regulatory action at home, as well as for Indian energy-related investment abroad.

In Part II, the article discusses the Indian energy scenario and how it is being shaped by traditional energy security and climate change concerns. Part III of the article discusses the emergence of India's investment treaty programme, and the rise of ISDS cases. Subsequently, it details the implications of ISDS cases, particularly energy-related ISDS cases, for India's energy policies in Part IV. In light of India's dual concerns in the energy sector, as well as its dual role as host State and outward investor, the article in Part V argues that the core concepts of India's investment treaties be reviewed from a sustainable development lens. Given the increased calls for a review or renegotiation of Indian investment treaties, this article concludes in Part VI with options for revising the existing Indian treaty provisions to ensure that they help further India's sustainable development goals.

II. HOW CLIMATE CHANGE HAS SHAPED THE INDIAN NARRATIVE ON ENERGY

With climate change climbing the international political agenda, the pressure for a transformation of the energy sector is steadily on the rise, especially since it contributes to roughly two-thirds of annual global greenhouse gas emissions.¹¹

The energy sector is an integral part of the climate change debate in India, as

⁹ According to ICSID statistics of 2013, 25% of the cases concerned oil, gas and mining while 12% concerned electric power and other energy. See, *The ICSID Caseload – Statistics* (Issue 2013-2), available at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English42>.

¹⁰ See, *The ICSID Caseload – Statistics* (Issue 2013-2), available at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English42>.

¹¹ Florini-Dubash, *supra* note 1.

on one hand, the energy sector is vital for India's development, while on the other, the emissions from the energy sector are large.¹² India sees an excessive dependence on low cost, but limited resources of fossil fuels, since renewable energy sources with abundant potential like solar energy prove to be more expensive thus defeating the objective of energy supply at an affordable price.¹³ Thus, a high priority for India remains 'expanding access to low cost energy, with minimal local social and environmental impacts, while keeping in mind future constraints of energy security and the climate'.¹⁴

The traditional narrative on energy security rests on ensuring more energy to raise living standards in poorer parts of the world, which in turn pushes governments to continue securing traditional energy resources.¹⁵ As a result, many governments, especially in Asia, are pursuing mercantilist approaches and territorial claims in order to ensure energy security.¹⁶ Fossil fuels, thus, continue to be entrenched in national political economies, with their energy policies under strong national control – a reality that does not bode well with the growing manifestation and urgency of global energy challenges.¹⁷

In India, the early 2000s saw the emergence of increased domestic concern over energy security in order to reliably meet the demand for energy services of investors and domestic energy needs of the most vulnerable sections.¹⁸ As a result, India was on the verge of doubling its coal-based capacity in light of its rapid economic growth and the need for ensuring low cost power supply.¹⁹ However, one of India's oft cited vulnerabilities to climate change is its dependence on natural resource extraction – more mining would lead to more destruction of forests, and consequently, more destruction of forests would lead to more greenhouse gas emissions.²⁰ Thus, the latter part of the decade saw a second driver, climate change, being introduced to the traditional narrative that primarily revolved around energy security. Although domestically climate change plays in a subsidiary

¹² Girish Sant & Ashwin Gambhir, *Energy, development and climate change*, in HANDBOOK OF CLIMATE CHANGE AND INDIA: DEVELOPMENT, POLITICS AND GOVERNANCE 289 (Navroz Dubash ed., 2012) [hereinafter Sant-Gambhir].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Florini-Dubash, *supra* note 1, at p.1.

¹⁶ Navroz K. Dubash & Ann Florini, *Mapping Global Energy Governance*, 2(1) GLOBAL POLICY 6, 8 (2011).

¹⁷ Florini-Dubash, *supra* note 1, at 2.

¹⁸ Navroz K. Dubash, *From Norm Taker to Norm Maker? Indian Energy Governance in Global Context*, 2(1) GLOBAL POLICY 66, 71 (2011) [hereinafter Dubash 2011].

¹⁹ Sant-Gambhir, *supra* note 12, at 295.

²⁰ Jairam Ramesh, *Foreword* in HANDBOOK OF CLIMATE CHANGE AND INDIA: DEVELOPMENT, POLITICS AND GOVERNANCE xx (Navroz Dubash ed., 2012).

role to energy security, it has had significant effects on the energy policy that has been shaped in India in recent years.²¹ The insular Indian energy landscape began outward-looking, with concerns of traditional energy security gradually being woven together with the narrative of promoting clean energy.²²

It is now being said that India occupies an ‘intriguing dual position in global climate politics’ – on one hand, India is still a developing economy with a substantial poverty problem and low levels of historical and per capita emissions; while on the other, it is a large emerging economy that is under increasing pressure to address the global climate challenge.²³

The official Indian position on climate change has been that it is not prepared to take on legally binding commitments regarding its carbon emissions in a bid to preserve the space for economic development, but that it would be ready to take on additional responsibilities.²⁴ This stems from a viewpoint that India is being unfairly labelled as a “major emitter” and any constraints on India in this regard are premature, given its unfinished development agenda.²⁵ However, owing to growing international political pressure to act on climate change, India has effectively tried to link measures originally aimed at domestic energy security concerns with global climate benefits.¹⁸ Having launched the NAPCC in 2008, India is demonstrating that the policy and action of pitting climate and development objectives against each other was uncalled for. The NAPCC outlines the various policies addressing climate mitigation and adaptation in India and marks a significant shift in the traditional Indian narrative on energy policy. The NAPCC rests on the concept of “co-benefits” – measures that ‘promote ... development objectives while also yielding co-benefits for addressing climate change effectively’.²⁶ With action on climate change taking the form of “co-benefits”, efforts to promote energy efficiency and adopt a clean energy path are being cast in national energy security terms.²⁷ As Dubash notes: “India is ... moving beyond its historical role as a norm

²¹ Dubash 2011, *supra* note 18, at 72.

²² *Id.* at 66.

²³ See, Navroz K. Dubash, *The Politics of Climate Change in India: Narratives of Equity and Co-benefits*, Working Paper 2012/1 (Nov. 2012), Centre for Policy Research, *available at*: <http://www.cprindia.org/workingpapers/4279-working-paper-20121-november-politics-climate-change-india-narratives-equity-and->

²⁴ See, Jairam Ramesh, *India will not undertake legally binding commitments*, THE HINDU, (Apr. 9, 2011) *available at*: <http://www.thehindu.com/sci-tech/energy-and-environment/india-will-not-undertake-legally-binding-commitments-jairam-ramesh/article1682549.ece>

²⁵ Navroz K. Dubash, *Climate Politics in India: How Can the Industrialized World Bridge the Trust Deficit?*, in INDIAN CLIMATE POLICY: CHOICES AND CHALLENGES 49 (David Michel & Amit Pandya eds., The Henry L. Stimson Center, Washington D.C., 2009).

²⁶ *Id.* at 54-55.

²⁷ Navroz K. Dubash, *Toward Enabling and Inclusive Global Environmental Governance*, 21(1)

taker on global energy, and toward being a norm shaper stimulated by the combined narrative of energy supply security and climate change".²⁸

As India advances its domestic energy-related regulatory measures and policies, either with a view on energy security or climate change concerns, it would become crucial to determine the ways in which its domestic energy policy framework intersects with the international investment regime. This is imperative in order to foresee whether such regulatory action or policy measures might be constrained due to their vulnerability to foreign investor claims. Alternately, it would also be crucial to determine instances of similar energy-related regulatory action or policy making that might affect Indian investment abroad.

Part III focuses on India's investment treaties and highlights some recent developments in ISDS cases, which have possible implications for India's domestic energy policy, as well as Indian energy-related investments abroad.

III. INDIA'S INVESTMENT TREATIES AND THE RISE OF INVESTOR-STATE DISPUTE SETTLEMENT CASES

Foreign investment is governed by three sources of law: the domestic law of the host State, international investment contracts and investment treaties.²⁹ The focus of this article is on investment treaties, which are treaties between States governing the promotion and protection of foreign investment.³⁰ The most common form of investment treaties are BITs, which gained popularity during the 1990s as a product of various governments embarking on an ambitious effort to protect, promote and remove barriers to foreign investment flows.³¹ Initially designed and promoted by the Western countries in a bid to protect their investors when they made investments abroad, especially in developing countries, BITs provided foreign investors guarantees of protection and non-discrimination, often in addition to the protection provided under domestic legal systems.³²

J. ENVT. DEV. 48, 50 (2012).

²⁸ Dubash 2011, *supra* note 18, at p.76.

²⁹ NATHALIE BERNASCONI-OSTERWALDER, AARON COSBEY, LISE JOHNSON & DAMON VIS-DUNBAR, INVESTMENT TREATIES & WHY THEY MATTER TO SUSTAINABLE DEVELOPMENT: QUESTIONS AND ANSWERS 3 (2012), http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf [hereinafter BERNASCONI-OSTERWALDER *ET AL.*].

³⁰ *Id.*

³¹ LUKE ERIC PETERSON, BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING 1, *available at*: http://www.iisd.org/pdf/2004/trade_bits.pdf [hereinafter PETERSON].

³² *Id.* at 1; Mahnaz Malik, *The legal monster that lets companies sue countries*, THE GUARDIAN (Nov. 4, 2011), *available at*: <http://www.guardian.co.uk/commentisfree/2011/>

International investment law regime, interestingly, remains indifferent to investor responsibilities and is solely dedicated to investor rights, which is evident from the “continued exclusion of the host State from protection under the rules of international investment law”.³³ BITs too, by their very nature, focus in a narrow manner on investor protection rather than development or other policy goals.

Moreover, most BITs afford foreign investors, or private actors, the right to directly bring a claim against host country governments in the event of a breach of any treaty obligations.³⁴ In addition, investment treaty arbitrations take place without any public awareness and are usually not open to the public unless the parties express otherwise.³⁵ This leaves the public at large almost entirely unaware of the existence or status of a dispute, even if it involves an issue concerning public policy.³⁶

In the absence of a comprehensive multilateral treaty framework to regulate global investment flows, States have increasingly tried to secure BITs due to pressure from foreign investors demanding more secure and predictable legal regimes protecting their investments.³⁷ By the end of 2012, there were estimates of approximately 3,196 investment treaties – 2,857 BITs and 339 other investment treaties such as free trade agreements [FTAs] with investment provisions, economic partnership agreements and regional agreements.³⁸

A. *Indian Investment Treaty Programme*

Given its origin as an instrument governing investment into the developing world, a majority of BITs were concluded between a developed and developing

nov/04/bilateral-investment-treaties [hereinafter Malik].

³³ Kate Miles, *International Investment Law: Origins, Imperialism and Conceptualizing the Environment*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 1, 27 (2010) [hereinafter Miles].

³⁴ Luke Eric Peterson, *Bilateral Investment Treaties – Implications For Sustainable Development And Options For Regulation* 1 (Feb. 2007), available at: http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf, Malik, *supra* note 32.

³⁵ Peterson, *supra* note 31, at 13.

³⁶ Nathalie Bernasconi-Osterwalder, *Combating Corruption through more Transparent Dispute Settlement Processes* (2008), available at: http://www.ciel.org/Publications/IACC_Presentation_Nov08.pdf.

³⁷ Miles, *supra* note 33, at 39; Prabhash Ranjan, *Indian Investment Treaty Programme in the Light of Global Experiences*, 45(7) ECON. & POL. WKLY. 68 (Feb. 13, 2010) [hereinafter Ranjan 2010].

³⁸ United Nations Conference on Trade and Development, *WORLD INVESTMENT REPORT – GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT* 101 (July 2013), http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

country.³⁹ In the aftermath of the economic reforms of 1991, India liberalized its foreign investment policy by entering into a number of BITs in order to promote and protect on a reciprocal basis, the investment of foreign investors. The model Indian BIT, also known as Bilateral Investment Promotion and Protection Agreement [BIPA], was drafted with the objective “[t]o promote and protect the interests of investors of either country in the territory of other country”.⁴⁰ India signed its first BIT with the United Kingdom in 1994 and has since entered into BITs with 82 countries.⁴¹ At present, 72 Indian BITs have come into force, while 10 have been signed and are in the process of being enforced.⁴² The past few years have also seen India conclude Comprehensive Economic Cooperation Agreements [CECAs] with various countries that contain a chapter on investment.⁴³ Currently, India is in the process of negotiating BIPAs with approximately 25 countries.⁴⁴

The Indian investment treaty programme, since its launch in the mid-1990s to date, seems to be running on the premise that offering treaty-based protection to foreign investors boosts investor confidence and leads to greater investment flows.⁴⁵ In the late 1990s, the Indian government favoured BITs on the belief that it did not “[p]lace any restrictions on host countries in following their own foreign direct investment policies in the light of each country’s unique needs and circumstances”.⁴⁶ The Indian government continues to be of the firm view that BIPAs “increase the comfort level of the investors by assuring a minimum standard of treatment in all matters and provides for justifiability of disputes with the host country”,⁴⁷ and that the absence of arbitral cases against India is proof of no conflict between India’s investment treaties and its sovereign policy space.⁴⁸

³⁹ *Id.*

⁴⁰ DEPARTMENT OF ECONOMIC AFFAIRS, GOVT. OF INDIA, BACKGROUND AND SALIENT FEATURES OF BIPA, *available at*: http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Background_and_salient_features.asp.

⁴¹ MINISTRY OF FINANCE, GOVT. OF INDIA, BILATERAL INVESTMENT PROMOTION AND PROTECTION AGREEMENTS, *available at*: http://finmin.nic.in/bipa/bipa_index.asp.

⁴² MINISTRY OF FINANCE, GOVT. OF INDIA, BILATERAL INVESTMENT PROMOTION AND PROTECTION AGREEMENTS, *available at*: http://finmin.nic.in/bipa/bipa_index.asp.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Ranjan 2010, *supra* note 37, at 69.

⁴⁶ Peterson, *supra* note 31, at 10-11.

⁴⁷ DEPARTMENT OF ECONOMIC AFFAIRS, GOVT. OF INDIA, BACKGROUND AND SALIENT FEATURES OF BILATERAL INVESTMENT PROMOTION AND PROTECTION AGREEMENT (BIPA), *available at*: http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Background_and_salient_features.asp.

⁴⁸ Prabhash Ranjan, *More than a BIT of a problem*, THE FINANCIAL EXPRESS (Apr. 27, 2013), *available at*: <http://www.financialexpress.com/news/column-more-than-a-bit-of-a-problem/1108228> [hereinafter Ranjan 2013].

However, this view has been criticized for not being fully aware of the implications of BITs.⁴⁹ With little or no direct evidence to show that the increased foreign investment flows to India in the past two decades have been a result of the BITs signed by India,⁵⁰ the view with which India enters into BITs seems misplaced. It is said that India is under an ‘erroneous’ belief that BITs adequately balance investment protection with its ability to exercise sovereign powers – a view that has been strengthened because India’s regulatory actions have rarely been challenged under BITs.⁵¹

B. *The Rise of ISDS Cases against India*

A series of investor claims emerged against the Government of India in 2012 with many foreign investors threatening to sue under different provisions of various Indian BITs: Russian telecom company Sistema and Norwegian telecom company Telenor have threatened to sue over the cancellation of 2G licenses of their joint ventures, under the BIPA with Russia and the CECA with Singapore respectively; the Children’s Investment Fund Management, a UK hedge fund is threatening to sue India over its policy to regulate the price of coal in India, under the BIPA with Cyprus; and the British telecom company Vodafone has also initiated a tax-related challenge under the BIPA with the Netherlands.⁵²

Furthermore, White Industries, an Australian firm, won the first-ever known investment treaty arbitration against India in November 2011. The case involved a dispute between Coal India and White Industries, with the latter claiming that the inordinate delay on the part of Indian courts, approximately nine years, to enforce an arbitral award obtained by it against Coal India violated the provisions on fair and equitable treatment [FET], expropriation, most favourable nation [MFN] treatment, and free transfer of funds under the India-Australia BIT. Although the UNCITRAL tribunal rejected the claims relating to violation of FET, expropriation and free transfer of funds, it ruled that India had violated the MFN provision of the India-Australia BIT.⁵³ The tribunal held that the delay by Indian courts to enforce the arbitral award violated India’s obligations to provide White Industries with an “effective means of asserting claims and enforcing rights”.⁵⁴

⁴⁹ Prabhash Ranjan, *The White Industries Arbitration: Implications for India’s Investment Treaty Program*, 2 (3) INVESTMENT TREATY NEWS 13-14 (2012) [hereinafter Ranjan 2012a].

⁵⁰ Ranjan 2010, *supra* note 37, at p.69.

⁵¹ *Id.*

⁵² Sujay Mehdudia, *Move to rework bilateral treaties*, THE HINDU (May 15, 2012) available at: <http://www.thehindu.com/business/article3422322.ece>.

⁵³ Santosh Tiwari, *Taking notice of investment treaties*, BUSINESS STANDARD (Feb. 4, 2012), available at: http://www.business-standard.com/article/opinion/santosh-tiwari-taking-notice-of-investment-treaties-112061400019_1.html.

⁵⁴ See ¶ 11 of the judgment. *White Industries Australia Limited v. Republic of India*, Final

Relying on the broad MFN provision in the India-Australia BIT,⁵⁵ the tribunal allowed White Industries to borrow the “effective means” provision from the India-Kuwait BIT⁵⁶ despite the fact that the India-Australia BIT contains no such provision.⁵⁷

According to Ranjan, these cases have been instrumental in busting certain myths held in India regarding investment treaties, according to which a BIT can be invoked only against the actions of the government i.e. the executive.⁵⁸ He points out that Sistema’s notice to the Government of India, as well as the *White Industries* arbitration, indicate that sovereign actions of the judiciary could violate treaty obligations contained in a BIT.⁵⁹ Lord Goldsmith, the former Attorney General of the United Kingdom has also stated that courts are considered to be part of the State under BITs.⁶⁰ Thus, the sovereign actions of any organ of the State, be it the executive, judiciary or legislature could be challenged under a BIT, for which India can be held liable.⁶¹

C. Energy and International Investment Law

Energy investment⁶² and international investment law are said to share a

Award dated 30 Nov. 2011, *available at*: <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf> [hereinafter White Industries Award].

⁵⁵ Article 4(2) of the India-Australia BIT provides the MFN provision according to which, ‘a contracting party shall at all times treat investments in its territory on a basis no less favourable than that accorded to investments or investors of any third country’.

⁵⁶ Article 4(5) of the India-Kuwait BIT provides that ‘each contracting party shall...provide effective means of asserting claims and enforcing rights with respect to investments...?’.

⁵⁷ Ranjan 2012a, *supra* note 49.

⁵⁸ Prabhash Ranjan, *Renegotiating a BIT*, THE INDIAN EXPRESS (July 17, 2012), *available at*: <http://www.indianexpress.com/news/renegotiating-a-bit/975397> [hereinafter Ranjan 2012b].

⁵⁹ Ranjan 2012b, *id.*

⁶⁰ Thomas K. Thomas, *India cannot sidestep obligation under bilateral treaties*, THE HINDU BUSINESS LINE (July 5, 2012), *available at*: http://www.thehindubusinessline.com/industry-and-economy/info-tech/article3606689.ece?ref=wl_industry-and-economy.

⁶¹ Ranjan 2012b, *supra* note 58. This line of argument also appears to be in line with Article 4(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 of the International Law Commission, which suggests that the conduct of any “organ” of the State shall be considered an act of the State under international law, irrespective of whether the organ exercises legislative, executive, judicial or any other function. *See also*, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), 24 May 1980, ICJ.

⁶² Or energy-related investment, for the purposes of this Part, looks specifically at the coal and renewable energy sectors.

common history as some of the first expropriation cases adjudicated by arbitral tribunals were concerned with the expropriation of foreign investments relating to the production of oil.⁶³ Today more than a third of all investment disputes adjudicated under the ICSID can be classified as energy-related disputes.⁶⁴ Investor claims against States under BITs are steadily increasing in various sectors ranging from oil and gas, mining, power, energy, water and sanitation, construction, tourism, agriculture and fisheries, and finance and services.⁶⁵

Although the aims and objectives of national energy policies differ from country to country, depending on its endowment associated with energy resources; the regulation, distribution and consumption of energy is a key element of national economic law and policy.⁶⁶ There are three identifiable regulatory objectives: *first*, to secure sufficient and continuous supply of energy; *second*, to assure universal and affordable access to energy; and *third*, to align energy production and consumption with the objectives of sustainability and environmental protection, particularly with respect to climate change.⁶⁷

Most investor-State disputes, relating to energy investment, deal with the protection of the investor against political and systemic risks arising out of the host State's contentious energy policy.⁶⁸ However, with no clear rules of interpretation available on the interaction of energy security or climate change objectives with the international investment regime, and the steady rise in energy-related ISDS cases, the threat of potential investor challenges to the host State's regulatory objectives, as described above, cannot be ignored. Given the rhetoric combining concerns of energy security and climate change in the Indian energy context, the next Part highlights the implications of ISDS cases, including those involving India, for India's twin concerns over ensuring energy security and adopting a low carbon pathway.

⁶³ See, Saudi Arabia v. Arabian American Oil Company (Aramco), 27 ILR (1958), Anglo-Iranian Oil Co., U.K. v. Iran, Judgment, 1952 I.C.J. 93, cited from Markus Krajewski, *The Impact of International Investment Agreements on Energy Regulation*, 3 EUR. Y.B. INT'L ECON. L. 343 (2012), available at: <http://ssrn.com/abstract=1855639> [hereinafter Krajewski].

⁶⁴ See, *The ICSID Caseload – Statistics* (Issue 2013-2), available at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English42>.

⁶⁵ *Id.*

⁶⁶ Krajewski, *supra* note 63, at 345.

⁶⁷ *Id.* at 346.

⁶⁸ *Id.* at 344.

IV. INVESTOR-STATE DISPUTE SETTLEMENT AND ITS IMPLICATIONS FOR INDIA'S ENERGY POLICIES

Sub-part I covers the traditional energy sector in India, with a focus on the vulnerable position of the coal based energy – a sector that the Indian economy is heavily dependent on for its energy supply and power generation. The argument goes that the cases of investment treaty arbitration against the government, both decided and potential, involving Coal India (an Indian public sector company) could have the effect of creating a 'regulatory chill' in the sector.⁶⁹ Additionally, such cases could prevent the government from legitimate regulatory action or policy making to ensure greater energy security and affordable energy access to its populace. Sub-part II looks at instances of recent ISDS cases in the renewable energy sector, in order to determine their possible implications for the Indian regulatory approach towards adopting a low carbon pathway.

A. The Coal Sector

In a letter dated 16 May 2012, sent to the Ministry of Finance, the Children's Investment Fund [TCI] a UK-based hedge fund, gave a formal notice of a dispute and threatened to invoke arbitration against the Indian government under the India-Cyprus BIT⁷⁰ for violating its obligations on FET and expropriation under the treaty.⁷¹ TCI became a minority shareholder in Coal India Limited [CIL] after it acquired a 1.01% stake when the Indian government sold off 10% of CIL's shares in 2010 through an initial public offering. TCI alleges that the Government of India's conduct toward CIL has "seriously impaired the business activities and operations of CIL" and is in contravention of the India-Cyprus BIT. TCI's main argument is that CIL must be allowed to price and sell its coal supplied under Fuel Supply Agreements [FSAs] at market prices and not government determined prices, which are substantially lower than the price the company has been able to

⁶⁹ Regulatory chill is best described through situations where countries refrain from enacting strict environmental response fearing a loss of the competitive edge against other countries in obtaining foreign investment. As a result, in such cases, it is said that environmental regulation gets 'stuck in the mud', or in the case of developing countries lacking any environmental regulation – the 'stuck at the bottom' effect. See, Kevin R. Gray, *Foreign Direct Investments and Environmental Impacts – Is The Debate Over?*, 11(3) RECIEL 307 (2002), available at: <http://www.worldtradelaw.net/articles/grayfdi.pdf>

⁷⁰ Article 9 of the India-Cyprus BIT provides for 'Settlement of Disputes Between an Investor and a Contracting Party'.

⁷¹ TCI alleges breach of India's obligation to accord TCI Cyprus' Shares fair and equitable treatment (Article 3 of the treaty) and its obligation not to expropriate TCI Cyprus' shares, or subject them to measures having effect equivalent to expropriation (Article 5 of the treaty). See, Letter from the Children's Investment Fund Management (UK) LLP to the Union of India dated May 16, 2012 available at: <http://coal4india.com/Coal4India/c4i11.pdf>.

get in limited auctions.⁷² TCI has alleged that it was wrong on part of the government to direct CIL to sell coal under FSAs at a discount of up to 70% compared to the international prices. Further, TCI has raised a red flag over the government's decision of directing CIL to enter into additional FSAs with power companies wherein CIL will have to unconditionally guarantee to supply 80% of the fuel requirements (even if it means importing coal to meet such requirements) or face severe financial penalties if it fails to meet the supply obligation.⁷³

A Partner at TCI is believed to have said that challenging the Indian government through the local courts could take years and that the "most effective way" to settle the dispute was "to go through the BIT".⁷⁴ This statement should be extremely disconcerting for the Indian government, as it exposes the Indian government's vulnerability to foreign investor claims in the face of the obvious slow pace of domestic regulation and its many investment treaty commitments.

The coal sector in India could prove to be an easy target for more investor-State disputes, especially if the TCI arbitration kicks off. Some of the strategies used by countries to achieve universal and affordable access have been the public ownership of energy companies, as well as price control (price capping or *ad hoc* price control) or the administrative determination of the price.⁷⁵ Many parts of rural India still suffer from widespread power cuts, and thus, the government's priority remains ensuring a consistent supply of power. Thus, it defends its existing coal policy in light of the bigger picture of providing inexpensive coal to power companies, steel mills and other businesses that are vital for the economy.⁷⁶ However, most tribunals are likely to view any measure affecting a foreign investor's interests negatively as a breach of the provisions under the relevant investment treaty, as most Indian investment treaties protect the interests of the foreign investor over the right of the host State to regulate.

⁷² Mark Tran, *UK hedge fund's India tussle puts unfair bilateral trade in spotlight*, THE GUARDIAN (May 16, 2012) available at: <http://www.guardian.co.uk/global-development/poverty-matters/2012/may/16/uk-hedge-fund-india-bilateral-trade> [hereinafter Tran].

⁷³ Ashish Rukhaiyar, *TCI sets a 6-month deadline for govt to act on charges against Coal India*, THE INDIAN EXPRESS (May 22, 2012), available at: <http://www.indianexpress.com/news/tci-sets-a-6month-deadline-for-govt-to-act-on-charges-against-coal-india/952063/0>.

⁷⁴ Sam Jones, *TCI initiates legal action against India*, THE FINANCIAL TIMES (March 27, 2012) available at: <http://www.ft.com/intl/cms/s/0/9f9b5722-784a-11e1-b237-00144feab49a.html#axzz2RvaCSnYS>.

⁷⁵ Krajewski, *supra* note 63, at 347.

⁷⁶ Tran, *supra* note 72.

B. The Renewable Energy Sector

With countries increasingly turning to renewable energy to mitigate climate change, domestic policies such as price support measures in the form of feed-in tariffs [FiTs]⁷⁷ have played an important role in stimulating the much needed investment in the renewable energy sector.

An important feature in many FiT policies is 'local content' or 'domestic content' requirements, which makes it mandatory for the investor to source a certain percentage of materials from local suppliers in order to be eligible to receive the benefits of the policy. For example, in Canada, the Province of Ontario's FiT program requires the 'Minimum Required Domestic Content Level' to be in the range of 25-50% for wind projects over 10 kW and 50-60% for solar projects over 10 kW.⁷⁸

In 2010, India announced its national solar policy, the Jawaharlal Nehru National Solar Mission [JNNSM]. The JNNSM lays the foundation for a clean energy future,⁷⁹ and aims at deploying solar power across the country, while mandating development across the entire value chain. Thus, in order to develop domestic manufacturing capacity across value chains the domestic content requirement was introduced under the JNNSM.⁸⁰

The United States has requested World Trade Organization (WTO) dispute settlement consultations with the Government of India concerning domestic content requirements in India's national solar mission.⁸¹ On 6 February 2013, the United States requested consultations with India concerning certain measures of India relating to domestic content requirements under the JNNSM for solar cells and solar modules. The main contention of the United States is that the measures

⁷⁷ FiTs are characterized by guaranteed electricity purchase prices (set higher than market rates), guaranteed grid access and a long-term contract. See, MARIE WILKE, FEED-IN TARIFFS FOR RENEWABLE ENERGY AND WTO SUBSIDY RULES: AN INITIAL LEGAL REVIEW (2011), available at: <http://ictsd.org/downloads/2011/11/feed-in-tariffs-for-renewable-energy-and-wto-subsidy-rules.pdf>.

⁷⁸ Feed-In Tariff Program Rules, Version 1.5.1 (15 July, 2011), available at: <http://fit.powerauthority.on.ca/>

⁷⁹ Indian Ministry of New and Renewable Energy, Jawaharlal Nehru National Solar Mission: Guidelines for Selection of New Grid Connected Solar Power Projects (July 2010), at 1, available at: http://www.mnre.gov.in/file-manager/UserFiles/jnnsn_gridconnected_25072010.pdf

⁸⁰ *Id.* at 7.

⁸¹ United States Challenges India's Restrictions on U.S. Solar Exports, available at: <http://www.ustr.gov/about-us/press-office/press-releases/2013/february/us-challenges-india-restrictions-solar>.

appear to be inconsistent with: Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Articles 3.1(b), 3.2, 5(c), 6.3(a) and (c), and 25 of the SCM Agreement.⁸²

Several senior officials in the Indian establishment hold the view that the JNNSM does not flout any WTO rules, as it is essentially government procurement that falls outside the purview of the WTO. The argument is that the power produced under the mission will be bought by NTPC, a public sector enterprise, which amounts to government procurement. Moreover, with India not being a signatory to the Government Procurement Agreement under the WTO, the officials believe that it is not under any obligation to follow rules prescribed by it.⁸³ This view of the official establishment, that the domestic content requirements are not violative of WTO rules, is evidenced by the Government of India recently announcing a plan for 75% domestic content requirements in Phase II projects under the JNNSM.⁸⁴ Coming a few months after the consultations requested by the United States at the WTO, this decision seems to suggest that the Indian government is in no mood to back down on domestic content requirements in its national solar policy in light of mounting pressure by the United States.

Irrespective of the issues raised at the WTO concerning the legality of FiTs,⁸⁵ FiTs for renewable energy are also involved in a series of claims by foreign investors under various investment treaties. There have been two distinct trends in the kinds of disputes relating to FiT for renewable energy – *first*, disputes relating to domestic content requirements imposed on investors; *second*, disputes relating to the withdrawal or modification of the FiTs.⁸⁶

⁸² *India – Certain Measures Relating to Solar Cells and Solar Modules*, DS456, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm.

⁸³ Amiti Sen, *Domestic Sourcing for Solar Mission no violation of WTO Rules*, THE ECONOMIC TIMES (Apr. 9, 2012), available at: http://articles.economictimes.indiatimes.com/2012-04-09/news/31313157_1_national-solar-mission-solar-power-vidyut-vyapar-nigam; Amiti Sen, *India worried over WTO's verdict on Ontario solar case*, THE HINDU (MAY 19, 2013), available at: <http://www.thehindubusinessline.com/industry-and-economy/india-worried-over-wtos-verdict-on-ontario-solar-case/article4730318.ece>.

⁸⁴ *Solar Mission-II projects to have 75% local content*, BUSINESS LINE (June 12, 2013), available at: <http://www.thehindubusinessline.com/industry-and-economy/solar-missionii-projects-to-have-75-local-content/article4807456.ece>.

⁸⁵ At the WTO, FiTs for renewable energy formed the main subject matter in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, Appellate Body Report, WT/DS412/AB/R, WT/DS426/AB/R (6 May, 2013), available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm.

⁸⁶ Vyoma Jha, *Trends in Investor Claims Over Feed-in Tariffs for Renewable Energy*, INVESTMENT TREATY NEWS (July 19, 2012), available at: <http://www.iisd.org/itn/2012/07/19/trends-in-investor-claims-over-feed-in-tariffs-for-renewable-energy/> [hereinafter Jha].

Domestic content requirements within a FiT for renewable energy are particularly vulnerable to an investor challenge if the country's investment treaties contain an express prohibition on performance requirements,⁸⁷ which are particularly common in the treaties involving Canada, the United States and Japan.⁸⁸ In such cases, there are clear inconsistencies between the climate-related policy and the investment treaties.

An example of such a dispute emerged in July 2011 when Mesa Power Group LLC, a Texas-based company, served Canada with a Notice of Intent to Submit a Claim to Arbitration under the North American Free Trade Agreement's [NAFTA] Chapter 11 in connection with Ontario's FiT program. The investor complained that the program breached several obligations under NAFTA; Articles 1102 and 1103, for providing more favourable treatment, in like circumstances, to a domestic company and to a non-NAFTA party; Article 1105, for failing to accord minimum standard of treatment; and Article 1106, for imposing prohibited "buy local" performance requirements.⁸⁹

Although investment disputes relating to performance requirements have been rare, the fact that Canada has recently lost a dispute brought by two US-based oil companies for the breach of NAFTA's provisions on performance requirements,⁹⁰ highlights the concerns over their prohibition — especially where they are designed to achieve environmental and social objectives. To avoid surprises, governments will need to ensure more than ever that they limit the scope of the prohibitions through careful drafting and exceptions.

Spain, Italy, and the Czech Republic are among the countries known to be facing the second kind of investor claims challenging FiT for renewable energy. For instance, the claim against Spain, has been brought by a group of 14 investors over retrospective cuts to solar energy tariffs. The investors claim that they relied on the FiT laws while making their investment and the subsequent cuts in tariffs

⁸⁷ *Infra* Part VI.G.

⁸⁸ For example, Article 1106 of NAFTA expressly prohibits a party from imposing or enforcing mandatory performance requirements to achieve a given level or percentage of domestic content.

⁸⁹ *More legal woes for Canada's Feed-in Tariff program for renewable energy*, INVESTMENT TREATY NEWS (October 7, 2011), available at: <http://www.iisd.org/itn/2011/10/07/news-in-brief-5/>; See also, Mesa Power Group's Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11 (6 July, 2011), available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1168.pdf>.

⁹⁰ *Mobil Investments Canada Inc and Murphy Oil Corporation v. Canada* (ICSID Case No ARB(AF)/07/4); See also, Jarrod Hepburn, *Canada loses NAFTA claim; provincial R&D obligations imposed on US oil companies held to constitute prohibited performance requirements*, IAREPORTER (June 1, 2012) available at: <http://www.iareporter.com/articles/20120601>.

by the government breach the Energy Charter Treaty [ECT], a multilateral agreement that provides protections to investors in the energy sector that are similar to those found in BITs.⁹¹ Italy, also, is in a dispute with foreign investors over its efforts to roll back FiTs in the country's booming solar energy sector. Generous subsidies which were granted initially with a view to induce investments in solar energy production have proved financially burdensome in times of economic austerity. Again, the investors complain that the cuts in FiT are a breach of the government's earlier promise of long-term price support.⁹² The Czech Republic, where investors were enticed by generous FiT policies for solar power, similarly faced a heavy bill for the solar boom. In order to curb costs, the government in December 2010 introduced a new 26 per cent retroactive 'solar tax' on all producers of solar energy. Other measures taken by the government in this regard were: ending the tax holiday for solar power plant operators, changes in the FiT policies and a 500% hike in land use fees.⁹³ Now the Czech Republic too is threatened with a series of legal disputes and potential arbitration claims by the foreign-based solar investors.⁹⁴

Given the spate of investor claims arising against FiTs for renewable energy policies, India needs to be particularly mindful of its own investment treaty commitments and design its FiT policies for renewable energy accordingly, especially if they invite foreign investment in the sector. If there are provisions in existing (or future) investment treaties that restrict (or could restrict) its ability to set and implement environmental and other legitimate policy objectives, then India will have to re-think its investment rules or ongoing investment treaty negotiations such as with the United States, whose model BITs contain a specific prohibition on performance requirements like the domestic content requirements.⁹⁵ India should also take care to build in flexibilities of time and duration within the FiT policy at the outset so as to eliminate the risk of legitimate policy decisions triggering legal battles, while at the same time it must not set incentives

⁹¹ *Foreign investors sue government of Spain over hikes to solar energy tariffs*, INVESTMENT TREATY NEWS (Jan. 12, 2012), available at: <http://www.iisd.org/itn/2012/01/12/news-in-brief-6/>.

⁹² Luke Eric Peterson, *Italy put on notice of treaty claim arising out of economic austerity*, 5(8) INVESTMENT ARB. REP. (Apr. 30, 2012).

⁹³ Jaroslav Dorda, *Solar bonanza turns into a nightmare for investors in the Czech Republic*, available at: http://www.pv-tech.org/guest_blog/guest_blog_iv_solar_bonanza_turns_into_a_nightmare_for_investors_in_the_cze

⁹⁴ Investors file for arbitration against Czech Republic in reaction to changes to renewable energy incentives, available at: <http://www.iisd.org/itn/2013/06/26/news-in-brief-12/>.

⁹⁵ Article 8(1)(b) of the Model U.S. BIT, 2012 provides an express prohibition on parties from imposing or enforcing any requirement or enforcing any commitment or undertaking in order "[t]o achieve a given level or percentage of domestic content".

unreasonably high or too difficult for the treasury to bear later.⁹⁶

V. A REVIEW OF INDIA'S INVESTMENT TREATIES: INCREASED CALLS, MULTIPLE VOICES

According to Bernasconi-Osterwalder, “[I]ndia has signed a large number of old-style treaties that leave it vulnerable to challenge”.⁹⁷ Since the *White Industries* decision and the series of potential investor claims against India, there have been increased calls for a critical review or renegotiation of India's investment treaties.⁹⁸ A review of existing Indian investment treaties has been deemed imperative in light of India's deepening integration with the global economy and increasing number of new trade and investment agreements, such as the India-EU FTA and a BIT with the United States.⁹⁹ In fact, the government has in a significant move ordered a “freeze” of all BIPA negotiations until a review of the model text of the BIPA is carried out and completed.¹⁰⁰

Many investment treaties – new and renegotiated – suggest that governments are trying to formulate investment treaties more precisely, with more attention being paid to ensure that the treaty language reflects their domestic policy objectives, reaffirms and strengthens the States' right to regulate in the public interest, and enhances the legitimacy of ISDS processes.¹⁰¹ While many countries are creating or revising their model investment treaties,¹⁰² developing a new model

⁹⁶ Jha, *supra* note 86.

⁹⁷ Latha Jishnu, *India's many investment treaties make it vulnerable*, DOWN TO EARTH (Jan. 31, 2012), available at: <http://www.downtoearth.org.in/content/india-s-many-investment-treaties-make-it-vulnerable>.

⁹⁸ *Id.* See also, Prabhash Ranjan, *Revisiting India's bilateral treaties*, THE FINANCIAL EXPRESS (Feb. 23, 2012), available at: <http://www.financialexpress.com/news/revisiting-indias-bilateral-treaties/915480>; Anuradha RV, *India should be cautious about bilateral trade pacts*, THE ECONOMIC TIMES (Mar. 3, 2012), available at: http://articles.economictimes.indiatimes.com/2012-03-03/news/31119524_1_coal-india-arbitration-proceedings-settlement-of-investment-disputes; Anuradha R.V. & Deepak Raju, *BIT of a problem*, THE INDIAN EXPRESS (Jul. 10, 2012), available at: <http://www.indianexpress.com/news/column--bit-of-a-problem/968053/>; Ranjan 2013, *supra* note 48.

⁹⁹ Ranjan 2012a, *supra* note 49.

¹⁰⁰ Sujay Mehudua, *BIPA talks put on hold*, THE HINDU (Jan. 22, 2013), available at: <http://www.thehindu.com/business/Economy/bipa-talks-put-on-hold/article4329332.ece>.

¹⁰¹ UNCTAD, *WORLD INVESTMENT REPORT: INVESTING IN A LOW CARBON ECONOMY* 87 (Oct. 2010), available at: <http://www.imf.org/external/pubs/ft/bop/2010/10-22.pdf> [hereinafter WIR 2010]

¹⁰² The Russian Federation in 2001 with an amendment in 2002, France in 2006, and Colombia, Mexico, Austria and Germany in 2008.

investment treaty,¹⁰³ or in the process of reviewing their earlier model investment treaties,¹⁰⁴ some other countries have fundamentally changed their approach towards BITs and denounced some of their treaties, setting into motion the process of terminating them.¹⁰⁵ The growing renegotiation of investment treaties is indicative of countries' social and environmental goals as well as an attempt to foster more sustainable economic growth through foreign investment.¹⁰⁶

Although it is not entirely clear which provisions the investors are relying on to bring their claims against India, or what stage the disputes are at, India needs to be mindful of the latest developments in ISDS cases while it regulates its domestic energy sector, and while it negotiates and plans to sign more BITs. Recent developments in energy-related ISDS cases, including those involving India, make it amply clear that the existing BITs could potentially constrain India's regulatory discretion. The assumption that BITs help attract overseas investors can be questioned if one cites the experiences of countries such as Brazil and China. Neither Brazil's failure to ratify BITs nor the restrictive terms in China's investment treaties have dissuaded foreign investors from entering the country.¹⁰⁷ Thus, India needs to focus on renegotiating its investment treaty provisions and narrow the scope of its provisions according to its developmental priorities.¹⁰⁸

Although some reports suggest that India may be planning to exclude arbitration clauses from future BITs,¹⁰⁹ it is argued that it would not be a wise idea for India to completely exclude the ISDS clause from its treaties. The problem with BITs is not necessarily a result of the ISDS provisions, rather it stems from

¹⁰³ Argentina, the Bolivarian Republic of Venezuela, Ecuador, Morocco, the Plurinational State of Bolivia, South Africa, Turkey, and the United States.

¹⁰⁴ Thailand and India with model BITs dating from 2002 and 2003.

¹⁰⁵ Bolivia, Venezuela and Ecuador have denounced the ICSID Convention. See, Sergey Ripinsky, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve*, INVESTMENT TREATY NEWS (Apr. 13, 2012), available at: <http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>.

¹⁰⁶ Daniel M. Firger and Michael Gerrard, *Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges and Opportunities*, in 43 Y.B. ON INT'L INVESTMENT L. & POL'Y (2010-11) (Karl P. Sauvant ed., 2011), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1733985 (hereinafter Firger-Gerrard).

¹⁰⁷ Vidya Ram, *Investment deals that BITe*, BUSINESS LINE (Apr. 22, 2012), available at: <http://www.thehindubusinessline.com/opinion/investment-deals-that-bite/article3342641.ece>.

¹⁰⁸ Ranjan 2012b, *supra* note 58.

¹⁰⁹ Sanjeet Malik, *India is planning to exclude arbitration clauses from BITs*, BUSINESS TODAY (May 27, 2012), available at: <http://m.businesstoday.in/story/india-planning-to-exclude-arbitration-clauses-from-bits/1/24684.html>; Jung Eun-joo, *India plans to abolish ISD clause in FTAs*, available at: <http://www.bilaterals.org/spip.php?article21295>.

the broad substantive protections covered in the treaty.¹¹⁰ BITs offer an important protection to foreign investors, especially by increasing their comfort level in turbulent global conditions. Removing the dispute resolution clause completely from Indian investment treaties could create a deterrent for foreign investors wanting to invest in India. In recent years several foreign companies have been unable to start or expand their projects in India, largely due to hurdles in environmental clearances, problems in land acquisition, poor infrastructure or local opposition¹¹¹. Hence, the absence of an ISDS clause could add to a foreign investor's worries.

Moreover, recent investment trends suggest that India is fast becoming an exporter of capital and a move to remove ISDS clauses from investment treaties could jeopardize the interests of Indian investment abroad, which has risen in recent years.¹¹² FDI from India increased from \$13.2 billion in 2010 to \$14.8 billion in 2011.¹¹³

There is also a continued boom in the extractive industry and one of the reasons is the growing demand in emerging markets.¹¹⁴ Several developed countries rich in natural resources, such as Australia, Canada and the United States, have also attracted FDI in oil and gas, particularly for unconventional fossil fuels, and in minerals such as coal, copper and iron ore.¹¹⁵ Transnational Corporations [TNCs] from developing countries are also increasingly active in acquiring natural-resource assets overseas, including in developed countries. For example, GVK Power, an Indian company acquired the Australian based Hancock Coal for \$1.26 billion.¹¹⁶ In addition, Jindal Steel and Power announced the largest project in 2011 – a power plant to be built in Mozambique, the largest greenfield electricity investment for Mozambique since 2003. This follows Jindal's \$1.6 billion project in manufacturing coal, oil and gas announced in 2008, for which it received a 25-year mining concession.¹¹⁷ In the renewable energy sector, as well, India's Suzlon invested \$255.69 million in its wholly-owned subsidiary in the Netherlands that

¹¹⁰ Ranjan 2012b, *supra* note 58.

¹¹¹ Shefali Anand, *Foreign Investment in India Slows*, THE WALL STREET JOURNAL (Jan. 25, 2011), *available at*: <http://online.wsj.com/article/SB10001424052748704698004576104011818941244.html>.

¹¹² Ranjan 2013, *supra* note 48.

¹¹³ UNCTAD, WORLD INVESTMENT REPORT - TOWARDS A NEW GENERATION OF INVESTMENT POLICIES 46 (July 2012), *available at*: <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf> [hereinafter WIR 2012].

¹¹⁴ *Id.* at 62.

¹¹⁵ *Id.* at xvii.

¹¹⁶ *Id.* at 62.

¹¹⁷ *Id.* at 65.

makes wind turbines.¹¹⁸ Moreover recent incidents, such as those between Indian companies like GMR and the Maldivian government and Jindal Steel and the Bolivian government, signify the importance of BIT protection for Indian companies in uncertain overseas markets.¹¹⁹

In view of the marked shift in the Indian investment narrative – whereby it is no longer just a host State attracting foreign investment, but is increasingly turning into an outward investor – and in light of its twin concerns over energy supply security and climate change, India’s next course of action must not rest on removing ISDS clauses from its treaties. It needs to reassess the core provisions of its investment treaties from a sustainable development lens so as to determine if the language of the provisions provides enough regulatory flexibility to host States to deviate from the substantive obligations in circumstances of energy security or climate change-related regulatory action. At the same time, the investment treaties must ensure that the interests of Indian investors abroad are not compromised and are protected under the different provisions of the treaty.

VI. EXAMINING THE CORE CONCEPTS OF INDIA’S INVESTMENT TREATIES FROM A SUSTAINABLE DEVELOPMENT LENS

Moltke observed that:

In other words, without investment, sustainability is unattainable. With such an urgent need for investment, the move toward sustainability requires that scarce resources be used efficiently — and that the imperatives of sustainability are respected in the investment process. Indeed, it can be argued that an investment regime, which does not actively promote sustainable development, represents an important step back from the widely endorsed principles of sustainable development.¹²⁰

This Part reviews options for renegotiating or revising India’s existing and future investment treaties, such that the investment treaty provisions sit well with India’s sustainable development concerns.

A. Preamble

Most Indian BITs contain overarching provisions that create favourable

¹¹⁸ *Indian companies overseas direct investment at \$2.57 bn*: RBI, THE INDIAN EXPRESS (Jan. 15, 2013), available at: <http://www.indianexpress.com/news/indian-companies-overseas-direct-investment-at-2.57-bn-rbi/1059730/>.

¹¹⁹ Ranjan 2013, *supra* note 48.

¹²⁰ KONRAD VON MOLTKE, AN INTERNATIONAL INVESTMENT REGIME? — ISSUES OF SUSTAINABILITY 7 (2000), available at: <http://www.iisd.org/pdf/investment.pdf> [hereinafter Moltke].

conditions for greater investment flows and protect the interest of the foreign investor, but there is no mention of the right of the host nation to regulate investments according to its national interest. The preamble of the model Indian BIPA states that the Government of India,

Desire[s] to create conditions favourable for fostering greater investment by investors of one State in the territory of the other State” and “[r]ecogniz[es] that the encouragement and reciprocal protection under international agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.¹²¹

A plain reading of the preamble of the model Indian BIPA, thus, gives an insight into the overall aims and objective of the treaty, which contains overriding concern for protection of foreign investments at the expense of genuine regulatory discretion of the State.¹²²

In order to uphold legitimate regulatory aims, an option for countries is to make changes to the preambular language.¹²³ UNCTAD's World Investment Report highlighted the possibility that countries could harness the potential of investment treaties to ensure positive climate change related effects by drafting preambular language that affirms the treaty's aim to help address the climate change challenge.¹²⁴ For instance, the preamble of the Japan-Switzerland FTA (2009) states that the parties are:

Determined, in implementing this Agreement, to seek to preserve and protect the environment, to promote the optimal use of natural resources in accordance with the objective of sustainable development and to adequately address the challenges of climate change.¹²⁵

Investment treaties could also refer to the United Nations Framework Convention on Climate Change [UNFCCC] in the preamble, such as in the ECT.

Recalling the [UNFCCC], the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international

¹²¹ Department of Economic Affairs, Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA), *available at*: http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp [hereinafter BIPA Model Text].

¹²² Ranjan 2010, *supra* note 37, at 70.

¹²³ Firger-Gerrard, *supra* note 106, at 48.

¹²⁴ WIR 2010, *supra* note 101, at 137.

¹²⁵ AGREEMENT ON FREE TRADE AND ECONOMIC PARTNERSHIP BETWEEN JAPAN AND SWISS CONFEDERATION, *available at*: <http://www.mofa.go.jp/region/europe/switzerland/epa0902/agreement.pdf>.

environmental agreements with energy-related aspects; and [r]ecognizing the increasingly urgent need for measures to protect the environment, [...].

Such attempt to harmonize a country's commitments under the UNFCCC with its investment commitments could ensure that if a future investment dispute involving a measure taken pursuant to obligations under the UNFCCC is before a tribunal, then the tribunal would be in a position to reach a conclusion that the parties intended to use the investment treaty to further their goals under the UNFCCC.¹²⁶

The 2007 Draft Model Norwegian BIT states that the treaty's objectives should be achieved "*in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labour rights*" and that "*the provisions of this agreement and provisions of international agreements relating to the environment shall be interpreted in a mutually supportive manner*".¹²⁷

India could take a cue from some of the above examples and revise the preambular language in its investment treaties so as to affirm the treaty's aim to help address the climate change challenge, or to harmonize a country's commitments under the investment treaty and another international agreement relating to the environment.

B. *Definition of "Investor" and "Investment"*

Most investment treaties define the term "investor" broadly as a natural or juridical person of one contracting party that has made an "investment" in the territory of the other State. "Investment", on the other hand, is often defined in these treaties to include "any kind of asset" in the host country. Some countries try and include language to exclude certain items from the scope of covered "investments" such as debt securities issued by a government; portfolio investments; or claims to money that arise solely from commercial contracts for the sale of goods or services. However, some others follow a closed definition of "investment", which contains an exhaustive list of covered assets rather than a reference to "all assets". Thus, making the treaty language crucial in determining the extent of treaty protection the "investor" or "investment" enjoys.¹²⁸

Most Indian investment treaties define the term "investor" broadly as "any

¹²⁶ Firger-Gerrard, *supra* note 106, at 49.

¹²⁷ DRAFT MODEL NORWEGIAN BILATERAL INVESTMENT TREATY, *available at*: <http://www.asil.org/ilib080421.cfm#t1>.

¹²⁸ Bernasconi-Osterwalder *et al.*, *supra* note 29, at 9-10.

national or company” of a contracting party, which has made an investment in the territory of other Contracting Party.¹²⁹

However, Indian investment treaties follow a closed definition of “investment”, containing an exhaustive list of covered assets rather than a reference to “all assets”. The definition of “investment” includes:

- (i) movable and immovable property as well as other rights such as mortgages, liens or pledges;
- (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company;
- (iii) rights to money or to any performance under contract having a financial value;
- (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;
- (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals.¹³⁰

It has been noted that the Indian government holds a myth that only FDI falls under the ambit of BITs; however, given the extremely broad definition adopted in most Indian investment treaties, “investment” covers portfolio investment, intellectual property rights, rights to money or to any performance under contract having a financial value or business concessions conferred under law or contract.¹³¹ It has also been suggested that by agreeing to include “claims based on rights to money or to any performance under contract having a financial value” in the definition of “investment”, India has allowed tribunals to opt for an expansive interpretation of what constitutes “investment”.¹³²

Interestingly, the India-France BIT, includes “minority and indirect forms” of investments in the definition of “investment”. Although there is no exact definition of the term “indirect forms” of investment, the only interpretation for the term is available under Article 2 of the treaty. It states that, “indirect investment made through another company, wherever located, which is owned to an extent of at least 51 per cent”. This could extend the benefit of the treaty to subsidiaries located in the territory of a non-party, implying that investment from subsidiaries located anywhere could be recognized as investment originating from within France.¹³³

¹²⁹ See, BIPA Model Text, *supra* note 121.

¹³⁰ *Id.*

¹³¹ Ranjan 2012b, *supra* note 58.

¹³² Biswajit Dhar, Reji Joseph & T.C. James, *India's Bilateral Investment Agreements – Time to Review*, 47(52) ECON. & POL. WKLY. 113, 114 (Dec. 29, 2012).

¹³³ *Id.*

The adoption of a broad definition of “investment” has negatively affected India’s interests in the *White Industries* arbitration as well. One of the main questions before the tribunal in the case of *White Industries* was whether the involvement of the Australian firm in the Coal India project could qualify as an investment? The Indian government’s stand was that White Industries was not an “investor” with an “investment”, rather the contract with White Industries was an ordinary commercial contract for the supply of goods and services. The tribunal, however, adopted an expansive interpretation and stated that the “BIT expressly includes in its definition of an ‘investment’ the right to money or to any performance having a financial value, contractual or otherwise”. It held that the definition of “investment” clearly included White Industries’ rights under the contract, thus concluding that White Industries had investor rights that were protected under the BIT.¹³⁴

One way to ensure a narrowing down of the category of “investment” is by adopting the approach that investments not approved by the host country will not be able to benefit from the heightened rights and remedies offered by the investment treaty.¹³⁵ For instance, the 1987 ASEAN Agreement on the Promotion and Protection of Investments provides that in order for an investment to be protected under the treaty, it has to be “approved in writing”.¹³⁶

However, some treaties go a little further and broaden the definition by including those who do not yet have an established investment in the host country but are “seeking” to do so.¹³⁷ Thus, investors under this category enjoy pre-establishment rights, meaning that the treaty protection is available to them even before the actual investment is established.

Usually, the provisions of investment treaties apply to the investments once they have been established in the host State. However, investment treaties as

¹³⁴ Refer to ¶ 7.4, *White Industries Award*, *supra* note 54. *See, id.* at 114-115.

¹³⁵ Bernasconi-Osterwalder *et al.*, *supra* note 29, at 10-11.

¹³⁶ Article II(1) provides that

This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.

The 2009 ASEAN Comprehensive Investment Agreement [ACIA] and the 2009 ASEAN-Korea Investment Agreement [AKIA] retain the “approval in writing” requirement and under Annex 1 further specify procedures relating to specific approval in writing in order to qualify for protection.

¹³⁷ Bernasconi-Osterwalder *et al.*, *supra* note 29, at 21.

championed by the United States, Canada and Japan have extended the protections to the pre-establishment phase of the investment.¹³⁸ While the greater majority of investment treaties do not include pre-establishment rights, if a country provides such rights then the host States will lose the flexibility to impose conditions on the admission and establishment of the foreign investment. Usually incorporated through the national treatment and MFN treatment provisions, pre-establishment rights extend these obligations to potential investors as well.¹³⁹

This could prove to be an extremely important consideration for India as it sets out to negotiate a BIT with the United States or Canada, since most BITs entered into by the United States and Canada provide pre-establishment rights to its investors. In that context, it would need to ensure that any exemption from liability given to domestic or third country investors must be extended to the American or Canadian investors as well.

C. *Most-Favoured Nation Treatment*

The MFN treatment in investment treaties obliges a State to treat another State's investors no less favourably than it treats investors from other countries. Though fairly straightforward, the MFN treatment has gained great significance in recent times due to investors using this provision to import more favourable treaty provisions from other investment treaties. This new interpretation of the MFN allows investors to cherry-pick among the different formulations of treaty provisions.¹⁴⁰

Post the 2000 ICSID ruling in *Maffezini v. Kingdom of Spain*,¹⁴¹ a major debate erupted over the investor's use of the MFN clause to import more favourable dispute resolution rules from another BIT. The investor had successfully invoked the MFN provision in order to bypass restrictions in the Argentina-Spain BIT requiring the investors to first turn to domestic courts before resorting to international arbitration. Similarly, in *MTD v. Chile*,¹⁴² a Malaysian investor used the MFN provision in the Malaysia-Chile BIT to invoke a more favourable and extensively worded FET provision from the Denmark-Chile and Croatia-Chile BITs.

Recent tribunals have continued to fuel the debate over the appropriate scope

¹³⁸ Peterson, *supra* note 31, at 3.

¹³⁹ Bernasconi-Osterwalder *et al.*, *supra* note 29, at 21.

¹⁴⁰ *Id.* at 24.

¹⁴¹ Emilio Agustin Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 (2000).

¹⁴² MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7 (2004).

of the MFN clause due to contradicting conclusions on the legal issue of investors using the MFN clause to pick and choose the best provisions from a variety of BITs.¹⁴³

Most countries have investment treaties in force, which contain older language. It is usually a broad interpretation of the old MFN treatment standard that allows foreign investors to isolate, extract and import more favourable provisions from other investment treaties. This facilitates the undoing of results of treaty negotiations and any purposeful limits in the agreement between that foreign investor and host country.¹⁴⁴ If the MFN provision in new investment treaties is not framed properly, then it may simply allow investors to nullify the effect of the improved text by importing more favourable and less restrictive older provisions.¹⁴⁵

One sees a very broad wording of the MFN provision in several Indian investment treaties, similar to the MFN provision under Article 5 of the model Indian BIPA, which states “*Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State.*”¹⁴⁶

In the Indian context, the recent *White Industries* ruling saw the tribunal allow the foreign investor to borrow the “effective means” provision present in the India-Kuwait BIT by relying on the MFN provision of the India-Australia BIT, despite the fact that the India-Australia BIT makes no mentions of such a duty for host States. The tribunal ultimately found that India had violated the MFN provision of the India-Australia BIT as the Indian judiciary failed to deal with White Industries’ jurisdictional claim for over nine years and ordered India to pay damages of about four million Australian dollars. Although the India-Australia BIT recognizes certain exceptions to the MFN provision,¹⁴⁷ as well as a general exception to the entire treaty,¹⁴⁸ none of these exceptions were applicable to India

¹⁴³ See, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005 (2010); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 (2011).

¹⁴⁴ Bernasconi-Osterwalder *et al.*, *supra* note 29, at 24-25.

¹⁴⁵ *Id.*

¹⁴⁶ BIPA Model Text, *supra* note 121.

¹⁴⁷ See, Article 4.4 of India-Australia BIT: Such as not extending any treatment, preferences or privileges arising from a) customs union, economic union or a free trade agreement; b) the provisions of a double taxation agreement; and c) any legislation relating wholly or mainly to taxation.

¹⁴⁸ Article 15 of India-Australia BIT - Prohibitions and restrictions: “Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non discriminatory basis, measures necessary for the protection of its own essential security interests or for the prevention of diseases or pests.”

in this case, and White Industries benefitted from the broadly worded MFN provision. In light of this ruling, it is imperative that India be mindful of the MFN provision contained in its various investment treaties and whether they are qualified by adequate exceptions or not.¹⁴⁹

The *White Industries* award draws attention to the fact that BIT provisions like the MFN clause are often vague and broad, which enable foreign investors to indulge in treaty shopping and arrive at a result that the host State may not anticipate. The ruling also clearly demonstrates how sovereign functions of the Indian judiciary could amount to violation of India's BITs.¹⁵⁰ The tribunal also held that the carefully negotiated balance of the BIT can be subverted only if the MFN provision is used to borrow a more favourable dispute resolution clause from another BIT and not while borrowing a more favourable substantive provision from a third-party treaty.¹⁵¹ This is a challenging situation for host States, especially in relation to a specific environmental or climate-friendly carve out within the investment treaty. Given the recent trend of investors using the MFN clause to import more investor-friendly provisions from other investment treaties to which the host State is a party, there is a credible threat that investors might bypass environmental exceptions in an investment treaty by substituting more investor-favourable provisions from another investment treaty.¹⁵²

One of the ways in which countries can avoid the MFN provision from being interpreted in such a broad manner is by excluding the MFN obligation from their treaties, such as the investment chapters in the India–Korea Comprehensive Economic Partnership Agreement [CEPA]¹⁵³ and India–Singapore CECA¹⁵⁴.

However, if the treaties continue to include the MFN obligation in the text, the other option would be to adopt relevant exceptions or limitations to the MFN clause itself. For example, exceptions indicating that the MFN provision cannot be used to (a) import more favourable provisions relating to certain rights and obligations such as dispute settlement procedures,¹⁵⁵ (b) import rights from

¹⁴⁹ Ranjan 2012b, *supra* note 58.

¹⁵⁰ Ranjan 2012b, *supra* note 58.

¹⁵¹ See, *White Industries Award*, *supra* note 54, ¶ 11.2.3-4.

¹⁵² FIONA MARSHALL, CLIMATE CHANGE AND INTERNATIONAL INVESTMENT AGREEMENTS: OBSTACLES OR OPPORTUNITIES? 38 (2010), *available at*: http://www.iisd.org/pdf/2009/bali_2_copenhagen_iias.pdf [hereinafter Marshall].

¹⁵³ This agreement, which entered into effect January 1, 2010, is *available at*: <http://commerce.nic.in/trade/INDIA%20KOREA%20CEPA%202009.pdf>.

¹⁵⁴ This agreement was entered into force August 1, 2005, is *available at*: <http://commerce.nic.in/ceca/toc.htm>.

¹⁵⁵ See *for example*, Colombia–Switzerland BIT, Ad Art. 4, para. 2 (2006); Free Trade Agreement between New Zealand and China, Ch. 11, art 139 (2008).

specific agreements,¹⁵⁶ or (c) import protections from treaties concluded before a certain date.¹⁵⁷

D. National Treatment

A non-discrimination obligation, the national treatment standard essentially obliges the host States to treat foreign investors no less favourably than they would treat domestic investors. Typically, the national treatment clause in Indian investment treaties reads:

Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded ... to investments of its own...¹⁵⁸

The national treatment standard typically applies to the investments once they have been established in the host State. However, they could also come into play in the case of pre-establishment rights. In investment treaties that provide pre-establishment rights to investors, the national treatment obligation applies not only to investors already operating in the host country, but to potential investors who are seeking to make investments in the host State. In such cases, the foreign investor has a right to enter the host country and make an investment on terms no worse than those faced by a domestic investor involved in the same type of investment.¹⁵⁹

For instance, Article 1102 of the North American Free Trade Agreement (NAFTA) contains a national treatment provision that creates pre-establishment rights:

[E]ach Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

The greater majority of investment treaties do not include pre-establishment rights, thus giving host states the flexibility to impose any conditions on the admission and establishment of the foreign investment in accordance with its national law.¹⁶⁰ However, countries that provide pre-establishment rights in their investment treaties must be careful in the design of the energy or climate-related

¹⁵⁶ See, Canadian Model FIPA, Art. 9(3).

¹⁵⁷ *Id.*

¹⁵⁸ See, BIPA Model Text, *supra* note 121.

¹⁵⁹ Bernasconi-Osterwalder *et al.*, *supra* note 30, at 20-21.

¹⁶⁰ Marshall, *supra* note 152, at 34.

policies to impose the same requirements on the foreign investors as those on domestic investors and investors from third States.¹⁶¹

Certain investment treaties tend to exclude certain types of interests, such as those relevant to the energy or mining sectors, from the protections under the national treatment and MFN obligations.¹⁶² For example, in the Annex to the US-Kazakhstan BIT the United States “reserves the right to maintain limited exceptions to national treatment” in many sectors, including “energy and power production.” According to the Annex, the United States also reserves the right to make or maintain limited exceptions to the most favoured nation treatment in the sectors or matters relating to “mining on the public domain.” Kazakhstan, meanwhile, reserves the right to provide national treatment to those sectors involving “ownership of land, its subsoil, water, plant and animal life, and other natural resources”.¹⁶³ Similarly, in Annex to the UK-Panama BIT, the United Kingdom reserves the right to make or maintain exceptions to the national treatment and most favoured nation treatment obligations within the sectors relating to “energy and power production” and “use of lands and natural resources”; while Panama reserves the right to make or maintain exceptions within sectors relating to “energy production”, “rights to the exploitation of natural resources including fisheries and hydroelectric power production” and “ownership of land allocated within 10 kilometres of the Panamanian border”.¹⁶⁴

Such exemptions and carve outs to the national treatment or the MFN treatment standards, may well have a place in future investment treaties which aim to further a larger energy security and climate change goal.

Another difficulty in the application of the national treatment standard comes when tribunals are left to determine what constitutes “like circumstances”.¹⁶⁵ This often results in different approaches by different tribunals, resulting in continued uncertainty. However, the recent Common Market for Eastern and Southern Africa [COMESA] Investment Agreement attempts to reduce this uncertainty by establishing a non-exhaustive list of criteria for tribunals to consider when applying the national treatment standard, which requires an overall examination on a case by case basis of all the circumstances of an investment including, “its effects on the

¹⁶¹ *Id.*

¹⁶² See generally, Timothy J. Tyler & Richard D. Deusch, *Structuring Energy Projects for Investment Treaty Protection: Pitfalls and Guidelines*, 2007(2) RMMLF-INST. PAPER NO. 23 (2007).

¹⁶³ Bilateral Investment Treaty, U.S–Kazakhstan (May 19, 1992), available at: <http://www.state.gov/documents/organization/43566.pdf>.

¹⁶⁴ Bilateral Investment Treaty, U.S–Panama (Oct. 27, 1982), available at: <http://www.state.gov/documents/organization/43582.pdf>.

¹⁶⁵ Marshall, *supra* note 152, at 65.

local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment.”¹⁶⁶ Such an enumerated list could potentially control the discretion of arbitrators to find national treatment violations in a host country’s energy, environment or climate-related policy, while not creating an outright exemption to the general national treatment obligation.¹⁶⁷

E. Fair and Equitable Treatment

The fair and equitable treatment [FET] standard contains two parts: the substantive and the procedural. While the notion of “legitimate expectations” is a key element of the substantive aspect of the standard,¹⁶⁸ the procedural aspects relate to the fair and equitable nature of the host State’s administrative decision-making processes.¹⁶⁹

In regulating its domestic energy or climate-related policies, the host State will need to understand the implications of the FET standard and the investor’s “legitimate expectations”, which are based on the principles of the State ensuring “a stable business environment”¹⁷⁰ and “a transparent and predictable framework for investors’ business planning and investment”.¹⁷¹

Investment decisions in the renewable energy sector are especially marked by the continued benefit from support schemes during a given period. Thus, investors have a “legitimate expectation” that the legal and regulatory framework of the support scheme will remain stable and predictable. However, in the promotion of renewable energy through support policies, States may interfere with the amount and the duration of support. There is always a possibility of imposition of price caps and substantial changes to the tariff policy, which could prevent the recovery of costs and financially jeopardize operations of the investor.¹⁷² As is evident from the examples in the earlier part of this article, foreign investors are challenging withdrawal of price support or cuts in FiT as a possible breach of the FET standards.¹⁷³

¹⁶⁶ Article 17 of the COMESA. *See*, Marshall, *supra* note 152, at 65.

¹⁶⁷ Firger-Gerrard, *supra* note 106, at 47.

¹⁶⁸ *See*, Saluka Investments BV v. Czech Republic, UNCITRAL, *Partial Award* (dt. 17 Mar. 2006), at ¶ 302 [hereinafter *Saluka*].

¹⁶⁹ Marshall, *supra* note 152, at 43-44.

¹⁷⁰ *See*, Occidental Exploration and Production Co. v. Ecuador, LCIA Case No. UN3467 (2004) at ¶ 183; *Also see*, *Saluka*, *supra* note 168, at ¶ 303.

¹⁷¹ *See*, Metalclad Corporation v. United Mexican States, ICSID Case No. Arb/AF/97/1, (2000), at ¶ 99 [hereinafter *Metalclad*].

¹⁷² Anatole Boute, *Combatting Climate Change through Investment Arbitration Changes*, 35 FORDHAM INT’L L.J. 613, 623-625 (2012) [hereinafter Boute].

¹⁷³ *Supra* Part IV.B.

Tribunals have taken divergent approaches in determining what constitutes an investor's "legitimate expectations," making it impossible to predict how a particular tribunal will rule in a given case. Some tribunals have placed a heavy burden on host states by not allowing them to avoid obligations on the grounds that compliance may be difficult or costly,¹⁷⁴ while others acknowledge that legal and economic frameworks must evolve. As an UNCITRAL tribunal in *Saluka Investments BV v. Czech Republic* highlighted, "no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged."¹⁷⁵ However, tribunals do frown on government actions that run counter to explicit commitments. Therefore, if a country refuses to pay or diminishes the amount or duration of the promised FITs, it risks frustrating the investor's legitimate expectations.¹⁷⁶

Clarifying the FET standard to anticipate certain "legitimate expectations" claims could be beneficial for States seeking to create stable and predictable policy frameworks to incentivize clean energy investment. At present, countries that have imposed or considered imposing a price on carbon emissions are under tremendous pressure to renege on such measures. A less ambiguous FET standard, if drafted properly, could be the difference between "legitimate expectations" claims with the potential to undermine legitimate energy or climate-related regulatory measures and those likely to result from a host country's failure to maintain policies necessary to safeguard investments.¹⁷⁷

An important consideration for countries, with regard to the FET provision, is the wording of the provision in the investment treaties. Linking the FET standard to the minimum standard of treatment under customary international law allows countries to restrict the interpretation of FET to a narrow customary international law standard, which arbitrators have generally agreed applies only to "egregious" or "outrageous" conduct by a host country.¹⁷⁸ It could be done by referring to customary international law explicitly in the provision or by drafting binding interpretive statements clarifying the meaning of the obligation.¹⁷⁹ For example, in 2001 the NAFTA Free Trade Commission [FTC] issued a binding interpretation under Article 1131(2), which clarified that the FET obligation in Article 1105 is "coextensive with the international minimum standard under customary

¹⁷⁴ *GAMI Investments GAMI Investments, Inc v. United Mexican States*, UNCITRAL (NAFTA) Final Award dated 15 Nov., 2004 at ¶ 94.

¹⁷⁵ See, *Saluka*, *supra* note 168 at ¶ 305.

¹⁷⁶ Boute, *supra* note 172, at 652.

¹⁷⁷ Firger-Gerrard, *supra* note 106, at 45.

¹⁷⁸ See, *Glamis Gold, Ltd v. United States of America*, UNCITRAL (NAFTA) Award, 8 June, 2009.

¹⁷⁹ Firger-Gerrard, *supra* note 106, at 45.

international law”¹⁸⁰.

However, some argue that even customary international law is evolving towards a more demanding standard as there is uncertainty over how the FET standard will be interpreted by a tribunal even if it is grounded in customary international law.¹⁸¹ For instance, the recent award in *Railroad Development Corp. v. Guatemala* (RDC)¹⁸² is an example of a tribunal’s approach that renders the linkage of the FET standard to customary international law largely meaningless. Porterfield writes that “the reluctance of investment tribunals to base their interpretations of customary international law on actual State practice and *opinio juris* suggests that more aggressive approaches may be necessary to deter tribunals from adopting increasingly broad interpretations of FET.”¹⁸³ Thus, RDC and similar awards highlight the importance for countries to consider alternative approaches to constrain the very broad interpretation of the FET standard by tribunals.¹⁸⁴

One option for India would be to revise the FET standard in very specific terms and be explicitly demanding. For example, a provision that State conduct be outrageous or egregious in order to violate the FET or minimum treatment standard should be included.¹⁸⁵ Alternatively, it could ensure that it does not fall within the uncertain confines of the FET standard is by avoiding the inclusion of the standard in their investment treaties, as it did in the investment chapter in the CECA between Singapore and India, which entirely omits the FET clause.¹⁸⁶

F. Provisions governing Expropriation

Investment treaties generally cover expropriation of two kinds: direct and indirect. While direct expropriation is a physical taking or nationalization of an investment involving a transfer of ownership to the host State, indirect

¹⁸⁰ *Id.*

¹⁸¹ Matthew C. Porterfield, *A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment under Customary International Law by Investment Tribunals*, INVESTMENT TREATY NEWS (Mar. 22, 2013), available at: <http://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/> [hereinafter Porterfield].

¹⁸² *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012) available at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C116>.

¹⁸³ Porterfield, *supra* note 181.

¹⁸⁴ *Id.*

¹⁸⁵ Bernasconi-Osterwalder *et al.*, *supra* note 29, at 14-15.

¹⁸⁶ Comprehensive Economic Cooperation Agreement, India–Singapore (2005), available at: <http://www.commerce.nic.in/ceca/toc.htm>.

expropriation is more difficult to define. Indirect expropriation has been identified as those actions through which the host State takes effective control of the investment, without a direct taking of the legal property. Most treaties contain expropriation provisions stating that it governs “direct and indirect expropriation” or “expropriation and measures tantamount to expropriation”. Thus, even if indirect expropriation is not specifically mentioned, tribunals have interpreted the expropriation provisions to cover indirect expropriation as well.¹⁸⁷

Although the tribunal did not rule on the question of expropriation in the *White Industries* arbitration, it made two very important observations that could have serious implications for future disputes involving India. *First*, it stated that all contractual rights, tangible or intangible, are capable of being expropriated. *Second*, it found the expropriation claim to be unfounded as the courts were yet to rule on Coal India’s application to set aside the foreign arbitral award and therefore, the award has not been “taken”. Thus, implying that a foreign arbitral award is an ‘investment’ under the BIT and that the setting aside of such valid foreign awards could constitute expropriation under the BIT.¹⁸⁸

Moreover, investment rules on direct and indirect expropriation also have the potential to be used to challenge climate-related measures that reduce the economic value of a particular investment.¹⁸⁹

In cases of renewable energy, a likely challenge could be that withdrawal of price support or cuts in FiT amount to indirect expropriation. Tribunals relying on the so-called “sole effects doctrine”, such as in the case of *Metalclad Corporation v. United Mexican States*¹⁹⁰ and many others that followed, could view such a measure as an indirect expropriation if it results in a significant decline in the economic value of the investment. However, it has been argued that FiTs merely entitle the operators of the renewable energy installation to fixed prices and that these may not be traded independently from the main electricity transaction.¹⁹¹ In that light, since FiTs are incapable of independent economic exploitation and investors will likely not lose control of their installations, any interference with such schemes may not be considered expropriation.¹⁹²

Although in recent times, tribunals have been reluctant to characterize measures as indirect or regulatory expropriation and have gone to assess regulatory

¹⁸⁷ *Id.* at 15-16.

¹⁸⁸ *See*, *White Industries Award*, *supra* note 54, ¶¶ 12.3.5-6. Also refer, Ranjan 2012a, *supra* note 55.

¹⁸⁹ *See*, WIR 2010, *supra* note 101, at 137.

¹⁹⁰ *Metalclad*, *supra* note 171.

¹⁹¹ Boute, *supra* note 172, at 635.

¹⁹² *Id.*

interferences with the investment largely under the fair and equitable treatment standard,¹⁹³ countries must aim to clarify or narrow the scope of indirect expropriation in order to preserve its policy space for climate change measures. An example of clarifying the scope of indirect expropriation can be seen in the 2004 Canadian Model BIT that provides:

Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.¹⁹⁴

While the U.S. and Canadian Model BITs go a long way towards alleviating concerns that climate-related regulations might be held to be in breach of the provisions of an investment treaty, the 2007 COMESA Investment Agreement¹⁹⁵ goes a step further and states that “*bona fide* [emphasis added] regulatory measures [...] that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment” shall not constitute indirect expropriation.¹⁹⁶

G. Performance Requirements

The “performance requirements” issue has played an important role in the international investment debate. These may be obligations that are linked to the approval of the investment, and may sometimes differ from comparable requirements imposed on domestic investors.¹⁹⁷ They are of particular interest to developing countries, since they can be used as a tool to ensure that the incoming foreign investments are guided towards local and national priorities to further environmentally and socially sustainable development.¹⁹⁸ However, performance

¹⁹³ Krajewski, *supra* note 63, at 357.

¹⁹⁴ Canada Model FIPA, 2003, Annex B.13(c); Austria Model BIT, 2008, Art. 7(4).

¹⁹⁵ Common Market for Eastern and Southern Africa Common Investment Agreement, Article 20(8) reads:

Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.

¹⁹⁶ Firger-Gerrard, *supra* note 106, at 44.

¹⁹⁷ Moltke, *supra* note 120, at 64.

¹⁹⁸ *Foreign Investment and Sustainable Development* (Center for International Environmental Law, 2002), available at: <http://www.ciel.org/Publications/investment.pdf>

requirements are strictly prohibited under some treaty models and such a ban on performance requirements can significantly weaken the developing country's bargaining position to promote sustainable development goals.¹⁹⁹

The argument for banning performance requirements has two pillars: *first*, performance requirements are economically inefficient entailing the risk of defeating the every purpose of the investment agreement; and *second*, it assumes that governments are in a position to impose their will on investors.²⁰⁰ However, very little attention has been paid to the fact that a prohibition on performance requirements in investment treaties has the potential to hinder governmental efforts to pursue certain types of social policies.²⁰¹ Local content or domestic content requirements in a country's domestic climate-related policy such as FiT for renewable energy investment are particularly vulnerable to investor challenge if the country's investment treaties contain an express prohibition on performance requirements.

The great majority of the 3000 investment treaties and chapters do not include any provisions banning or limiting the use of performance requirements. However, the United States and Canadian Model BITs, most United States and Canadian BITs and FTAs contain a specific provision prohibiting performance requirements.²⁰² Significantly, investment agreements of the European Union member States, as well as the recent regional investment agreements of COMESA and South African Development Community [SADC] do not mention performance requirements or a prohibition thereof.

Indian investment treaties do not contain a prohibition on performance requirements, with the exception of the 2005 CECA between India and Singapore.²⁰³ It contains provisions on performance requirements simply by referencing and incorporating the WTO Agreement on Trade-Related Investment Measures (TRIMs). The TRIMs Agreement explicitly provides restrictions on performance requirements, building on the notion that certain investment measures can have trade-restricting or distorting effects and therefore, prohibits certain categories of trade-related performance requirements such as requirements

¹⁹⁹ *Id.*

²⁰⁰ Moltke, *supra* note 120, at 64.

²⁰¹ Peterson, *supra* note 31, at 34.

²⁰² See e.g. Canada-Peru BIT (2006), Canada-Jordan BIT (2009), Canada-Romania BIT (2009), Canada-Latvia BIT (2009). Canada's Free Trade Agreements with Colombia (2011), Peru (2008) and Panama (2010). Also, U.S.-Uruguay BIT (2005), U.S.-Rwanda BIT (2008), the Dominican Republic-Central America-United States Free Trade Agreement (2004), US-Chile FTA (2004), US-Morocco (2004), US-Peru Trade Promotion Agreement (2006) and US-Oman FTA (2009).

²⁰³ Article 6.23, 2005 CECA between India and Singapore.

for domestic sourcing of inputs, and restrictions on imports and exports related to local production.²⁰⁴

Thus, the main issue a country like India needs to be mindful of while designing its energy or climate-related policies is not to include local content or technology transfer requirements if their investment treaties contain a prohibition on performance requirements. Such measures could be vulnerable to potential investor challenges, unless the scope of the prohibition on performance requirements is limited through exceptions.

The scope of the prohibition on performance requirements can be limited through exceptions. One can see two kinds of exceptions clauses: (i) a general exceptions clause, applicable to all or a series of host State obligations;²⁰⁵ and (ii) an

²⁰⁴ See, Annex to the WTO Agreement on Trade-Related Investment Measures, Apr. 15, 1994, 1868 U.N.T.S. 186.

Illustrative List

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

(a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

²⁰⁵ See, Article 10 Canadian Model BIT 2004.

exceptions clause applicable to specific performance requirements restrictions and prohibitions.²⁰⁶ These general or specific exceptions relating to the environmental exceptions could be relevant for justifying certain performance requirements, such as those relating to technology transfer or local content requirements in renewable energy projects. It could be argued that such performance requirements are necessary for the generation of employment opportunities and in turn strengthening the renewable energy sector, the promotion of which is in line with the larger aim of climate change mitigation.

H. Exceptions and Non-Precluded Measures

Indian investment treaties contain provisions relating to Non-Precluded Measures [NPMs], which typically start with: “nothing in this agreement precludes” and provide the vital regulatory flexibility to host countries to deal with threats to important national interests, thereby allowing the host countries to adopt measures for the pursuance of non-investment objectives without incurring any liability under international law.²⁰⁷ However, according to Ranjan, such provisions are inadequate in India’s treaties, and that the present formulation of NPM provisions is inadequate for the exercise of regulatory power by India for all its policy needs.²⁰⁸

One of the considerations within Indian investment treaties is whether the “national security” or “essential security” exceptions contained in the NPM provisions would apply if a foreign investor brings an investment treaty-based claim against a host State in response to the State’s enactment of an energy security or climate-related policy or regulatory measure?

At present, given the current formulations the essential security interest in Indian investment, treaties can be interpreted in two ways – narrowly and broadly. In the narrow interpretation, the essential security interest may be limited to narrow security interest such as military threat. This is also supported by the fact that the object and purpose of most Indian investment treaties is investment protection. Thus, an exception from investment protection would be very narrowly construed.²⁰⁹ A broad interpretation of the essential security interest, on the other hand, could cover both “security” and “non-security” policy objectives.²¹⁰

It has been argued that the national or essential security exception could cover

²⁰⁶ See, Article 8(3) U.S. Model BIT 2012.

²⁰⁷ See generally, Prabhash Ranjan, *Non-Precluded Measures in Indian International Investment Agreements and India’s Regulatory Power as a Host Nation*, 2 ASIAN J. INT’L L. 1-38 (2011).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 18.

²¹⁰ *Id.* at 19.

host States' climate change-related measures, because there are numerous and diverse implications of climate change for national security issues due to the many direct and indirect impacts of climate change within and between countries.²¹¹ Therefore, it is argued that just as likelihood of investors bringing challenges against host States' climate change-related measures is high, the possibility that host States will defend such a challenge by relying on the national security exception is also a very real one.²¹² In fact, climate change is also predicted to give rise to and/or exacerbate resource scarcity, which may cause or contribute to conflicts within or between nations.²¹³ Thus, policies aimed at ensuring resource security or energy supply security on account of resource scarcity could be covered by a broad interpretation of the essential security interest.

However, the current formulation of NPM provisions in Indian investment treaties does not provide legitimacy to measures designed to address energy security or climate change concerns. Thus, in addition to all the definitional changes suggested to the substantive provisions of investment treaties, another option for preserving regulatory flexibility for energy security or climate change-related policy objectives is by including environmental clauses in the investment treaties. For instance, the 2009 India-Korea Comprehensive Economic Partnership Agreement (CEPA) includes measures that may be "necessary to protect human, animal or plant life or health, or the environment" in the general exceptions clause.²¹⁴ India could also look to create a carve out from ISDS, national treatment or other substantive obligations for climate change measures, as under the Belgium-Colombia BIT (2009) and the COMESA investment agreement, respectively.²¹⁵

VII. CONCLUSION

The competing pressures of energy security, climate change and investment point to the importance of policy and legal clarity on how the domestic regulatory space in the energy sector could be constrained by its interaction with international investment rules. Additionally, India's interest in investment treaties is not only as a host country whose domestic policy space may be stifled, but also from the point of view of an outward investor that would want to be covered by the protections offered to foreign investors under BITs. Thus, any renegotiation in existing Indian

²¹¹ Lise Johnson, *International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing It*, 39 ENVTL. L. REP. 11147, 11154-11156 (2009).

²¹² *Id.* at 11156.

²¹³ *Id.* at 11155.

²¹⁴ WIR 2010, *supra* note 101, at 88.

²¹⁵ Fieger-Gerrard, *supra* note 106, at 47.

investment treaties is fraught with both these sets of concerns and the solution cannot be to completely remove the ISDS clause from the treaties.

In light of the complex energy regime motivated by the twin concerns of climate change and energy security, one of the most viable options for India to ensure a more flexible regulatory space, is to weave in sustainable development concerns in existing investment treaties by changing the language of the provisions or by providing better interpretative tools for the clauses. For India, energy security and climate change concerns come hand in hand with economic development, and it is important that in its zealotry to undertake regulatory action in that regard, it does not hurt the investment climate in the country. Using the backdrop of the Indian energy sector, this article makes an attempt to establish the need for coherent design choices for Indian investment treaties in order to ensure that investment can be a means to an end i.e. energy security and climate change policy. Moreover, in order to protect its outward foreign investors, India must be careful not to exclude the basic investor protections in the investment treaties, especially the ISDS clause. It is important for India to ensure transparent and more comprehensive clauses in investment agreements that are crucial in fostering a safer investment climate in the country, furthering sustainable development goals, reducing the incidence of investor-State disputes and protecting the interests of its own investors abroad.