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ARTICLE

Indian International Investment Agreements and "Non Investment Concerns": time for a right(s) approach

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Abstract This article reviews India's International Investment Agreements including its Bilateral Investment Treaty models in the light of Non Investment Concerns (NIC) and the integration—or not—of related measures furthering the State's normative autonomy. In this context, particular attention is paid to the following issues: the right to regulate, human rights, development, labour, corporate social responsibility, the environment and anti-corruption. While certainly subjective, this perspective is based on today's most recurring treaty practices, which respond, even timidly, to pressing "societal" challenges treaty drafters and adjudicators do not yet dare to formulate in a rights, and precisely human rights, language. The paper later shows the importance of a right-based approach in a changing international context and concludes in favour of a greater and original integration of NIC in India's current negotiations and treaty drafting.

Keywords International Investment Agreements · Indian model BIT · Dispute settlement · Non Investment Concerns · World Trade Organization · Human rights based approach

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1 Introduction

In reaction to the problematic increase of global trade disputes, India recently expressed its reluctance to see certain "Non Trade Concerns" (NTC), including labour and the environment, introduced in the World Trade Organisation (WTO)'s purview. According to India's Commerce Secretary indeed, developing nations are facing a double challenge when dealing with the WTO dispute settlement system: a lack of internal capacity to tackle complex technical issues such as trade remedies, and the progressive inclusion of labour and environment related decisions, settled in other forums, in the reasoning of the WTO's adjudicators.[1,2] This perspective is unfortunately not uncommon as it echoes other developing countries approaches to international trade law and, at the same time, contributes to the artificial fragmentation of international law, which has characterized the past 20 years.[3] While developing and, to a lesser extent, emerging economies have traditionally associated their global attractiveness to a rather loose normative framework of protection for labour and the environment hence creating a comparative advantage in trade, these disastrous views for a sound and sustainable development have only but been reinforced by the technicalization and strategic division of international law in many sub-disciplines eventually read in isolation to meet short term policy objectives. *Lex specialis* (specialized law), "self-contained" regimes, and regionalism have indeed been advanced as many explanations of the current international law complication while, at the same time, *jus cogens*, "systemic integration" and repeated incantations to refer to the Article 31 (3) (c) of the Vienna Convention of the Law of Treaties[4] (VCLT) are supposed to provide drafters and judges with solutions in favour of a pluralistic and integrative vision of international law as well as the integration of Non Trade Concerns in trade law.[5]

What are these controversial "Non Trade Concerns" about? Virtually anything and everything if not defined rigorously. In a trade in agriculture context, the NTC appeared in relation to the interpretation of the WTO Agreement on Agriculture (AoA), which is said to be flexible enough to provide for the protection of food

[1] On India's willingness and challenges to build up trade capacity, *see* James J. Nedumpara, *WTO*, *State*, *and Legal Capacity Building: An Indian Narrative*, *in* Leïla Choukroune, Judging the State in International Trade and Investment Law (2016).

[2] *See Non trade Issues at the WTO: Lack of Capacity Worries India*, The Hindu, May, 3 2016, http://www.thehindu.com/business/Economy/nontrade-issues-at-wto-lack-of-legal-experts-worry-india/article8548230.ece.

[3] On fragmentation, *see* International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 2006. *See also* Margaret Young, Regime Interaction in International Law: Facing Fragmentation (2012); Ole Kristian Fauchald & Andreas Nollkaemper, The Practice of International and National Courts and the (De-)Fragmentation of International Law (2014); on the methodological challenge in international economic law, *see* Ernst Ulrich Petersmann, *Methodological Pluralism and Its Critics in International Economic Law Research*, 15(4) J. Int'l Econ. L. 921–970 (2013).

[4] Vienna Convention on the Law of Treaties, A/CN.4/L.682, Article 31(2).

[5] *Id.*

security, rural development, poverty alleviation, and the environment.[6] In this context, the "multi-functionality" of agriculture already addressed by the Organisation for Economic Cooperation and Development (OECD) in its March 1998 Communiqué,[7] has been stressed by the WTO itself in the preamble of the Agreement on Agriculture:

> commitments under the reform programme should be made in an equitable way among all Members, having regard to Non Trade Concerns, including food security and the need to protect the environment; having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing developing countries.

This apparently simple reasoning has nevertheless generated numerous heated debates from the early years of the WTO.[8] The absence of a clear definition of what could be a NTC contributed to the confusion and developing countries fears to see their trade policies impeded by externally imposed "western" values and standards. This again revealed a rather short-term vision, but remains largely prevalent in today's discussions. In addition, recent cases such as the "seal dispute" have reactivated the debate on the basis of the interpretation of Article XX (General Exceptions) of the General Agreement on Tariffs and Trade (GATT 1994) and the protection of public morals (Article XX (a)) and indigenous communities (Inuit) rights in particular.[9] Yet no consensus could be achieved in treaty drafting or case law on the very coverage of NTC.

Having this in mind, one can wonder what could then be "Non Investment Concerns" (NIC) while the expression has not yet gained much popularity in international investment practice and scholarship. Such a definition would require a genuine theoretical construction going beyond the limited borders of this short article, but for the clarity of the discussion, the following elements will be

[6] *See* WTO, '*Non-trade' Concerns: Agriculture Can Serve Many Purposes*, https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd17_agri_e.htm.

[7] *See* OECD, *Ministerial Communiqués Related to Agricultural Policies*, http://www.oecd.org/tad/agricultural-policies/ministerialcommuniquesrelatedtoagriculturalpolicies.htm#mar98.

[8] These include academic debates on NTC as reminded by Laurence Boisson de Chazournes in a recent article honouring the scholarship of Professor Jackson. *See* Laurence Boisson de Chazournes, *WTO and Non-Trade Issues: Inside-Out*, 19 J, Int'l Econ. L., 379–381 (2016); for an investment related perspective on environmental aspects: *see* Laurence Boisson de Chazournes, *Environmental Protection and Investment Arbitration: Yin and Yang*?, Colum. J. Int'l. L. (2016) (forthcoming).

[9] *See* Appellate Body Report., *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R (May 22, 2014), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm. In this case, the Appellate Body upheld the Panel's finding that the EU Seal Regime is "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994, but that the European Union had not justified the EU Seal Regime under Article XX and in fact applied its exception in a discriminatory manner inconsistent with the GATT and the Agreement on Technical Barriers to Trade (TBT). On interpreting the WTO agreements and developments in interpretation of the Article XX, *see* Joel Trachtman *The WTO Seal Products Case: Doctrinal and Normative Confusion*, Am. J. Int'l L. (2015), https://www.asil.org/blogs/wto-seal-products-case-doctrinal-and-normative-confusion.

considered as falling under NIC: the right to regulate—despite its many and problematic meanings—human rights, development, labour, corporate social responsibility (CSR), the environment and anti-corruption. While certainly subjective, this list is based on today's most recurring treaty practices responding, even timidly, to pressing "societal" challenges treaty drafters and adjudicators do not yet dare to formulate in a rights and precisely human rights language.

Based on a variety of previous researches on India (and emerging countries) and international trade and investment law, this article reviews India's International Investment Agreements (IIAs) including its Bilateral Investment Treaty (BIT) models in the light of Non Investment Concerns (NIC) and the integration—or not—of related measures (I).[10] In doing so, it shows the importance of a right-based approach in a changing international context (II) and concludes in favour of a greater and original integration of NIC in India's current negotiations and treaty drafting.

2 Non Investment Concerns in Indian International Investment Agreements

In early 2013, India decided to suspend all its BITs negotiations to eventually publicly release a first new BIT model draft, which has largely been commented since the beginning of 2015.[11] This did not come as a complete surprise as India is facing, for the past 5 years or so, a growing number of investors' claims (around seventeen according to certain estimates).[12,13] Some of these disputes, and the landmark decision on the *White Industries* case to start with, have literally produced a landslide of comments and interrogations on the direction to be given to India's investment policy with regard to some essential aspects of its autonomy to regulate economic activities including its tax policy.[14] With eighty four BITs and thirteen other Treaties with Investment Provisions (TIPs) (either concluded or under

[10] *See* in particular Leïla Choukroune, Emerging Countries and International Trade and Investment Law (2016); Leïla Choukroune, *Human Rights in International Investment Disputes: Global Litigation as International Law Re-Unifier*, *in* Judging the State in International Trade and Investment Law (Leïla Choukroune, 2016); Leila Choukroune, *Disasters and International Trade and Investment Law—the State's Regulatory Autonomy between Risk Protection and Exception Justification*, *in* Research Handbook on Disasters and International Law (S. Breau &, K. L. H. Samuel, 2016); Leila Choukroune, *The Liberalization of Water and Sanitation Services in International Trade and Investment Law: for a Holistic (Human) Rights Based Approach*, *in* The Regulation of the Global Water Services Market (Julien Chaisse, 2016); Leila Choukroune, *Indian and Chinese FDI in Developing Asia: the Standards Battle Beyond Trade*, 7 The Indian J. Int'l Econ. L., 89–116 (2015).

[11] *Draft Indian Model Bilateral Investment Treaty Text*, Government of India, https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/.

[12] *See* Puja Mehra & Suhasini Haidar, *India-U.S. Investment Protection Pact in the Offing*, The Hindu, Jul. 21, 2105, http://www.thehindu.com/news/national/indiaus-investment-protection-pact-in-theoffing/article7444730.ece?homepage=true.

[13] Some of these cases are identifiable on the Investment Treaty Arbitration Website.

[14] We will further develop the *White Industry* case's impact on the Most Favoured Nation (MFN) standard of treatment below. *See White Industries Australia Limited v. The Republic of India*, UNCITRAL Arbitration, Final Award (November 30th, 2011).

negotiation), India has been at the forefront of treaty negotiations for the past three decades.[15] Interestingly, the changing nature of its trade from a rather closed socialist economy to more liberal and internationalized paradigms as much as its recent encounters with international investment arbitration have impacted India's perceptions of the best possible treaty.

Although a relatively late entrant on the BIT scene with a first treaty signed with the UK in 1994, India has progressively crafted a very large number of treaties with developed and developing countries all over the world. While it restricted itself to BIT until 2004, it then entered into regional negotiations and FTA with countries such as Japan, Korea and Malaysia (see the Appendix tables) and there are many more to come at the bilateral or mega-regional level. Interestingly, India took an opposite stance to, for example, China as far as National Treatment and Most Favoured Nations (MFN) are concerned. While it generally granted the two standards of treatment [as well as Fair and Equitable Treatment (FET)] in most of its 1990s and 2000s treaties, its recent attempts show a real suspicion of the MFN. This, of course, is a direct result of its recent—and first condemnation by an arbitral tribunal in the *White Industries* case. While based on the India-Australia BIT, the broad interpretation of the MFN standard by the investment tribunal resulted in finding that the standard of "effective means of asserting claims and enforcing rights" could be found in the India-Kuwait BIT.[16] It then concluded that: "the Republic of India has breached its obligation to provide effective means of asserting and enforcing rights" with respect to the White Industries Australia Limited's investment pursuant to the article 4(2) of the BIT incorporating the Article 4(5) of the India Kuwait BIT.[17] For these reasons, and as seen in many other relatively similar (tax related) cases that are underway, the Indian government decided to review its BIT policy including its BIT model. The 2015 model hence does not mention the MFN standard, which may pose problem for Indian investors going global.[18]

2.1 India's BITs models and practices

As far as NIC are concerned, the 2003 and 2015 BIT models offer a different approach. Short and investment friendly, the 2003 model visibly aimed at economic efficacy: how to attract foreign direct investment (FDI) in an era of liberalization. There is in fact no genuine provision related to NIC. The BITs concluded with India's partners in the early 2000s are hence noted for their brevity and absence of

[15] See Bilateral Investment Promotion and Protection Agreements (BIPA), Ministry of Finance, Government of India, http://finmin.nic.in/bipa/bipa_index.asp; Trade Agreements, Ministry of Commerce and Industry, Government of India, http://commerce.nic.in/trade/international_ta.asp?id=2&trade=i.

[16] Article 4(5) of the India-Kuwait BIT provided that: "Each party shall… provide effective means of asserting claims and enforcing rights with regard to investments…". Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of MFN.

[17] *White Industries Australia Limited, supra* note 14, at ¶ 16.1.1.

[18] On the recent developments and pros and cons of an MFN insertion, *see* Prabhash Rajan, *Most Favoured Nation Provisions in India BIT, A Case For Reform*, 55 (1) Indian J. Int'l L. 39–64 (2015).

NIC related provisions. In the early 2000s, while a number of investment disputes were already questioning the State's right to regulate in favour of the public interest, the gap in India's practice is quite striking and has later become problematic when disputes have arisen.

On the other hand, and as a reaction, the 2015 model BIT offers quite a number of NIC related provisions, which counterbalance the criticism often formulated since its adoption.[19] A curious instrument indeed, at the intersection of various approaches of investment law (liberal and statist), the 2015 model BIT somehow contradicts other political ambitions of the current government and the "Make in India" campaign. The model BIT does not always provide a protective and attractive environment for FDI while, at the same time, it does not necessarily protect the interests of the State and its population. The debateable new provisions include : the stricter definition of investment, the complete exclusion of taxation, the absence of an MFN provision and the curiously drafted dispute settlement provisions, which requires the exhaustion of local remedies by the investor before it can proceed to international arbitration, i.e. quite a challenging task in a country where the number of pending cases is infamous. These provisions also have to be taken into consideration for Indian investors "going global" as they are now offered less protection than in the past. However, as briefly indicated above, the NIC related provisions deserve particular attention. They are identifiable in the following sections: Preamble (Sustainable development and right to regulate), Article 9 (Entry and Sojourn of Personnel), Article 10 (Transparency), Article 11 (Compliance with Law), Article 12 (Corporate Social Responsibility including labour, human rights, environment and anti-corruption standards), Article 32 (General Exceptions) and Article 33 (Security Exceptions and Appendix 1 related).

The preamble sets the tone in reaffirming the "[r]ight of [p]arties to regulate investments in their territory in accordance with their law and policy objectives".[20] Directly related to individual rights protection, the Article 9 (Entry and Sojourn of Personnel) and Article 10 (Transparency) have to be read in relation to today's evolution of trade and investment and increasing expectations in terms of freedom of movement and access to information although the latest is well framed by certain other imperatives (Article 10.4):

> Nothing in this Treaty shall require a Party to furnish or allow access to confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular juridical persons, public or private.

Article 11 (Compliance with Law) and Article 12 (CSR including labour, human rights, environment and anti-corruption standards) can be read together as far as

[19] For well-argued and constructive criticism, *see Analysis of the 2014 Draft Model Indian Bilateral Investment Treaty: Report No. 260*, Law Commission of India, Aug. 2015.

[20] *Model Text for the Indian Bilateral Investment Treaty*, Ministry of Finance, Government of India, Dec. 28, 2015, http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf; *See Draft Indian Model Bilateral Investment Treaty Text*, Government of India, https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/.

anti-corruption measures are concerned. Here again, they correspond to contemporary evolutions and the greater public demand in favour of political and economic accountability. Article 12 is however of particular interest knowing India's recent moves in favour of the implementation of sound CSR policies and the 2013 change in company law which requires businesses with annual revenues of more than ten billion Rupees to give away two percent of their net profit to charity, putting India at the forefront of CSR:

> Investors and their enterprises operating within the erritory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.

The direct references to human rights is of particular importance although a language of rights in the nature of a precise binding instrument is still absent.

In addition, Article 32 (General Exceptions) and Article 33 (Security Exceptions and Appendix 1 related), largely modelled on WTO exceptions, could prove useful in dispute settlement and help contribute to de-fragmentation of international law. The sceptics would, of course, argue that their implementation could be complicated in an investment context.

2.2 Indian Treaties with Investment Provisions (TIPs)

As if anticipating this new trend, previous TIPs had already paved the way for further NIC measures being integrated. Amongst them a few deserve special attention.[21] The 2005 India-Singapore Comprehensive Economic Cooperation Agreement (CECA) set the tone of the developments to come. Its preamble reaffirms the "right to pursue economic philosophies suited to development goals and right to regulate activities to realize national policy objectives" and recognizes that:

> "economic and trade liberalization should allow for the optimal use of natural resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment."

In addition, the chapter 6 (investment) comprises public interest related measures (right to regulate, Article 6.10) as well as WTO type "general exceptions" (Article 6.11).

The 2010 India-Korea CEPA follows the same path and interestingly integrates an original Article 10.16 on "health, safety and environmental measures":

1. Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Agreement that is in

[21] *See* annexes for a synthetic approach to the provisions included.

the public interest, such as measures to meet health, safety or environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.

The 2011 CECA with Malaysia allows for measures on public interest and on "environmental measures":

> Each Party recognizes that it is inappropriate to encourage investment activities in its Area of investors of the other Party by relaxing its environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion of investment.

Lastly, the recently negotiated (2014) India-ASEAN Investment Agreement contains a large number of NIC measures. For example, it includes: Preamble (Special and differential treatment (SDT) and Development), Article 3 and 4 and 5 (Reservation List on National Treatment and Review of the same), Article 16 (SDT for newer members), Article 21 (General Exceptions), Article 22 (Security Exceptions and Appendices 1 and 2 related).

While engaging in multilateral negotiations including trade and investment issues with developed and developing countries, India will certainly benefit from a larger and more comprehensive inclusion of NIC measures in its current BITs and other IIAs and eventually the adoption of a (human) rights based approach.

2.3 The right time for a right (s) based approach

2.3.1 A fast changing international landscape

With 3,304 International Investment Agreements (IIAs) and almost 600 FTAs the production of economic norms for global and regional integration has reached an unprecedented stage.[22] In addition, international investment law and dispute settlement is at the centre of this troubled environment and indeed constantly evolving from a conceptual framework to a variety of other approaches, which may apparently refer to the same standards but greatly differ in putting forward different policy objectives and economic development paths.[23] Investor-state dispute

[22] *See World Investment Report 2015—Reforming International Investment Governance*, UNCTAD, http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245 [hereinafter UNCTAD World Investment Report].

[23] *See* R. ECHANDI & P. SAUVE, Prospects in International Investment Law and Policy: World Trade Forum (2013).

settlement has radically changed. While the number of disputes has exploded with seventy new cases introduced in 2015 (i.e. highest number of cases in a year), and bringing the total number of known treaty based cases to six hundred and ninety six, the geographical representation as well as the nature of the cases have dramatically evolved.[24] As far as countries targeted by investment arbitrations are concerned, an important evolution is under way. With 40 % of new cases initiated against developed countries, the relative share of cases against these countries has been on the rise (compared to the historical average of 28 %). This has already impacted the discussion on investment arbitration including the EU's reluctance to introduce investment arbitration provisions in the agreements its currently negotiating and the Transatlantic Trade and Investment Partnership (TTIP). As far as the nature of disputes is concerned, investors do not hesitate anymore to target host countries regulatory activity in challenging national policies for health, the environment or energy production and security.[25,26] In addition, the latest rendered awards have reached astronomical sums with a 2014 award amounting to USD fifty billion in the *Yukos* three closely related cases[27]—the highest known award by far in investment arbitration.

During the same period, in 2014, Asia became, for the first time, the world's largest investor region (with USD four hundred and forty billion outward FDI), hence overtaking North America (with USD three hundred and ninety billion) and Europe (with USD two hundred and eighty six billion).[28] China and India have played a large part in this massive expansion with Hong Kong becoming the second largest investor in the world behind the US, and FDI outflows from India increasing fivefold to USD twelve billion in 2014.[29] This concrete realization of Narendra Modi's "Act East" and China "good neighbour" policies heralds tremendous new developments for the world. Beyond trade statistics and other investment flows, there is now another lengthier and deeper struggle which is that of political redefinition of the rules governing global economics. In this regard, as demonstrated above, India and China have taken a rather heterodox path, which might appear for many as an alternative to "western rules".[30] This international law, which they hardly had a hand in creating, has not reduced their normative autonomy. On the contrary, they have seized on it to strengthen their powers and create—if not yet

[24] *See* UNCTAD World Investment Report, *supra* note 22.

[25] *See World Investment Report 2014-Investing in the SDGs: An Action Plan*, UNCATD, http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=937.

[26] *See Reform of Investor-State Dispute Settlement: in Search of a Roadmap*, UNCTAD, IIA Issues Note, No. 3, (June 2013).

[27] *See* Hulley Enterprises Limited former Yukos Oil Company in the ISDS proceedings against the Russian Federation: *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, Permanent Court of Arbitration, Award, (18th July, 2014), *Yukos Universal Limited (Isle of Man) v. The Russian Federation,* UNCITRAL, PCA Case No. AA 227, Award 18 July 2014, *Veteran Petroleum Limited (Cyprus) v. The Russion Federation,* UNCITRAL, PCA Case No. AA 228, Award, 18 July 2014.

[28] *Investment Trends Monitor*, No.19, UNCTAD, (May 18, 2015), http://unctad.org/en/PublicationsLibrary/webdiaeia2015d2_en.pdf.

[29] *Id*.

[30] Leïla Choukroune, Emerging Countries and International Trade and Investment Law (2016).

export—a *sui generis* model mixed with norms imported and reinterpreted in light of creative practices embedded in contrasting histories and political regimes. This heterodox strategy eventually gave space for regulatory autonomy and gradual economic liberalization in supporting the development of national champions. As some of these national champions go "global", the national treatment standard of protection may be important.[31]

Lastly, in relation to NIC, a few newly drafted treaties have taken into account the civil society's concerns and the need for human rights-related provisions integration and clarification. While timid and sometimes not even using the term "human rights" nor referring to precise provisions, these attempts are real and deserve to be put into perspective. Two are of particular interest, one being more politically daring and legally rigorous than the other: the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada and the Transpacific Trade Partnership (TPP) between the United States and eleven Pacific countries, a group representing 40 % of the world GDP.[32] The CETA negotiators have clearly offered an attentive ear to civil society's criticism echoed by the EU Parliament.[33] What has been called in diplomatic, yet very curious terms, "a legal scrubbing" to "fine tune" the treaty in response to civil society pressure, eventually led to the publication of a new treaty in late February 2016.[34] At the core of this "fine tuning" are investment provisions and investment dispute settlement reforms in relation to the massive criticism and concerns following the publication of the first CETA draft at a time European countries are also targeted by investment arbitration, a new reality which came as a shock for government and public opinions discovering that Europe was also fallible and the ISDS system was not only made to sue developing countries.[35] A look into the text of the treaty is disappointing: while a number of provisions are indeed supporting states sovereignty and so their ability to protect their citizens' rights, human rights are certainly not at the core of the treaty text despite some references found in the preamble to the "Universal Declaration of Human Rights" and the importance of "international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation".[36] Unfortunately again, the treaty drafters use the vague language of

[31] *See* M. Sornarajah, *India*, *China and Foreign Investment*, *in* China, India and the International Economic Order 132–166 (Sornarajah & Wang, eds., 2010).

[32] For official presentations, *see* European Commission, Comprehensive Economic and Trade Agreement (CETA), http://ec.europa.eu/trade/policy/in-focus/ceta/[hereinafter CETA]. The TTP countries are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam.

[33] For a synthesis of EU Parliament concerns and initiatives and positions, *see European Parliament*, *EU-Canada Comprehensive Economic and Trade Agreement*, (Jan. 2016), http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573929/EPRS_BRI(2016)573929_EN.pdf.

[34] For the EU comments at the time, *see*: *European Commission*, *CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement*, (Feb., 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468.

[35] *See* UNCTAD World Investment Report, *supra* note 22 (the introduction above and generally the latest UNCTAD reports which show a surge in European countries related investment cases with countries like the Chez Republic or Ukraine topping the list of respondents).

[36] *See*, CETA, *supra* note 32.

the parties "right to regulate within their territories" to "achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity", but nothing clear and binding is further elaborated as to the same parties' human rights obligations. In this regard, and despite the absence of the term "human rights" in the more than 5000 pages of the treaty text, the TPP is politically daring and legally rigorous. Politically daring indeed, when confronted to a negotiation process with extremely varied countries, many of which are not democratic and not deliberately supporting an ambitious international human rights agenda; and legally rigorous as some provisions of the TPP are better defined than equivalent provisions of the CETA with clear references to labour or environmental legal instruments and commitments.[37]

2.3.2 The need for a renewed approach of NIC through standards and rights

The progressive integration of certain standards of treatment is revealing of the flexibilities of international law. To understand the possibilities offered by a creative approach, one has to bear in mind the revolutionary nature of certain standards and, for instance, a national treatment directly impacting regulatory autonomy of the State and domestic constitution. Granting national treatment to foreigners can indeed be seen as a profound contribution towards universalism by means of a concrete adherence to international law, but it can also be interpreted as too intrusive a standard that a State is not able to adhere to in view of its economic development or the lack of reciprocity its nationals may *de facto* face in the absence of either corresponding foreign regulations or economic capacity to trade and invest abroad. So there is reluctance by many, in views of political and pragmatic considerations to take such a fundamental turn in their approach to opening up and globalization. Now widely accepted, the national treatment standard is present, at the post-entry stage, in all Indian FTAs and IIAs, coupled (or not) with other investment standards and the MFN and FET standards in particular. Pre-entry national treatment provisions modelled on US practice are not generalized because many countries and emerging countries in particular, are resisting its introduction to protect their regulatory autonomy. While of a limited nature in the 1990s BITs, exceptions are often introduced in the new IIAs that firmly support investment liberalization. India should make a greater use of these. Of various types and nature, these exceptions can be general (public health, order, moral, security) and influenced (or not) by Article XX of the GATT. They can also be country specific to protect nationals against foreign investment in certain economic fields (infant industry, strategic economic sectors such as the cultural industry) or target specific domains for exemption of national treatment (intellectual property, prudential measures, financial services, etc.). The qualifications/exceptions to the national treatment serve to balance the legal symmetry sometimes artificially created by the

[37] On the TPP negotiations, *see* Leïla Choukroune, *Le Partenariat Transpacifique Precurseur De Nouveaux Traités Commerciaux*, LE MONDE, Oct. 7, 2015, http://www.lemonde.fr/idees/article/2015/10/07/le-partenariat-transpacifique-precurseur-d-une-nouvelle-generation-de-mega-traites-commerciaux_4784436_3232.html.

national treatment standard with the economic asymmetries resulting from a *de facto* dominance from one partner's powerful multinational companies over the other partner's economy. Thus the national treatment standard effectively induces and supports a sovereign to develop itself through an autonomous regulatory project. In addition, a smart and efficient use of regulatory flexibilities could reconcile different approaches in trade and investment law. In this regard, a positive reconsideration of the national treatment standard by India and the many possibilities it offers to enhance State sovereignty in their economic choices would contribute to the very objective of a regulated trade and investment liberalization—a globalization, beneficial to all.

India can now use its own investment model integrating NIC for the benefit of its population through a (human) rights approach. This of course, will reveal challenging, as human rights are generally not taken into consideration in international investment law and dispute settlement. Whether it is the unwillingness of treaty drafters to incorporate human rights provisions often perceived as counter-productive to foreign direct investment (FDI) reception or the reluctance of arbitrators to go beyond the letter of the law and interpret agreements in conjunction with general international law norms and principles, the debate has occupied legal scholars for some time while civil society was fighting for these rights to be directly addressed by the international investment regime.[38,39] This current tedious debate has largely been fuelled by political and economic interests rather than convincing legal arguments.[40] Interestingly, the apparent contradiction between norms could indeed be easily resolved through political and economic will to read the law from a holistic perspective making use of its many flexibilities.[41] Why would it be essential to now integrate human rights in treaty drafting? Because they are directly invoked in dispute settlement and the issues addressed are related. In this regard, the recent *Novartis* case[42] clearly stresses the relations between investment and public choices and the need to legislate to improve public health. In the context of a series of amendments to the Indian Patents Act, which took effect on 1 January 2005, India indeed adopted Section 3(d). This controversial reform *de facto* limited

[38] In this regard, please see one of the first comprehensive publication on the topic, released after a number of investment human rights–related disputes took place: Pierre-Marie Dupuy, et al., Human Rights in International Investment Law and Arbitration (2009). For an updated analysis on the same essential issues, *see* Vivian Kube & Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration,* EUI, Department of Law Working Paper No. 2016/02.

[39] Amnesty International, *Human Rights Trade and Investment Matter*, 2006, https://www.amnestyusa.org/sites/default/files/pdfs/hrtradeinvestmentmatters.pdf.

[40] On the relation between international investment law and international law and public law, *see* Eric de Bradandere, Investment Treaty Arbitration as Public International Law (2016); Stephen Schill International Investment Law and Comparative Public Law (2010); Andreas Kulick, Global Public Interest in International Investment Law (2014).

[41] On a comparison with the absence of political will to take human rights consideration into account in the Doha round of trade negotiation, *see* Ernst-Ulrich Petersmann, International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods (2012).

[42] *See Novartis v. Union of India*, Civil Appeal Nos. 2706-2716 of 2013, Supreme Court of India[hereinafter *Novartis*].

pharmaceutical companies' ability to obtain "secondary patents" that is a patent protecting an alternative structural form of a given molecule and hence protects innovation only if it demonstrates enhanced "efficacy". On April 1, 2013, the Supreme Court of India decided on an appeal made by the pharmaceutical giant *Novartis* against a rejection of a patent application by the Indian Patent Office. The court's decision was essentially based on a clarification of Section 3(d) and the concept of "therapeutic efficacy" while, at the same time, affirming compliance with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).[43] Hence the court argued that the Parliament had to produce, "within a very limited time, an Act that would be TRIPS compliant without, in any way, compromising on public health considerations".[44] It is important to recall here that India was at the forefront of the negotiation of the WTO Ministerial Declaration on TRIPS and Public Health adopted in Doha in 2001 and affirming that:

> the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.[45]

As to the interpretation of "therapeutic efficacy", the court demonstrated that:

> Efficacy means "the ability to produce a desired or intended result". Hence, the test of efficacy in the context of section 3(d) would be different, depending upon the result the product under consideration is desired or intended to produce. In other words, the test of efficacy would depend upon the function, utility or the purpose of the product under consideration. Therefore, in the case of a medicine that claims to cure a disease, the test of efficacy can only be "therapeutic efficacy".[46]

Technically complex and based on an equally long procedure, the text of the judgment is very well argued and scientifically grounded. It raises the issue of rewarding genuine innovation involving therapeutic efficacy and at the same time, dealing with major public health challenges for the State. The case has made the headlines and received massive criticism[47] but it is a genuine contribution made by an emerging country.

[43] *See Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

[44] *See* Novartis, *supra* note 42, at ¶76 (India).

[45] *See* Doha Declaration WT/MIN(01)/DEC/W/2, 14B November 2001, http://www.who.int/medicines/areas/policy/tripshealth.pdf?ua=1.

[46] *See* Novartis, *supra* note 42, ¶ 179.

[47] *See* in this regard Prof. Abbott measured interpretation which contrasts with more technical and market oriented reading of the same provisions from the TRIPS to the idea of efficacy and the related concept of "evergreen": Dorothy Du, *Novartis Ag v. Union of India:* "*Evergreening,*" *Trips*, *and* "*Enhanced Efficacy*" *Under Section 3(d)*, 21 J. Intell. Prop. L. 223 (2014).

3 Conclusion

A (human) rights-based approach directly tackling NIC appears as the only logical path to address all other international law issues. Not only does it encompass essential human rights principles, but it also proves an effective tool to international law reunification and coherent application from treaty drafting to dispute resolution while putting an end to the debate on the definition and categorization of NIC. As applied to investment (and trade), it places the discussion in another perspective, that of legal entitlements, rights holders can claim against the state and other non-state actors.

Hence, instead of a passive defensive approach resisting the exportation of "western" norms and standards, it is worth pondering why emerging economies such as India have not adopted a proactive and creative strategy in defining the essential norms and standards applicable to their companies' operations abroad or for the protection of their own interests and populations.[48] Low standards will only weaken the economic capacity of emerging and developing countries in great need for growth and jobs creation. It is ample time to integrate NIC in investment treaty drafting and to adopt a creative approach to standards definitions based on (human) rights. Amongst these, the conservation of natural resources, the betterment of working conditions or the health and safety of consumers should obviously matter to India.

Appendix 1: Indian IIAs and Non Investment Concerns

Indian BITs	Partners	Date of entry into force	Status	Non investment measure(s)
2003 BIT Model			Terminated	X
2015 BIT Model			In force	Preamble (Sustainable development and right to regulate)
				Article 9 (Entry and Sojourn of Personnel)
				Article 10 (Transparency)
				Article 11 (Compliance with Law)
				Article 12 (Corporate Social Responsibility including labour, human rights, environment and anti-corruption standards)
				Article 32 (General Exceptions)

[48] As a striking example, a recent report from the Swiss NGO shows that European oil companies and commodity traders are exploiting weak fuel standards in African countries to export highly polluting fuels that they could not sell in Europe or the US where standards of protection are higher: *See* Alice Ross, *Trafigura, Vitol and BP Exporting Dirty Diesel to Africa, Says Swiss NGO*, The Guardian, Sep. 15, 2016.

Indian BITs	Partners	Date of entry into force	Status	Non investment measure(s)
				Article 33 (Security Exceptions and Appendix 1 related)
Asia and Middle East				
1	Armenia	30/05/2006	In force	x
2	Australia	01/03/2001	In force	x
3	Bahrain	05/12/2007	In force	x
	Bangladesh	07/07/2011	In force	x
	Brunei Darussalam	18/01/2009	In force	x
4	China	01/08/2007	In force	x
5	Indonesia	22/01/2004	In force	x
6	Israel	8/02/1997	In force	x
7	Jordan	22/01/2009	In force	x
8	Kazakhstan	26/07/2001	In force	x
9	Korea	07/05/1996	In force	x
10	Kuwait	8/06/2003	In force	x
11	Kyrgyzstan	12/05/2000	In force	x
12	Laos	05/01/2003	In force	x
13	Malaysia	12/04/1997	In force	x
14	Mongolia	29/04/2002	In force	x
15	Myanmar	08/02/2009	In force	x
16	Nepal	Signed21/10/2011	Not in force	x
17	Oman	13/10/2000	In force	x
18	Philippines	29/01/2001	In force	x
19	Qatar	15/12/1999	In force	x
20	Saudi Arabia	20/05/2008	In force	x
21	Sri Lanka	13/02/1998	In force	x
22	Syria	22/01/2009	In force	x
23	Tajikistan	14/11/2003	In force	x
24	Taiwan	28/11/2002	In force	x
25	Thailand	13/07/2001	In force	x
26	Turkey	18/10/2007	In force	x
27	Turkmenistan	27/02/2006	In force	x
28	United Arab Emirates	21/08/2014	In force	x
29	Uzbekistan	28/07/2000	in force	x
30	Vietnam	01/12/1999	in force	x
31	Yemen	10/02/2004	in force	x

Indian BITs	Partners	Date of entry into force	Status	Non investment measure(s)
Europe				
1	Austria	01/03/2001	In force	x
2	Belarus	23/11/2003	in force	x
3	BLEU (Belgium-Luxembour Economic Union)	08/01/2001	In force	
4	Bosnia Herzegovina	13/02/2008	In force	x
5	Bulgaria	23/09/1999	In force	x
6	Croatia	19/01/2002	In force	x
7	Cyprus	12/01/2004	In force	x
8	Czech Republic	06/02/1998	In force	x
9	Denmark	28/08/1996	In force	
10	Finland	09/04/2003	In force	x
11	France	17/05/2000	In force	x
12	Germany	13/07/1998	In force	x
13	Greece	10/04/2008	In force	x
14	Hungary	02/01/2006	In force	x
15	Iceland	2008	In force	x
16	Italy	26/03/1998	In force	x
17	Latvia	27/11/2010	In force	x
18	Lithuania	01/12/2011	In force	x
19	Macedonia	17/11/2008	In force	x
20	Montenegro	Signed 31/01/2003	Not in force	x
21	Netherlands	01/12/1996	In force	x
22	Poland	31/12/1997	In force	x
23	Portugal	19/07/2002	In force	x
24	Romania	09/12/1999	In force	x
25	Russian federation	05/08/1996	In force	x
26	Serbia	24/02/2009	In force	x
27	Slovakia	27/09/2007	In force	x
28	Slovenia	Signed in 14/06/2011	Not in force	x
29	Spain	15/12/1998	In force	x
30	Sweden	01/04/2001	In force	x
31	Switzerland	16/02/2000	In force	x
32	Ukraine	12/08/2003	In force	x
33	United Kingdom	06/01/1995	In force	x
Africa (14)				
1	Congo, Democratic Republic	Signed 13/04/2010	Not in force	x

Indian BITs	Partners	Date of entry into force	Status	Non investment measure(s)
2	Djibouti	Signed 19/05/2003	Not in force	x
3	Egypt	22/11/2000	In force	x
4	Ethiopia	Signed 05/07/2007	Not in force	x
5	Ghana	Signed 05/08/2010	Not in force	x
6	Libya	23/03/2009	In force	x
7	Mauritius	20/06/2000	In force	x
8	Morocco	22/02/2001	In force	x
9	Mozambique	23/09/2009	In force	x
10	Senegal	17/10/2009	In force	x
11	Seychelles	Signed 02/06/2010	Not in force	x
12	Sudan	18/10/2010	In force	x
13	Trinidad and Tobago	07/10/2007	In force	x
14	Zimbabwe	Signed 10/02/1999	Not in force	x
Americas				
1	Argentina	12/08/2002	Terminated	x
2	Colombia	03/07/20113	In force	x
3	Mexico	23/02/2008	In force	x
4	Trinidad and Tobago	07/10/2007	In force	x
5	Uruguay	Signed 17/02/2008	Not in force	x

Appendix 2: Treaties with Investment Provisions (TIPs)

Indian TIPs	Parties	Date of entry into force	Status	Non investment measure(s)
ASEAN-India Investment Agreement	ASEAN	Signed 12/11/2014	Not in force	Preamble (SDT and Development) Article 3 and 4 and 5 (Reservation List on National Treatment and Review of the same) Article 16 (SDT for newer members) Article 21 (General Exceptions) Article 22 (Security Exceptions and Appendices 1 and 2 related)
India-Malaysia FTA	Malaysia	07/01/2011	In force	Preamble (Right to regulate) Chapter 10 (Investments) Article 10.20 (Measures in the Public Interest)
India-Japan EPA	Japan	01/08/2011	In force	Preamble (Right to regulate) Chapter 8 (Investment) Article 99 (Environmental Measures)

Indian TIPs	Parties	Date of entry into force	Status	Non investment measure(s)
India-Korea CEPA	Korea	01/01/2010	In force	Preamble (Right to regulate, sustainable development and environment, regulatory cooperation)
				Chapter 10 (Investment) Article 10.16. (Health, Safety and Environmental Measures)
India Singapore CECA	Singapore	01/08/2005		Preamble (Right to regulate, natural resources and environment protection)
				Chapter 6 (Investment), Article 6.10 (Measures in the public interest)
				Article 6.11 (General Exceptions)
India-Chile Framework Agreement	Chile	Signed 20/01/2005	Not in force	
India-GCC Cooperation Framework	Gulf Cooperation Council	Signed 25/08/2004	Not in force	
India-ASEAN Framework Agreement		01/07/2004	In force	
BIMSTEC Framework Agreement	Bangladesh, India, Myanmar, Sri Lanka Thailand	30/06/2004	In force	X
SAFTA		01/01/2006	In force	
India-Thailand Framework Agreement		Signed 09/10/2003	Not in force	
EC-India Cooperation Agreement	EU	01/08/1994	In force	Preamble (Right to own economic path and protection of the poor populations)
RCEP		In negotiation		