GAR INVESTMENT TREATY ARBITRATION

India

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Contents

I Overview

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

BIT contracting party or MIT[2]	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
Bahrain, 5 December 2007[3]	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Bangladesh, 7 July 2011[4]	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Belarus, 5 March 2020	No	Yes	Yes	Yes	No	6 months	Yes	Yes
Colombia, 2 July 2012[5]	Yes	Yes	Yes	Yes	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
Serbia (Yugoslavia), 24 February 2009	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Sudan, 18 October 2010 [6]	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Syrian Arab Republic, 22 January 2009	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Taiwan, 14 February 2019[7]	No	Yes	Yes	Yes	No	6 Months	Yes	Yes
United Arab Emirates, 21 August 2014	Yes	Yes	Yes	Yes	No	6 Months	Yes	Yes

FTAs/EPAs[8]	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
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, renewed on 29 July 2017	No	No	No	No	No	No	No	No
India–EC Cooperation Agreement, 1 August 1994	No	No	Yes[9]	Yes	No	No	No	No
Indo-Nepal Treaty of Trade, 27 November 2009	No	No	No	Yes, but restricted	No	No	No	No

FTAs/EPAs[8]	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
Japan (Comprehensive Economic Partnership Agreement between Japan and the Republic of India), 1 August 2011	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
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 (Preferential Trade Agreement between MERCOSUR and the Republic of India), 1 June 2009	No	No	No	No	No	No	No	Yes[10]
SAFTA (Agreement on South Asian Free Trade Area), 1 January 2006	No	No	No	No[11]	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), 9 October 2003[12]	No	No	No	No	No	No	No	No[13]

II Qualifying Criteria

2 Definition of investor

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	Following its economic liberalisation in 1991, India signed several BITs with close to 90 counterparties between 1994 and 2011. These BITs afforded common investor-friendly protections to overseas investors including non-discrimination, most favoured nation treatment (MFN) and fair and equitable treatment (FET). Prior to 2004, there were nine reported BIT cases against India arising from the financing of the failed Dabhol energy project.[14] These arbitrations – which ultimately settled – were invoked by investors (primarily creditor banks and shareholders) from Mauritius, Netherlands, United Kingdom, France, Switzerland, and Austria under the respective BITs with India. The first publicly known investment treaty decision against India was in *White Industries Australia Limited v Republic of India* (*White Industries*). The *White Industries* ruling (and the decade-long enforcement proceedings in the Indian courts), coupled with a large number of subsequent treaty claims against India, precipitated a fundamental re-assessment of India's investment treaty framework. Post-*White Industries*, more than a dozen BIT cases were filed against India (some still pending) challenging a range of regulatory measures including the imposition of retrospective taxation on capital gains as well as the cancellation of spectrum[15] and telecom licences. The review led India to adopt a new Model BIT in December 2015 (the Model BIT), after a period of consultation based on a draft version published earlier that year in March 2015. The new Model BIT is a significant departure from the previous 2003 Model BIT, on which many of India's (now terminated) BITs were based. Further, it is notable that the March 2015 draft version of the BIT contained a range of provisions based on the 2003 model BIT as well as other BITs. However, many of the more noteworthy and progressive investor-friendly provisions in that draft were either removed from or diluted in the narrower and more state-centric Model BIT that was ultimately adopted. It is aimed at 'providing appropriate protection to foreign investors in India and Indian investors in the foreign country, in the light of relevant international precedents and practices, while maintaining a balance between the investor's rights and the Government obligations'.[16] Under the Model BIT, 'investor' is defined as 'a natural or juridical person of a Party, other than a branch or representative office, that has made an investment in the territory of the other Party'. 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 defines investor as 'any national, company or government of a Contracting State'. This broader definition therefore (i) expands the scope of protection to state organs; and (ii) removes any question of whether state-owned companies fall within the definition (this question being relatively common in investment treaty disputes).
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–Serbia BIT, for example, additionally requires that such entities have their 'seat' within the territory of a contracting party. Certain treaties (eg, the India–Colombia BIT and India–Lithuania BIT) require that such entities should carry on substantive business activities within the territory of the contracting party where they are incorporated. This discourages investors from 'treaty shopping' (ie, to incorporate their business in a jurisdiction for the purposes of benefiting from investor-state investment protections without actually carrying on any business activities in that jurisdiction). In a similar vein, the India–Singapore CECA excludes investors with negligible or nil operations, or with no real or continuous business activities within the territory of the contracting party. It is also notable that such requirements are not necessarily reciprocal; for example, the India–Philippines BIT not only applies this precondition to investors from Philippines but not to those from India, it further requires that Filipino companies as defined in the BIT be limited to those where the place of effective management is situated in the Philippines, and that specific companies may be excluded from the definition by mutual agreement between India and Philippines on a limited number of public policy grounds.
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 in India. Protection under the India-Malaysia CECA is not afforded to Indian citizens who are permanent residents of Malaysia.
Dual nationals	India does not permit its nationals to be of dual nationality.

3 Definition of investment

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'
Assets that qualify for protection	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, India has sought to narrow the meaning of a qualifying 'investment' in the Model BIT. 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 specific characteristics to qualify as an investment such as a 'certain duration' of existence (without specifying what that may be) or must have '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. Based on the definition at articles 1.3 and 1.4 of the Model BIT, a foreign investment must legally constitute an enterprise according to Indian laws. The uncertain factors and lack of guidance to measure those factors may result in a denial of treaty protection to foreign investments on subjective grounds. In general, most Indian BITs stipulate what types of investments are protected (eg, movable and immovable property; share, bonds and other forms of interests in a company). Four of them (the India–Malaysia CECA, India–ASEAN Agreement on Investment, India–Korea CEPA and India–Singapore CECA) expressly include reinvested returns under the definition of 'investment', most likely to preclude arguments concerning the 'nationality' of the reinvestment (ie, the contention that such investments do not fall within the territorial scope of the BIT and are therefore not protected because the origin of the reinvestment is the host state itself and not from abroad).
Indirect control of assets	Some Indian investment treaties, such as the India–Korea CEPA and the India–Malaysia CECA, expressly include assets controlled indirectly by a protected investor in the definition of 'investment'.
Exclusion of certain assets	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'. Some Indian investment treaties exclude from the definition of 'investment' certain types of assets such as loans and money claims (eg, the India–Colombia BIT and India–ASEAN Agreement on Investment). About half of the Indian BITs also exclude portfolio investments from the definition of investments.
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 entered into force. Protection under the Model BIT does not extend to pre-investment activities related to the establishment, acquisition or expansion of an investment or any law or measure governing such activities and, further, does not extend to events prior to the treaty's entry 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).
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.

III Substantive Protections

4 Fair and equitable treatment

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
Illustrations of FET standard	The Model BIT does not contain a conventional FET provision but instead, contains a 'Treatment of Investments' provision' at article 3.1. The exclusion of the conventional FET provision in the Model BIT may be attributable to the fact that tribunals tend to interpret FET provisions broadly, as a result of which, foreign investors have frequently and successfully invoked FET claims against states. India is, however, not the first state to exclude the FET provision and some other states have done so.[17] Some Indian BITs entered into prior to the Model BIT contain an FET provision, such as the India–Senegal BIT and the India–Russia BIT. Three investment treaties provide that the FET standard includes the obligation 'not to deny justice in criminal, civil or administrative proceedings in accordance with the principle of due process' (ie, the India–Colombia BIT, India–ASEAN Agreement on Investment and India–Korea CEPA).
Customary international minimum standard	Pursuant to article 3.1, the Model BIT narrows the scope of investor protection by replacing the traditional FET standard with customary international law protection, limiting protection to cases of denial of justice, fundamental due process violations, targeted discrimination on manifestly unjustified grounds such as gender, race or religious belief, and manifestly abusive treatment such as coercion, duress and harassment. The India–Korea CEPA, India–Malaysia CECA and India–Japan CEPA equate the obligation to provide FET with the concept of FET under the customary international minimum standard of treatment of aliens. Some Indian BITs entered into prior to the Model BIT do not have a reference to the international minimum standard. Others, such as the India–Columbia and India–Mexico BIT, first set out the standard and thereafter clarify that the standard expects a treatment no higher than the international minimum standard.[18]

5 Expropriation

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	All 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. Under article 5 of the Model BIT, measures enacted for reasons of public purpose and non-discriminatory regulatory actions by a party, or measures or award by judicial bodies of a party designed and applied to protect legitimate public interest or public purpose are exempt from the purview of expropriation. It excludes the impact of actions taken by the host state in a commercial capacity. Article 5.4 of the Model BIT provides that legitimate public objectives include public health, safety and the environment.
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. The Model BIT also expressly covers both direct or indirect expropriation under article 5.3(a)(i) and further defines what constitutes indirect expropriation under article 5.3(a)(ii). 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	None of the investment treaties provide for a limited right to arbitration. Instead, almost all the Indian investment treaties 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. In what appears to be a shift from an approach favouring state regulation, the Model BIT contains provisions enabling a tribunal to review the state's determination of whether a measure was taken for a public purpose or in compliance with the law. However, this is not without qualification. The Model BIT contains provisions that circumvent interpretation that are non-deferential to the state's regulatory power (eg, where tribunals typically rely on the sole effects of the measure, the Model BIT sets out factors such as character, object and intent of the measure that may override the analysis based on the sole effects of the measure).

Issue	Distinguishing features of the 'expropriation' standard
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–Singapore CECA, India–ASEAN Agreement on Investment, India–Korea CEPA, India–Malaysia CECA and India–Japan CEPA). Some Indian investment treaties use slightly different language and require that any expropriation of an investment must occur in accordance with law (eg, the Bahrain, Bangladesh, Colombia, Latvia, Libya, Lithuania, Philippines, Senegal, Serbia and 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.[19]

6 National treatment/most favoured nation treatment

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 any 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 the *White Industries* case, where the investor relied on the MFN clause in the applicable India–Australia BIT to benefit from the more favourable rights accorded to investors under the India–Kuwait BIt, to prevent treaty shopping. The absence of the MFN clause in the Model BIT tilts the balance in favour of the host state's interests and dilutes the protection afforded to foreign investors.
Scope of the MFN clause	The MFN clause contained in many Indian 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 BITs contain both Most Favoured Nation and National Treatment protection. 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 Protection and security

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 across the Indian investment treaties. While the Model BIT does not contain a FET provision, it does provide for Full Protection and Security (FPS). 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 subsequently incorporated to the Model BIT. Seven investment treaties, such as the Model BIT, provide for FPS (ie, the India–Lithuania BIT, India–Colombia BIT, India–Senegal BIT, and India–Korea CEPA, India–ASEAN Agreement on Investment, India–Malaysia CECA and India–Japan CEPA). Several other investment treaties use a different wording in reference to the FPS standard. For example, the India–Latvia BIT provides only for 'protection and security', the India–Serbia BIT offers a unique clause of 'full legal protection and security', while the India–Syria BIT provides for 'adequate protection and security'. Three investment treaties provide for reciprocal protection in its preamble (ie, the Bahrain, Bangladesh and Sudan BITs). The India–Philippines BIT provides for 'Promotion and Protection' in its Preamble. It is unlikely that a full protection and security claim can be made out solely on the basis of such language in the preamble of the investment treaties.
Customary international law on protection and security	Save for the India–Korea CEPA, India–ASEAN Agreement on Investment, India–Malaysia CECA and India–Japan CEPA, no Indian investment treaty links the FPS protection with customary international law.

8 Umbrella clause

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. This is unsurprising, given that the Model BIT aims to balance the rights of investors with those of the state, and the inclusion of an umbrella clause will potentially result in a state's increased exposure to investor claims.

9 Other substantive protections

What are the other most important substantive rights provided to qualifying investors in this country's investment treaties?

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 in order 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, India–Malaysia CECA and India–Singapore CECA). The India–Senegal BIT uses the word impede instead of the word impair, and its scope covers 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 a 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–Singapore CECA, India–ASEAN Agreement on Investment and India–Japan CEPA 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.

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–Singapore CECA and India–Korea CEPA 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. These are also sometimes known as non-precluded measures clauses, and the purpose of these exceptions are to allow host states to adopt measures for the protection of certain public policy concerns that may otherwise constitute a violation of investment treaties.[20] These clauses may prove to be instrumental in any potential claims brought by investors against India as a result of the covid-19 pandemic, which has led to the Indian government imposing a series of measures that arguably restrict or cause loss to foreign investors and their investments. Notably, the Model BIT excludes any taxation measures from its purview. As stated above, it would appear that this carve-out was a reaction to the treaty cases filed between 2014 to 2016 against India beginning with *Vodafone International Holdings BV v India*, which was filed at the Permanent Court of Arbitration in 2014. Vodafone made claims arising out of retrospective transaction tax imposed by the Indian government over Vodafone's acquisition of Hutchison Whampoa's telecoms business in India.

IV Procedural Rights

10 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, the India–Colombia BIT, India–Latvia BIT, India–Lithuania BIT, India–Korea CEPA, India–ASEAN FTA and India–Japan 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.
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 is likely to have been aimed at ensuring the timely settlement of disputes given that the issue of delays has been a major concern for foreign investors in India. However, it is currently unclear whether a foreign investor will be completely barred from making any claim under the Model BIT for failing to submit the dispute to a local court within one year, but if tribunals interpret article 15.4 in this manner, this appears to be a harsh procedural requirement, translating to increased pressure on for foreign investors to be advised of this restriction at the outset when disputes arise.
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). Most of the Indian BITs require that both contracting parties be parties to the Washington Convention before a dispute may be referred to ICSID; therefore, this option will not be available to foreign investors wishing to commence arbitration proceedings at ICSID against India. Among the free trade agreements, the India–Malaysia CECA, India–Singapore CEPA and India–Korea CEPA provide a right to recourse to ICSID, if both states are parties to the Washington Convention – this is unlikely to be relevant for now since India is not yet a party to the Washington Convention.
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, the India–Singapore CECA, India–Malaysia CECA, India–Japan CEPA and India–Korea CEPA). 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.

Issue	Procedural rights
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, the India–Singapore CECA, India–Malaysia CECA, India–Japan CEPA, India–ASEAN Agreement on Investment and India–Korea CEPA) 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.
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.

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

India is in the process of re-aligning its investment treaty regime with the Model BIT. Since 2016, after the adoption of the Model BIT, India has unilaterally terminated 72 of 83 BITs[21] (two of which – the India–Colombia BIT and India–Democratic Republic of the Congo BIT – are signed but not in force). Only three treaties have been signed since 2016, with Brazil, Belarus and Kyrgyzstan, of which only the India–Belarus BIT is currently in force. 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. The Model BIT has also been used by India in its negotiations of the more recently concluded BITs.

Notably, several of the terminated BITs contain 'sunset clauses' that will result in continued protection for investments made prior to the termination. For example, the India–South Korea BIT contains a sunset clause that will protect investments made in India prior to the BIT's termination on 22 March 2017 for 15 years from the date of termination. This is notable as it means that India's hopes of starting afresh will only become fully realised once the last of these sunset clauses expires, a process that could take years. In the meantime, India will continue to face investment treaty claims under the terminated BITs. For example, in November 2019, a subsidiary of a Korean state-run power company brought a US$400 million investment treaty claim against India under the terminated India–South Korea BIT, alleging breaches of, inter alia, fair and equitable treatment. Whether there will be a rush by other foreign investors protected by recently terminated investment treaties to commence claims against India remains to be seen.

In relation to some of 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 a Joint Interpretative Note with Bangladesh (2017) and a Joint Interpretative Declaration with Colombia (2018).

India has also entered into 17 CECA/ CEPA/ FTA/ Co-operation Agreements with investment chapters giving protection to investors. Of note, investments by US entities backed or insured by the US International Development Finance Corporation (previously OPIC) are protected under the investment incentive agreement entered into between India and the USA, though only the US or Indian governments are permitted to submit an arbitration notice under this investment incentive agreement. It is likely that this Investment Incentive Agreement will only provide indirect protection to US entities for large-scale investment projects (eg, the Dabhol Power Project), since investors will have to rely on their government espousing their claim. Pending the successful negotiation of an India–USA BIT (which has been ongoing for almost a decade), most investments by US entities in India continue to be unprotected except through strategic manoeuvrings. For example, an investor may attempt to circumvent the lack of protection by incorporating an SPV in a state with which India has a BIT in force. However, this is increasingly difficult given India's recent termination of many of its BITs.

V Practicalities (Claims)

12 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. 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. 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. In the case of FTAs, the notice may be sent to the Ministry of Commerce.

13 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 & Justice and any ministries concerned are involved.

14 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.

VI Practicalities (Enforcement)

15 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.

16 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.

17 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.

18 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 AUD 4,085,180 and interest thereon at the rate of 8 per cent per year from March 1998. The government of India has voluntarily complied with the award.

19 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* and a wave of BIT claims. The government of India 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. India also terminated 72 existing BITs. All future BITs will be negotiated using the Model BIT. India is also trying to renegotiate its current BITs to bring them more in line with the provisions of the Model BIT.

20 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 (now terminated) 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.

VII National Legislation Protecting Inward Investment

21 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.

VIII National Legislation Protecting Outgoing Foreign Investment

22 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.

IX Awards

23 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)[22]
Flemingo DutyFree Shop Private Limited v Republic of Poland, Final Award dated 12 August 2016 (PCA Case No. 2014-11) (India–Poland BIT)
Indian Metals & Ferro Alloys Ltd v Republic of Indonesia, Award dated 29 March 2019 (PCA Case No. 2015-40) (India–Indonesia BIT)
Pending proceedings[23]
As Respondent
CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v Republic of India (India–Mauritius BIT)
Vodafone International Holdings BV v Republic of India (I) (India–Netherlands BIT)
Khaitan Holdings (Mauritius) Limited v Republic of India (India–Mauritius BIT)
Nokia v Republic of India (India–Finland BIT)
Vedanta Resources v Republic of India (India–UK BIT)
Cairn Energy Plc and Cairn UK Holdings Limited 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 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)
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)
As Claimant
Simplex Projects Ltd. v Libya (India–Libya BIT)
Khadamat Integrated Solutions Private Limited (India) v The Kingdom of Saudi Arabia (India–Saudi Arabia BIT)
Naveen Aggarwal, Neete Gupta, and Usha Industries, Inc v Bosnia and Herzegovina (India-Bosnia and Herzegovina BIT)

Reading list

2015 Indian Model Bilateral Investment Treaty.

Notes

1 The information in this table is available at UNCTAD's Investment Policy Hub, accessible at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india (last accessed on 14 August 2020) and the Indian Government's Department of Economic Affairs website, accessible at: www.dea.gov.in/bipa (last accessed on 30 November 2020).

2 India decided to terminate 58 of its existing BITs in 2017. Investments that were made before the termination of these BITs will be protected for some years under the sunset clauses in the respective BITs. India has also notified that its Union Cabinet has approved a new treaty with Cambodia, the first such treaty to be based on the Model BIT (source: The Prime Minister of India website, accessible at: www.pmindia.gov.in/en/news_updates/cabinet-approves-bilateral-investment-treaty-between-india-and-cambodia-to-boost-investment/?comment=disable (last accessed on 14 August 2020)).

3 The India–Bahrain BIT will be terminated with effect from 23 March 2021 (https://dea.gov.in/bipa?page=5).

4 India entered into a Joint Interpretative Note with Bangladesh in 2017. While the BIT was not terminated, the parties sought to import provisions from the Model BIT in the Joint Interpretative Note.

5 India and Columbia entered into a Joint Interpretative Declaration in 2018, similar to the Joint Interpretative Note between India and Bangladesh. The India–Colombia BIT has also not been terminated.

6 The India–Sudan BIT will be terminated with effect from 19 October 2021 (https://dea.gov.in/bipa?page=4).

7 Strictly speaking, this 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. For ease of reference, it will be referred to as the India–Taiwan BIT in the ensuing sections.

8 The information in this table is available on UNCTAD's Investment Policy Hub, accessible at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india (last accessed on 14 August 2020) and the Department of Commerce, Ministry of Commerce and Industry, Government of India website, accessible at: www.indiantradeportal.in/vs.jsp?lang=0&id=0,270 (last accessed on 14 August 2020).

9 Article 11(2) of the India-EC Cooperation Agreement uses the term 'promotion and protection of investments ... on the basis of the principles of non-discrimination and reciprocity'.

10 The signatories are required to first 'make all reasonable efforts' to settle disputes by direct negotiations. If direct negotiation fails, the disputing parties may by mutual consent request the Joint Administration Committee to adjudge the dispute, in a process that is similar, but not identical, to conventional arbitration.

11 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).

12 This framework agreement was updated on 31 August 2004 and 1 April 2012. Source: Department of Commerce, Ministry of Commerce and Industry, Government of India websites, accessible at: www.indiantradeportal.in/vs.jsp?lang=0&id=0,1,63,2401 and https://commerce.gov.in/International_ta_Thailand_indl_details.aspx?id=20 (last accessed on 14 August 2020).

13 Disputes to be settled amicably through consultations.

14 Source: UNCTAD's Investment Policy Hub, accessible at: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india (last accessed on 30 November 2020).

15 See *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India* (https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/484/devas-v-india); and *Deutsche Telekom AG v Republic of India* (https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/550/deutsche-telekom-v-india).

16 See, Government of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion, Lok Sabha Unstarred Question No. 1290 (25 July 2016), http://164.100.24.220/loksabhaquestions/annex/9/AU1290.pdf (accessed 29 November 2020).

17 See paragraph [5-02] in 'Chapter 5: Treatment Standards', in Aniruddha Rajput, *Protection of Foreign Investment in India and Investment Treaty Arbitration* (Kluwer Law International 2017) pp. 87–126.

18 See paragraph [5-02] in 'Chapter 5: Treatment Standards', in Aniruddha Rajput, *Protection of Foreign Investment in India and Investment Treaty Arbitration* (Kluwer Law International 2017) at p. 107.

19 Financial Times, *India overhauls its investment treaty regime* (15 July 2016), accessible at: www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc (last accessed on 13 August 2020).

20 Prabhash Ranjan and Pushkar Anand, 'COVID-19, India, and Investor-State Dispute Settlement (ISDS): Will India Be Able to Defend Its Public Health' (October 2020) 28(1) *Asia Pacific Law Review* 1.

21 Information as at 30 November 2020, based on the Government of India's Department of Economic Affairs (Ministry of Finance) website, available here: www.dea.gov.in/bipa (last accessed 30 November 2020). In addition to the 72 terminated BITs, the India–Sudan and India–Bahrain BITs have also been terminated, with termination taking effect in 2021.

22 his US$36 million claim was dismissed by an UNCITRAL arbitral tribunal. The claim was initiated under the India-France BIT.

23 The information in this table is available at UNCTAD's Investment Policy Hub, accessible at: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india (last accessed on 14 August 2020).

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