India's Bilateral Investment Agreements
Time to Review

Biswajit Dhar, Reji Joseph, T C James

This paper highlights some of the provisions in India's Bilateral Investment Promotion and Protection Agreements that have enabled foreign investors to win cases before international arbitration tribunals. Warning that these disputes with foreign investors signal the emerging struggle between foreign investors and sovereign states in the face of uncertain economic prospects in the post-crisis world, the paper makes a strong case for a review of India's BIPAs so that there is consistency in provisions across all such agreements in the national interest.

Biswajit Dhar (*bisjit@gmail.com*), Reji Joseph (*rejikjoseph@gmail.com*) and T C James (*jamesthanickan@gmail.com*) are with Research and Information System for Developing Countries, New Delhi.

Bilateral Investment Promotion and Protection Agreements (BIPAs)[1] – the agreements that guarantee a slew of rights to the foreign investors operating in India – have recently been in focus as investors have raised or are threatening to raise disputes with the Indian government. India has signed BIPAs with 82 countries since 1994 when the first such agreement was concluded with the United Kingdom (UK). However, the first dispute involving the use of the provisions of the BIPAs became known in the closing months of 2011 when the Government of India faced an adverse decision pronounced by a Singapore-based United Nations Commission on International Trade Law (UNCITRAL) tribunal adjudicating a dispute between the public sector Coal India and the Australian firm, White Industries.[2]

More recently, a number of investors have given indications that they were preparing to invoke the provisions of the BIPAs for enforcing their rights, which, according to them, are being violated in India. Vodafone Plc, a UK-based company and the world's largest telephone service provider, has sent a notice invoking the provisions of India-Netherlands BIPA through its Dutch subsidiary Vodafone International Holdings BV, against the retrospective application[3] of capital gains tax included in the Finance Act, 2012. The proposal in the Finance Act, 2012 is aimed at plugging a loophole in the Income Tax Act, 1962, which, according to the government, allowed Vodafone to avoid its tax liability arising from the acquisition of Indian telecom company Hutchison Essar in 2007 merely because the transaction took place in the Cayman Islands. Since the takeover deal was carried out from a tax haven, Vodafone did not have to pay the capital gains tax of $2.2 billion, which it would have had to pay if the deal was conducted in India. The justification used by the Government of India has been that although the deal was concluded in a foreign territory, the assets involved in the deal were located in the territory of India. In response to the move of the Government of India, Vodafone has argued that the tax liability that the firm would incur as a result would violate a number of provisions of the India-Netherlands BIPA including fair and equitable treatment, full protection and security and indirect expropriation of investment.[4]

A second case of dispute with a foreign investor involves the Children's Investment Fund Management (TCI), a UK-based hedge fund that is a minority stakeholder in Coal India (holding 1% share). TCI has served an arbitration notice questioning the Government of India's direction to Coal India to delink the price of domestically produced coal from imported prices while concluding fuel supply agreements with independent power producers, a move that would lower the price of coal sold by the firm.[5] TCI has contended that Coal India's profits will decline by $20 billion and the interests of the minority shareholders in the firm will be affected as a result. Moreover, the ruling of the Supreme Court to cancel 122 second generation spectrum licences (2G licences) has led two of the firms whose licences were revoked to serve arbitration notices on the Government of India. Russian firm, Sistema and the Norwegian firm, Telenor have served notices to the Government of India invoking provisions of the BIPAs that India had signed with Russia and Singapore, respectively.

Disputes with foreign investors are not unique to India; nor are they typical of developing countries. A slew of cases have emerged recently involving countries like Germany[6] and Australia.[7] Further, the number of disputes between the investors and their host country governments has been rising rapidly in recent years – 46 disputes were recorded in 2011, the highest number of disputes in a calendar year.[8]

The disputes with foreign investors referred to above signal the emerging struggle between foreign investors and sovereign states in the economic spaces, which are looking constricted in the face of the uncertain economic prospects. In the post-crisis world, governments have increasingly been called upon to "manage" the economies, but their ability to formulate policies has run contrary to the rights granted to foreign investors. This has forced several governments in the developed world, most notably the United States (US), to have a relook at their bilateral investment treaties (BITs) and other agreements guaranteeing investor rights. This paper highlights some of the provisions in India's BIPAs that have either been invoked by foreign investors to initiate disputes or have the potential of going that way.

Definition of Investment

What constitutes an investment is a key element of an investment treaty for it lays down the extent to which foreign investors can get protection against direct and/or indirect expropriation in their host countries. Most BIPAs that are currently in operation include a broad definition of investment. These treaties usually cover "every kind of asset", which is usually followed by a non-exhaustive list of covered assets.

The genesis of this definition lies in the series of BIPAs that the then Federal Republic of Germany (FRG) had formalised in the early 1960s.[9] The BIT with Malaysia (the then Malaya) signed in 1961 provides the template[10] for the definition of "investment" that has been adopted by all countries. A point to be noted here is that BIPAs were initiated by capital exporting countries to protect their investments in developing countries and the former socialist republics.[11] It is hardly surprising, therefore, that exporters of capital would include a broad definition of investment in BIPAs to protect the interests of their commercial entities in a comprehensive manner.

India, too, has adopted the broad definition of investment in BIPAs. The Model BIPA[12] defines "investment" thus:

> '[I]nvestment' means every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:
> (i) movable and immovable property as well as other rights such as mortgages, liens or pledges;
> (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company;
> (iii) rights to money or to any performance under contract having a financial value;
> (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;
> (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals.

Three observations regarding the definition of investment included in BIPAs should be made here. The first is that by agreeing to include forms of investment such as "rights to money or to any performance under contract having a financial value" in the definition, India has left the door open for an expansive interpretation of what should constitute as investment. This issue was brought up by the UNCITRAL tribunal adjudicating *White Industries vs Republic of India*, which is discussed below. The second is that the definitions of investment in several agreements show significant departures from that included in the Model Law. This is evident most prominently in those concluded with Mexico, Korea and Kuwait.[13]

A third observation is regarding the inclusion of minority and indirect forms of investments in the definition of investment in the India-France BIPA. The term "indirect forms" of investment is not defined and the only interpretation available for this term is under the scope of the treaty, which states "indirect investment made through another company, *wherever located*, which is owned to an extent of at least 51 per cent" (emphasis added). This clause would extend the benefit of the treaty to investors (subsidiaries) located even in the territory of a non-party. Since investment from subsidiaries located anywhere is recognised as investment originating from within France, subsidiaries located in those countries with which India has BIPAs with more favourable terms can initiate disputes on behalf of the parent company in France. Since this provision is there in one of India's BIPAs, investors from other contracting parties can import this provision using the most favoured nation (MFN) clause and initiate disputes through their subsidiaries located in other territories. It should be noted in this context that in their BIPAs, several other countries have confined the scope of the treaty to "covered investments", which are defined as investment in the territory of one contracting party from an investor in the other contracting party.[14]

It was the adoption of the broad definition of investment that had affected India's interests in a dispute involving an Australian firm in the UNCITRAL arbitration. The tribunal in *White Industries vs Republic of India* adjudicated the dispute raised by the Australian firm, White Industries, claiming denial of its rights as an investor in India.[15] The claims made by White Industries originated in a contract that the firm had entered into with the public sector Coal India for the supply of equipment and technical services for the development of a coal mine at Piparwar against a payment of approximately Australian $206.6 million. The dispute arose over the denial of bonus payments under a performance guarantee clause made by the equipment supplier.[16] Although the dispute was between two firms, in the case brought by White Industries before the tribunal the Government of India was the defendant. This was the result of the invoking of the provisions on "investor-State dispute" of BIPAs under which the foreign investor can involve the Government of India for the settlement of disputes. The implications of this aspect of BIPAs will be dealt with later.

The critical question in the *White Industries vs Republic of India* case was whether the involvement of the Australian firm in the Coal India project could qualify as an investment. The Indian government argued that White Industries was "not an 'investor' with an 'investment' in India that (was) entitled to the protections in the BIT"[17] and that the "Contract (with White Industries) was an ordinary commercial contract for the supply of goods and services and as such, [did] not constitute an 'investment'".[18] Differing with this interpretation, the arbitration panel observed that the "definition of investment in the BIT is set out in broad terms"[19] and that the "BIT expressly includes in its definition of an 'investment' the right to money or to any performance having a financial value, contractual or otherwise".[20] The tribunal concluded that given "the definition of 'investment' in the BIT, which clearly includes White's rights under the Contract, and the decisions of other tribunals that rights arise from contracts may amount to investments[21]...White's rights under the Contract...does not exclude the Contract from qualifying as an investment".[22] The tribunal was unequivocal in its assessment that as a supplier of equipment and technical services, White Industries had investor rights that were protected by BIPAs. It is, therefore, imperative that the Government of India reviews the definitions of investment included in BIPAs so as to remove the ambiguities in dealing with the foreign investors.

While host countries in the developing world, including India, have encountered problems with foreign investors over the ambiguous definition of investments that are included in their BIPAs, capital exporting countries have taken steps to overcome this problem by subjecting their BIPAs to periodic reviews. The best example of this is the US, which initiated its BITs programme in 1981 and has reviewed its model BIT twice in a period of eight years. The first review resulting in the 2004 Model BIT was triggered by the Trade Act of 2002, which stated that the "principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that *foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States*..."[23] (emphasis added). The second review, the outcome of which is the 2012 US Model BIT, resulted from President Barack Obama's Trade Policy Agenda of 2009 that called for a "review [of] the implementation of our free trade agreements (FTAs) and BITs to ensure that they advance the public interest".[24] This review was driven by yet another set of concerns: "whether [US] FTAs and BITs give foreign investors in the US greater rights than US investors have under US law; whether the FTAs and BITs give governments the 'regulatory and policy space' needed to protect the environment and the public welfare; and whether an investor should have the right to submit to arbitration a claim that a host government has breached its investment obligations under an FTA or a BIT".[25]

The definition of investment appearing in the US model BIT was comprehensively amended in the review undertaken in 2004 and this definition was adopted in the 2012 Model BIT as well. The preambular language was changed from "every kind of investment owned or controlled directly or indirectly, including equity, debt; and service and investment contracts" to "every asset that an investor owns or controls, directly or indirectly*, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or assumption of risk*" (emphasis added). At the same time, the forms of involvement of foreign enterprises that can get protection under the BITs were narrowed down and, importantly, these bore a direct relationship with the long-term forms of participation. Table 1 provides a detailed comparison.

An appropriate definition of investment will also help in protecting the country's interest in the arbitration process. A majority of investment treaty disputes are filed at the International Centre for Settlement of Investment Disputes (ICSID).[26]

Table 1: Comparison of Definition of Investment in US Model Bilateral Investment Treaties

Definition of Investment Prior to the Amendment of the Model BIT in 2004	Definition of Investment in the Model BITs of 2004 and 2012
"Investment" means every kind of investment owned or controlled directly or indirectly, including equity, debt; and service and investment contracts; and includes; (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;	"[I]nvestment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
(ii) a company or shares, stock, or other interests in a company or interests in the assets thereof;	(a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise;
(iii) a claim to money or a claim to performance having economic value, and associated with an investment;	(c) bonds, debentures, other debt instruments, and loans; (d) futures, options and other derivatives;
(iv) intellectual property, including rights with respect copyrights and related patents, trademarks and trade names, industrial designs, trade secrets and know-how, and goodwill;	(e) turnkey, construction, management, production, concession, revenue- sharing, and other similar contracts; (f) intellectual property rights;
(v) any right conferred by law or contract, including rights to search for or utilise natural resources, and rights to manufacture, use and sell products; and	(g) licences, authorisations, permits, and similar rights conferred pursuant to domestic law; and
(vi) reinvestment of returns and of principal and interest payments arising under load agreements	(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.

Sources: 2012 US Model Bilateral Investment Treaty and 2004 Model BIT ("Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment") .

The ICSID Convention does not define investment and its interpretation is left to the tribunals.[27] Providing a broad definition of investment bestows the tribunal with considerable discretion in determining whether a particular asset meets the criteria of investment, which otherwise may not qualify for investment as per the domestic law.[28]

Protection and Promotion of Investment

On the protection and promotion of investment, different BIPAs of India provide for different provisions and use different terms. When MFN is applied, the most favourable among all such provisions becomes applicable to any contracting party of India. The India-Germany BIPA states that investments and investors would be provided with "all times fair and equitable treatment and full protection and security". But the treaty does not define these terms nor does it establish the minimum conditions for meeting this provision. Since the definition is not given, important clauses such as these are left open for interpretation by tribunals and can go in favour of corporate entities against the state. Similarly, while in the India-Australia BIPA the term "enjoyment" has been used, in the India-Kuwait BIPA the term "effective means of asserting claims and enforcing rights" is used. Enjoyment is a very broad term and can cover anything under an investment.

The scope of this provision, if left unqualified, might be broad enough to encompass all adverse treatments to an investment. The tribunals could attribute a new standard to this provision by interpreting the minimum standard, as requiring treatment beyond what is required in customary international law. According to United Nations Conference on Trade and Development (UNCTAD), the fair and equitable treatment provision is one of the most important provisions that are most likely to be relied upon by the investor in arbitral claims.[29] Indeed, breach of Article 3.2 of the India-Australia BIPA providing for fair and equitable treatment was one of the grounds on which White Industries dragged the Government of India into the dispute. Sensing the danger in keeping an unqualified fair and equitable treatment clause, the North American Free Trade Agreement (NAFTA) in 2001 issued a note clarifying that "concepts of fair and equitable treatment and full protection and security do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens".[30] Subsequently, a few BIPAs and FTAs clarified what is meant by this provision. The US-Australia BIPA states that measures aimed at protection and promotion of investment are applicable to covered investments "in accordance with the customary international law minimum standard of treatment to aliens, including fair and equitable treatment and full protection and security". Fair and equitable treatment obligation is:

> [N]ot to deny justice in criminal, civil or administrative proceedings in accordance with the principle of due process embodied in the principal legal systems of the world" and full protection and security contains the obligation "to provide the level of police protection required under customary international law (Article 11.5).

The article also states that the provisions "fair and equitable treatment" and "full protection and security" do not require any treatment beyond what is required by the "minimum standard" and "do not create any additional rights". A similar interpretation is also given in the Association of South-East Asian Nations (ASEAN)-Australia-New Zealand FTA (Chapter 11 Article 6). The US Model BITs of 2004 and 2012 state unequivocally:

> [T]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard [customary international law], and do not create additional substantive rights.

Further, it is clarified:

> 'Fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world (and) 'full protection and security' requires each Party to provide the level of police protection required under customary international law (Article 5).

All of these three treaties also clarify that a determination that there has been a breach of another provision of that agreement or of a separate international agreement does not establish that there has been a breach of minimum standard of protection clause.

The Most Favoured Nation Clause

The MFN provision included in India's Model BIPA states, "each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State".[31] This implies that any favourable provision provided for in a BIT will be available to every other country with which the host country has a BIT containing an MFN clause. In effect, an MFN clause raises the "level of protection guaranteed by each BIT concluded by a country to the level guaranteed by that country's most protective BIT".[32]

In several BIPAs that India has formalised thus far, a very broad application of MFN provisions can be seen. For example, the MFN provisions of the BIPA with France[33] accords "to investments of investors of the other Contracting Party, including their operation, management, maintenance, use, enjoyment or disposal by such investors, treatment *which shall not be less favourable than that accorded to investments of its investors, or than the most favourable treatment accorded to investments of investors of any third country, whichever is more favourable*.[34] (emphasis added).

However, in a later agreement entered into with Mexico, an attempt has been made to circumscribe the rights of the foreign investor by narrowing the MFN provisions by agreeing to accord "to investments of investors of the other Contracting Party treatment no less favourable than that it accords, *in like circumstances*, to investments of investors of any third State with respect to the management, maintenance, use, enjoyment or disposal of investments"[35] (emphasis added). However, the caveat introduced in the MFN provisions of the India-Mexico BIPA would, in effect, be rendered ineffective since "in a like circumstance" of an investor making an investment in India, the India-France BIPA accords to the investor "the most favourable treatment accorded to investments of investors of any third country". In other words, an investor from Mexico could cherry-pick from among the BIPAs that are on offer.

That India faces such a situation was amply demonstrated in the *White Industries vs Republic of India* case. The complainant took recourse to the MFN provisions available to it under the India-Australia BIPA[36] and argued that it could legitimately use Article 4.5 of the India-Kuwait BIPA that provided to investors "effective means of asserting claims and enforcing rights". While India argued that the use of the India-Kuwait BIPA would "fundamentally subvert the carefully negotiated balance of the [Australia-India] BIT",[37] the arbitration panel observed that it "achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause".[38]

Many countries have restricted the scope of application of MFN to similar situations. Investment treaties of the US (Model BIT and NAFTA) and ASEAN-Australia-New Zealand FTA state that "treatment no less favourable than it accords, in like circumstances". These treaties also limit the application of MFN to certain aspects of the investment. The US Model BITs of 2004 and 2012 limit the scope of these two provisions to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition" of investment and do not extend to other aspects of investment such as disputes settlement. The US Model BITs further state that MFN does not apply to "(a) government procurement or (b) subsidies or grants provided by a Party including government supported loans, guarantees and insurance" (Article 14).

Expropriation

Although in common parlance expropriation of investment is equated with nationalisation, in the world of BITs this term is used in several different situations. An indication of the complexity involving the term "expropriation" (the other term commonly used is "takings") can be gauged from the fact that investors use this term whenever they find hindrances in their operations in their host countries. UNCTAD points out that there can be three broad categories of expropriations: (1) direct expropriations include nationalisations and/or outright physical seizure of the property; (2) indirect expropriations which permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way; and (3) regulatory measures, i e, acts taken by states in the exercise of their right to protect public interest, which may have the same effects as an indirect expropriation.[39]

All investment treaties provide for expropriation under certain circumstances. Investment treaties such as the NAFTA, the US-Australia BIT, the ASEAN-Australia-New Zealand FTA, and India's BIPAs provide that expropriation of investment is not allowed except for public purposes in a non-discriminatory manner and on payment of fair and equitable compensation. It may be pointed out that the definition of investment holds the key to the determination of expropriation. Thus, in countries that have a more precise definition of investment (as in the case of the US discussed above), claims of expropriations may be far fewer as compared to that of India.

The investment protection agreements that the US has entered into with advanced countries, e g, NAFTA and the US-Australia BIT, have a significant set of exclusions from expropriation and these relate to intellectual property rights. This exclusion is also included in the US Model BIT. The relevant article states that provisions on expropriation do not "apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement". Interestingly, this exclusion does not find mention in the BITs concluded with developing countries.

Particularly important in the list of exclusions from appropriation is compulsory licence (CL), an instrument that can be used by countries to counter excessive use of monopoly rights by patent holders. This instrument was used recently by India when an Indian firm Natco was granted compulsory licence to produce an anti-cancer drug, Nexavar, over which the German firm Bayer AG has the patent. The CL was granted after the Indian Patent Office ruled that Bayer AG was selling the drug at an excessively high price. According to the terms of the CL, Natco agreed to supply the drug at Rs 8,800 per month and to give the drug at no cost to at least 600 patients every year. At this price, Nexavar will cost just 3% of the Bayer's price and many more patients will be able to access the drug.

Nothing prevents Bayer from taking the Government of India to international arbitration invoking India's BIPAs.[40] Although the grant of the CL has not affected Bayer's ownership over its Nexavar patent, the patent owner, as an act of expropriation, may regard the fact that its patent rights would now be circumscribed because of Natco's presence in the market for the product. To what extent Indian authorities were justified granting the CL to protect public interest is a matter that will be determined by an arbitration tribunal should Bayer decide to approach one.

Customary international law and most investment treaties provide for three conditions to make the expropriation lawful: it must be for a public purpose, must be non-discriminatory, and compensation must be paid. Some investment treaties such as NAFTA, the US-Australia FTA, and the ASEAN-Australia-New Zealand FTA provide for a fourth parameter – "due process" (Tienhaara 2010). Indirect expropriation, however, is very controversial as no parameter has been prescribed to judge whether an expropriation has taken place. The model BITs of the US provide for certain criteria to decide whether an act amounts to indirect expropriation. They are (among other factors) the economic impact of the government action, the extent to which the act interferes with the reasonable expectations of the investor and the character of government action.[41] If such criteria were to be applied to the act of granting a CL to Natco, the Government of India would have a tough time. The price offered by Bayer is not reasonable (reasonable to whom – the patients, the company or a reasonable price that balances the interests of the patients as well as the company?) and Natco's price is reasonable and whether all patients will be able to afford the price under the CL are some of the issues that the Government of India will have to prove in the arbitration process. It is also highly likely that India would be at the receiving end in the test of whether the CL interferes with the reasonable expectations of the investor.

The other aspect of provisions on expropriation in India's BIPAs is that it will enable Bayer to claim compensation that is based on the market value of the investment immediately before the issue of the CL. India's BIPAs provide that expropriation even for a public purpose will have to be compensated and such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation. The point here is that if India is to compensate Bayer amounting to the market value of its investment before expropriation, what gain does the country have in issuing a CL aimed at reducing the price? Whether Bayer will invoke investor-state dispute provisions of India's investment treaties is a different matter, but the company is entitled to do that. All these uncertainties can be avoided if it is clarified in the BIPAs that CLs issued in pursuance to TRIPs do not fall under the purview of expropriation. Some countries have been extremely careful that they have clarified that certain acts aimed at protecting public interest cannot be brought under the purview of not only direct expropriation but also indirect expropriation. The annexes of expropriation in both the US-Australia FTA and the investment chapter of the ASEAN-Australia-New Zealand FTA state that "non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives such as the protection of public health, safety, and the environment do not constitute indirect expropriation".[42]

Investor-State Dispute Settlement

Investor-state dispute settlement is one of the key features of the BITs worldwide and Indian BIPAs are no exception. This form of settlement of disputes gained ground particularly after the World Bank established the ICSID[43] in 1965. The raison d'être of ICSID was to provide proceedings "for the conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states". ICSID thus gave unto itself the task of arbitrating in disputes between the foreign investor and the host state, which in the past was largely seen to be within the jurisdiction of the courts in the host countries.[44] In 1976, a further fillip to this form of arbitration was provided through rules adopted by the UNCITRAL. UNCITRAL rules were specifically designed for use in ad hoc common law/civil law arbitrations. Besides these forums, there are others, including those provided by the ICC, where the investment-related disputes are heard but the quantum of disputes handled by these alternate forums are often not available in the public domain.

Although the investor-state dispute mechanism has been in place since the 1960s, the exercise of this provision became widespread since the late 1990s. In the first three decades since the setting up of ICSID in 1965, the total number of disputes registered with it was only 32. However, between 1995 and 2012, the number of disputes registered with ICSID was 352.[45] The period since the 1990s also saw a sharp increase in the number of BITs that have come into force. Out of the 1,735 BITs that have come into force since 1960, 1,493 (86%) came into force after 1989.[46] By the end of 2011, the total number of known investor-state disputes had reached 450, and the total number of countries that have responded to one or more arbitrations increased to 89. In fact, 2011 saw initiation of 46 new disputes, the largest number in any single year. Thus, the increase in the number of BITs has gone hand-in-hand with the increase in investor-state disputes.[47]

Several commentators have written critically on a number of aspects of the investor-state dispute mechanism. They have alluded to the "pro-investor" bias of BITs and the process of investor-state arbitration, including the ability of the courts in the host countries to deal with the rulings of arbitration panels. A key feature of the investor-state dispute process is that it gives the investor superior bargaining power vis-à-vis their host countries. This dimension manifests itself in several forms. The first is that the consent of the investor is essential for initiating an investor-state dispute under BITs. Commentators have suggested that this element introduces "an inherent pro-investor bias in the system (Tienhaara 2010: 5) since investors will participate only if it is in their interest to participate in the dispute. The ICSID arbitration process introduces a second "pro-investor" bias. The ICSID Convention does not require an investor to exhaust local administrative or judicial remedies as a condition to arbitration, whereas a contracting state may require the exhaustion of such remedies. Interestingly, some commentators have justified this dimension of the "pro-investor bias" thus: "A foreign investor, justifiably in many instances, will not have confidence in the impartiality of the local tribunals and courts in settling any disputes that may arise between him and the host state".[48]

Evidence of this "pro-investor bias" is available from several BIPAs that India has entered into. For example, the India-France BIPA states:

> [I]f the Contracting Party of the investor and the other Contracting Party are both parties to the [ICSID], and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes, such a dispute shall be referred to the Centre[49]... (and) if the investor so decides, the dispute shall be referred to an ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law.[50]

Moreover, investor-state disputes are protected from public scrutiny; there is no requirement that an investor-state dispute needs to be made known to the public. ICSID and UNCITRAL hearings cannot be opened to the public if any party disagrees.[51] The ICSID secretariat keeps a registry of all cases filed under its rules and publishes the awards on its website only if both parties to the dispute agree.

Commentators have pointed out that arbitration tribunals are often insulated from the control of the judicial authorities of the host countries since "investment treaties provide that investor-state disputes are to be treated as commercial disputes for the purposes of the New York Convention. This restricts the degree to which domestic courts can refuse to enforce an investor-state award on the grounds that it goes beyond the bounds of commercial arbitration".[52] The Supreme Court recently overturned a decade-old ruling that allowed Indian companies to approach Indian courts against unfavourable awards given by foreign arbitration panels.[53] This will give a further boost to foreign investors in their disputes with Indian companies and the Government of India. What seems more egregious is that arbitration rules allow a judicial review of the decisions of the panels based solely on the laws of the country where the arbitration is held. Furthermore, in the attempt to create business for the arbitration industry, many countries have revised their national laws to provide for less vigorous judicial review of foreign arbitration awards. As mentioned earlier, BITs give investors the right to initiate disputes against their host states and, therefore, while deciding the jurisdiction, investors often decide in favour of locations that limit judicial review of international arbitration. Belgium has gone to the extent of removing any kind of judicial oversight by Belgian courts on international arbitration awards (van Harten 2005).

Controversies over the investor-state dispute mechanism have spilled over into the negotiations on the Trans-Pacific Partnership Agreement (TPPA),[54] which has been described as the 21st century trade agreement by its most prominent protagonist, the US. Among the issues figuring in the TPPA negotiations is an investment agreement that would have "provisions for expeditious, fair, and transparent investor-State dispute settlement…" (USTR 2011). The negotiations on the investment chapter of TPPA have met with strong opposition from Australia, which has rejected the inclusion of the investor-state mechanism. In its trade policy statement of 2011, the Julia Gillard government was against "provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses".[55] Alongside, the Australian government also announced that it would no longer seek "inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses". The Gillard government declared that it "will discontinue this practice".[56]

This turnaround in Australia's position has not come without reason. The Gillard government was involved in a dispute over packaging of cigarettes, which it was trying to regulate through the Tobacco Plain Packaging Act 2011. The Bill was brought to regulate the retail packaging and appearance of tobacco products among others, "to increase the effectiveness of health warnings on the retail packaging of tobacco products".[57] Tobacco giant Philip Morris Asia challenged this legislation, which controlled the operation of its subsidiary in Australia. The firm used the investor-state dispute provisions of the Australia-Hong Kong BIT to challenge the Australian government's legislation on plain packaging of tobacco products. The reverberations of this dispute were heard in the trade policy statement of 2011. The Australian government declared that it "has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products…".[58]

As the system of international arbitration of investment disputes is biased in favour of investors, it is in our interest to review India's BIPAs so as to clearly define the scope of various investment protection measures so that such measures do not become subject to expansionist interpretation by arbitrators.

Conclusions

The genesis of BIPAs lies in the felt need by capital exporting countries to assure protection to their investments in other countries, and by developing countries to attract foreign capital in their development programmes. These agreements put in place strong iron walls around foreign investments, keeping out government intervention. Gradually, many countries woke up to the disproportionate protection extended to foreign investment by limiting policy space that governments had and started modifying the treaties. In the case of India, the enthusiasm to go for a large number of BIPAs to attract foreign investments led to many deviations, even from the template it had originally finalised. When the country was on a high growth trajectory, this did not pose much of a problem, but when the slowdown started straining the profit margins of companies, they began to search for loopholes in the BIPAs to enhance profits through arbitral awards. The few settled, pending and threatened arbitration cases make a strong brief for review of India's BIPAs from a national interest perspective.

The review should cover, inter alia, issues of more favourable treatment to foreigners than locals, and limitations on the policy space of the government to address public interest concerns such as public health and equity. The review should provide for laying down parameters that would qualify an investment for protection under a BIPA. The scope of the treaty should be limited to investments made after the entry into force of the agreement. It should make clear what obligations India has in terms of protection of investment. The national treatment and MFN treatment provisions should be applicable only to like circumstances and the use of terms such as "whichever is more favourable", "enjoyment", and "effective means of asserting claims" that can be subjected to an expansionist interpretation should be avoided. The review should specify that CLs in pursuance of the TRIPS agreement, and acts aimed at protecting public interest such as public health, safety and environment be kept completely out of the purview of the clause on expropriation of investments. In fact, it would be more appropriate if intellectual property rights are totally kept out of the purview of BIT since the same are regulated by the TRIPS Agreement, to which most countries of the world are signatories and India, as a country, is against any TRIPS plus provisions in bilateral and plurilateral agreements. It may also be necessary to qualify the term "expropriation" to exclude from its purview results consequent to any legislation passed by a state or national legislature as well as of the orders resulting from a judicial process. The review should also ensure consistency in provisions across all BIPAs. Since, even after the termination of an agreement, it shall continue to be effective for a further period of 15 years from the date of its termination in respect of investments made or acquired before such termination, the review needs to be undertaken at the earliest.

NOTES

1 These agreements are better known as the Bilateral Investment Treaties, or BITs.

2 In the Matter of an UNCITRAL Arbitration in Singapore under the Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, between White Industries Australia and The Republic of India, Final Award, 30 November 2011, http://www.iareporter.com/downloads/20120214.

3 The proposed amendment would enable the Government of India to tax such transactions with six years retrospective effect. However, this proposal is currently under review.

4 The case involving Vodafone has two interesting parallels, both from the UK. First, Vodafone's acquisition of Hutchison Essar, and the subsequent reports of tax evasion, is similar to the case in which the firm's home government had discovered much later that its acquisition of the German firm Mannesmann was completed in 2000 through yet another tax haven, viz, Luxembourg. The UK government initiated proceedings against the firm soon after, but the dispute could be settled only a decade later with Vodafone agreeing to pay £1.25 billion, while independent assessments of the firm's liabilities were several times higher. Lending credence to these assessments was the fact that Vodafone had made a £2.2 billion provision in its books relating to the dispute. For details, see Armitstead (2010) and Maitland (2011).

The second parallel relates to the imposition of the retrospective tax to plug the abuse of loopholes in the double taxation treaties, which exist between the UK and other countries. In 2008, the UK government introduced a provision in the budget (BN66) expressly aimed at double taxation treaty abuse by its residents. BN66 was introduced with the tagline "UK residents are taxable on their income wherever it arises" and this provision was introduced with retrospective effect, from 1987. For details, see HM Revenue and Customs (2008).

5 TCI has filed an arbitration notice in the International Court of Justice under the India-UK and India-Cyprus BIPAs on 16 May 2012. It has also filed a case on the same issue in Delhi High Court against Coal India on 1 August 2012.

6 The implementation of the Federal Government of Germany's decision to phase out nuclear power by 2022 is mired in a dispute with the Stockholm-based power generation company Vattenfall. It is one of Europe's biggest electricity producing firms and has stakes in three nuclear plants in Germany. Of the three plants, two have been not functioning for years and would not be allowed to restart, according to the decision. The third plant will continue to function till 2021 and thereafter it will also shut down. The company initiated a dispute with Germany last year claiming more than 1 billion Euro compensation. The company had successfully challenged Germany in 2009 in another case involving certain standards set out in power generation (Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG V Federal Republic of Germany (ICSID Case No ARB/09/6). As a settlement, Germany had to withdraw the standards set out in an environmental permit required for the operation of a coal-fired power plant situated on the river Elbe aimed at limiting the increase in water temperatures. Vattenfall sued Germany under the Energy Charter Treaty of 1994.

7 In November 2011, Australia passed two anti-tobacco bills for restricting the sale of cigarettes. The bills allowed cigarettes to be sold only in packets with large health warnings and no brand logos; company names were permitted in small size. Philip Morris, a firm having considerable presence in Australia, argued that the government's move would "substantially diminish the value of PMA's investments in Australia". The firm initiated arbitration process under the UNCITRAL invoking the Australia-Hong Kong BIT alleging breach of investor rights, including unlawful expropriation, failure to provide fair and equitable treatment, impairment of investment and failure to provide full protection and security. Australia has already announced that it will not have the investor-state dispute settlement provision in its future investment agreements.

8 For details see UNCTAD (2012b).

9 FRG signed the first of these BITs with Pakistan in November 1959, which became effective in 1962.

10 According to this agreement, the term "investment" shall comprise every kind of asset and more particularly, though not exclusively: (a) movable and immovable property as well as any other rights in rem, such as mortgage, lien, pledge, usufruct and similar rights; (b) shares or other kinds of interest in companies; (c) title to money or to any performance having an economic value; (d) copyright, industrial property rights, technical processes, trade-names and goodwill; and (e) such business concessions under public law, including concessions regarding the prospecting for, or the extraction or winning of, natural resources, as give to their holder a legal position of some duration.

11 An interesting facet of the BITs existing today is that the traditional exporters of capital have not signed any treaty amongst themselves.

12 Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA), viewed on 3 August 2012, http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp

13 See Annex table for details.

14 For example, the US Model BIT 2012 (article 2), US-Australia BIT (Article 11.1), and NAFTA (Article 1101).

15 See Note 2.

16 The Contract provided that White Industries was to be entitled to a bonus where production was in excess of the target figure and, conversely, White Industries was also liable to a penalty where production was below the target figure agreed between the parties.

17 Paragraph 5.1.1, p 47.

18 Paragraph 5.1.1, p 48.

19 Paragraph 7.3.1, p 72.

20 Paragraph 7.3.8, p 76.

21 The tribunal referred to several cases in this context. These include, *Chevron Corporation and Texaco Petroleum Company vs Republic of Ecuador* (UNCITRAL, PCA Case No 34877, Interim Award, 1 December 2008); *Inmaris Perestroika Sailing Maritime Services GmbH vs Ukraine* (lCSID Case No ARB/08/08, Decision on Jurisdiction, 8 March 2010); and *ATA Construction, Industrial and Trading Company vs the Hashemite Kingdom of Jordan* (ICSID Case No ARB/08/02, Award, 18 May 2010).

22 Paragraph 7.4.7, p 76.

23 Trade Act of 2002, Public Law 107-210, 107th Congress, Section 2102. Trade Negotiating Objectives, http://www.gpo.gov/fdsys/pkg/PLAW-107publ210/pdf/PLAW-107publ210.pdf

24 USTR, 2009 Trade Policy Agenda and 2008 Annual Report of the President of the United States on the Trade Agreements Programme, p 4, http://www.ustr.gov/sites/default/files/uploads/reports/2009/asset_upload_file810_15401.pdf)

25 For details see the report of the hearing before the Committee on Ways and Means, US House of Representatives, 14 May 2009, Serial 111-20.

26 27 out of 35 disputes in 2007 were filed in ICSID. For details see IISD (2008).

27 IISD (2008: 21).

28 So far 279 cases were registered with ICSID whereas 126 cases came up in UNCITRAL. Out of the 46 new disputes registered in 2011, 34 were with ICSID. For details, see UNCTAD (2012a).

29 UNCTAD (2007a: 32).

30 Interpretations of Chapter 11, NAFTA Free Trade Commission, 31 July 2001, http://www.state.gov/documents/organization/ 38790.pdf

31 Article 4 (1) of *Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA)*, viewed on 10 August 2012, http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp?pageid =3

32 Gabriel Egli (2006), Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions, BE Press Legal Series, paper 1266, viewed on 10 August 2012, http://law.bepress.com/cgi/viewcontent.cgi?article=6044&context=expresso

33 Finalised in 2007.

34 "Agreement between the Government of the Republic of India and the Government of the

Republic of France on the Reciprocal Promotion and Protection of Investments", Article 5.1, viewed on 10 September 2012, http://www.finmin.nic.in/bipa/ France.pdf

35 "Agreement Between the Government of the Republic of India and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments", Article 4.2, viewed on 10 September 2012, http://www.finmin.nic.in/bipa/Mexico.pdf

36 In Article 4.2 of the India-Australia BIPA, India had committed to treat "at all times...investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country". For details see, "Agreement Between the Government of the Republic of India and the Government of Australia on the Reciprocal Promotion and Protection of Investments", Article 4.2, viewed on 10 September 2012, http://unctad.org/sections/dite/iia/docs/bits/australia_india.pdf.

37 Paragraph 11.2.1 in UNCITRAL 2011.

38 Paragraph 11.2.4 in UNCITRAL 2011.

39 UNCTAD (2012b: 6).

40 The client alert issued by White & Case, one of the world's leading law firms based in New York, in the wake of CL in India advises companies to pursue their claims under India's BIPAs in addition to working with their governments to find out whether the act is consistent with India's obligations under the TRIPS Agreement. The alert states "affected parties may be able to seek relief under applicable bilateral investment treaties with India depending on the residence of the affected parties and the language of the relevant treaties. Patentees should pay particular attention to structuring their activities in India so as to benefit from the protections afforded by numerous bilateral investment treaties that India has entered into". "Indian Patent Office Grants Compulsory License for Bayer's Nexavar: Implications for Multinational Drug Companies", http://www.whitecase.com/files/Publication/f1e2ff33-cc55-40d6-938c-bc77146b782b/Presentation/PublicationAttachment/0d511714-843f-4641-b961-cea6117bc185/alerts-Indian-Patent-Office-Grants-Compulsory-License.pdf

41 Annex B.4 of US Model BITs 2004 and 2012.

42 Annex 11-B of US-Australia Free Trade Agreement, viewed on 10 September 2012, http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text. See also *Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA),* Annexure on Expropriation and compensation, para 4, available at http://www.dfat.gov.au/fta/aanzfta/aanzfta.PDF

43 Also known as the "Washington Convention".

44 This followed the so-called "Calvo doctrine", which maintained that foreign investors could not make claims in their home countries or depend on diplomatic intervention until potential local remedies were exhausted.

45 Till 30 June 2012. Data obtained from *The ICSID Caseload – Statistics* (Issue 2012-2), https://icsid.worldbank.org

46 Based on *ICSID Database of bilateral Investment Treaties*, https://icsid.worldbank.org. This data is available till 2007.

47 van Harten (2005) observes that "increased mobility of international capital, including both foreign direct investment and portfolio investment, put multinational enterprises in a stronger position to demand legal concessions from host states", p 609.

48 M Sornarajah (1994), *The International Law on Foreign Investment*, 207, quoted by Dodge (2006), p 11.

49 "Agreement between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments", Article 9(3)(a), http: //www.finmin.nic.in/bipa/France.pdf

50 "Agreement between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments", Article 9(3)(b), http: //www.finmin.nic.in/bipa/France.pdf

51 Tienhaara (2010: 6).

52 The New York Convention, officially known as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded in 1958. This treaty offers greater scope for the enforcement of international arbitration awards primarily because the convention dropped the requirement that an arbitration award had to comply with the laws of the state in which it was enforced. Instead, the convention maintained that in order to be enforceable, the award had to comply only with the laws of the state in which the arbitration was held. This implies that State parties to the convention "relinquished national judicial control over awards made in other jurisdictions". For details see, van Harten (2005: 605).

53 Decision dated 6 September, 2012 of the Constitution Bench of the Supreme Court in *Bharat Aluminium Co vs Kaiser Aluminium Technical Service (BALCO).*

54 Countries currently engaged in the TPPA negotiations are Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States and Vietnam.

55 Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity, April 2011, p 14.

56 This development is interesting for the developed countries have always maintained double standards as regards investor-State disputes. While they have insisted on including this provision in their BITs with the developing countries, in the very few BITs they have signed amongst themselves, this form of dispute is either excluded or has not been used in recent years. For details see Dodge (2006).

57 Article 3 of the Tobacco Plain Packaging Act 2011. For details see Parliament of Australia (2011).

58 Gillard Government Trade Policy Statement, "Trading Our Way to More Jobs and Prosperity", April 2011, p 14, http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf

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van Harten, Gus (2005): "Private Authority and Transnational Governance: The Contours of the International System of Investor Protection", *Review of International Political Economy*, Vol 12(4), October.

Annexure

Country	Definition
Model BIPA	"investment" means every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes (i) movable and immovable property as well as other rights such as mortgages, liens or pledges; (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company; (iii) rights to money or to any performance under contract having a financial value; (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party; (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals.
France (1997)	"investment" means every kind of asset, such as goods, intellectual property rights and other rights and interest of whatever nature, invested in the area of the Contracting Party in accordance with the laws of that Contracting Party, and in particular though not exclusively includes: (a) movable and immovable property as well as any other rights in rem such as mortgages, liens, usufructs and pledges, and similar rights; (b) shares and other kinds of interest including minority or indirect forms, in companies constituted in the territory of one Contracting Party; (c) debentures or rights to money, or to any legitimate performance having a financial value; (d) business concessions conferred by law or under contract, including concessions to search for, extract or exploit natural resources, which are located in the maritime area of the Contracting parties.
Korea (1996)	"investments" means every kind of asset invested in accordance with the national laws of the Contracting Party, by investors of one Contracting Party in the territory of the other Contracting Party and in particular, though not exclusively, includes: (a) movable and immovable property and any other property rights such as mortgages, liens or pledges; (b) shares in, stocks and debentures of, and any other forms of participation in a company or any business enterprises; (c) rights to money or to any performance under contract having a financial value; (d) intellectual property rights including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, technical processes, trade secrets and know-how, and goodwill in accordance with the relevant law of the respective Contracting Party; (e) business concessions and any other rights required to conduct economic activities and having economic value conferred by law or under contract, including rights to search for, extract and utilise oil, gas and other minerals; (f) goods that, under a leasing contract, are placed at the disposal of a lessee in the territory of a Contracting Party in accordance with its laws and regulations.
Italy (1995)	"investment" means every kind of asset invested, before or after the entry into force of this Agreement, by an investor of a Contracting Party in the territory of the other Contracting Party, in accordance with the national laws of the latter Contracting Party and in particular, though not exclusively, includes; (a) movable and immovable property, including rights in rem on property of a third Party, such as mortgages, liens or pledges; (b) shares, debentures, equity holdings or any other instruments of credit, as well as Government and public securities in general on the basis of respective national laws and regulations; (c) rights to money or to any performance under contract having a financial value, as well as reinvested income related to the initial investment; (d) intellectual and industrial property rights such as copyright, commercial trade marks, patents, industrial designs, know-how, trade secrets, trade names and goodwill, in accordance with the relevant laws of the respective Contracting Party; (e) any economic right accruing by law or by contract and any licence and franchise, including concessions to prospect for, extract and commercialise oil and other minerals.
Kuwait (2001)	"investment" means every kind of asset, owned or controlled directly or indirectly by an investor of one Contracting State and invested in the territory of the other Contracting State in accordance with the laws of the Contracting State. This term shall include in particular though not exclusively: (a) tangible, intangible, movable and immovable property and any property rights such as leases, mortgages, liens, pledges, usufructs and other similar rights; (b) share, stocks, bonds, debentures and any other similar forms of participation in a company and other debts and loans and securities issued by any investor of a Contracting State and returns retained for the purpose of reinvestment and associated activities as these terms are defined hereinafter; (c) rights or claims to money or to any performance under contract having a financial or economic value; (d) intellectual property rights, goodwill, technical processes, know-how, copyrights, trademarks, trade names and patents in accordance with the relevant laws of the respective host Contracting State; (e) any right conferred by law, contract or by virtue of any licences or permits granted pursuant to law, including rights to prospect, explore, extract, or utilise natural resources, and rights to manufacture, use and sell products, and rights to undertake other economic and commercial activities.
Mexico (2007)	"investment" means the following assets established or acquired by an investor of one Contracting Party in accordance with the laws in force of the other Contracting Party in whose territory the investment is made, and involving the commitment of capital, expectation of gain or profit or an assumption of risk: (a) an enterprise having substantial business operations in the territory of the host Contracting Party; (b) shares, stocks and other forms of equity participation in an enterprise; (c) bonds, debentures and other debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a Contracting Party or of a State enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a Contracting Party or to a State enterprise; (e) movable and immovable property as well as other rights such as mortgages, liens or pledges, acquired in the expectation or used for the purpose of economic benefit or other business purposes; (f) interests arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the other Contracting Party, including turnkey or construction contracts, (ii) business concessions conferred by law or under contract, including concessions to search for and extract natural resources, or (iii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; (g) intellectual property rights; and (h) claims to money involving the kind of interest set out in (a) to (g) above but no claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a nation or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d) above.

Source: Bilateral Investment Promotion and protection Agreements, Ministry of Finance, Government of India.