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Aniruddha Rajput

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Foreword

This book fulfils the expectations which are raised by its title, and it goes beyond. It provides a well-structured and comprehensive account of the law relating to the protection of foreign investment in India. But it is not merely a treatise which faithfully records this country's law and the practice regarding investment protection. This book also offers a historically informed and politically sensitive analysis of the Indian experience with investment protection from the time of independence to the complex situation today.

The author, Dr Aniruddha Rajput, is particularly qualified to write this book. After getting deeply acquainted with the topic academically, he was called, by the Government of India, to contribute to developing the new Indian Model BIT 2015. This unique combination of experience has enabled Dr Rajput to offer a meticulous description of the Indian practice over time, with an emphasis on the present situation, as well as an authentic articulation of the spirit of the current Indian policy. This spirit is self-confident and ambitious. One of its characteristics is the apparent tension between a perceived 'progress' in investment protection in India and a simultaneous 'regress' in the possibility of investors to bring claims before international investment tribunals. Dr Rajput, who, as an Advocate at the Supreme Court of India, has a strong basis in national law, can credibly describe the important protections which Indian Law, and in particular the Indian judiciary, provide for investors. At the same time, Dr Rajput, who is now also a member of the UN International Law Commission, displays a keen sense of the international political and legal situation in the area of investment protection more generally situates the Indian law and policy within this general framework. This entails the credible ambition of India to change from being a norm-taker to that of a norm maker.

Foreword

This book is an important read, not only for those who wish to get a reliable sense of the state of investment protection in India, but also for those want to become familiar with the political dynamics and motivations in this context. Investment protection in India is an important element of investment protection law more generally, and its development. Dr Rajput's book gives us a missing piece in the development of investment law, and international law more generally.

Georg Nolte
Professor of Law, Humboldt University Berlin
Member and Chair of the International Law Commission
Berlin, September 2017

Preface

The World Trade Organization (WTO) commenced its operations as a new international organization (IO) in January 1995. At the very first WTO General Council's meeting held on January 31, 1995, the Committee on Trade and Environment (the *CTE*) was formally created with its first chairman being appointed in the person of Ambassador Juan Carlos Sanchez Arnau of Argentina, who would convene its first meeting on February 16, 1995.

The CTE already had its roots in its predecessor, known as the Working Group on Environmental Measures and International Trade (*GEMIT*), established by the General Agreement on Tariffs and Trade (GATT) in November 1971. Expectations had always run high on what the GATT or its successor, the WTO, could contribute to the quest for effective global governance in the field of environmental protection; to trade experts, this expectation was welcomed with a mix of caution and willingness. In both instances, in 1971, and again in 1994, the creation of the GEMIT, and later the CTE, were closely linked to then-current global events in the field of environment advocacy, particularly in relation to preparations for the Stockholm 1972 United Nations (UN) Conference on the Human Environment and the preparations for, and implementation of the Rio Earth Summit in 1992.

This book was initially motivated by my chairing the CTE (in regular and Special Session) from 2007 to 2011, triggering an interest in the committee's history with the question in mind of identifying the contributions of the CTE to improving trade and environment global governance. It can, therefore, be viewed as an attempt to evaluate and understand the historical performance and work of the CTE as an institution and as an IO, promoting both trade and environment policy objectives.

To a legal practitioner as myself, more inclined to measuring performance through the lens of results, outputs, deliverables, bills or laws passed, and cases won or lost, the natural question was whether there was any advantage or public good that could be derived from the years of work that international practitioners, bureaucrats like myself, and secretariat teams had devoted to the subject, despite the cold fact that there remains no actual new rule or treaty law to speak of that the CTE can lay claim to as evidence of norm creation or international law (IL) formulation. Hence, inspired by the reference to Sisyphus, pre-Camus, and like Zhi Sou, the interlocutor of Yu Gong, my study sought to know the existential meaning or value of all the CTE activity and documentation over the last two decades, hoping it can be more than a lot of *sound and fury*.

Over the course of writing this book, however, which required a detailed examination of the specific work outputs of the CTE, and the repetitive proceedings and recorded minutes, including pre-CTE GATT materials, and some pre-GATT historical records, the superficiality of seeking only hard results and outputs became evident. The main focus of this book evolved naturally towards a more nuanced and contextualized approach at assessing the work processes and deliberations of the CTE, as part of the general evolution of the trade, development, and environment legal and policy regimes. With that, the focus also shifted towards a greater understanding of how particular objectives and specific mechanisms are underpinned by particular policy agendas, biases, movements, or trends in the domestic, regional and international fora concerned.

This is not unique to the CTE, and the assessment approaches suggested or derived in this book could be useful as well in approaching the work of other international cooperation fora that are prone to generating work outputs similar to the CTE that are not delivered as binding new rules or treaties. Of course, not all rules or norms are subject to reform or change; some are clearly meant to remain constant anchors to the very basic system it underpins. So in trade, development and environment, the basic anchor in a rules-based system, i.e., of promoting fair and open markets, has remained constant, and the role of that constant aids in providing a stable grounding for the competing forces at play and to balance the conflicting interests and occasional tensions between the different policy regimes, and their respective immediate or medium-term objectives.

However, there are two divergent theoretical frameworks underpinning the international rules-based system. One frame is biased towards a singular solution approach of unified governance and harmonization, sometimes described as *Leviathan* or *Hobbesian* in tone; the other or counter-trend attempts to find localized or regionalized solutions, that is perhaps best inspired by Elinor Ostrom's work espousing alternative models for governing the commons as discussed below.

The CTE in the WTO provides a particular example of that tension between a globalized or a localized approach to addressing particular challenges and problems, and the availability of approaches that are shades of grey in between. With these frameworks, it is hoped that this book can contribute to a better understanding and appreciation of the role of the CTE in the continuing dialog on how to best *govern the commons* through approaches that can engender best practices in the formulation of globalized, regional or localized trade and environment norms, rules and policies.

List of Abbreviations

BIPAs	Bilateral Investment Promotion and Protection Agreements
BIT	Bilateral Investment Treaty
CCEA	Cabinet Committee on Economic Affairs
CPC	Code of Civil Procedure, 1908
DPC	Dabhol Power Company
DTH	Direct to home
EU	European Union
FCN	Friendship Commerce and Navigation
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act
FERA	Foreign Exchange Regulation Act
FET	Fair and Equitable Treatment
FIB	Foreign Investment Board
FIPB	Foreign Investment Promotion Board
FPS	Full Protection and Security
FTA	Free Trade Agreement
G77	Group of 77
GATT	General Agreement on Tariff and Trade
GE	General Electric
IBA	International Bar Association
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
IFAD	International Fund for Agriculture Development

List of Abbreviations

IIAs	International Investment Agreements
ILC	International Law Commission
IMF	International Monetary Fund
ISA	International Seabed Authority
ITA	Investment treaty arbitration
LCIA	London Court of International Arbitration
LDCs	least developed countries
LIBOR	London Interbank Offered Rate
LLP	Limited Liability Partnership
MAI	Multilateral Agreement on Investments
MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agreement
MNCs	Multinational Corporations
MSEB	Maharashtra State Electricity Board
NAFTA	North American Free Trade Agreement
NIEO	New International Economic Order
NT	National Treatment
OECD	Organization for Economic Cooperation and Development
OPIC	Overseas Private Investment Corporation
PCIJ	Permanent Court of International Justice
RBI	Reserve Bank of India
SEBI	Securities and Exchange Board of India
TRIM	Trade Related Investment Measures
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States
USA	United States of America
USD	United States Dollars
VCFs	Venture Capital Funds
VCLT	Vienna Convention on Law of Treaties, 1969
WTO	World Trade Organization

Acknowledgements

I take this opportunity to thank various persons and institutions that have contributed immensely for the successful completion of this book. Most portions of the book were written during my stay at Berlin with the KFG International Rule of Law Rise or Decline? My sojourn in Berlin was possible due to the generous invitation extended by Professor Georg Nolte – an invitation supported by his colleagues Professor Heike Krieger and Professor Andreas Zimmermann. The intellectual environment there was robust and gratifying, which facilitated the work on this book. Researchers at the research group were helpful to find books and other material from time to time.

I must also thank students that assisted me at various stages of the project. They are Sarthak Malhotra, Vikhyat Oberoi, Rouble Sorkkar, Debaranjan Goswami, Karthik Tayur, Vaishali Movva, Gayathree Devi K.T., Vishakha Choudhary, Nirmal Mathew and Pradyumna Duwarah.

Equally crucial has been the role of the publishers: Kluwer International. The professional and experienced team allowed, facilitated and expedited the preparation of the book; and its presentation in the form in which the readers have it before them.

My parents Dr Dhananjay Rajput and Mrs Vasundhara Rajput have always been a source of inspiration. Despite all my failings and drawbacks they always believed in me and persuaded me to undertake and continue in an uninterrupted manner, an 'intellectual journey' – of which, the present book is a part.

Chapter 2
Historical Background of Investment Protection

In unravelling the stumbling or building block debate on the Regional Trade Agreement (RTA) and World Trade Organization (WTO) dispute settlement mechanisms, we commence by giving an overview of multilateralism. We then pay specific attention to the WTO dispute settlement mechanism, and give a descriptive outline of the WTO dispute settlement. Given the broad scope of WTO dispute settlement, this study only focuses on some attributes or features of the system; namely, standing, standard of review and remedies. These features are key for the creation of the relationship between the RTA and WTO dispute settlement mechanisms. With regard to regionalism, the discussion will give a background of regionalism and political economy of RTA dispute settlement mechanisms. Lastly, the chapter concludes by looking at the question of whether the RTA dispute settlement institutions are a building or stumbling block to a coherent global trading system.

Indian policy and outlook towards foreign investment and its protection have transformed overtime. It has oscillated from one approach to another in the past and now appears to have stabilized. There have been three phases. The first two phases represent oscillation from one approach to another, whereas the third represents maturity and stability. The first phase extended from the time of independence from the British rule, until the reluctant opening of the Indian economy in 1991. At this point, the second phase begins. The second period extends from the integration of the Indian economy with the world economy through regulatory reforms, including liberalization, allowing easier entry and operation of foreign investment and investors in India. This period ended with the first investment arbitration case that India lost in 2011 (*White Industries v. India*). This case marks an important policy shift in the policy and international legal framework for the protection of foreign investment.

§2.01 THE FIRST PHASE (1947–1991)

The first phase is long with some variations in the Indian policy. However, it would be appropriate to discuss the whole period of the first phase together, as there were no sudden policy shifts. The changes were mostly gradual. The approach of the Government of India could be understood better if the domestic and international law approaches are seen separately. However, before undertaking the discussion on the Indian approach to investor protection in domestic and international law, it would be informative to understand the nature of the Indian economy and the role of foreign investors at the time of independence from the British rule.

[A] The Role of Foreign Investment at the Time of Independence

Kidron starts his book on the history of foreign investment in India with the following instructive paragraph:

> With independence, India became host to a large body of foreign capital. It was three-quarters British, almost entirely privately-owned, and still fairly typical of business investment in a colonial economy. Characteristically, it concentrated on extractive industries and processing for export for international trade, and on ancillary services. At the first official count, less than a year after Independence, a little over one-quarter was in tea and jute which together made up half [of] India's exports; 17 percent in trading; finance and management accounted for just 8 percent; and utilities (electricity mainly) and transport (shipping mainly) for about 6 percent each. No more than one-fifth was invested in manufacturing jute.[1]

The reason for dominance of British private business was the policy of the British Government. In 1930, the bulk of British investments in India were in, 'tea, jute, cotton, mining, timber, leather, shipping, railways, agriculture, engineering, insurance, banking, and in general all forms of export and import trade.'[2] The British Government adopted a policy of encouraging investors from Britain, undertook steps for their promotion and protection and actively discouraged domestic Indian investments and investors. The Government gave aid to British companies in shipping, railway construction and made land and labour available for tree plantation. These British companies had lobbied for these benefits with their government.[3] The British funded and supported many industry associations. These associations were primarily meant to assist British businesses; they showed complete indifference to the needs of Indian businesses and expectations.[4] In the shipping industry, the authorities gave contracts to companies in which they had interests for a long duration without allowing any opportunity to Indian companies to compete. This kept the control of the shipping industry exclusively in British hands, and Indian competitors were driven out of

1. Michael Kidron, *Foreign Investment in India* 3 (Oxford Univ. Press 1965).
2. *Ibid.* For a detailed discussion on the number of sectors under control of foreign investment, extent of control with individuals from England and development of an economic chain from financing, banking to import and export, *See ibid.*, at 3–11.
3. *Ibid.*, at 112.
4. *Ibid.*, at 9.

business.[5] Moreover, during the Second World War, the Indian shipping industry was requisitioned and the control was handed over to those protecting British shipping interests.[6] There were various tariff benefits granted to British companies that were not extended to the Indian companies.[7]

In addition to the hostile regulatory framework towards Indian investors, the market conditions were maintained unfavourably through other means. Banks were inaccessible for Indian borrowers. The cost of borrowing was high and special privileges were granted to foreigners. Indian banks were discouraged and measures were taken to destroy their business by declining recognition and through unfavourable regulations.[8] The monetary policy, particularly the currency exchange rate, was structured to facilitate British investors. According to Jathar, 'the basis of the British Government and British business interests was towards a high rather than a low ratio for the rupee, in other words, towards making a certain number of rupees earned in India worth more and more in terms of pounds, shillings and pence in England'.[9] Kidron points out that 'there is substance in the charge of conscious and active discrimination'.[10] Despite these challenges, some Indian entrepreneurs emerged and survived the onslaught of British policies. The impact of the British policies on the Indian companies continued for years after independence, and the 'Indian capital bore the marks of having grown in the shadows of a powerful, tightly-knot foreign competitor, and an unsympathetic, frequently hostile state.'[11]

Where there is a contradiction between different sources, the general approach adopted by the labour courts is to take that which is more favourable to the employee. The legal sources are interpreted by the labour court, the main judicial body developing labour law (and in some cases creating new norms and mandatory practices). It should also be noted that international standards (the ILO conventions adopted by Israel and also EU standards) are used as guidelines by the labour courts even though they are not binding.

During the earlier years of its establishment, Israel was a country with socialist orientation. The General Federation of Workers in Israel (the 'Histadrut') played an influential and important role in the early development of labour laws in Israel. In addition to providing direct membership to blue and white collar unions, the Histadrut provided social services – health care, pensions, insurance schemes, sports and cultural activities, etc. The Histadrut was an integral part of the labour movement, which formed the government coalitions until 1977. The influence of the Histadrut combined with the ideology of the labour movement led to the adoption of a comprehensive system of employee protective legislation for employment laws. The union density was high and remained so until the 1990s.

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5. Walchand Hirachand, *Why Indian Shipping Does Not Grow*, 4 Bombay Investors Yearbook 58–66 (1940) cited in Kidron, *supra* n. 1, at 16–17.
6. Kidron, *supra* n. 1, at 65.
7. *Ibid.*, at 12–14.
8. *Ibid.*, at 9–10.
9. *Ibid*, at 17.
10. *Ibid.*, at 9.
11. *Ibid.*, at 19.

This high union density resulted in collective agreements governing most large workplaces. The preference was to keep the courts out of the area of collective labour law – resulting in a model of state non-intervention in this area. The legislation governing collective labour law is the Collective Agreements Law, 1957 and the Settlement of Labour Disputes Law, 1957. Until the early 1970s, there were no limits on strikes and the law gave unions and strikers protection for strike activity.

In the early 1970s (with the adoption of the Labour Courts Law, 1969), the labour courts were established. The labour courts have made a significant contribution to the development of labour law in Israel. For example, the labour courts have contributed to the stabilization of labour relations and settlement of collective disputes through negotiation and adjudication. They also interpret collective and individual agreements and reside over cases involving employee rights.

The situation in other newly independent countries was not very different. In some cases, it was dramatic as compared to India. The control of the economy was in the hands of companies and foreign investors from the colonizing state, and investments were mostly in non-priority sectors such as extraction and export of natural resources. There was no effort made by the colonial governments to adopt policies that would facilitate and ensure foreign investments in important sectors necessary for growth or the ones which were labour intensive. The focus was on protecting the business interests of the investors from the colonizing country.[12]

[B] Domestic Policy Towards Foreign Investment

Having faced discrimination at the hands of the British Government during the colonial times, there was resentment towards foreign investment from the domestic industry. The domestic industry was insisting that all foreign investments are bought and their control from foreign hands be taken away. The existing foreign investments were mostly in natural resource extraction; therefore, they were retarding the nation's development.[13]

The newly formed government of independent India did not accept this approach. During this time, especially in the 1950s and 1960s, the Government was receptive and welcoming towards foreign investment. The economic philosophy in this duration was to allow foreign investors to operate with the knowledge that eventually they would have to transfer technology, skill and finally control to nationals of the host state.[14] In the Industrial Policy Resolution of 1948, the Government gave an indication to that effect. It was unequivocally stated that whenever the control of the foreigner's property would be taken, it would be subject to the fundamental rights under the Indian Constitution, and, fair and equitable compensation. At that time, right to property was a fundamental right. The relevant part of the Resolution was:

12. *Ibid.*, 300–305.
13. Jagdish Bhagwati & Padma Desai, *India: Planning for Industrialization* 216-1 (Oxford Univ. Press 1970).
14. For a detailed discussion on import substitution policy, *see ibid.*

> While the inherent right of the State to acquire any existing industrial undertaking will always remain, and will be exercised whenever the public interest requires it, Government has [*sic*] decided to let existing undertakings in these fields develop for a period of ten years, during which they will be allowed all facilities for efficient working and reasonable expansion. At the end of this period, the whole matter will be reviewed and a decision taken in the light of circumstances obtaining at the time. If it is decided that the State should acquire any unit, the fundamental rights guaranteed by the Constitution will be observed and compensation will be awarded on a fair and equitable basis.[15]

The insistence on the transfer of ownership within ten years was changed in the following year. There was a retreat from the Industrial Policy Statement of 1948,[16] and the Indian government adopted an open foreign investment regime.[17] The World Bank was influential in India's policy-making right from the early years of independence. In 1949, the Bank sent its first Mission to survey the potentialities of Indian economy. As a follow-up of the Industrial Policy of 1948, the Prime Minister, Jawaharlal Nehru submitted a special policy statement on foreign capital to the Parliament on 6 April 1949. It was declared that:

1. Existing foreign interests would be accorded 'national treatment': 'Government does not [sic]intend to place any restrictions or impose any conditions which are not applicable to similar Indian enterprise'.
2. New foreign capital would be encouraged: 'Government would so frame their policy as to enable further foreign capital to be invested in India on terms and conditions that are mutually advantageous.'
3. Profits and remittances abroad would be allowed, as would capital remittances of concerns 'compulsorily acquired'.
4. Fair compensation would be paid 'if and when foreign enterprises are compulsorily acquired'.
5. Although majority ownership by Indians was preferred, 'Government will not object to foreign capital having control of a concern for a limited period, if it is found to be in the national interest, and each individual case will be dealt with on its own merits'.
6. 'Vital importance' was still attached to rapid Industrialization of personnel, but 'Government would not object to the employment of non-Indians in posts requiring technical skills and experience when Indians of requisite qualifications are not available'.[18]

From the legal standpoint, two principles emerge from this policy and they remained the cornerstone of the Indian attitude towards foreign investment at the international level: national treatment (NT – no higher treatment to foreign investors than domestic investors), and the right of nationalization, subject to the payment of fair compensation.

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15. Ministry of Micro, Small and Medium Enterprises, Government of India, *Industrial Policy Resolution (IPR)*, para. 4 (6 Apr. 1948) http://laghu-udyog.gov.in/policies/iip.htm (accessed 19 Mar. 2017).
16. N.K. Chandra, *Role of Foreign Capital in India*, 5(9) Social Scientist 3–20 (1977); G. Findlay Shirras, *Foreign Capital in India – A Rejoinder* 43(171) Econ. J. 532–534 (September 1933).
17. Arvind Panagariya, *India: The Emerging Giant* 29–30 (Oxford Univ. Press 2008).
18. Kidron, *supra* n. 1, at 101.

The Government gave many concessions to foreign firms including reduction in wealth tax and tax exemption to foreign personnel. In the budgets of 1959 and 1961, the government lowered taxes on corporate incomes and royalties of foreign firms. Double taxation treaties were signed in this period.[19] In 1961, the Government of India established the Indian Investment Centre with offices in major capital-exporting countries to disseminate information and advice on the profitability of investing in India. Officers from the Ministry of Commerce and Industry were appointed to guide foreign investors.[20] Local participation was encouraged but not insisted on, and foreign firms were welcome.[21] The response of MNCs was lukewarm in the early 1950s, and they did not show much interest in investing, except in oil refineries. After 1957, substantial investments came into various industries which were considered to be non-essential by the government (Table 2.1). During this time there were some joint ventures of foreign investors with Indian companies, including setting up of manufacturing subsidiaries in India by drug companies.[22]

Table 2.1 GATT Period GEMIT Work Outputs

No.	*Date Issued*	*Document*	*Document Description*
1	April 29, 1992	TRE/W/1	Trade Provisions Contained in MEAs
2	September 4, 1992	TRE/W/2	Agenda Item 2: Multilateral Transparency of National Environmental Regulations
3	September 29, 1992	TRE/W/3	Agenda Item 3: Packaging and Labelling Requirements
4	November 16, 1992	TRE/W/4	Multilateral Transparency of National Environmental Regulations likely to have Trade Effects
5	November 17, 1992	TRE/W/5	European Community Submission on ‘The GATT and the Trade Provisions of Multilateral Environmental Agreements’
6	December 11, 1992	TRE/W/6	United States submission on ‘Environmental Packaging and Labeling Activities in the United States’
7	March 3, 1993	TRE/W/7	Agenda Item 2: Multilateral Transparency of National Environmental Regulations likely to have Trade Effects
8	March 10, 1993	TRE/W/8	New Zealand submission on ‘Agenda Item 1: Trade Provisions Contained in Existing MEAs vis-a-vis GATT Principles and Provisions’
9	March 10, 1993	TRE/W/9	Agenda Item 3: Trade Effects of New Packaging and Labelling Requirement aimed at Protecting the Environment

19. Panagariya, *supra* n. 17, at 30.
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*, at 30–31.

No.	*Date Issued*	*Document*	*Document Description*
10	March 17, 1993	TRE/W/10	Agenda Item 2: Multilateral Transparency of National Environmental Regulations likely to have Trade Effects
11	June 9, 1993	TRE/W/11	Poland submission on 'Ecological Labeling and Utilization of used Packaging in Poland'
12	June 14, 1993	TRE/W/12	Agenda Item 3: Packaging and Labelling Requirements
13	June 29, 1993	TRE/W/13	The Trade Effects of Environmental Measures
14	July 21, 1993	TRE/W/14 COM.TD/W/503	UNCED Follow-up: Results of the First Session of the Commission on Sustainable Development and other Related Activities
15	July 23, 1993	TRE/W/15	Germany submission on 'The Packaging Ordinance and International Trade'
16	September 2, 1993	TRE/W/16	Agenda Item 1: Trade Provisions contained in Existing Multilateral Environmental Agreements vis-à-vis GATT Principles and Provisions
17	September 7, 1993	TRE/W/17	Agenda Item 1: Trade Provisions Contained in Existing MEAs vis-à-vis GATT Principles and Provisions
18	October 1, 1993	TRE/W/18	Agenda Item 1: Trade Provisions Contained in Existing Multilateral Environmental Agreements vis-à-vis GATT Principles and Provisions
19	October 1, 1993	TRE/W/19	Austria submission on 'GATT and International Environmental Agreements (IEAS)'[1]
20	January 11, 1994	TRE/W/20	Border Tax Adjustments
21	January 17, 1994	TRE/W/21	Unnecessary Obstacles to International Trade

Source: Summary of Reports of CTE and CTESS from 1995 till 2018.

[1] GATT and International Environmental Agreements (IEAS).

The peculiar characteristic of India was absence of mass scale nationalization of foreign business as was done in other newly independent countries. The post-independence era was marked by economic nationalism for many states. This was the time when the governments of the newly independent states took over control of major industries with strategic importance and high economic value from foreigners. These foreigners belonged mostly to the colonizing powers. The governments of the newly independent states nationalized or expropriated properties of foreigners. Whereas, targeted nationalization or expropriation of foreign property did not take place in India. There were no xenophobic tendencies, and the relations between India and its former colonizer England remained cordial and friendly. India continued to remain a part of Commonwealth while retaining its sovereignty and nationality. The last Viceroy sent to

India by the British was requested to stay back as the Governor General of independent India.[23] However, Indians suffered effects of nationalization abroad, in Burma, Ethiopia, Mozambique, Portugal, Tanzania and Uganda. There were several problems but all of them were resolved peacefully.[24]

Nationalization was undertaken sector-wise in India, applicable without discrimination towards foreigners, and without the philosophy of taking back control from foreign corporations. In some cases, foreign investors were excluded from such measures. Air transport was nationalized in 1953, Imperial Bank was nationalized in 1955, life insurance in January 1956 and Kolar Gold Fields in December 1956.[25] Each of these nationalizations was undertaken for specific and well-defined objectives, rather than as a part of an anti-private sector strategy. Air transport in India was weakly organized and incapable of being extended to other cities and abroad without government support. The Imperial Bank was nationalized to create structures for availability of credit in small towns to reduce the presence and influence of private money-lenders, and the overall unwillingness of banks to provide services in rural areas. This was an important area to be brought under financial inclusion. Life insurance was nationalized to clean up corruption and inefficiency in the sector. At no stage was there any hint or philosophy of confiscation, which normally underlines nationalization processes.[26] Nationalization in Europe took place in the same sectors to provide better public utility. In all cases, compensation was paid.[27]

The time during 1965–1981 was turbulent. This was a period of economic difficulty for India and economic disparity within India. In response, inward-looking protectionist policies were adopted, which made foreign investors lose faith in the economy. Relations with the US became difficult because India was unwilling to support the US in the Vietnam War. Food aid from the US was seen to be used as a lever to interfere in internal affairs.[28] It was at this time that the second wave of nationalizations took place. It targeted domestic companies and excluded foreign investors. Economic inclusion was one of the planks hailed by the then Prime Minister, Mrs Gandhi. Privately owned commercial banks were unwilling to lend to crucial sectors such as agriculture and small-scale industry. These sectors had to be promoted because India was suffering from shortage of food grains and was dependent on the US for food aid and other imports of food grains. India started the programme of green revolution where the objective was to achieve self-sufficiency in food grains. To bolster this project, lending to the agricultural sector was necessary. Therefore, the Government decided to nationalize the banking sector. Consequently, the decision to nationalize

23. There is a vivid description of how the Viceroy and his family were warmly received by Indians on streets at the time of independence. *See* Alex von Tunzelmann, *Indian Summer: The Secret History of the End of an Empire* (Henry Holt and Company 2007).
24. P.S. Rao, *Bilateral Investment Protection Agreements: A Legal Framework for the Protection of Foreign Investment*, 26 Commonwealth Law Bulletin 623–624 (2000).
25. *Oxford Handbook on Indian Foreign Policy* 291 (David M. Malone, C. Raja Mohan & Srinath Raghavan eds, Oxford Univ. Press 2015).
26. Kidron, *supra* n. 1, at 133–135.
27. Rao, *supra* n. 24.
28. Panagariya, *supra* n. 17, at 49–51.

banks was taken – however, foreign banks were excluded, to protect India's image abroad.[29]

Likewise, the nationalization of coal sector took place to control rampant and unregulated coal mining. In private coalmines, unscientific mining practices were adopted and poor labour conditions were maintained, which became matters of concern for the Government. The private coal sector had ignored safety, labour welfare and protection, lack of metallurgical output, etc. To address these problems, the Central Government took the decision to nationalize private coalmines.[30] The reasons were primarily domestic and did not have an element of taking away property of foreigners.[31]

The Foreign Investment Board (FIB) was setup in 1968 to regulate incoming foreign investment. Once the economic policy became protectionist and inward-looking in the 1970s, it became difficult to obtain permissions. The FIB conducted tougher scrutiny of investment proposals.[32] The rigid approach undertaken from 1973 through the enactment of Foreign Exchange Regulation Act (FERA), 1973 further antagonized the foreign investors. List of favoured sectors for setting up of industries was issued. The problem with the list was that the foreign investors were not interested in investing in those areas. And, where the foreign investors were interested in investing they had to have a domestic collaborator. In most situations, none existed. Shareholding of foreign firms in various sectors was strongly controlled.[33] These measures started choking foreign investment.

As per the Industrial Policy of 1977, foreign companies were required to dilute their equity up to 40% to get NT.[34] Companies in many sectors, such as airline, shipping and banking, were forced to incorporate under the Indian Companies Act. Multinational corporations that did not have manufacturing plants and were in the field of services or were monitoring the economy could not dilute to less than 40% and had to leave.[35] In 1977, Coca-Cola left the Indian market because the government insisted that it collaborate with an Indian entity. It came back in 1993, when the economy was liberalized.[36]

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29. Panagariya, *supra* n. 17, at 53.
30. *See* Mohan Kumaramangalam, *Coal Industry in India: Nationalisation and Tasks Ahead* (Oxford & IBH Publishing Company 1973). It is natural that a more rational course would have been to regulate the coal mines rather than nationalize them, but this was the time of fervour for socialism.
31. *Ibid. See* Rajiv Kumar, *Nationalisation by Default: The Case of Coal in India*, 16(18) Econ. & Pol. Wkly 824–830 (2 May 1981).
32. Nagesh Kumar, *Liberalisation and Changing Patterns of Foreign Direct Investments*, 33(22) Econ. & Pol. Wkly 1321, 1322 (1998).
33. Panagariya, *supra* n. 17, at 60–61.
34. Department of Industrial Development, Ministry of Industry, Government of India, *Industrial Policy Statement* http://www.dcmsme.gov.in/policies/iip.htm#Indus3 (accessed 19 Mar. 2017).
35. Panagariya, *supra* n. 17, at 14.
36. R. Nagaraj, *Foreign Direct Investment in India in 1990s: Trends and Issues*, 38(17) Econ. & Pol. Wkly 1701, 1701 (2003); *see also* Arvind Virmani, *Policy Regimes, Growth and Poverty in India: Lessons of Government Failure and Entrepreneurial Success!* (ICRIER Working Paper No. 170 2005), available at http://icrier.org/pdf/WP170GrPov11.pdf (accessed 1 Jul. 2017).

The low growth in the 1970s led to some changes in the policy in the mid-1980s. There was a somewhat receptive attitude towards foreign investment with the 40% cap of domestic ownership being removed.[37] Yet, the overall regulatory framework remained stringent and cumbersome, causing serious economic problems in the domestic economy and loss of faith of foreign investors in the potential for doing business and earning profits. There was a severe balance of payment crisis which led to the opening up of the Indian economy for foreign goods and investment in the 1990s. This is where the second phase of acceptability began.

These developments coincide with the resolution on the New International Economic Order (NIEO) and the Charter on Economic Rights and Duties of States, discussed below.

[C] Protection of Foreign Investment and International Law

India has been an active participant at all international forum, including those regulating international economic relations, and the international policy towards economic relations with other states has been liberal. India concluded various bilateral treaties in relation to trade and participated in the negotiations for creating international organizations. Trade Agreements were concluded with Austria, Finland, Switzerland and West Germany in 1949, with Sweden in 1950 and with Norway in 1951. Difficulties were faced while negotiating a treaty for friendship, commerce and navigation with the United States of America (USA) – but practical arrangements were worked out to enhance commercial exchanges and facilitate industrial collaboration.[38] India naturally turned to other developing countries and its neighbours. A treaty was entered into with Nepal, Burma, Sri Lanka and Indonesia in 1950.[39] There were various cooperation arrangements with other states, including Afghanistan where India allowed imports despite restrictions on other imports due to balance of payment problems.[40]

India's participation in the making and working of international institutions was driven by the goal of protecting national interests, as well as providing leadership to the newly independent states that were also fighting for similar causes. India is a founding member of the United Nations (UN) and participated actively in the process of decolonization. India was involved in the process of creation of the General Agreement on Tariff and Trade (GATT), IMF and the World Bank. India's involvement in GATT was peripheral. Yet, soon India played an important role in protecting its own interests and interests of other developing countries.[41] During the formulation of the IMF's

37. Kumar, *supra* n. 32. A degree of flexibility was introduced in the policy concerning foreign ownership, and exceptions from the general ceiling of 40% on foreign equity were allowed on the merits of individual investment proposals.
38. K.B. Lall, *India and the New International Economic Order,* 17 International Studies 435, 436 (1978).
39. *Ibid.*, at 437.
40. *Ibid.*, at 437–438.
41. *Ibid.*, at 435, 439–440.

Articles, India was a vocal representative of the concerns of least developed countries (LDCs). The Indian delegation said that:

> Our experience in the past has shown that international organisations have tended to approach all problems from the point of view of the advanced countries of the West. We want to ensure that the new organization which we are trying to create will avoid this narrow outlook and give due consideration to the economic problems of countries like India.[42]

The Indian delegation proposed an amendment to the Fund's Articles that would have required the Fund to assist in the fuller utilization of the resources of economically underdeveloped countries. The proposal was supported by Ecuador, but was opposed by the United Kingdom and the US on the grounds that issues of development were a matter for the Bank rather than the Fund.[43]

The prominent forum where India profoundly contributed towards the shaping of international economic law, and specifically in relation to protection of foreign investors, was at the UN. India actively participated in supporting the right of self-determination of peoples under colonial rule and their subsequent struggle for economic independence and ending the monopoly of foreign rulers over economic resources. India associated itself with the cause of the countries under colonial rule. India was an active participant of the Non Aligned Movement and G77, where it was representing the vision and expectations of these countries.[44] Stating its reasons for joining and leading the movement, the Government of India declared that: 'India adopted a policy of non-alignment to promote peace and cooperation with all nations in order to devote its energy and resources to national development and social progress'.[45]

The crucial debate where India sided with the newly independent states from Asia and Africa and the Latin American countries in the UN was on protection of foreign investment in international law. The genesis of the debate was the already ongoing difference between Latin American countries and the Western European and North American countries.

In the nineteenth century, after the Latin American countries gained independence from their former Spanish colonizers, they allowed European and North American investors to invest in their countries.[46] The European and North American States were capital-exporting states and had interest in protecting investors from their countries investing in the Latin American countries. The points of difference about the

42. Proceedings and Documents, vol. 11, P.1G10, quoted in Gerald M. Meier, *Emerging from Poverty: The Economics that Really Matters* 16 (Oxford Univ. Press 1984); Anand Chandavarkar, *Keynes and India: A Study in Economics and Biography* 122 (Macmillan Press Ltd. 1989); Lynge Nielsen, *Classifications of Countries Based on Their Level of Development: How It Is Done and How It Could Be Done* 14 (IMF Working Paper, WP/11/31, 2011).
43. *See* P. Subrahmanyam, *New International Economic Order and India* (1991), http://shodhganga.inflibnet.ac.in/handle/10603/74581 (accessed 19 Jul. 2017).
44. Rajen Harshe, *India's Non-Alignment, An Attempt at Conceptual Reconstruction*, 7(25) Econ. & Pol. Wkly 399–405 (1990).
45. Government of India, *India 1987*, 252 (Annual Publications Division, 1988).
46. Alejandro Alvarez, *Latin America and International Law*, 3(2) Am. J. Int'l L. 269–353 (1909).

contents of international law was on the standard of protection for foreign investors, invocation of diplomatic protection by the home state of the foreigner, and the standard of compensation in situations of nationalization, expropriation or other measures that affected the property of the foreign investor.

The capital-exporting countries insisted that the standard of protection of their investors in the host state was the international minimum standard, which in their view was customary international law standard for treatment of foreigners/aliens. According to the international minimum standard, states were free to have whatever judicial and legal system they wish to have in their jurisdiction and may treat their nationals in whichever manner they deem appropriate. But, the treatment of foreigners should not fall below a particular standard of justice.[47] The international minimum standard was set out in the *Neer*[48] case.[49] In response to the claim of international minimum standard, Argentine jurist, Carlos Calvo argued that international law did not entitle foreigners for a standard of treatment higher than that granted to nationals. The host state courts have exclusive jurisdiction over disputes involving foreign nationals.[50] This is the Calvo doctrine which insisted on NT and rejected the international minimum standard.

The Calvo doctrine was founded on the principle of equality of states and equality between foreigners and nationals of a state.[51] Although the substantive prescription of the Calvo doctrine was in favour of NT, this doctrine emerged in response to the doctrine of diplomatic protection.[52] Diplomatic protection grants the right to a state 'to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels'.[53] While 'taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law'.[54] During the nineteenth and the first half of the twentieth century, diplomatic protection gained disrepute, because it was used to exert military, political or economic pressure by strong states against weaker states.[55]

47. Elihu Root, *The Basis of Protection of Citizen's Residing Abroad*, 4 Am. J. Int'l L. 517, 521–522 (1910).
48. *L. Fay H. Neer (USA) v. United Mexican States*, USA – Mexico General Claims Commission (15 Oct. 1926) 4 RIAA 60.
49. According to Sornarajah, reliance on the *Neer* case to argue for the existence of the international minimum standard was incorrect because the observations by the arbitral tribunal were based on the need of physical protection of aliens entering a foreign state, rather than observations on the protection of property and other economic rights. M. Sornarajah, *International Law on Protection of Foreign Investment* 122 (Cambridge Univ. Press 3d ed. 2010).
50. Bernardo Cremades, *Resurgence of the Calvo Doctrine in Latin America*, 7 Bus. L. Int'l 53, 53–54 (2006).
51. 1 Carlos Calvo, *Derecho Internacional Teorico y Practico de Ruropa y America*, 393–397 (D'Amyot 1869) cited in Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* 38–39 (Hart Publishing 2009).
52. Santiago Montt, *supra* n. 51, at 35–38.
53. *Mavrommatis Palestine Concessions Case (Greece v. UK)* (1924) PCIJ Series A No. 2, 12.
54. *Ibid.*; *see also Panevezys-Saldutiskis Railway Case*, Judgment (1939) PCIJ Series A/B, No. 76, 14.
55. C. Wilfred Jenks, *The Prospects of International Adjudication* 514–515 (Oceana Publications 1954).

Whenever there was nationalization or failure to make payment on bonds by governmental authorities in Latin America, capital-exporting states would invoke the doctrine of diplomatic protection and resort to gun boat diplomacy to coerce the host state to make good the losses suffered by the foreign investor.

Three important conventions were concluded during the first half of the twentieth century for preventing forcible self-help of this kind. The first was the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contractual Debts, also called the 'Porter Convention' – concluded at the Second Hague Conference, 1907. This treaty excluded use of forcible self-help in collection of contractual debts. The second was the General Treaty for the Renunciation of War of 1928, known as the 'Kellog-Brian Pact'. The third and the most important instrument was the UN Charter in 1945.[56] After the outlawing of the use of force by the Kellog-Brian Pact and the UN Charter, the possibility of force being used for exercising diplomatic protection was reduced. Calvo doctrine had originally emerged as a response to the possibility of use of force.[57]

These developments denuded the possibility of use of force accompanying diplomatic protection. The legal basis for taking up the claim of one's national was the breach of the international minimum standard, for which the host state allegedly attracted state responsibility. The need for insisting that the international minimum standard is a rule of customary law was that till the time the colonies were under control, no law for protection of their investments was required. The need of international rules for protection of foreign investment was required after states became independent from the foreign rule. Till the time they were rulers, the colonial powers controlled them, and the foreign investments originated in their states. They ensured that their investments are protected and even promoted to make substantial inroads into the economic life of the colonized countries. It was only after the colonies fought and achieved independence that the need of protecting foreign investment through external rules was felt.[58]

There was a fear that under the garb of state responsibility, the old practice of diplomatic protection would be 'used as a device for securing economic or political domination or supremacy in the life of another State'.[59] The arguments of absence of state responsibility for affecting aliens and lack of support in international law for diplomatic protection were pointed out by Indian scholars.[60] Foreigners are entitled to a treatment not higher than nationals.[61] India supported the NT principle, and Indian scholarship also supported this view.[62] At the International Law Commission (ILC), the Special Rapporteurs had narrowed the work on state responsibility only to the question of treatment of aliens. This focus remained despite the support for identification of

56. Montt, *supra* n. 52, at 49–50.
57. *Ibid.*, at 31–33.
58. Sornarajah, *supra* n. 49, at 21–22.
59. S.N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55(4) Am. J. Int'l L. 886–887 (1961).
60. *Ibid.*, at 863, 872–875.
61. *Ibid.*, at 863, 884.
62. *See* generally *ibid*.

substantive principles on state responsibility.[63] The narrow approach to state responsibility was also supported by the Latin American countries.[64] When it came to finding state responsibility, the Indian member at the ILC opposed the doctrine of state responsibility for injuries to aliens because this was 'a completely different ideology of social justice, involving completely different social and economic systems which endanger, among other things, the existing conception of private property.'[65] Ultimately, the ILC dropped any reference to protection of foreign investors or aliens in the final Draft Articles.[66]

India rejected the argument that there was a customary international law on state responsibility for losses caused to aliens, and insisted that this area should be based on treaties. The discussion above has shown that in domestic policy, India had insisted on NT. India did not support absolute protection of private property. After independence, the urgent priority of India was social justice. Lands were concentrated in the hands of rulers of former princely states, aristocrats, land hoarders (called zamindars) and others close to the colonial administration. If steps for redistribution of land were not taken, the exploitation of the deprived would have continued and independence from colonial rule would have no real meaning or impact for the large majority. The domestic policies and the laws were shaped in a manner that redistribution of land would be upheld.

The Indian position can be summarized as follows: absence of state responsibility for economic losses caused to foreign investors due to actions of host state; the foreign investors are regulated by NT principle, whereby they should approach the domestic courts of the host state and should not claim higher protection than domestic investors and their home state should not grant them diplomatic protection; and third, the right of nationalization as an attribute of state sovereignty.

The final part of this debate between the capital-exporting countries and Latin American countries was played out in the UN General Assembly, with the participation of newly independent countries of Asia and Africa. India supported the views of the capital-importing countries in various *fora* of the UN. The post-World War II period was characterized by decolonization. The regions in Asia and Africa that were under colonial subjugation obtained political independence. It was realized that political independence would be incomplete without economic independence. In the colonies, the control of the economic activities was in the hands of former colonizers. The newly independent countries felt the need for recovering control over vital sectors of economies from foreign investors, which were owned mostly by the nationals of former colonial powers. The consequence was a wave of nationalization in these countries.[67] Nationalization was used as an instrument to claim back control of

63. Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 Harv. Int'l L.J. 1–26 (1988).
64. *The Pursuit of Nationalized Property* 29–32 (M. Sornarajah ed., Martinus Nijhoff Publishers 1986).
65. ILC, *Yearbook of the International Law Commission: Summary Records of the Ninth Session*, vol. I, 158 (United Nations Publications 1957).
66. Montt, *supra* n. 52, at 59–60.
67. Sornarajah, *supra* n. 49, at 21–22.

economic activity and natural resources. This was also the time when the Cold War was simmering. The states in Eastern Europe, Middle East, Asia, North Africa and Latin America resorted to nationalization, especially of oil industry. In many states, properties of former colonizers were nationalized.[68] For example, in Indonesia properties under Dutch control were nationalized.[69]

There were two aspects of the demands of these countries: control of natural resources and the control of their domestic economy with freedom from interference from other states, especially former colonial rulers. This was achieved through a string of resolutions. The first step was claiming control over natural resources, followed by declaration of an NIEO and finally a set of obligations and rights of states regarding economic relations. The principal resolutions were the Permanent Sovereignty over Natural Resources, the NIEO and the Charter on Economic Rights and Duties of States. Although separated by a time gap, these resolutions represent continuity of thought. These resolutions were aimed at rejecting the international minimum standard and replacing it with the NT standard. The host state was not to attract state responsibility for violations of the rights of foreign investors, and the foreign investors were to approach national courts for redressal of their claims. The important element was the right of states to nationalize. The NIEO represented the philosophy of replacing the old economic order of colonial control with a new order of equality between states, cooperation between them as equals and greater integration of the world economy with free flow of goods with appropriate prices for raw materials and commodities produced mostly in the developing countries. The objective was the expectation of creation of an equitable international society where all states, irrespective of the past, have equal right of progress.[70] The movement for the NIEO was inspired by the thought that during colonial period inequitable and onerous arrangements were made to obtain greater benefit from the newly independent countries. The newly independent countries were seeking to undo these arrangements.[71]

These resolutions at the General Assembly represent this philosophy of the newly independent states, which Indian representatives spoke about at different discussions in the UN.

68. *See* generally *The Pursuit of Nationalized Property*, *supra* n. 64; Adeoye A. Akinsanya, *The Expropriation of Multinational Property in the Third World* (Praeger Publishers 1980).
69. Andreas F. Lowenfeld, *International Economic Law* 405 (Oxford Univ. Press 2002).
70. The entire discussion on the NIEO is well-documented in academic discussions. *See* Georges Abi-Saab, *Permanent Sovereignty Over Natural Resources and Economic Activities*, *in International Law: Achievements and Prospects* (Mohammed Bedjaoui ed., UNESCO 1991); M. Sornarajah, *The Pursuit of Nationalized Property* 29–32 (Martinus Nijhoff Publishers 1986); Akinsanya, *supra* n. 68; Rosalyn Higgings, *The Taking of Property by the State: Recent Developments in International Law*, 176 Recueil des Cours 259 (1982); Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 Am. J. Int'l L. 553 (1981); Detlev Vagts, *Foreign Investment Risk Reconsidered: The View from the 1980's*, 2 Foreign Investment Law Journal 1 (1980); Ian Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)* 162 Recueil des Cours 244 (1980); Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1977).
71. Kamal Hossain, *Permanent Sovereignty over Natural Resources: Principles and Practice* 9–10 (Kamal Hossain & Subrata Roy Chowdhury eds, Frances Printer 1984).

The movement in the direction of permanent sovereignty over natural resources started with the objective of promoting international cooperation for economic development in the developing countries. Prior to the resolutions on permanent sovereignty over natural resources, the General Assembly passed two resolutions that formed the basis of further actions: the resolution on integrated economic development and commercial agreements[72] and the resolution on right to exploit natural wealth and resources freely.[73]

Natural resources were important because they had the potential to act as engines of development for the newly independent states. A lot of the resources were already depleted during the colonial rule. The structure of the economies had become such due to the colonial rule that they were dependent on export of raw material or commodities. These commodities were sold at cheap rates as compared to the finished products. The technology and technical know-how was with the developed states. There was a lack of financial resources that would contribute towards setting up of industries and fostering research and development of technology. The newly developed countries needed capital as well as technology for which, they depended on the developed countries. While wanting foreign capital, these states wished to be careful that colonialism or interference in their economies does not return. There was a threat – whether perceived or real – of their return, if the control of economic resources and activities was under foreign control. Many saw that the first task to do was to take back control of the natural resources and economic activity from the foreign control and transfer it to the government or its nationals. The resolutions passed in the General Assembly tried to address these problems.

The newly independent states had the natural resources but did not have the necessary technical expertise to exploit and market them. The first step was to take back control from the former colonial powers and the next step was to enter into fair contractual engagements with corporations, which were mostly from the former colonial powers. The foreign investment that came into these countries was mostly in the field of exploitation of natural resources. The resolution on integrated economic development aimed at giving newly independent developing countries the freedom to exercise control over natural resources and use them for achieving economic development.[74] There was a need to ensure that these states could acquire machinery, equipment and industrial raw materials.[75] Appropriate agreements had to be entered into to ensure there was smooth movement of technical know-how and raw materials through agreements.[76]

72. Integrated Economic Development and Commercial Agreements, GA Res. 523, UN GAOR, 6th Sess., Supp. No. 20, at 20, UN Doc. A/2119(1952).
73. Right to Exploit Freely Natural Wealth and Resources, GA Res. 626, UN GAOR, 7th Sess., Supp. No. 20, at 18, UN Doc. A/2361(1952).
74. Integrated Economic Development and Commercial Agreements, GA Res. 523, *supra* n. 72, at Preamble.
75. *Ibid*.
76. Integrated Economic Development and Commercial Agreements, GA Res. 523, *supra* n. 72, at Art. 1(b).

Through Resolution 1314 of 12 December 1958, the Commission on Permanent Sovereignty over Natural Resources was established, which had to conduct 'survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of states under international law and to the importance of encouraging international co-operation in the economic development of developing countries'.[77]

Permanent sovereignty over natural resources was declared through Resolution 1803 by the General Assembly. The focus of the GA resolution on Permanent Sovereignty over Natural Resources was of economic independence of the states. The Preamble stated:

> Attaching particular importance to the question of promoting the economic development of developing countries and securing their economic independence,
>
> Noting that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence,
>
> Desiring that there should be further consideration by the United Nations of the subject of permanent sovereignty over natural resources in the spirit of international co-operation in the field of economic development, particularly that of the developing countries.[78]

The relationship between all states, especially the newly independent states and their former colonizers, 'must be based on the principles of equality and of the right of peoples and nations to self-determination.'[79] The idea was that even if foreign investment came into a developing state it did not conflict with the interest of the recipient states.[80] Yet, at the same time, it was necessary to ensure that there was exchange of technical and scientific information for promoting development.[81] The resolution declined preferential treatment to foreign investors and affirmed the right of states to regulate foreign investments as per their own economic objectives.[82] These resolutions apply to all agreements: including those between states, and between states and foreign investors.[83]

The follow-up on the resolution on Permanent Sovereignty over Natural Resources was the resolution establishing the NIEO. The General Assembly Resolution 3201 declared that:

> *Solemnly proclaim* our united determination to work urgently for the Establishment of a New International Economic Order based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic

77. Preamble, GA Res. 1803, UN GAOR, 17th Sess., Supp. No. 17, at 15, UN Doc. A/5217 (1962).
78. *Ibid.*
79. *Ibid.*
80. *Ibid.*
81. *Ibid.*
82. Abi-Saab, *supra* n. 70, at 605.
83. *Ibid.*, at 606.

> and social development and peace and justice for present and future generations, and, to that end, declare… .[84]

The resolution recognized the need of full participation of all states in resolving world economic problems on the basis of equality of States.[85] The resolution recognized that the states have 'full permanent sovereignty' over 'natural resources and all economic activities', 'including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State'.[86] The concern of obtaining proper price for commodities was also focused – a point that was introduced and emphasized by India.[87]

Very soon, the Charter on Economic Rights and Duties of States was declared, which set out obligations of states. The Charter which focused on the need of expanding liberal world trade without obstructions was postulated[88] with removal of obstructive tariff barriers.[89] It spelt out the attitude towards foreign investment in the following words:

> Article 2
> 1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
> 2. Each State has the right:
>   (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
>   (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;
>   (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

84. Declaration on the Establishment of a New International Economic Order, Preamble, GA Res. 3201, UN GAOR, 6th Spl. Sess., Supp. No. 1, at 3, UN Doc. A/RES/S-6/3201 (1974).
85. *Ibid.*, at para. c.
86. *Ibid.*, at para. e.
87. *Ibid.*, at para. j.
88. Charter on Economic Rights and Duties, GA Res. 3281, UN GAOR, 29th Sess., Supp. No. 31, at para. 14, UN Doc. A/RES/29/3281 (1974).
89. *Ibid.*, at Art. 18.

The newly developed countries stayed together on political as well as economic issues, and the NIEO was an outcome of this united stand taken at the UN.[90] In the discussions that took place in the General Assembly on the NIEO, the Indian representative highlighted the vast differences in the economic conditions of the developing countries vis-à-vis the developed countries. One of the major factors was the taking of raw material from developing countries at cheaper rates. Paying appropriate value to developing countries for the raw materials was necessary.[91] The objective for pushing for the NIEO was to achieve fairness and removal of obstacles in the development of the developing countries.[92] The role of foreign investment was supported in the following words:

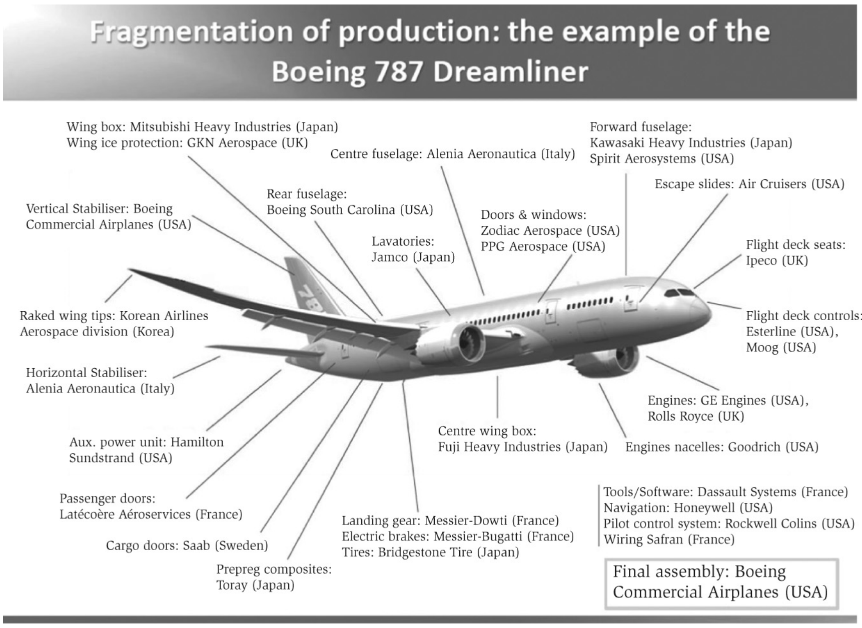
> the role of external capital in the development process is crucial. The targets for development aid provided in the International Development Strategy should be fulfilled and the current arrangements revised to provide for speedier disbursement on softer terms.[93]

The emphasis was on resolving economic disparities in an atmosphere of cooperation, rather than 'conditions of chaos or by a bitter confrontation between the rich and the poor'.[94] The Indian delegation participated actively in the deliberations of the time, emphasizing the point that the requirements of the developing countries should receive greater attention in the present situation.[95] India was an active participant at the discussions in UNCTAD on the Charter of Economic Rights and Duties of States.

As Professor John Jackson indicated or warns, regionalism can be important to allow a few countries to foster economic cooperation but there is a potential danger of tensions between economic blocs – potentially *TTIP v. BRICS* countries, particularly because there are always political motives behind conclusion of economic blocs; therefore a global or multilateral institution is desirable to mediate any tensions that can arise between blocks using multilateral rules (*see* Figure 2.1).

90. Harshe, *supra* n. 44, at 403–405.
91. United Nations General Assembly, 6th Special Session, 223rd Plenary Meeting, paras 86, 88–97 (19 Apr. 1974).
92. *Ibid.*, at paras 101, 124.
93. *Ibid.*, at para. 129.
94. *Ibid.*, at 134.
95. Ad hoc Committee of the Sixth Special Session, 8th meeting, para. 37 (17 Apr. 1974).

Figure 2.1 Boeing Supply Chain



The overwhelming support of states to the NIEO in the UN represented that the international minimum standard was replaced by NT. In order to get the international minimum standard of treatment for foreigners back on the agenda, capital-exporting states started entering into BITs that introduced this standard as a treaty standard. There was uncertainty about the standard of protection of foreign investment in customary international law; BITs were a response to this uncertainty.[96] It was the relative success of NIEO that made BITs desirable.[97]

The General Assembly resolutions were used as a basis by the host state to expropriate or nationalize foreign property. While Eastern Europe had justified nationalizations without any compensation, other developing nations generally offered compensation. However, the amount of compensation offered was variable. From complying with the capital exporters norm of 'adequate compensation' to variations including instances like compensation limited to infrastructure developed on land to deductions of 'excess profits', a wide divergence arose, especially in the context of the circumstances leading to the NIEO.[98] The developed countries were insisting on compensation based on the Hull formula, which was payment of 'prompt, adequate

96. *Total SA v. Argentina Decision on Jurisdiction*, ICSID Case No. ARB/04/01, para. 78 (25 Aug. 2006).
97. Kenneth Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 Am. J. Int'l L. 621, 628 (1998).
98. M. Sornarajah, *Compensation for Expropriation*, 12 Journal of World Trade Law 108–131 (1979).

and effective compensation'.[99] The objective of BITs was to ensure that the expropriation occurred as per proper procedures and the host state would be responsible for payment of complete compensation – equivalent to the market value, for the losses suffered due to expropriation or nationalization. BITs also introduced other treatment standards that granted robust protection to foreign investors. Moreover, for the first time, they allowed direct right to initiate arbitration without the need of diplomatic protection.[100] Germany entered into the first two BITs with Pakistan and Dominican Republic in 1959.[101] Other western countries quickly followed.[102] The BITs were primarily entered into between the developed and developing countries with the underlying assumption that the investments of the developing countries would be protected.[103]

India did not participate in the BIT making process until it was forced into economic reforms due to a serious balance of payments crisis in the 1990s. At this point, the second phase, a dramatic shift in policy, took place.

§2.02 THE SECOND PHASE (1991–2011)

The second phase was of acceptance – but forced acceptance. The trigger point for giving up the protectionist domestic policy and heavy regulatory framework was the balance of payment crisis in 1990–1991, when India had to give up protectionist policies. The reforms were drastic, and the regulatory framework underwent dramatic changes overnight.[104] Various macroeconomic reforms were undertaken, including bringing down high import tariffs and encouragement of foreign institutional investment (FII) and FDI.[105] FDI up to 51% was permitted in crucial sectors and 100% in the energy sector. The Foreign Investment Promotion Board (FIPB) was setup and the FERA was amended to treat foreign companies with more than 40% of foreign equity

99. The formula of 'prompt, adequate and effective compensation' was articulated by the Secretary of States of the United States, Cordell Hull in a note to the Mexican government. *See* Kenneth Vandevelde, *United States Investment Treaties: Policy and Practice* 118 (Kluwer Law and Taxation 1992).
100. This idea was based on Abs-Shawcross Draft Convention on Investments Abroad of 1959. *See* Georg Schwarzenberger, *Foreign Investments and International Law* 109–134 (Stevens 1969). The ICSID Convention was soon negotiated thereafter in 1965, which provided a forum for resolution of investment disputes.
101. UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* 8, 177 (United Nations Publications 1998).
102. Kenneth Vandevelde, *A Brief History of International Investment Agreements*, 12 UC Davis J. Int'l L. & Pol'y 157, 169 (2005).
103. UNCTAD, *supra* n. 101, at 8–19.
104. Panagariya, *supra* n. 17, at 103–105.
105. For a detailed discussion on reforms, *see* R. Nagaraj, *Foreign Direct Investment in India in the 1990's: Trends and Issues* 38(17) Econ. & Pol. Wkly 1701 (2003); C. Rangarajan, *Two Episodes in the Reform Process*, *in India's Economy: Performance and Challenges* 100 (Shankar Acharya & Rakesh Mohan (eds) Oxford Univ. Press 2010); Arvind Panagariya, *Growth and Reforms During 1980s and 1990s*, 39(25) Econ. & Pol. Wkly (2003); Montek Singh Ahluwalia, *Productivity and Growth in Indian Manufacturing* 67 (Oxford Univ. Press 1991).

at par with domestic industries.[106] Later FERA was repealed and replaced by the Foreign Exchange Management Act (FEMA). This was a shift in attitude towards control of foreign capital from 'regulation' to 'management'. The new Act introduced liberal provisions on movement of capital making it easier to bring foreign capital into India and take capital out of India.

In April 1992, India joined the Multilateral Investment Guarantee Agreement (MIGA). On 20 December 1993, the European Union (EU) and India signed third generation Cooperation Agreement on Partnership and Development. Article 11 contemplated 'encourage[ment] and increase in mutually beneficial investment by establishing a favorable climate for private investments including better conditions for the transfer of capital and exchange of information on investment opportunities'.

After these early steps for encouraging foreign investment, India started entering into BITs with many countries. India expressed its willingness to adhere to higher standards of protection for foreign investment and gave up the insistence on NT. Writing in 2000, the legal adviser of India stated that: 'in the current context of negotiation of investment protection agreements a less ideological and more pragmatic approach to these concepts has become possible'.[107]

It was at this point of time that India wholeheartedly joined the project of BITs. India started entering into BITs to attract foreign investment. The programme was called BIPAs.[108] The dominant thinking within the Government was that entering into BITs would result into greater inflow of foreign investment.[109] It first floated a model BIT[110] and entered into the first BIT with UK in 1994. The second Model BIT was released in 2003. This Model BIT had strong capital-exporting country features. A capital-exporting country feature means a model of a treaty that capital-exporting developed countries would prefer to protect their investments abroad. The jurisdiction and dispute resolution clauses in these treaties are broad. The foreign investor would have the right to initiate arbitration against the host state for violation of the BIT, without the need of going to domestic courts. The treatments standards were broad and would lean in favour of investor protection, rather than seeking a balance between investor protection and the protection of regulatory freedom of the host state.[111] These treaties obviously meant there was little space for the host states to exercise regulatory freedom. From 1994 to 2000, India entered into BITs with major European countries

106. Nirupam Bajpai & Jeffery Sachs, *Foreign Direct Investment in India: Issues and Problems* 13 (HIID Development Discussion Paper No. 759/2001, 2001); Nagaraj, *supra* n. 36, at 1701-1702.
107. Rao, *supra* n. 24, at 623, 626.
108. Ministry of Finance, Government of India, *Bilateral Investment Promotion and Protection Agreements (BIPA)*, http://finmin.nic.in/bipa/bipa_index.asp (accessed 19 Mar. 2017).
109. *See* the 'Foreword' by Palainappan Chidambaram, *in India's Bilateral Investment Promotion and Protection Agreements*, vol. 1 (Government of India, Ministry of Finance ed. 1997); *See* the 'Foreword' by Yashwant Sinha *in India's Bilateral Investment Promotion and Protection Agreements*, vol. 3 (Government of India, Ministry of Finance ed. 1999); *See* the 'Foreword' by Pranab Mukherjee, *in India's Bilateral Investment Promotion and Protection Agreements*, vol. 7 (Government of India, Ministry of Finance ed., 2009).
110. The first model BIT is not in public domain.
111. For a detailed discussion, *see* Aniruddha Rajput, *India's Shifting Treaty Practice: A Comparative Analysis of the 2003 and 2015 Model BITs*, 7 Jindal Global L. Rev. 201, 224–226 (2016).

including France, Germany, Italy, Netherlands, Belgium, Denmark, Poland, Switzerland and Sweden. From 2000 onwards, India entered into BITs with many developing countries such as Argentina, Mexico, China, Thailand, Indonesia and Saudi Arabia, as well as with LDCs such as Bangladesh, Sudan and Mozambique.[112] There is little literature or any other record of the reasons behind the Government of India undertaking the BIT programme. There were disparities within the BITs and FTAs that were entered into during this time because the nodal ministries for negotiating them were different. The FTAs were more carefully drafted that the BITs. The FTAs ensured that regulatory freedom is protected.[113] No steps were taken to find out the extent to which these investment treaties would affect the freedom to regulate. Despite these efforts, the amount of foreign investment India attracted in this period was much less as compared to China – despite the fact that India had vital points of democracy and the rule of law as highlights.[114] During this time, India did not face any investment claim, except a brief brush in the Dabhol Power Project.

Immediately after liberalization of the economy in 1991, India started encouraging foreign investors to invest in India and established fast track approval.[115] The Enron Corporation, General Electric (GE) Corporation and Bechtel Enterprises together formed a company called Dabhol Power Company (DPC) in Maharashtra, a western Indian state and entered into an agreement with the Maharashtra State Electricity Board (MSEB) (the Board) for a two-phase project. The project was the largest until that date, with over USD 2 billion secured in loans.[116] Through an agreement, the MSEB agreed to purchase power from the Dabhol Power Corporation and the government of Maharashtra state, and the Government of India gave payment guarantees. Disputes arose in 1995 after a new government came to power in Maharashtra. On the basis that there was corruption, irregularities and high cost of power, the MSEB cancelled the contract, leaving DPC without a customer, because MSEB was the only customer.[117] DPC commenced arbitration proceedings against the Government of Maharashtra, against which the state of Maharashtra filed a suit in the Bombay High Court, praying that the contract may be declared as void since it was based on fraud and misrepresentation. Parties reached a negotiated settlement and the arbitration and court proceedings were terminated.[118]

Five years later, DPC sought to invoke the guarantees of the Government of India and Maharashtra on the ground that the MSEB had defaulted in payment. In April 2001,

112. Prabhash Ranjan, *India and Bilateral Investment Treaties: A Changing Landscape*, 29 ICSID Rev. 420 (2014).
113. Prabhash Ranjan, *Comparing Investment Provisions in India's FTAs with India's Stand-Alone BITs*, 16(5–6) J. World Invest. & Trade 899–930 (2015).
114. For a discussion on the disparity in investments, *see* Nagaraj, *supra* n. 106, at 1705–1706; For a comparative discussion and the reasons for this disparity, *see* M. Sornarajah, *India, China and Foreign Investment*, in *China, India and the International Economic Order* (M. Sornarajah & Jiangyu Wang eds, Cambridge Univ. Press, 2011).
115. Ronald Bettauer, *India and International Arbitration: The Dabhol Experience*, 41 Geo. Wash. Int'l L. Rev. 381, 382 (2009–2010).
116. Preeti Kundra, *Looking Beyond the Dabhol Debacle: Examining Its Causes and Understanding Its Lessons*, 41 Vand. J. Transnat'l L. 907, 908–914 (2008).
117. *Ibid.*, at 932–933.
118. Bettauer, *supra* n. 115, at 381, 383.

the Corporation commenced arbitration proceedings against the Board, the State Government and the Central Government.[119] The MSEB commenced proceedings against DPC before the Maharashtra State Electricity Regulatory Commission (Commission) – a quasi-judicial body constitution under the domestic law regulating electricity. The Commission held that it had exclusive jurisdiction over the dispute between DPC and the MSEB. This was challenged in the Bombay High Court, which held that the Commission had the authority to decide upon its own jurisdiction. This decision was challenged before the Supreme Court, where the Court sent the matter back to the High Court, directing the Bombay High Court to make a finding whether the Commission had exclusive jurisdiction. The Bombay High Court held that the Commission had the jurisdiction and the matter was taken back to the Supreme Court and remained pending until 2005, when the dispute was settled.[120]

The Government of Maharashtra approached the Bombay High Court, and the Government of India approached the Delhi High Court seeking anti-arbitration injunction and relief against the invocation of guarantee. During 2003–2005, the American companies filed arbitration against Overseas Private Investment Corporation (OPIC), invoking political risk insurance on the ground that the Government of India and its courts had thwarted the remedy of arbitration available under the contract. The arbitral panel also found that the MSEB, the Commission and the Indian courts had enjoined and taken away the claimants' international arbitration remedies in violation of established principles of international law and in disregard of India's commitments under the New York Convention (NYC) and the Indian Arbitration Act. As a result, the panel ordered OPIC to pay the companies.[121] Thereafter, the US filed proceedings against India, subrogating for the OPIC under the US Investment Guarantee Agreement with India.[122]

Proceedings under the International Chamber of Commerce (ICC) resulted into an award against India in April 2005. India was found to be in breach of its obligations under the BIT.[123] The American companies initiated arbitration proceedings through Mauritian subsidies under the India-Mauritius BIT. Before the matter could be decided, the matter was settled.[124] The commencement of arbitration by the US under the Investment Incentive Agreement and the ITA under the Mauritius BIT had a significant

119. *Ibid*.
120. *Ibid*.
121. *Bechtel Enterprises Int'l Ltd. v. Overseas Private Inv. Corp.*, AAA Case No. 50 T195 0050902, at 3–24 (2003).
122. *United States v. India*, Request for Arbitration (4 Nov. 2004) https://www.opic.gov/sites/default/files/docs/GOI110804.pdf (accessed 1 Jul. 2017).
123. *Capital India Power Mauritius I v. Maharashtra Power Dev. Corp. Ltd.*, ICC International Court of Arbitration, Case No. 12913/MS (2004), 30–31, https://www.italaw.com/documents/Dabhol_award_050305.pdf (accessed 1 Jul. 2017). The proceedings under the Dutch bilateral investment treaty (BIT) were still pending at the time the Dabhol matter was settled.
124. GE Settles Dabhol Issue, The Indian Express (3 Jul. 2005) http://www.indianexpress.com/oldStory/73760 (accessed 1 Jul. 2017).

impact.[125] The parties reached an overall settlement, and the proceedings before courts and arbitral tribunals were terminated.[126]

The *Dabhol Power* case presents the factual, legal and political complications that could be associated with investment disputes. Although India managed to settle the dispute, its legacy has been criticized.[127]

In the period from 1991 to 2011, India never faced investment claims, except for the *Dabhol Power* case, which was soon settled. It may not be argued that the situation of the regulatory framework from 1991 to 2011 was perfect and therefore investors had no occasions to complain. There may have been many situations where the foreign investor might have been unhappy with the regulatory framework and suffered losses. Yet no investment claims were filed. One of the reasons for this phenomenon is the efficient and independent judicial system. The actions of the state can be challenged before the higher judiciary in India (Supreme Court and High Court), where decisions are delivered relatively faster. The jurisprudence developed by the courts grants more rights to investors than those granted under a BIT. These proceedings do not antagonize the governments as compared to investment arbitration. After the *White Industries* case, this trend of approaching domestic courts is broken and the investors are and would be willing to file investment claims.

Serious rethinking of an overly liberal investment protection regime in the BITs started only when India lost the first investment case in *White Industries v. Australia* in 2011. There have been concerns about the expansive interpretation of investment treaties.[128] Some states have experienced wearisome consequences of investment arbitration.[129] This was the first time India had a first-hand experience of an investment claim. The experience was painful for various reasons. It exposed the possibility that the actions of the Supreme Court (which is the highest Court of Appeal in India and also serves as the constitutional court) could be challenged before an arbitral tribunal. The claim in *White Industries* was based on delays in the Indian judicial system. The Supreme Court of India has a special position in the psyche of the political establishment, legal community and the general public, has steadfastly protected its independence and has intervened in various public interest issues.[130] The other troubling issue

125. Bettauer, *supra* n. 115, at 385, 383.
126. *See* Press Release, Bechtel, *Statement by Bechtel on Dabhol Settlement* (12 Jul. 2005) http://www.bechtel.com/newsroom/releases/2005/07/statement-bechtel-dabhol-settlement/ (accessed 1 Jul. 2017); Press Release, GE, *GE Announces Comprehensive Settlement on Dabhol Power Project* (2 Jul. 2005) http://stage.genewsroom.com/press-releases/ge-announces-comprehensive-settlement-dabhol-power-project-260068 (accessed 1 Jul. 2017).
127. *See* Gus Van Harten, *TWAIL and the Dabhol Arbitration*, 3 Trade L. & Dev. 131 (2011).
128. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1626 (2005).
129. Latin American States have faced most of the investment claims. Argentina has faced more than fifty arbitration claims, which arose out of the regulations that Argentina had to undertake at the time of financial crisis. José Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases*, 6 World Arb. & Mediation Rev. 491 (2012).
130. The significance of the judiciary in India and its role in the overall investment arbitration process cannot be ignored. Therefore, a full chapter is dedicated for this discussion below. *See* M.P. Singh, *Securing the Independence of the Judiciary – The Indian Experience*, 10 Ind. Int'l & Comp. L. Rev. 245, 292 (2000); U. Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4(6) Third World Legal Stud. 107, 132 (1985).

in the case was that a commercial arbitration award, which would technically be enforced by an Indian court, was enforced by the investment tribunal, thereby replacing the function of Indian courts. The tribunal adopted an expansive approach by invoking India-Kuwait BIT to import more convenient treatment standards through the MFN clause in the India-Australia BIT.[131] This exposed the possibility that an investment tribunal could import any provision from any treaty to hold India liable even if the investment claim was not based on a treaty in which a convenient standard is present. Almost all Indian BITs contained an MFN clause.

After losing this case, many investment claims were filed against India and the third phase with a policy shift thus commenced.

§2.03 THE THIRD PHASE (2011 ONWARDS)

The third era started with India losing the first investment case filed by an Australian investor White Industries in 2011. This case marked an important shift in the Indian policy towards foreign investment. The case exposed the vulnerability of India to investment claims.

There is a swathe of notices lodged against the Indian government for various actions. Some of them involve the decision of the Supreme Court. The Supreme Court had struck down spectrum allocation to cellular companies due to irregularities in the grant of licences. The spectrum licences were procured through corruption and at a huge cost to the public exchequer.[132] The foreign investors that have suffered losses as a consequence of the decision of the Supreme Court have initiated investment arbitration. The investment claims would again question the decision of the Supreme Court on an important point that involves questions of corruption and protection of public interest.

For the first time the Government of India, through the Ministry of Commerce (which is one of the concerned ministries on the BIT programme) prepared a paper analysing the Indian BIT programme critically. It concluded that there is a need to 'rethink the role of BITs in attracting foreign investment in India' and 'while IIAs may be a desirable objective, they are neither necessary nor sufficient for promoting FDI'.[133] On the need of maintaining balance between investor protection and protection of domestic regulatory space, the paper stated that 'when developing countries enter into BITs, a balance between investor's rights and domestic policy must be ensured' and 'other legitimate public concerns must not be subordinated to investment protection issues'. The paper acknowledged that the existing Indian BITs lack balance between investor protection and regulatory freedom of India. A need to review the BITs was expressed, to ensure that regulatory freedom is adequately protected.[134]

131. For a detailed discussion, *see* Ch. 7.
132. *Centre for Public Interest Litigation v. Union of India*, 3 SCC 1 (2012).
133. The paper is not in public domain but for extracts, *see* Prabhash Ranjan, *supra* n. 112, at 419, 439–441.
134. *Ibid*., at 419, 440.

Due to numerous BIT claims brought against India, India decided to put all ongoing stand-alone BIT negotiations on hold. In 2015, a Model BIT was issued, which would become the basis of negotiations for future BITs, and all the existing BITs were cancelled in 2017.

The Model BIT is the basis on which India negotiates BITs. In early 2015, a draft Model BIT was issued and comments were invited from public.[135] The draft Model BIT was far reaching since it severely curtailed the treatment standards and the dispute resolution clause by introducing the requirement of exhaustion of local remedies. The Law Commission of India constituted a Study Group to comment upon the draft Model BIT. The Study Group made extensive comments[136] based on which the draft was changed and a new Model BIT was announced.[137]

The Model BIT represents a major shift in approach of India towards investor protection through BITs – an instance of shifting state practice.[138] It has introduced the concept of sustainable development in the preamble for the first time and emphasized the need of conserving regulatory space for undertaking regulations for public interest.[139] It has narrowed the definitions of investor, investment and treatment standards. For the first time, an enterprise-based definition has been introduced to ensure that only those investors that have actual and real presence in the host state are protected.[140] Many controversial treatment standards such as FET, MFN treatment and umbrella clause have been removed. The provisions on expropriation, particularly indirect expropriation, have been set out in detail.[141] The NT standard is retained.[142] The distinguishing characteristic of the Model BIT is the introduction of exceptions aimed at protecting regulatory exercise.[143] The dispute resolution procedure has been made strict with the need to first exhaust local remedies unless they are unavailable or futile.[144] There are various other provisions in relation to the conduct of the arbitral proceedings and requirements of independence of arbitrators.[145] In substance, the

135. The first version of the Model BIT – Ministry of Commerce and Industry, Government of India, *Model Text for Indian Bilateral Investment Treaty* https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (accessed 19 Mar. 2017).
136. Law Commission of India, Government of India, *Report No. 260: Analysis of the 2015 Model Indian Bilateral Investment Treaty* (August 2015) http://lawcommissionofindia.nic.in/reports/Report260.pdf (accessed 19 Mar. 2017).
137. The final text of the Model BIT is at Ministry of Commerce and Industry, Government of India, *Model Text for the Indian Bilateral Investment Treaty*, Art. 1.2 (28 Dec. 2015) http://www.finmin.nic.in/reports/ModelTextIndia_BIT.pdf (accessed 17 Jul. 2017).
138. Rajput, *supra* n. 111.
139. *Model Text for the Indian Bilateral Investment Treaty*, *supra* n. 137, at Preamble.
140. *Ibid.*, at Arts 1.3–1.5.
141. *Ibid.*, at Art. 5.
142. *Ibid.*, at Art. 4.
143. *Ibid.*, at Art. 32.
144. *Ibid.*, at Ch. 4.
145. Lise Johnson, Lisa Sachs & Jesse Coleman, *International Investment Agreements, 2014: A Review of Trends and New Approaches*, in *Yearbook on International Investment Law and Policy 2014-2015*, 15, 25–27 (Andrea K. Bjorklund ed., Oxford Univ. Press 2016); Grant Hanessian & Kabir Duggal, *The 2015 Indian Model BIT: Is This Change the World Wishes to See?*, 30 ICSID Rev. 729 (Fall 2015); Kabir Duggal, *The Changing Landscape of Investor-State Arbitration in India*, 7 Jindal Global L. Rev. (2016); *See also* Prabhash Ranjan, *Investment Protection and Host*

Model BIT makes every effort towards conserving India's regulatory space while protecting investor interests.[146]

Investment treaties come with an opportunity cost.[147] The choice would depend on where the country stands in terms of the reception and exportation of foreign investment. In the situation where the amount of outgoing foreign investment outpaces incoming investments with a large margin, there are incentives for that state to insist on higher standards of investment protection abroad. Investments of such a state are under threat of mistreatment abroad. The extent of compensation such a state would have to pay if sued by a foreign investor would be far lesser as compared to the extent of protection required for its investors abroad. If the incoming investments are as high as compared to the outgoing investments, then a large successful investment claim may wipe off benefits of the investment to a substantial degree. But then the challenge is how far the state can insist on a conservative BIT, and whether other states would agree. The overall international scenario today has changed from what it was when investment arbitration had emerged. The first situation suited traditional capital-exporting states such as the USA and the Western European States. After the rise of China, India, South Africa and other Asian economies, the inflow of investments into these countries increased, exposing them to the prospect of an investment claim. There have been many claims filed against these countries, for example, the USA has faced fifteen claims.[148] The traditional capital-exporting countries that have insisted on high standards of protection have started reducing the standards of protection in their investment treaties.[149] There may be divergence on the precise extent of protection that one state would wish but consensus is evident amongst states that the standards of protection under investment treaties should be removed. There is discomfort with the existing model of dispute resolution in the BITs. Efforts are being made to reform the dispute resolution structures – prominent amongst them is the introduction of a world investment court.[150]

State's Right to Regulate in Indian Model Bilateral Investment Treaty 2015: Lessons for Asian Countries, *in Investment Law Arbitration in the Asia Pacific Region – Current Practice, Emerging Issues, Future Prospects* (Julian Chaisse et al. eds, Cambridge Univ. Press 2017).

146. Aniruddha Rajput, *Protection of Foreign Investment in India and International Rule of Law: Rise or Decline?*, 27 (No. 10 KFG Working Paper Series, Berlin Potsdam Research Group, June 2017).
147. Lauge N. Skovgaard Poulsen, Jonathan Bonnitcha & Jason Webb Yackee, *An Analytical Framework for Assessing Costs and Benefits of Investment Protection Treaties* (LSE Enterprise, March 2013) http://discovery.ucl.ac.uk/1471852/1/bit%20framework.pdf (accessed 3 Mar. 2017).
148. European Commission, *Investor-to-State Dispute Settlement (ISDS): Some Facts and Figures* (12 Mar. 2015) 6 http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf (accessed 4 Mar. 2017).
149. For example, see the changes made to the US Model BIT and Canada Model BIT over time.
150. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (10 Dec. 2014), 54 ILM 747 (2015); Unified Agreement for the Investment of Arab Capital in the Arab States (26 Nov. 1980) Economic Documents, No. 3; The idea to establish a permanent multilateral investment court to decide investment disputes has been proposed by the European Commission. *See* European Commission, *Fact Sheet, A Future Multilateral Investment Court*, http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm (accessed 1 Jul. 2017); *See also* European Union, *Draft Text Transatlantic Trade and Investment Partnership,* http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (accessed 1 Jul. 2017); For further information on the formation of the world investment court refer to the UNCTAD,

India has negotiated a BIT with Cambodia on the basis of the present Model BIT.[151] India is negotiating new BITs with other states. The final texts of BITs that emerge from negotiations may be different from the original Model BIT, since it would depend on the points of negotiations and the matching of priorities with the negotiating counterparties. It is too early to write off the Model BIT. It is certainly an important shift, since India would remain a predominantly capital-importing country for at least a decade or even more, but not less. The approach of major states has undergone a change, and there is scepticism towards the role of investment treaties and investment arbitration in promoting movement of capital.

Some employers in Israel use skill testing, in order to seek to select the applicants best suitable to fit the requirements of the employment in question as well as to establish whether these applicants have the skills and qualifications they have said they have. The Israeli case law has recognized the right of an employer to use 'suitability tests' for the purpose of choosing employees. These tests must measure the relevant traits and be reasonably reliable. The employer is not permitted to discriminate between candidates when establishing the tests.

Graphology testing is permitted, even though its reliability has been questioned, and it has been characterized as problematic because of serious interference with the candidate's rights of privacy.

The labour court has exclusive jurisdiction over all civil cases claiming a violation of the Equal Opportunities at Work Law, 1988 and other related legistlation. A violation of this Law also results in criminal sanctions. The court is empowered to award damages – although if no economic damage is caused – the court is empowered to award damages of up to a certain sum without the need for proof of damage. The court can also order mandatory injunctions or specific performance if it considers that an award of damages alone is not justified. In considering whether to make such an order, the court is required to take into account certain factors (e.g., the effect on the relationships at the place of work and the chances that another employee would be affected as well as any applicable collective agreement).

Reform of Investor-State Dispute Settlement: In Search of a Roadmap, Special Issue for the Multilateral Dialogie on Investment, IIA Issue Note No. 2, UNCTAD/WEB/DIAE/PCB/2013/4 (14 May 2013); Also *see* chapter titled *The Challenges of Creating a Standing International Investment Court*, *in Reshaping the Investor-State Dispute Settlement System* 402–423 (Eduardo Zuleta ed., International Law E-Books Online Collection 2015); Further *see* Nicolette Butler, *In Search of a Model for the Reform of International Investment Dispute Resolution: An Analysis of Existing International and Regional Dispute Settlement Mechanisms*, TDM 1 (2014); For problems with the formation of a world investment court, refer to chapter titled *Making Impossible Investor-State Reform Possible*, *in Reshaping the Investor-State Dispute Settlement System* 424–436 Luis (Gonzalez Garcia ed., International Law E-Books Online Collection 2015); for the options taken by countries in Latin America to set up a permanent investment court, refer to Omar E. Garcia-Bolivar, *Permanent Investment Tribunals: The Momentum is Building Up*, TDM 1 (2014).

151. Prime Minister's Office, *Cabinet Approves Bilateral Investment Treaty between India and Cambodia to Boost Investment*, http://www.pmindia.gov.in/en/news_updates/cabinet-approves-bilateral-investment-treaty-between-india-and-cambodia-to-boost-investment/ (accessed 19 Mar. 2017).

Note should also be made of the Enforcement Law, 2012, which imposes criminal and civil sanctions for violations of laws addressing recruitment issues (such as the Equal Opportunities at Work Law, 1988, the Genetic Information Law, 2000, etc.).

In general, it has to be recalled that, whatever information is collected during the recruitment process, careful use of the same has to be made in order to prevent issues of discrimination arising as between potential applicants.

The question remains – what is it that the Uruguay Round brought to stimulate the Regional Trade Agreement (RTAs)? Is it because of the disappointing results of the Doha Round? There is conflicting opinions to this question: some scholars argue that the disappointing results of the Doha Round has caused World Trade Organization (WTO) members to conclude RTAs, meaning that members see RTAs as policy alternative to the WTO.[152] However, there are scholars who hold that RTAs have participated in the sluggish pace of concluding the Doha Round,[153] while other scholars argue that there is no correlation between prolific RTAs and sluggish multilateralism. The reason behind the latter is that where the GATT has stalled, even the RTAs have stalled201 although this is not always the case because there are areas where RTAs have made significant headway.[154]

The Protection of Privacy Law, 1981 imposes restrictions relevant to the conduct of background checks and contains data protection provisions. The type of information collected on applicants would most likely require the registration of a database. The applicant's consent would be required in order to conduct background checks and for storing, using and transferring the data. Even with consent, the information collected must be relevant, used for a legitimate business purpose and the infringement of privacy proportionate. If the employer intends to keep the data after the decision on hiring the individual is reached (with respect to hired employees and applicants that were not hired) employer will have to state the purpose of retaining such data and specific consent is required.

152. Bernard Hoekman, *Trading Blocs and the Trading System: The Services Dimension*, 10 J. Econ. Integration 1, 13 (1995).
153. The new wave of RTAs cover areas such as competition, services, investment, environmental and labour standards; and, these are the areas that are difficult to conclude at the DOHA Round.
154. However, Pomfret warns that to allege that regionalism is rife in the current wave by counting the number of RTAs is misleading because the count also includes defunct or abrogated RTAs as well as those involving non-WTO members. To this end, he makes an example of the enlargement of EU, pointing out that it effectively reduced the number of RTAs by 65 because those 65 RTAs were among members that are now part of the EU, rendering 65 RTAs defunct. Also, the separation of RTAs notified under GATT and GATS between same members inflate the number, for example, Thailand and Australia notified RTA(s) on the 5 Jan. 2005 involving goods and services and that was treated as two RTAs notified under GATT and GATS respectively, Promfet. Other than double counting, Pomfret is of the view that some RTAs are of less importance to the global economy to be counted because they involve bilateral agreements between small countries, which are insignificant to the global economy – as a result, such RTAs cannot divert nor create trade, also, they cannot be regarded as building or stumbling blocks. In addition, a distinction must be drawn between RTAs that are created as a result of regional disintegration as it happened in the aftermath of breakdown of USSR and former Yugoslavia, which saw countries acceding to WTO and notified the bilateral agreements they already had.

As a general rule, the employee rights and entitlements given by mandatory provisions of law, extension orders and collective agreements (whether general or specific) are overriding and the parties to the individual employment relationship cannot waive them or derogate from them. However, the parties are free to improve upon the minimum entitlements.

Summing up this section, what is striking with the RTAs dispute settlement mechanisms is that often RTA members still approach the WTO dispute settlement yet their disputes could well be settled at the RTA level. As a result, it becomes difficult to understand the reasons for why RTAs created dispute settlement organs and this creates an opportunity for WTO to serve as a global institution for settling disputes because seemingly members have a trust in the WTO DSM. The section below interrogates the political economy of the RTA dispute settlement mechanisms with a view to understanding why RTAs created these procedures. This determination will assist in unraveling the question of whether RTAs are a stumbling or building block to the coherent global trading system.

Much of the employment law legislation sets forth fundamental and minimum employee entitlements. These laws apply to all employees (subject only to specific exceptions).

In addition to the legislation, a large part of the employees' rights as well as their obligations are included within the framework of collective agreements. By virtue of the Collective Agreements Law, 1957, these agreements have acquired a special status and the employee unions and employers have been granted wide legal powers to determine legal norms. Accordingly, collective agreements constitute a source of employment law. In the event of a contradiction between the provisions of a collective agreement and those of an individual employment agreement, the former will take precedence, unless the employment agreement improves upon the rights of the employee provided under the collective agreement.

The Collective Agreements Law, 1957 also empowers the Minister of Economy and Industry to extend collective agreements using extension orders. By means of these extension orders, collective agreements can apply to employers and employees who are not members of those particular unions which are parties to the collective agreements themselves. Extension orders have normative effect and have been frequently issued. The extension orders may apply to the general work force (such as the extension order regarding pension rights) or may be directed only to a specific sector within the work force. While it is still true to say that, in the main, the Israeli hi-tech industry operates such that much of the terms of employment are set forth in the individual employment agreements, subject of course to the mandatory provisions of Israeli employment law, there has been increased employee union involvement in that industry and other industries that were traditionally based on personal employment agreements, such as insurance or finance in more recent years.

Note can also be made of the following:

(a) Criminal records – the only person who can access a criminal record for the purposes of pre-employment inquiries is the individual involved. In general terms, (and except for work with minors or helpless persons) the potential employer cannot require the applicant to produce his or her criminal record or a certificate issued by the Israeli police confirming no criminal record. Such a requirement, in itself, may be considered a criminal offense.

(b) For certain sensitive positions, employers may seek a declaration by candidate regarding relevant criminal records.
These should be drawn for specific measures and include specific wording as instructed by the Supreme Court in *Dayan v. The National Gambling Association*.

(c) Education records – the applicant can be required to provide such information – please note that the applicant can obtain certified copies issued 1by the relevant educational institution of his/her courses and grades.

(d) Past employment details – the applicant can be required to provide such information.

(e) Health checks or details – Other than specific positions detailed in different regulation, inquiring on candidate's health or requiring a health check should only be considered if and to the extent relevant to the position. Details and results are obviously subject to the protection of privacy law and regulations.

The progress of this period represents moderation in approach towards investment treaties and investment arbitration. Investments are welcome but rigid investment protection treaties with broad treatment standards that would intrude upon regular freedoms are unacceptable. Through an innovative Model BIT, India has assumed the position of a rule maker rather than simply a rule taker.[155] It remains to be seen how other states take these rules. There are challenges raised to the capacity of investment treaties with dispute resolution clauses to attract investments. Yet, investment treaties provide psychological comfort for investors.

During the 1990s, the socialist basis of the society changed – the high union density declined. As from 1 January 1995, the Compulsory National Health Insurance Law entered into force, which guaranteed medical coverage to every resident. This in itself brought about a substantial overnight reduction in Histadrut membership. While the Histadrut still holds a prominent position, there are also other important employee unions – the Teachers' Unions (Grade School and High School), the Doctors' Union and the Leumit National General Union.

The main employment law legislation (not in any particular order) includes the following legislation by way of example:

- Notification to an Employee (Terms of Employment Law), 2002.
- Advance Notice for Dismissal and Resignation Law, 2001.
- Hours of Works and Rest Law, 1951.
- Minimum Wage Law, 1957.
- Wages Protection Law, 1958.
- Annual Vacation Law, 1951.
- Sick Pay Law, 1976.

155. Rajput, *supra* n. 138, at 201, 225–226.

- Employment of Women Law, 1954.
- Equal Opportunities at Work Law, 1988.
- Equal Wages Law, 1996.
- Severance Pay Law, 1963.
- Enhancement of Enforcement Law, 2011.

The decisions of the labour courts are also a source of law in the interpretation of the various legislative measures and also the terms of individual employment agreements. In addition, the labour courts may go so far as to create new norms or mandatory procedures. It is worth noting that the general approach of the Israeli Labour Courts is that it is more likely that an order to reinstate an employee would be made in the public sector whereas this is less likely in the case of employment relationships within the private sector (although more recent case law has found it appropriate to make such an order in certain cases).

Overall, the number of RTAs in the second and third wave has grown tremendously. With the rise in the RTA number comes the rise of diverse regional dispute settlement mechanisms, whose jurisdiction overlaps with that of the WTO. Not only has the third wave of regionalism replicated WTO areas of trade regulation while also adopting WTO-plus standards, it has also replicated WTO dispute settlement mechanism as well. Nevertheless, the RTA dispute settlement mechanisms remain dysfunctional. With the WTO-plus standards, it is imperative that the WTO should be redesigned to serve as a platform for solving global disputes on trade; otherwise, the global trading system is under siege especially against the backdrop of mega-regionals.

Appendix I

The Association of Litigation Funders of England and Wales – Code of Conduct for Litigation Funders – November 2016 Revision

CODE OF CONDUCT FOR LITIGATION FUNDERS[1]

November 2014[2]

1. This code ('the Code') sets out standards of practice and behaviour to be observed by Funders (as defined in clause 2 below) who are Members of The Association of Litigation Funders of England & Wales ('the Association') in respect of funding the resolution of disputes within England and Wales.
2. A litigation funder:
   2.1 has access to funds immediately within its control, including within a corporate parent or subsidiary ('Funder's Subsidiary'); or
   2.2 acts as the exclusive investment advisor to an entity or entities having access to funds immediately within its or their control, including within a corporate parent or subsidiary ('Associated Entity'), ('a Funder') in each case:
   2.3 to fund the resolution of disputes within England and Wales; and

1. Copyright Association of Litigation Funders, 2016. Reprinted with Permission. The original version of this document is available at http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Nov2016-Final-PDF.pdf.
2. This is the date of the original version of this document available on the Association of Litigation Funders website. However, the date at the end of this document is November 2016, which is the correct date of the latest revision of this Code. The only change from the 2014 version to the 2016 version is that the capital adequacy amount was raised from GBP 2 million to GBP 5 million in Section 9.4.2, below.

2.4 where the funds are invested pursuant to a Litigation Funding Agreement ('LFA') to enable a party to a dispute ('the Funded Party') to meet the costs (including pre-action costs) of resolving disputes by litigation, arbitration or other dispute resolution procedures.

In return the Funder, Funder's Subsidiary or Associated Entity:

2.5 receives a share of the proceeds if the claim is successful (as defined in the LFA); and

2.6 does not seek any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA.

3. A Funder shall be deemed to have adopted the Code in respect of funding the resolution of disputes within England and Wales.
4. A Funder shall accept responsibility to the Association for compliance with the Code by a Funder's Subsidiary or Associated Entity. By so doing a Funder shall not accept legal responsibility to a Funded Party, which shall be a matter governed, if at all, by the provisions of the LFA.
5. A Funder shall inform a Funded Party as soon as possible and prior to execution of an LFA:

5.1 if the Funder is acting for and/or on behalf of a Funder's Subsidiary or an Associated Entity in respect of funding the resolution of disputes within England & Wales; and

5.2 whether the LFA will be entered into by the Funder, a Funder's Subsidiary or an Associated Entity.

6. The promotional literature of a Funder must be clear and not misleading.
7. A Funder will observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Funded Party. For the avoidance of doubt, the Funder is responsible for the purposes of this Code for preserving confidentiality on behalf of any Funder's Subsidiary or Associated Entity.
8. An LFA is a contractually binding agreement entered into between a Funder, a Funder's Subsidiary or Associated Entity and a Funded Party relating to the resolution of disputes within England and Wales.
9. A Funder will:

9.1 take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the LFA prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute;

9.2 not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties;

9.3 not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder;

9.4 Maintain at all times access to adequate financial resources to meet the obligations of the Funder, its Funder Subsidiaries and Associated Entities to fund all the disputes that they have agreed to fund and in particular will;

9.4.1 ensure that the Funder, its Funder Subsidiaries and Associated Entities maintain the capacity;

9.4.1.1 to pay all debts when they become due and payable; and

9.4.1.2 to cover aggregate funding liabilities under all of their LFAs for a minimum period of 36 months.

9.4.2 maintain access to a minimum of £5 m of capital or such other amount as stipulated by the Association;

9.4.3 accept a continuous disclosure obligation in respect of its capital adequacy, including a specific obligation to notify timeously the Association and the Funded Party if the Funder reasonably believes that its representations in respect of capital adequacy under the Code are no longer valid because of changed circumstances;

9.4.4 undertake that it will be audited annually by a recognised national or international audit firm and shall provide the Association with:

9.4.4.1 a copy of the audit opinion given by the audit firm on the Funder's or Funder's Subsidiary's most recent annual financial statements (but not the underlying financial statements), or in the case of Funders who are investment advisors to an Associated Entity, the audit opinion given by the audit firm in respect of the Associated Entity (but not the underlying financial statements), within one month of receipt of the opinion and in any case within six months of each fiscal year end. If the audit opinion provided is qualified (except as to any emphasis of matters relating to the uncertainty of valuing relevant litigation funding investments) or expresses any question as to the ability of the firm to continue as a going concern, the Association shall be entitled to enquire further into the qualification expressed and take any further action it deems appropriate; and

9.4.4.2 reasonable evidence from a qualified third party (preferably from an auditor, but alternatively from a third party administrator or bank) that the Funder or Funder's Subsidiary or Associated Entity satisfies the minimum capital requirement prevailing at the time of annual subscription.

9.5 comply with the Rules of the Association as to capital adequacy as amended from time to time.

10. The LFA shall state whether (and if so to what extent) the Funder or Funder's Subsidiary or Associated Party is liable to the Funded Party to:
    10.1 meet any liability for adverse costs;
    10.2 pay any premium (including insurance premium tax) to obtain costs insurance;
    10.3 provide security for costs; and
    10.4 meet any other financial liability.
11. The LFA shall state whether (and if so how) the Funder or Funder's Subsidiary or Associated Entity may:
    11.1 provide input to the Funder Party's decisions in relation to settlements;
    11.2 terminate the LFA in the event that the Funder or Funder's Subsidiary or Associated Entity:
        11.2.1 reasonably ceases to be satisfied about the merits of the dispute;
        11.2.2 reasonably believes that the dispute is no longer commercially viable; or
        11.2.3 reasonably believes that there has been a material breach of the LFA by the Funded Party.
12. The LFA shall not establish a discretionary right for a Funder or Funder's Subsidiary or Associated Party to terminate a LFA in the absence of the circumstances described in clause 11.2.
13. If the LFA does give the Funder or Funder's Subsidiary or Associated Entity any of the rights described in clause 11, the LFA shall provide that:
    13.1 if the Funder or Funder's Subsidiary or Associated Entity terminates the LFA, the Funder or Funder's Subsidiary or Associated Entity shall remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach under clause 11.2.3;
    13.2 if there is a dispute between the Funder, Funder's Subsidiary or Associated Entity and the Funded Party about settlement or about termination of the LFA, a binding opinion shall be obtained from a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council.
14. Breach by the Funder's Subsidiary or Associated Entity of the provisions of the Code shall constitute a breach of the Code by the Funder.
15. The Association shall maintain a complaints procedure. A Funder consents to the complaints procedure as it may be varied from time to time in respect of any relevant act or omission by the Funder, Funder's Subsidiary or Associated Entity.
16. The Code (as amended) applies to LFAs commencing on or after the date hereof.

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