

**COURSE TITLE**

***Responsible Faculty Instructor:***  
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Professor and Vice Dean (Research)

Credits: 4

Credits Type:

Cross-registration: NO

Pre-requisites: NONE

COURSE DESCRIPTION (COURSE VISION): What has been India's approach towards foreign investment and international investment law? How has India looked at bilateral investment treaties (BITs)? What place BITs enjoy in India's overall landscape of economic liberalization and globalization? What impact BITs have had on India's right to regulate in sovereign interest? What relevance BITs have in the ever-changing dynamic picture of international arbitration? These are some of the questions this course is going to explore.

India's tryst with investment treaty arbitration (ITA) would be studied by dividing India's experience with international investment law in three phases: phase I from 1947 till 1990; phase II from 1991 till 2010; and phase III from 2011 onward. The course will not just look at India's legal engagement with the international investment law regime but will also juxtapose this with India's approach to foreign investment in general. In the first phase i.e. the phase of refusal, India did not sign any BIT. India gave primacy to domestic laws over international law in regulating foreign investment. During this phase, India had a protectionist approach towards foreign investment. This changed in the second phase when India embraced the neoliberal economic order and started accepting BITs as an important tool to attract foreign investment. India's approach towards foreign investment became more welcoming. India signed close to 70 BITs and free trade agreements (FTAs) with investment chapters. Consequently, India revised its old position. India was now keen to allow foreign investment to be regulated as per international law. India's third phase of backlash started from 2011 when India lost an ITA case to an Australian company called White Industries. This was followed by several foreign investors' ITA claims against India for a wide variety of regulatory measures such as imposing taxes retroactively, cancelling spectrum licenses, etc.

India has lost many of these cases. Due to these cases, India has terminated unilaterally a large number of BITs (though due to the sunset clause the BIT remains active for a period of 10 to 15 years). India has also adopted a new Model BIT, which will be the basis of negotiating new investment treaties. India is currently negotiating investment treaties with several important players like the European Union, Australia, and the United Kingdom (UK) either individually or as part of an FTA. The cases that India lost have generated rich jurisprudence that has important implications for all stakeholders. This course would aim to closely study all these critical developments in ITA vis-à-vis India.

TEACHING METHODOLOGY:

The primary methodology to deliver the course will be through weekly lectures. The instructor would follow the Socratic method of teaching and thus expect the students to actively participate in the class discussions. Students should have read the compulsory readings before the class to enable class discussions. The course involves a deep discussion on several decided cases and thus the students would be expected to know the facts of these cases beforehand. Group exercises such as group discussions etc. would also be employed for certain topics.

INTENDED LEARNING OUTCOMES:

Students who successfully complete this course would:

1. Know the international investment law that binds India internationally.
2. Have a detailed understanding of the ISDS claims that have been brought against India for a wide variety of regulatory measures.
3. Appreciate India's overall approach towards foreign investment and international investment arbitration.
4. Comprehend the place of investment treaty arbitration within the larger and broader sphere of international economic globalization involving India.
5. Understand the interface between international investment law and international commercial arbitration in context of India.
6. Complement their learning derived from other economic law courses such as trade law, corporate law, IP law, and international commercial arbitration to have a full 360-degree view of the functioning of the Indian economy.

READING LIST (upto 10 select readings):

- Prabhash Ranjan (2024), *India and ISDS: Affronting Sovereignty or Indicting Capriciousness* (Routledge: London).
- Prabhash Ranjan (2019), *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP: New Delhi).
- Aniruddha Rajput (2018), *Protection of Foreign Investment in India and Investment Treaty Arbitration* (Kluwer: Hague).
- Ridhi Kabra, 'Return of the Inconsistent Application of the 'Essential Security Interest' Clause in Investment Treaty Arbitration: *CC/Devas v India and Deutsche Telekom v India*' (2019) 34 *ICSID Review - Foreign Investment Law Journal*, 723.
- Grant Hanessian and Kabir Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2017) 32 *ICSID Review - Foreign Investment Law Journal*, 216.
- Jarrod Hepburn and Ridhi Kabra, 'India's New Model Investment Treaty: Fit for Purpose?' (2017), 1 *Indian Law Review*, 95.

WEEKLY READING PLAN (WEEKLY OUTLINE):

A weekly plan is provided below:

<b>Week(s)</b>	<b>Topic and Description</b>	<b>Reading/Course Materials</b>
1.	<b>An Introduction to International Investment Law</b> – what is international investment law; the treatification of international investment law and the emergence of bilateral investment treaties (BITs); the key jurisdictional provisions like definition of investment and investor; the core substantive investment protection standards like fair and equitable treatment (FET), expropriation, most favoured nation (MFN), etc.	<u>Compulsory Readings:</u>  Leila Choukroune and James Nedumpara (2022), International Economic Law: Text, Cases and Materials (CUP: Cambridge), 493-520 [hereinafter Choukroune and Nedumpara (2022)].
2.	<b>An Introduction to investor-State dispute settlement (ISDS) and investment treaty arbitration (ITA)</b> – Significance of investment treaty arbitration; the nature of disputes between investors and States; ‘arbitration without privity’; consent to investment arbitration; the difference between investment treaty arbitration and international commercial arbitration; the public law aspect of investment treaty arbitration; Fork in the road clauses; ICSID versus adhoc arbitration.	<u>Compulsory Readings:</u>  Rudolf Dolzer and Christoph Schreuer (2012) Principles of International Investment Law (OUP: Oxford/New York), 235-263 [hereinafter Dolzer and Schreuer (2012)].  <u>Additional Reading:</u>  Choukroune and Nedumpara (2022), 540-595.
3 and 4	<b>Economic Nationalism - India’s phase of refusal to BITs – 1947 till 1990</b> – India’s foreign investment policy from 1947 till 1990; the period from 1947 till 1965 – cautious optimism towards foreign investment; nationalization of foreign investment; period from 1966 to 1990 – deep protectionism; India’s general approach towards international law and international investment law at the multilateral and bilateral level; India’s quest to build a new international economic order (NIEO); Permanent Sovereignty over Natural Resources (PSNR); the primacy to use domestic law	<u>Compulsory Readings:</u>  Prabhash Ranjan (2019), India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash (OUP: New Delhi), 47-85 [hereinafter Ranjan (2019)].  Aniruddha Rajput (2018), Protection of Foreign Investment in India and Investment Treaty Arbitration (Kluwer: Hague), 9-16 [hereinafter Rajput (2018)].

	instead of international law to regulate and protect foreign investment; the signing of investment guarantee agreements (IGA) with United States and West Germany.	
5.	<b>Economic Liberalism – India’s phase of acceptance of BITs – 1991 till 2010</b> – the 1991 Balance of Payment Crisis and spurring of economic reforms; Global developments in view of broader consensus on neoliberal economic policies; liberalization of India’s foreign direct investment (FDI) policy; India’s signing of BITs as a tool to attract higher foreign investment; BITs and FDI inflows in India – the empirical evidence; India’s overall BIT practice; marginal involvement of India with ISDS (the Dabhol Power Company case).	<p><u>Compulsory Readings:</u></p> <p>Ranjan (2019), 99-115</p> <p><u>Additional Reading:</u></p> <p>Prabhash Ranjan, ‘India and Bilateral Investment Treaties – A Changing Landscape’ (2014) 29 (2) <i>ICSID Review – Foreign Investment Law Journal</i>, 419</p> <p>P Kundra, ‘Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons’ (2008), 41 <i>Vanderbilt Journal of Transnational Law</i>, 908.</p>
6 and 7	<b>Key characteristics of India’s BITs and investment chapters in free trade agreements (FTAs) signed during the phase of economic liberalism</b> – the definition of investment; FET provision; expropriation; monetary transfer provision; full protection and security; general exception clauses and ISDS provisions. The discussion would focus on how these key provisions were worded in India’s BITs and investment chapters in FTAs. The endeavour would be to discuss whether these provisions allow India to exercise its right to regulate in public interest.	<p><u>Compulsory Readings:</u></p> <p>Ranjan (2019), 142-192.</p> <p><u>Additional Readings:</u></p> <p>Rajput (2018), 59-146.</p>
8.	<b>Backlash against BITs – the phase of strong opposition to investment treaties and ITA – 2011 till date</b> – what factors led to India’s backlash against investment treaties; the rise of ISDS claims against India – the relevance and importance of the <i>White Industries v Australia</i> case – what led to this case, the interpretation of the MFN provision in India-Australia BIT, the ‘effective means’ standard.	<p><u>Compulsory Readings:</u></p> <p>Prabhash Ranjan (2024), <i>India and Investor-State Dispute Settlement: Affronting Sovereignty or Indicting Capriciousness?</i>, Routledge: London [hereinafter Rajan 2024], 30-45.</p> <p>Ranjan (2019), 219-232.</p> <p><u>Additional Readings:</u></p>

		<p>Manu Sanan, The White Industries Award – Shades of Grey, 13 Journal of World Investment and Trade, 661-681.</p> <p>Fali Nariman, Investment Arbitration under the Spotlight – What next for Asia, The Annual Herbert Smith Freehills – Singapore Management University Asian Arbitration Lecture 2014, 34-41.</p> <p><u>Important Cases:</u></p> <p>White Industries Australia Limited v Republic of India, Final Award UNCITRAL (30 November 2011).</p> <p>Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award on Merits, 30 March 2010.</p>
<p>9.</p>	<p><b>ITA claims for retroactive taxes</b> – several ISDS claims were brought against for India, notably by Vodafone and Cairn Energy, for imposition of retroactive taxes; what was the background to these cases; how did India amend the Income Tax Act to impose taxes retroactively; the tribunal’s ruling against India for breach of the FET provision; taxation as a matter of a country’s sovereign right; India’s 2021 amendment to the Income Tax Act to undo the retroactive amendment.</p>	<p><u>Compulsory Readings:</u></p> <p>Ranjan (2024), 98-126</p> <p><u>Important Cases:</u></p> <p>Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016-35.</p> <p>Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016-7, Award, 21 December 2020.</p>
<p>10</p>	<p><b>ITA claims for cancellation of spectrum licenses</b> – several ISDS claims have been brought against India for the cancellation of spectrum licenses; the spectrum licenses were cancelled after the annulment of the contract between Indian Space Research Organization and Devas Multimedia; claim brought by the Mauritian investors of Devas (CC/Devas) against India under the India-Mauritius BIT; claim also brought by Deutsche Telekom (DT) against India under the India-Germany BIT; interpretation of the essential security interest and the FET provision.</p>	<p><u>Compulsory Readings:</u></p> <p>Ranjan (2024), 64-92.</p> <p><u>Additional Reading:</u></p> <p>Ridhi Kabra, ‘Return of the Inconsistent Application of the ‘Essential Security Interest’ Clause in Investment Treaty Arbitration: CC/Devas v India and Deutsche Telekom v India’ (2019) 34 ICSID Review - Foreign Investment Law Journal, 723.</p> <p><u>Important Cases:</u></p> <p>CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India, PCA Case No 2013-09, Award on Jurisdiction and Merits, 25 July 2016.</p>

		Deutsche Telekom AG v Republic of India, PCA Case No. 2014-10, Interim Award, 13 December 2017.
11	<p><b>Indian Model BIT 2016</b> – what are the key characteristics of the Indian Model BIT; what objectives was it set out to achieve; how is investment defined in the Model BIT; the interpretation of substantive investment protection standards – expropriation, monetary transfer provision, full protection and security; how are investor-State dispute settlement (ISDS) provisions worded in the Indian Model; the general exception clause; the provision on investor obligations; standard of review</p>	<p><u>Compulsory Readings:</u></p> <p>Ranjan (2019), 310-338</p> <p><u>Additional Readings:</u></p> <p>Grant Hanessian and Kabir Duggal, ‘The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?’ (2017) 32 <i>ICSID Review - Foreign Investment Law Journal</i>, 216.</p> <p>Jarrod Hepburn and Ridhi Kabra, ‘India’s New Model Investment Treaty: Fit for Purpose?’ (2017), 1 <i>Indian Law Review</i>, 95.</p> <p>Shreyas Jayasimha and Abhimanyu George Jain, Regulation of Foreign Investments in India: Analysing India’s 2015 Model BIT in Mahdev Mohan and Chester Brown (Eds) <i>The Asian Turn in Foreign Investment</i> (CUP: Cambridge), 136.</p> <p>Nedumpara, J. (2017). India’s trade and investment agreements: Striking a balance between investor protection rights and development concerns. In F. Morosini &amp; M. R. S. Badin (Eds.), <i>Reconceptualizing international investment law from the global south</i> (pp. 188–217). Cambridge University Press.</p> <p>Deepak Raju, ‘General Exceptions in the Indian Model BIT: Is the ‘Necessity’ Test Workable?’ (2016) 7 <i>Jindal Global Law Review</i> 227.</p> <p>Prabhash Ranjan, ‘Necessary’ in Non Precluded Measures Provisions in Bilateral Investment Treaties: The Indian Contribution, 67(3) <i>Netherlands International Law Review</i> (2020), 473-501.</p>
12	<p><b>Investment Treaties and National Governance in India</b> – what role investment treaties have played in national governance in India; who are the main governance actors in the investment treaty negotiations process; to what extent have investment treaties been internalized in India; what role the Indian parliament has played in the</p>	<p><u>Compulsory Readings:</u></p> <p>Josef Ostřanský and Facundo Pérez Aznar, ‘Investment treaties and national governance in India: Rearrangements, empowerment, and discipline’ (2021) 34 <i>Leiden Journal of International Law</i>, 373-391.</p> <p><u>Additional Reading:</u></p>

	<p>internalization of investment treaties; what kind of narratives about BITs, ITA and ISDS dominate policy making in India.</p>	<p>Ranjan (2019), 267-309</p> <p>Prabhash Ranjan, 'The Internalisation of Investment Treaties in India: A Critical Examination' in Jansen Calamita and Ayelet Berman (Eds) Investment Treaties and the Rule of Law Promise: The Asian Experience (Cambridge University Press: 2022) (forthcoming)</p> <p>Mihaela Papa and Aditya Sarkar. 2017. 'Rising India in Investment Arbitration: Shifts in the Legal Field and Regime Participation', in The Indian Legal Profession in the Age of Globalisation, David B. Wilkins, Vikramaditya S. Khanna, David M. Trubek (eds), pp. 705. Cambridge: Cambridge University Press</p> <p>Justice B.N. Srikrishna committee (2017) 'High Level Committee to Review Institutionalization of Arbitration Mechanism in India', 30 July, <a href="http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf">http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf</a></p>
13-14	<p><b>Indian Courts and investment treaty arbitration</b> - jurisdiction of domestic courts on matters pertaining to BIT arbitration; the applicability of the Indian Arbitration and Conciliation Act, 1996 ('A&amp;C Act') to BIT arbitration and questions surrounding "abuse of process" by foreign investors; if the A&amp;C Act does not apply to ITA then which law would govern the enforcement of ITA awards in India; can domestic courts issue anti-arbitral injunctions against ongoing ITA proceedings; can foreign investors attach Indian assets abroad in trying to enforce ITA awards.</p>	<p><u>Compulsory Readings:</u></p> <p>Prabhash Ranjan and Pushkar Anand, 'Indian Courts and Bilateral Investment Treaty Arbitration' (2020) 4 Indian Law Review, 199 - 220.</p> <p><u>Important Cases:</u></p> <p>The Board of Trustees of the Port of Kolkata v Louis Dreyfus Armatures, G.A. 1997 of 2014 &amp; C.S. No 220 of 2014 (Calcutta High Court, 29 September 2014)</p> <p>Union of India v Vodafone Group Plc United Kingdom &amp; Anr, CS(OS) 383/2017 &amp; I.A. No 9460/2017 (Delhi High Court, 7 May 2018)</p> <p>Union of India v Khaitan Holdings (Mauritius) Limited &amp; Ors, CS (OS) 46/2019, I.As. No 1235/2019 &amp; 1238/2019 (Delhi High Court, 29 January 2019)</p>

Week 15 Revision