

GAR INVESTMENT TREATY ARBITRATION

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# India

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## Overview of investment treaty programme

### 1 What are the key features of the investment treaties to which this country is a party?

The first ever BIT (referred to as Bilateral Investment Protection Agreement (BIPA) in India) entered into by India was with the United Kingdom in 1994. With the opening-up of Indian markets to foreign investment in 1991, India entered into a series of BITs (mostly with capital exporting countries) with the expectation that they would increase investors' confidence and lead to higher foreign investment. By 2015, India had signed 83 BITs (of which 74 were in force) and several other investment chapters in international investment agreements (IIA).

The BIT regime in India gained attention in 2010 with the settlement of first ever treaty claim launched against India<sup>[1]</sup> and in 2011, when India received its first adverse award in *White Industries v Republic of India*<sup>[2]</sup> under the Australian BIT. This opened a floodgate of BIT cases against India. By 2015, there were about 17 known BIT claims, all of which were contested by India.<sup>[3]</sup> With increased national concern around the surge of BIT arbitrations filed against India, there was a call for curtailment of investor state dispute settlement ('ISDS'). Between 2012 and 2016, India revisited its BIT regime, which led to two main outcomes. The first was the adoption of a new model BIT in December 2015 (Model BIT) with the twin objects of affording 'appropriate protection to foreign investors in India ... while maintaining a balance between investor's rights and the government's obligations';<sup>[4]</sup> and the second was (i) termination of the old BITs, where initial duration had concluded, or (ii) issuance of joint interpretative notes/statements (JIS) for renegotiation on basis of the Model BIT, where the BIT's initial term was valid.

Since 2016, India has terminated 76 BITs, the most recent being the Latvia BIT; entered into several 'new-generation BITs', including Belarus, Brazil<sup>[5]</sup>, Taiwan<sup>[6]</sup> and Kyrgyzstan BITs all largely based on the Model BIT. Most recently, India has also entered into Comprehensive Economic Partnership Agreement (CEPA) with UAE on 1 May 2022. The negotiations of other BITs/IAs are at various stages with 37 countries/blocks.

#### BITs that are in force

BIT Contracting party	Substantive protections					Procedural rights		
	Fair and Equitable Treatment (FET)	Expropriation	Protection and Security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Bangladesh (7 July 2011)	Yes	Yes	No	Yes	No	Six months	Yes	Yes
Belarus (5 March 2020)	No	Yes	Yes	No	No	Six months	Yes	Yes
Colombia (2 July 2012)	Yes	Yes	Yes	Yes	No	Six months	Yes	Yes
Israel (18 February 1997)	Yes	Yes	No	Yes	No	Six months	Yes	Yes
Libya (25 March 2009) <sup>[7]</sup>	Yes	Yes	No	Yes	No	Six months	Yes	Yes
Lithuania (1 December 2011)	Yes	Yes	Yes	Yes	No	Six months	Yes	Yes
Philippines (29 January 2001)	Yes	Yes	No	Yes	No	Six months	Yes	Yes
Senegal (17 October 2009)	Yes	Yes	Yes	Yes	No	Six months	Yes	Yes
Taiwan (14 February 2019)	No	Yes	Yes	No	No	Six months	Yes	Yes
United Arab Emirates (13 September 2014)	Yes	Yes	Yes	Yes <sup>[8]</sup>	No	Six months	Yes	Yes

#### BITs and MITs that are signed but not in force:

BIT contracting party or MIT	Substantive protections				Procedural rights			
	FET	Expropriation	Protection and security	MFN	Umbrella clause	Cooling-off period	Local courts	Arbitration
Brazil (not in force)	No	Yes <sup>[9]</sup>	No	No	No	No	No	Yes
Kyrgyzstan Republic (not in force)	No	Yes	Yes	No	No	6 months	Yes	Yes

#### BITs that are terminated

Between 2016 and 2021, India terminated BITs with 76 countries,<sup>[10]</sup> with Latvia as the most recent one. Note that these treaties remain relevant as the investments made before termination of these treaties remain protected under the sunset/survival provisions in the respective treaties (which is typically 10 to 15 years).

**Free Trade Agreements (FTAs), Preferential Treatment Agreements(PTA) and investment chapters in international agreements (signed /entered in):**

FTAs	Substantive protections					Procedural rights		
	Fair and Equitable Treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Afghanistan–India PTA (13 May 2003)	Yes	No	No	No	No	No	No	Yes
Agreement on SAARC Preferential Treatment Trading Agreement (7 December 1995)	No	No	No	No	No	No	No	No
ASEAN–India Investment Agreement (1 July 2015)	Yes	Yes	Yes	No	No	180 days	Yes	Yes
Asia-Pacific Trade Agreement (17 June 1976)	No	No	No	Yes	No	No	No	No
Indo-Bhutan Agreement on Trade Commerce and Transit (29 July 2017)	No	No	No	No	No	No	No	No
BIMSTEC Framework Agreement (30 June 2004)	No	No	No	No	No	No	No	No
Chile–India (11 September 2007)	No	No	No	No	No	No	No	No
European Union Cooperation Agreement (1 August 1994)	No	No	No	Yes	No	No	No	No
Gulf Co-operation Council Framework Agreement (Not in force)	No	No	No	No	No	No	No	No
Japan CEPA (1 August 2011)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Korea CEPA (1 January 2010)	Yes	Yes	Yes	No	No	6 months	Yes	Yes
Malaysia Comprehensive Economic Cooperation Agreement (CECA) (1 July 2011)	Yes	Yes	Yes	Yes	No	180 days	Yes	Yes
Mauritius CECPA (1 April 2021)	No	No	No	No	No	No	No	No
MERCOSUR Framework Agreement (1 June 2009)	No	No	No	No	No	No	No	No
Indo-Nepal Treaty of Trade – 27 November 2009)	No	No	No	No	No	No	No	No
Singapore CECA (1 August 2005)	No	Yes	No	No <sup>(11)</sup>	No	6 months	Yes	Yes
South Asian FTA (1 January 2006)	No	No	No	No	No	No	No	No
Thailand FTA (not in force)	No	No	No	No	No	No	No	No

FTAs	Substantive protections					Procedural rights		
	Fair and Equitable Treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
United Arab Emirates CEPA (1 May 2022)	No	No	No	No	No	No	No	No

## Qualifying criteria - any unique or distinguishing features?

### 2 What are the distinguishing features of the definition of “investor” in this country’s investment treaties?

Issue	Distinguishing features in relation to the definition of ‘investor’
Definition of an investor	<p>Prior to the Model BIT, the Indian BITs defined the term ‘investor’ expansively to include any national or juridical person/company of a country of the contracting party.</p> <p>Now, the Model BIT excludes a representative office or a branch office of a juridical person from this definition. This new definition is largely followed by most Indian BITs/IIAs that have been entered into after 2016. Interestingly, the Indian–UAE BIT includes the government within the definition.</p>
Permanent place of business of companies	<p>While most Indian BITs required the juridical person to be incorporated or duly organised according to the laws of the contracting party in which it is an ‘investor’, they do not require the investor to have a permanent place of business in India. The Philippines BIT applies a precondition of having a place of effective management to investors from the Philippines but not to those from India. The Singapore CECA excludes investors that have ‘negligible or nil operations or with no real or continuous business activities. This requirement appears to have been introduced to prevent treaty shopping.</p> <p>The Model BIT requires a juridical person to have ‘substantial business activities’ in the territory of the contracting party. This provision can be noted in subsequent BITs or JIS including with Colombia, Belarus, Brazil and Bangladesh.</p>
Definition of nationals	<p>BITs entered prior to Model BIT, such as with Israel, Libya and Senegal did not define ‘nationals’.</p> <p>Now, while some new-generation BITs, such as with Belarus define ‘natural person’ as a national or citizen of a contracting party; the others such as with Kyrgyzstan and Taiwan diverge by not defining it.</p>
Treatment of dual citizens and permanent residency	<p>India does not recognise dual citizenship for its nationals.</p> <p>Under some BITs<sup>[12]</sup> such as with Bangladesh, Colombia and Belarus, dual citizens are deemed nationals of the place of their ‘dominant and effective nationality’ (ie, where they ordinarily or permanently reside).</p>
Inclusion of government as an investor	<p>As a general rule, Indian BITs neither include nor exclude the government as an investor. The UAE BIT is an exception and includes the ‘government’ of a contracting party within the definition of an investor. Certain other BITs and FTAs (such as the Korea CEPA, Japan CEPA, ASEAN FTA and Singapore CECA) note that investors may be government-owned companies.</p>
Indirect investments	<p>Investments in most Indian BITs are defined broadly and do not specifically exclude indirect investments. The exceptions however are JIS with Colombia and Bangladesh, where indirect investments are expressly excluded.</p>
Investors seeking investments	<p>Most Indian BITs require investors who have made investments in the host country to be eligible. The Japan CEPA is an exception and includes persons who ‘seeks to make’ an investment within the definition of an investor.</p>

### 3 What are the distinguishing features of the definition of “investment” in this country’s investment treaties?

Issue	Distinguishing features in relation to the concept of ‘investment’
Investment in good faith and in accordance with law	<p>Most pre-2016 Indian BITs do not expressly mention this requirement. However, the Model BIT included this as a substantive requirement with the intent to prevent treaty shopping and to afford protection to genuine investors. Of the new-generation BITs this requirement is present in the BITs with Kyrgyzstan and Belarus, but not with Brazil.</p> <p>All Indian BITs, which are in force, also require that investments are made in accordance with the law. The Brazil BIT, however, does not specifically include this requirement under its definition.</p>

Issue	Distinguishing features in relation to the concept of 'investment'
Characteristics of an investment	<p>Most Indian BITs entered into prior to 2016 provided a broad asset-based definition of 'investment'. However, narrowing this definition, the Model BIT adopts an 'enterprise' based approach set out in <i>Salini Costruttori S.p.A and Italstrade S.p.A v. Morocco</i><sup>[13]</sup> that equates 'investment' with an 'enterprise' incorporated in the host state.</p> <p>To qualify for protection under the Model BIT, an investment must also demonstrate certain minimum characteristics such as 'commitment of capital or other resources', 'certain duration', 'the objective of establishing a lasting interest', the 'expectation of gain or profit or assumption of risk' and have 'significance for the development' of the host state. These provisions are largely adopted in the BITs with Brazil, Taiwan, Kyrgyzstan, Belarus, Colombia and Bangladesh as well as ASEAN IIA and Korea CEPA. These 'new-generation treaties' are relatively recent and given the ambiguity and lack of thresholds/ benchmarks in these characteristics, it is a likely area for future disputes.</p>
Changes in the form of the investment	<p>At times, change in 'form' of the investment may disqualify it as an investment. Most BITs are silent as to the effect of the change in the form of investment. However, certain BITs, including with Libya, Israel, Bangladesh, Colombia and the ASEAN IIA and Korea CEPA, specifically clarify that an alteration or change has no effect on the definition of 'investment'.</p>
Indirect investments	<p>Korea CEPA and Malaysia CECA expressly include assets controlled indirectly by a protected investor in the definition of 'investment'.</p>
Exclusion of certain assets	<p>Most Indian BITs exclude portfolio investments from the definition of investments. A few Indian treaties, such as Colombia BIT and ASEAN IIA exclude loans and money claims from the definition of 'investment'. The Model BIT further seeks to limit protection by explicitly excluding certain classes of investment such as brand value, goodwill, market share, portfolio investments and debt securities issued by the government from the definition. As a backlash to the <i>White Industries</i> award, it also excludes order or judgment sought or entered in any judicial, administrative, or arbitral proceeding. These exceptions have been reflected in all 'new generation' BITs.</p>
Commencement of treaty protection	<p>Most Indian BITs protect all existing investments regardless of whether or not they were made before the date on which the BIT enters into force. The BIT with Bangladesh only protects investments made after 1 January 1980 and a few others (Colombia, Latvia, Lithuania, Senegal, Serbia and Syria BITs, ASEAN IIA, Korea CEPA and Malaysia CECA) do not apply to any disputes concerning investments made prior to the BIT's entry into force.</p> <p>Finally, some new-generation BITs such as with Belarus, Brazil and Kyrgyzstan do not protect pre-investment activities.</p>

## Substantive protections - any unique or distinguishing features?

### 4 What are the distinguishing features of the fair and equitable treatment standard in this country's investment treaties?

Issue	Distinguishing features of the fair and equitable treatment standard
Removal and replacement of Fair and Equitable Treatment (FET).	<p>Pre-2016 BITs (eg, with UAE, Lithuania, Senegal, Libya, Philippines and the ASEAN IIA, Malaysia CECA, Japan CECA, Korea CECA) provided an unqualified FET protection - those investments 'shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party'.</p> <p>The Model BIT removed the FET protection in this form and instead introduced article 3.1 - 'Treatment of Investment' and aimed to provide normative content to the 'International Minimum Standard' that the host state must follow. Protection now offered was against measures of host state in violation of customary international law in four specific circumstances, viz 'denial of justice in any judicial or administrative proceedings,' 'fundamental breach of due process', 'targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief', or 'manifestly abusive treatment, such as coercion, duress and harassment'. This was implemented in the BITs with Brazil, Kyrgyzstan, Belarus, and also in CECA with Singapore. Brazil BIT in fact added an additional conduct, 'discrimination in matters of law enforcement, including the provisions of physical security' to this list.</p> <p>The possible reason for this approach is to remove reference to breach of legitimate expectations, which many ISDS tribunals (eg, in <i>Tecmex v Mexico</i>)<sup>[14]</sup> have held to be part of the FET provision. Importantly for India, this ensures that change of law and regulatory framework does not amount to breach of legitimate expectation (and consequently FET standard).</p>
Public policy objective exception	<p>The JIS entered into with Colombia and Bangladesh excludes measures that are taken by the host state to further public policy objectives that include (but are not limited to) protection or improvement of natural resources and environment, human, plant, animal health or life, improvement of human capital conditions, improvement of economic system and implementation of fiscal policies including taxation.</p>

Issue	Distinguishing features of the fair and equitable treatment standard
Customary international law minimum standard treatment	The ASEAN IIA, Malaysia CECA, Japan CECA and Korea CEPA provide that FET and FPS do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.

## 5 What are the distinguishing features of the protection against expropriation standard in this country's investment treaties?

Issue	Distinguishing features of the 'expropriation' standard
Due process of law	<p>Brazil BIT, ASEAN IIA, Malaysia CECA, Korea CEPA and Singapore CECA require that expropriation can only legitimately occur 'in accordance with due process of law'.</p> <p>Some BITs use a slightly different language and require that any expropriation of investment must occur in 'accordance with law' (eg, BITs with Bahrain, Bangladesh, Colombia, Latvia, Libya, Lithuania, Senegal, Serbia and Sudan) or 'procedure established under law' (eg, the BIT with the UAE).</p>
Public purpose exception	<p>Most of the Indian BITs provide for protection against expropriation without fair and equitable compensation and allow expropriation for a public purpose on a non-discriminatory basis. The BITs with Brazil, Kyrgyzstan, Belarus, and Colombia; the Korea CEPA, ASEAN IIA and the Malaysia CECA exclude 'non-discriminatory regulatory measures or awards by judicial bodies of that are designed and applied to protect the legitimate public interest or public purpose objectives from the ambit of expropriation. This is a broad exception given to the host nation and leaves room for abuse by camouflaging regulatory measures for 'public purpose' objectives.</p> <p>Interestingly, the Colombia BIT provides that this exception would not apply where measures are not in good faith.</p>
Indirect expropriation	<p>Amongst pre-2016 BITs, the Colombia BIT, the Korea CEPA, Malaysia CECA and Japan CEPA expressly refer to protection against indirect expropriation.</p> <p>The Model BIT expressly covers both direct and indirect expropriation. Model BIT provides that indirect expropriation occurs if a country's measure or a series of measures has an effect 'equivalent to direct expropriation', that is, the effect should result in 'substantial or permanent deprivation of the fundamental attributes of property' (ie, rights of use, enjoyment and disposal of the investor's investment, without the formal transfer of title). The Model BIT further clarifies that the determination requires a case-by-case, fact-based inquiry, that takes into consideration several prescribed factors such as economic impact of the measures, the duration and character of the measures, and whether there has been a breach of prior written commitment to the investor.</p> <p>This approach is reflected in post-2016 BITs such as the Belarus and Kyrgyzstan BITs, which cover both direct and indirect expropriation and expressly define indirect expropriation by reference to deprivation of 'fundamental attributes of property' in the investment.</p> <p>The Brazil BIT is in deviation from the Model BIT as it explicitly excludes 'indirect expropriation'. However, this is more so a feature of the Brazil Investment Regime and appears as a one-time occurrence. Also, the definition of 'indirect expropriation' in the UAE BIT is substantially different from the Model BIT.</p>
Date of expropriation and value of investment	<p>There is vast variation in calculating the 'date of expropriation' under the Indian BITs. This has an impact on the economic value of the claim.</p> <p>The date of determination for compensation is immediately before the date of expropriation in the BITs with Kyrgyzstan and Belarus, which reflect the Model BIT approach. The BITs with Brazil, Kyrgyzstan, Belarus, and the CEPA with Korea explicitly provide that there will be no change in value if the intended expropriation had become known earlier/publicly known. The Brazil BIT uniquely provides for a period of 30 days before expropriation date for the evaluation of compensation.</p> <p>Japan CEPA, ASEAN IIA and Malaysia CECA provides that the date of expropriation is when expropriation occurred or was publicly announced. The BITs with UAE, Lithuania, Colombia, Bangladesh, Senegal, Libya, and Philippines include the time when intended expropriation became publicly known in ascertaining the 'date of expropriation'.</p>
Fair market value or similar standards	<p>Brazil, Kyrgyzstan, Belarus, UAE and Colombia BITs, the ASEAN IIA, Malaysia CECA, Japan CEPA and Singapore CECA provide for 'fair market value' as a standard for determination of compensation for expropriation. BITs with Lithuania, Bangladesh and Senegal provide for 'market value' as the standard. In contrast, BITs with Libya and Philippines provide for 'genuine value'.</p>
Taxation and expropriation	<p>In the past decade, several treaty claims have been brought against India for violation of its international law obligations by its application of retrospectively amended taxation law, the most famous being by <i>Vodafone</i><sup>[15]</sup> and <i>Cairn Energy</i><sup>[16]</sup>.</p> <p>Not surprisingly, the Model BIT expressly kept taxation measures outside the purview of treaty protection. It provides that the BIT shall not apply to taxation laws and measures, including measures to enforce taxation obligations. Further, the host state's decision that a particular measure is related to taxation (whether prior to or after the commencement of arbitration) shall be 'non-justiciable'. This was followed in the new generation BIT, such as Belarus, Brazil and Kyrgyzstan.</p>



## 6 What are the distinguishing features of the national treatment/most-favoured-nation treatment standard in this country's investment treaties?

Issue	Distinguishing features of the 'national treatment' and/or 'most favoured nation' standard
National treatment (NT) and exclusion of most favoured nation (MFN) treatment	<p>Model BIT provides for NT protection, but not MFN treatment. Most Indian IIAs prior to the 2016 Model BIT provided for MFN treatment, few of which are still in force – the UAE, Lithuania and Colombia BITs.</p> <p>The Model BIT excludes the MFN clause as a backlash to the <i>White Industries</i> award, which promotes the host state's regulatory power and undermines investors' protection. In line with the Model BIT, BITs with Brazil, Kyrgyzstan and Belarus, do not provide for MFN treatment.</p> <p>Further, most of the Indian FTAs and economic partnership agreements only include NT protection and not MFN treatment. Notable exceptions include the Asia Pacific Trade Agreement and Japan CEPA.</p>
Scope of MFN	<p>Scope of the MFN clause varies in different treaties where this protection is provided for. For example, UAE and Lithuania BITs provide for MFN treatment to both the 'investors' and the 'investment'. But Colombia BIT provides for MFN treatment only for 'investors'. ASEAN IIA guarantees MFN treatment regarding the compensation paid to other investors of other states in the case of armed conflict or civil unrest. Japan CEPA extends the MFN clause only to post-establishment investments and for 'management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investment'.</p>
Scope and limitations of the NT clause	<p>Scope and limitation of NT varies from treaty to treaty. The Brazil, Kyrgyzstan, Belarus and UAE BITs provide for NT to both the investors and the investments, whereas the Lithuania, Colombia and Bangladesh BITs do not provide NT to investors.</p> <p>Under the Model BIT, violation of NT will only be made out if the host state's measure discriminates against foreign investment, where the investments are being compared in 'like circumstances'. Guidance on 'like circumstances' (through a clarificatory footnote) lists the following factors to consider:</p> <ul style="list-style-type: none"> <li>• the goods or services consumed or produced by the investment;</li> <li>• the actual and potential impact of the investment on third persons, the local community, or the environment,</li> <li>• if the investment is public, private, or state-owned or controlled, and</li> <li>• the practical challenges of regulating the investment.</li> </ul>
Extension to regional and local governments	<p>Among post-2016 BITs, Brazil BIT does not list relevant factors such as the Model BIT but includes legitimate public welfare or regulatory objectives as the basis of such treatment. The Kyrgyzstan BIT provides a list of relevant factors in determining 'like circumstances', which is identical to the Model BIT. Colombia and Bangladesh BITs through their interpretative JIS have provided for an expansive list of factors to determine 'like circumstances'. This list is more expansive than the Model BIT.</p> <p>In the older treaties, the general rule on state responsibility applies and covers the conduct of a larger spectrum of state actors. While the Model BIT covers the conduct of state governments, does not apply to measures of a 'local government', meaning urban local body, municipal corporation or village level government, or an enterprise owned or controlled by any of such bodies.</p> <p>The Brazil BIT does not explicitly extend the purview to sub-national governments, unlike the Model BIT. However, the Kyrgyzstan and Belarus BITs, and Japan CEPA and Malaysia CECA extend the purview to local governments.</p>
Exclusion of benefits from Customs Union and taxation	<p>All Indian investment treaties expressly provide that the provision for MFN and/or NT to investment does not extend to the benefits of membership of, or association with, a customs or economic union, a common market or a free trade area or taxation, including an agreement on the avoidance of double taxation. The treaties currently in force, (ie, with UAE, Libya, Senegal, Philippines and Malaysia (FTA)) provide this exception.</p> <p>However, Brazil, Kyrgyzstan and Belarus BITs do not exclude the extension of NT to custom union and taxation benefits.</p>

## 7 What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country's investment treaties?

Issue	Distinguishing features of the 'protection and security' standard
Full Protection and Security (FPS) Clause	<p>Overall, the scope and protection under an FPS clause vary in Indian BITs.</p> <p>Few pre-2016 BITs entered by India, for example, with Egypt, Ghana, Sri Lanka and Australia do not have an FPS clause. But others such as the UAE, Lithuania, Colombia BITs, ASEAN IIA, Malaysia CECA, Japan CEPA and Korea CEPA provide for an FPS Clause. While worded slightly differently, Latvia, Serbia and Syria also provide for a protection and security standard that is likely to be interpreted like the FPS clause in other treaties.</p> <p>Tellingly, some BITs in force (both pre and post 2016) such as the Bangladesh, Libya, Philippines BITs and Singapore CECA do not provide for an FPS clause. The lack of a protection as basic as FPS from the host state makes the investment vulnerable to a number of harms, physical or otherwise.</p> <p>The Model BIT provides for a limited FPS Clause stating that it only refers to obligations relating to physical security of investors and to investments made by the investors of the other party and not to any 'other obligation whatsoever'. This is a rather narrow protection and has not been reviewed by a tribunal till date, thus leaving room for interpretation of its application. From the recent BITs, while Belarus and Kyrgyzstan incorporate this provision, Brazil does not.</p>
Restriction of scope	<p>The pre-2016 treaty, such as the UAE BIT restricts the scope to manner consistent with domestic law and applicable international law.</p> <p>The ASEAN IIA, Malaysia CECA, Japan CEPA and Korea CEPA restrict the FPS clause to what is required by customary international law. The Lithuania and Senegal BITs do not provide for any restriction of scope. The variety in restriction of scope of FPS clause is a matter of concern and this will be dependent on each arbitral tribunal that decides the cases on these treaties.</p>

## 8 What are the distinguishing features of the umbrella clauses contained within this country's investment treaties?

Issue	Distinguishing features of any 'umbrella clause'
Exclusion of umbrella clause	The Model BIT or any active Indian BIT (signed or in force) does not provide for an umbrella clause.

## 9 What are the other most important substantive rights provided to qualifying investors in this country?

Issue	Other substantive protections
Compensation for losses	<p>From amongst the existing treaties, the Brazil, UAE, Lithuania, Colombia, Bangladesh, Senegal, Libya, Philippines BITs and ASEAN IIA, Malaysia CECA, Japan CEPA, Korea CEPA and Singapore CECA provide for MFN Treatment and NT with regard to restitution, indemnity or other forms of compensation, in case of losses due to war or other armed conflicts, revolution, state of emergency, civil strife or any other similar events.</p> <p>The BITs and other treaties have slight variations in the listing of events that may cause such losses. However, largely the language remains the same.</p>
Transparency and transferability provisions	<p>The ASEAN IIA, Japan CEPA and Singapore CECA, and Brazil, Belarus and Kyrgyzstan BITs provide that the states shall make public all laws, regulations, policies and procedures that pertain to or directly affect investments in its territory of investors of the other contracting party. Additionally, the Brazil, Belarus and Kyrgyzstan BITs impose further obligations on states to publish future measures and affected investors be afforded an opportunity to present themselves. This is in line with the Model BIT.</p> <p>Most Indian BITs include clauses that require the contracting parties to permit investors to transfer investments and investment returns freely.</p>
Non-Impairment	<p>Some investment treaties impose upon contracting parties an obligation not to impair the management, maintenance, use, enjoyment or disposal of investments (eg, the Colombia and Latvia BITs, ASEAN IIA, Malaysia CECA and Singapore CECA). The Senegal BIT uses slightly different wording: 'impede' instead of the word 'impair', covering management, preservation, use, increase or disposal of the qualifying investments through discriminatory measures.</p>

## 10 Do this country's investment treaties exclude liability through carve-outs, non-precluded measures clauses, or denial of benefits clauses?

Issue	Other substantive protections
General exceptions clause and necessity of a measure	<p>Initially, the 'general exceptions' clause was self-judging and specified that the state would not be precluded from taking actions or measures 'which it considered necessary'. These allowed the state to deviate from its international obligations by unilaterally declaring its obligations to be non-binding. Now, the self-judging clause can only be found in the provision pertaining to security exceptions.</p> <p>The Model BIT provides for general exceptions to substantive protections where the state adopts measures necessary for public order; to protect human, animal or plant life; to comply with laws or regulations; for the protection or conservation of national treasures.</p> <p>It also provides guidance to the arbitral tribunal for determination of 'necessity' of a measure: whether there was no less restrictive alternative measure reasonably available to the country or not. This reduces arbitral discretion, and at the same time, by requiring that only the least investment restrictive measure, which is reasonably available to the host country be adopted, it ensures that foreign investment will get adequate protection.</p> <p>The Brazil, Kyrgyzstan and Colombia BITs, ASEAN IIA, Korea CEPA, Singapore CECA, SAFTA, BIMSTEC Agreement, Thailand FTA and ASEAN Framework Agreement also include the necessity provision.</p>
Specific limitations in the scope of Treaty	<p>Similar to the Model BIT, the 'new generation' BITs such as with Brazil, Kyrgyzstan, and Belarus limit the scope by carving out measures taken by local government, taxation measures, compulsory IP licensing, government procurement, subsidies or grants to vulnerable groups, services in exercise of government authority. The Malaysia CECA excludes all these measures except compulsory licensing provision.</p> <p>The Model BIT and post-2016 treaties further provide that host state's decision as to whether a particular regulatory measure is related to taxation (whether made before or after the commencement of arbitral proceedings), shall be non-justiciable. The decision to preclude taxation from the purview of India's future BITs is visibly in response to the spate of BIT claims brought by <i>Vodafone</i> and <i>CairnEnergy</i> against India with respect to retrospective application of taxation law.</p>
Monetary measures	<p>The Model BIT under article 32.2 restricts applicability to non-discriminatory measures of general application taken by a central bank or monetary authority of a party in pursuit of monetary and related credit policies or exchange rate policies. This is without prejudice to a host state's rights regarding monetary transfers.</p> <p>On these lines, the BITs with Brazil, Kyrgyzstan, and Belarus excludes non-discriminatory measures taken by monetary authority or central bank in pursuit of monetary and credit policies.</p> <p>Further, ASEAN IIA and Japan CEPA provide exceptions for measures taken in serious balance of payments and where movement of capital may cause a serious economic disturbance.</p>
Security interests	<p>The scope of this provision varies among Indian treaties.</p> <p>The Libya and the Philippines BITs only exclude non-discriminatory measures taken for the protection of its essential security interests or in circumstances of extreme emergency. Essentially security interest exception is also present in the Colombia and Bangladesh BITs, and the Korea CEPA.</p>
Denial of Benefits Clause	<p>The pre-2016 treaties, such as the Lithuania BIT, Colombia BIT, the ASEAN IIA and the Malaysia CECA contain an extensive 'denial of benefits' clause that denies benefit to enterprise that are owned or controlled by a third party that does not have diplomatic relations with denying party or the denying party adopts or maintains measures with respect to the non-party that prohibits transactions with the enterprise or that would be violated or circumvented if the benefits of the treaty are accorded. Additionally, it denies benefits to enterprise that has no substantial business activities in other party or is owned or controlled by investors of denying party or non-party.</p> <p>The Kyrgyzstan BIT, Belarus BIT, Singapore CECA and Korea CEPA provide for a 'denial of benefits' clause that denies benefits of treaty protection to an investment or an investor established primarily to access the dispute resolution mechanisms of the treaty, and thus benefit a non-party. The 'new generation' BITs have followed this provision from the Model BIT.</p>
Environment	<p>Indian BITs increasingly provide for protection of regulatory actions when they are taken to protect environment of the host state.</p> <p>For example, the Brazil BIT specifically provides that measures adopted to ensure that investment activities accord with the host state's environmental law are permitted, so long as such measures are not tantamount to 'arbitrary or unjustifiable discrimination or a disguised restriction'. Similarly, the Belarus and Colombia BITs expressly state that non-discriminatory regulatory actions designed to protect the environment will not amount to expropriation, except in rare circumstances based on good faith.</p>

## Procedural rights in this country's investment treaties

### 11 Are there any relevant issues related to procedural rights in this country's investment treaties?

Issue	Procedural rights
Fork in the road	<p>Some of the treaties, eg. Colombia BIT, Lithuania BIT, ASEAN IIA, Japan CEPA and Korea CEPA contain a fork-in-the-road provision pursuant to which an investor must make a choice between pursuing its claims against the state either through the arbitration mechanisms provided in the relevant BIT or in local courts. In such treaties, the investors elect to either submit a dispute to arbitration or seek remedy before the local courts; they cannot do both.</p> <p>However, the Model BIT contains no such provisions, nor do the post-2016 BITs, such as the Brazil, Belarus and Kyrgyzstan BITs.</p>
Exhaustion of local remedies	<p>Article 15.2 of the Model BIT provides that an investor must exhaust local remedies for a period of at least five years before commencing arbitration, unless the investor can demonstrate that there are 'no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure'. The five-year period commences from the date on which the investor first acquired knowledge of the measure and the resulting loss or damage to investment or when the investor should have first acquired knowledge of such loss or damage. Additionally, article 15.1 provides that the foreign investor should submit the dispute to a local court within one year of the date on which the investor acquired or should have acquired knowledge about the measure.</p> <p>However, this provision has been altered in the 'new-generation' treaties. The time period for an investor to commence an action in the domestic courts from the time of acquiring knowledge of the loss is one year under Kyrgyzstan BIT and two years under Belarus BIT. the Brazil BIT has omitted this requirement. It is unclear whether failure to commence the domestic claim in time would preclude the investor from commencing an action under the BIT altogether.<sup>[17]</sup></p>
ICSID	<p>India is not a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 (Washington Convention). However, for a dispute to be referred to ICSID, most of the Indian BITs require that both contracting parties should be parties to the Washington Convention. Among the FTAs, the Korea CEPA, Malaysia CECA and Singapore CEPA provide a right to recourse to ICSID, if both states are parties to the Washington Convention.</p>
Additional facilities of ICSID	<p>Most of the Indian BITs, with one of the exceptions being the Philippines BIT, have a provision for the dispute to be referred to Additional Facilities of ICSID if both contracting parties so agree even when they are not signatory to ICSID. This provision is also present in Japan CEPA, Korea CEPA, Malaysia CECA and Singapore CECA.</p> <p>As an additional condition, the ASEAN IIA, the Korea CEPA and the Malaysia CECA require that one contracting party is a signatory to the Washington Convention.</p>
Ad hoc arbitration	<p>As a general rule Indian BITs and certain FTAs such as the ASEAN IIA, Singapore CECA, Malaysia CECA, Japan CEPA and Korea CEPA allow investors to pursue an arbitration claim through an ad hoc arbitration in accordance with the UNCITRAL rules.</p>
Appointing authority	<p>The appointing authority usually varies depending on the dispute resolution method chosen. For example, in the ASEAN IIA, if the investor chooses arbitration under the Washington Convention or the ICSID Additional Facility Rules, the appointing authority is the Secretary-General of ICSID, whereas if the UNCITRAL Arbitration Rules were selected or if the parties agree on a different arbitral institution, then the appointing authority is the Secretary-General of the Permanent Court of Arbitration.</p> <p>The 'Appointing Authority' under article 7 of the UNCITRAL Rules is the President, the Vice President or next senior judge of the International Court of Justice, who is not a national of either contracting party.</p>
Time limit	<p>The time limit for commencement of claim varies in each treaty. For example, the Colombia BIT and certain FTAs and economic partnership agreements (such as ASEAN IIA, Japan CEPA, Korea CEPA, Malaysia CECA and Singapore CECA) require this time period to be within a period of three years of the investor having acquired knowledge of the facts giving rise to the alleged breach. There are other treaties where this time limit is five years (eg, UAE BIT), six years (eg, Kyrgyzstan BIT) and seven years (eg, Belarus BIT).</p>
Applicable law	<p>Indian BITs generally require that arbitral tribunals to have regard to the terms of the investment treaty when determining the dispute.</p> <p>Some investment treaties, such as the Colombia BIT, provide that the arbitral award shall be in accordance with the national laws of the contracting party involved in the dispute or in whose territory the investment is made, generally including its rules on conflict of laws.</p>

## 12 What is the approach taken in this country's investment treaties to standing dispute resolution bodies, bilateral or multilateral?

Unlike proposals like the Transatlantic Trade and Investment Partnership Treaty, the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam FTA where the states have proposed the reference of disputes to a permanent, multilateral investment court, no similar proposal has been made by India. India has not taken any formal stance on the establishment of a permanent, multilateral court. In fact, India has previously refused to become a signatory to the ICSID Convention or adopt the ICSID framework.

## 13 What is the status of this country's investment treaties?

India is currently in the process of renegotiating its BITs with different nations and blocks to make its investment treaty regime more aligned with the Model BIT. The Parliamentary Report (2021) largely explains the logic or rationale behind Model BIT provisions to create a balance between the government of India's right to regulate and investment protection. The provisions are more specific, less vague and to leave less room for interpretation. It is expected that 'in any treaty based on Model BIT 2015 text, the position of India in dealing with international arbitration as a respondent would improve.' As per the Parliamentary Report (2021), the renegotiations are at various stages with 37 nations/blocks. Currently, there are 11 BITs in force and two BITs signed but not in force. Since the adoption of Model BIT in 2016, India has terminated 76 BITs.<sup>[18]</sup> India has successfully issued two JISs for existing BITs with Colombia and Bangladesh for aligning them to the Model BIT. According to the Parliamentary Report (2021), India aims to expedite the renegotiation process and formalise investment and trade relations through BITs/FTAs.

Interestingly, India recently entered into a CEPA with UAE on 18 February 2022, which came into force on 1 May 2022. Relevantly, it contains an important clause that has a bearing on the existing UAE-India BIT. Article 12.1 provides that the parties renew their commitment to the ongoing negotiations to replace the current BIT and replace it with a new agreement by June 2022. Further information on these discussions is awaited. This is indicative of India's eagerness to renegotiate new BITs along the lines of the Model BIT.

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## Practicalities of commencing an investment treaty claim against this country

### 14 To which governmental entity should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed?

#### Government entity to which claim notices are sent

This information is not very clear and there is no express guidance issued on it. The Parliamentary Report states that all correspondence concerning BITs between states are routed through the Economic Diplomacy Division (a nodal division of the Ministry of External Affairs) by means of *note verbales*,<sup>[19]</sup> while Department of Economic Affairs, Ministry of Finance (DEA) website provides requires it to be addressed to Secretary, Department of Economic Affairs, Ministry of Finance, North Block, New Delhi – 110001.<sup>[20]</sup> The only treaty that provides clarity on this is the Columbia BIT which expressly provides that a notice of arbitration must be sent must be addressed to the Department of Economic Affairs, Ministry of Finance. The Model BIT provides that the notice of arbitration has to be sent to India's 'designated representative' who, under article 1.2, is India's Secretary/Additional Secretary/Joint Secretary of the DEA. However, the three BITs (Brazil, Kyrgyzstan and Belarus) signed after the adoption of the Model BIT do not specify any governmental entity to whom the notice of a dispute may be sent. They only provide for the notice of arbitration or dispute to be sent to the 'Defending Party'.

### 15 Which government department or departments manage investment treaty arbitrations on behalf of this country?

#### Government department that manages investment treaty arbitrations

Departments under three Indian ministries are largely responsible for managing investment treaty arbitrations:

- International Investment Treaties & Framework Section, DEA: It is responsible for handling notices and disputes arising out of BITs. It also participates in inter-ministerial group meetings with other relevant departments that are handling the dispute.<sup>[21]</sup>
- Legal and Treaties (L&T) Division and the Economic Diplomacy Division, Ministry of External Affairs: According to the Transaction of Business Rules, the L&T division renders a legal opinion on all international law issues to the government of India, including on international investment law disputes. This division is an active part of the delegations that negotiate BITs and other treaties.
- Department of Legal Affairs, Ministry of Law & Justice also plays an active and joint role in legal issues relating to the government of India.

- 16 Are internal or external counsel used, or expected to be used, by the state in investment treaty arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them?

#### Internal/external counsel

India uses a hybrid of internal and external counsel to represent the state in investor-state disputes.<sup>[22]</sup> In January 2016, the Department of Economic Affairs, Ministry of Finance floated a call for empanelment of domestic and international law firms to represent the government in investor-state disputes. In November 2016, the government shortlisted 12 law firms on the basis of their technical bids. The final decision was taken after formal assessment of the financial bids by the relevant department of the ministry.<sup>[23]</sup> As for legal officers in the Legal and Treaties Division of the Ministry of External Affairs, who assist the ministry with matters relating to investment arbitration, they are recruited by the specialised government body, Union Public Services Commission.<sup>[24]</sup> The Parliamentary Report (2021) specifically notes that India requires capacity building and training for internal resources.

## Practicalities of enforcing an investment treaty claim against this country

- 17 Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)? Please identify any legislation implementing the Washington Convention.

#### Washington Convention implementing legislation

India has not signed the Washington Convention.

- 18 Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention)? Please identify any legislation implementing the New York Convention.

#### New York Convention implementing legislation

India is a party to the New York Convention, having it on 10 June 1958 and ratified it on 13 July 1960. India implements New York Convention through a domestic legislation. Chapter I in Part II of the Indian Arbitration and Conciliation Act, 1996 (Arbitration Act) sets out the conditions for the enforcement of awards passed under the New York Convention.

However, India made two reservations to the New York Convention under article 1:

- India will enforce awards made in the territory of only those contracting states that have been notified as a reciprocal territory by the Indian government. As of now, India has notified 48 out of 164 contracting states; and
- India will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

- 19 Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?

#### Legislation governing non-ICSID arbitrations

Part I of the Arbitration Act governs arbitrations seated within India.

20 Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state?

<p>Compliance with adverse awards</p>	<p>There is no uniformity in India’s approach with respect to compliance with adverse investment treaty awards. While there are reports that it voluntarily complied with the award obtained by <i>White Industries</i> (on 30 November 2011), the recent awards obtained against have been subject of additional proceedings by investors to enforce the awards. For example, <i>Cairn Energy</i> has had to commence enforcement proceedings in various jurisdictions, including Canada, France, the Netherlands and the US, which eventually led to a settlement with the Indian government.</p> <p>India is also resisting payment under the awards obtained by <i>Vodafone International Holdings BV</i>, <i>Deutsche Telekom</i> and <i>Devas (Mauritius) Ltd</i>. In <i>Vodafone’s</i> case, India is challenging the award on the ground that the imposition of a retrospective tax is within the sovereign power of a state. In <i>Devas</i>, Indian has alleged that the award was obtained because of fraud and/or corruption, which is a recognised ground for setting aside an award in jurisdictions such as Singapore.</p> <p>Last, India has also settled the investment arbitration cases commenced by investors such as <i>Nissan</i>, <i>Bechtel</i> and <i>ABN Amro</i>, which shows some disposition in arriving at a settlement instead of fighting every case commenced against it.</p>
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21 Describe the national government’s attitude towards investment treaty arbitration

<p>Attitude of government towards investment treaty arbitration</p>	<p>India’s has been more cautious in its approach to BITs after the <i>White Industries</i> award led to opening of floodgates of BIT proceedings against it. Consequently, it adopted its Model BIT in 2016, which watered down investment protection provisions (as described in response 1). India has terminated 76 out of the 83 BITs since 2016 and is currently renegotiating with 37 nations/blocks. Only 10 older BITs are currently in force, of which with two countries (Bangladesh and Colombia), India has issued JISs with provisions to restrict an arbitral tribunal’s discretion to broadly interpret provisions.</p> <p>Between 2016 and 2022, only four new BITs have been signed. The recent Parliamentary Report (2021) provides insight into the government of India’s attempts to expedite these renegotiations ‘... especially in priority/core sectors particularly with the countries with whom there were such treaties in the past should be encouraged while keeping in mind the need for balancing investment protection of foreign investors in the country and Indian investors abroad with India’s regulatory power without compromising our national interests and priorities. ...’</p>
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## 22 To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards?

### Attitude of local courts towards investment treaty arbitration

While there have been no cases relating to enforcement of an investment treaty award, there have been three prominent cases where the Indian courts have dealt with anti-arbitration injunctions sought by India against the investors. Overall, the approach of Indian courts has been supportive of investment treaty arbitration as explained below:

- 1 *Board Trustees of the Port of Kolkata v Louis Dreyfus Armatures SAS*, Calcutta High Court, 2014: Anti-arbitration injunction was granted to refrain from proceeding with arbitration against subsidiary governmental entities such as the Kolkata Port Trust on the ground that under the France–India BIT could only be initiated against the Indian government and not sub-national entities. This decision is reasoned and interprets the BIT. While this decision could have been deferred to the arbitral tribunal, the Indian court considered tests for grant of anti-arbitration injunction and then, granted limited relief.
- 2 *Union of India v Vodafone Group Plc United Kingdom & Anr*, Delhi High Court, 2018: Vodafone initiated arbitral proceedings under the Netherlands BIT and thereafter also gave notice of proceedings under the UK BIT. India sought to injunct the latter proceedings on the ground that the multiplicity of arbitrations would lead to an abuse of process. The Delhi High Court initially passed an order restraining the parties from proceeding under the UK BIT. However, in its final order, the court declined to interfere in the arbitration as its interference would deprive the investors of remedy of ‘foreign forum’. This reflects positive and continues the pro-arbitration approach taken by Indian courts in commercial arbitration cases.
- 3 *Union of India v Khaitan Holdings (Mauritius) Limited & Ors*, Delhi High Court, 29 January 2019: A Mauritian company that held close to 27% of an Indian company invoked the Mauritius BIT due to losses resulting from the cancellation of the company’s telecom licenses. India sought an injunction against arbitral proceedings alleging that it would amount to an abuse of process wherein Indian nationals who controlled the company would effectively benefit under the BIT. The court refused to intervene and did not grant an anti-arbitration injunction.

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## National legislation protecting inward investments

### 23 Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content.

While there is a law for general regulation and promotion of foreign investment under (Indian) Foreign Exchange Management Act, 1999, there exists no law protecting inward foreign investment.

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## National legislation protecting outgoing foreign investment

### 24 Does the country have an investment guarantee scheme or offer political risk insurance that protects local investors when investing abroad? If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections?

India does not have any investment guarantee scheme that offers political risk insurance to local investors investing abroad.



## Awards

25 Please provide a list of any available arbitration awards or cases initiated involving this country's investment treaties.

### Awards

*White Industries Australia Limited v The Republic of India* (Australia BIT), Final Award dated 30 November 2011  
*Deutsche Telekom AG v The Republic of India* (Germany BIT), Interim Award (PCA Case No. 2014-10)  
*Flemingo Duty Free Shop Private Limited v Republic of Poland* (India–Poland BIT), Final Award dated 12 August 2016 (PCA Case No. 2014-11)  
*Louis Dreyfus Armateurs SAS v Republic of India* (India–France BIT), Final Award dated 11 September 2018 (PCA Case No. 2014-26)  
*CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v Republic of India*, Award on Jurisdiction and Merits dated 25 July 2016 and Award on Quantum dated 13 October 2020 (PCA Case No. 2013-09) (Mauritius BIT)  
*Vodafone International Holdings BV v Republic of India (I)* (India–Netherlands BIT), Final Award (Operative Part) dated 25 September 2020 (PCA Case No. 2016-35)  
*Cairn Energy Plc and Cairn UK Holdings Limited v Republic of India* (India–UK BIT), Final Award dated 21 December 2020 (PCA Case No. 2016-07)  
*Maxim Naumchenko, Andrey Poluektov and Tenoch Holdings Limited v Republic of India*, Award dated 1 July 2019 (PCA Case No. 2013-23) (India–Cyprus BIT, India–Russia BIT)  
*Naveen Aggarwal, Neete Gupta, and Usha Industries, In. v Bosnia and Herzegovina*, Award dated 2020 (PCA Case No. 2018-03) (India–Bosnia and Herzegovina BIT)  
*Khadamat Integrated Solutions Private Limited (India) v The Kingdom of Saudi Arabia*, Award dated 7 February 2020 (PCA Case No. 2019-24) (India–Saudi Arabia BIT)  
*Indian Metals & Ferro Alloys Ltd v Republic of Indonesia*, Award dated 29 March 2019 (PCA Case No. 2015-40) (India–Indonesia BIT)  
*Tenoch Holdings Limited & Ors. v Government of India*, Award rendered in India's favour in January 2020 (India–Russia BIT and India–Cyprus BIT)  
*Astro All Asia Networks Limited & Others v Government of India*, Consent Award dated 8 October 2018 (UK–India BIT and India–Mauritius BIT)  
*Simplex Projects Ltd v Libya*, Termination Order dated 23 July 2021 (India–Libya BIT)  
*Carissa Investments LLC*, Withdrawn (India–Mauritius BIT)  
*Gokul Das Binani and Madhu Binani v. the Republic of North Macedonia*, Discontinued (India–North Macedonia BIT) (PCA Case No. 2018-38)

### Settled arbitration claims

*Nissan Motor Co Ltd v Republic of India*, May 2020 (India–Japan CEPA) (PCA Case No. 2017-37)  
*Nokia v Republic of India*, Double Taxation Avoidance Agreement (India–Finland BIT)  
*ABN Amro N.V. v the Republic of India* (India–Netherlands BIT)  
*ANZEF Ltd. v the Republic of India* (India–UK BIT)  
*BNP Paribas v the Republic of India* (India–France BIT)  
*Credit Lyonnais S.A. (now Calyon S.A.) v the Republic of India* (India–France BIT)  
*Credit Suisse First Boston v the Republic of India* (India–Switzerland BIT)  
*Erste Bank Der Oesterreichischen Sparkassen AG v Republic of India* (India–Austria BIT)  
*Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power Investments B.V. v Republic of India* (India–Netherlands BIT)  
*Standard Chartered Bank v the Republic of India* (India–UK BIT)  
*Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v The Government of India* (India–Mauritius BIT)  
*Ashok Sancheti v Germany* (India–Germany BIT)<sup>[25]</sup>

### Pending proceedings

#### As respondent

*The Vedanta Resources v Republic of India* (PCA Case No. 2016-05) (India–UK BIT).  
*Khaitan Holdings (Mauritius) the Limited v Republic of India* (PCA Case No. 2018-50) (India–Mauritius BIT)  
*Strategic Infrasoil Foodstuff LLC and The Joint Venture of Thakur Family Trust, UAE with Ace Hospitality Management DMCC, UAE v Republic of India* (India–UAE BIT)  
*Vodafone Group Plc and Vodafone Consolidated Holdings Limited v Republic of India (II)* (India–UK BIT)  
*Ras-Al-Khaimah Investment Authority v India* (India–UAE BIT)  
*Korean Western Power Co v The Republic of India* (PCA Case No. 2020-06) (India–Korea CEPA)  
*The Children's Investment Fund Management (UK) LLP v Republic of India* (India–UK BIT and India–Cyprus BIT)  
*Sistema Joint Stock Financial Corporation v Republic of India* (India–Russia BIT).  
*Axiata Group v Republic of India* (India–Mauritius BIT)  
*GPC Mauritius IX LLC v Republic of India* (PCA Case No. 2020-36) (India–Mauritius BIT)  
*Maxis Communications Berhad and Global Communications Services Holdings Limited* (India–Malaysia BIT and India–Mauritius BIT)  
*Earlyguard Ltd v Republic of India* (India–UK BIT)

#### As claimant

*Patel Engineering Limited v Republic of Mozambique* (India–Mozambique BIT).

## Awards

New notices/letters received which has not proceeded to arbitration<sup>[26]</sup>

*Cc/Devas (Mauritius) Ltd, v Republic of India (III)*, (India-Mauritius BIPA).  
*GETI AG & LA Financieri Finvestia KB (Two Notices) v Republic of India* (India –Germany BIT) and (India-Sweden BIT)  
*KeyTrade AG v Republic of India* (India –Switzerland BIPA)  
*Vodafone Group Plc. & Vodafone consolidated Holdings Limited v The Republic of India* (India-UK BIPA)  
*Astro All Asia Network Ltd & others v Republic of India* (India-Malaysia BIPA)  
*Jaldhi Overseas Pte Ltd v Republic of India* (India-Singapore CECA)  
*Thakur Family Trust v Republic of India* (India-UAE BIPA)  
*Essar Power Holdings v Republic of India* (India-Mauritius BIPA)

Non-active disputes that have not proceeded to arbitration<sup>[27]</sup>

*Mascarenhas Family v Republic of India* (India-Portugal BIPA)  
*Federal Agency for the State Property Management of the Russian Federation v Republic of India* (India-Russia BIPA)  
*M/s Chaucer Capital Limited v Republic of India* (India-UK BIPA)  
*Axiata Investment Ltd & Axiata Investment 2 Ltd. Mauritius v Republic of India* (India-Mauritius BIPA)  
*Sistema Joint Stock Financial Corporation v Republic of India* (India-Russia BIPA)  
*Telenor Asia Private Limited v Republic of India* (India-Singapore CECA)  
*The Children Investment Fund v Republic of India* (India-UK BIPA)  
*PLUS BKSP Mauritius Ltd v Republic of India* (India-Mauritius BIPA)

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## Reading List

26 Please provide a list of any articles or books that discuss this country's investment treaties.

## Article/book

Nish Shetty and Weeramanthy Romesh. "India's New Approach to Investment Treaties" *Asian Disp. Rev.* 18 (2016): 189  
 Ranjan, Prabhaskar; Singh, Harsha Vardhana; James, Kevin; Singh, Ramandeep, *India's Model Bilateral Investment Treaty: Is India Too Risk Averse?*  
 Brookings India Impact Series No. 082018. August 2018  
 Aniruddha Rajput, *Protection of Foreign Investment in India and Investment Treaty Arbitration*, Wolters Kluwer, 2018  
 Lim, Ho and Paparinskis, *International Investment Law and Arbitration* (Cambridge University Press, 2018)  
 Prabhaskar Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash*, Oxford University Press, 2019  
 Ranjan, Prabhaskar and Anand, Pushkar, *Indian Courts and Bilateral Investment Treaty Arbitration* (February 21, 2020). *4 Indian Law Review* 2020  
 Ministry of External Affairs, *Parliamentary Committee Report on External Affairs*, 10<sup>th</sup> Report (September 2021)  
 Model Indian Bilateral Investment Treaty, 2016

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## Notes

- [1] *Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v. The Government of India; Standard Chartered Bank v. Republic of India; Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power Investments B.V. v. Republic of India; Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India; Credit Suisse First Boston v. Republic of India; Credit Lyonnais S.A. (now Calyon S.A.) v. Republic of India; BNP Paribas v. Republic of India, UNCITRAL; ANZEF Ltd. v. Republic of India; and ABN Amro N.V. v. Republic of India* (BITs with Mauritius, Netherlands, France, Austria, Switzerland and the UK), UNCITRAL arbitration initiated in 2003/04 regarding claims arising out of respondent's alleged failure to protect claimants' investment in the Dabhol power plant project in India, which resulted in significant losses to the claimants' financing of the failed project (*Dhabhol*).
- [2] UNCITRAL arbitration under the India-Australia BIT, Final Award, 30 November 2011 (*White Industries*).
- [3] The list of ongoing cases against India is provided in response to question 25.
- [4] Parliamentary Committee Report on External Affairs, Ministry of External Affairs, 10<sup>th</sup> Report, September 2021 (*Parliamentary Report*), page 1.
- [5] Strictly speaking, the Brazil-India BIT makes a slight departure from the Model BIT in several aspects. For example, on absence of investor-state dispute settlement (ISDS) mechanism and exclusion of indirect expropriation.
- [6] The India-Taiwan BIT in force is an atypical BIT – it is not an agreement between two countries but between the cultural centre in India and the city of Taipei. It is formally known as the 'Bilateral Investment Agreement between India Taipei Association in Taipei and The Taipei Economic and Cultural Centre in India'.
- [7] The termination notice was issued by India, but could not be conveyed due to the lack of a credible institutional counterpart. This BIT is considered to be in force by the government of India (*Parliamentary Report*, page 13).
- [8] The scope of the MFN clause is limited to treatment with respect to compensation, transfers, management, use, enjoyment or disposal of the investments.

- [9] The BIT only covers direct expropriation which occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
- [10] Argentina, Armenia, Australia, Austria, Bahrain, Belarus, Belgium, Bosnia & Herzegovina, Brunei Darussalam, Bulgaria, China, Croatia, Cyprus, Czech, Republic, Democratic Republic of Congo, Denmark, Djibouti, Egypt, Ethiopia, Finland, France, Germany, Ghana, Greece, Hungary, Iceland, Indonesia, Israel, Italy, Jordan, Kazakhstan, Kuwait, Kyrgyz Republic, Lao People’s Democratic Republic, Latvia, Macedonia, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Nepal, Netherlands, Oman, Poland, Portugal, Qatar, Romania, Russian Federation, Saudi Arabia, Serbia, Seychelles, Slovak Republic, Slovenia, South Korea, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Taiwan, Tajikistan, Thailand, Trinidad and Tobago, Turkey, Turkmenistan, Ukraine, United Kingdom, Uruguay, Uzbekistan, Vietnam, Yemen, Zimbabwe.
- [11] This is a limited protection clause for MFN treatment regarding ‘compensation, transfers, management, use, enjoyment or disposal’ of investor’s investments.
- [12] The reference to BITs with Bangladesh and Colombia includes the JIS issued between India and the respective country, unless specifically specified otherwise.
- [13] ICSID Case No. ARB/00/4.
- [14] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2.
- [15] *Vodafone International Holdings BV v Republic of India (I)* [India–Netherlands BIT], Final Award (Operative Part) dated 25 September 2020 (PCA Case No. 2016-35).
- [16] *Cairn Energy Plc and Cairn UK Holdings Limited v Republic of India* [India–UK BIT], Final Award dated 21 December 2020 (PCA Case No. 2016-07).
- [17] Lim, Ho and Paparinskis, *International Investment Law and Arbitration* (Cambridge University Press, 2018), *The Panevezys-Saldutiskis Railway Case* [Estonia v Lithuania][1939] PCIJ [ser A/B] No 76 at 22; *Interhandel Case* [Switzerland v United States of America], Preliminary Objections [1959] ICJ 6 at 27; *RosInvestCo UK Ltd v The Russian Federation*, SCC Case NoV079/2005, Award on Jurisdiction, 1 October 2007 at [153]; Chittharanjan Felix Amerasinghe, *Local Remedies International Law* (Cambridge University Press, 2nd ed, 2004) at p 294.
- [18] Parliamentary Report [2021], pages 5, 6, 7 & 11.
- [19] Parliamentary Report [2021], page 9.
- [20] Available at <https://dea.gov.in/divisionbranch/investment-division> last accessed on 13 June 2022.
- [21] Available at <https://dea.gov.in/divisionbranch/investment-division> last accessed on 13 June 2022.
- [22] Parliamentary Report [2021], page 20.
- [23] Available at <https://www.livemint.com/Politics/UD26JNKvEZiLEQ4vKToXrK/Finance-ministry-shortlists-global-law-firms-to-represent-In.html> last accessed on 13 June 2022.
- [24] Parliamentary Report [2021], page 59.
- [25] This information has been obtained from [https://jusmundi.com/en/document/other/en-ashok-sancheti-v-united-kingdom-termination-order-saturday-25th-july-2009#other\\_document\\_8188](https://jusmundi.com/en/document/other/en-ashok-sancheti-v-united-kingdom-termination-order-saturday-25th-july-2009#other_document_8188) last accessed on 20 July 2022.
- [26] Parliamentary Report [2021], page 16.
- [27] Parliamentary Report [2021], pages 16 to 17.



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Sanjeev Kapoor is a partner in the dispute resolution team of Khaitan & Co. Sanjeev, through a rich and diverse practice of over 24 years, has gained invaluable experience in diverse areas of law including constitutional law, general trade and commercial laws, laws relating to environment, mining, energy and infrastructure, foreign exchange laws etc. Sanjeev is also a registered Advocate on Record with the Supreme Court of India. He is the Vice President of ICC International Court of Arbitration.

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