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Prabhash Ranjan, *FDI in Multi-Brand Retail Trading and India's Bilateral Investment Treaties*
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FDI IN MULTI-BRAND RETAIL TRADING AND INDIA'S BILATERAL INVESTMENT TREATIES

PRABHASH RANJAN*

This note assesses India's policy of permitting foreign direct investment (FDI) up to 51 per cent in the multi brand retail-trading (MBRT) sector in light of India's bilateral investment treaties (BITs). This is assessed by examining whether India's BITs provide pre-entry national treatment protection to foreign investment or not. Based on this assessment, the note finds that this policy is consistent with India's BIT obligations. However, the note argues that given the current political opposition to this policy and other features of India's BIT like protection of foreign investment from both direct and indirect expropriation, reversal of this policy in future by a later government, after foreign investment has been made, might trigger BIT claims against India.

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I. INTRODUCTION

India started the process of shifting from 'the Indian version of socialism' and liberalising the economy, in a major way, in the early 1990s.¹ In 1991, India

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¹ For more on the economic reforms launched by India in early 1990s, see M.S. AHLUWALIA, *PRODUCTIVITY AND GROWTH IN INDIAN MANUFACTURING* (1991) [hereinafter AHLUWALIA]; A. Virmani, *Policy Regimes, Growth and Poverty in India: Lessons of*

unleashed major structural adjustments and macro-economic reforms such as gradually dismantling quantitative restrictions on imports, bringing down tariff rates from a peak of 300 percent to a peak of 35 percent and comprehensive reform of the exchange control regime.² An integral component of this economic reform process was the liberalisation of Foreign Direct Investment (FDI) and Foreign Institutional Investment (FII) inflows, not just to overcome the problem of over-dependence on debt, but also to boost long term economic growth. This was clearly evident from the new industrial policy that India adopted in 1991, which recognised that “foreign investment would bring attendant advantages of technology transfer, marketing expertise, introduction of modern managerial techniques and new possibilities for promotion of exports”.³

The industrial policy of 1991 allowed investment through two routes – the automatic route (where no permission is needed from the government) and the Government or approved route (where prior permission of the government is needed). Since then, India has progressively liberalised the sectors in which FDI is allowed. Thus, barring activities like gambling, lottery business, chit funds, real estate, atomic energy, and railway transport, FDI is allowed in all sectors subject to sector-specific conditions.⁴ Till very recently, one of the sectors included in this prohibited list was multi-brand retail trading (MBRT), although FDI in single brand retailing was permitted in 2006 to the extent of 51%.⁵ However, on September 20, 2012, after reviewing the existing FDI policy, the Government of India decided to permit 51% FDI in MBRT under the Government route.⁶

Arguments in favour and against FDI in MBRT and its potential impact on the

Government Failure and Entrepreneurial Success 8 (ICRIER, Working Paper No. 170, 2005) available at: <http://icrier.org/pdf/WP170GrPov11.pdf>; C. Rangarajan, *Two Episodes in the Reform Process, in INDIA'S ECONOMY: PERFORMANCE AND CHALLENGES* 100 (S. Acharya & R. Mohan eds., 2010) [hereinafter Rangarajan]; A. Panagariya, *Growth and Reforms During 1980s and 1990s*, 39 (25) *ECON. & POL. WKLY.* (2004) 2581.

² For a detailed discussion on these economic reforms, see AHLUWALIA, *supra* note 1; RANGARAJAN, *supra* note 1.

³ GOVERNMENT OF INDIA, *INDIA'S NEW INDUSTRIAL POLICY OF 1991*, available at: <http://business.webindia.com/polinwid.htm>.

⁴ For more on this, see DEPARTMENT OF INDUSTRIAL POLICY & PROMOTION, MINISTRY OF COMMERCE AND INDUSTRY, GOVERNMENT OF INDIA, *CONSOLIDATED FDI POLICY 39 (2013)*, at: http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf.

⁵ MINISTRY OF COMMERCE, GOVERNMENT OF INDIA, *DISCUSSION PAPER, FOREIGN DIRECT INVESTMENT IN MULTI BRAND RETAIL TRADING (2011)*.

⁶ DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, MINISTRY OF COMMERCE AND INDUSTRY, GOVERNMENT OF INDIA, *PRESS NOTE NO. 5 (2012 SERIES): REVIEWING OF THE POLICY ON FOREIGN DIRECT INVESTMENT – ALLOWING FDI IN MULTI BRAND RETAIL TRADING (2012)*, available at: http://dipp.nic.in/english/acts_rules/Press_Notes/pn5_2012.pdf.

Indian economy, employment and consumers have been adequately flagged and debated.⁷ The validity of this policy was also challenged in the Supreme Court of India,⁸ which provides further evidence of opposition to the policy. However, the Supreme Court refused to interfere and held that courts should desist from the realm of policy making unless the policy itself is unconstitutional. The liberalisation of FDI in the MBRT sector was, according to the Supreme Court, not unconstitutional.⁹ This Note does not discuss the merits and demerits of this policy, but instead, examines whether India's FDI policy in MBRT is consistent with its international obligations imposed by the numerous Bilateral Investment Treaties (BITs) it is part of. In order to answer this question, this Note is divided in the following parts. Part II briefly introduces India's BIT programme. Part III introduces the FDI policy in MBRT. Part IV discusses whether India's FDI policy on MBRT breaches its BIT obligations. Finally, Part V concludes.

II. INDIA'S BIT PROGRAMME

BITs are treaties between two countries aimed at protecting investments made by investors of both countries.¹⁰ These treaties allow individual investors to bring

⁷ Many concerns have been expressed regarding FDI in MBRT such as it will adversely impact employment and the manufacturing sector, it will result in anti-competitive practices like predatory pricing by big retailers, and it will adversely impact domestic retailers. The Bhartiya Janata Party (BJP), the principal opposition party in the Lok Sabha (House of Commons), is of the view that opening the multi-brand retail sector to FDI will result in job losses and adversely impact the manufacturing sector – see Arun Jaitley, *Brief points made while opposing FDI in Multi Brand Retail* (Dec. 6, 2012), available at: http://www.bjp.org/index.php?option=com_content&view=article&id=8423:brief-points-made-by-shri-arun-jaitley-while-opposing-fdi-in-multi-brand-retail&catid=69:speeches&Itemid=495. See also, the views of the Communist Party of India (Marxist), which also opposes FDI in Multi Brand Retail – Press Statement, *Intensify Struggle Against FDI in Multi Brand Retail* (Dec. 12, 2011), available at: <http://cpim.org/content/intensify-struggle-against-fdi-retail>. See also, Madhyam, *The Pitfalls of FDI in Multi Brand Retailing in India* (2011), available at: <http://www.madhyam.org.in/admin/tender/Madhyam%20Briefing%20Paper%203.pdf>; and Sukhpal Singh, *FDI in Retail: Misplaced Expectations and Half Truths*, 46(51) ECON. & POL. WKLY. (2011) [hereinafter Sukhpal Singh], for critical views on FDI in MBRT. Also see, K.S.C. Rao & B. Dhar, *Vaulting Over India's Retail FDI Policy Wall*, 47(46) ECON. & POL. WKLY (2012). For arguments in favour of FDI in MBRT, see A. Mukherjee, D. Satija *et al.*, *Impact of the Retail FDI Policy on Indian Consumers and the Way Forward*, ICRIER POLY SERIES NO. 5 (2011). See also, the debate on this issue in the Indian Parliament – Lok Sabha, Discussion under Rule 184: Motion to recommend the Government to Withdraw 51% FDI in MBRT (Dec. 5, 2012).

⁷ For other critical views on FDI in MBRT, see Sukhpal Singh, *supra* note 6.

⁸ Manohar Lal Sharma v. Union of India, (2013) 6 SCC 616.

⁹ *Id.*

¹⁰ For a general discussion on BITs, see R. DOLZER & C. SCHREUER, PRINCIPLES OF

cases against host states. This is known as investment treaty arbitration (ITA). India started its BIT programme in 1994 in order to attract foreign investment. This is clearly enunciated in the policy statement of Ministry of Finance, Government of India, which is the nodal body in India that deals with BITs. The policy statement states –

As part of the Economic Reforms Programme initiated in 1991, the foreign investment policy of the Government of India was liberalised and negotiations undertaken with a number of countries to enter into Bilateral Investment Promotion and Protection Agreement (BIPAs)¹¹ in order to promote and protect on reciprocal basis investment of the investors.¹²

The Finance Ministry also states –

[T]he objective of Bilateral Investment Promotion and Protection Agreement is to promote and protect the interests of investors of either country in the territory of other country. Such Agreements increase the comfort level of the investors by assuring a minimum standard of treatment in all matters and provides for justifiability of disputes with the host country.¹³

Since then, India has entered into BITs with 86 countries, out of which 73 have already come into force.¹⁴ India's first BIT was with the United Kingdom (UK) in 1994. Since then, India has entered into BITs with almost all major European countries like France, Germany, Italy, the Netherlands, Belgium, Denmark, Poland, Switzerland, and Sweden. India's BITs in the first six years of its BIT programme (1994-2000) were mainly with European countries in a clear attempt to attract foreign investment. From the year 2000 and after, India entered

INTERNATIONAL INVESTMENT LAW (2012); A. NEWCOMBE & L. PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 1-73 (2009) [hereinafter NEWCOMBE & PARADELL]; J. SALACUSE, THE LAW OF INVESTMENT TREATIES (2010).

¹¹ In India, BITs are known as Bilateral Investment Promotion and Protection Agreements (BIPAs).

¹² MINISTRY OF FINANCE, GOVERNMENT OF INDIA, BILATERAL INVESTMENT PROMOTION AND PROTECTION AGREEMENT, *available at*: http://finmin.nic.in/bipa/bipa_index.asp.

¹³ *Id.*

¹⁴ See P. Ranjan & D. Raju, *The Enigma of Enforceability of Investment Treaty Arbitration Awards in India*, 6 ASIAN J. COMP. L. Art.5 (2011). Out of these 73 BITs, 69 are stand-alone investment agreements whereas four are investment chapters in Free Trade Agreements (FTAs) – In this note collectively called BITs. The note has not taken into account India's BITs with those countries with whom India has also entered into a FTA with an investment chapter such as Korea and Malaysia.

into BITs with many developing countries like Argentina, Mexico, China, Thailand, Indonesia, Saudi Arabia as well as with least developed countries (LDCs) like Bangladesh, Sudan, Mozambique.¹⁵ All these BITs are for a 10-year period and are deemed to be automatically extended after this period unless either State gives notice in writing to terminate the treaty. Further, even if the treaty is terminated, the protection for the existing investments made in India will continue to apply for the next 15 years as given in Article 16 (2) of the Indian Model BIT.¹⁶

Out of these 73 BITs, 69 are stand-alone investment treaties (BITs) whereas in case of four countries - Singapore, Korea, Malaysia and Japan – investment protection obligations are part of a Free Trade Agreement (FTA).¹⁷ These FTAs, apart from investment protection, also cover trade liberalisation (goods and services), investment liberalisation, competition policy, trade facilitation, rules of origin and intellectual property rights. India recently finalised an FTA containing a chapter on investment with ASEAN.¹⁸ India is also negotiating FTAs containing investment chapters with Indonesia, Australia, Mauritius, New Zealand¹⁹ and European Union.²⁰ It is also negotiating a BIT with Canada²¹ and the US.²²

¹⁵ Full list of countries with whom India has entered into a BIT is available at MINISTRY OF FINANCE, BILATERAL INVESTMENT AND PROMOTION AGREEMENT (BIPA), *available at*: http://finmin.nic.in/bipa/bipa_index.asp?pageid=2.

¹⁶ Indian Model Text of Bilateral Investment Promotion and Protection Agreement, Ministry of Finance, Government of India, *available at*: http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp?pageid=1

¹⁷ In India, FTAs are known as Comprehensive Economic Cooperation Agreements (CECA).

¹⁸ S. Mehdudia, *India, ASEAN Finalise FTA in Services, Investment*, THE HINDU (Dec. 20, 2012), *available at*: <http://www.thehindu.com/business/Economy/india-asean-finalise-fta-in-services-investments/article4222052.ece>.

¹⁹ Department of Commerce, Government of India, *International Trade – Trade Agreements*, *available at*: http://commerce.nic.in/trade/international_ta.asp?id=2&trade=I. India already has a BIT with Indonesia and Mauritius.

²⁰ *Luxembourg for Early Conclusion of India-EU FTA*, THE ECON. TIMES (Oct. 16, 2012), *available at*: http://articles.economictimes.indiatimes.com/2012-10-16/news/34498965_1_india-gaston-stronck-luxembourg-ambassador-luxembourg-stock-exchange. *See also*, Economic Survey of 2011-12 that gives information about the ongoing negotiations on these CECA – GOVT. OF INDIA, UNION BUDGET & ECON. SURVEY (2011-12), at 176-77, *available at*: <http://indiabudget.nic.in/survey.asp>.

²¹ FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, GOVERNMENT OF CANADA,, CANADA-INDIA FOREIGN INVESTMENT PROMOTION AND PROTECTION AGREEMENT NEGOTIATIONS, *available at*: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apic/india-inde.aspx?lang=eng&view=d>.

However, recent developments suggest that this BIT has run into rough weather. *See* P. Ranjan & K. Bharadwaj, *Stephen Harper Left India with no FIPA. Here's Why*, TROY MEDIA

A large majority of India's BITs contain all the assurances of protection of investment to foreign investors with scant exceptions, reservations and carve-out provisions. All Indian BITs also contain an investor-state dispute resolution clause that allows investors to challenge the sovereign actions of the host state.²³

III. FDI IN MBRT: THE POLICY

India has allowed FDI in MBRT subject to certain conditions. Some of these conditions include – an obligation on the foreign investor to invest a minimum amount of US \$100 million; to invest at least 50% of the total FDI in 'backend infrastructure' within three years of the first tranche of FDI; to source at least 30% value of procurement of manufactured processed products from small-scale Indian industries which have a total investment in plant & machinery not exceeding US \$1 million; and the Government of India will have the first right to procurement of agricultural products.²⁴

These conditions have been imposed in order to ensure that Indian agriculture and small-scale industry benefits directly from FDI in MBRT. Thus, a foreign retailer investing 50% of the investment in 'backend' infrastructure will help create better food-storage facilities that will help mitigate wastage of agricultural produce. Further, mandatory procurement by foreign retailers from small-scale industries will ensure better markets for their produce.²⁵

(Dec. 17, 2012), available at: <http://www.troymedia.com/2012/12/17/stephen-harper-left-india-with-no-fipa-heres-why>.

²² William Burns, *The United States and India: A Vital Partnership in a Changing World*, US DEPARTMENT OF STATE WASHINGTON DC (Oct. 26, 2012), available at: <http://www.state.gov/s/d/2012/199801.htm>. See also, P. Ranjan & D. Raju, *A BIT About Walmart*, THE INDIAN EXPRESS (Nov. 28, 2012) [hereinafter *A BIT About Walmart*].

²³ For more on Indian BITs, see P. Ranjan, *India's International Investment Agreements and India's Regulatory Power as a Host Nation* (2013) (unpublished Ph.D. thesis, King's College London) [hereinafter P. Ranjan, Ph.D. Thesis]; P. Ranjan, 'Object and Purpose' of Indian International Investment Agreements: Failing to Balance Investment Protection and Regulatory Power, in FOREIGN INVESTMENT AND DISPUTE RESOLUTION: LAW AND PRACTICE IN ASIA 192 (V. Bath & L. Nottage eds., 2011); P. Ranjan, *International Investment Agreements and Regulatory Discretion: Case Study of India*, 9 (2) J.WORLD INV. & TRADE 209 (2008); P. Ranjan, *Indian Investment Treaty Programme in Light of Global Experiences*, 45 (7) ECON. & POL. WKLY, 68 (2010); S. Rao, *Bilateral Investment Promotion Agreements: A Legal Framework for the Protection of Foreign Investments*, 26 COMMONWEALTH L. BULL. 623 (2000); D. Krishan, *India and International Investment Law*, in INDIA AND INTERNATIONAL LAW, Vol. 2, 277 (B.N. Patel ed., 2008).

²⁴ For full details on the conditions imposed on FDI in MBRT, see *supra* note 6.

²⁵ However, according to recent reports, Indian government is contemplating to change this requirement after foreign retailers like Walmart expressed their inability to meet these conditions – see S. Phukan, *Government Blinks After Walmart's Reported Inability to Meet*

An important condition given in the FDI policy is:

The above policy is an enabling policy only and the State Governments/Union Territories would be free to take their own decisions in regard to implementation of the policy. Therefore, retail sales outlets may be set up in those States/Union Territories which have agreed, or agree in future, to allow FDI in MBRT under this policy. The list of States/Union Territories which have conveyed their agreement is annexed. Such agreement, in future, to permit establishment of retail outlets under this policy, would be conveyed to the Government of India through the Department of Industrial Policy & Promotion and additions would be made to the annexed list accordingly. The establishment of the retail sales outlets will be in compliance of applicable State/Union Territory laws/ regulations, such as the Shops and Establishments Act etc.²⁶

This makes the entire policy on FDI in MBRT an enabling one. So, while the government of India has allowed 51 per cent FDI in MBRT, it will let the state governments decide whether they want to implement it. This reflects the political divide on this question amongst different state governments run by different political parties. For example, the Tamil Nadu state government has opposed the FDI policy on MBRT because it will adversely impact domestic manufacturing and services sector causing job losses.²⁷ The Kerala state government has also opposed the policy on similar grounds.²⁸ So far, only nine states have welcomed the prospect of foreign retailers.²⁹ Thus, every state has the right to decide whether to allow establishment of retail sales outlets in their states as per their individual Shops and Establishments Acts.³⁰

IV. CONSISTENCY WITH INDIA'S BITS

Given these conditions on FDI in MBRT, some have argued that this violates India's obligations under BITS. For instance, some are of the view that many of

Norms, NDTV (July 30, 2013), available at: <http://profit.ndtv.com/news/economy/article-government-blinks-after-walmarts-reported-inability-to-meet-norms-325126>.

²⁶ *Supra* note 21.

²⁷ See Chief Minister of Tamil Nadu, Press Statement on FDI in MBRT, available at: http://cms.tn.gov.in//sites/default/files/press_release/pr271111_212.pdf.

²⁸ N. P. Ullekh, *FDI in Retail: Why Kerala is Fiercely Opposing Big Foreign Investment*, THE ECON. TIMES (Sept. 23, 2012), available at: http://articles.economictimes.indiatimes.com/2012-09-23/news/34023003_1_multi-brand-retail-reform-fdi.

²⁹ *Supra* note 6.

³⁰ Shops & Establishments Act, 1953, regulates shops, retail stores and other commercial establishments like hotels etc.

the conditions imposed on foreign retailers like investing 50% of the total investment in 'backend' infrastructure violates the national treatment provision of India's BITs because such conditions have not been imposed on domestic retailers.³¹ However, this argument does not hold ground because the majority of Indian BITs follow the post-establishment or post-entry model.³² BITs containing the post-entry model provide no general rights of admission and establishment.³³ In other words, India's obligation to provide national treatment and most favoured nation treatment does not extend to the admission and establishment stage of foreign investment.³⁴ These obligations kick in only when foreign investment has already been admitted in India and is in play. The measure of imposing conditions in the form of FDI policy on the entry of foreign retailers followed by their screening, even if same conditions have not been imposed on domestic retailers, is consistent with India's BITs.³⁵ It is important to recall that India made a submission to a WTO working group to examine the relationship between trade and investment in 2002, emphasising on the need for developing countries to have flexibility to screen and channel foreign investment in accordance with their domestic interests and priorities.³⁶ Thus, India has long considered that imposing conditions on foreign retailers is in accordance with its domestic interests and priorities.

As discussed earlier, India has also entered into four free trade agreements containing investment chapters apart from stand-alone BITs.³⁷ The investment

³¹ See Prakash Javadekar, *FDI Policy Not Bound by Bilateral Investment Promotion Agreement*, THE ECON. TIMES (Sept. 19, 2012), available at: http://articles.economicstimes.indiatimes.com/2012-09-19/news/33952634_1_multi-brand-bilateral-investment-fdi-policy. See also, Sugato Roy, Member of Parliament, Speech at Lok Sabha Debates (Dec. 4, 2012).

³² Press Release, Ministry of Commerce and Industry, Government of India, FDI Policy on Multi Brand Retail Trading and India's Commitments under International Investment Agreements (Sept. 18, 2012).

³³ For full discussion on post-entry model BITs, see NEWCOMBE & PARADELL, *supra* note 8, at 133.

³⁴ *Id.* See also, P. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW, 177-214 (2007); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 98-108 (2d ed., 2004); I. Shihata, *Recent Trends Relating to Entry of Foreign Investment*, 9 ICSID REV. 47 (1994).

³⁵ See UNCTAD, ADMISSION AND ESTABLISHMENT (UNITED NATIONS: NEW YORK AND GENEVA) (2002), available at: http://unctad.org/en/docs/iteiit10v2_en.pdf; UNCTAD, BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING 21-22(2007) available at: http://unctad.org/en/Docs/iteiia20065_en.pdf.

³⁶ WORLD TRADE ORGANISATION, COMMUNICATION FROM INDIA, WORKING GROUP ON THE RELATIONSHIP BETWEEN TRADE AND INVESTMENT, WT/WGTI/W/148 (Oct. 2, 2002).

³⁷ For detailed discussion on India's trade treaties, see S. Francis and M. Kallummal, *India's Comprehensive Trade Agreements: Implications for Development Trajectory*, 48(31) ECON. &

chapters in these FTAs are quite different from the stand-alone BITs. One major difference, relevant for discussion here, is that the investment chapters in FTAs follow a pre-entry model. For example, Article 10.3.1 of the investment chapter in the India-Korea FTA states “[e]ach Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment ... of investments in its territory.” Similar provisions can be found in the investment chapters of the India-Singapore FTA³⁸ and the India-Malaysia FTA.³⁹

Presence of the word ‘establishment’ above points to the pre-entry model. Put otherwise, as per these provisions, India has agreed to national treatment obligations to foreign investment even before investment has entered the country. However, in all these treaties, specific exceptions or reservations have been made for MBRT. For instance, the investment chapter of the India-Korea FTA exempts the application of the national treatment provision to retail trading. Accordingly, one can conclude that the FDI policy on MBRT is consistent with the national treatment provision of India’s BITs, whether the BIT in question follows the pre-entry or post-entry model.

However, based on this policy, a situation may emerge in the future, where a violation of India’s BIT provisions might take place. The FDI policy on MBRT is an enabling policy, which gives individual state governments the right to decide whether to allow investment by foreign retailers, as discussed above. In this regard, one cannot rule out the possibility that a future state government, opposed to FDI in retail, could reverse a current state government’s decision to allow a foreign retailer to set up shop. For instance, let us assume that in state ‘A’ of India, the current government allows foreign retailers to set up shops by issuing them licenses under the respective Shops and Establishment Act. Further, assume that in the future, a different political party, opposed to FDI in MBRT, is voted to power in the state. The new government may cancel or revoke the license issued to the foreign retailer, thus closing down her business. There are many instances in investment treaty arbitration where cancellation or revocation of licenses or permits by the host state has triggered a BIT dispute between the foreign investor and the host state. For example, in *Churchill Mining v Indonesia*,⁴⁰ a foreign investor challenged the cancellation of four mining licenses by Indonesia.⁴¹ Similarly, in *Genin v Estonia*,⁴² the dispute arose when the Central Bank of Estonia revoked the

POL. WKLY. (2013).

³⁸ See Art.6.3.1, Investment Chapter, India Singapore FTA.

³⁹ See Art.10.4.1, Investment Chapter, India Malaysia FTA.

⁴⁰ *Churchill Mining PLC v. Republic of Indonesia*, ICSID Case No. ARB/12/14.

⁴¹ *Id.*

⁴² *Alex Genin, Eastern Credit Limited, INC. & A.S. Baltoil v. Republic of Estonia*,

operating license.⁴³ Also, in *Metalclad v Mexico*,⁴⁴ the dispute between the foreign investor and the host state arose when the Mexican government revoked the permit issued earlier to *Metalclad* to construct and operate a landfill.⁴⁵ In India, many foreign corporations have issued arbitral notices, under different BITs, to the Indian government for the cancellation of telecom licenses by the Supreme Court of India.⁴⁶

A foreign investor can challenge such regulatory actions by a state government in India as violative of India's BIT obligation, which is not to directly or indirectly expropriate foreign investment unless certain conditions are fulfilled, such as public purpose and payment of compensation. Expropriation is 'taking' of privately owned property by the government. This 'taking' can be direct or indirect. Protection from both direct and indirect expropriation is one of the substantive investment protection provisions in all the 73 Indian BITs.

Determination of direct expropriation is not difficult. However, determination of 'indirect expropriation' is complicated. One of the factors used to determine whether a regulatory measure amounts to expropriation is the 'effect' of the regulatory measure on foreign investment. In majority of Indian BITs, the sole factor to be used to determine indirect expropriation is this 'effects' test. Very few Indian BITs mention other factors like purpose behind the regulatory measure as an important factor in determining expropriation.⁴⁷ Thus, if the license issued to the foreign retailer is revoked, the foreign retailer will not be able to carry out business activities, which, consequently, will imply substantial or complete deprivation of the investment. This, in turn, will trigger a claim of indirect expropriation against India.

However, one factor that may become critical in the determination of expropriation is knowledge on the part of the foreign retailer that the FDI policy on MBRT is an enabling one, which entails that every state government has the right to decide whether to allow a foreign retailer to open a shop in a particular state. Thus, every foreign retailer who invests in India should be aware of the risks related to the politically sensitive nature of this policy.

ICSID Case No. ARB/99/2.

⁴³ *Id.*

⁴⁴ *Metalclad Corporation v. The United Mexican States*, Case No.ARB(AF)/97/1.

⁴⁵ *Id.*

⁴⁶ For more on this, see P. Ranjan, *Can BIT Claims be Made Against India for the Actions of Indian Judiciary*, 1(1) NLUJ L. REV. (2013)

⁴⁷ For more on the expropriation provision of India's 73 Indian BITs, see P. Ranjan, Ph.D. Thesis, *supra* note 20.

V. CONCLUSION

The policy on FDI in MBRT has proved to be contentious given the sensitive nature of the retail sector and the political divide on this issue. This Note has briefly examined the nature of this policy in light of India's commitments under its BITs. One can conclude that the policy as such is not inconsistent with India's BIT obligations primarily because majority of Indian BITs do not recognise investment protection obligations at the stage of admission and establishment. Thus, India has the right to regulate foreign investment in terms of imposing conditions on its entry without its BITs curtailing this right. However, it is important to note that a BIT dispute may arise if a later state government reverses the policy made by an earlier state government, after foreign investment has been made. India will have to guard herself from such potential conflict situations.