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**Fair and Equitable Treatment in  
Indian International Investment  
Agreements: An overview**

Prabhash Ranjan

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International Institute for Sustainable Development  
161 Portage Avenue East, 6th Floor  
Winnipeg, Manitoba  
Canada R3B 0Y4  
Tel: +1 (204) 958-7700  
Fax: +1 (204) 958-7710  
Email: [info@iisd.ca](mailto:info@iisd.ca)  
Website: [www.iisd.org](http://www.iisd.org)

## Introduction

This note gives a brief overview of the fair and equitable treatment (FET) provision in Indian International Investment Agreements (IIAs).<sup>1</sup> Based on the study of 68 Indian IIAs, including the Indian model IIA, this note will briefly discuss the presence of the Fair and Equitable Treatment (FET) provisions in 68 different Indian IIAs signed by India from 1995 to 2010. The note will show the differences that exist in different Indian IIAs on the FET provision. It will also discuss whether the Indian IIAs define the normative content of the FET provisions or contain any indication for its interpretation.

Before the note discusses the FET provision in Indian IIAs, a short discussion on the Indian IIA program is important to understand the broader context.

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<sup>1</sup> IIAs, as a generic term, means Bilateral Investment Treaties (BITs), investment chapters in Free Trade Agreements (FTAs) and in Comprehensive Economic Cooperation Agreements (CECAs). In India, IIAs are called Bilateral Investment Promotion Agreements (BIPAs). The term IIAs, in this paper, does not include Double Taxation Avoidance Agreements. The text of Indian IIAs, referred in this paper, is taken from the seven volumes of Compendium of India's investment agreements published by the Ministry of Finance, Government of India (on file with author).

## Indian IIAs

India has a gigantic IIA program. India started entering into IIAs to attract foreign investments as clearly articulated by the Ministry of Finance—the nodal department in India that negotiates and signs IIAs with other countries.<sup>2</sup> However, there is no evidence to show that the increase in foreign investment inflows into India over the last two decades has been due to IIAs; nor is there evidence of the extent IIAs have contributed in attracting foreign investment.<sup>3</sup> India signed its first IIA in 1994 with the U.K. Since 1994, India has signed IIAs with 75 countries;<sup>4</sup> of those, 66 are already in force and nine have yet to come into force.<sup>5</sup> Out of the 66 BITs that are in force, close to 40 are with developing and less developed countries. Further, in the last few years, India has concluded Comprehensive Economic Cooperation Agreements (CECAs; also known as Comprehensive Economic Partnership Agreements [CEPAs]), containing a chapter on investment, with Korea<sup>6</sup> and Singapore;<sup>7</sup> is negotiating CEPAs with investment chapters with Malaysia, Indonesia, Mauritius, Japan<sup>8</sup> and New Zealand;<sup>9</sup> has concluded negotiations on an IIA with Canada;<sup>10</sup> is negotiating a Free Trade Agreement (FTA) with the European Union with a chapter on investment;<sup>11</sup> and is also

<sup>2</sup> Investment Division, Ministry of Finance, India. Introduction Material, retrieved from: [http://www.finmin.nic.in/the\\_ministry/dept\\_eco\\_affairs/dea.html](http://www.finmin.nic.in/the_ministry/dept_eco_affairs/dea.html) (current as of October 2, 2010). The Ministry of Finance also takes the help of other ministries in this process such as the Ministry of External Affairs and Ministry of Commerce. The negotiations on CECAs containing chapters on investment are anchored by the Ministry of Commerce with Ministry of Finance playing a supporting role. Other departments of the Government of India are also involved in negotiating IIAs like the Legal and Treaties Division of the Ministry of External Affairs and the Ministry of Commerce.

<sup>3</sup> For more on this see R. Banga (2003), *Impact of government policies and investment agreements on FDI inflows*. Indian Council for Research on International Economic Relations Working Paper No. 116. New Delhi: ICRIER; Prabhaskar Ranjan (2010) Indian Investment Treaty Programme in light of global experiences. *Economic & Political Weekly*, 68.

<sup>4</sup> Ministry of Finance Compendium, above n. 14

<sup>5</sup> Ibid.

<sup>6</sup> India-Korea CECA (containing the chapter on investment) was signed in 2009 and came into force January 1, 2010. However, India also has an IIA with Korea signed in 1996. This IIA has not been repealed and hence, as of now, both the IIAs (that is the BIT and the investment chapter of CECA) are in existence. This might create problems in terms of creating a double investment protection regime towards Korean investors. However, this paper has left out India-Korea IIA of 1996 and has included the investment chapter of CECA signed with Korea in 2009 as India-Korea IIA.

<sup>7</sup> India-Singapore CECA was signed in 2005.

<sup>8</sup> Nayanima Basu & Da Nang (2010, August 27). India, Japan to soon sign in-principle pact on CEPA. *Business Standard*. Retrieved from: [www.business-standard.com/india/news/india-japan-to-soon-sign-in-principle-pactcepa/406043/](http://www.business-standard.com/india/news/india-japan-to-soon-sign-in-principle-pactcepa/406043/)

<sup>9</sup> Department of Commerce, India. Trade Agreements. Retrieved from: [http://commerce.nic.in/trade/international\\_ta.asp?id=2&trade=i](http://commerce.nic.in/trade/international_ta.asp?id=2&trade=i) (current as of March 15, 2010). India already has IIAs with Malaysia, Indonesia and Mauritius.

<sup>10</sup> Foreign Affairs and International Trade Canada. *Background on Canada-India Foreign Investment Promotion and Protection Agreement*. Retrieved from: [www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/india-inde.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/india-inde.aspx?lang=en)

<sup>11</sup> European Parliament. EU-India FTA. Retrieved from: [www.europarl.europa.eu/oel/FindByProcnum.do?lang=en&procnum=INI/2008/2135](http://www.europarl.europa.eu/oel/FindByProcnum.do?lang=en&procnum=INI/2008/2135)

negotiating an IIA with the United States.<sup>12</sup> These numbers and facts point to the vigour with which India is following its IIA program.<sup>13</sup> By entering into so many IIAs, India is undertaking binding treaty obligations on foreign investments emanating from her IIA partner countries.

Indian IIAs are broadly worded with preambles openly declaring that the purpose of these treaties is to promote and protect investment. Indian IIAs contain investment protection clauses like providing most-favoured nation (MFN) treatment, national treatment, fair and equitable treatment, protection against expropriation, free capital transfer provisions and the right to challenge host states' actions at international arbitral forums. There are very limited exceptions available in the majority of Indian IIAs, allowing India to deviate from investment protection in order to accomplish other non-investment policy objectives.

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<sup>12</sup> Kamal Narang. (2009, October 26). US keen to push for a Bilateral Investment Treaty. *Business Line*. Retrieved from: [www.blonnet.com/2009/10/26/stories/2009102651830100.htm](http://www.blonnet.com/2009/10/26/stories/2009102651830100.htm)

<sup>13</sup> For more on India's IIA program see D. Krishan (2008). India and international investment law. In B. N. Patel (Eds.), *India and international law* (Vol. 2, pp. 292–93). Leiden/Boston: Martinus Nijhoff; Prabhash Ranjan (2008). International Investment Agreements and regulatory power: Case study of India. *Journal of World Investment and Trade*, 243; Prabhash Ranjan. (2008b). Medical patents and expropriation in international investment law—with special reference to India. *Manchester Journal of International Economic Law*, 72; Prabhash Ranjan. (2010, August 27). *Posco Paradox*. Retrieved from: [www.financialexpress.com/news/posco-paradox/672631/0#](http://www.financialexpress.com/news/posco-paradox/672631/0#)

## FET Provision

A study of 68 Indian IIAs reveals that as many as 66 Indian IIAs contain the FET principle. In other words, in 66 Indian IIAs, India has undertaken the treaty obligation to treat foreign investments fairly and equitably. The two IIAs that do not contain the FET principle are the India-Turkey and the India-Singapore IIAs. India-Turkey IIA was signed in 1998 but came into enforcement in 2007 and India-Singapore IIA came into force in 2005. In other words, India is not under an obligation to treat Turkish and Singaporean investments in India fairly and equitably in the sense as it is supposed to for other foreign investments emanating from 66 countries. However, India-Turkey IIA contains the MFN provision and that makes it possible for any Turkish investor to borrow a FET provision from any of the other Indian IIAs. Uniquely, the Singaporean investor will not be able to do this because there is no MFN in the India-Singapore IIA.

These 66 Indian IIAs, which contain the FET provision, can be divided into three types: model-IIA, modified-model IIA and content-indicative IIA. Model-IIA indicates those IIAs where the FET provision is same as the FET provision given in the model Indian IIA. Modified-model IIA indicates IIAs that contain the FET provision, which is slightly different from the one given in the model-IIA. Content-indicative IIA indicates limited IIAs that provide some indication of the possible content of the FET provision. Let us understand each of these types and their trends.

### **Model-IIA FET Provisions**

Article 3(2) of the Indian model IIA<sup>14</sup> gives the FET definition. According to Article 3(2), “Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.” There are three important points to note about the FET formulation. First, the FET provision does not state what is meant by FET and when can it be said that the treatment offered to foreign investment is unfair and inequitable. Thus, it is left to the arbitrators to determine the meaning of FET in case a dispute arises. The arbitrator can draw some inference about the possible interpretation by looking at the context (as required in Article 31 of the VCLT). Some indicators to look for an “immediate context” are the “title” of the provision that contains the FET provisions, and the neighbouring provisions.

The FET provision in the model IIA is part of the Article titled “Promotion and Protection of Investment.” The other part of this Article talks of contracting parties encouraging and creating favourable conditions for foreign investments. Thus, the contextual evidence for the treaty

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<sup>14</sup> Indian Model IIA is available at [http://finmin.nic.in/the\\_ministry/dept\\_eco\\_affairs/icsection/Indian%20Model%20Text%20BIPA.asp?pageid=1](http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp?pageid=1)

interpreter to interpret the FET provision is that it has to be interpreted keeping investment protection in mind. Second, India is required to provide FET treatment “*at all times*.” The presence of the phrase “at all times” signifies the importance attached to ensuring that foreign investments are fairly and equitably treated. Third, FET provision in the model IIA (although part of the title “Promotion and Protection of Investments”) exists as a stand-alone provision and is not combined with protection and security of investments or with the national treatment and MFN clause. The same formulation of FET exists in as many as 32 Indian IIAs, out of the 68 studied, and thus, the FET provision in 32 Indian IIAs is of the model-IIA type.

### **Modified-Model IIA Type**

The modified-model IIA type represents those IIAs where the FET formulation is not very different from the formulation of the FET provision in the model Indian IIA. For example, Article 4 (1) of the India-Netherlands IIA provides “investments and investors of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party.”

This FET provision is different from the FET formulation used in the model IIA-type FET provisions. Before we look at the differences, the important unifying factor in the two types of IIAs are that they do not provide the normative content of the FET provision. In other words, the FET provision in modified-model IIA also remains undefined and without much guidance about the conditions when the host states’ action will be classified as unfair and inequitable for foreign investments.

There are minor differences between the two types. For example, the FET provision in the modified-model IIA type exists under the heading “Treatment of Investments” or is combined with “Full Protection and Security” or with the national treatment and MFN treatment, and is not a stand-alone provision like in the model IIA. In some IIAs, like the India-Italy IIA, apart from full protection and security, the provision containing FET (Article 3(2) also requires that investment shall in no way be subject to unjustified or discriminatory measures). In the India-Malaysia IIA, the obligation to provide “equitable” treatment is mentioned twice—under the heading “Promotion and Protection of Investments” and along with “fair” under the heading “Treatment of Investments.” Under the heading “Treatment of Investments,” it is combined with national treatment and MFN. There are 27 such IIAs, which also do not define the normative content of the FET provision like the model-IIA types do, but differ from model-IIA types in some regards. These 27 IIAs are called modified-model IIA because they contain a formulation of the FET provision in a modified form, as compared to the model-IIA.

### **Content-Indicative IIA Type**

Out of the 68 studied, seven IIAs provide some content or direction regarding the meaning of the FET provision, and are hence referred to as content-indicative IIAs. Out of these seven IIAs, three of them (India-France, India-Mexico and India-Korea) refer to the minimum standard of treatment. In India-France, the reference is not as clear because it says that FET treatment is to be extended in accordance with internationally established principles to investments. India-Mexico and India-Korea are the only two IIAs that provide a more definite indication to the tribunals regarding the interpretation of the FET principle.

For example, the India-Korea IIA states in Article 10.4(1): “Each Party shall accord to an investment of an investor of the other Party in its territory ‘fair and equitable treatment’ and ‘full protection and security.’ The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.” These IIAs make it clear that the FET does not require treatment in addition to the minimum standard of treatment to aliens owed under customary international law. These two IIAs also make it clear that simply because there has been a breach of a particular provision of the IIA or any other international agreement, that does not establish that the foreign investment has not been treated fairly and equitably. This is clearly inspired from NAFTA’s interpretative note that was adopted in 2001 in order to ensure that arbitral tribunals do not give a very expansive meaning to the FET provisions in IIAs. By linking FET to the international minimum standard of treatment of aliens, these IIAs have ensured that arbitral tribunals do not interpret the FET provision autonomously and start giving normative content to the provision on their own.



## Trends

Broadly, three points can be made about the formulation of the FET provisions in Indian IIAs. First, barring a small minority of IIAs, none of the Indian IIAs provide any normative content to the FET provision. Second, the formulation of the FET provision in the model-IIA and modified-model IIA types support an interpretation that gives impetus to investment protection. The treaty interpreter cannot go far by using the plain meaning of the words to interpret FET; however, the immediate context lends weight to interpretation of the FET provision favouring investment protection. Third, it is difficult to draw any specific trend in the formulation of the FET provision in Indian IIAs. For example, the Indian model IIA was adopted in 2004. However, India has been agreeing to the model-IIA formulation both pre- and post-2004. Similarly, there are instances of agreeing to both model-IIA and modified-model IIA types in the same year. The only interesting trend to note is that, after the Enron debacle,<sup>15</sup> India decided not to have FET in its IIA with Singapore, which was negotiated when “Enron memories” were fresh. However, lack of FET is not a feature of any of the other IIAs signed by India at that time. Thus, except for India-Singapore, all Indian IIAs of that time contain a FET provision. One might want to distinguish between the India-Singapore IIA and other IIAs because, in the former, an investment chapter is part of the CECA and thus perhaps can justify that CECAs with investment chapters will be differently negotiated as compared to stand-alone bilateral investment treaties. However, this logic fails when one sees the presence of FET in the India-Korea CECA, which came into force in 2010. Although the investment chapter of this CECA is very close to that of the India-Singapore IIA, the marked difference is that the India-Korea IIA contains FET provision—although it is different from the model-IIA and modified-model IIA types, as discussed above.

The other instance where the FET is linked with international minimum standard is that with Mexico. Given Mexico’s experience in the NAFTA cases, one can safely argue that this linking up has been done at the behest of Mexico and not India.

Thus, the important issue that needs to be debated is which approach to FET is better—is it the approach prevalent in the majority of IIAs, which do not provide the normative content of the FET; the approach of not having a FET in the IIA; or the approach of providing some indication regarding the normative content of the FET provision?

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<sup>15</sup> *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Cooperation Limited*, International Court of Arbitration of the ICC, Case No. 12913/MS. Under this dispute, investors initiated a number of claims against India, including an expropriation claim under the India-Mauritius IIA when the Indian state of Maharashtra refused to buy power from the investors as per a contract, which in turn greatly diminished the value of foreign investment. Later, anti-arbitration injunctions issued by Indian courts stopping the investors from pursuing international arbitration strengthened the case of expropriation. However, a settlement was reached before the final hearing on very favourable terms. What these favourable terms were is not in the public domain.