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Protection of Foreign Investment in India and International Rule of Law: Rise or Decline?

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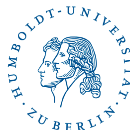

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Protection of Foreign Investment in India and International Rule of Law: Rise or Decline?*

Aniruddha Rajput [1]

Abstract:

This paper narrates the changes in the Indian policy towards foreign investment and analyses them in the backdrop of overall changes in the field of international law and particularly within the framework of the international rule of law. The policy changes that have taken place in India can be categorised into three periods. The first period commences after independence from colonial rule. This period is intriguing. At the international level, India insisted on national treatment for foreign investment and supported the New International Economic Order. Domestically, however, nationalisation was not pursued, and even when pursued, was not applied to foreign investors. This period continued until the 1990s when India faced serious economic problems and this coincided with the high point of the Washington consensus, often seen as the rise of the international rule of law. During this time, national treatment was abandoned and innumerable investment treaties granting liberal protection were entered into. This process ended abruptly after India lost the first investment case. This turn of events comments the third period, where efforts were made towards balancing between investor protection and conserving regulatory freedom. Although this period may appear to be a decline of the international rule of law, a nuanced approach shows that it is rather a rise. India has not withdrawn from the system of investor protection, as has been done by some other States. This period is characterised by extensive and detailed treaties to replace the prior sketchy treaty provisions. This is a move towards a more rule based investment protection.

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1. Introduction

Indian policy and outlook towards foreign investment and its protection has 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 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 protection of foreign investment. In the background of this transformation of policy and standard of legal protection through time, the phenomenon of 'international rule of law: rise or decline?' is analyzed.

There are good reasons for taking India and protection of foreign investment as a case for undertaking this study. The prospects of global growth are bleak; however, India is expected to lead the global growth story along with other Asian economies.[2] It was the fastest growing economy for a brief period.[3] However, it still continues to grow at a fast pace. Indian economy has grown in size and recently surpassed the United Kingdom to become the sixth largest economy in the world.[4] It is expected that by 2050 it would be the largest economy in the world.[5] It has been receiving foreign investments in large amounts. In terms of FDI inflows in 2015, India ranked 4th in Asia having registered a 28% year on year growth in FDI[6]). India is also exporting capital and presently a dominant investor in the South Asia region[7]. It is therefore an influential player in the cross-border movement of capital. In addition to the economic stature, India has been an active member at various international fora and has emerged as a leader in various negotiations. It is also in an influential position politically, which will only increase with its economic stature. Until now, India was mostly a rule taker in the field of international law. It has emerged as a rule maker by introducing innovative provisions in its Model Bilateral Investment Treaty (BIT), which are bound to

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[2] International Monetary Fund, *International Economic Outlook Update*, 19 January 2016, http://www.imf.org/external/pubs/ft/weo/2016/update/01/pdf/0116.pdf (accessed on 19 March 2017).

[3] The slot was lost to China due to the decision of the Government to demonetize the currency. This has resulted in reduction in available case and thus the purchasing powers of consumers. The IMF therefore has reduced its pace of growth by 1%. International Monetary Fund, *International Economic Outlook Update*, 16 January 2017, https://www.imf.org/external/pubs/ft/weo/2017/update/01/pdf/0117.pdf (accessed on 19 March 2017).

[4] The Financial Express, *India tops United Kingdom to become 6th largest economy of the world*, http://www.financialexpress.com/economy/india-tops-united-kingdom-to-become-6th-largest-economy-of-the-world/481849/ (accessed on 19 March 2017).

[5] The Economic Times, *With $85 trillion, how India can become world's largest economy*, 12 November 2011, http://economictimes.indiatimes.com/opinion/et-commentary/with-85-trillion-how-india-can-become-worlds-largest-economy/articleshow/10699821.cms (accessed on 19 March 2017); According to PwC, the Indian economy will be second largest, but the gap between India and other economies will be large, PwC, *The world in 2050*, 2, available at: https://www.pwc.com/gx/en/issues/the-economy/assets/world-in-2050-february-2015.pdf (accessed on 19 March 2017).

[6] UNCTAD, *World Investment Report 2016*, 45, http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (accessed on 19 March 2017).

[7] *Ibid.*, at 47, http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (accessed on 19 March 2017).

influence future treaty making of India and of other states.[8] The phases through which India has been were experienced by other developing states as well. In the case of the developed traditional capital exporting countries, their policy approach is heading in the approach India is taking in the third phase. Position of India in the global growth scenario, coupled with similar concerns being raised by the traditional capital exporting states, India is undoubtedly in a position to influence and shape the regime of international investment law.

2. 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 first phase together because 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. Also, 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 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.[9]

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'.[10] 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.[11] The British funded and supported many industry associations. These associations were primarily meant to assist British businesses; they

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[8] Aniruddha Rajput, *India's Shifting Treaty Practice: A Comparative Analysis of the 2003 and 2015 Model BITs*, 7 Jindal Global Law Review, 201, 224-6. (2016).

[9] Michael Kidron, *Foreign Investment in India*, 3 (Oxford University Press, 1965).

[10] *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 3-11.

[11] *Ibid.*, at 11-12.

showed complete indifference to needs of Indian businesses and expectations.[12] 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 business.[13] Moreover, during the Second World War, the Indian shipping industry was requisitioned and the control was handed over to those protecting British shipping interests.[14] There were various tariff benefits granted to British companies that were not extended to the Indian companies.[15]

In addition to the hostile regulatory framework towards Indian investors, the market conditions were maintained unfavorably 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 unfavorable regulations.[16] 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'.[17] Kidron points out that 'there is substance in the charge of conscious and active discrimination'.[18] 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.'[19]

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 were labour intensive. The focus was on protecting the business interests of the investors from the colonizing country.[20]

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 be bought and their control from foreign hands be taken

[12] *Ibid.*, at 9.

[13] Walchand Hirachand, *Why Indian Shipping Does not Grow*, 4 Bombay Investors Yearbook (1940) cited in Michael Kidron, *Foreign Investment in India*, 16-7.

[14] Kidron, supra n. 9, at 65.

[15] *Ibid.*, at 12-4.

[16] Ibid., at 9-10.

[17] Cited in Michael Kidron, *Foreign Investment in India*, at 17.

[18] Ibid., at 9.

[19] Ibid., at 19.

[20] Ibid., at 300-5.

away. The existing foreign investments were mostly in natural resource extraction; therefore, they were retarding nation's development.[21]

The newly formed government of independent India did not accept this approach. During this time, especially in the 50s and 60s 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.[22] In the Industrial Policy Resolution of 1948, the Government gave an indication to that effect. It was equally unequivocally stated that whenever the control of the foreigners' 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:

> 4. 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 guarantee by the Constitution will be observed and compensation will be awarded on a fair and equitable basis.[23]

The insistence on transfer of ownership within ten years was changed in the following year. There was a retreat from the Industrial Policy Statement of 1948[24] and the Indian government adopted an open foreign investment regime.[25] 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, Jawahar Lal Nehru submitted a special policy statement on foreign capital to Parliament on April 6, 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 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'.

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[21] Jagdish Bhagwati and Padma Desai, *India: Planning for industrialization*, 216-1 (Oxford University, 1970).

[22] Ibid. for a detailed discussion on import substitution policy.

[23] Ministry of Micro Small and Medium Enterprises, Government of India, *Industrial Policy Resolution (IPR), 1948*, http://laghu-udyog.gov.in/policies/iip.htm (accessed on 19 March 2017).

[24] 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) The Economic Journal, 532-34, (Sep. 1933).

[25] Arvind Panagariya, *India: The Emerging Giant,* 29-30 (Oxford University Press, 2013).

> 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 Industrialisation 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'.[26]

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 (no higher treatment to foreign investors than domestic investors) and the right of nationalization subject to the payment of fair compensation.

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.[27] In 1961 the Government of India established the India Investment Center 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.[28] Local participation was encouraged but not insisted and foreign firms were welcome.[29] The response of MNCs was lukewarm in 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. 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.[30]

The peculiar characteristic of India was absence of mass scale nationalization of foreign business as it was done in other newly independent countries. Post independence era was marked by economic nationalism for many states. This was the time when the governments in 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

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[26] Kidron, supra n. 9, at 101.

[27] Panagariya, supra n. 25, at 30.

[28] *Ibid*.

[29] *Ibid*.

[30] *Ibid*., at 30-31.

British was requested to stay back as the Governor General of independent India.[31] However, Indians suffered nationalizations abroad in Burma, Ethiopia, Mozambique, Portugal, Tanzania and Uganda. There were several problems but all of them were resolved peacefully.[32]

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.[33] 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 to extend 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.[34]Nationalization in Europe took place in the same sectors to provide better public utility. In all cases, compensation was paid.[35]

The time during 1965-81 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.[36] 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 on 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 nationalise banks was taken – however foreign banks were excluded, to protect India's image abroad.[37]

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

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[31] 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).

[32] S. Rao, *Bilateral Investment Protection Agreements: A Legal Framework for the Protection of Foreign Investment,* 26 Commonwealth Law Bulletin, 623-4 (2000).

[33] *Oxford Handbook on Indian Foreign Policy*, 291 (David M. Malone, C. Raja Mohan, Srinath Raghavan (eds.) Oxford University Press 2015).

[34] Kidron, supra n. 9, at 133-35.

[35] S. Rao, supra n. 32, at 623-24.

[36] Panagariya, supra n. 25, at 49-51.

[37] *Ibid*., at 53.

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.[38] The reasons were primarily domestic and did not have an element of taking away property of foreigners.[39]

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 70s it became difficult to obtain permissions. The FIB conducted tougher scrutiny of investment proposals.[40] The rigid approach undertaken from 1973 through the enactment of Foreign Exchange Regulation Act, 1973 further antagonized the foreign investors. A 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.[41] 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 national treatment.[42] Companies in many sectors such as airline, shipping and banking were forced to incorporate under the Indian Companies Act. Multi-national corporations that did not have manufacturing facilities and were in the field of services or were monitoring the economy could not dilute to less than 40% and had to leave.[43] In 1977 Coca-Cola left the Indian market because the government insisted that it should collaborate with an Indian entity. It came back in 1993, when the economy was liberalized.[44]

The low growth in the 70s led to some changes in the policy in the mid 80s. There was a somewhat receptive attitude towards foreign investment with the 40% cap of domestic ownership being removed.[45] 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 and the Charter on Economic Rights and Duties of States, discussed below.

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[38] Mohan Kumaramangalam, *Coal industry in India: Nationalisation and Tasks Ahead* (International Book House 1973); It is natural that a more rational course would have been to regulate the coalmines rather nationalize them, but this was the time of fervor of socialism.

[39] Ibid.; see also: Rajiv Kumar, *Nationalisation by Default: The Case of Coal in India*, 16(18) Economic and Political Weekly, 824-30 (May 2, 1981).

[40] Nagesh Kumar, *Liberalisation and Changing Patterns of Foreign Direct Investments*, 33(22) Economic and Political Weekly, 1321-22 (1998).

[41] Panagariya, supra n. 25, at 60-1.

[42] Department of Industrial Development, Ministry of Industry, Government of India, *Industrial Policy Statement'* http://www.dcmsme.gov.in/policies/iip.htm#Indus3 (accessed on 19 March 2017).

[43] Panagariya, supra n. 25, at 14.

[44] Nagaraj, *Foreign Direct Investment in India in 1990s,* 38(17) Economic and Political Weekly, 1701 (2003); see also: Arvind Virmani, *Policy Regimes, Growth and Poverty in India: Lessons of Government Failure and Entrepreneurial Success* (2005 ICRIER Working Paper No 170) http://icrier.org/pdf/WP170GrPov11.pdf (accessed on 20 November 2012).

[45] Kumar, supra n. 39, 1321-23; A degree of flexibility was introduced in the policy concerning foreign ownership, and exceptions from the general ceiling of 40 per cent on foreign equity were allowed on the merits of individual investment proposals.

c) Protection of foreign investment and international law

India has been an active participant at all international fora including those regulating international economic relations and its 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 – but practical arrangements were worked out to enhance commercial exchanges and facilitate industrial collaboration.[46] India naturally turned to other developing countries and its neighbors. A treaty was entered into with Nepal, Burma, Sri Lanka and Indonesia in 1950.[47] There were various cooperation arrangements with other states, including Afghanistan. In view of the precarious economic situation in Afghanistan, India continued import of commodities from Afghanistan, despite restrictions on imports from other States due to balance of payment problems.[48]

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 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), International Monetary Fund (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.[49] During the formulation of the IMF's Articles, India was a vocal representative of the concerns of LDCs. The Indian delegation said that:

> Our experience in the past has shown t h at 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[50]

The Indian delegation proposed an amendment to the Fund's Articles that would have required the Fund to assist in the fuller utilisation of the resources of economically underdeveloped countries. The proposal was supported by Ecuador, but was opposed by the United Kingdom and the United States on the grounds that issues of development were a matter for the Bank rather than the Fund.[51]

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

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[46] K B Lall, *India and the New International Economic Order,* 17 International Studies, 435-36 (1978).

[47] *Ibid.,* at 437.

[48] *Ibid*., at 437-38.

[49] *Ibid.,* at 435, 439-40.

[50] Proceedings and Documents, Vol. 11, P. 1G10, quoted in Gerald M. Meier, *Emerging from Poverty: The Economics that Really Matters,* 16 (Oxford University Press 1984).

[51] P. Subrahmanyam, *New International Economic Order and India, PhD Thesis,* http://shodhganga.inflibnet.ac.in/bitstream/10603/74581/11/11_chapter%205.pdf (accessed on 19 March 2017).

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.[52] 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'[53]

The crucial debate where India sided with the newly independent states from Asia and Africa and the Latin American countries in the United Nations was on protection of foreign investment in international law. The genesis of the debate was the already on-going 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 colonisers, they allowed European and North American investors to invest in their countries.[54] 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 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 nationalisation, 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.[55]The international minimum standard was set out in the Neer[56] case.[57] 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

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[52] Rajen Harshe, *India's Non-Alignment, An Attempt at Conceptual Reconstruction,* 7(25) Economic and Political Weekly, 399-405 (1990).

[53] Government of India, *India, 1987*, 252 Annual Publications Division, New Delhi, 1988.

[54] Alejandro Alvarez, *Latin America and International Law*, 3(2) American Journal of International Law, 269-353 (1909).

[55] Elihu Root, *The Basis of Protection of Citizen's Residing Abroad,* 4 American Journal of International Law, 517, 521-22 (1910).

[56] L. Fay H. Neer (USA) v. United Mexican States, Opinion of Commissioners of October 15, 1926, IV R.INT'L ARB. AWARDS, 60 (1926).

[57] 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 (3rd edn., Cambridge University Press 2010).

have exclusive jurisdiction over disputes involving foreign nationals.[58]This is the Calvo doctrine which insisted on national treatment 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.[59] Although the substantive prescription of the Calvo doctrine was in favour of national treatment, this doctrine emerged in response to the doctrine of diplomatic protection.[60] 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'.[61] 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'.[62]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.[63] 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-Briand Pact'. The third and the most important instrument was the UN Charter in 1945.[64] After the outlawing of the use of force by the Kellog-Briand 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.[65]

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 form 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

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[58] Bernardo Cremades, *Resurgence of the Calvo Doctrine in Latin America*, 7 Business Law International, 53-4 (2006).

[59] Carlos Calvo, 1 *Derecho Internacional Teorico y Practico de Ruropa y America*, 393-7 (1st end, 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).

[60] Montt, supra n. 59, at, 35-38.

[61] Mavrommatis Palestine Concessions Case (Greece v UK) (1924) PCIJ Reports Series A No. 2, 12.

[62] *Mavrommatis Palestine Concessions Case (Greece v UK)* (1924) PCIJ Reports Series A No. 2, 12; (1924); also see *Panevezys-Saldutiskis Railway Case* (1939) PCIJ Ser A/B, No. 76, 14. (1939).

[63] C Wilfred Jenks, *The Prospects of International Adjudication,* 514-5, (Oceana Publications, 1954).

[64] Montt, supra n. 59, at 49-50.

[65] *Ibid.,* at 31-33.

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.[66]

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"[67] The arguments for absence of state responsibility for affecting aliens and lack of support in international law for diplomatic protection were pointed out by Indian scholars.[68] Foreigners are entitled to a treatment not higher than nationals.[69] India supported the national treatment principle and Indian scholarship also supported this view.[70] 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 substantive principles on state responsibility.[71] The narrow approach to state responsibility was also opposed by the Latin American countries.[72] When it came to finding state responsibility for deprivation of property of foreigners, the Indian member at the ILC Justice Radhabinod Pal 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 engender, among other things, the existing conception of private property.'[73] Ultimately, the ILC dropped any reference to protection of foreign investors or aliens in the final Draft Articles.[74]

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 national treatment. India did not support absolute protection of private property. Post 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 summarised as follows: absence of state responsibility for economic losses caused to foreign investors due to actions of host state; foreign investors are regulated by national treatment 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.

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[66] Sornarajah, supra n. 57, at 21-22.

[67] S. N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* 55(4) AJIL, 886-887 (1961).

[68] Ibid., at 863, 872-75.

[69] Ibid., at 863, 884.

[70] See generally Guha Roy, supra n. 67.

[71] Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 Harvard International Law Journal (1988).

[72] M. Sornarajah (ed.), *The Pursuit of Nationalized Property*, 29-32, Martinus Nijhoff Publishers, 1986.

[73] 9th Session of ILC, ICC Yearbook, 157-58 (1957).

[74] Montt, supra n. 59, at 59-60.

The final part of this debate between the capital exporting countries and capital 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 forums of the UN. The post World War II period was characterised by decolonization. The regions in Asia and Africa that were under colonial subjugation obtained political independence. It was realised that political independence would be incomplete without economic independence. In the colonies the control of the economic activities was in the hands of former colonisers. The newly independent countries felt the need of 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.[75] Nationalisation was used as an instrument to claim back control of 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 nationalisation, especially of oil industry. In many states properties of former colonisers were nationalised.[76] For example in Indonesia properties under Dutch control were nationalised.[77]

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 a new international economic order and finally a set of obligations and rights of states regarding economic relations. The principal resolutions were the Permanent Sovereignty Over Natural Resources, the New International Economic Order (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 national treatment standard. The host state was not to attract state responsibility for violations of the rights of foreign investors and the foreign investors should 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.[78] 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

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[75] Sornarajah, supra n. 57, *at* 21-22.

[76] See generally Sornarajah, supra n. 72; Adeoya Akinsanya, *The Expropriation of Multinational Property in the Third World* (Praeger Publishers, 1980).

[77] Andreas Lowenfeld, *International Economic Law,* 405 (Oxford University Press, 2002).

[78] 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); Sornarajah, supra n. 72; Akinsanya, supra n. 76; 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 American Journal of International Law, 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).

independent countries. The newly independent countries were seeking to undo these arrangements.[79]

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.

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: resolution on integrated economic development and commercial agreements[80] and the resolution on right to exploit natural wealth and resources freely.[81]

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 due to the colonial rule had become such 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 could 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 its return if the control of economic resources and activities was under foreign control. Many saw the first task 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 them 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.[82] There was a need to ensure that these states could acquire machinery, equipment and industrial raw materials.[83] Appropriate agreements had to be entered into to ensure there is smooth movement of technical know-how and raw materials through agreements.[84]

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

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[79] Kamal Hossain, *Introduction*, in Permanent Sovereignty over Natural Resources: Principles and Practice, 9-10, Kamal Hossain and Subrata Roy Chowdhury (eds.) Frances Printer (1984).

[80] GA Resolution 523 (VI) (12 January 1952).

[81] GA Resolution 626 (VII) (21 December 1952).

[82] Preamble, GA Resolution 523 (VI) (12 January 1952).

[83] *Ibid.*

[84] Article 1 (b), GA Resolution 523 (VI) (12 January 1952).

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'[85]

Permanent Sovereignty Over Natural Resources was declared through the 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[86]

The relationship between all states and especially the newly independent states and their former colonisers 'must be based on the principles of equality and of the right of peoples and nations to self-determination'[87]The idea was that even if foreign investment came into a developing state it should not conflict with the interest of the recipient states.[88] Yet, at the same time, it was necessary to ensure that there was exchange of technical and scientific information for promoting development.[89]The resolution declined preferential treatment to foreign investors and affirmed the right of states to regulate foreign investments as per their own economic objectives.[90]These resolutions apply to all agreements: including those between states, and between states and foreign investors.[91]

The follow-up resolution on the Permanent Sovereignty Over Natural Resources was the resolution establishing the New International Economic Order. 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 and social

[85] Preamble, GA Resolution 1803 (14 December 1962).
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] Georges Abi-Saab, *Permanent Sovereingty Over Natural Resources and Economic Activities,* in International Law: Achievements and Prospects, 605 (Mohammed Bedjaoui (ed.) UNESCO, 1991).
[91] *Ibid*., at 606.

> development and peace and justice for present and future generations, and, to that end, declare[92]

The resolution recognised the need of full participation of all states in resolving world economic problems on the basis of equality of states.[93] The resolution recognised 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'.[94] The concern of obtaining proper price for commodities was also focused – a point that was introduced and emphasized by India.[95]

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[96] with removal of obstructive tariff barriers[97]. It spelt out the attitude towards foreign investment is 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,

[92] Preamble, Declaration on the Establishment of a New International Economic Order, (1 May 1974). A/RES/S-6/3201.

[93] *Ibid*., at para. c.

[94] *Ibid*.

[95] *Ibid.,* at para j.

[96] Charter on Economic Rights and Duties, para. 14 (12 December 1974) A/RES/29/3281.

[97] *Ibid*., Article 18.

> 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.

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.[98] In the discussions that took place in the General Assembly on the New International Economic Order, the Indian representative highlighted vast difference 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.[99] The objective for pushing for the NIEO was to achieve fairness and removal of obstacles in the development of the developing countries.[100] 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.[101]

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'.[102] 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.[103] India was an active participant at the discussions in UNCTAD on the Charter of Economic Rights and Duties of States.

The overwhelming support of states to the NIEO in the United Nations represented that the international minimum standard was replaced by national treatment. 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.[104] It was the relative success of NIEO that made BITs desirable.[105]

The General Assembly resolutions were used as a basis by the host state to expropriate or nationalise 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

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[98] Rajen Harshe, *India's Non-Alignment, An Attempt at Conceptual Reconstruction,* 7 Economic and Political Weekly XXV, 403-05 (1990).

[99] United Nations General Assembly, 6th Special Session, 223rd Plenary Meeting, paras. 86, 88-97 (19 April 1974).

[100] *Ibid*., at paras. 101, 124.

[101] *Ibid*., at para. 129.

[102] *Ibid.,* at para. 134.

[103] *Ad hoc Committee of the Sixth Special Session, 8th meeting*, para. 37 (17 April 1974).

[104] *Total SA v Argentina Decision on Jurisdiction*, ICSID Case No. ARB/04/01, para. 78 (25 August 2006).

[105] Kenneth Vandevelde, *The Political Economy of a Bilateral Investment Treaty,* 92 American Journal of International Law, 621, 628 (1998).

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 New International Economic Order[106]. The developed countries were insisting on compensation based on the Hull formula, which was payment of "prompt, adequate and effective compensation".[107] The objective of BITs was to ensure that the expropriation occurred as per proper procedures and the host state should be responsible for payment of complete compensation – equivalent to the market value, for the losses suffered due to expropriation or nationalisation. 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.[108] Germany entered into the first two BITs with Pakistan and Dominican Republic in 1959.[109] Other western countries quickly followed.[110]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.[111]

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 90s. At this point, the second phase begins and there is a dramatic shift in the policy.

3. The Second Phase (1991-2011)

The second phase was of acceptance – but forced acceptance. As was discussed above, the inward looking policies with focus on import substitution adopted in the 1970's and 1980's scared foreign investors away and the domestic regulatory environment was not conducive for domestic investors. Economic growth that had started to decline since then was at its worst phase by the end of 1980s. The trigger point for giving up protectionist domestic policy and heavy regulatory framework was the balance of payment crisis in 1990-91, when India had to give up protectionist policies. The reforms were drastic and the regulatory framework underwent dramatic changes overnight.[112] Various macroeconomic reforms were undertaken, including bringing down high import tariffs and encouragement of foreign institutional investment (FII) and foreign direct investment (FDI).[113] FDI up to 51 percent was permitted in crucial sectors and 100 percent in the energy sector. The Foreign Investment Promotion Board (FIPB) was setup and the Foreign Exchange Regulation Act (FERA) was

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[106] M. Sornarajah, *Compensation for Expropriation*, 12 Journal of World Trade Law, 108-131 (1979).

[107] 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).

[108] This idea was based on Abs-Shawcross Draft Convention on Investments Abroad of 1959. See George Schwarzenberger, *Foreign Investments and International Law* (Stevens, 1969), 109-34; The ICSID Convention was soon negotiated thereafter in 1965, which provided a forum for resolution of investment disputes.

[109] UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, 8, 177 (United Nations, 1998).

[110] Kenneth Vandevelde, *A Brief History of International Investment Agreements,* 12 UC Davis Journal of International Law and Policy 157, 169 (2005).

[111] UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, 8-19 (United Nations, 1998).

[112] Panagariya, supra n. 24, at 103-5.

[113] For a detailed discussion on reforms see R. Nagraj, *Foreign Direct Investment in India in the 1990's: Trends and Issues,* 38 (17) Economic and Political Weekly, 1701 (2003); C. Rangarajan, *Two Episodes in the Reform Process,* in India's Economy: Performance and Challenges, 100 (Shankar Acharya and Rakesh Mohan (eds.) OUP 2010); Arvind Panagariya *Growth and Reforms During 1980s and 1990s,* 39(25) Economic and Political Weekly (2003); Montek Singh Ahluwalia, *Productivity and Growth in Indian Manufacturing,* 67 (OUP 1991).

amended to treat foreign companies with more than 40% at par with domestic industries.[114] Later the 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 national treatment. 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'.[115]

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 Bilateral Investment Promotion and Protection Agreements (BIPA).[116] The dominant thinking within the Government was that entering into BITs would result into greater inflow of foreign investment.[117] It first floated a model BIT[118] 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 aboard. 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.[119] 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 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,

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[114] Nirupam Bajpai and Jeffery Sachs, *Foreign Direct Investment in India: Issues and Problems*, HIID Development Discussion Paper No 759/2001 (2001); Nagaraj, supra n. 4, at 1701–2.

[115] S. Rao, supra n. 32, at 623, 626.

[116] Ministry of Finance, Government of India, *BILATERAL INVESTMENT PROMOTION AND PROTECTION AGREEMENTS (BIPA*), http://finmin.nic.in/bipa/bipa_index.asp (accessed on 19 March 2017).

[117] See Palainappan Chidambaram, *Foreword,* in India's Bilateral Investment Promotion and Protection Agreements, vol. 1 (Government of India, Ministry of Finance (ed.) 1997); Yashwant Sinha, *Foreword* in India's Bilateral Investment Promotion and Protection Agreements, vol. 3 (Government of India, Ministry of Finance (ed.) 1999); Pranab Mukherjee *Foreword* in India's Bilateral Investment Promotion and Protection Agreements, vol. 7 (Government of India, Ministry of Finance (ed.) 2009).

[118] The first model BIT is not in public domain.

[119] For a detailed discussion see Aniruddha Rajput, supra n. 8, at 201, 224-26.

Indonesia and Saudi Arabia, as well as with least developed countries (LDCs) such as Bangladesh, Sudan and Mozambique.[120]

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 as compared to the BITs. The FTAs ensured that regulatory freedom is protected.[121] 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 lesser as compared to China – despite the fact that India had vital points of democracy and the rule of law as highlights.[122] During this time India did not face any investment claim, except a brief brush in the Dabhol Power Project. 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. After losing this case, many investment claims were filed against India and the third phase with a policy shift thus commenced.

4. 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.

a) White Industries case

In the White Industries Case, the Australian investor invoked arbitration proceedings against India under the Australia- India BIT on the ground that India was responsible for violation of the BIT due to the failure of its courts in enforcing a commercial arbitration award in Indian courts within a reasonable time. The Tribunal rejected the argument of the claimant that the Indian courts were responsible for denial of justice because there were delays in adjudication. It had been 8 years since the arbitration award was pending enforcement in Indian courts and at the time when arbitration proceedings were initiated, it was pending before the Supreme Court undecided.[123] The Tribunal held that there were multiple proceedings initiated by the claimant. Although it took time before the Supreme Court, at other levels the adjudication was fairly quick. Considering the caseload of the Supreme Court, it could not be said that the delay has raised concerns about the "judicial propriety of the outcome".[124] The Tribunal acknowledged that India has a huge population with a seriously overstretched judiciary. The Tribunal said that:

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[120] Prabhash Ranjan, *India and Bilateral Investment Treaties: A Changing Landscape,* 29 ICSID Review, 420 (2014).

[121] Prabhash Ranjan, *Comparing Investment Provisions in India's FTAs with India's Stand-Alone BITs*, 16.5-6 The Journal of World Investment & Trade, 899-930 (2015).

[122] For a discussion on the disparity in investments see Nagraj, supra n. 113, at 1705-6; 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 and Jiangyu Wang (eds.) Cambridge University Press 2011).

[123] For a description of facts see White Industries v Australia, paras. 3.2.33-3.2.65.

[124] *Ibid*., at para. 10.4.12.

> "The Tribunal considers it also to be relevant, when examining the behavior of the courts, to bear in mind that India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary."[125]

One has to be careful since a delay could be seen as defect in the judicial system, which would be treated to amount to denial of justice.[126]

The Tribunal conducted independent analysis of the time spent at each level of proceedings to conclude that the delay was not unreasonable.[127]

Although the Indian Courts were not held responsible for denial of justice, the Tribunal circuitously arrived at the same conclusion by relying on the MFN clause in India Australia BIT to import 'effective means' standard from the Kuwait BIT. In a highly unusual manner the Tribunal abruptly concluded that:

> "In these circumstances, and even though we have decided that the nine years of proceedings in the set aside application do not amount to a denial of justice, the Tribunal has no difficulty in concluding the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court's inability to hear White's jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White with "effective means" of asserting claims and enforcing rights."[128]

Therefore, India was responsible the actions of the judiciary, which were found to violate the India –Kuwait BIT.

There have been concerns about the expansive interpretation of investment treaties.[129] Some states have experienced wearisome consequences of investment arbitration.[130] 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 of 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. The Supreme Court has steadfastly protected its independence

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[125] *Ibid*., at para. 10.4.18.

[126] El Oro Mining Railway Company (Great Britain) v Mexico, V RIAA 191, 198 (Great Britain v Mexico Claims Commission, Decision No. 55 of 18 June 1931); the Tribunal found a nine years delay to amount to denial of justice. The tribunal held that: "the amount of work incumbent on the Court and the multitude of law suits which they are confronted, may explain, but not excuse, the delay. If this number is so enormous as too occasion an arrear of nine years, the conclusion cannot be other than the judicial machinery is defective". Para, 10, at 198.

[127] *Ibid*., para. 10.4.21, 10.4.22.

[128] *Ibid*., para. 11.4.19.

[129] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1626 (2005).

[130] Latin American states have faced most of the investment claims. Argentina has faced more than 50 arbitration claims, which arouse of the regulations that Argentina had to undertake at the time of financial crisis. José Alvarez and Gustavo Topalian, *The Paradoxical Argentina Cases*, 6 World Arb. & Mediation Rev., 491 (2012).

and has intervened in various public interest issues.[131]The other troubling issue 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 expansive approach by invoking India Kuwait BIT to import more convenient treatment standard through the MFN clause in the India Australia BIT.[132]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 MFN.

b) Increased exposure to investment arbitration claims and review of policy

In the period from 1991 to 2011 India never faced investment claims, except for one proceeding, 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 that those granted under a BIT. These proceedings do not antagonize the governments as compared to investment arbitration. After White Industries case experience, this trend of approaching domestic courts is broken and the investors are and would be willing to file 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 licenses. The spectrum licenses were procured through corruption and at a huge cost to the public exchequer.[133] 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 analyzing 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'.[134]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

[131] See M. P. Singh, *Securing the Independence of the Judiciary - The Indian Experience*, 10 Indiana International & Comparative Law Review, 245, 292 (2000); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4(6) Third World Legal Studies, 107, 132 (1985).

[132] El Oro Mining Railway Company (Great Britain) v Mexico, supra n. 126, para. 11.4.19.

[133] Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1 (Supreme Court of India 2012).

[134] The paper is not in public domain, but for extracts see Ranjan, supra n. 120, at 419, 439-41.

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.[135]

Due to numerous BIT claims brought against India, India decided to put all on-going stand-alone BIT negotiations on hold.[136] India unilaterally terminated all existing investment treaties on 31 March 2017, having given one year's time to countries to renegotiate the treaties based on the model BIT passed by the cabinet. India brought out a new model BIT in December 2015, intending to replace its existing Bilateral Investment Promotion and Protection Agreements (BIPAs) and future investment treaties[137] India has sent notices to 47 countries terminating and offering to negotiate the existing BITs.[138]

One of the responses of the Indian Government was to change the Model BIT. 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.[139] 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[140] based on which the draft was changed and a new Model BIT was announced.[141]

The Model BIT represents a major shift in approach of India towards investor protection through BITs – an instance of shifting state practice.[142] 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.[143] It has narrowed the definition 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

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[135] Ibid., at 419, 440.

[136] Shutapa Paul, *Cornered Government Puts All BIPA Negotiations on Hold* http://newindianexpress.com/business/news/article 1513318.ece (accessed on 19 March 2017); An exception to this was India's BIT with the United Arab Emirates (UAE), which was signed in 2013 and entered into force in 2014; see Kavaljit Singh*, Assessing India's Bilateral Investment Protection Agreement with UAE,* http://www.madhyam.org.in/assessing-indias-bilateral-investment -protection-agreement-uae/(accessed on 19 March 2017).

[137] Asit Ranjan Mishra, *India rejects EU, Canada's bid for global investment pact*, http://www.livemint.com/Politics/3mD8bKW3Q6rSiyfQVFcgSM/India-rejects-EU-Canadas-bid-for-global-investment-pact.html (accessed on 19 March 2017).

[138] Deepakshi Sikarwar, *India seeks fresh treaties with 47 nations,* http://economictimes.indiatimes.com/news/economy/foreign-trade/india-seeks-fresh-treaties-with-47-nations/articleshow/52458524.cms?intenttarget=no (accessed on 19 March 2017).

[139] 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 on 19 March 2017).

[140] Law Commission of India, *Report No. 260, Analysis of the 2015 Model Indian Bilateral Investment Treaty,* Law Commission of India, Government of India, http://lawcommissionofindia.nic.in/reports/Report260.pdf (accessed on 19 March 2017).

[141] The final text of the Model BIT - Ministry of Commerce and Industry, http://indiainbusiness.nic.in/newdesign/upload/Model_BIT.pdf (accessed on 19 March 2017).

[142] Rajput, supra n. 8, at 201, 224-26.

[143] Preamble, Indian Model BIT.

are protected.[144] Many controversial treatment standards such as fair and equitable treatment, most favoured nation treatment and umbrella clause have been removed.[145] The provisions on expropriation and particularly indirect expropriation have been set out in detail.[146] The national treatment standard is retained.[147] The distinguishing characteristic of the Model BIT is the introduction of exceptions aimed at protecting regulatory exercise.[148] The dispute resolution procedure has been made strict with the need to first exhaust local remedies, unless they are unavailable or futile.[149] There are various other provisions in relation to the conduct of the arbitral proceedings and requirements of independence of arbitrators.[150] In substance, the Model BIT makes every effort towards conserving India's regulatory space while protecting investor interests.

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 skepticism towards the role of investment treaties and investment arbitration in promoting movement of capital.

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 treat standards that would intrude into regular freedom are unacceptable. Through an innovative Model BIT, India has assumed the position of a rule maker rather than simply a rule taker.[152] It needs to be seen how do other states take these rules. There are challenges raised about the capacity of investment treaties with dispute resolution clauses to attract investments. Yet, investment treaties provide psychological comfort for investors.

5. Conclusions

What are the implications for the international rule of law with the shifting policy perspectives of India? Is this a story of rise of decline?

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[144] *Ibid*., Articles 1.3 to 1.5.

[145] See Aniruddha Rajput, *Safeguarding India's Regulatory Autonomy: Analysis of the New Model Bilateral Investment Treaty* (forthcoming).

[146] Article 5, Indian Model BIT.

[147] *Ibid*., Article 4.

[148] *Ibid*., Article 32.

[149] *Ibid*., Article 4.

[150] Lise Johnson, Lisa Sachs and Jesse Coleman, *International Investment Agreements, 2014: A Review of Trends and New Approaches*, in Yearbook on International Investment Law and Policy: 2014–2015, 15, 25-7; Grant Hanessian and Kabir Duggal, *The 2015 Indian Model BIT: Is This Change the World Wishes to See?,* 30 ICSID Rev—FILJ 729 (Fall 2015); Kabir Duggal, *The Changing Landscape of Investor-State Arbitration in India*, 7 Jindal Global Law Review (2016); See also Prabhash Ranjan, *Investment Protection and Host 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 and others (eds.), Cambridge University Press 2017) (forthcoming).

[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 on 19 March 2017).

[152] Rajput, supra n. 8, at 201, 225-6.

The discussion in three phases elucidates the transformation of the legal regime of foreign investment. At the same time, these three phases coincide with the points of departure for the analysis of the phenomenon of 'international rule of law: rise of decline?'[153] Rather the second phase is an outcome of the Washington consensus and the sudden rise of international institutions and treaty making. The period prior to the 90s was a period of irreconcilable differences on cooperation on international law rules on investment. The period post the 90s was characterized by a dramatic rise of regimes and institutions and particularly in the field of investment arbitration, entering into of investment treaties. In that regard, the 90s is a crucial timeline for a sudden rise and acceptability of the BITs. In the following two decades, the outcomes of investment cases and arbitral reasoning caused a lot of discomfort amongst states. States saw the expansive interpretation of treatment standards coupled with large amounts of compensation granted by investment tribunals as diminishing regulatory freedom of States. Many public interest regulations came under challenge and investment arbitration was seen to create 'regulatory chill'.[154]A response from the states was expected. It is the experience of investment arbitration that has resulted into and shaped the third phase, which is interestingly similar for many states – including the traditional capital importing and exporting states.

If the graph of rise or decline is drawn based on 1990 as the point of departure then the events post 2011 in India may give the impression that there is a decline. But this would be a very simplistic position. It would be fruitful to see how these phases perform by applying different understandings of the international rule of law. If international rule of law is understood as 'a social system that divides society into political and legal domains….and situates the latter within the former'[155], then international rule of law would be present and on decline as long as it is insulated from politics. If diplomatic protection is taken as the lowest mark and the chart of legal rules for protection of foreign investment is drawn, then there is only a rise. The nature, content and priorities of the rules might have changed over time and it is only obvious that they would so change. The understanding of the rules and their consequences are bound to result into the alteration and adjustment of those rules. Accordingly the rules for investment protection through treaty making have altered and adjusted but the international community is still in the arena of legal rules and is not keen on going back to diplomatic protection – the domain of politics. The defining characteristic of rule making in the second and the third phase is treaty making and therefore rule should be understood as a treaty based rule rather than a customary law rule. In the first phase there was an effort to create rules, which were not readily agreed to by the international community. The rule structure in the second phase was comparatively robust. In the third phase there is a robust network of rules. The treaties in the second phase were sketchy. But the treaties in the third phase are detailed. They specify the rights and obligations of parties and particularly the sphere of investor protection and scope for regulatory exercises more clearly than ever before.

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[153] Heike Krieger and Georg Nolte, *International Rule of Law- Rise of Decline? Points of Departure*, 9, KFG Working Paper Series No. 1 (October 2016).

[154] There are many instances of regulatory chill. For a general overview of the challenges posed to regulatory freedom see M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015).

[155] Ian Hurd, *International Rule of Law: Law and the Limits of Politics,* 28 Ethics and International Affairs, 39, 40 (2014).

Elaboration in contents of a treaty not only represents vigorous legislation, but it also adds certainty to the contents of a treaty. There is greater guidance for an arbitral tribunal for interpretation. States such as India are keen on insisting the continuation of the system, rather than going back to the days of diplomatic protection. There are various problems associated with the regime of diplomatic protection. The role of politics comes to fore in the regime of diplomatic protection. The discretion of whether or not to grant diplomatic protection is exclusively with the home state – violation of legal rights are not the sole and often not the preponderant criteria for granting diplomatic protection. Home states would be reluctant to damage their relations with other states simply to protect one foreign investor. The problem is not just that the home state has to make a political choice – the precarious problem is that diplomatic protection opens the possibility of political interference from other states to influence the decision. This is certainly not a positive sign for a rule-based system of international law.

Involvement and participation of states in the “normative framework for the development of international law” is another paradigm to analyze international rule of law.[156] The current trend of India and other states represents greater participation in rule making. The default position is to enter into investment protection treaties and set out the rules of investor protection and regulatory freedom clearly. States are not oblivious or simple bystanders for the unfolding system. They understand that they are stake holders and are actively participating in the system. Therefore from the perspective of the participation of states in an international framework and a rule based system there is definitely a ‘rise’. Since the so-called crisis ‘of the international legal system may not reflect a crisis of the law, in the first place, but it may signal a need for reconfiguring the role of the State more broadly’.[157] From that broader perspective, the rise continues.

Taking legitimacy as one of the angles for analyzing the metaphor of rise or decline[158], one of the vigorous criticisms of the investment law regime has been lack of legitimacy[159]. Greater participation of states, particularly in clarifying the meaning of treatment standards would contribute towards curing the legitimacy problem. To this extent, the role of the state is reconfiguring and its participation increasing. If narrowing the standards of protection of foreign investors is seen as decline of international rule of law, then the steps taken by states to conserve regulatory freedom, while narrowing the scope of protection of public interest represents the rise of international rule of law.

These developments need not be seen as ‘decline’ of investor protection. They rather represent maturity in the approach towards investor protection. The original objective of BITs was for protecting foreign investors from capricious conduct aimed at harassing foreign investors. Excess enthusiasm of scholars and arbitrators converted the BITs into an insurance from any and every loss that the foreign investor may suffer due to actions of the host state. Host states were constrained even from adopting legitimate regulations for protection of public interest. In the current phase, all states – as India – are keen to control the jurisprudential excesses of investment tribunals.

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[156] Heike Krieger and Georg Nolte, *International Rule of Law- Rise of Decline?* Points of Departure, 17, KFG Working Paper Series No. 1 (October 2016).

[157] *Ibid.*

[158] *Ibid.*

[159] Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,* 73 Fordham L. Rev., 1521 (2005).

If the international rule of law is equated to insulating foreign investors from all losses then, probably, there is a decline! If the regime of international investment law is to be seen as balancing the interests of the host state, unhampered movement of capital and treaty making to regulate international relations rather than allowing politics have a sway then there is definitely a rise!

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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