Indian and Chinese FDI in Developing Asia: The Standards Battle Beyond Trade

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Abstract

At a turning point for trade governance, while developing Asia has become, for the first time, the world's largest investor region, this article critically examines the normative battle at stake between China and India in their Asian International Investment Agreements (IIAs) in focusing on international investment law standards of treatment generally and the National Treatment (NT) precisely. Starting from a historical and conceptual perspective shedding some light on the different phases of the standard of treatment's acceptance and denial, this article develops into a substantial analysis of the scope and application of the NT in Chinese and Indian Asian IIAs as a concrete and effective alternative to currently proposed solutions based on the limited and often tautological ideas of states' autonomy to regulate and other novel 'flexibilities'. Lastly, as a conclusion, it argues in favour of a more strategic use of the national treatment standard, and the qualifications/ exceptions it assumes, to foster states' sovereign economic paths and development strategies.

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INTRODUCTION

'If we don't write the rules for trade around the world, guess what: China will.'[410] While President Obama's statement has the merit of reiterating American ambitions over the world's governance and the genuine nature of the normative battle at stake between the US and China, it also proves relevant to many other nations, including China and India, at a turning point for trade governance and a crucial moment for their development as Asian and global leaders. In 2014, developing Asia has become, for the first time, the world's largest investor region (with USD 440 billion outward FDI), hence overtaking North America (with USD 390 billion) and Europe (with USD 286 billion).[411] 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 12 billion in 2014.[412] This concrete realization of Narendra Modi's 'Act East' and China 'Good Neighbour' policies herald tremendous new developments for the world. Beyond trade statistics and other investment flows, there is now another lengthier and deeper struggle; that of a political redefinition of the rules governing global economics.

With more than 3000 International Investment Agreements (IIAs) and almost 600 Free Trade Agreements (FTAs),[413] the production of economic norms for global and regional integration has reached an unprecedented stage. As part of a response

410 See President Obama: <https://twitter.com/barackobama/status/596721150291378176> accessed 17 August 2015 and on how to make case for the Transpacific Partnership: <https://www.youtube.com/watch?v=A16Dptv_Nus/> accessed 17 August 2015 and the need to 'raise the standards' as a reaction to China.

411 UNCTAD, (2015) Investment Trends Monitor No. 19.

412 Ibid.

413 See UNCTAD (n 3).

to the limited evolutions of multilateral trade negotiations conducted by the World Trade Organization (WTO), a myriad of mega-regional trade and investment agreements are currently being negotiated. From the Transatlantic Trade and Investment Partnership (TTIP), to the Trans-Pacific Partnership (TPP) or the Regional Comprehensive Economic Partnership (RCEP), the magnitude of these new deals is simply immense! This bewildering array of new legal instruments covers an incredibly vast legal and political landscape at the crossroads between trade, investment and essential societal concerns such as human rights, labour, health and environmental protection. From 'regulatory cooperation' to a more ambitious 'regulatory convergence', these initiatives question the very nature of regulation as an attribute (or not) of the state. The way in which the tension between the economic gains of a comprehensive integration and the societal implications of potential restrictions on regulatory autonomy is mediated will eventually determine who sets the rules and so wins the trade game.

In this regard, India and China have taken a rather heterodox path, which might appear for many as an alternative to 'western rules'. This international law, which they hardly had a hand in creating, has not reduced their normative autonomy. On the contrary, India and China have, differently, seized on it to strengthen their powers and created – if not yet exported – a *sui generis* model mixed with norms imported and reinterpreted in light of creative practices embedded in contrasted histories and political regimes. As a matter of fact, India was one of the 23 original contracting parties of the General Agreement on Tariffs and Trade (GATT) and a founding member of the WTO, but China has only acceded to the WTO in December 2001, after more than 15 years of complex negotiations questioning the very nature of its 'socialist market economy'. While India has played a central role in the introduction of development issues within the GATT and was one of the main negotiators of the Generalised System of Preferences (GSP) adopted in 1968 in the context of the second United Nations Conference on Trade and Development (UNCTAD), China has long been a 'rule taker' more than 'rule maker'.[414] In the recent past, India has often resisted certain trade

414 See Leïla Choukroune, 'Les BRICS et le droit international du commerce et de l'investissement, entre autonomie et intégration', in Habib Gherari (ed), *Les dérèglements économiques internationaux: Crise du droit ou droit des crises,* (Paris, Pédone, 2014). See also , Leïla Choukroune (ed), *Special Issue of China Perspective: China's WTO Decade* (2012) <http://chinaperspectives.revues.org/5770> accessed 17 August 2015

evolutions in relation to agriculture, services or intellectual property with, for example, along with Brazil and South Africa, the drafting of the Doha Declaration on the TRIPS agreement and public health of November 2001, and the Protocol amending the TRIPS agreement in 2005.[415][416] Far from being a passive actor in normative integration however, China has learned to act by observing the strategy of other members and is now at the forefront of WTO dispute settlement, not only as far as the number of disputes is concerned, but also with regard to the legal strategy it develops to juggle with the flexibilities envisaged in the WTO agreement, hence surprisingly managing to reactivate the customary principle of permanent sovereignty over natural resources.[417] These arguments, together with the principles of 'equity and common but differentiated responsibilities' as applied to climate change negotiations, now find a real echo among developing countries.[418]

With shrewd negotiating skills and strategic advocacy, India and China have been able to use the existing trade regime as a tool of their might. Shunning the paths marked by regulated liberalism of the 1990s, they affirm a heterodox model, which partly stands out and appeals to developing countries seeking alternatives to a Washington consensus, which has failed to bring the development benefits expected. At a chosen pace, their selective and critical normative integration has contributed to their political autonomy and this is particularly true in the area of

415 See <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> accessed 17 August 2015.

416 See <https://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm> accessed 17 August 2015.

417 See in particular the WTO disputes DS394 *China — Measures Related to the Exportation of Various Raw Materials* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm> accessed 17 August 2015. See also DS *431China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm)> accessed 17 August 2015.

418 See the BRICS 2015 Environment Ministers Declaration <http://www.brics.utoronto.ca/docs/150422-environment.html>: 'We recognize that sustainable development should comprehensively address the key challenges of today, in particular, poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production, protecting and managing the natural resource base of economic and social development and effectively addressing climate change. We reaffirm our commitment to implement the Rio Declaration, Agenda 21, the Johannesburg Plan of Implementation (JPOI), and the outcomes of the Rio+20 Conference in our respective countries, and through our cooperation within the framework of BRICS in accordance with the Rio principles, including the principle of common but differentiated responsibilities.'

international investment law, a key domain of sovereign independence now at the centre of a renewed international attention.

International investment law and dispute settlement is 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 policy objectives and economic development paths.[419] In recent years, profound changes have occurred, hence modifying the landscape designed by the proponents of the 1990s investment liberalization: countries like Ecuador, Bolivia or Venezuela have denounced the International Convention for the Settlement of Investment Disputes (ICSID) and some of their Bilateral Investment Treaties (BITs), as exemplified by Ecuador's March 2013 decision to terminate its BIT with the US, a few months after a record USD 2.3 billion award against Quito in the *Occidental Petroleum Corporation v Ecuador* case.[420] Another revealing example was provided, in early 2013, by India when it 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[421]. This did not come as a complete surprise as India has been facing, for the past 5 years or so, a growing number of investors' claims (around 17 according to certain estimates).[422] Some of these disputes, and the landmark decision on the *White Industry* case to start with, have literally produced

419 See R. Echandi and P. Sauvé (eds), *Prospects in International Investment Law and Policy*,World Trade Forum, Cambridge, 2013.

420 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention) entered into force on 14 October 1966; *Ecuador in Occidental Petroleum Corporation v Ecuador*, ICSID Case No. ARB/06/11. It has been reported that this is the largest sum ever awarded by a tribunal under the ICSID Convention and, unsurprisingly, has been challenged by Ecuador. This controversial dispute arose out of Ecuador's April 2006 decision to terminate, by way of a decree the Participation Contract under which Occidental Petroleum Corporation (Occidental) and Occidental Exploration and Production Company (OPEC, the Claimants, were exploiting oil in the Oriente Basin in the Ecuadorian Rainforest (the same region where the Chevron- Texaco case took place). While the 3 arbitrators of the tribunal were unanimous on the liability of Ecuador (breach of the contract and violation of the US-BIT in acting disproportionate manner), Professor Brigitte Stern firmly and brilliantly dissented upon the calculation of damages. On the basis of this dissenting opinion Ecuador is said to plan to seek annulment of the award. She indeed argues that the Claimant himself contributed to the damage causing the contract termination by Ecuador.

421 See < https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/ > accessed 17 August 2015.

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.[423] At the centre of a global controversy, indeed, investor-state dispute settlement has radically changed. While the number of disputes has exploded with 42 new cases introduced in 2014, hence bringing the total number of known treaty based cases to 608, the geographical repartition as well as the nature of the cases have dramatically evolved.[424] As far as countries targeted by investment arbitrations are concerned, an important evolution is under way: with 40 per cent 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 per cent) and this has already impacted the discussion on investment arbitration, including the EU's reluctance to introduce investment arbitration provisions in the agreements it is currently negotiating and the TTIP precisely. 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.[425] In addition, the latest rendered awards have reached incredible amounts with a 2014 award of USD 50 billion, the highest known award by far in investment arbitration, in the *Yukos* three closely related cases.[426] So that the concerns with the current investors-state dispute settlement (ISDS) system are based on a number of clearly identified issues:

422 See *The Hindu* at <http://www.thehindu.com/news/national/indiaus-investment-protection-pact-in-the-offing/article7444730.ece?homepage=true> accessed 17 August 2015.; Some of these cases are identifiable on the Investment Treaty Arbitration Website <http://www.italaw.com> accessed 17 August 2015.

423 We will further develop the White Industry case's impact on the Most Favoured Nation (MFN) standard of treatment below. The White Industry case Final Award is available at <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf> accessed 17 August 2015.

424 See the February 2015 UNCTAD report available at <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> accessed 17 August 2015.

425 See UNCTAD, World Investment Report 2014 and 2015; See UNCTAD, 'Reform of Investor-State Dispute Settlement: in Search of a Roadmap' (2013), No. 3 IIA Issues Note,

426 See Hulley Enterprises Limited former Yukos Oil Company in the ISDS proceedings against the Russian Federation : *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Award, 18 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.

a democratic deficit coupled with a deficit of legitimacy in relation to the questionable professionalism, independence and impartiality of arbitrators and the lack of transparency in the proceedings and publication of decisions; a deficit of coherence and consistency in the arbitral awards; third parties financing; the cost of arbitration, and finally the absence of an appeal mechanism.[427]

Since all these developments are affecting Asia directly at a time it has become the main global investor, this article focuses on Chinese and Indian FDI in developing Asia as a laboratory of the global investment standards battle and pays particular attention to the National Treatment (NT) standard as a fascinating example of the state's ability to exercise its sovereignty in regulating essential domains. Starting from a historical and conceptual perspective shedding some light on the different phases of the standard of treatment's acceptance and denial (I), the research develops into a critical examination of the national treatment standard and a substantial analysis of the scope and application of this very standard in Chinese and India Asian IIAs as a concrete and effective alternative to currently proposed solutions based on the limited and often tautological ideas of states' autonomy to regulate and other novel 'flexibilities' (II). Lastly, as a conclusion, it argues in favour of a more strategic use of the national treatment standard, and the qualifications/ exceptions it assumes, to foster states sovereign economic paths and development strategies.

427 See for quite critical study, P. Eberhardt and C. Olivet, 'Profiting from Injustice, How Law Firms, Arbitrators and Financiers are Fuelling and Investment Arbitration Boom' (2012), Corporate Europe Observatory and the Transnational Institute.

I. NATIONAL TREATMENT: A RELATIVE STANDARD AND POLITICAL SENSITIVE ISSUE

International investment standards of treatment have successively taken a large variety of sophisticated yet sometimes ambiguous shapes from the classical non-discrimination principles commonly manifested in the national treatment (NT) and most-favoured-nation (MFN)[428] treatment to a customary minimum standard of treatment now often expressed in terms of a broader treaty based 'fair and equitable treatment' (FET), which has gained worldwide prominence but remains (in investment law particularly) problematic with regard to the very extensive interpretation of states obligations it encourages.[429] Although less debated than the controversial FET, the national treatment standard today deserves to be carefully reinvestigated as it poses a number of fundamental questions in relation to the balance between the state's autonomy to regulate foreign trade and investment liberalization for public interest and sovereign economic development, and private actors' legitimate expectations of market access, protection and equality of treatment. While the national treatment standard is now largely enshrined in international trade and investment agreements, it has gone through different phases of acceptance and denial, which deserve to be put in perspective with regard to today's large variety of international instruments and players. In addition, a careful review of some of the recent treaties' incarnations of the national treatment standard highlight its relative nature and flexible character in relation to other standards of treatment and a number of complicated issues including investment admission and establishment at all government levels. Lastly, an assessment of the available investment jurisprudence provides for some clarification, but these decisions are neither sufficiently varied nor consistent enough to produce an accurate analysis of a predictable application and possible interpretation of the national treatment standard.

428 See UNCTAD, 'Most-Favoured-Nation Treatment' (2010) Series on Issues in International Investment Agreements II.

429 See R. Kläger, 'Fair and Equitable Treatment in International Investment Law' (2011) 83 Cambridge Studies in International and Comparative Law; See also UNCTAD, 'Fair and Equitable Treatment' (2012) Series on Issues in International Investment Agreements II.

A. FROM DENIAL TO UNIVERSALIZATION

While the whole international law system rests upon states sovereignty and its corollary of equality amongst states, the responsibility of host states to foreigners has never been easy to conceptualize, nor universally accepted.[430] Late 19th century western practices tend to show that aliens were entitled to equality of treatment with nationals of the host state, but the protection of their property, already proclaimed as an unalienable right by the 1789 French Declaration of the Rights of Man and the Citizen, remained ambiguous. Prior to the 1917 Russian Revolution and the abolition of private property without compensation, the Calvo doctrine – often confused with the Calvo clause one could find in a number of Latin American Constitutions and other international investment agreements – gave an excellent account of the competing approaches to state responsibility in international law. The work of Carlos Calvo, the famous Argentine jurist, is indeed systematically referred to in international investment law publications to explain the reluctance of States, and Latin American States in particular, to grant a more favourable treatment than the treatment they accorded to their nationals. But what was Carlos Calvo writing in his 1868 *Derecho International Teorico y Practico de Europa y America* and his further elaborated 1896 *French edition Le droit international : théorie et pratique*? Not that much about private property and international investment, as suggested by his many critics, but rather about states' equality, sovereignty and independence in the context of solvency crisis and the many attempts by western States to resort to the use of force to collect debt as exemplified by the US 'gunboat diplomacy' performed in the 1980s in Venezuela. Out of this rather simple 'Calvo doctrine' a number of Latin American countries developed a 'Calvo Clause' introduced in their Constitutions (the post 1917 Mexican Consitution being characteristic of this trend) or indeed in some of the contracts they concluded with aliens. These legal instruments more specifically argued in favour of a strict approach to national treatment as the best possible treatment accorded to foreigners who would then refrain from resorting to other

430 As clearly exemplified by the United Nations International Law Commission's work on State responsibility, which started as early as 1949 and was concluded in 2001 by the adoption of a set of 'Draft Articles on the Responsibility of States for internationally Wrongful Acts'. See International Law Commission, State Responsibility <http://untreaty.un.org/ilc/summaries/9_6.htm> accessed 17 August 2015.

dispute settlement mechanisms than those available at the domestic level while leaving aside the possibility of calling for diplomatic protection from their home State.[431] So that the famous Hull formula, named after the US Secretary of States, had to firmly express the American view (and most probably the western views of that time) of the rights and obligations of host states to foreign investors, and their home States in general, and the protection of private property in particular. As far as the national treatment standard was concerned, nothing was codified and the unwritten rules of customary international law prevailed. One had to wait for the drafting of the – never adopted as too ambitious (trade, investment, labour, environment) – Havana Charter to find some national treatment related provisions as shown by its Article 12 (International Investment for Economic Development and Reconstruction). The waves of expropriations following the Socialists' revolutions, in Eastern Europe and in the Third World, as well as the decolonization era, forced international investment players to rethink the customary legal basis upon which international investment law rested. A fascinating first attempt took place within the United Nations General Assembly. From the 1962 Resolution 1803 on Permanent Sovereignty over Natural Resources[432] to the 1974 Declaration on the Establishment of a New International Economic Order (NIEO)[433] and the 1986 proclamation of the Right to Development,[434] developing States started to elaborate a special approach to international trade and investment, which today deserves to be reconsidered as it already showed some of the challenges resulting from a fast paced economic internationalization. While the 1803 Resolution eventually proved quite consensual in affirming a number of fundamental principles such as the payment of compensation, in accordance with international law, in the event of a taking of alien property for public interest, as well as the possibility of resorting to international dispute settlement mechanisms after exhaustion of local remedies, this apparent international consensus did not

431 See M. Garcia Mora, 'The Calvo Clause in Latin American Constitutions and International Law' (1950) 33(4) Marquette Law Review.

432 See General Assembly Resolution 1803 (XVII), 14 December 1962. For the procedural history as well as related documents, See <http://untreaty.un.org/cod/avl/ha/ga_1803/ga_1803.html> accessed 17 August 2015.

433 See General Assembly Resolution 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, 1 May 1974.

434 See General Assembly Resolution 41/128, Declaration on the Right to Development, 4 December 1986.

last for long. The adoption, in December 1973, of the General Assembly Resolution 3171, and, even more importantly, of the 1974 Charter of Economic Rights and Duties of States designed to support the NIEO, lifted all ambiguities.[435] The approach was clearly not sympathetic toward a liberal model promoting states' opening-up policies. Although the text of the Charter remains of a general and non-binding nature and cannot be compared to precise treaty provisions, it is clear that: 'no State shall be compelled to grant preferential treatment to foreign investment'[436] and '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, 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'.[437] In this context, national treatment, including domestic settlement of disputes, was considered the best available standard of treatment expressing a cautious approach to an economic liberalization, which did not always prove beneficial to the developing world. Interestingly, a rather different, if not opposed, perspective to liberalization was also adopted, in the same key period, with the drafting of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. As history has shown, this liberal approach favouring investor protection won out over the 1970s NIEO. However, as far as national treatment was concerned, this international transformation of economic relations was neither as evident as some seemed to analyze it, nor was it systematically supporting a 'goal of equal opportunity' hence caring about 'the fate of human without seeking egalitarianism'.[438] Nevertheless, the liberal view was crystallized, in the 1990s, in a variety of international instruments that soon became the apparent normative references of international trade and investment law from the WTO 'constitution' itself to a blossoming number of international investment instruments. The 1992 Preamble of the World Bank's Guidelines on the Treatment of Foreign Direct

435 See General Assembly Resolution 29/3281, Charter of Economic Rights and Duties of States, 12 December 1974.

436 ibid Article 2, para. a.

437 Charter of Economic Rights and Duties of States (n 30) Article 2, para. c.

438 See Thomas Cottier and Lena Schneller, 'The Philosophy of Non-discrimination in International Trade Regulation' in Anselm Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law* (2014) note 6, pp 7-8.

Investment set the tone in praising the positive role of foreign direct investment for the world economy and developing countries in particular. It was rapidly followed by a surge in BITs and, very importantly, the negotiations of a vast number of investment treaties by all major Asian states (China, India, South East Asian nations). Amongst these international investment initiatives, three instruments are particularly revealing of the 1990s spirit with regard to the national treatment standard: the OECD National Treatment Instrument, the NAFTA, and the Energy Charter Treaty. These three international instruments designed for the greatest protection of foreign investment in a post-socialist era promoting trade and investment liberalization greatly influenced the drafting of specific IIAs and BITs in particular. The 1994 NAFTA Treaty Chapter 11 defining national treatment in its famous Article 1102 as follows is quite revealing of the spirit of that time:

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

   (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

As we will see below, this Article has been extensively interpreted in a rather broad, yet often inconsistent manner, hence providing the basis for national treatment jurisprudence. Along the same lines, the 1994 Energy Charter Treaty reformulated the national treatment standard (together with the MFN standard) quite synthetically:

Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).

(c) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.[439]

With new environmental and human rights challenges arising from multinational corporations' operations, but also the rise and consolidation of non-western super economic powers, which have taken a different road towards trade and investment liberalization, the 2000s offer a much more diverse picture for both investment and trade. In this fragmentation of international economic law[440] at various regional levels, one can however identify a number of interesting tendencies showing economic actors' preoccupations with much more than simple liberalization.[441] Although never really consistent and sometimes contradictory, these evolutions are visible at the BITs level, but also in the context of the now very popular FTAs, which integrate a substantial investment chapter, not to mention all the

439 Energy Charter Treaty, art 10, Promotion, Protection and Treatment of Investments, paras 2-3.

440 See International Commission's work on the 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law' <http://untreaty.un.org/ilc/guide/1_9.htm> accessed 17 August 2015.

441 See J. Vinuales, "Foreign Investment and the Environment in International Law", *Cambridge Studies in International and Comparative Law*, (2012).

megaregional deals recently concluded or negotiated.[442] As far as BITs are concerned, the same proponents of the 1990s investment liberalization are currently introducing what some have described as 'smart flexibility clauses' in their new IIAs.[443] The 2012 US and Canada BIT models are indeed very well playing with states' regulatory autonomy for public purposes while incorporating some additional flexibility/protection in relation to labour, corporate social responsibility and the environment.[444] In these new models, the national treatment standard is defined as a straightforward way illustrated by the US 2012 BIT model Article 3:

National Treatment:

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favourable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

442 See generally, UNCTAD, International Investment Policy Making in Transition, op.cit, and UNCTAD World Investment Report 2012, *op. cit*.

443 See A. van Aaken, 'Smart Flexibility Clauses in International Investment Agreements' (2013) 3(4) Investment Treaty News, pp 3-5.

444 See the US 2012 BIT Model <http://www.state.gov/e/eb/ifd/bit/index.htm> accessed 17 August 2015 ; See also the Canada 2012 BIT Model <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng> accessed on 17 August 2015.

All levels of government are concerned and the national treatment standard is granted post-establishment or, if granted pre-establishment, as illustrated by the US-China investment discussions generated by the business lobby, it is done in a hybrid manner based on a list of industry sectors, which could benefit (or not) from this particular standard before they enter the country. Generally, NAFTA jurisprudence lessons have been learned and developed States have understood that their political autonomy and social stability could also be threatened by IIAs that are too friendly. In addition, the new models, and the Canada 2012 BIT model especially, provide a good example for the possible usage of exceptions. The exception provisions are indeed quite detailed while departing from the previous Canada BIT model, which was very much inspired by the GATT Article XX and its famous chapeau some - as argued in NAFTA jurisprudence – feel difficult to apply to an investment context.[445] This new approach finds an interesting application in the recent Canada-China BIT that opens with a preamble recognizing the need 'to promote investment based on the principles of sustainable development' and contains a long list of exceptions covering a large variety of domains from cultural industries to environmental, financial or transparency issues.[446] Interestingly, this autonomy to regulate in a flexible, yet justifiable manner, seems to be challenged by the freshly negotiated EU-Canada Comprehensive Economic and Trade Agreement (CETA).[447] As far as non-discrimination is concerned, the draft provisions recently made public indeed seem to couple pre-establishment requirements together with more traditional non-discrimination measures. This combination could *de facto* limit the use of exceptions in furthering the obligations

445 The GATT Article XX (General Exceptions) 'Chapeau' indeed states: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures'.

446 See Agreement between the Republic of Canada and the People's Republic of China for the Promotion and Reciprocal Protection of Investments, 9 September 2012 <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng> accessed on 17 August 2015.

447 See generally CETA consolidated texts <http://ec.europa.eu/trade/policy/in-focus/ceta/> accessed on 17 August 2015.

of host states towards investors in the pre-establishment phase.[448] That FTAs or regional IIAs negotiations contradict or limit other bilateral investment negotiations conducted in parallel is not a surprising phenomenon. The incredible surge in FTAs, and regional IIAs in general, produces such oddities. Similar questions are raised about the coexistence of not completely dissimilar, yet not exactly identical, investment provisions –and national treatment clauses in particular – present in some of the recently concluded FTA including a detailed investment chapter, such as the 2009 ASEAN-Australia-New-Zealand FTA Chapter 11,[449] the Central-America Mexico FTA (2011)[450] the China–Japan–Republic of Korea investment agreement (2012)[451] or the recently signed ASEAN–India Trade in Services and Investment Agreements,[452] and other IIAs the same countries are parties to. Some of these agreements, as the Central-America Mexico FTA,[453] contain detailed lists of exceptions directly framing the application of the national treatment standard. Without clarification of the relationship and hierarchy between new and old treaties, the application of the exceptions clauses as well as the interpretation of possible national treatment breaches will remain as complicated as it is uncertain. Some investment actors will naturally play with this great diversity in looking for the best possible combination, while others, including emerging States and developing States especially, will suffer from a lack of stability and predictability.

448 Section 3 of the Investment Chapter (10), Non-Discriminatory Treatment - Article X.6.1 National Treatment reads as follows:

1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

It has to be read in conjunction with the Article X.4 Market Access as well as the quite detailed investment reservation lists (from aboriginal population protection to gambling sector) annexed to the treaty.

449 See Association of South East Asian Nations (ASEAN)-Australia-New-Zealand FTA <http://asean.fta.govt.nz/preamble/> accessed on 17 August 2015.

450 See Central-America Mexico FTA (2011) <http://www.sice.oas.org/tpd/CACM_MEX/CACM_MEX_e.asp> accessed on 17 August 2015.

451 See China–Japan–Republic of Korea investment agreement (2012) <http://www.meti.go.jp/english/press/2012/0513_01.html> accessed on 17 August 2015.

452 See <http://pib.nic.in/newsite/PrintRelease.aspx?relid=109489> accessed on 17 August 2015.

B. JURISPRUDENTIAL CLARIFICATIONS AND LIMITATIONS

As far as clarification is concerned, the NT jurisprudence has only provided for relatively limited clarifications as it relies on a small number of cases and suffers from a lack of consistency. The most significant cases are indeed based on the North American Free Trade Agreement (NAFTA) Article 1102, which de facto limits the interpretation to a very specific context at a time the national treatment standard was essentially envisaged as a barrier against state's protectionism. While some of the tribunals have found in favour of the state's autonomy to regulate for public interest – in relation to environmental issues mostly - the legal reasoning followed by the arbitrators did not prove consistent, if not in absolute contradiction, as exemplified by the diametrically different *Metalclad* and *Methanex* decisions.[454] However, some major directions are identifiable.[455]

The first test of international investment standard interpretation generally consists in the determination of discrimination. In our case, national treatment violation is seemingly an easy task: first comes the determination of a differentiation (*de jure* or *de facto*) in terms of treatment accorded to the foreign investment and/or investor, then it has to be demonstrated whether the foreign investment and/or investor are placed in a comparable situation ("like circumstances" or "like situation") to the domestic one. But this simple last test comes with many complications. Let us briefly address this important issue in highlighting some of its essential features:

In the first substantive analysis of a national treatment claim in an investor-state dispute, *the SD Myers Inc v. Canada* tribunal considered that the general principles

453 See Central-America Mexico FTA, Chapter XX, Exceptions and article 20.2 General Exceptions. Available at <http://www.sice.oas.org/Trade/CACM_MEX_FTA/Text_s.asp#Art%C3%ADculo11.4> accessed on 17 August 2015.

454 See for example, J. Elcombe, 'Regulatory Power v. Investment Protection under the NAFTAs Chapter 1110: Metalclad, Methanex and Glamis Gold' (2010) 68(1) University of Toronto Faculty of Law Review. The Glamis case also involved environmental issues of special importance. Glamis Gold Limited (the claimant) is a Canadian-based mining company that had obtained an authorization to develop a mine site in California using open pit techniques. To protect the Native American religious and cultural heritage sites, California adopted a set of more stringent rules. So that Glamis alleged that the US breached their NAFTA obligations under Article 1105 (fair and equitable treatment) and Article 1110 (expropriation). The tribunal rejected all claims and found in favour of the US.

456 *SD Myers Inc v Canada*, First Partial Award, 13 November 2000, para 250.

'emerging' from the legal context of NAFTA were to be taken into consideration to interpret the expression "like circumstances". It argued:

> that the interpretation of the phrase "like circumstances" in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector.[456]

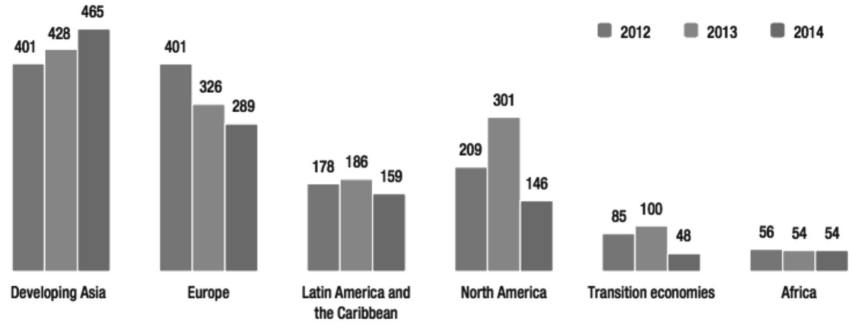
From this interpretative elaboration, just like in trade law, a link was made between likeness and competition. Competition (amongst other elements) appears as a condition of likeness. A similar reasoning can be found in the *Pope & Talbot* decision.[457] However, just like in trade law again, subsequent decisions did not necessarily support this approach. In *Occidental v Ecuador* as well as in the much-debated *Mehtanex v US*, the tribunals departed from a competition based analysis of the national treatment standard and failed to provide for an alternative. Despite further sophistication, including frequent references to WTO jurisprudence and the role that Article XX (general exceptions) could play, the absence of consistency and coherence in arbitral reasoning is evident, and so the need to approach these decisions with great care as they involve considerable political elements, which go far beyond simple treaty interpretation and the protection of investment and/or the state's autonomy to regulate in favour of environmental protection. This politically strategic usage of the national treatment standard has proved to be particularly true in the different sequences of denial, acceptance and distantiation operated by China and India in the course of their internationalization from FDI recipients to FDI exporters.

457 Pope & Talbot, para. 78.

FOCUS

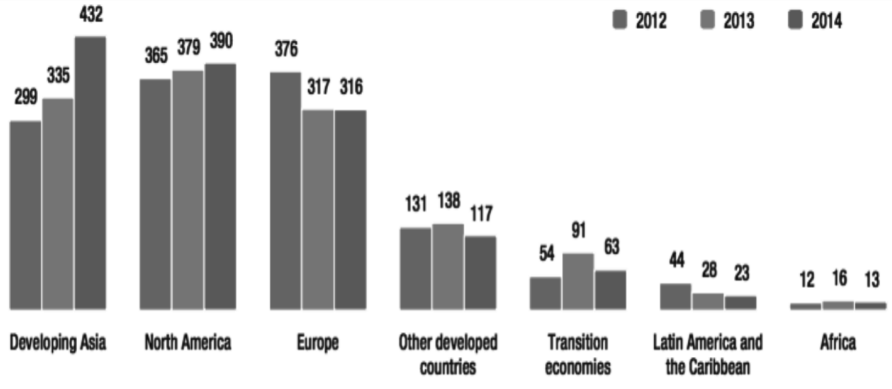
Developing Asia as Global FDI Leader

FDI Inflows by region, 2012-2014 (billion of dollars)



Source: UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics).

FDI Outflows by Group of Economies and Regions, 2012-14 (billions of dollars)



Source: UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics).
Note: Excludes Caribbean offshore financial centres.

According to the 2015 UNCTAD *World Investment Report*, most economies experienced a fall in FDI inflows in 2014. But two Asian groups resisted the fall: the Association of Southeast Asian Nations (ASEAN), with a 5 % increase in FDI inflows, and the Regional Comprehensive Economic Partnership (RCEP), with a 4 % increase. In addition, in 2014, multinational enterprises (MNEs) from developing economies alone invested $468 billion abroad, a 23 % increase from the previous year and their share in global FDI reached a record 35 %, up from 13 % in 2007. MNEs from developing Asia revealed extremely dynamic and, for the first time, developing Asia became the world's largest investing group with outward investment increased by 29% to $432 billion in 2014. MNEs from Hong Kong (China) jumped to a historic high of $143 billion, hence positioning Hong Kong as the second largest investor after the United States. Interestingly, investment by Chinese MNEs grew faster than FDI inflows into China, reaching a new high of $116 billion. In South-East Asia, FDI outflows from Singapore increased to $41 billion. In South Asia, FDI outflows from India increasing fivefold to $10 billion. Lastly, Investments by Turkish MNEs almost doubled to $7 billion.

II. THE NATIONAL TREATMENT STANDARD IN CHINESE AND INDIAN ASIAN IIAS

A. A SEQUENTIAL APPROACH TO STANDARDS INTEGRATION

Before we delve into the study on the national treatment standard in Chinese and Indian Asian IIAs, let us take time to briefly examine how these two countries have dealt with other major standards of treatment over the years to better frame their evolving relationships with FDI promotion and protection. With 130 BITs and 17 other IIAs for China and 84 BITs and 13 other IIAs for India, the two countries have been at the forefront of treaty negotiations for the past 3 decades.[458] Interestingly, the changing nature of their trade from closed socialist economies to more liberal and internationalized paradigms have naturally impacted their perceptions of the best possible treaty as much as their recent encounters with international investment arbitration and the challenges this de-territorialized way

458 For China, see <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu>; For India see http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu> accessed on 17 August 2015.

of settling dispute may pose to sovereignty. So their recent attempts to review their BITs and other IIAs in a manner they feel is better suited to today's economic needs and political realities.

As far as China is concerned, one generally identifies 3 moments, if not 3 generations of IIAs. The initial phase started with China's first BIT with Sweden, in 1982, and lasted until the late 1990s.[459] It was largely characterised by a prudent, if not reluctant, approach to normative internationalization, with NT seldom granted and international dispute settlement limited to the determination of the amount of compensation for expropriation. From 1998 on, with the China-Barbados BIT of July 1998 that offered, for the first time, foreign investors unrestricted access to international arbitration, China entered into a new phase of BIT drafting inspired by EU model treaties and framing NT in a less restrictive and somehow personalized manner depending on whether the country was a developed or developing nation. The last phase, starting from 2007 and the China-Korea BIT, is generally described as a more liberal one partly inspired by NAFTA in the sense that Chinese treaties granted Fair and Equitable Treatment (FET) in de facto accepting certain customary international law features, but also the national treatment and MFN often defined in using the now generalized yet difficult to interpret "in like circumstances" terminology.[460] To these three generations, I would add a fourth one corresponding to today's mega-regional trade and investment negotiations and China's expansion as a global investor. As we will see below, this fourth generation may well be characterized – and this is not China specific – by a certain distancing from the late 1990s NAFTA model in relation to today's new investment issues. In addition, it integrates the lessons learned from China's accession to and participation in the WTO.[461] Lastly, the recent wave of

459 Agreement Between the Government of the People's Republic of China and the Government of the Kingdom of Sweden on the Mutual Protection of Investments, 29 March1982.

460 On China's investment treaties evolution, see for example the recent research of Katle Hadley, 'Do China's BITs Matter? Assessing the effect of China's investment agreements on foreign investment flows, investor's rights and the rule of law' (2013) 45 Georgetown Journal of International Law, pp 255-321; See also Axel Berger, 'Investment Rules in Chinese Preferential Trade and Investment Agreements', Discussion Paper / Deutsches Institut für Entwicklungspolitik, 2013.

461 On the accession and participation of China to the WTO, including dispute settlement, see: Leïla Choukroune (ed), 'China WTO Decade', (2012) No. 1 China Perspective <http://www.cefc.com.hk/issue/china-perspectives-2012-1/> accessed on 17 August 2015.

FTA drafting does not seem to add much to China's general BIT approach on the contrary to some thesis often put forward and according to which a regional negotiation's aim is to further liberalize trade in introducing greater protection and flexibilities.[462]

Although a relative latecomer on the BIT scene with a first treaty signed with the UK in 1994, India has progressively developed a very large number of treaties with developed and developing countries all over the world. While it restricted itself to BITs until 2004, it then accepted to enter into regional negotiations and FTA with countries such as Japan, Korea and Malaysia (see the below table) and there are many more to come at the bilateral or mega-regional level. Interestingly, India took an opposite stance to China as far as NT and MFN are concerned. While it generally granted the two standards of treatment (as well as FET) in most of its 1990s and 2000s treaties, its recent attempts show a real suspicion against the MFN. This, of course, is a direct result of its novel – and first – condemnation by an arbitral tribunal in the *White Industry* case. While based on the India-Australia BIT, the enlarged interpretation of the MFN standard by the investment tribunal resulted in the finding that the standard of 'effective means of asserting claims and enforcing rights' could be found in India-Kuwait BIT.[463] 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 Industry Australia Limited's investment pursuant to the article 4(2) of the BIT incorporating the article 4(5) of the India Kuwait BIT.'[464] For these reasons, and because, as we have seen many other relatively similar (tax related) cases underway, the Indian government has decided to review its BIT policy including its BIT model, the latest draft having no mention of the MFN standard, which may pose problematic for Indian investors going global.[465]

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462 See Axel Berger, (n 57).

463 Art 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.'

464 See The White Industry Final Award at 16.1.1.

465 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', (2015) Indian Journal of International Law, Online test issue.

B. NATIONAL TREATMENT: FROM CONTESTATION TO ADOPTION AND DISTANCIATION CHINA ASIAN IIAS AND NT

Agreement (signature date)	NT Standard	MFN
China-Azerbaijan (1994)		X
China-Brunei (2000) signed but not in force		X
China-Cambodia (1996)		X
China-India (2006)	x	X
China-Indonesia (1994)		X
China-Japan (1998)	x	X
China-Kazakhstan (1992)		X
China-Kyrgyzstan (1992)		X
China-Laos (1993)		X
China-Malaysia (1988)		X
China-Mongolia (1991)		X
China-Myanmar (2001)		X
China-Pakistan (1989)		X
China-Philippines (1992)		X
China-Singapore (1985)		X
China-Sri Lanka (1986)		X
China-Thailand (1985)		X
China-Turkmenistan (1992)		X

INDIA ASIAN IIAS AND NT

x	NT Standard	MFN
India-Bangladesh (2009)	x	X
India-Brunei (2008)	x	X
India-China (2006)	x	X
India-Indonesia (1999)	x	X
India-Kazakhstan (1996)	x	X
India-Republic of Korea (1996)	x	X
India-Kyrgyz Republic (1997)	x	X
India-Lao (2000)	x	X
India-Mongolia (2001)	x	X
India-Myanmar (2008)	x	X
India-Philippines (2000)		X
India-Sri Lanka (1997)	x	X
India-Taiwan (2002)		X
India-Tajikistan (1995)	x	X
India-Turkmenistan (2006)	x	X
India-Uzbekistan (1999)	x	X
India-Vietnam (1997)	x	X
India-Asean (2014)	x	
India-Japan FTA (2011)	x	x
India-Korea CEPA (2009)		
India-Malaysia FTA (2011)	X	
India Singapore CECA (2005)		

As we understand from the previous developments and the tables above, major emerging economic players such as China[466] and India (to a lesser extent)[467] did not initially grant the NT standard to foreign investors in order to protect certain strategic economic sectors and so that their own populations at the entrepreneurial or individual level. China for instance has had a very progressive integration of the NT standard, first granting it (with qualification/exceptions) to developed countries and then to developing countries. The China-India BIT is in this regard revealing as its article 4 strikes an interesting balance between the two countries perspectives:

Article 4:(National Treatment and Most-Favoured-Nation Treatment

(l) Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own investors or investments of investors of any third State.

(2) In addition, each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State.

(3) The provisions of paragraph (1) and (2) above shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

(a) any existing or future customs unions, or similar international agreement to which it is or may became a party, or

(b) a ny matter pertaining wholly or mainly to taxation. Such taxation matters shall be governed by the Agreement between the Republic of India and the People's Republic of China for Avoidance of Double taxation of 18-7-1994.

466 See N. Gallagher and W. Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford University Press, Oxford, 2009).

467 See P. Ranjan, 'International Investment Agreements and Regulatory Discretion: Case Study of India' (2008) 9(2) The Journal of World Investment and Trade, pp 209-243.

The China-Australia 2015 BIT offers a renewed vision of the NT with the notable reference to the term 'in like circumstances':

> Article 9.3: National Treatment
>
> 1. Australia shall accord to investors of China treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
>
> 2. China shall accord to investors of Australia treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the expansion, conduct, opation and sale or other disposition of investments in its territory.
>
> 3. Australia shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
>
> 4. China shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory, investments with respect to the management, conduct, operation, sale or other disposition of Investments in its territory.

Lastly, the NT article of the 2015 draft Indian BIT model showed some distantiation to the general phrasing and underlined the possibility of exceptions:

> 4.4 Exercises of discretion, including decisions regarding whether, when and how to enforce or not enforce a Law shall not constitute a violation of this Article provided such decisions are taken in furtherance of the Law of the Host State.
>
> 4.5 Extension of financial assistance or Measures taken by a Party in favour of its investors and their investments in pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a violation of this Article.

This heterodox strategy eventually emerged positive as it gave space for regulatory autonomy and gradual economic liberalization in supporting the development of national champions now 'going global' as they claim, in turn, the national treatment standard of protection.[468] To explain this, one has to bear in mind the revolutionary nature of a national treatment directly impacting on states' regulatory autonomy 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 view of political and pragmatic considerations, to take such a fundamental turn in their approach to opening up and globalization.

CONCLUSION

Now widely accepted, the national treatment standard is present, at the post-entry stage, in all Chinese and 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 their introduction to protect their regulatory autonomy. While of a limited nature in the 1990s BITs, exceptions are now often introduced in the new IIAs including by developed States firmly supporting investment liberalization. China and India should make a larger use of these. Of various nature, these exceptions can be general (public health, order, moral, security) and influenced (or not) by the GATT Article XX general exceptions provision, but 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).

468 See M. Sornarajah, 'India, China and Foreign Investment' in M. Sornarajah and J. Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, Cambridge, 2010), pp 132-166; On Chinese Outward Investment Policies, see, for example, International Institute for Sustainable Development, (IISD), Chinese Outward Investment, an Emerging Policy Framework (compilation of primary sources), 2012.

The qualifications/exceptions to the national treatment serve as a regulator to balance the legal symmetry sometimes artificially created by the 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 by 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 China and 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.