GAR INVESTMENT TREATY ARBITRATION

India

Kamal Shah and Daniel Boon
Stephenson Harwood LLP

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Contents

Practicalities of enforcing an investment treaty claim against this country

National legislation protecting inward investments

National legislation protecting outgoing foreign investment

Awards

Reading List

Overview of investment treaty programme

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

According to data available on the UNCTAD Investment Policy Hub, India has terminated approximately 69 BITs since 2017, the most recent being the India–Bahrain BIT (on 23 March 2021). Investments that were made before the termination of these BITs will be protected for some years under the sunset clauses in the respective BITs. This trend was likely a reaction to the increased number of investor claims brought against India in recent years. Notably, the 'new generation' India BITs (such as the India–Belarus, India–Brazil and India–Kyrgyzstan BITs) are based on India's new Model BIT published in December 2015 (the Model BIT). The first treaty to be based on the Model BIT is the India–Cambodia BIT, which, at the time of writing, has not yet been signed (albeit receiving approval from the Indian Union Cabinet in 2016).

(a) BITs/MITs

BIT contracting party or MIT	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	6 months	Yes	Yes
Belarus, 5 March 2020	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Brazil (not in force)	No	Yes	No	No	No	(no, see Note 1)	No	Yes
Colombia, 2 July 2012	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Kyrgyzstan (not in force)	No	Yes	Yes	No	No	6 months	Yes	Yes
Latvia, 27 November 2010	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Libyan Arab Jamahiriya, 25 March 2009	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Lithuania, 1 December 2011	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Philippines, 29 January 2001	Yes	Yes	No	Yes	No	6 Months	Yes	Yes
Senegal, 17 October 2009	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Sudan, 18 October 2010	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Taiwan, 14 February 2019 (see Note 2)	No	Yes	Yes	Yes	No	6 Months	Yes	Yes
United Arab Emirates, 21 August 2014	Yes	Yes	Yes	Yes	No	6 Months	Yes	Yes

Note 1: The India–Brazil BIT requires disputing parties to first engage in a confidential Dispute Prevention Procedure before they are permitted to submit the dispute to arbitration. This procedure includes the potential claimant submitting a written request to a Joint Committee of Indian and Brazilian government representatives. The Joint Committee must meet within 90 days of receiving a written request, and must issue a report setting out findings on the alleged breach within 120 days of meeting. The parties can only proceed to arbitration if the dispute does not settle after the Joint Committee report is issued, or if the other party does not participate in this procedure.

Note 2: Strictly speaking, the India–Taiwan BIT is not a bilateral investment treaty between two countries but is, instead, an agreement between 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.

FTAs/EPAs	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
Asia-Pacific Trade Agreement (APTA), 17 June 1975	No	No	No	Yes	No	No	No	No
Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), 7 September 2004	No	No	No	No	No	No	No	No
Chile (Framework Agreement to Promote Economic Cooperation between The Republic of Chile and The Republic of India), 11 September 2007	No	No	No	No	No	No	No	No
European Community (Cooperation Agreement between the European Community and the Republic of India on partnership and development) (1 August 1994)	No	No	No	Yes	No	No	No	No
Gulf Cooperation Council (Framework Agreement on Economic Cooperation Agreement between the Gulf Cooperation Council (GCC) and India (not in force)	No	No	No	No	No	No	No	No
India–Afghanistan Preferential Trading Agreement, 13 May 2003	Yes	No	No	No	No	No	No	Yes
India–ASEAN Agreement on Investment, 1 July 2015	Yes	Yes	Yes	No	No	180 days	Yes	Yes
India–Bhutan Agreement on Trade, Commerce and Transit, 29 July 2006	No	No	No	No	No	No	No	No
Indo-Nepal Treaty of Trade, 27 November 2009	No	No	No	Yes, but restricted	No	No	No	No
Japan (Comprehensive Economic Partnership Agreement between Japan and the Republic of India), 1 August 2011	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes

FTAs/EPAs	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
Korea (Comprehensive Economic Partnership Agreement between the Republic of India and the Republic of Korea), 1 January 2010	Yes	Yes	Yes	No	No	6 months	Yes	Yes
Malaysia (Comprehensive Economic Cooperation Agreement between the Government of Malaysia and the Government of the Republic of India) (1 July 2011)	Yes	Yes	Yes	No	No	6 months	Yes	Yes
MERCOSUR (Framework Agreement between the MERCOSUR and the Republic of India) (1 June 2009)	No	No	No	No	No	No	No	No
SAFTA (Agreement on South Asian Free Trade Area) (1 January 2006)	No	No	No	No (see Note 3)	No	Up to 60 days	No	No
SAPTA (Agreement on SAARC Preferential Trading Arrangement) (7 December 1995)	No	No	No	No	No	No	No	No
Singapore (Comprehensive Economic Cooperation Agreement between The Republic of Singapore and The Republic of India) (1 August 2005)	No	Yes	No	No	No	6 months	Yes	Yes
Sri Lanka (Free Trade Agreement between The Republic of India and Democratic Socialist Republic of Sri Lanka) (15 December 2001)	Yes	No	Yes	No	No	6 Months	No	Yes
Thailand (Framework Agreement for Establishing Free Trade Area between the Republic of India and the Kingdom of Thailand) (not in force)	No	No	No	No	No	No	No	No
Note 3: SAFTA contains a qualified MFN provision in favour of Maldives, whereby Maldives benefits from MFN if the least developed contracting states have the most favourable treatment (either in general or in relation to specific areas).								

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 investor	While most Indian investment treaties define 'investor' as any national or juridical person/company of a country that is party to the relevant treaty (a 'contracting party'), the India–UAE BIT includes 'government of a Contracting State' in the definition of an investor. It is notable that the March 2015 version of the Model BIT contained a range of provisions based on other templates. However, many of the more noteworthy and progressive 'investor-friendly' provisions in that draft were either removed from or diluted in the Model BIT.
Seat of the investor / place of business	While most Indian investment treaties provide that a juridical person incorporated or duly organised according to the laws of a contracting party is an 'investor', the India-Korea CEPA requires that such entities have their 'registered office' or 'seat' within the territory of a contracting party. Certain treaties (eg, India–Colombia BIT and India–Lithuania BIT) require that such entities should carry on substantive business activities or operations within the territory of the contracting party where they are incorporated. The India–Philippines BIT applies this precondition to investors from Philippines but not to those from India. This requirement is likely to prevent treaty shopping. The Singapore–India CECA excludes an investor that has negligible or nil operations or with no real or continuous business activities within the territory of the contracting party.
Branches and representative offices	The 'new generation' Indian BITs all expressly exclude branches and representative offices from protection (ie, India–Brazil, India–Belarus and India–Kyrgyzstan BITs).
Permanent residents	The concept of permanent residency does not exist in India. While most of the Indian investment treaties define the term 'investor' to include and only protect its nationals, the India–ASEAN Agreement on Investment also affords protection to permanent residents. Protection under the Malaysia–India CECA is not given to Indian citizens who are permanent residents of Malaysia.
Dual nationals	India does not permit its nationals to hold dual nationality.

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"
Indirect control of assets	Three Indian investment treaties (India–Sudan BIT, India–Korea CEPA and India–Malaysia CECA) expressly include assets controlled indirectly by a protected investor in the definition of 'investment'.
Assets that qualify for protection and 'characteristics of an investment'	Indian investment treaties have traditionally defined 'investment' to include 'every kind of asset owned or controlled' by a national. However, in a recasting of its investment treaty regime, the Model BIT India sought to narrow the meaning of a qualifying 'investment'. Instead of the broader asset-based approach, the Model BIT adopts the enterprise-based approach set out in *Salini Costruttori S.p.A and Italstrade S.p.A v. Morocco*. At article 1.4, the Model BIT requires that enterprises must possess characteristics to qualify as an investment, such as a 'certain duration' of existence (without specifying what that may be) or having 'significance for development of the party in whose territory the investment is made' (without specifying benchmarks against which the 'significance' of contribution is measured). It also stipulates that investments must be 'constituted, organised and operated in good faith'. The precise scope of this shift remains to be seen, but the ambiguity may well provide grounds for inconsistent and arbitrary interpretation of this provision by tribunals. In practice, the requirement that investments have 'characteristics of an investment' appears to be left relatively broad, but has been expressed to include 'commitment of capital', the 'objective of establishing a lasting interest', 'expectation of gain or profit', and 'assumption of risk' (India–Brazil BIT). In addition, the India–Belarus and India–Kyrgyzstan BITs also consider 'contribution to the development' of the host state as a characteristic. It is unclear whether these characteristics have to be met by the enterprise or also by its assets. Given that these 'new generation' Indian BITs have only recently been signed or came into force, we are not aware of any disputes concerning the interpretation of 'characteristics of an investment'. However, we anticipate this requirement to be an area to watch for future disputes. It is notable that the India–Taiwan BIT expressly includes indirect investments that are owned or controlled in good faith by an investor of the other contracting party in accordance with the law of the territory in which the investment is made. Four investment treaties (India–ASEAN Agreement on Investment, India–Korea CEPA, India–Malaysia CECA and India–Singapore CECA) expressly include reinvested returns in the definition of 'investment'.
Indirect control of assets	Three Indian investment treaties (India–Sudan BIT, India–Korea CEPA and India–Malaysia CECA) expressly include assets controlled indirectly by a protected investor in the definition of 'investment'.

Issue	Distinguishing features in relation to the concept of "investment"
Exclusion of certain assets	Some Indian investment treaties exclude from the definition of 'investment' certain types of assets such as loans and money claims (eg, India–Colombia BIT and India–ASEAN Agreement on Investment). About half of the Indian BITs also exclude portfolio investments from the definition of investments. The Model BIT seeks to limit protection by explicitly excluding certain classes of investment such as brand value, goodwill, portfolio investments and debt securities issued by the government. Importantly for commercial parties and funders, it also excludes order or judgment sought or entered in any judicial, administrative or arbitral proceeding from the definition of investment. This has been reflected in the India–Brazil BIT.
Commencement of treaty protection	Almost all Indian investment treaties protect all existing investments regardless of whether or not they were made before the date on which the treaty enters into force. The India–Bangladesh BIT is one of the exceptions whereby only investments made after 1 January 1980 are protected. Some investment treaties expressly provide that they do not apply to any disputes that arose or any claims settled prior to the treaty's entry into force (eg, the Colombia, Latvia, Lithuania, Senegal, Serbia and Syria BITs, India–ASEAN Agreement on Investment, India–Korea CEPA and India–Malaysia CECA). Protections under the India–Belarus, India–Brazil and India–Kyrgyzstan BITs do not extend to pre-investment activities related to the establishment, acquisition or expansion of an investment or any law or measure governing such activities. Similarly, events prior to the treaties' entry into force are not protected. This approach reflects the Model BIT.
Admission/approval of investment	Most of the Indian investment treaties expressly require investments to have been 'admitted' or 'accepted' by a contracting party subject to that contracting party's laws. The India–ASEAN Agreement on Investment expressly provides that a contracting party may take reservations to exclude admission of portfolio investments.

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 and/or "most favoured nation" standard
Common exceptions to MFN treatment	The 'old generation' Indian BITs (eg, India-Bahrain, India–Bangladesh, India–Colombia, India–Sudan and India–UAE BITs) expressly provide that the provision for 'most favoured nation' and/or 'national treatment' 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 Model BIT has retained the national treatment standard at article 4, albeit with certain limitations (see below). Notably however, the Model BIT completely excludes the usual MFN clause. This has been put into practice, as indicated by the India–Brazil, India–Belarus and India–Kyrgyzstan BITs. This shift is likely to be a reaction to the ruling against the government in *White Industries v Republic of India*, to prevent 'treaty shopping'. The absence of the MFN clause tilts the balance in favour of the host state's interests, and undermines protection for foreign investors.
Scope of the MFN clause	The MFN clause contained in many BITs applies to 'investments', 'investors' and 'return on investment' (eg, India–Bangladesh, India–Latvia, India–Libya, India–Lithuania, India–Sudan and India–Syria BITs). Some treaties provide the MFN treatment to investments and further extends the scope of treatment to management, maintenance, use, enjoyment, sale or disposition of investments (eg, India–Bahrain and India–Colombia BITs), while others, such as the India–Senegal BIT, extend the scope of treatment to the management, use, enjoyment or disposal of the qualifying investments.
Limitation on national treatment	In some investment treaties, the obligation to provide national treatment of investments is subject to the host state's laws, regulations and investment policies (eg, India–Syria BIT). An earlier draft of the Model BIT was criticised for excluding the actions of state governments from the ambit of national treatment. In light of the fact that state governments of each Indian state are granted wide powers under the Constitution of India to take actions independent of the central government, an exclusion of this nature would have the effect of undermining investor confidence. This exclusion did not eventually find its way into the Model BIT and the actions of state governments are included. If anything, some of the Indian investment treaties based on the Model BIT expressly include the actions of governments of the Indian states within the national treatment standard (eg, India–Belarus and India–Kyrgyzstan BITs).

Issue	Distinguishing features of the fair and equitable treatment standard and/or "most favoured nation" standard
National treatment only	Most 'old generation' Indian BITs contain both the Most Favoured Nation and National Treatment standards. As highlighted above, the Model BIT excludes the MFN clause, and all the 'new generation' Indian BITs exclude the MFN clause (ie, India–Brazil, India–Belarus and India–Kyrgyzstan BITs). Similarly, most of the Indian free trade agreements and economic partnership agreements only include national treatment protection and not MFN treatment. However, notable exceptions include the Asia Pacific Trade Agreement, Cooperation Agreement between the European Community and India, and India–Japan CEPA

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
Right to regulate for a public purpose	Most of the Indian investment treaties provide for protection against expropriation without fair and equitable compensation and allow expropriation for a public purpose on a non-discriminatory basis. The Model BIT, and the India-Brazil, India–Belarus and India–Kyrgyzstan BITs, exclude non-discriminatory measures, and measures or awards by judicial bodies concerning the protection of legitimate public interest or public purpose objectives such as public health, safety and the environment, from the ambit of expropriation. Singh (2021) noted that this broad provision could be abused by host states by 'camouflaging all regulatory measures as measures aimed at pursuing some public welfare objectives'.
Indirect expropriation	The India–Colombia BIT and three investment agreements (ie, the India–Korea CEPA, India–Malaysia CECA and India–Japan CEPA) expressly refer to protection against indirect expropriation. This approach has carried over to some of the 'new generation' Indian BITs, where the India-Belarus and India–Kyrgyzstan BITs reflect the Model BIT, which expressly covers both direct or indirect expropriation. Further, these two BITs expressly define indirect expropriation by reference to the deprivation of the 'fundamental attributes of property' in the investment. It is unclear what these attributes are, given that different legal systems may have vastly different legal foundations of property and ownership. Interestingly, the India–Brazil BIT expressly excludes indirect expropriation from protection. This is likely to be a rare occurrence for Indian investment treaties, since the Model BIT expressly provides for such protection. This position is likely a result of Brazil's bargaining position; Brazil's Model BIT specifically excludes protection from indirect expropriation. While the scope of most Indian investment treaties in relation to expropriatory measures cover direct and indirect expropriation as well as actions having effect equivalent to expropriation, there are some notable exceptions. For example, the India–Brazil BIT (signed on 25 January 2020 but not yet in force) expressly excludes indirect expropriation from protection. This is likely to be a rare occurrence for BITs with India, since the Model BIT expressly provides for such protection. This position is likely a result of Brazil's bargaining position; Brazil's Model BIT specifically excludes protection from indirect expropriation.
Limited right to arbitration	Most of the 'old generation' Indian BITs (eg, India–Bahrain, India–Latvia, India–UAE BITs) do not provide for a limited right to arbitration. Instead, they provide the investors with a right to review by judicial authority or other adjudication by independent authorities in accordance with the principles set out for its evaluation.
Expropriation in accordance with the 'due process of law'	Five Indian investment treaties require that expropriation can only legitimately occur with the 'due process of law' (ie, the India–ASEAN Agreement on Investment, India–Japan CEPA, India–Korea CEPA, India–Malaysia CECA and India–Singapore CECA). Some Indian investment treaties use slightly different language and require that any expropriation of an investment must occur in accordance with law (eg, India–Bahrain, India–Bangladesh, India–Colombia, India–Latvia, India–Libya, India–Lithuania, India–Senegal, India–Serbia and India–Sudan BITs).
Taxation and expropriation	In what can be seen as a response to recent claims brought by Vodafone and Cairn Energy against retrospective application of taxation law, the Model BIT expressly keeps taxation measures outside the purview of treaty protection. Article 2.4(ii) of the Model BIT provides that the treaty shall not apply to taxation laws and measures, including measures to enforce taxation obligations, and further, that 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'. Given that taxation is recognised by international law as part of the state's public powers, the exclusion may well give the state absolute and unfettered power to amend and frame taxation laws even if, in certain situations, it may be seen as an alleged abuse of taxation powers that may amount to expropriation. India also sought to negotiate this issue with 25 other countries with which the investment agreements were still within their respective initial durations.

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
Common exceptions to MFN treatment	All Indian investment treaties expressly provide that the provision for 'most favoured nation' and/or 'national treatment' 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 Model BIT has retained the national treatment standard at article 4, albeit with certain limitations (see below). Notably, however, the Model BIT completely excludes the usual MFN clause. This is likely to be a reaction to the ruling against the government in *White Industries v Republic of India*, to prevent 'treaty shopping'. The absence of the MFN clause tilts the balance in favour of the host state's interests, and undermines protection for foreign investors.
Scope of the MFN clause	The MFN clause contained in many BITs applies to 'investments', 'investors' and 'return on investment' (eg, the Bangladesh, Latvia, Libya, Lithuania, Sudan and Syria BITs). Some treaties provide the MFN treatment to investments and further extends the scope of treatment to management, maintenance, use, enjoyment, sale or disposition of investments (eg, the India–Bahrain BIT and India–Colombia BIT), while others, such as the India–Senegal BIT, extend the scope of treatment to the management, use, enjoyment or disposal of the qualifying investments.
Limitation on national treatment	An earlier draft of the Model BIT was criticised for excluding the actions of state governments from the ambit of national treatment. In light of the fact that state governments of each Indian state are granted wide powers under the Constitution of India to take actions independent of the central government, an exclusion of this nature would have the effect of undermining investor confidence. This exclusion did not eventually find its way into the Model BIT and the actions of state governments are included. In some investment treaties, the obligation to provide national treatment of investments is subject to the host State's laws, regulations and investment policies (eg, the India–Syria BIT).
National treatment only	Most Indian bilateral investment treaties contain both the treatments (ie, the Most Favoured Nation and National Treatment). As highlighted above, the Model BIT excludes the MFN clause. However, most of the Indian free trade agreements and economic partnership agreements only include national treatment protection and not MFN treatment. Notable exceptions include the Asia Pacific Trade Agreement and India–Japan CEPA.

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
Scope	The formulation of this standard varies amongst the Indian investment treaties. Seven investment treaties provide for Full Protection and Security (FPS) (ie, India–Colombia BIT, India–Lithuania BIT, India-Senegal BIT, India–ASEAN Agreement on Investment, India–Japan CEPA, India–Korea CEPA and India–Malaysia CECA). The India–Latvia BIT provides only for 'Protection and security', while the India–Syria BIT provides for 'adequate protection and security', but these variations are unlikely to detract from the standard of protection afforded. The India–Serbia BIT offers a unique clause of 'full legal protection and security'. This may be superfluous, as several tribunals have recognised that the 'usual' formulation of FPS extends beyond physical protection to include legal protection (eg, *CME Czech Republic B.V. v Czech Republic*; *Ceskoslovenska Obchodni Banka, A.S. v Slovakia*; *Siemens A.G. v Argentina*). Three investment treaties provide for reciprocal protection in its preamble (ie, India–Bahrain, India–Bangladesh and India–Sudan BITs). However, it is unlikely that an FPS claim can be made out solely on the basis of such language in the preamble of the investment treaties. In addition to 'promotion', the Model BIT includes 'protection' as an objective in its preamble. It provides that foreign investments and investors shall be accorded full protection and security but restricts the FPS obligations to physical security of investors and investments and does not extend to 'any obligation whatsoever'. This was initially excluded from the earlier draft version but was incorporated after the omission was highlighted. The narrower FPS protection stipulated in the Model BIT has been replicated in the India-Belarus and India–Kyrgyzstan BITs. It remains to be seen how tribunals will interpret and apply the narrower FPS protection in these BITs in relation to legal protection.
Customary international law on protection and security	No Indian investment treaty links the FPS protection with customary international law, except the India–ASEAN Agreement on Investment, India–Japan CEPA, India–Korea CEPA and India–Malaysia CECA.

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

Issue	Distinguishing features of any 'umbrella clause'
Scope	All the Indian investment treaties currently in force do not contain an umbrella clause; this position is in line with the Model BIT, which also does not contain one.

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

Issue	Other substantive protections
Free transfer of payments	Most Indian BITs contain a provision that requires the contracting parties to permit investors to transfer investments and investment returns freely. A few, however, consider the possibility of restricting the transfer of funds to obtain compliance from the investor in protection of creditors or to safeguard the balance of payments (eg, article 7.17 of the India–Singapore CECA).
Non-impairment	Some investment treaties impose upon contracting parties an obligation not to impair the management, maintenance, use, enjoyment or disposal of investments (eg, the India–Colombia BIT, India–Latvia BIT, India–ASEAN Agreement on Investment, India–Korea CEPA, Malaysia–India CECA and Singapore–India CECA). The India–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.
Armed conflict/civil unrest	The India–ASEAN Agreement on Investment guarantees investors of contracting parties 'most favoured nation' treatment as regards to compensation paid to other investors of other states in the case of armed conflict or civil unrest.
Transparency	The Framework Agreement for Establishing Free Trade Area between the Republic of India and the Kingdom of Thailand seeks to strengthen cooperation in investment, facilitate investment and improve transparency of investment rules and regulations. The India–ASEAN Agreement on Investment, India–Japan CEPA and India–Singapore CECA provide for the state to 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.

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	Most of the Indian BITs, the Framework Agreement for Establishing Free Trade Area between the Republic of India and the Kingdom of Thailand, the BIMSTEC Framework Agreement, the SAFTA Agreement, India–Korea CEPA and India–Singapore CECA provide 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 of national treasures; or relating to the conservation of natural resources.
Tax carve-out	Notably, three significant cases have been brought against India in relation to retrospective taxation legislation: *Vodafone International Holdings BV v Republic of India (I)*; *Cairn Energy Plc and Cairn UK Holdings Limited v Republic of India* and *Vedanta Resources v Republic of India*. In both the *Vodafone* and *Cairn* cases, the tribunals found that India had breached the Fair and Equitable Treatment standard due to the taxation legislation. It is therefore unsurprising that the Model BIT contains a tax carve-out. This tax carve-out is reproduced in the India–Brazil BIT, India–Belarus BIT and India–Kyrgyzstan BIT. Additionally, some of the 'old generation' Indian BITs, such as the India–Colombia and India–UAE BITs, also contain a tax carve-out. Given that tax allegations are often the subject of Fair and Equitable treatment or Expropriation claims, it remains to be seen how the tax carve-outs will be treated by tribunals. This is exacerbated by the fact that taxation is recognised by international law as part of the state's public powers. Consequently, the exclusion may well give the state absolute and unfettered power to amend and frame taxation laws even if, in certain situations, it may be seen as an alleged abuse of taxation powers that may amount to expropriation.
Subsidies or grants to vulnerable groups	Interestingly, the India-Brazil BIT permits the host state to adopt 'affirmative action measures' and grant subsidies to 'vulnerable groups'. It is unclear what such groups are.

Issue	Other substantive protections
Denial of benefits	The India–Colombia BIT contains a 'denial of benefits' clause, under which treaty protection can be denied to investors and/or investments controlled by an investor that does not have substantial business activities in either contracting states. This is a narrower clause than that found in the Model BIT, which permits denial of benefits where the investment or investor is controlled by persons of a non-party, or if the investment and/or investor was established for the purpose of treaty-shopping. The broader 'denial of benefits' clause in the Model BIT has been replicated in the India–Belarus and India–Kyrgyzstan BITs.
Environment	The India–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'. The India–Belarus, India–Colombia and India–Kyrgyzstan 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. The India–UAE BIT contains a non-expropriation related clause that permits the host state to pass measures that hinder or restrict the use or disposal of investments where such measures are 'deemed vital' due to 'environmental concerns'. This appears to be a very broad exception.
Measures by local government	The Model BIT expressly provides that it will not apply to 'any measure by a local government', which is defined to include 'an urban local body, municipal corporation or village level government' (or any enterprise owned or controlled by such local governments). As expected, the India–Brazil, India–Belarus and India–Kyrgyzstan BITs all contain this exception. This is a significant exception for investors in India, where local governments may enjoy a substantial level of autonomy under the country's purported 'quasi-federal' structure. Further, this general exclusion may conflict with the national treatment protection set out in the India–Belarus and India–Kyrgyzstan BITs, insofar as creating a debate as to whether the actions by 'a local government' includes actions by the government of an Indian state (to which the national treatment protection applies).

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	Some of the investment treaties (eg, India-Colombia BIT, India–Latvia BIT, India-Lithuania BIT, India–ASEAN FTA, India-Japan CEPA and India–Korea CEPA) contain a 'fork-in-the-road' provision. This provision requires that the investors elect to either submit a dispute to arbitration or seek remedy before local courts; they cannot do both. However, the Model BIT contains no such provisions, nor do the India–Brazil, India–Belarus and India–Kyrgyzstan BITs.
Exhaustion of local remedies	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 15.4 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. This provision has been adopted in some of the 'new generation' BITs, such as the India-Belarus and India-Kyrgyzstan BITs. However, these BITs also require the investor to commence an action in the domestic courts within a certain period of time from acquiring knowledge of the loss or damage (one year in Kyrgyzstan's case, and two years in Belarus' case). It is unclear whether failure to commence the domestic claim in time would preclude the investor from commencing an action under the BIT altogether – if so, this appears to be unduly harsh.
ICSID	India is not a signatory to the Washington Convention of 1965 (Convention on the Settlement of Investment Disputes between States and Nationals of other States) (the Washington Convention). However, for a dispute to be referred to ICSID, most of the Indian bilateral investment treaties require that both contracting parties should be parties to the Washington Convention. Among the free trade agreements, the India–Korea CEPA, India–Malaysia CECA and India–Singapore CEPA provide a right to recourse to ICSID, if both States are parties to the Washington Convention.

Issue	Procedural rights
Additional facilities of ICSID	Most of the Indian BITs, with one of the exceptions being the India–Philippines BIT, have a provision for the dispute to be referred to Additional Facilities of ICSID if both contracting parties so agree. This provision is also available in certain free trade agreements (eg, India–Japan CEPA, India–Korea CEPA, India–Malaysia CECA and India–Singapore CECA). However, the India–ASEAN Agreement on Investment, the India–Korea CEPA and the India–Malaysia CECA require that one of the contracting party should be a signatory to the Washington Convention. In the India–Japan CEPA, the dispute can be referred to Additional Facilities of ICSID only if the contracting party to the dispute is not a signatory to ICSID.
Ad hoc arbitration	All Indian BITs and certain free trade agreements and economic partnership agreements (eg, the India–ASEAN Agreement on Investment, India–Singapore CECA, India–Malaysia CECA, India–Japan CEPA and India–Korea CEPA) allow investors to pursue an arbitration claim through an ad hoc arbitration in accordance with the UNCITRAL rules. In most of the Indian investment treaties that provide for ad hoc arbitration, 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. However, for the India–ASEAN Agreement on Investment, the appointing authority is the Secretary-General of the Permanent Court of Arbitration, the Hague.
Appointing authority	The appointing authority usually varies depending on the dispute resolution method chosen. For example, in the India–ASEAN Agreement on Investment, 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.
Time limit	By way of example, the India–Colombia BIT and certain free trade agreements and economic partnership agreements(eg, India–ASEAN Agreement on Investment, India–Japan CEPA, India–Korea CEPA, India–Malaysia CECA and India–Singapore CECA) require that a claim be commenced within a period of three years of the investor having acquired knowledge of the facts giving rise to the alleged breach. This time limit is extended in other BITs to five years (India–UAE BIT), six years (India–Kyrgyzstan BIT) and seven years (India–Belaurs BIT).
Applicable law	Indian investment treaties generally provide that arbitral tribunals must have regard to the terms of the investment treaty when determining the dispute. Some investment treaties 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 (eg, the India–Colombia BIT). The India–Syria BIT, like the India–Colombia BIT, provides that the applicable law shall be the national laws of the contracting party in whose territory the investment has been made, the provisions of the BIT and the applicable rules and principles of international law.

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

To date, India has not publicly expressed a strong stance on permanent investment courts. The Model BIT does not contain any provision in favour of a permanent investment court. However, article 19.1 of the India–Brazil BIT permits the parties to submit a dispute to either an ad hoc tribunal or a permanent arbitration institution for the settlement of investment disputes. None of the other investment treaties involving India contain such a provision.

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

India is in the process of resetting its investment treaty regime along the lines of the Model BIT. Some commentators have criticised the Model BIT for tilting the scales in favour of the host State, and for containing vague and imprecise provisions which may afford significant discretion to tribunals (eg, Ranjan and Anand, 2017). Conversely, Sisodia and Raman (2018) consider that the Model BIT still 'provides appropriate protection to inward and outward investments', tantamount to a 'balanced approach in tune with domestic as well as new realities of international investment landscape'.

Since 2016, after the adoption of the Model BIT, India has unilaterally terminated 67 of 83 BITs. Only three treaties have been signed since 2016, with Brazil, Belarus and Kyrgyzstan, none of which are in force yet. Uniquely, India also entered into a bilateral investment agreement with Taipei based on the Model BIT – the agreement is formally known as the Bilateral Investment Agreement between the India Taipei Association in Taipei and The Taipei Economic and Cultural Centre in India; it is entered into between two associations as opposed to between two nation states.

Investments made before the termination of these BITs may be protected for some years under the sunset clauses in those BITs. For the remaining BITs that have not completed their initial term, India circulated a proposed joint interpretative statement in 2016 to the counterparties to these BITs to align the ongoing BITs with the Model BIT. It concluded joint interpretative statements/notes with Bangladesh (2017)

and Colombia (2018). According to India's Department of Economic Affairs, the Model BIT has also been used by India in its BIT negotiations with Iran, Switzerland, Morocco, Kuwait, Ukraine, San Marino, Hong Kong, Israel, Mauritius and Oman.

India has also entered into an Investment Incentive Agreement for promotion of investment through OPIC and into 17 CECA / CEPA / FTA / cooperation agreements with investment chapters giving protection to investors.

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	Only the India–Colombia BIT specifies that notice is to be sent to the Department of Economic Affairs, Ministry of Finance, government of India. For all other treaties that do not stipulate upon whom the dispute notice is to be served, no express guidance has been given by the government of India. However, as a general practice, the notice is sent to the Secretary of the Department of Economic Affairs, Ministry of Finance, government of India. Further, by way of caution, the notice may also be sent to the Ministry of External Affairs and any other concerned Ministry of the government of India. In the case of FTAs, the notice may be sent to Ministry of Commerce.

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

Government department that manages investment treaty arbitrations	There is no express guidance given by the government of India but as a general practice, the Department of Economic Affairs, Ministry of Finance, along with the Ministry of External Affairs, Ministry of Law and Justice and any concerned ministries are involved.

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	As a general practice, external counsel are used. The government of India recently attempted to put in place a formal public procurement process for hiring external counsel. A request for proposals for international and domestic law firms to represent India in investment treaty disputes was floated.

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 is not a signatory to 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 has signed and ratified the New York Convention. Part II of the Indian Arbitration and Conciliation Act 1996 deals with recognition and enforcement of Foreign Arbitral Awards.

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

Legislation governing non-ICSID arbitrations	All arbitrations seated within India are governed by the provisions of Part I of the Indian Arbitration and Conciliation Act 1996, which is based on the UNCITRAL Model Law.

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?

Compliance with adverse awards	A prominent adverse final award was made against the government of India in *White Industries Australia Limited v The Republic of India*, Final Award, 30 November 2011, where India was ordered to pay to White Industries A$4,085,180 and interest thereon at the rate of 8% per year from March 1998. The government of India has voluntarily complied with the award. In December 2020, the government of India was ordered to pay US$1.25 billion and interest to Cairn Energy PLC and Cairn UK Holdings Limited, following the final award in the *Cairn Energy Plc and Cairn UK Holdings Limited v Republic of India* case. At the time of writing, Cairn has sought to enforce this award in the US District Court for the District of Columbia, and India is challenging this enforcement action.

21 Describe the national government's attitude towards investment treaty arbitration

Attitude of government towards investment treaty arbitration	The attitude of the government of India has seen a dramatic shift after being at the receiving end of the arbitral award in *White Industries v Republic of India* and a wave of BIT claims. The government is in the process of recasting its investment treaty regime. The Model BIT, with watered-down investor protections, was notified on 28 December 2015 to form the text for its investment agreements. To date, India has also terminated 69 existing BITs. All future BITs will be negotiated using the Model BIT, as demonstrated by the India–Brazil and India–Belarus BITs. India is also trying to renegotiate its current BITs to bring them more in line with the provisions of the Model BIT.

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	The Indian courts, to date, have not been faced with the issue of enforcing an investment treaty award. As demonstrated by recent cases, the Indian courts have shown a pro-arbitration disposition not only in the sphere of commercial arbitration but also investment treaty arbitration. India's unsuccessful attempts to restrain the claims filed by Vodafone Group under the India–UK BIPA and by Khaitan Holdings (Mauritius) under the India–Mauritius BIT are cases in point. In both cases, the Delhi High Court refused to grant anti-arbitration injunctions to India. The High Court in both cases affirmed its support for the *Kompetenz-Kompetenz* principle in international arbitration and in doing so, its resistance to put its own judgment before that of the tribunal.

National legislation protecting inward investments

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

There is no national legislation that protects inward foreign investment in India.

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?

There is no investment guarantee scheme in place in India.

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, Final Award dated 30 November 2011 (India–Australia BIT)
Deutsche Telekom AG v. The Republic of India, Interim Award (PCA Case No. 2014-10) (India–Germany BIT)
Louis Dreyfus Armateurs SAS v Republic of India, Final Award dated 11 September 2018 (PCA Case No. 2014-26) (India–France BIT)[1]
Flemingo DutyFree Shop Private Limited v Republic of Poland, Final Award dated 12 August 2016 (PCA Case No. 2014-11) (India–Poland BIT)
Nokia v Republic of India, Settlement (India–Finland BIT)
Indian Metals & Ferro Alloys Ltd v Republic of Indonesia, Award dated 29 March 2019 (PCA Case No. 2015-40) (India–Indonesia BIT)
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)
Nissan Motor Co, Ltd v Republic of India, Settled in May 2020 (PCA Case No. 2017-37) (India–Japan CEPA)
Vodafone International Holdings BV v Republic of India (I), Final Award (Operative Part) dated 25 September 2020 (PCA Case No. 2016-35) (India–Netherlands BIT)
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) (India–Mauritius BIT)
Cairn Energy Plc and Cairn UK Holdings Limited v Republic of India, Final Award dated 21 December 2020 (PCA Case No. 2016-07) (India–UK BIT)
Simplex Projects Ltd v Libya, Termination Order dated 23 July 2021 (India–Libya BIT)

Pending proceedings
As Respondent
Khaitan Holdings (Mauritius) Limitedv Republic of India (India–Mauritius BIT)
Vedanta Resources v Republic of India (India-UK BIT)
Strategic Infrasol Foodstuff LLC and The Joint Venture of Thakur Family Trust, UAE with Ace Hospitality Management DMCC, UAE v Republic of Idispundia (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)

Pending proceedings
As Respondent
Korea Western Power Co v The Republic of India (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)
GPIX LLC v Republic of India (India–Mauritius BIT)
As Claimant
Patel Engineering Limited v Republic of Mozambique (India–Mozambique BIT)

[1] This US $36 million dollar claim was dismissed by an UNCITRAL arbitral tribunal. The claim was initiated under the India–France BIT.

Reading List

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

Article/Book
2015 Indian Model Bilateral Investment Treaty
Aditya Singh, 'Chapter 13: Investor-State Dispute Settlement and India', in Dushyant Dave, Martin Hunter, et al. (eds), *Arbitration in India* (Kluwer Law International 2021)
Aniruddha Rajput, *Protection of Foreign Investment in India and Investment Treaty Arbitration* (Kluwer Law International 2017)
Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38(1) *Northwestern Journal of International Law & Business* 1
Rohini Singh Sisodia and Ramya Raman, 'Evolution of the Indian Model Bilateral Investment Treaty Vis-à-Vis Investor-State Dispute Settlement Mechanism – A Balancing Act' (2018) 2 *Transnational Dispute Management* 14.

Kamal Shah

Stephenson Harwood

Kamal is the head of Stephenson Harwood's Africa and India groups. He specialises in complex, cross-border international arbitration, litigation and fraud and asset recovery. Kamal is highly regarded by his peers and clients in his abilities in multi-jurisdictional disputes

Kamal acts for governments, government entities, banks, private corporations and high net worth individuals in a range of matters including those relating to projects and infrastructure, joint ventures, banking and finance, shareholder arrangements, energy and a range of schemes commonly used to defraud individuals and corporations.

Kamal is highly ranked in the legal directories including *The Legal 500 UK*, *Chambers* (UK, Global and Asia Pacific) and *IFLR1000*. "Kamal Shah is highly experienced in Africa and India–related arbitrations" (Chambers UK 2020, international arbitration) and "he understands the continent" (*Chambers Global* 2019, Dispute resolution Africa-wide). He was named as a leading international arbitration practitioner in "*Who's Who Legal: Future Leaders* 2017–2020" and has been recognised in Africa's 30 Arbitration Powerlist 2020 and *The Legal 500*'s Powerlists for arbitration and Africa for 2019. In addition to being an LCIA court member, Kamal is currently the president of the LCIA African Users Council.

Daniel Boon

Stephenson Harwood

Daniel is a lawyer in the international arbitration team, who advises on complex commercial arbitrations for international clients.

Daniel has advised and represented multinational corporations in international arbitrations under the rules of the major arbitral institutions, including the ICC. During his time on secondment to Stephenson Harwood's Seoul office, Daniel also worked on LMAA arbitrations, including a high value shipbuilding dispute.

Beyond international commercial arbitrations, Daniel also has a background in investment treaty disputes, garnered through his law master's degree and assisting a partner in Stephenson Harwood's Hong Kong office in preparing for the FDI Moot Shenzhen.

His practice often involves disputes in Asia, the Middle East and Africa.

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1 Finsbury Circus
London EC2M 7SH
United Kingdom
Tel: +44 20 7329 4422
www.shlegal.com

Kamal Shah
kamal.shah@shlegal.com

Daniel Boon
daniel.boon@shlegal.com