Guide

For

Foreign Investors
Wanting to Seek Relief under
Their Country's Investment Treaty
with Republic of India

Sixth Edition – May 2022

Anil Chawla Law Associates LLP

Business Lawyers, Strategic Advisors and Insolvency Professionals

www.indialegalhelp.com

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Notes:

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This Guide is an academic exercise. It does not offer any advice or suggestion to any individual or firm or company.

Preface

Whenever an entrepreneur or investor moves out of his / her home country to a foreign land, there are many unforeseeable risks. Investment protection treaties between countries are intended to protect investors from such risks to some extent.

India signed her first Bilateral Investment Protection Agreement (BIPA) with United Kingdom in 1994, with the objective of attracting and incentivizing foreign investment. India's first BIPA was based on a model created by a developed country - where emphasis was on protection of foreign investment, rather than internationally recognized regulatory powers of the State. This excessively investor friendly regime remained unchanged for nearly two decades.

The India-UK BIPA served as the base template for India to negotiate further BIPAs. The regime garnered scanty attention and until 2011, only one arbitration was initiated against India internationally. This was ultimately settled and did not result in an international investment arbitration award.

India's approach to investment treaties started undergoing a sea-change after the case of White Industries in 2011. Government of India received several notices (including three from Anil Chawla Law Associates LLP, acting on behalf of foreign investors) and several cases were filed against India between 2011 and 2016. This irritated the powers in Delhi. India unilaterally terminated almost all of the BIPAs by end of March 2017. Subsequently, India has signed BIPAs with a few countries. But most large developed countries that invest in India have shunned the new draft BIPA proposed by India.

India signed a treaty named Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, January 25, 2020 with Brazil (India-Brazil Treaty). India Brazil treaty differs substantially from the investment treaties executed by India before 2020.

India's post-independence investment protection regime can be divided into three phases as follows:

a) From independence to year 1995 when India-UK treaty came into force

b) From 1995 to 2020

c) After year 2020 when India-Brazil Treaty came into force

In addition to unilateral termination of BIPAs, the way India has been resisting enforcement of two major awards has rattled the global investor community. India's termination of treaties has also made Indian entrepreneurs who set up enterprises abroad vulnerable.

General impression is that since the investment protection treaties have been terminated, their provisions for investor protection including third country arbitration are dead. This is not true. Most terminated treaties have a sunset clause which provides that the investments made during the validity of the relevant treaty will enjoy protection for ten or fifteen years after the date of termination of the treaty.

The sunset clause will protect foreign investors (of countries whose BIPAs have been terminated) who have invested in the past in India. It will also protect Indian investors who have invested abroad. It can be said that for all old investments, the relevant investment protection treaty will continue to be operative and effective for many years to come.

The most powerful provision for protection of investors in the old model of BIPAs is the provision for third country international arbitration in case of a dispute between an investor and the concerned country. This has led to the birth of a specialized branch of law called investor state dispute settlement (ISDS) or international investment arbitration.

ISDS or International investment arbitration is different from international commercial arbitration, which relates to disputes between two business entities of different countries.

This Guide is intended to help entrepreneurs, investors, corporate houses, executives of global business houses dealing with India to develop some understanding of the options that they can exercise under India's bilateral treaties concerning investment protection.

We, Anil Chawla Law Associates LLP, specialize in adding value to businesses. This Guide is a step in our ongoing passion and commitment to help businesses across the globe grow, prosper and create sustainable value.

We have had the honour of being involved with some extremely large and complex international investment arbitration cases (including the world's second largest ISDS case) against Republic of India. Our focus is to help businesses and we remain committed to the same without any conflict of interest in any form. Kindly do not hesitate to contact us for any professional assistance that you may require in relation to international business.

Anil Chawla
Senior Partner, Anil Chawla Law Associates LLP

Glossary

BIPA	Bilateral Investment Protection Agreement
BIT	Bilateral Investment Protection Treaty
CECA	Comprehensive Economic Cooperation Agreement
CEPA	Comprehensive Economic Partnership Agreement
Draft Articles / ILC Articles	Draft Articles on Responsibilities of States for Internationally Wrongful Acts approved by ILC
FET	Fair and Equitable Treatment
GOI	Government of India
ICC	International Chamber of Commerce
ICSID	The International Centre for Settlement of Investment Disputes
ILC	International Law Commission
JIS	Joint Interpretative Statements
LCIA	London Court of International Arbitration
MFN	Most Favored Nation
MoU	Memorandum of Understanding
PCA	Permanent Court of Arbitration, Hague, Netherlands
PPP	Public Private Partnership
PSU	Public Sector Undertaking (A company / corporation owned largely by Government)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

Part A

Frequently Asked Questions

Q.1 Which are the countries with whom India has Bilateral Investment Protection Agreement (BIPA)?

In the past few years, India has terminated her BIPA with most of the countries. Countries with whom BIPA has been terminated are as follows:

Country	Date of Initial Expiry of BIPA Agreement	Date on which Notice of Termination Issued by India
Argentina	11 August 2012	23 March 2016
Armenia	29 May 2016	23 March 2016
Australia	03 May 2010	23 March 2016
Austria	28 February 2011	23 March 2016
Bahrain	04 December 2017	23 March 2020
Belarus	22 November 2013	23 March 2016
Belgium	07 January 2011	23 March 2016
Bosnia & Herzegovina	13 February 2018	01 August 2018
Britain	05 January 2005	23 March 2016
Brunei Darussalam	14 February 2019	22 March 2019
Bulgaria	22 September 2009	23 March 2016
China	31 July 2017	04 October 2017
Congo	Never Enforced	23 March 2016
Croatia	18 January 2012	23 March 2016
Cyprus	11 January 2014	23 March 2016
Czech Republic	05 February 2008	23 March 2016
Denmark	27 August 2006	23 March 2016
Djibouti	Never Enforced	23 March 2016
Egypt	21 November 2010	23 March 2016
Ethiopia	Never Enforced	23 March 2016
Finland	08 April 2018	01 August 2018
France	16 May 2010	23 March 2016
Germany	12 July 2008	23 March 2016
Ghana	Never Enforced	23 March 2016
Hellenic (Greece)	12 April 2008	23 March 2016
Hungary	01 January 2016	23 March 2016
Iceland	15 December 2018	01 August 2018
Indonesia	21 January 2014	23 March 2016
Israel	17 February 2007	23 March 2016
Italy	27 March 2008	23 March 2016

Country	Date of Initial Expiry of BIPA Agreement	Date on which Notice of Termination Issued by India
Jordan	21 January 2019	22 March 2019
Kazakhstan	25 July 2011	23 March 2016
Kuwait	27 June 2018	26 June 2017
Kyrgyz	11 May 2010	23 March 2016
Lao PDR	04 January 2018	01 August 2018
Latvia	26 November 2020	26 November 2020
Macedonia	16 October 2018	01 August 2018
Malaysia	11 April 2007	23 March 2016
Mauritius	19 June 2010	23 March 2016
Mexico	22 February 2018	31 July 2018
Mongolia	28 April 2012	23 March 2016
Morocco	21 February 2011	23 March 2016
Mozambique	22 September 2019	22 March 2019
Myanmar	07 February 2019	22 March 2019
Nepal	Never Enforced	23 March 2016
Netherlands	30 November 2016	23 March 2016
Oman	12 October 2010	23 March 2016
Philippines	28 January 2011	23 March 2016
Poland	30 December 2007	23 March 2016
Portugal	18 July 2012	23 March 2016
Qatar	14 December 2009	23 March 2016
Romania	08 December 2009	23 March 2016
Russia	04 August 2006	23 March 2016
Saudi Arabia	19 May 2018	01 August 2018
Serbia	23 February 2019	22 March 2019
Seychelles	Never Enforced	23 March 2016
Slovak	Valid for 12 months after issue of the Notice of Termination	23 March 2016
Slovenia	Never Enforced	23 March 2016
South Korea	06 May 2006	23 March 2016
Spain	15 October 2008	23 March 2016
Sri Lanka	12 February 2008	23 March 2016
Sudan	17 October 2020	19 October 2020
Sweden	31 March 2011	23 March 2016
Switzerland	15 February 2010	23 March 2016
Syrian Arab Republic	21 January 2019	20 June 2019

Country	Date of Initial Expiry of BIPA Agreement	Date on which Notice of Termination Issued by India
Taiwan	24 February 2015	22 March 2017
Tajikistan	22 November 2013	23 March 2016
Thailand	12 July 2011	23 March 2016
Trinidad & Tobago	06 September 2017	16 August 2017
Turkey	17 October 2017	09 July 2018
Turkmenistan	26 February 2016	23 March 2016
Ukraine	11 August 2013	23 March 2016
Uruguay	Never Enforced	23 March 2016
Uzbekistan	Valid for 12 months after issue of the Notice of Termination	23 March 2016
Vietnam	30 November 2009	23 March 2016
Yemen	24 February 2015	23 March 2016
Zimbabwe	Never Enforced	23 March 2016

India's termination of its original BIPA network does not mean that it has turned its back on investment protection altogether. On the contrary, it has been trying to re-negotiate these BIPAs according to its newly adopted Model BIPA, which introduced some significant changes to India's investment regime.

Since the termination of its BIPAs in 2017, India has signed five new BIPAs, namely with **Colombia, Belarus, Kyrgyz Republic, Taiwan** and in January 2020, **Brazil**. The latest BIPA with Brazil does not include a broad fair and equitable treatment clause, but instead lists specific measures that would traditionally have formed part of that protection including prohibition of: (a) denial of justice; (b) fundamental breach of due process; and (c) certain discriminatory actions.

Apparently, the only countries with whom India has ongoing investment protection agreement are the five countries named above and Bangladesh. Details of the bilateral agreements are as follows:

Country	Date of Expiry of BIPA Ageement	Remarks
UAE	12 September 2024	India-UAE Comprehensive Economic Partnership Agreement was signed in February 2022 and came into force on 1 May 2022. Article 12.1 of the CEPA confirms the present BIPA and says that a new BIPA is likely to be concluded by June 2022.
Colombia	01 July 2022	Joint Interpretative Declaration (JID) has been signed on 4 October 2018.
Bangladesh	06 July 2022	Joint Interpretative Note (JIN) has been signed on 4 October 2017.
Senegal	16 October 2024	Notice of Termination is proposed to be issued in 2024 if no response received on JIS (Joint Interpretative Statement).
Lithuania	30 November 2026	Notice of Termination is proposed to be issued in 2026 if no response received on JIS.
Libya	24 March 2019	Termination Notice could not be conveyed due to the lack of a credible institutional counterpart.

Source: Committee on External Affairs (2020-2021), Ministry of External Affairs, India and Bilateral Investment Treaties, Tenth Report, (September 2021)

As mentioned earlier, India terminated treaties with most of the countries mentioned above during March 2017 unilaterally. Generally speaking, a bilateral treaty cannot be terminated unilaterally by one of the signing countries. Hence, there may be some doubts about India's unilateral termination of treaties. Legal position in this regard will need to be decided by Investment Arbitration Tribunals when the issue of jurisdiction is decided by the tribunals.

Prior to termination, India had issued notices to various countries seeking renegotiation of the BIPAs and proposing a set of Joint Interpretative Statements to be made a part of the relevant BIPA.

The Joint Interpretative Statements (JIS), proposed by India, were extremely damaging for investor protection. It is not surprising that most countries refused to accept the JIS.

Four key damaging aspects of the proposed JIS can be summed up as follows:

1. Limitations imposed on definition of Investor

The proposed JIS impose conditions on the definition of investor. Some of the conditions are (a) if the investor is from country A and has invested in India, the investor must have substantial business activities in A, (b) the investor must have "*direct, real and transparent links*" with both countries and (c) the investor from A must not be owned or controlled by persons of either a third country or from India.

2. Denial of benefits clause

India wishes to have a blanket authority to deny benefits of the Treaty to any investor at her own whims and fancies. This absurd wish of Government of India reads as follows:

3. **Note on denial of benefits clause**

1.	The Contracting Parties affirm their understanding that they may deny the benefits of this Agreement pursuant to Article [ ] at any time, including after the initiation of arbitration proceedings under Article [ ].

3. Dilution of "Fair and Equitable Treatment" and "Full Protection and Security"

The proposed JIS dilute and reduce the concepts of "*Fair and Equitable Treatment*" (FET) and "*Full Protection and Security*" (FPS) to a level that is inconsistent with the international interpretation of the two concepts. The proposed JIS introduce the concept of "*designed or applied to further public policy objectives*" for overriding FET and FPS. And to cap it all, the concept of FPS is limited to only physical security of investments and all other obligations are specifically excluded.

4. Investment arbitration

The proposed JIS put entirely on the claimant the burden of proving that the claimant has suffered damages and that there was a breach of the concerned Treaty. The claimant will also need to prove that the damages suffered are actual, non-speculative, direct and foreseeable result of the alleged breach.

In addition, the state facing allegations of breach of treaty obligations will have recourse to many new defenses like "*essential security interests*", "*public policy objectives*", "*rights to regulate within respective borders*", "*defenses of necessity, force majeure and sovereign immunity*".

Q.2 If the investment is made when India's BIPA with my country was in force and the cause of action for dispute arose after termination, will it possible to take recourse of the terminated BIPA between India and my country?

India's BIPAs with most countries have a clause similar to the one given below (extracted from India-UK BIPA):

ARTICLE 15
Duration and Termination

This Agreement shall remain In force for a period of ten years. Thereafter It shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that In respect of investments made whilst the Agreement is in force, Its provisions shall continue in effect with respect to such investments for a period of 15 years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

Notably, if the investment is made during the period when the Agreement was in force, the protection of BIPA will be available for a period of **ten or fifteen years** (as per the treaty) from the date of termination. There is no way that the Republic of India can wriggle out of this commitment. Hence, in most cases the investments made during the validity of the relevant BIPA will continue to enjoy protection for many years to come.

An example of this comes from the case of GPIX LLC vs. Republic of India filed under India-Mauritius BIPA, which was terminated on 22 March 2017. Proceedings started on 9th March 2020. Clearly, the proceedings have begun much after the termination of the treaty.

Claimant	GPIX LLC
Respondent	Republic of India
Case No.	2020-36
Administering Institution	Permanent Court of Arbitration
Case Status	Pending
Applicable Rules	UNCITRAL Arbitration Rules 1976
Agreement governing the Parties	India - Mauritius BIT (1998)
Seat of Arbitration	United Kingdom
Date of Commencement of Proceeding	9 March 2020

Notably, the period provided under India-Mauritius Treaty for disputes arising after termination of treaty is ten (10) years. Relevant sub-clause 13(3) of the treaty reads as follows:

(3) In respect of investments approved and /or made prior to the date the notice of termination of this Agreement becomes effective, the provisions of the proceeding articles shall remain in force with respect to such investments for a further period of ten years from that date or for any longer period as provided for or agreed upon in the relevant contract or approval granted to the investor.

It may be clarified here that the investment must be made before the termination of the relevant BIPA. Cause of action may arise after termination of BIPA within the period of ten or fifteen years as specified within the relevant BIPA.

Q.3 India had signed a BIPA with say Russian Federation, and subsequently India's BIPA with Russian Federation terminated in 2017. A Russian company had invested in a project in India. The investment was made in the year 2015. Some actions of an agency of Government of India in year 2019 led to loss of investment for the said Russian investor. Can the investor take advantage of the terminated BIPA between India and Russian Federation?

This question relates to the discussion under Question 2.

In the case under question the investment was made prior to expiry of the relevant BIPA while the cause of action arose after expiry of the BIPA. Date of cause of action is within the specified sunset period of fifteen (15) years under the India-Russia BIPA. Hence, the investor is eligible to protection under the relevant BIPA.

India-Russia BIPA has the following sub-clause 13(3) which provides for the sunset period:

3. In respect of investments made prior to the date of termination of this Agreement, its provisions shall continue to be effective for a further period of fifteen years from this date.

Q.4 Which are the countries with whom India has Comprehensive Economic Cooperation Agreement (CECA) / Comprehensive Economic Partnership Agreement (CEPA)? And what is the status of CECA / CEPA agreements?

Till some time back, India had CECA with Malaysia and Singapore and CEPA with Japan and Republic of Korea.

Generally speaking, CEPA used to be wider and more comprehensive than CECA. A few years back, it was assumed that CECA / CEPA had a section on investment and thus BIPA used to be a part of CECA / CEPA. This is no longer true.

On 22nd February 2021, India and Mauritius have signed a Comprehensive Economic Cooperation and Partnership Agreement (CECPA), which does not even mention investment.

India-UAE CEPA was signed on 18th February 2022 and came into force from 1st May 2022. It is the first deep and full free trade Agreement to be signed by India with any country in the past decade. However, India-UAE CEPA does not include BIPA. Relevant Article 12.1 reads as follows:

> *The Parties note the existence of the Agreement Between the Government of the United Arab Emirates and the Government of the Republic of India on the Promotion and Protection of Investments, signed at New Delhi, India on 12 December 2013 (UAE-India Bilateral Investment Agreement). Further, the Parties renew their commitment to the ongoing negotiations between the Parties to replace the UAE-India Bilateral Investment Agreement, and agree to finalise a new agreement by June 2022.*

It seems that government of India is committed to demolishing the investment protection regime that had been built up over two and a half decades. New agreements (CECA / CEPA / CECPA) will not have any provisions related to investment protection. As far as old agreements are concerned, it will be reasonable to presume that the protection accorded by the sunset clause will be the only one that is still be available.

Q.5 Are there some major countries with whom India does not have and never had any investment treaty?

Yes! USA, Canada, South Africa, Iran and Tanzania are examples of countries with whom India does not have and never had any type of investment treaty.

Q.6 Where can I get a copy of India's BIPA / CECA / CEPA with one of the above-mentioned countries?

Ministry of External Affairs maintains a Database of Treaties at
http://www.mea.gov.in/treaty.htm

All BIPAs executed by India are available at
http://dea.gov.in/bipa?page=3

https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india

All trade agreements and CECA's executed by India are available at
https://commerce.gov.in/international-trade/trade-agreements/

A word of caution – While a treaty may be available at one or more of the above websites, one may not presume that the treaty is valid and is in force. The treaty may have expired or may have been terminated. So, extreme caution is advised.

Q.7 What is the difference between BIPA and CECA / CEPA?

BIPA relates to only protection of investment while CECA & CEPA cover every aspect of economic relations between the countries including trade, customs, movement of natural persons, intellectual property rights etc. Generally speaking, CECA & CEPA are more detailed than BIPA.

Q.8 What are the salient features of the new model Bilateral Investment Treaty proposed by India?

India tried to devolve a new Model BIPA in 2016. It may be said that the 2016 Model is more state-centric than its earlier predecessor.

Definition of investment under the new BIPA imposes new criterion for an enterprise to be considered as an 'investment'.

> 1.4. "investment" means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, which have the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and contribution to the development of thc Party in whose territory the investment is made.

Under the above definition, just putting in money will not be sufficient. There must be an "*enterprise constituted, organized and operated in good faith*". This new criterion will complicate jurisdiction issues in any investment arbitration.

The Model BIPA, 2016 has removed the Most Favoured Nation ('MFN') clause. The MFN clause allowed an investor to take benefit of a treaty that India had with a third country. Removal of MFN clause has taken away this benefit.

India has also incorporated Article 15.2 which states that an investor has to necessarily seek legal remedy from the domestic courts of the host state for an initial period of 5 years before seeking a claim under Model BIPA. This clause makes the process of seeking relief under investment arbitration a long-drawn-out and difficult process since one has to first struggle through domestic courts.

15.2 Where applicable, if, after exhausting all relevant judicial or administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question, no resolution has been reached satisfactory to the investor, the investor may commence a proceeding under this Chapter by transmitting a notice of dispute ("notice of dispute") to the Defending Party.

The Model BIPA, 2016 has also an Article on expropriation. Notably, expropriation for "*reasons of public purpose*" is allowed.

5.1 Neither Party may nationalize or expropriate an investment of an investor (" expropriation") of the other Party either directly or through measures having an effect equivalent to expropriation (indirectly), except for reasons of public purpose, in accordance with the due process of law and on payment of adequate compensation. For the avoidance of doubt, any measure of expropriation relating to land shall be for the purposes as set out in a law of a Party concerned relating to land acquisition and any questions as to public purpose and compensation shall be determined in accordance with the procedure specified in such law. Such compensation shall at least

be equivalent to the fair market value of the expropriated investment immediately on the day before the expropriation takes place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value, and other criteria, as appropriate, to determine fair market value.

Article 5 of Model BIPA, 2016 is clearly host-state-centric. This is likely to create doubts in the minds of any investor intending to invest in India.

Extracts given above are from Treaty dated 24th September 2018 between the Republic of Belarus and the Republic of India on Investments.

Q.9 Can an individual foreign citizen be considered as an investor under BIPA / CECA? In other words, is relief under investment

treaties available only to companies or is it also available to natural persons or foreign citizens?

The following extract from Malaysia-India Comprehensive Economic Cooperation Agreement is illustrative of the general position:

> **investor of a Party** means a natural person or an enterprise of a Party, that is making, or has made an investment in the territory of another Party; and

It is clear that an individual foreign citizen (as well as any firm / company / society of India) is classified as an investor under BIPA and CECA. So, the relief under the treaties is available to both, individuals as well as companies.

The position has not changed in the new treaties signed by India after 2017. The following extract from ICFT between India and Brazil illustrates the unchanged position:

> **"Investor"** means:
>
> a) any natural person of a Party that makes an investment in the territory of the other Party; or
>
> b) any enterprise constituted and organized in accordance with the law of a Party, other than a branch, that has substantial business activities in the territory of that Party and that makes an investment in the territory of the other Party.

Q.10 A foreign investor is from a country that had signed both BIPA and CECA. In a dispute with Republic of India, should he proceed under BIPA or CECA?

He can proceed under both BIPA and CECA. Signing of CECA does not extinguish BIPA.

Q.11 A treaty like BIPA / CECA / CEPA has many legal terms. How are these terms to be interpreted? Are there any rules of interpretation that are universally accepted and followed?

In 2001, International Law Commission (ILC) adopted Draft Articles on Responsibilities of States for Internationally Wrongful Acts with Commentaries and recommended them to General Assembly.

Responsibility of States for Internationally Wrongful Acts
2001

> Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2001,* vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

Draft articles on
Responsibility of States for Internationally Wrongful Acts, with commentaries
2001

> Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.

http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

The Draft Articles without commentaries and with commentaries are available from the above links of Office of Legal Affairs of United Nations. The Office is also responsible for maintaining United Nations Treaty Collection, which can be accessed at https://treaties.un.org/

By resolution 56/83 of 12 December 2001, 59/35 of 2 December 2004, 62/61 of 6 December 2007 and 65/19 of 6 December 2010 the General Assembly of United Nations commended them to the attention of Governments, without prejudice to their future adoption as a treaty text or other appropriate action.

Some countries have pressed for a diplomatic conference to consider the Draft Articles. Others have preferred to maintain their status as an ILC approved text waiting for approval by the General Assembly.

The Draft Articles have been very widely approved and applied in practice, including by the International Court of Justice.

International Arbitration Panels routinely refer to the Draft Articles for interpretation of treaties. In this Guide also any reference to Draft Articles means reference to Draft Articles on Responsibilities of States for Internationally Wrongful Acts with Commentaries as approved by ILC.

It may be mentioned here that India had been pushing for Joint Interpretative Statements (JIS) for interpretation of various terms used in the treaties. Bangladesh signed the JIS on 4th October 2017 and Colombia signed a Joint Interpretative Declaration (JID) on 4th October 2018. The JIS and JID must be used to interpret the terms of the relevant treaties.

Q.12 For an investor-state dispute arising from a contract between a foreign company and a government of some state of India which of the two - domestic arbitration or treaty based international arbitration should be opted for and why?

Answer to this question will depend on the nature of dispute (and also the provisions of the concerned treaty). If the dispute has arisen because of a breach of contract by an organ of the government, domestic arbitration as provided under the agreement is the correct recourse. On the other hand, if there has been some state action which may or may not be a breach of contract but has affected the ability of the company to work, international arbitration under the relevant treaty will be the correct course to be followed. Often a wrongful act of the government may be both a state action and a breach of contract terms creating the possibility of taking advantage of any of the two possibilities.

In case both options (domestic arbitration and international arbitration) are found to be equally feasible, one must keep in mind that domestic arbitration will be followed by appeals through the hierarchy of courts in the relevant foreign country – leading to a cumulative process that may continue for many years depending on the time taken for judicial processes in the country concerned. International arbitration can be relatively quicker. As regards appeal, decisions of international investment tribunals have rarely been challenged in appeal. However, it is possible to appeal against the decision either as per procedure provided in the relevant treaty or based on the seat of arbitration.

The most important point to be noted is that one cannot choose both paths. The company should either go for domestic arbitration or go for international arbitration under BIPA. The company cannot go for both ways of arbitration simultaneously.

Some investment protection treaties have a clause prohibiting recourse to investor-state arbitration under the relevant treaty if there is a written contract between investor and the state. The following clause from India-UAE BIPA is illustrative:

> This Article shall not be applied in the following situations:
>
> a) If there is a written contract or agreement between a Contracting Party and an Investor, the dispute shall only be resolved in accordance with the procedure specified in that contract or agreement; or

One should look for such clauses in the relevant treaty before taking a decision about the course to be pursued.

In case of new BIPAs, as mentioned earlier in the answer to Q8, it is necessary to pursue domestic litigation for a period of five years before taking resort to international investment arbitration.

Q.13 We are a Chinese company working on a project for Government of a state of India. We have a dispute with the state government regarding employment of manpower for the project leading to stoppage of work at the project. Our Agreement with the state

government provides for domestic arbitration with a state government officer as Sole Arbitrator. Can we go for International Arbitration under India-China BIPA?

India-China BIPA treaty has the following provision:

> (4) The Contracting Party involved in the dispute may require the investor concerned to exhaust the domestic review procedure before the dispute is submitted for international conciliation under Article 9(2) (b) or arbitration under Article 9(3).

Your company can issue a notice to Republic of India under Article 9(1) of India-China BIPA seeking amicable resolution of the dispute. However, it will be open to Republic of India to require your company to exhaust the "*domestic review procedure*" before any further steps be taken under India-China BIPA.

Such an option for Republic of India to ask for exhaustion of "*domestic review procedure*" before taking steps under BIPA is also found in many other treaties e.g. with United Kingdom and Republic of Korea.

It may also be mentioned here that India-China BIPA was terminated on 3rd October 2018. As per Article 16(2) of the BIPA, the Agreement shall continue to be effective for fifteen years (up to 2nd October 2033) in respect of investments made or acquired before 3rd October 2018.

Q.14 Our company had been assigned work by a Municipal Corporation in India. 10% shares of the company are held by a foreign company incorporated in a country having BIPA with India. Can our dispute with the Municipal Corporation be taken up under BIPA?

State Governments, Municipal Bodies and even Gram Panchayats (village councils) are organs of the Republic of India. They are constitutional bodies exercising governmental functions. Article 4 of the Draft Articles reads as follows:

Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

From the above it is clear that the Republic of India is liable for all acts done by any of its organs including Municipal Corporation. Hence, the foreign company, which is an investor in an Indian company, can take up the dispute under BIPA with the Republic of India.

However, in case of some treaties (example, India-UAE BIPA), recourse to dispute settlement procedure can be taken up only with regards to "*Measures taken by the Central or State Government while exercising their executive powers in accordance with the Constitution of India*". Clearly, in case of such treaties disputes arising out of wrongs committed by municipal bodies cannot be taken up under the appropriate BIPA. The relevant portion of India-UAE BIPA is as follows:

In the context of Republic of India, this Article shall cover Measures underlying a dispute taken by the Central Government and/or the state governments while exercising their executive powers in accordance with the Constitution of India.

Even though, treaties like India-UAE BIPA prohibit dispute resolution through BIPA mechanisms for disputes arising out of actions by bodies like municipal corporations, it is possible to take recourse to Most Favored Nation (MFN) clause listed under Treatment of Investments. An investor of UAE is entitled to argue that since actions by municipal bodies are covered under investment treaties with other nations, by virtue of MFN clause he becomes entitled to take recourse to India-UAE BIPA.

Q.15 Is a relationship with Regional / Provincial / County Government also covered under BIPA / CECA / CEPA?

Yes, please see the reply to Q.14.

Q.16 Our company is partially owned by a foreign company. We had been assigned work by a Public Sector Undertaking (PSU) of India. After the completion of the work, the Indian PSU did not release the Security Deposit as well as the last payment. Can we ask our foreign shareholders to take action under BIPA?

Whether PSU is an organ of the state or not will depend on the circumstances of the case. Ownership by the Government is not a relevant consideration in deciding whether a particular entity is an organ of the state. Even a private company can be an organ of the state.

Article 5 of the Draft Articles on Responsibility of States for Internationally Wrong Acts adopted by the International Law Commission reads as follows:

> ***Article 5. Conduct of persons or entities exercising elements of governmental authority***
>
> **The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.**

As can be seen from the above article, the key consideration is "exercising elements of governmental authority". The following extract from the Commentaries to the above article in the said Draft Articles illustrates the point further.

(2) The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.[127]

Under Article 8 (reproduced below) of the Draft Articles, if an entity is directed or controlled by an organ of the State, the entity's actions can be considered an act of the State.

Article 8. Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

In an award dated 30 November 2011 in the matter of UNCITRAL Arbitration in Singapore under the Agreement between the Government of Australia and the Government of the Republic of India between White Industries Australia Limited versus the Republic of India, the issue came up whether the Republic of India is responsible for actions of Coal India Ltd. (a PSU). Discussion on the matter is reproduced below:

8.1.19 On the record before us, there is simply no suggestion that the officers and employees of Coal India required or obtained the approval of India to activate the Bank Guarantee. It is also clear that the GOI was not involved, either directly or indirectly, in the negotiation of the detailed contractual terms of the Contract with White - this is clear from the testimony Mr Ghodke and Mr Malhotra. Further, the GOI played no role in the "execution, implementation or completion" of the project - this was for Coal India. As Mr Malhotra explained:

> *"the role of the Government of India was limited to facilitating and improving CIL's Piparwar Project. As I have explained above, the Government was required to approve the Piparwar Project, because CIL's utilisation of public funds in Piparwar had to be sanctioned by the Government"*

8.1.21 Based on the documentary and testimonial record, the Tribunal therefore concludes that the evidence does not support White's contention that the conduct of Coal India is properly to be attributed to India.

The Tribunal decided that Coal India Ltd. even though owned largely by the Government of India was not an organ of the state since (a) it did not exercise any element of government authority and (b) its actions in the particular instance were not directed or controlled by the Government of India.

Summing up it can be said that whether a company's actions can be attributed to the country will depend on (a) whether the company is exercising elements of government authority and (b) whether the actions of the company are directed or controlled by the Government in the instance. For example, a private company involved in collecting toll tax on a road may be considered an organ of the country while a PSU like Coal India Ltd. may not be covered by BIPA.

Notwithstanding the above discussion, one has to keep in view the provisions of the relevant BIPA regarding applicability. Please refer answer to Question no. 14 above.

Q.17 We are a company located in the United States of America. Our country does not have investment treaty arrangements with India. We made investments in an Indian company through our wholly owned subsidiary in Mauritius. The Indian company signed an Agreement with a state Government. Now there are some problems in the working of the Agreement. Can we benefit from India-Mauritius BIPA?

The Mauritius based company should seek relief under India-Mauritius BIPA. Your company (based in the USA, a non-treaty country) cannot directly take benefit of India's investment treaties.

Q.18 We are Indian citizens living in Singapore. We have set up a company in Singapore. The Singapore company has executed a PPP agreement with GOI. Some disputes have come up in the PPP agreement and GOI is behaving in most unfair manner. Can the Singapore company owned by us take advantage of India-Singapore CECA?

India-Singapore CECA defines investor and enterprise as follows:

4. **investor of a Party** means:

(a) an enterprise of a Party; or

(b) a national of a Party

6. **enterprise** means any entity that is incorporated, constituted, set up or otherwise duly organized under the law of a Party[6-1], whether or not for profit, whether privately or otherwise owned, with limited or unlimited liability, including any corporation, company, association, partnership, trust, joint venture, co-operatives or sole proprietorship. An enterprise shall not include any legal entity, which is established and located in the territory of a Party with negligible or nil business operations or with no real and continuous business activities carried out in the territory of that Party.

Most importantly, the CECA has this clause which stipulates that a Singapore company to take benefit of India-CECA must have substantial business operations in Singapore and investors of India should not own or control the Singapore company.

ARTICLE 6.9: DENIAL OF BENEFITS

1. A Party may deny the benefits of this Chapter to an investor that is an enterprise of the other Party where the denying Party establishes that:

(a) the enterprise has no substantial business operations in the territory of the other Party; or

(b) investors of the denying Party own or control the enterprise.

In your case, the Singapore company is owned and controlled by Indian citizens. Hence, Government of India has a right to deny the benefit of India-Singapore CECA to your company.

The above Denial of Benefits clause is unique to India-Singapore CECA. Such clause although not present in most old BIPA treaties (now terminated) signed by India, is present in the new treaties executed by India.

Q.19 We are a Malaysia-based company. We have made some investments in India through a tax haven country which does not have any treaties with India. Can we take benefit of India-Malaysia BIPA / CECA?

Malaysia has BIPA as well as CECA with India. The definition of Investment under India-Malaysia CECA is as follows:

investments means every kind of asset owned or controlled, directly or indirectly, by an investor of a Party in the territory of the other Party, and invested in accordance with the latter Party's laws, regulations and national policies, and has the characteristics of an investment, such as the commitment of capital, the expectation of gain or profit, or the assumption of risk, and includes:

The expression "directly or indirectly" makes it clear that investments routed through third countries are also included. Hence, the Malaysian company can take benefit of India-Malaysia CECA.

Notably, the definition of investment under India-Malaysia BIPA is narrower than the one given in CECA. Hence, while it is possible to take advantage of India-Malaysia CECA, it is not possible to take recourse to India-Malaysia BIPA.

Q.20 We (a foreign company) had invested in debentures of an Indian company. The company is defaulting on the debentures citing a force majeure condition created by some legislative changes made by Indian Parliament. The new law has made it impossible for the Indian company to do business. Can we claim relief under the BIPA treaty that our country has with India?

The following extract from India-Russia BIPA (most old BIPAs have a similar definition of "investments") makes it clear that debentures are classified as investments. Hence, any action by an organ of the Republic of India threatening the investment will make India liable to action under the relevant BIPA. In other words, you may be able to claim relief under the BIPA treaty.

1. The term "investment" means every kind of asset, including Intellectual property rights. Invested by an investor of one Contracting Party in the territory of the State of the other Contracting Party in accordance with the laws of the State of that Contracting Party, in particular:

   a. movable and Immovable property, as well as related rights in rem;

   b. shares, stock and any other form of participation in a company, enterprise, corporation, firm, association or other legal entity;

   c. claims based on rights to money or to any performance under contract having a financial value;

Q.21 We (a foreign company) own shares (minority) in an Indian company. The Indian company had taken up some contract with a State Government. A dispute had taken place between the Indian company and the State Government. The matter was referred to arbitration. After the decision of the arbitrator, the matter now is before High Court where it has been pending for past eleven years. Can we take recourse to the provisions of BIPA?

All courts are organs of the Republic of India. Excessive delays by courts have been viewed internationally as "breach of India's voluntarily assumed obligation of providing with effective means of asserting claims and enforcing rights".

The following extract from the award in White Industries Australia Limited versus the Republic of India makes interesting reading.

> Tribunal has no difficulty in concluding the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court's inability to hear White's jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White with "effective means" of asserting claims and enforcing rights.

> 11.4.20 Accordingly, India is in breach of Article 4(2) of the BIT.

In the matter referred to in the question it may be possible to seek relief under the provisions of BIPA.

However, it should be noted that BIPAs between India and some countries cover only actions by the executive wing of Republic of India. In such cases, judicial decisions and delays are specifically excluded. In such a case, recourse to Most Favored Nation Treatment clause may be used to take benefit of treaties with other countries.

Q.22 We are an investment company in UAE which is largely owned by Indian residents. We entered into a Joint Development Agreement with a land owner in a prominent Indian city. The two parties had agreed to jointly develop a township on a big plot of land located near the said Indian city. We invested a big sum of money in the project. Concerned state government changed rules related to township development after we had invested money making the township development impossible. Can we claim compensation from Republic of India?

Ownership of UAE company is an irrelevant detail and should be ignored.

The state government is an organ of Republic of India. If an action by the organ has led to loss to the UAE company, the UAE company is eligible to claim compensation under India-UAE BIPA.

It may be mentioned here that if instead of UAE, your company had been based in Singapore, your company would not have been eligible to take benefit of India-Singapore CECA since the said CECA has a clause denying benefit to Singapore companies owned by residents of India.

ARTICLE 6.9: DENIAL OF BENEFITS

1. A Party may deny the benefits of this Chapter to an investor that is an enterprise of the other Party where the denying Party establishes that:

(a) the enterprise has no substantial business operations in the territory of the other Party; or

(b) investors of the denying Party own or control the enterprise.

Q.23 What is "Most Favoured Nation Treatment"? What are the implications of this clause if provided in BIPA between two countries?

The following extract from India-Germany BIPA is an example of a typical Most-favoured-nation (MFN) Treatment clause in an investment treaty.

ARTICLE 4

National Treatment and Most-favoured-nation Treatment

(1) Each Contracting Party shall accord 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 either to investments of its own investors or to investments of investors of any third State.

(2) The Provisions of paragraphs 1 shall not relate to privileges which either Contracting Party accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.

(3) The Provisions of paragraphs 1 shall also not relate to advantages which either Contracting Party accords to its own investors or to investors of third Stats by virtue of an agreement, legislation. or arrangements consequent to such legislation regarding matters of taxation, including an agreement on the avoidance of double taxation.

MFN treatment clause ensures that the investors of the concerned nation get the treatment which any other investor from any other country gets. So, if India-UAE BIPA has a provision which is more favorable than the provisions of India-Germany BIPA, investors of Germany are entitled to take the benefit of the said beneficial provision of India-UAE BIPA.

India-Germany BIPA provides for two exceptions to MFN clause. The first exception relates to membership of a common market or free trade area. So, Indian investors cannot claim benefits that Germany grants to investors of European Union and similarly, German investors cannot claim the benefits that India extends to investors from SAARC countries.

The second exception relates to Double Taxation Avoidance Treaties. MFN clause cannot be used to claim double taxation avoidance benefits that India or Germany extends under her Double Taxation Avoidance Treaties with other countries.

In effect, MFN clause in a BIPA is a very powerful tool in the hand of investors. However, it makes the legal professional's task much more difficult. The professional has to study all BIPAs and find the most favorable provision from all treaties. For example, if the professional is acting on behalf of an Indian investor, he needs to study not only India-UK BIPA but also all other BIPAs, CECAs and CEPAs signed by UK with other countries. Some benefit may not be available to investors under India-UK treaty but if it is available under some other treaty signed by the UK, the Indian investor is entitled to claim the same.

It may be mentioned here that Government of India does not seem happy with MFN provisions of investment treaties and has largely done away with it in the proposed Model BIPA 2016. So, the MFN clause is relevant only to old terminated treaties.

Q.24 We are a company from France. We had attended an Investor Meet organized by a state government. At the Investor Meet, the Chief Minister of the state presented the state's Industrial Policy which offered certain benefits to industries set up in the state. Based on the Policy document, we decided to set up a power generating plant in the state. The French company and the state government also signed a MoU wherein it was written that the company will get the benefits of the Industrial Policy. We made significant investments related to setting up power plant in the state. Subsequently, the state government issued a circular declaring that benefits announced in Industrial Policy will not be available to power generating plants. Can we claim reparation and compensation under BIPA?

Article 6 of India-France BIPA reads as follows:

ARTICLE 6
Expropriation and compensation

1. Neither Contracting Party shall take any measure of expropriation or nationalisation or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments in its area, except in the public interest and provided that these measures are not discriminatory or contrary to a specific obligation entered into by Contracting Party not to take a measure of dispossession.

2. Any measure of dispossession which might be taken shall give rise to adequate and reasonably prompt compensation, the amount of which shall be equal to the real value of the investments concerned and shall be set, indicating conditions of payment, in accordance with the normal economic situation prevailing prior to any threat of dispossession.This compensation shall be effectively realisable, and shall then be paid without delay. Until the date of payment, it shall produce interest calculated at the appropriate market rate of interest.

The change in policy by way of a circular amounts to an act of dispossession on the part of the state government. This measure of dispossession, even though it might have been carried out in public interest, gives rise to a claim for "*adequate and reasonably prompt compensation*". Hence, the French company is entitled to file a claim for compensation under India–France BIPA.

Q.25 Our company is based in Israel. We had participated in a PPP project in India. Government of India has issued an executive order and taken over the special purpose vehicle formed for the purpose of executing the PPP project citing flimsy grounds. We had insured our investment and have received compensation from the insurance company. Now, the insurance company is pressing us to take up the dispute under India-Israel BIPA. Can we take advantage of the treaty provisions?

Yes, you can take advantage of dispute resolution provisions of India-Israel BIPA. The following article of India-Israel BIPA makes a very clear provision:

(viii) during conciliation or arbitration proceedings or the enforcement of an award, the Contracting Party Involved In the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage. In this case the other Contracting Party will respect the award made in the arbitration or conciliation proceedings and shall not initiate fresh proceedings for the same matter as covered in the award.

A similar provision exists in India-Germany BIPA. In case of treaties with other countries where a similar provision does not exist, MFN clause may be invoked, if the treaty has MFN clause.

Q.26 What is the difference between reparation and compensation? What type of reliefs can be claimed under BIPA?

The first relief that can be claimed under BIPA is a promise to cease the offending act.

Article 30. Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(*a*) to cease that act, if it is continuing;

(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Along with ceasing to do the offending act, there should be a promise that the offending action will not be repeated in future.

Once the offending act has stopped, it is the responsibility of the state to remove all consequences that might have been caused by the offending act. This "wipe out all the consequences" is called reparation as defined in the following much-quoted paragraph.

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[450]

Reparation is the undoing of injury and damage in the widest possible terms, as defined in the following Article from Draft Articles on Responsibility of States for Internationally Wrong Acts.

Article 31. Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

It may be mentioned here that the injury or damage should be direct and should not be too remote. The three criteria that are often used in this regard are directness, foreseeability and proximity. However, sometimes other considerations like whether the damage was caused deliberately may also be used.

Reparation can be either in the form of restitution or compensation or satisfaction or two or all of the three.

Article 34. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Restitution amounts to restoring the status that existed prior to the offending act. In a way this is similar to (but not the same as) cessation as discussed earlier.

Article 35. Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) is not materially impossible;

(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Compensation follows restitution and is only to the extent that the injury has not been undone by restitution.

Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

There are some injuries that cannot be undone completely by any form of compensation – for example, the loss of a loved one. In such cases, the offending state is required to do other acts that show remorse, repentance etc. Such acts are called satisfaction.

Article 37. Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Q.27 In case of third country arbitration under India's BIPA / CECA / CEPA with another country, the arbitration is conducted under which rules – UNCITRAL or ICSID or ICC or some other?

International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and such other bodies can be venues for investor-state disputes, but their rules will not apply to any disputes under BIPA / CECA / CEPA.

The ICSID is part of and funded by the World Bank Group, headquartered in Washington, D.C., in the United States. It is an autonomous, multilateral specialized institution to encourage international flow of investment and mitigate non-commercial risks by a treaty drafted by the International Bank for Reconstruction and Development's executive directors and signed by member countries. India has never signed ICSID convention. Most investment treaties signed by India have a clause which provides for ICSID arbitration if the two countries are signatories to ICSID. Since India is not a signatory, the clause becomes ineffective. An example of such an ineffective clause is the following from India-UAE BIPA:

5. If such dispute cannot be settled amicably within a period of six months from the date of receipt of Notice of Dispute, the dispute may be submitted to one of the following dispute settlement mechanisms :

a) the International Center for Settlement of Investment Disputes ("the Center"), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (the "Washington Convention"), if both Contracting Parties are parties to the Washington Convention; or

India-Singapore CECA is an example of a treaty that has a different provision in respect of ICSID arbitration. The following clause is not ineffective:

(b) the International Centre for Settlement of Investment Disputes (ICSID) for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington on 18 March 1965 ("ICSID Convention") if the ICSID Convention is in force between the Parties; or if the ICSID Convention is not in force between the Parties, to the ICSID for conciliation or arbitration pursuant to the Additional Facility Rules of ICSID; or

With the above clause, arbitration is conducted at ICSID under the Additional Facility Rules of ICSID.

In all treaties signed by India, investor-state disputes are resolved by arbitration under UNCITRAL Rules. The Rules cover all aspects of the arbitral process, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award. The UNCITRAL Arbitration Rules (as revised in 2010) have been effective since 15 August 2010.

Q.28 What is the role of UNCITRAL Secretariat in case of third country arbitration under UNCITRAL rules for an investor-state dispute?

UNCITRAL Secretariat maintains a Transparency Registry.

Parties to an investor-state dispute have the option of accepting UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules).

In case the relevant BIPA / CECA / CEPA has been executed after April 2014, application of UNCITRAL Transparency Rules is mandatory. Since almost all of India's old investment treaties have been executed before April 2014, application of the said rules is optional. In the few treaties executed after 2017, the Rules are likely to be mandatory.

UNCITRAL Secretariat does not play any other active role in investor-state disputes.

Q.29 What is the first step to be taken in case of a dispute between a foreign investor and Republic of India?

Generally speaking, the first step under the old treaties is issue of Request for Amicable Settlement under the provisions of the relevant BIPA and, if applicable, CECA / CEPA.

In case the dispute is under the new treaties executed by India, the procedure involves exhausting domestic remedies.

Relevant portions of India-Belarus treaty are as follows:

15.1 In respect of a claim that the Defending Party has breached an obligation under Chapter II, other than an obligation under Article 9 or 10, a disputing investor must first submit its claim before the relevant domestic courts or administrative bodies of the Defending Party for the purpose of pursuing domestic remedies in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed. Such claim before the relevant domestic courts or administrative bodies of the Defending Party must be submitted within two (2)year(s) from the date on which the investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the investment, or the investor with respect to its investment, had incurred loss or damage as a result.

For greater certainty, in demonstrating compliance with the obligation to exhaust local remedies, the investor shall not assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action.

The requirement to exhaust local remedies shall not be applicable if the disputing investor can demonstrate that there are no available domestic legal remedies capable of reasonably providing relief in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed by the investor.

15.2 Where applicable, if, after exhausting all relevant judicial or administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question, no resolution has been reached satisfactory to the investor, the investor may commence a proceeding under this Chapter by transmitting a notice of dispute ("notice of dispute") to the Defending Party.

15.3 The notice of dispute shall specify the name and address of the disputing investor; set out the factual basis of the claim, including the measures at issue; specify the provisions of the Treaty alleged to have been breached and any other relevant provisions; demonstrate compliance with paragraphs 1 and 2 of this Article, where applicable; specify the relief sought and the approximate amount of damages claimed; and furnish evidence establishing that the disputing investor is an investor of the other Party.

15.4 For no less than six (6) months after receipt of the notice of dispute, the disputing parties shall use their best efforts to try to resolve the dispute amicably through meaningful consultation, negotiation or other third party procedures. In all such cases, the place of such consultation or negotiation or settlement shall be the capital city of the Defending Party, unless otherwise agreed by the disputing parties.

Under the new treaties, the notice of dispute serves as the notice for amicable settlement if all domestic remedies have been exhausted.

Q.30 What happens after the issue of Request for Amicable Settlement / Notice of Dispute (under new treaties)?

Generally speaking, the parties (the foreign investor and the Government of India) have six months to arrive at an amicable settlement. Negotiations should take place between the parties during this period of six months. Neither party is under any compulsion to agree to a compromise settlement.

While theoretically, there ought to be negotiations for amicable settlement, our experience is that Government of India takes no interest in conducting negotiations at this stage.

Q.31 What are the options available to the parties during negotiations?

The parties may either agree on a settlement or may agree mutually to adopt any of the following two options:

(a) Submit the dispute to resolution to any judicial body of India; or

(b) Submit the dispute for international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

In some treaties, there is a provision for conciliation. The following provision from India-China BIPA is illustrative:

> (2) Any such dispute which has not been amicably settled within a period of six months may, if both parties to the dispute agree, be submitted:
>
> (a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies if available; or
>
> (b) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

Conciliation provisions are, generally speaking, subject to mutual consent of the investor and the concerned state. Hence, the investor has the option to refuse to submit the dispute to conciliation.

Q.32 What happens if the parties fail to agree to anything or in other words if the talks fail?

The dispute will be referred to international arbitration under the terms of the relevant BIPA / CECA / CEPA.

Q.33 Can there be an appeal against the award of the International Arbitration Tribunal in a matter between an Investor and the Republic of India?

Earlier the view was that there is no appeal against the award in any court either in India or elsewhere. However, now the prevailing view is that the award may be appealed in the country in which the arbitration panel is seated.

In the matter of Republic of India v Vedanta Resources PLC 2020 SGHC 208, Republic of India moved an application before the Tribunal (seated in Singapore) regarding transparency. After the Tribunal decided on the application, the Republic of India first moved to the High Court and later the Supreme Court of Singapore. On 12th May 2021, Honourable Supreme Court of Singapore delivered judgment in the appeal.

Republic of India v Vedanta Resources plc [2021] SGCA 50

SUPREME COURT OF SINGAPORE

12 May 2021

Case summary

Republic of India v Vedanta Resources plc [2021] SGCA 50
Civil Appeal No 51 of 2020

Q.34 How much time is the International Arbitration process likely to take?

The time frame for relief under BIPA / CECA / CEPA can vary greatly. However, generally speaking in very approximate terms the schedule of activities and times expected to be taken can be summed up as follows:

Activity	**Start Date** (Ref. Zero Date)	**End Date** (Ref. Zero Date)
Serving of Request for Amicable Settlement by the Investor to the Government of the host country	Zero Date	
Negotiations between the Investor and the host country	0th Day	180th Day
Preparation of Notice for Arbitration and Service of the Notice to the host country	180th Day	190th Day

Notice Period provided in the Notice for Arbitration	190th Day	280th Day
International Arbitration Proceedings under BIPA / CECA	280th Day	645th Day to about 1000th day

Broadly speaking, if the dispute is resolved at the amicable settlement by negotiations, the process can be resolved within six to twelve months. However, if amicable settlement is not reached the international arbitration process may further take about 12 to 24 months.

In some treaties there is a provision for conciliation prior to arbitration. In such cases, time taken for conciliation may be in addition to the times specified above.

Practically speaking, the process often takes much longer. Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-07 was introduced on 22nd December 2015 and the final order is dated 21st December 2020.

Q.35 We are a company based in Malaysia. Our lawyer sent a Notice for Amicable Settlement and subsequently a Notice of Arbitration under India-Malaysia CECA to Republic of India. However, even months later, Republic of India has not replied to our Notices. What should we do?

This is not an uncommon situation. Fortunately, most treaties have a provision for such a situation. In case of India-Malaysia CECA, the following Article is relevant:

Selection of Arbitrators

12. Unless the disputing investor and the disputing Party ("the disputing parties") agree otherwise, an arbitral tribunal established under subparagraphs 8 (a), (b), (c) and (d) shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by the two arbitrators. If the disputing investor or the disputing Party fails to appoint an arbitrator within sixty (60) days from the date on which the investment dispute was submitted to arbitration, the Secretary-General of International Centre for Settlement of Investment Disputes ("ICSID") in the case of arbitration referred to in subparagraphs 8(a) or 8(b), or the Secretary-General of the Permanent Court of Arbitration ("PCA") in the case of arbitration referred to in subparagraphs 8(c) or 8(d), on the request of either of the disputing parties, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed from the ICSID or PCA Panel of Arbitrators respectively subject to the requirements of paragraph 13.

You may firstly proceed to appoint your arbitrator. Subsequently, please ask your lawyer to approach Secretary General of the Permanent Court of Arbitration (PCA) to appoint an arbitrator for Republic of India from PCA Panel of Arbitrators.

Relevant extracts from UNCITRAL Rules are as follows:

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

The above portion of UNCITRAL Rules has often been modified by treaty provisions. In general, it may be considered that the Secretary General of the PCA is the appointing authority unless BIPA provisions specify otherwise.

Q.36 Is it necessary to appoint a Secretary in case of Arbitration?

No, it is not necessary to appoint a Secretary. However, it is often necessary that arbitration process is administered efficiently. Use of an institution to provide such administrative help is common. Even when an institution is used to administer the arbitration process, the institution may appoint some legal professional to provide administrative help like sending notices, fixing up place of meeting, taking notes at the meeting etc. In some cases, the arbitrators rely on such an assisting legal professional to provide research inputs. However, it is must be clearly understood that a secretary or assisting legal professional has no authority and cannot act as a fourth arbitrator.

Q.37 What is the limitation for initiating action under provisions of BIPA / CECA / CEPA?

This varies depending on the treaty that we are referring to. For example, the limitation provisions in treaties of some major countries are as follows:

> 9. An investor shall not be entitled to make a claim, if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred substantial loss or damage.

India-Malaysia-CECA

> 8. This Article shall not be applied in the following situations:
>
> b) If more than five (5) years have elapsed from the date on which the Investor first acquired, or ought to have with reasonable diligence first acquired, knowledge of the Measure underlying the dispute in question and the knowledge that the Investment had incurred substantial loss or damage as a result of such Measure.

India-UAE BIPA

> 4. Each Party hereby consents to the submission of a dispute to conciliation or arbitration under paragraph 3(b) and paragraph 3(c) above in accordance with the provisions of this Article, conditional upon:
>
> (a) the submission of the dispute to such conciliation or arbitration taking place within three years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Chapter causing loss or damage to the investor or its investment; and

India-Singapore CECA

Generally speaking, the limitation provided is either three years or five years. However, in many treaties no such limitation provision exists. In such cases, the presumption is likely to be in favor of reasonable time which is likely to be considered to be three years.

Q.38 Is international arbitration expensive?

Yes and No! In absolute terms, the answer is yes, while in relative terms the answer is no. It is expensive when seen in absolute or Rupee / Dollar terms.

White Industries vs. Republic of India Case (Date of Award – 30 November 2011)

The following claims of costs made by both parties in White Industries Australia Limited versus the Republic of India are interesting:

In the event that the Tribunal should decide to award costs on the basis that "costs follow the event", Claimant claims a total of A$ 923,040.75 and US$ 52,374. These amounts were broken down as follows:

(a)	Mallesons' legal fees	A$ 787,543.20
(b)	Mallesons' disbursements	A$ 49,247.73
(c)	Luthra & Luthra legal fees	US$ 52,374.00
(d)	Witness fees and expenses	A$ 86,249.82

Respondent sought an award of costs on the basis that costs should follow the event. It claimed:

(a)	Fox Mandal legal fees and expenses	INR	13,020,513.00
(b)	Counsel fees	GB£	465,022.44
(c)	Witness fees and expenses and arbitration expenses	INR	2,523,766.00
		US$	8,394.00
		SG$	535.00
		GB£	12,628.00

White Industries claimed costs of about Rs. 54 million while Government of India claimed costs of about Rs. 45 million.

<u>Cairn vs. Republic of India</u> (Date of Award – 21 December 2020)

The following extracts from the final order in the Cairn case give an indication of the costs incurred by the two parties:

> The Claimants seek the payment of all their costs and fees incurred in this arbitration, amounting to US$ 26,159,184.91. The Claimants seek the payment of all their costs and fees incurred in this arbitration amounting to US$ 26,159,184.91, the breakdown of which is as follows:

Category	**Amount (US$)**
Cost Advances	2,116,848.00
Legal Fees and Expenses	20,127,778.83
Experts' Costs	3,712,062.00
Witness Costs	42,981.84
Other Fees	159,514.24
Total	**26,159,184.91**

> The Respondent seeks the payment of all its costs and fees incurred in this arbitration amounting to INR 353,361,528, GBP 5,773,618, EUR 276,232, and US$ 2,714,107. The Respondent seeks the payment of all its costs and fees incurred in this arbitration amounting to INR 353,361,528, GBP 5,773,618, EUR 276,232, and US$ 2,714,107, the breakdown of which is as follows:

Category	**Amount (INR)**	**Amount (GBP)**	**Amount (EUR)**	**Amount (USD)**
Cost Advances	-	-	-	2,115,000
Legal Fees and Expenses	342,707,228	5,282,832	276,232	-
Experts' Fees and Expenses	-	490,786	-	599,107
Other Expenses	10,654,300	-	-	-

Total	**353,361,528**	**5,773,618**	**276,232**	**2,714,107**

> Based on the above figures, the tribunal and administrative costs, comprising the items covered in Articles 38(a) to (c) of the UNCITRAL Rules, total US$ 4,011,400.83.

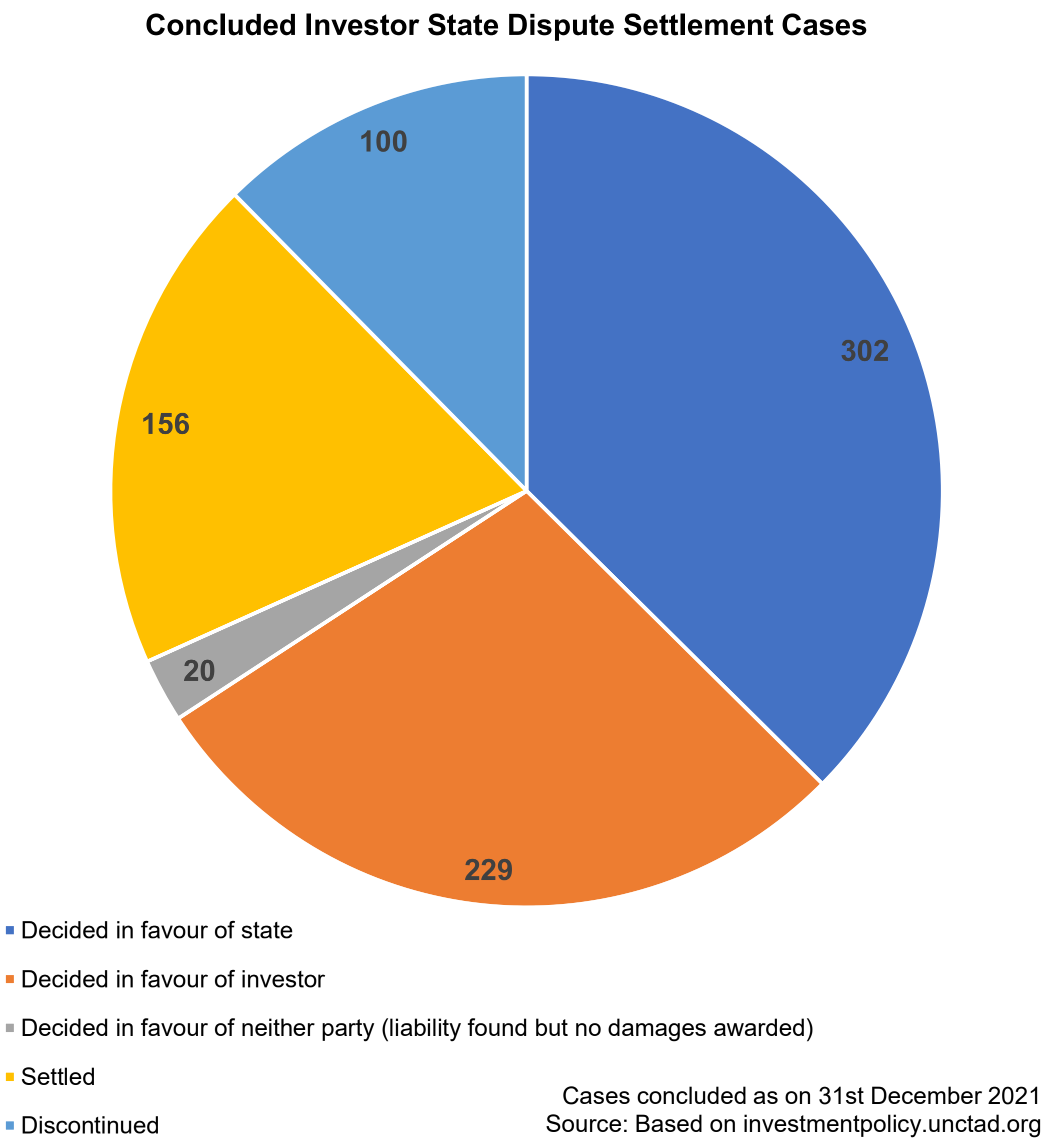
These are large sums when viewed in isolation. However, when one keeps in mind the long time that the company had been struggling for and also sees it in comparison to the amount that are claimed, the sums spent on international arbitration are not large.

In the Sample Cases covered in this Guide, we have tried to present the costs claimed by the parties concerned. The same can be used to get an indication of the costs involved.

Q.39 What are the chances of success of an investor vis-à-vis state in international investment arbitration? Statistically speaking, what is the percentage of cases where investors have been successful?

Cumulatively as on 31st December 2021, total 1,190 known ISDS (Investor State Dispute Settlement) cases had been filed. Of these, 807 had been concluded and 370 were pending, while fate of 13 was unknown. Of the known concluded cases, 302 were decided in favour of the state, 229 were decided in favour of the investor, 156 were settled, 20 were decided in favour of neither party (liability found but no damages awarded) and 100 were discontinued.

(Source: https://investmentpolicy.unctad.org/investment-dispute-settlement)



It may be said that results of international investment arbitration are evenly balanced between the investors and the state.

Q.40 We are in the process of appointing arbitrator in our investment dispute against Republic of India. Can we appoint someone from our country as our representative?

Yes, you can appoint someone from your country as an arbitrator. In most BIPAs and such other treaties executed by India, there is no requirement that the arbitrator appointed by either party should be from a neutral third country. Under UNCITRAL Rules also there is no such requirement.

Republic of India had appointed an Indian as an arbitrator in Devas (Mauritius) Ltd. vs. Republic of India.

Generally speaking, the Presiding Arbitrator must be from a third country.

Q.41 Can the arbitrator appointed by us be someone who is currently an officer of our company? What are Conflict of Interest Rules governing appointment of arbitrators?

No, you cannot appoint an officer of your company as your arbitrator. Even though the arbitrator is appointed by you, he / she must be a neutral and independent person. In case there are any doubts about independence of the appointed person, the opposite person has a right to object to the appointment.

Relevant UNCITRAL rule in this regard is as follows:

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

In addition to the UNCITRAL Rules, IBA (International Bar Association) Guidelines on Conflict of Interest in International Arbitration are often followed. Relevant extracts from IBA Guidelines are as follows:

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.

(c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.

IBA Guidelines have four lists – Non-waivable Red List, Waivable Red List, Orange List and Green List about the conflicts of interest that are acceptable and the ones that are not acceptable. Please check the IBA Guidelines for more clarification.

Q.42 If an investor gets a favorable order from an investment tribunal against a state, what is the procedure for enforcing the award? If the state refuses to pay, what are the options for an investor?

That is a difficult question. And the law in this regard seems to be emerging. Republic of India has been resisting enforcement of at least three awards. Investors are taking various measures to enforce the awards. In the case of Cairn, the investor has moved courts in various countries for seizing assets of Government of India and public sector corporations like Air India.

Countries are resorting to all sorts of legal tricks to resist enforcement of awards.

It seems that we shall need to watch the outcomes of ongoing proceedings before being able to provide a clear and affirmative answer to this question.

Q.43 What are the types of new clauses being incorporated in investment treaties being executed by various countries?

The following extract from World Investment Report 2020 (published by UNCTAD) gives a summary of some innovative features incorporated in various investment treaties executed in 2019.

A few provisions found in some of the IIAs or treaty models concluded in 2019 are worth mentioning for their innovative features:

- Specifying that a required economic contribution to the host State economy – itself not an unusual practice in the definition of investment – be made towards sustainable development and providing indicators for measuring such a contribution (Morocco model BIT).
- Clarifying in the national treatment and most-favoured-nation provisions that one of the elements to take into consideration when determining the existence of like circumstances is whether a treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives (Australia–Indonesia CEPA, Brazil–United Arab Emirates BIT).
- Clarifying that measures undertaken for the protection of a State's essential security interests, whether before or after the commencement of arbitral proceedings, shall be non-justiciable (India–Kyrgyzstan BIT).
- Allowing for the termination of the treaty at any time after its entry into force, subject to survival clauses where applicable (Australia–Hong Kong, China Investment Agreement, Australia–Indonesia CEPA, Brazil–Ecuador BIT, Brazil–United Arab Emirates BIT, EU–Viet Nam Investment Protection Agreement, India–Kyrgyzstan BIT).

Other novel provisions can be found in the 2020 Brazil–India BIT (e.g. allowing the parties to adopt or maintain affirmative action measures towards vulnerable groups, prohibiting the parties from subjecting investments to measures that constitute targeted discrimination based on race, gender or religious beliefs).

Q.44 It is said that international investment arbitration or investor state dispute settlement (ISDS) under treaties is coming under severe

criticism from various poor and developing countries. What is the future of ISDS or international investment arbitration?

Yes, it is true that there is strong demand for reform or scrapping of ISDS or international investment arbitration. Many poor and developing countries find it too expensive. Some countries have also complained of other aspects related to such tribunals.

In new treaties, ISDS is either being scrapped completely or a reformed version is being adopted. The following extract from World Investment Report 2020 (published by UNCTAD) sums it up very well:

> In *WIR19*, UNCTAD identified the principal approaches to ISDS emerging from recent IIAs. Countries continued implementing four ISDS reform approaches in IIAs signed in 2019 (table III.6):
>
> *(i)* *No ISDS:* The treaty does not entitle investors to refer their disputes with the host State to international arbitration (either ISDS is not covered at all or it is subject to the State's right to give or withhold arbitration consent for each specific dispute, in the form of the so-called "case-by-case consent") (three IIAs entirely omit ISDS).
>
> *(ii)* *Standing ISDS tribunal:* The system of ad hoc investor–State arbitration and party appointments is replaced with a standing court-like tribunal (including an appellate level), with members appointed by contracting parties for a fixed term (one IIA).
>
> *(iii)* *Limited ISDS:* Approaches may involve a requirement to exhaust local judicial remedies (or to litigate in local courts for a prolonged period) before turning to arbitration, the narrowing of the scope of ISDS subject matter (e.g. limiting treaty provisions that are subject to ISDS, excluding policy areas from the ISDS scope) and/or the setting of a time limit for submitting ISDS claims (11 IIAs).
>
> *(iv)* *Improved ISDS procedures:* The treaty preserves the system of investor–State arbitration but with certain important modifications. Among other goals, such modifications may aim at increasing State control over the proceedings, opening proceedings to the public and third parties, enhancing the suitability and impartiality of arbitrators, improving the efficiency of proceedings, or limiting the remedial powers of ISDS tribunals (nine IIAs).
>
> For 2019, the most frequently used approaches were "limited ISDS" and "improved ISDS procedures", often in combination.

Even though voices are being raised against the present system of ISDS, we are of the opinion that some form of rule-based just and fair system of adjudication of investment disputes is likely to continue and grow.

Part B

Selected Sample Cases

B1. Cairn Energy PLC & Cairn UK Holdings Limited versus Republic of India

PCA CASE NO. 2016-7

In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With The Agreement Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of The Republic Of India For The Promotion And Protection Of Investments

-and-

The Arbitration Rules Of The United Nations Commission On International Trade Law, 1976 (the "UNCITRAL Arbitration Rules")

-between-

CAIRN ENERGY PLC
CAIRN UK HOLDINGS LIMITED

Claimants

-and-

The Republic of India

Respondent

Award

The Arbitral Tribunal

Mr Laurent Lévy (Presiding Arbitrator)
Mr Stanimir A. Alexandrov
Mr J. Christopher Thomas QC

Secretary of the Tribunal

Ms Sabina Sacco

Assistant to the Tribunal

Mr David Khachvani

Registry

Permanent Court of Arbitration

21 December 2020

Claimant:	Cairn Energy PLC ("Cairn Energy" or "CEP") and Cairn UK Holdings Limited ("CUHL") (hereinafter collectively referred to as "**Cairn**" or the "**Claimants**")
Respondent:	Republic of India (hereinafter referred to as "**India**" or "**Respondent**").
Applicable Rules:	UNCITRAL Arbitration Rules
Date of Notice of Arbitration	22 December 2015
Date of Award:	21 December 2020
Agreement governing the Parties:	Agreement Between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for The Promotion and Protection of Investments

I. Facts of the Case

1. Cairn India Holdings Limited ("**CIHL**") was incorporated in Jersey in August, 2006 as a wholly owned subsidiary of CUHL, a holding company incorporated in the United Kingdom in June, 2006. Under a share exchange agreement between CUHL and CIHL, CUHL transferred to CIHL shares constituting the entire issued share capital of nine subsidiaries of the Cairn group, held directly and indirectly by CUHL, that were engaged in the oil and gas sector in India.

2. In August 2006, Cairn India Limited (**CIL**) was incorporated in India as a wholly owned subsidiary of CUHL. In October 2006, CUHL sold

shares of CIHL to CIL in an internal group restructuring (the Transaction). This was done by way of a subscription and share purchase agreement, and a share purchase deed, through which shares constituting the entire issued share capital of CIHL were transferred to CIL. The consideration was partly in cash and partly in the form of shares of CIL.

3. CIL then divested 30.5% of its shareholding by way of an Initial Public Offering in India in December 2006. As a result of divesting approximately 30% of its stake in the Subsidiaries and part of IPO proceeds, CUHL received approximately Rs. 6101 Crore (Approx. USD 931 Million).

4. In December 2011, UK-based Vedanta Resources Plc (**Vedanta UK**) acquired 59.9% stake in CIL. In April 2017, CIL merged with Vedanta Ltd. (**VL**), a subsidiary of Vedanta UK. Under the terms of the merger, Cairn Energy, a subsidiary of Vedanta Resources Plc, received ordinary shares and preference shares in VL in exchange for the residual shareholding of approximately 10% in CIL. As a result, Cairn Energy had a shareholding of approximately 5% in VL along-with an interest in preference shares. As on December 31, 2017, this investment was valued at approximately US$ 1.1 billion.

II. Decision of the Tribunal

The final decision of the Tribunal is produced here without detailed discussion on the issues involved considering the complexity of the matter:

2032. For the foregoing reasons, the Tribunal:

1. DECLARES that it has jurisdiction over the Claimants' claims and that the Claimants' claims are admissible;

2. DECLARES that the Respondent has failed to uphold its obligations under the UK- India BIT and international law, and in particular, that it has failed to accord the Claimants' investments fair and equitable treatment in violation of Article 3(2) of the Treaty; and finds it unnecessary to make any declaration on other issues for which the Claimants request relief under paragraph 2(a), (c) and (d) of the Claimants' Updated Request for Relief.[2598]

3. ORDERS the Respondent to compensate the Claimants for the total harm suffered by the Claimants as a result of its breaches of the Treaty, in the following amounts:

   a. <u>US$ 984,228,274.00</u> for the net proceeds that would have been earned from the planned 2014 sale of CIL shares, plus interest at a rate of US$ 6-month LIBOR plus a 6-month margin of 1.375%, compounded semi-annually on the net proceeds, from the following dates and until full payment thereof:

      i. For the US$ 64,708,741.00 in lost net proceeds incurred in January 2014, pre-award interest from 31 January 2014;

      ii. For the US$ 303,352,155.00 in lost net proceeds incurred in February 2014, pre-award interest from 28 February 2014;

      iii. For the US$ 313,076,958.00 in lost net proceeds incurred in March 2014, pre-award interest from 31 March 2014;

      iv. For the US$ 191,695,557.00 in lost net proceeds incurred in April 2014, pre-award interest from 30 April 2014;

      v. For the US$ 111,394,863.00 in lost net proceeds incurred in May 2014, pre-award interest from 31 May 2014;

   The Tribunal DENIES the Claimants' request for US$ 230,868,360.00 for the loss of the exemption from UK corporation tax;

   b. <u>US$ 240,645,158.81</u> for the withheld tax refund due with respect to AY 2012-13 (i.e., share sales to Vedanta), plus interest at a rate of US$ 6-month LIBOR plus a 6-month margin of 1.375%, compounded semi-annually from 30 June 2017 until full payment thereof; and

   c. <u>US$ 7,946,710.55</u> for the withheld tax refund due with respect to AY 2010-11 (i.e., share sales to Petronas), plus interest at a rate of US$ 6-month LIBOR plus a 6-month margin of 1.375%, compounded semi-annually from 30 June 2017 until full payment thereof;

4. DECLARES that the amounts awarded under paragraphs 3(a) and 3(c) above have been calculated on a net-of-Indian-tax basis, and that, accordingly, India may not deduct taxes in respect of payment thereof. The Tribunal DENIES this request for relief with respect to the amounts awarded under paragraph 3(b) above;

5. DECLARES that the tax demand against the Claimants in respect of AY 2007-08, as set forth in the FAO (the "Demand") is inconsistent with the Treaty and the Claimants are relieved from any obligation to pay it, and ORDERS the Respondent to neutralise the continuing effect of the Demand, by permanently withdrawing the Demand and refraining from seeking to recover further the alleged tax liability or any interest and/or penalties arising from this alleged liability through any other means. The Claimants' request under para. 6(b) of their Updated Request for Relief is therefore rendered moot;

6. DECLARES that, as paragraph 6(b) of the Claimants' Updated Request for Relief has been rendered moot, the Claimants' request at paragraph 7 of their Updated Request for Relief (for a declaration that the Respondent is liable to compensate the Claimants for UK corporation tax paid by the Claimants on amounts awarded under Paragraph 6(b) of their Updated Request for Relief, as well as the Claimants' request for an order to pay into an escrow account an amount necessary to meet the estimated UK corporation tax due under Paragraph 6(b)) has likewise been rendered moot;

7. DECLARES that the Respondent's arguments on unlawful tax avoidance and Section 2(47)(vi) of the ITA are not found to be grounds for the Demand and, in any event, are not substantiated on the merits; and

8. ORDERS the Respondent to pay the Claimants' costs of arbitration and legal representation in connection with these arbitration proceedings, in the following amounts:

    a. US$ 2,005,700.42 as reimbursement for the Arbitration Costs; and

    b. US$ 20,389,413.97 towards their legal costs incurred in the arbitration proceedings.

III. Decision about the Cost of Arbitration

Respondent to pay to the Claimants' costs of arbitration and legal costs.

B2. Vodafone International Holdings BV (The Netherlands) versus Republic of India

PCA Case No. 2016-35: Vodafone International Holdings BV (The Netherlands) v. India Award (Page 121)

Claimant:	Vodafone International Holdings BV (hereinafter referred to as "**Vodafone**" or "**Claimant**")
Respondent:	Republic of India (hereinafter referred to as "**India**" or "**Respondent**").
Applicable Rules:	UNCITRAL Arbitration Rules
Date of Notice of Dispute	17 April 2012
Date of Award:	25 September 2020
Agreement governing the Parties:	Agreement Between The Kingdom of Netherlands And The Government Of The Republic Of India On The Promotion And Protection Of Investments done at Hague on 6th November 1995

I. Facts of the Case

In 2007, Hutchinson Telecommunications International Limited, a Hong Kong entity (HTIL) sold its stake in Hutchinson Essar Limited, an Indian company (HEL) to Vodafone International Holdings B.V., a Netherlands entity (Vodafone) for a consideration of USD 11.1 Billion. HTIL earned capital gains on the sale.

Indian revenue authorities considered that acquisition of stake in HEL by Vodafone was liable for tax deduction at source under Section 195 of the Income Tax Act, 1961. Since Vodafone failed to withhold Indian taxes on payments made to the selling Hutch entity, a demand was raised on Vodafone under Section 201(1)(1A) / 220(2) for non-deduction of tax.

On 20 January 2012, the Supreme Court of India discharged Vodafone of the tax liability imposed on it by the Income Tax Department of the Plaintiff. The Supreme Court held that sale of share in question to Vodafone did not amount to transfer of a capital asset within the meaning of Section 2(14) of the Income Tax Act. The Apex Court not only quashed the demand of INR 120 billion by way of capital gains tax but also directed refund of INR 25 billion deposited by the Vodafone in terms of the interim order dated 26 November 2010 along with interest at 4% p.a. within two months.

Post the above judgment, the Indian Parliament passed the Finance Act 2012, which provided inter alia for the insertion of two explanations in Section 9(1)(i) of the Income Tax Act (2012 Amendment). The insertions effectively overruled the judgment of the Supreme Court of India with retrospective effect and made Vodafone liable to pay tax.

II. Arbitration Process

Aggrieved by the imposition of tax by way of retrospective amendment of the Indian tax legislation, Vodafone invoked arbitration under the India – Netherlands BIPA through a Notice of Dispute dated 17 April 2012. On 20 February 2014 India stated that "*disputes relating wholly or mainly to taxation are excluded from the scope of the India – Netherlands BIT*". On 17 April 2014, Vodafone issued a Notice of Arbitration to India as required under the India-Netherlands BIPA.

III. Other Parallel Action

On 24 January 2017, Vodafone Group Plc. (VGP), a United Kingdom entity and the parent company of Vodafone, initiated arbitration against India under the India - United Kingdom BIPA, challenging the retrospective amendment by India of its tax legislations.

Government of India (GOI) filed a suit before its national courts seeking anti-arbitration injunction to restrain VGP from continuing arbitration proceedings under the India-UK BIPA. On 22 August 2017, the Court passed an ex-parte interim order restraining the Defendants from initiating or continuing arbitration proceedings under the India-UK BIPA. However, in its final judgment on 7 May 2018, the Delhi High Court vacated the stay and dismissed the suit against Union of India.

IV. Final Award

On 25 September 2020, an international arbitral tribunal comprising L.Y. Fortier, R. Oreamuno Blanco and F. Berman passed an award in favour of Vodafone, reportedly for violation of the fair and equitable treatment standard under the India – Netherlands BIPA. The arbitral tribunal directed India to reimburse legal costs of approximately INR 850 million to Vodafone. The complete award is not available in public domain. The excerpt available in public domain is reproduced below:

363. After deliberation, and for the reasons of fact and law set out above, the Tribunal decides as follows:

(1) The Tribunal has jurisdiction, under the terms of the Agreement between the Kingdom of the Netherlands and the Republic of India for the Promotion and Protection of Investments, done at The Hague on 6 November 1995, to consider the Claimant's claims for breach of the Agreement.

(2) The Claimant is entitled, in respect of its investments in mobile telecommunications in India, to the protection of the guarantee of fair and equitable treatment laid down in Article 4(1) of the Agreement.

(3) The Respondent's conduct in respect of the imposition of the Claimant of an asserted liability to tax notwithstanding the Supreme Court Judgement is in breach of the guarantee of fair and equitable treatment laid down in Article 4 (1) of the Agreement, as is the imposition of interest on the sums in question and the imposition of penalties for non-payment of the sums in question.

(4) The finding of breach in paragraph (2) entails the obligation on the Respondent to cease the conduct in question, any failure to comply with which will engage its international responsibility.

(5) In the light of the above findings, it is not necessary for the Tribunal to proceed to a determination of the Claimant's other claims.

(6) The costs of the arbitration will be borne equally between the Parties.

(7) The Respondent will reimburse to the Claimant the sum of £ 4,327,294.50 or its equivalent is US Dollars, being 60% of the Claimant's costs for legal representation and assistance, and € 3,000 or its equivalent in US dollars, being 50% of the fees paid by the Claimant to the appointing authority.

V. Decision about the Cost of Arbitration

Cost of the arbitration to be borne equally by the parties. Respondent to pay 60% of the Claimant's costs for legal representation and assistance.

B3. White Industries Australia Limited versus Republic of India

**IN THE MATTER OF AN UNCITRAL ARBITRATION IN SINGAPORE
UNDER THE AGREEEMENT BETWEEN
THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT
OF THE REPUBLIC OF INDIA ON THE PROMOTION AND PROTECTION
OF INVESTMENTS**

BETWEEN

WHITE INDUSTRIES AUSTRALIA LIMITED

(Claimant)

and

THE REPUBLIC OF INDIA

(Respondent)

FINAL AWARD

The Tribunal:

**The Hon. Charles N. Brower
Christopher Lau SC
J. William Rowley QC (Chairman)**

Claimant:	White Industries Australia Limited, a company constituted in accordance with the laws of the Commonwealth of Australia with its domicile in Sydney, Australia (hereinafter referred to as "**White Industries**" or the "**Claimant**")
Respondent:	Republic of India (hereinafter referred to as "**India**" or "**Respondent**").
Applicable Rules:	UNCITRAL Arbitration Rules
Date of Notice of Arbitration	27 July2010
Date of Award:	30th November, 2011
Agreement governing the Parties:	Agreement Between The Government Of Australia And The Government Of The Republic Of India On The Promotion And Protection Of Investments

I. Facts of the Case

1. White Industries entered into a Contract with Coal India Ltd.(hereinafter referred to as "**CIL**"),which is a state owned and controlled company. Under the Contract White Industries had to supply equipment and share know-how in relation to coal exploration in Piparwar, Uttar Pradesh, India

2. CIL had to take approval from the Government of India (hereinafter referred to as "**GOI**") for undertaking the project. In September 1989 GOI approved the project.

3. The Contract was executed on 28th September1989 and entitled White Industries to receive bonus if certain production targets and

quality standards were met. It also provided for White Industries to bear penalty if it did not fulfil the targets. The Contract also provided for White Industries to provide performance guarantee in favour of CIL.

4. The Contract was governed by Indian law. It contained an arbitration clause requiring the parties to arbitrate all disputes under the International Chamber of Commerce (**ICC**) Arbitration Rules.

IV. Issues of dispute between the Parties

a. Was White Industries entitled to bonus or was CIL entitled to penalty payments?

b. CIL claimed penalty from White Industries as the quality of washed coal produced by the Coal Preparation Plant did not meet the contractual standard. The claim was contested by White Industries.

c. CIL's encashment of Bank Guarantee provided by White Industries, against the amount of penalty was contested by White Industries.

d. Technical disputes concerning the quality of washed and processed coal and sampling process by which quality was measured.

V. Actions taken by Parties before action under BIPA

a. White Industries filed a Request for Arbitration at London, United Kingdom under the ICC on 28 June 1999 against the actions of CIL.

b. CIL requested ICC for reconstitution of the Tribunal due to apprehension of bias which was rejected by the ICC.

c. The Tribunal rendered an award on 27 May 2002 (hereinafter referred to as the "**Award**") as follows:

   (i) CIL entitled to a penalty of Australian Dollars (AUD) 969,060-;

(ii) White Industries entitled to a Coal Handling Plant bonus of AUD 2.28 million along with the amount of bank guarantee encashed by CIL worth AUD 2.77 million.

d. On 6th September 2002 CIL filed a petition (under the Indian Arbitration and Conciliation Act 1996) before Honourable High Court, Calcutta, India to set aside the Award without any notice to White Industries.

e. On 11th September 2002, White Industries applied to Honourable High Court, New Delhi, India to get the Award enforced.

f. On 4th October 2002, White Industries received notice from CIL informing about the case filed by them before the Honourable High Court at Calcutta.

g. On 24th October 2002, White Industries filed an application before the Honourable Supreme Court of India (a) to transfer CIL's case from Calcutta High Court to Delhi High Court and (b) for stay of proceedings at Calcutta.

h. On 29th October 2002, the Honourable Supreme Court of India granted stay on the proceedings at Calcutta and asked CIL to file its reply within four weeks.

i. On 27th November 2002, the Honourable High Court, Delhi rejected CIL's application seeking stay on the proceedings for enforcement of Award.

j. Despite several attempts by White Industries to get the Award enforced, the Honourable Supreme Court of India could not settle the matter and no decision was given till 2009.

VI. Actions under BIT

a. On 10 December 2009, White Industries sent notice for amicable settlement to Republic of India under the Bilateral Investment Treaty existing between Government of Australia and Republic of India (hereinafter referred to as "**BIT**"). A further reminder was sent by White Industries on 30th March 2010 but Republic of India failed to respond to both the notices.

b. On 27th July 2010 White Industries initiated arbitration proceedings under BIT.

VII. Claims of the Claimant under BIT

a. Claimant is an Investor;

b. Bank Guarantee given by the Claimant is an investment;

c. Award granted by ICC is an original investment;

d. CIL is an organ of Republic of India;

e. Republic of India's inordinate delay of nine years in enforcing Award granted by ICC amounts to denial of fair and equitable treatment and breaches the country's obligations under BIT;

f. Financial Claims of Claimant: (a) AUD 3,203,873 towards bonus under the Contract; (b) AUD 2,772,640 in connection with retention of performance guarantee; (c) interest; and (d) AUD 923,040.75 and USD 52,374 towards legal expenses.

VIII. Contentions of the Respondent

a. White Industries is not an "investor" under BIT;

b. Contract in itself not an Investment. Bank Guarantees were an integral part of the Contract, and thus Bank Guarantees provided do not form part of Investment.

c. Award not an investment;

d. BIT Tribunal lacks jurisdiction;

e. CIL an independent entity and not an organ of GOI;

f. GOI not a party to the Contract;

g. Financial Claims of Respondent: (a) AUD 7,940,720 and interest; (b) legal expenses as follows: INR 15,544,279 + GBP 477,650.44 + USD 8,394 + SGD 535

h. ICC to reconstitute the tribunal and commence proceedings afresh.

IX. Decision of the Tribunal

a. ICC Award enforceable in India;

b. Republic of India breached its obligation to provide "*effective means of asserting claims and enforcing rights*" with respect to investment made by White Industries;

c. White Industries entitled to receive compensation (as decided under the ICC Award) as under:

   i. AUD 4,085,180 with interest thereon at the rate of 8% per annum from 24 March 1998 until the date of payment;

   ii. USD 84,000 towards the fees and expenses of the arbitrators in the ICC Arbitration;

   iii. AUD 500,000 towards White Industries costs in the ICC arbitration;

   iv. AUD 86,249.82 for its witness fees and expenses with interest thereon at the rate of 8% per annum from 30th November 2011 (date of the Award) till the date of payment;

d. Republic of India had breached its obligation to provide "*effective means of asserting claims and enforcing rights*" with respect to investment made by White Industries Australia Limited.

e. Republic of India shall pay to White Industries Australia Limited the amount of AUD 4,085,180 (payable under the Award), together with interest thereon at the rate of 8% per annum from 24 March 1998 until the date of payment.

f. Republic of India to pay to White Industries the amount of USD 84,000 for the fees and expenses of the arbitrators in the ICC Arbitration, AUD 500,000 for costs incurred by White Industries in the ICC arbitration and amount of AUD 86,249.82 for its witness fees and expenses, together with interest thereon at the rate of 8% per annum from the date of this Award until the date of payment.

X. Decision about the Cost of Arbitration

Cost of the arbitration to be borne equally by the parties.

B4. Philip Morris Asia Limited Vs The Commonwealth of Australia

PCA Case No. 2012-12

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMEN
BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF
AUSTRALIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS,
SIGNED ON 15 SEPTEMBER 1993 (THE "TREATY")**

-and-

**THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULES
ARBITRATION AS REVISED IN 2010 ("UNCITRAL RULES")**

-between-

PHILIP MORRIS ASIA LIMITED

("Claimant")

-and-

THE COMMONWEALTH OF AUSTRALIA

("Respondent", and together with the Claimant, the "Parties")

AWARD ON JURISDICTION AND ADMISSIBILITY

17 December 2015

ARBITRAL TRIBUNAL

Professor Karl-Heinz Böckstiegel (President)
Professor Gabrielle Kaufmann-Kohler
Professor Donald M. McRae

REGISTRY

Dr. Dirk Pulkowski
Permanent Court of Arbitration

Claimant	Philip Morris Asia Limited, a limited liability company incorporated and existing under the laws of Hong Kong (hereinafter referred to as "**PM Asia**" or "**the Claimant**")
Respondent	Commonwealth of Australia (hereinafter referred to as "**Australia**" or "the **Respondent**")
Case No.	PCA Case No. 2012-12
Applicable Rules	UNCITRAL Arbitration Rules
Date of Notice of Arbitration	21st November 2011
Date of Award	17th December, 2015
Agreement governing the Parties	Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments dated 15thSeptember 1993 (hereinafter referred to as "**the Treaty**" or "**BIT**")
Registry	Permanent Court of Arbitration, Hague, Netherlands
Place of Arbitration	Singapore

I. Facts of the case

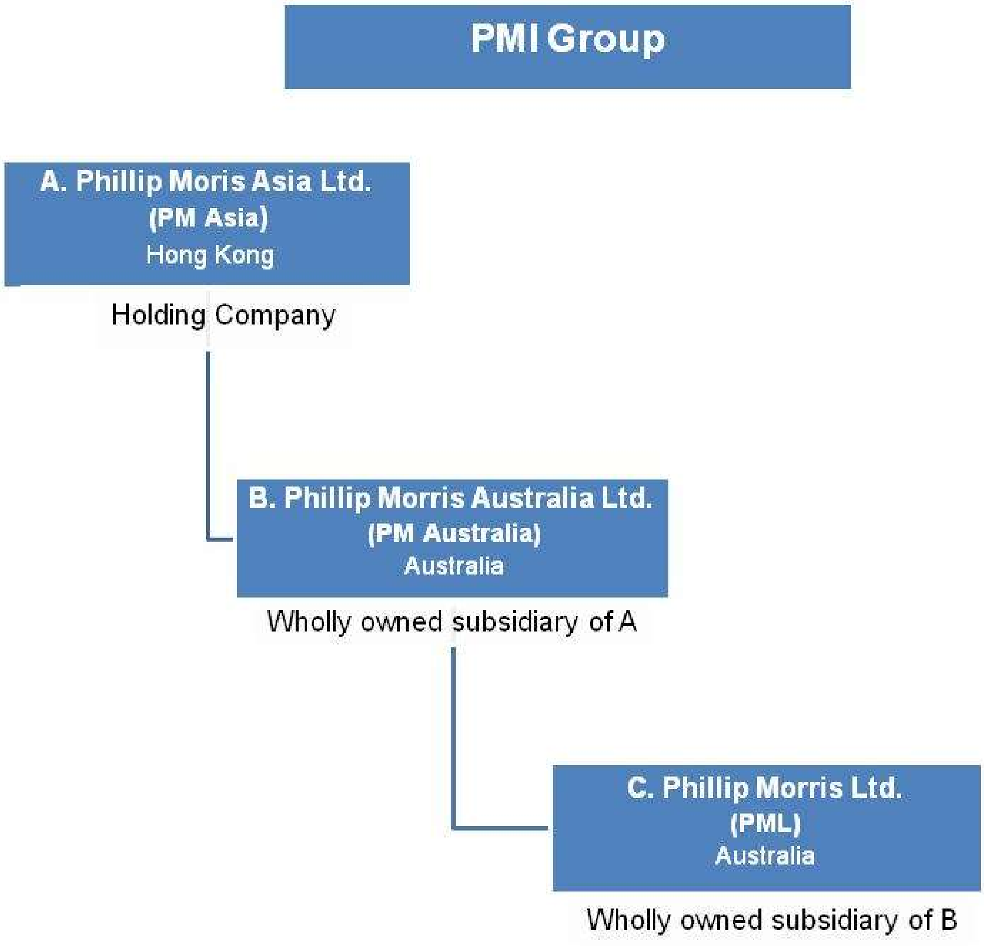
1. **Philip Morris International** (hereinafter referred to as "**PMI**") is the world's leading global tobacco company, having seven of the world's top 15 international cigarette brands. It has subsidiaries and affiliates

around the world (hereinafter referred to as "**PMI Group**") and **PM Asia** is one of them.

2. PM Asia is a holding company of **Philip Morris (Australia) Limited** (hereinafter referred to as "**PM Australia**").

3. PM Australia holds 100% shares of **Philip Morris Limited,** (hereinafter referred to as "**PML"**) an Australian company.

4. The following chart illustrates the relationship between various companies.



5. PML and PM Australia are into manufacturing, importing, marketing and selling of tobacco products, mainly cigarettes.

6. PML had intellectual property rights (trademarks, copy rights, designs, trade secrets, logos, brand relating to product and packaging) over its tobacco products and packaging in Australia.

7. On 7th July 2010, the Respondent published a timetable about the Tobacco Plain Packaging Legislation 2011 (hereinafter referred to as "the **TPP**") which was to be introduced before 30th June 2011 and implemented by 1stJuly 2012.

8. On 3 September 2010, PMI group carried out restructuring of its various affiliates and as a result the Claimant became the indirect owner of PML.

9. On 26th November 2010 and 14th January 2011 the Respondent / the Australian Department of Health and Ageing (**DoHA**) had individual discussions with the three major Australian tobacco companies including PML in context with the Plain Packaging Measures.

   PML in the meetings had conveyed its opposition to implementing the TPP as its business largely depended upon its intellectual property and its brand. PML argued that the use of plain packaging for its products will result in diminished brand value and substantial downfall in its investment in Australia.

10. On 7th April 2011, the Respondent made public the draft of the TPP which prescribed each and every aspect of tobacco products manufacturing and retail sale. It prohibited use of intellectual property on or in context with tobacco products.

11. PML was opposed to the idea of introducing the TPP as the same barred PML from using its intellectual property and its products lost brand value without customised packaging.

12. On 27th June 2011 PM Asia served Notice of Claim to the Respondent pursuant to the BIT.

13. On 21st November 2011 the TPP Act was enacted. On the same day itself, the Claimant served a Notice of Arbitration under the BIT to the Respondent.

14. On 7th December 2011, Tobacco Plain Packaging regulations were promulgated and retail sale of tobacco products had to comply with the measures as of 1st December 2012.

II. Dispute between the Parties

a. Respondent enacted and implemented the TPP Act, which eliminated branding of Claimant's tobacco products.

b. The Claimant's investments in Australia suffered significant losses due to the TPP Act.

c. According to the Claimant, compulsion of plain packaging amounted to imposing restrictions which led to expropriation of its investments made on acquiring the intellectual properties.

III. Claims of the Claimant under BIT

a. Claimant is an investor. It holds investment in PM Australia and PML.

b. The Plain Packaging Measures had substantially diminished the value of their investments in Australia.

c. It exercises management control over PML.

IV. Contentions of the Respondent

a. Claimant not an investor;

b. Claim related to dispute existing before the signing of the Treaty;

c. Claimant's restructuring plan intentional in order to seek protection under the Treaty for a pre-existing dispute;

d. Claimant's indirect ownership in PML does not constitute an investment under the Treaty;

e. Claimant does not have any economic interest in PML;

f. Claimant failed to inform about its control over PML to the Treasurer as required under Foreign Acquisitions and Takeovers Act, 1975 of Australia;

g. Tribunal's jurisdiction does not extend to claims relating to a dispute that is invoked before making of investment.

V. Decision of the Tribunal

a. Claims of the Claimant inadmissible.

b. Restructuring plan of acquiring Australian subsidiary was carried out by the Claimant after having known intention of the Respondent to introduce Plain Packaging Measures. In other words, the Tribunal considered corporate restructuring by the Claimant as abuse of rights granted under the Treaty.

c. The purpose of restructuring by the Claimant was to gain protection under the Treaty.

d. The Tribunal lacks jurisdiction.

e. Final award on costs awaited.

B5. Toto Costruzioni Generali S.P.A vs Republic of Lebanon

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the matter between

TOTO COSTRUZIONI GENERALI S.P.A.
(Claimant)

and

REPUBLIC OF LEBANON
(Respondent)

(ICSID Case No. ARB/07/12)

AWARD

Members of the Tribunal
Professor Dr. Hans van Houtte
Judge Stephen M. Schwebel
Mr. Fadi Moghaizel

Secretary of the Tribunal
Ms. Milanka Kostadinova

Representing the Claimant
Bechara S. Hatem, Esq.
Professor Hadi Slim, Esq.
Hatem, Kairouz, Messihi & Partners
Beirut, Lebanon

Representing the Respondent
Nabil Abdel-Malek, Esq.
Mireille Rached, Esq.
Joseph Bsaibes, Esq.
Nabil Abdel-Malek Law Offices
Beirut, Lebanon

Date of Dispatch to the Parties: June 7, 2012

Claimant	TOTO COSTRUZIONI GENERALI S.P.A., a company constituted in accordance with the laws of Italy (hereinafter referred to as "**Toto**" or "**the Claimant**")
Respondent	Republic of Lebanon (hereinafter referred to as "**Lebanon**" or "**the Respondent**")
Case No.	ICSID Case No. ARB/07/12
Applicable Rules	International Centre for the Settlement of Investment Disputes (**ICSID**) Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
Date of Notice of Arbitration	19 March 2007
Date of Award	7 June 2012
Agreement governing the Parties	Treaty between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments signed on 7th November 1997(hereinafter referred to as "**the Treaty**" or "**BIT**")
Place of Arbitration	World Bank, European Headquarters, Paris, France

I. Facts of the case

1. Toto entered into a Contract with Conseil Exécutif des Grands Projets, a Lebanese Government organization engaged in infrastructure

development (hereinafter referred to as "**CEPG**"), on 11 December 1997 (hereinafter referred to as "**the Contract**"), to construct the Saoufar-Mdeirej Section, a 62-kilometer long "Hadath-Syrian Border" highway project linking Beirut to the Syrian border (hereinafter referred to as "**the Project**").

2. The Contract, inter alia, included a condition that parts of the land would be delivered progressively to Toto as soon as the same were acquired.

3. The Contract provided CEGP to appoint an engineer (hereinafter referred to as "**the Engineer**") to give directions to Toto in relation to execution of the Project.

4. Start date for the Project was 10 February 1998 and the contractual completion date was 24 October 1999. The Contract also provided for a 12 months post completion, maintenance and guarantee period making the effective date of completion as 24 October 2000.

5. Toto proposed certain modifications in the Project. The first modification was made vide Addendum I in November 1998 while the second modification was made vide Addendum II on 23 December 1998. Both these changes were duly accepted by the Respondent with the completion date remaining unchanged.

6. Claimant demanded and received five extensions to complete the Project.

7. While seeking first four extensions, Toto agreed that in lieu of the extensions granted, it would waive off all its claims against additional costs incurred for completion of the Project.

8. At the time of accepting the fifth extension, the Claimant expressed that it was not possible to waive its claims arising from the extension. Meanwhile, on 12 September 2002, the Claimant had submitted to

the Engineer a claim which included compensation for the period extended.

9. On 23 September 2002, the Claimant reminded to CEGP that it did not waive any claim for compensation as the last extension granted was for additional works done.

10. Actual construction was completed in December 2003, and the Project was finally handed over in December 2004 after the 12 months maintenance and guarantee period.

11. Between 1997 and 2003, Toto submitted various claims to CEPG. Such claims covered (a) additional cost incurred due to changes in legislations (b) loss of productivity (c) delayed site possession and (d) other factors causing delay in the project completion.

12. None of the Claims were accepted by CPEG.

13. On 19 March 2007, Toto filed a request for arbitration to ICSID in accordance with Article 36 of the ICSID Convention and Article 7 of the Treaty.

14. Toto in its notice for arbitration alleged failure of Lebanon to provide possession of land on time along with giving erroneous instructions. It also contended other failures on part of Lebanon which gave rise to the dispute.

II. Dispute between the Parties as per Toto

a. Lebanese Government through CEGP was responsible for several actions and omissions in relation to the Project.

b. These actions and omissions, caused substantial delays in the construction of the highway and thereby jeopardized Toto's investment in Lebanon.

c. The acts of Lebanon caused a direct negative impact on the reputation of the Toto group.

d. Actions and omissions of Lebanon were breaches of the Treaty and Toto is entitled to award of compensation for those breaches.

e. Respondent breached Articles 2, 3 and 4 of the BIT, jeopardizing the Investment made by the Claimant through the Contract.

III. Claims of the Claimant under BIT

a. Claimant is an investor.

b. Cause of action arose on 30 June 2004 when Claimant requested the Respondent to pay the amount of claim.

c. Dispute falls within the scope of Treaty although the Contract was signed on 11 December 1997 while the Treaty was signed on 7 November 1997and came into force on 9 February 2000.

d. Lebanon increased customs duties leading to loss for the Claimant. Lebanese custom duties on cement, building materials, diesel and steel increased unreasonably, thus increasing Toto's cost. For instance, diesel price allegedly increased about 40% and government duties on cement more than doubled. Lebanon failed to maintain favorable economic conditions.

e. Lebanon is direct party to the Contract acting through its agency CPEG.

f. Claims are treaty claims as they relate to public works.

g. Its investments qualify under the Treaty and under ICSID Convention for the Tribunal to exercise jurisdiction.

IV. Contentions of the Respondent

a. Denied Claimant's contention of making investments as defined under the Treaty and ICSID Convention.

b. Lebanon not a direct party to the Contract. The Contract was between the Claimant and CPEG, a council with separate legal entity.

c. Claimant's claims are contractual claims and not treaty claims, therefore Claimant should take recourse under local laws.

d. Claims submitted by the Claimant to the Respondent between 1997 and 9 February 2000 should be excluded from the Tribunal's jurisdiction as the cause of action arose before the Treaty became effective from 9 February 2000.

e. While obtaining the first four extensions, the Claimant had repeatedly waived its right for compensation for the delay resulting from the alleged breaches.

f. The waivers apply to contractual as well as to Treaty claims.

g. Claimant did not point any action of Respondent which could be considered as discriminatory.

V. Decisions of the Tribunal with regard to Jurisdiction

The Tribunal considered the issue of jurisdiction at great length and held as follows:

1) *The Conseil Exécutif des Grands Projets and the Council for Reconstruction and Development are public legal entities whose actions are attributable to the Republic of Lebanon;*
2) *Toto's project meets the requirements to be considered as an "investment" under the Treaty as well as under the ICSID Convention;*
3) *The Tribunal has jurisdiction over the dispute* ratione temporis *under Article 7.2.b and Article 10 of the Treaty as the dispute has arisen on June 30, 2004, i.e., after the Treaty entered into force;*
4) *The Tribunal has jurisdiction to decide the dispute pursuant to the ICSID Convention, the ICSID Arbitration Rules and the Treaty rules;*
5) *Subject to the Tribunal's considerations, stated above, the Tribunal has jurisdiction to decide whether (i) the delay in expropriation, (ii) the failure to remove Syrian troops and (iii) the changes in the regulatory framework, constitute breaches of Article 2 and/or Article 3.1 of the Treaty;*
6) *The Tribunal has no jurisdiction with respect to the following claims:*
    a) *Erroneous Instructions and Design as breaches of Article 2 and Article 3.1 of the Treaty;*
    b) *Disruption of negotiations as breach of Article 3.1 of the Treaty;*
    c) *Delays in two law suits before the Conseil d'Etat as breach of Article 3.1 of the Treaty;*
    d) *Lack of Transparency in the proceedings before the Consei ld'Etat as breach of Article 3.1 of the Treaty; and*
    e) *Indirect expropriation as breach of Article 4.2 of the Treaty.*
7) *With regard to Article 9.2 of the Treaty, and in the presence of a jurisdiction clause in the Contract, the Tribunal has no jurisdiction with respect to breaches to the extent they are violations of the Contract;*
8) *The Tribunal has jurisdiction to decide over breaches of Articles 2, 3 and 4 of the Treaty, its jurisdiction thereover not being affected by Article 7.2 of the Treaty; and*

The key point to be noted in the above decision is the differentiation between breaches "*to the extent they are violations of the Contract*" and breaches of the Treaty. The Tribunal denied any jurisdiction with regards to the former.

VI. Decision of the Tribunal on other issues

a. On the issue of excluding claims before the signing of the Treaty, the Tribunal held as under:

58. As a general rule, treaties do not apply retroactively.[22] The treaty, moreover, can specify how it applies *ratione temporis*. In the Treaty between Italy and Lebanon, Article 10 provides that "*the Agreement shall not apply to disputes that have arisen before its entry into force.*" As the Treaty entered into force on February 9, 2000, disputes which have arisen before that date are not covered by its scope *ratione temporis*.

62. The Tribunal notes that the CCCG,[27] which are part of the Contract, distinguish between "*difficulties*" (problems) (Article 50) and "*contestations*" (disputes) (Article 51). As held in its Decision on Jurisdiction, the Tribunal did not consider a mere problem, breach or demand for reparation to be a "dispute."

63. The Tribunal wishes to reassert in relation to this question that "breach," "problem" and "dispute" are three different notions. A "breach" arises when contractual or treaty obligations are not honored. A "problem" arises when that party's claim is not accepted by the other side, *i.e.,* when the engineer and the contractor have different views which need to be referred for final decision to the employer/administration. On September 12, 2002, Toto requested to be compensated for the additional works and the delay occurred.[28] However, the CDR did not take a position, so Toto invited it on June 30, 2004, to have recourse to Article 7 of the Treaty ("Settlement of Disputes"). Thus, the dispute, which had been in limbo for months, crystallized then.

64. Based on the foregoing, the Tribunal dismisses Lebanon's argument that the subject-matter of the claims that Toto has submitted to Lebanon or its Engineer between 1997 and February 9, 2000, should be excluded from the Tribunal's jurisdiction.

The Tribunal's discussion about "breach", "problem" and "dispute" is extremely interesting. The Tribunal held that the dispute crystallized on June

30, 2004 even though it was in limbo for a long time. Based on this argument, the Tribunal rejected the contention of Lebanon that claims arising prior to the Treaty coming in force in February 2000 ought to be rejected.

b. About the waiver of right to claim in return for extensions, the Tribunal held as under:

84. The Tribunal finds Toto's argument that it did not waive its claims to compensation under the Contract unconvincing. The text of the relevant documents is unambiguous. In fact, it is customary in circumstances such as the case at stake that the employer grants time extensions in return for a waiver by the contractor of its right to claim compensation for the additional time to be used to finish the Project. There is no proof that waivers were not granted under the Contract or that they were obtained under duress.

85. However, as stated repeatedly, the Tribunal is concerned by claims of Treaty breaches, and not by breaches of the Contract. Toto's waiver of its right to invoke the CEGP's liability under the Contract to claim contractual damages does not affect its right to invoke Lebanon's breach of the Treaty before this Tribunal. However, as will be elaborated later, the assessment of damages and of the compensation to be granted for a Treaty breach may be affected by a waiver not to claim compensation under the Contract, when both damage claims cover the same harm. Indeed, when it concerns the same damage for the same act, compensation that a Claimant has waived under the Contract cannot be recovered under the Treaty.

The Tribunal did not differentiate between waiving of claims under the Contract and waiving of claims under the Treaty. The legal principle propounded by the Tribunal is, "*when it covers the same damage for the same act, **compensation that a Claimant has waived under the Contract cannot be recovered under the Treaty***".

c. <u>**Fair and Equitable Treatment Principle**</u> – The Tribunal applied its mind to the question of violation of the Treaty in terms of fair and equitable treatment and held as under:

161. For an alleged breach of contract to be considered as a breach of the fair and equitable treatment principle, State conduct is required. As was found in ***Impreglio SpA v. Pakistan***:

> "*In order that the alleged breach of contract may constitute a violation of the BIT, it 'must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the state in the exercise of its sovereign authority ('puissance publique'), and not as a contracting party, may breach the obligations assumed under the BIT.*"[124]

162. As was also stated in other decisions, only when the State acted as sovereign authority – and not merely as a contracting partner – was there treaty protection of fair and equitable treatment.[125]

163. Moreover, in the event a contract has allegedly been breached and the investor has access to the domestic courts, the threshold for a fair and equitable treaty protection may be higher. If the treaty requires recourse to domestic courts, it is not the existence of the contractual breach as such, but the 'treatment' that the alleged breach of contract has received in the domestic context that may determine whether the treaty obligation of fair and equitable treatment has been breached.[126]

164. In the present case, as extensively discussed in the Decision on Jurisdiction,[127] Toto had access to the domestic courts of Lebanon, but did not establish that it diligently pursued the settlement of its contractual claims before them.

165. Finally, legitimate expectations are more than the investor's subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host State.[128]

166. The fair and equitable treatment standard of international law does not depend on the perception of the frustrated investor, but should use public international law and comparative domestic public law as a benchmark. As was recently also confirmed in **Total S.A. v. Argentina,** "*a comparative analysis of what is considered generally fair and unfair conduct by domestic public authorities in respect to private investors and firms in domestic law may also be relevant to identify the legal standards under BITs.*"[129]

The two key legal principles accepted by the Tribunal above are - (1) benchmarking against domestic public law and (2) higher threshold under treaty law as compared to domestic law.

As per the Tribunal, the first option for an investor ought to be domestic courts. Recourse to treaty law should come when the domestic avenues are not available.

The Tribunal revisited fair and equitable treatment as follows:

193. Furthermore, fair and equitable treatment has to be interpreted with international and comparative standards of domestic public law as a benchmark. The investor is certainly entitled to expect that the host State will not act capriciously to violate the rights of the investors. Toto indicated that Lebanon failed to carry out the expropriations in a consistent and coherent manner as it would have done if investments of its own or other foreign investors would have been involved. However, Toto did not submit any proof that Lebanon acted in a discriminatory or capricious way, or that it did not comply with the applicable international minimum standards.

194. On the contrary, the extension of time and waiver of its claim to compensation because of late expropriations, that Toto accepted, detract from the legitimacy of Toto's expectations to receive compensation for delayed expropriations.

d. **<u>Changes in Customs Duties</u>**–The Tribunal did not accept the Claimant's intention giving reasons as follows:

242. The Tribunal considers that fair and equitable treatment does not, in the circumstances prevailing in Lebanon at the time, entail a guarantee to the investor that tax laws and customs duties would not be changed.

243. In ***Parkerings-Compagniet AS v. Lithuania***, the arbitrators recognized the right of States to modify their laws:

> "*It is each State's undeniable right and privilege to exercise its sovereign legislative power. A state has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.*"[165]

244. In the absence of a stabilisation clause or similar commitment, which were not granted in the present case, changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment only in case of a drastic or discriminatory change in the essential features of the transaction. Toto failed to establish that Lebanon, in changing taxes and customs duties, brought about such a drastic or discriminatory consequence. The additional cost resulting from increased taxes and custom duties is small compared to the overall amount of the Project. The changes to the custom duties and taxes on cement, diesel, and construction material were moreover applicable to foreign investors as well as Lebanese nationals. This cannot amount to discriminatory or unreasonable actions towards Toto.

245. In ***Parkerings-Compagniet AS v. Lithuania***, the arbitrators concluded that the circumstances in a country in transition could not justify the legitimate expectations as regards the stability of the investment's environment. Rather, the investor was considered to have taken the business risk to invest, notwithstanding the possible legal and political instability.[166] Likewise, the post-civil war situation in Lebanon, with substantial economic challenges and colossal reconstruction efforts, did not justify legal expectations that custom duties would remain unchanged.

e. Respondent did not breach its obligations under the Treaty.

f. Claims of the Claimant were dismissed.

VII. Decision about costs

a. The Parties shall bear the cost of arbitration equally.

b. Each Party shall bear its own cost and legal fees.

B6. Mesa Power Group LLC versus Government of Canada

PCA Case No. 2012-17 **24 March 2016**

AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES, 1976

between

MESA POWER GROUP, LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

AWARD

ARBITRAL TRIBUNAL

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

The Honorable Charles N. Brower

Toby Landau, QC

Secretary of the Tribunal

Rahul Donde

Claimant	**Mesa Power Group LLC**, a Delaware limited liability corporation created in July 2008 (hereinafter referred to as "**Mesa**" or the "**Claimant**")
Respondent	**Government of Canada** (hereinafter referred to as the "**Respondent**" or "**Canada**" or "**the Government**")
Case No.	PCA Case No. 2012-17
Applicable Rules	UNCITRAL Arbitration Rules
Date of Notice of Intent	6 July 2011
Date of Notice of Arbitration	4 October 2011
Date of Award	24th March 2016
Agreement governing the Parties	North American Free Trade Agreement (hereinafter referred to as **NAFTA**)
Institution of Arbitration	Permanent Court of Arbitration
Legal Seat of Arbitration	Miami, Florida, USA

I. Brief facts of the Case

1. Ontario Power Authority (hereinafter referred to as "**OPA**") had been established by the Government to promote the generation and consumption of renewable energy in Ontario province.

2. The Government introduced "feed-in-tariff" program (hereinafter referred to as "**FIT Program**") in 2009 to promote use of renewable

sources of energy. OPA was made responsible for implementing the program.

3. FIT Program provided for the following:

   (a) 20 or 40-year power purchase agreement (hereinafter referred to as a "**FIT Contract**") with the OPA.

   (b) Generators to be paid a guaranteed price per KWh for electricity delivered into the Ontario electricity system.

   (c) Participants had to satisfy prescribed domestic content requirement.

   (d) It provided for eligibility criteria for evaluating the applications for FIT program.

4. Mesa filed six applications under the FIT Program. Mesa's proposed projects were located in the Bruce Region of Ontario and due to transmission constraints, no contracts were awarded to Mesa.

5. On 21 January 2010, the Respondent and a Korean Consortium entered into a Green Energy Investment Agreement ("**GEIA**"). Valued at CAD 7 billion GEIA was the single largest investment in renewable electricity generation in the Province's history.

6. The GEIA required the Korean Consortium to establish and operate manufacturing facilities for wind and solar generation equipment in Ontario. In exchange, the Korean Consortium was inter alia guaranteed priority access to 2,500 MW of transmission capacity in Ontario.

7. OPA awarded 14 FIT Contracts but none of them was awarded to the Claimant.

II. Allegations by the Claimant

1. The Claimant contends that the "arbitrary and unfair" design and implementation of the FIT Program, as well as the directives of the Minister of Energy, ultimately led to it not being awarded any FIT Contracts.

2. The Claimant contends that the GEIA granted the Korean Consortium "significantly" better access to Ontario's energy grid and ultimately led to the Claimant not receiving any FIT Contracts.

3. The "manipulation" of the FIT Program prevented it from obtaining FIT Contracts, and caused loss and damage to Mesa and its related business operations.

208. In essence, the Claimant contends that Ontario and thereby Canada:

i. In violation of Article 1106 of the NAFTA, imposed minimum domestic content requirements on the Claimant;

ii. In violation of Articles 1102 and 1103 of the NAFTA, treated the Claimant and its investments less favourably than other investors in like circumstances;

iii. In violation of Article 1104 of the NAFTA, failed to provide to the Claimant and/or its investments the better treatment required under Articles 1102 and 1103; and,

iv. In violation of Article 1105 of the NAFTA, failed to treat the Claimant's investments in accordance with the international law standard of treatment.

III. Claims of the Claimant

In the Notice of Arbitration, the Claimant sought the following relief:

"a. Damages of not less than CDN$775 million in compensation for loss, harm, injury, moral damage, loss of reputation, and damage caused by or resulting from Canada's breach of its obligations under Part A of Chapter 11 of the NAFTA;

b. Costs of these proceedings, including all professional fees and disbursements;

c. Fees and expenses incurred to mitigate the effect of the unlawful governmental measures taken by Canada;

d. Pre-award and post-award interest at a rate to be fixed by the Tribunal; and

e. Such further relief as counsel may advise and the Tribunal may deem appropriate."

IV. Contentions of the Respondent

a. Tribunal lacks jurisdiction over the claims.

b. Claimant's application to the FIT Program was fairly and reasonably assessed.

c. Mesa's failure to acquire FIT Contract could be attributed to its own business failures.

d. Claimant failed to establish that Respondent has breached its NAFTA obligations.

e. Claimant fundamentally misconstrued the provisions of NAFTA.

V. Decision about Procurement Exception and MFN

395. Articles 1108(7)(a) and 1108(8)(b) of the NAFTA provide as follows:

> "7. Articles 1102, 1103 and 1107 do not apply to:
>
> (a) Procurement by a Party or a State enterprise; […]
>
> 8. The provisions of:
> […]
> Article 1106(1)(b) […] do not apply to procurement by a Party or a State enterprise;
> […]"

396. Accordingly, if the FIT Program constitutes procurement by a Party or a State enterprise, a number of guarantees invoked by Mesa would not apply, specifically Articles 1102 (national treatment), 1103 (most favored nation treatment), and 1106(1)(b) (domestic content).[147]

397. For the reasons discussed above (§§324 et. seq.), the Tribunal considers that it lacks jurisdiction over the domestic content claims. Thus, it will not further analyze these claims and will not consider the Respondent's arguments according to which Article 1108(8)(b) excludes the domestic content claims.

398. The Tribunal does, however, have jurisdiction over the MFN and NT claims. It will therefore consider Canada's position that it cannot entertain these claims as a result of Article 1108(7)(a).

400. The Claimant submits that because neither the Canada-Czech FIPA nor the Slovak Treaty contains a procurement exemption like the one found in Article 1108(7)(a), Mesa can avoid the application of this exemption by relying on the MFN provision in Article 1103 of the NAFTA, which requires that the Claimant be treated no less favorably than a Czech or Slovak investor. Put differently, relying on Article 1103 and the allegedly more favorable standards of protection in the Canada-Czech FIPA and the Slovak Treaty, the Claimant submits that Article 1108(7)(a) does not apply to Mesa. The Tribunal cannot accept this position.

401. For an MFN clause in a base treaty to allow the importation of a more favorable standard of protection from a third party treaty, the applicability of the MFN clause in the base treaty must first be established. Put differently, one must first be *under* the treaty to claim *through* the treaty.[148] Thus, the Claimant must first establish that the MFN provision of the base treaty applies. Then, relying on that provision, it may be able to import a more favorable standard of protection from a third party treaty. Here, the base treaty is the NAFTA. Thus, the Claimant must first establish that the MFN provision, i.e. Article 1103 of the NAFTA, is applicable. As Article 1108(7)(a) expressly excludes the application of Article 1103 in cases of procurement by a Party or State enterprise, for the Claimant to establish that Article 1103 of the NAFTA applies, it must show that the FIT Program does not constitute procurement.

402. For the reasons set forth below, the Tribunal has come to the conclusion that the FIT Program does constitute procurement. Thus, by virtue of Article 1108(7)(a), the MFN provision enshrined in Article 1103 cannot apply. As a result, the Claimant cannot rely on that provision to import the allegedly more favorable provisions of the Canada-Czech FIPA or of the Slovak Treaty.

The above discussion is interesting. The Claimant tried to use the MFN clause to take advantage of Canada's treaty with Czech and Slovak. However, NAFTA denies some benefits of the Treaty to procurement contracts. Since the case concerns a procurement matter, the Claimant is denied the benefit of some articles of NAFTA which contain the MFN clause. By implication, the Claimant is denied advantages from other more favorable treaties.

VI. Decision about FET

475. Article 1105(1) of the NAFTA reads as follows:

> "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

476. The FTC Note states in relevant part the following:

> "2. Minimum Standard of Treatment in Accordance with International Law.
>
> 1.Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2.The 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.

502. On this basis, the Tribunal considers that the following components can be said to form part of Article 1105: arbitrariness; "gross" unfairness; discrimination; "complete" lack of transparency and candor in an administrative process; lack of due process "leading to an outcome which offends judicial propriety"; and "manifest failure" of natural justice in judicial proceedings.[231] Further, the Tribunal shares the view held by a majority of NAFTA tribunals[232] that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached.

503. The Tribunal disagrees with the Claimant's submissions that the "autonomous" fair and equitable treatment provisions in other treaties impose additional requirements on Canada beyond those deriving from the minimum standard. As was already discussed above, the FTC Note is clear that the Tribunal must apply the customary international law standard of the international minimum standard of treatment, and nothing else. There

512. The Tribunal also notes that in various instances the Claimant alleges that Canada's conduct was "unfair", "arbitrary", "unexpected", "non-transparent", "unreasonable", "discriminatory" and contrary to the Claimant's legitimate expectations. On the facts of this case, the Tribunal does not consider it necessary to review whether each of these elements is within the scope of Article 1105. Neither does it appear necessary to set forth a specific test for each element. The following discussion of the evidence will demonstrate that the facts required for a finding of breach of Article 1105 have not been made out and the impugned conduct does not reach the high threshold needed to establish a violation of Article 1105. Thus, even if all of the components identified by the Claimant were to form part of Article 1105 (an issue which the Tribunal does not decide), there would still be no breach of Article 1105.

The Tribunal examined in detail the allegations of the Claimant related to the conduct of the Government and found that the Claimant had not made out a case for denial of FET.

VII. Decision about Agreement with Korean Consortium

The Tribunal refused to accept the Claimant's arguments about GEIA, the Agreement with Korean Consortium.

553. In reviewing this alleged breach, the Tribunal must bear in mind the deference which NAFTA Chapter 11 tribunals owe a state when it comes to assessing how to regulate and manage its affairs. This deference notably applies to the decision to enter into investment agreements.[296] As noted by the *S.D. Myers* tribunal, "[w]hen interpreting and applying the 'minimum standard', a Chapter Eleven tribunal does not have an open-ended mandate to second-guess government decision-making."[297] The tribunal in *Bilcon*, a case which the Claimant has cited with approval, also held that "[t]he imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard."[298]

558. It follows – again contrary to the Claimant's characterization – that the position of the Korean Consortium cannot be compared with the position of FIT Applicants. It was agreeing to a different set of undertakings, on a different scale. And hence, necessarily, the Korean Consortium secured an entitlement to different treatment. It follows that there is no basis to deem this difference in treatment discrimination, or the product of arbitrariness.

In these circumstances, the Tribunal cannot find that the conclusion of the GEIA was "arbitrary", "grossly unfair" or "unreasonable".

573. Further, and in any event, whether or not the GEIA actually succeeded in its objectives is not a relevant consideration, as long as the conclusion of the GEIA was pursuant to a *bona fide* policy decision by the Ontario government, at the time.

574. In these circumstances, the Tribunal does not regard the conclusion of the GEIA as inconsistent with Article 1105. The Government provided benefits to the Korean Consortium under the GEIA over and above those provided under the FIT Program, but it did so in the context of a program that was not comparable to the FIT Program. On the contrary, the benefits were in return for specific, time-bound and substantial commitments undertaken by the Korean Consortium, different in scale and nature to those imposed on FIT participants, and designed to achieve policy goals beyond the scope of the FIT Program.

579. Be that as it may, these are all policy considerations and questions that were for the government of Ontario alone. It is not the Tribunal's role to act as an appellate body in this regard, or second guess or weigh the wisdom of Ontario's decision to enter into the GEIA at the time – even if sufficient renewable energy would possibly have been available through the FIT Program.[328] Rather, it is for the Tribunal to examine whether, as the Claimant alleges, the beneficial treatment was granted to the Korean Consortium arbitrarily, or in any other way that contravened Article 1105. In particular, the Tribunal must determine whether Canada's conclusion of the GEIA lacked a justification, and whether there was a reasonable relationship between the justification supplied and the terms of the GEIA.[329] For the reasons discussed above, the Tribunal comes to the conclusion that such justification and reasonable relationship did exist. It is a different question, on which the Tribunal does not express a view, whether entering into the GEIA was a wise move under the circumstances. As a result, the Tribunal rejects the claim that by entering into the GEIA, Canada breached Article 1105 of the NAFTA.

VIII. Decision about the Cost of Arbitration

a. The total costs of the proceedings were **EUR 1,551,343.80**.

b. The Claimant's costs for legal representation and assistance amounted to **USD 8,518,585.47** while the Respondent's costs amounted to **CAD 6,109,001.95**. Considering the complexity of these proceedings, both these amounts appeared reasonable to the Tribunal.

c. The Tribunal ordered the Claimant to bear the entire costs of the arbitration proceedings i.e. **EUR 1,551,343.80-**

d. Further the Tribunal ordered the Claimant to bear all its own costs and **30%** of Canada's costs in an amount of **CAD 1,832,701-**.

IX. Final Order of the Tribunal

706. For the reasons set forth above, the Tribunal:

i. Decides that it has jurisdiction over the claims brought in the present proceedings, excluding the claims for breaches that occurred prior to the Claimant's investment in Canada;

ii. Decides that these claims are admissible;

iii. Decides that, by reason of Articles 1108(7)(a) and 1108(8)(b) of the NAFTA, the Claimant's claims under Articles 1102, 1103 and 1104 of the NAFTA must be dismissed;

iv. Decides that the Respondent has not acted in breach of Article 1105 of NAFTA;

v. Fixes the costs of the arbitration at EUR 1,551,343.80;

vi. Decides that the Claimant shall bear 100% of the arbitration costs fixed in the preceding paragraph and thus orders the Claimant to pay CAD 1,116,000 to the Respondent within 30 days of notification of this award;

vii. Decides that the Claimant shall bear 30% of the Respondent's costs and thus orders the Claimant to pay CAD 1,832,701 to the Respondent within 30 days of notification of this award;

viii. All other claims are dismissed.

All these decisions are unanimous, except for those set forth in subparagraphs (iii) and (iv), which are made by majority.

B7. Tulip Real Estate and Development B.V vs The Republic of Turkey

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

ICSID Case No. ARB/11/28

Tulip Real Estate Investment and Development Netherlands B.V.

(Claimant)

and

Republic of Turkey

(Respondent)

AWARD

Members of the Tribunal

Dr Gavan Griffith QC (President)
Mr Michael Evan Jaffe
Professor Dr Rolf Knieper

Secretary to the Tribunal

Ms Martina Polasek

Legal Assistant to the Tribunal

Ms Eugenia Levine

Date of dispatch to the Parties: 10 March 2014

Claimant	Tulip Real Estate and Development B.V., a company constituted in accordance with the laws of The Netherlands (hereinafter referred to as "**Tulip**" or the "**Claimant**")
Respondent	Republic of Turkey (hereinafter referred to as "**Turkey**" or "**the Respondent**")
Case No.	ICSID Case No. ARB/11/28
Applicable Rules	International Centre for the Settlement of Investment Disputes (**ICSID**) Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
Date of Request for Arbitration	11 October 2011
Date of Award	10 March 2014
Agreement governing the Parties	Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey dated 27 March 1986 (hereinafter referred to as "**the Treaty**" or "**BIT**")
Place of Arbitration	World Bank Conference Centre, Paris, France

I. Facts of the case

1. The Claimant is a wholly-owned subsidiary of A. Van Herk Holding B.V., a major Dutch investment company based in Rotterdam which is part of the Van Herk group of companies.

2. This matter concerns treatment of alleged investments made by the Claimant in connection withthe construction of a mixed-use residential and commercial real estate development project in Istanbul, known as **Ispartakule III**.

3. The Ispartakule III development was to be carried out by an unincorporated joint venture known as **Tulip JV**, which was awarded a tender to complete the project by a Turkish real estate investment trust, Emlak Konut Gayrimenkul Yatirim OrtakligiA.S. (**Emlak**) in 2006.

4. For the purposes of making the bid for Ispartakule III, Mr Van Herk and Mr Meyer Benitah, (a national of the Netherlands and a long-standing business partner of Mr Van Herk) formed an unincorporated joint venture, Tulip JV, with three local Turkish partners - FMS Mimarlik Ltd Sti. (**FMS**), Mertkan Insaat Ltd Sti. (**Mertkan)** and Ilci Insaat A.S. (**Ilci**).

5. The "*lead*" partner in Tulip JV, a Turkish company known as Tulip Gayrimenkul Gelistirme ve Yatirim Sanayi ve Ticaret A.S. (**Tulip I**), was established as a local investment vehicle by the Van Herk Group and Mr Meyer Benitah in advance of bidding for the Ispartakule III project. Following the award of the tender for the Ispartakule III project to Tulip JV, Tulip I and the other joint venture partners entered into a "*Revenue- Sharing in Exchange for the Sale of Parcels*" Contract with Emlak (the **Contract**).

6. Shortly after entering into the Contract, Tulip I, Mertkan and Ilci began experiencing problems with joint venture partner FMS. The JV Agreement required the involvement of FMS in key decisions with respect to the Contract.

7. On 17 October 2008, Tulip JV requested Emlak to grant it a 655-day extension of time to complete the Contract work on account of the zoning-related delay.

8. Tulip JV was granted an extension of 471 days. Tulip JV accepted the extension.

9. On 13 March 2009 Court of First Instance of Ankara decreed Mertkan bankrupt. Emlak issued a warning to Tulip JV to secure a new partner that possessed the requisite Business Experience Certificate within thirty days or otherwise Emlak would terminate the Contract. Emlak also warned Tulip JV of encashing the performance bond which the Van Herk Group had given to Emlak by way of a bank guarantee.

10. In April 2009, Tulip JV demanded another extension for completion of the project for the delay associated with global economic crisis.

11. Emlak's Board decided not to grant extention to Tulip JV. On 1 March 2010, Emlak notified Tulip JV that the date of completion of the project was 19 May 2010, with no further extension.

12. Tulip JV made efforts to complete the project within the specified time frame by employing more than 250 personnel on site.

13. On 24 May 2010, Emlak notified Tulip JV of the decision of the Board to terminate the Contract as the job could not be completed within the specified time frame. Also, Emlak encashed full amount of performance bond provided by Tulip JV.

14. In July 2010, Emlak re-tendered Ispartakule III project. On 23 July 2010, Emlak's Board resolved to grant a new contract to an entity called Dogu Joint Venture and the site was delivered to it.

II. Allegations by the Claimant

a. Tulip was prevented from starting construction due to zoning litigation concealed from it by Emlak and Turkey's Housing Development

Organization (**TOKI**), a state organ responsible for Turkey's public housing and operating under the auspices of the Prime Ministry of Turkey.

b. Tulip was forced to revise its architectural plans when TOKI inexplicably changed the zoning for its project.

c. Emlak arbitrarily refused to grant Tulip its contractual right of extension, even though delay was caused by reasons not in control of Tulip.

d. While the work was in progress Emlak constantly threatened Tulip to terminate the Contract.

e. Emlak had decided not to grant an extension and wrongfully terminated the Contract.

III. Breaches as per the Claimant

a. The Respondent had failed to comply with the "*fair and equitable treatment*" obligation in Art 3(1) of the BIT.

b. The Respondent expropriated the relevant investment in breach of Art 5 of the BIT.

c. The Respondent failed to comply with its obligations in Art 3(2) of the BIT to "*observe any obligation it may have entered into with regard to investments*" and to afford "*full protection and security*" to the relevant investment.

IV. Respondent's assertions

1. The Claimant's alleged investments fell outside the Tribunal's jurisdiction.

2. The claims asserted by the Claimant on behalf of Mr Benitah were inadmissible on the basis that he had not joined as a party and the Claimant could not otherwise present his claims on the basis of a purported power of attorney signed by Mr Benitah in favour of the Claimant.

3. The claims asserted by the Claimant were not attributable to the Respondent.

4. The claims asserted by the Claimant did not arise from the BIT and were, on the contrary, in essence contractual claims that were subject to the jurisdiction of the Turkish courts (or, alternatively, were not admissible pending the resolution of local Turkish litigation).

5. The Respondent had not violated any aspect of the BIT.

V. Decision of the Tribunal about Jurisdiction

a) The Tribunal determined that the Claimant had made an investment as defined under the BIT.

200. The Tribunal finds that the Claimant made an "investment" for the purposes of Art 1(b) of the BIT and Art 25 of the ICSID Convention when it acquired shares in Tulip I on 14 August 2008.[233] The effect of this transaction was to give the Claimant an 'indirect investment' into Tulip JV and, consequently, the Ispartakule III Project.

201. It is well-established that an indirect shareholding in a local vehicle may form the basis for an "investment".[234] Further, in this case, Art 1(d) of the BIT expressly contemplates direct or indirect ownership or control of an investment. Accordingly, the Claimant's Tulip I shareholding constitutes a qualifying investment for the purposes of the Tribunal's jurisdiction.

b) Faced with the issue of the Claimant representing Mr. Benitah, the Tribunal held as under:

218. In making these submissions, the Claimant has plainly sought to justify the right of a non-party to assert claims before the Tribunal.

220. The central point is that Mr Benitah did not bring his own claims before the Tribunal. Rather, he has sought to have the Claimant assert his claims in a representative capacity.

221. The issue before the Tribunal is whether it may entertain such representative claims without Mr Benitah acting as a claimant in his own right.

226. In its unambiguously plain language, Art 8 limits the right to assert claims against the State to the "investor" who has an investment dispute with the State. Art 8 contemplates only that the "investor" who has a dispute with the State may submit claims in its own right, as a claimant. The Tribunal considers that there is no basis to read into Art 8, or any other provisions of the BIT, the establishment of a right for any alleged investor to bring claims through another entity (albeit itself a claimant) acting in a representative capacity.

229. *Ex facie*, no provision of the ICSID Convention enables such a non-party to impose himself upon a State party respondent by deciding to "submit himself" by giving a prior or subsequent authority to the named claimant, nor to himself be joined later in the proceeding without the explicit consent of the respondent State.

VI. Decision of the Tribunal about Attribution

The Tribunal examined the issue of attribution in depth as follows with reference to Articles 4, 5 and 8 of ILC Articles.

Article 4

232. The Claimant contends that the acts of Emlak which form the basis of its complaint in this proceeding are attributable to TOKI and therefore to the State of Turkey.

276. The issue of attribution relates both to the Tribunal's jurisdiction and to the merits of this dispute. Attribution is relevant in the present context to ascertaining whether there is a dispute with a Contracting State, here Turkey, for the purposes of the BIT and Art 25 of the ICSID Convention. At the same time, the claims presented in this investment arbitration (particularly with respect to the conduct of Emlak) may only succeed if they are attributable to the State. In that sense, the issue of attribution is also relevant to the merits of the dispute. Finally, purely contractual conduct *per se* does not amount to (wrongful) action of the State.

279. First, as in *Hamester v Ghana*, the Respondent accepts that insofar as the Claimant alleges wrongful conduct by actors such as the Supreme Audit Board or the Prime Ministry of Turkey, these are State actors. Accordingly, for the purposes of jurisdiction, the Tribunal is satisfied that the allegations by the Claimant involve actions of the State. For practical purposes, this means the Tribunal may decide which particular acts (including the acts of Emlak) constitute State actions.

281. The Tribunal agrees with the Parties and accepts that the ILC Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State and apply to the present dispute.

290. In view of the evidence before it, the Tribunal's determination is that Emlak is:

(1) an entity separate from the State;

(2) not part of the governmental structure;

(3) subject to the Commercial Code, the Capital Markets Law and other private law instruments; and

(4) separate from rather than an emanation of the State.

291. For these reasons, the Tribunal determines that Emlak is not a "state organ" within the meaning of Art 4 ILC Articles.

<u>Article 5</u>

292. As regards attribution under Art 5, referring to the exercise of governmental authority, the Tribunal agrees with the Parties that in order for Emlak's conduct to be attributable to Turkey, it must be established both that:

(1) Emlak is empowered by the law of Turkey to exercise elements of governmental authority; and

(2) The conduct by Emlak that the Claimant complains of relates to the exercise of that governmental authority.

293. As to (1), the evidence on the record does not establish that Emlak is empowered to exercise elements of governmental authority. The Claimant refers to Art 26 of the Zoning Law as granting governmental privileges to Emlak. However, as is plain on the face of Art 26, it refers to the granting of permits to public agencies and institutions in accordance with preliminary designs. It grants certain preferential treatment with respect to construction permits, but does nothing to empower Emlak actually to <u>exercise</u> any kind of governmental authority with respect to any other entity or subject matter.

294. The position is similar with respect to the fact that Emlak is entitled to buy land from TOKI's land banks on a preferential basis. This merely establishes that Emlak enjoys certain privileges granted to organisations affiliated with TOKI. It does not show that Emlak itself <u>exercises</u> elements of governmental authority vis-à-vis any particular object or person.

295. Equally, decisions made by Emlak within the framework of the Contract, such as whether or not to grant certain extensions of time for the completion of Ispartakule III (governed by Art 33 of the Contract) did not require the exercise of any public authority.

296. Since Emlak did not exercise any governmental authority *per se*, it cannot be the case that it exercised specific governmental authority with respect to the acts that the Claimant asserted constituted violations of the BIT.

297. Accordingly, the Tribunal concludes that the requirement of the first limb of Art 5 is not satisfied.

299. In this regard, the Claimant did not explain precisely how the relevant elements of governmental authority were exercised in Emlak's administration of the Contract for the purposes of attribution of those acts to the State under Art 5 ILC Articles. That is, the Claimant did not explain how Emlak exercised *puissance publique* in carrying out any of the acts relating to its pre-contractual dealings with Tulip JV, its administration and termination of the Contract or any other acts it may have performed with respect to Ispartakule III and the Tulip JV or any of its members. The Tribunal finds that none of the acts constituted the exercise of governmental authority. There is no evidence on the record to conclude that Emlak's pre-contractual dealings with Tulip JV, its decisions on requests for extension of time and, particularly, its decision to terminate the Contract, expose *per se* any exercise of *puissance publique*.

300. Accordingly, the Tribunal concludes that the evidence on the record does not show that Emlak exercises any governmental power within the meaning of Art 5 ILC Articles.

Article 8

302. For the purposes of Art 8 ILC Articles, the question before the Tribunal is whether Emlak acted "on the instructions of, or under the direction or control of [the State] in carrying out the conduct" which forms the subject of the Claimant's complaints under the BIT.

306. The Commentary to the ILC Articles confirms that it is insufficient for the purposes of attribution under Art 8 to establish merely that Emlak was majority-owned by TOKI, *i.e.*, a part of the State:

309. However, the relevant enquiry remains whether Emlak was being directed, instructed or controlled by TOKI with respect to the specific activity of administering the Contract with Tulip JV in the sense of sovereign direction, instruction or control rather than the ordinary control exercised by a majority shareholder acting in the company's perceived commercial best interests.

311. However, the Tribunal considers that the weight of the evidence is strongly to the contrary, to establish that the decision to terminate the Contract with Tulip JV was made by the Board of Emlak independently, in the pursuit of Emlak's commercial interests and not as a result of the exercise of sovereign power by TOKI. An analysis of the content and nature of key decisions taken by Emlak's Board with respect to the Contract, including minutes and agenda papers, does not lead to the conclusion that Emlak acted under the governmental control, direction or instructions of TOKI with a view to achieving a certain State purpose. Rather, the evidence confirms that Emlak acted in each relevant instance to pursue what it perceived to be its best commercial interest within the framework of the Contract.

322. Furthermore, there is no evidence of any specific and disproportionate influence by Mr Bayraktar or any instructions from TOKI to make a particular decision for an ulterior sovereign purpose. To the contrary, the evidence of Mr Kurum confirms that the termination decision was made pursuant to the ordinary procedures of the Emlak Board and was done in the exercise of perceived rights as a party to the Contract, and only after a succession of indulgences given to the Claimant after its failure to meet contractual milestones.[346] The evidence (particularly the Board minutes) confirms that the decision to terminate the Contract was considered carefully and dispassionately by members of the Emlak Board and that they acted professionally and independently as required by Art 12.3 of Emlak's Articles of Association.

323. There is also no evidence that the decision to terminate the Contract was made under the direction, instructions or control of Turkey's Supreme Audit Board (an entity that the Parties accept is an organ of the State).

324. Rather, the Tribunal concludes that Emlak was acting in what it perceived to be its commercial best interest in terminating the Contract.

326. Accordingly, the Tribunal concludes that while Emlak was subject to TOKI's corporate and managerial control, Emlak's conduct with respect to the execution, maintenance and termination of the Contract is not attributable to the State under Art 8 of the ILC Articles due to an absence of proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests.

327. In conclusion, the Tribunal therefore determines by majority that Emlak's conduct with respect to the Contract and the Ispartakule III Project is not attributable to the Turkish State and is, on that basis, outside the remit of the Tribunal.

Having determined that actions of Emlak were not attributable to the Respondent, the question rose about other state entities. The tribunal decided in the matter as follows:

328. On the other hand, insofar as the Claimant alleges that certain independent acts of other state entities breached the BIT (such a such as TOKI and its alleged misuse of zoning powers or the Turkish police and its alleged actions with respect to the Ispartakule III site), the Tribunal agrees with the Parties that these allegations plainly involve action by State organs which would be attributable to the State.

VII. Decision of the Tribunal about Treaty vs. Contract Claims

The Tribunal determined that the claims of the Claimant related to breaches of the contract and not of the Treaty. The essence of the Tribunal's decision is as follows:

348. The Tribunal considers that the BIT, properly construed, does not extend to cover purely contractual disputes. This is apparent from the definition of the term "investment dispute" in Art 8(1) of the BIT:

349. Art 8(3) confers jurisdiction on the Tribunal only with respect to "investment disputes", stating:

> (a) Each Contracting Party hereby consents to the submission of an investment dispute to the [ICSID] for settlement by arbitration.

350. The Tribunal notes that Art 3(2) of the BIT may be characterised as an obligation contained in an 'umbrella clause', which provides that:

> [...] Each Contracting Party shall observe any obligation it may have entered into with regard to investments.

351. While Art 3(2) of the BIT may arguably be relied on in certain circumstances to "elevate" a contractual obligation "entered into" by the State "with regard to investments", the Claimant does not here rely on Art 3(2) to argue that the Contract with Emlak is so converted into an international obligation. The Claimant's only contention with respect to the "umbrella clause" aspect of Art 3(2) of the BIT concerns Turkey's alleged obligations under the Foreign Direct Investment Law. Indeed, the Claimant confirms in its submissions:

354. The Tribunal agrees with the Parties that the determination of whether a claim arises under a BIT involves an inquiry into the "essential basis" or "normative source" of that particular claim. In order to amount to a treaty claim, the conduct said to amount to a BIT violation must be capable of characterisation as sovereign conduct, involving the invocation of *puissance publique*. This principle has been affirmed by numerous previous investment tribunals. For example, in *Impregilo v Pakistan*, the

356. The Tribunal's views are in accord with the statement in *Bayindir* that:

> because a treaty breach is different from a contract violation, the Tribunal considers that the Claimant must establish a breach different in nature from a simple contract violation, in other words one which the State commits in the exercise of its sovereign power.[381]

357. The Tribunal must therefore assess whether the impugned conduct involves the exercise of sovereign power distinct from action attributable to an ordinary contractual counter-party.

358. This issue is inexorably intertwined with the question of attribution. Indeed, it is difficult in this case clearly to separate the issue of attribution from the question of whether the claims presented by the Claimant arise from the BIT. In this regard, in concluding that the conduct of Emlak is not attributable to the State under Art 5 of the ILC Articles, the Tribunal has already determined that none of the conduct in question amounted to the exercise of governmental (*i.e.*, sovereign) power. Similarly, in holding that the actions of Emlak vis-à-vis Tulip JV and the Ispartakule III project are not attributable to the State under Art 8 ILC Articles, the majority of the Tribunal has concluded that such conduct was not carried out under the instructions, direction or control of the State in pursuit of a sovereign purpose. In sum, the majority of the Tribunal has concluded that there is no cogent evidence of sovereign interference - *i.e.*, sovereign instructions, direction or control - in Emlak's contractual relations with Tulip JV.

359. The Tribunal's finding that Emlak's conduct is properly characterised as contractual in nature, in the context of attribution, informs its determination that the claims asserted by the Claimant with respect to Emlak's conduct may not properly be characterised as treaty claims.

VIII. Decision of the Tribunal about FET

The issue of FET (Fair and equitable Treatment) was examined by the Tribunal as follows:

401. The Tribunal concludes that Art 3(1) of the BIT is to be construed according to the ordinary meaning of the term "fair and equitable," *i.e.*, "'just,' 'even-handed', 'unbiased', 'legitimate'" and infringement of that standard requires "treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable".[436]

402. The Tribunal notes that the Claimant has indicated that its principal claims on the merits concern the failure to grant extensions (principally in 2009-2010) and the termination of the Contract. The Tribunal has considered the Claimant's other assertions about earlier conduct, such as with respect to the zoning dispute, as part of the course of conduct alleged against the Respondent, but has noted that they do not form part of the primary claim asserted by the Claimant.

408. On the Claimant's complaint that Emlak insisted on FMS's participation in the affairs of Tulip JV, the Tribunal notes, without determining issues of Turkish law, that the Tulip JV Agreement which was not imposed upon the Van Herk Group by TOKI or Emlak but freely entered into, specifically provided for an appointee of FMS, as a member of the Executive Board, to be included in all submissions. The Tribunal also notes that FMS consistently insisted on the respect of this provision and threatened legal actions against Emlak on several occasions in the event that Emlak proceeded to deal with Tulip JV without FMS. The Claimant does not argue that the provisions of the Joint Venture Agreement were inoperative in light of FMS' conduct absent a court order, nor does the Claimant dispute that the interim injunction obtained against FMS was vacated. What is

409. While Emlak could have elected to ignore FMS' threats and deal with the consequences, the Tribunal cannot say that it was obliged to choose that course. From that it follows that it cannot be said that Emlak's decision amounted to arbitrary behaviour. Accordingly, insofar as Tulip JV predicates a claim of a BIT violation on Emlak's response to FMS' threats, that claim is not sustained.

413. The decision to decline further extensions cannot be considered "discriminatory" or "arbitrary" in circumstances where Emlak enjoyed a broad contractual discretion by virtue of Art 33 of the Contract and where: (1) the evidence showed that construction progress on other projects that received extensions vastly outpaced the progress made on the Ispartakule III project, even if measured only by the progress achieved in 2010 when Tulip JV increased the resources that it brought to bear; (2) Art 11.17 of the Contract required Tulip JV to complete the project with its own resources in the absence of funds available from sales; and (3) the EUR 20 million available under the First Loan Facility was completely drawn down on 28 November 2008 and the EUR 2 million available under the Second Loan Facility was completely drawn down on 19 May 2009.[442]

414. For these reasons, the Tribunal also concludes unanimously that the termination of the Contract was not a violation of Art 3(1) of the BIT in circumstances where Emlak was faced with a project that was in substantial financial hardship and beset with severe construction delays.

IX. Decision of the Tribunal about Expropriation

The Tribunal rejected the claim of the Claimant regarding expropriation. Decision related to expropriation is summed up as follows:

415. In short, the Claimant contends that the termination of the Contract by Emlak and the acts that followed constitute an expropriation of its investment by the Republic of Turkey in violation of Art 5(1) of the BIT. The Claimant argues that, by terminating Claimant's Contract, physically seizing the Ispartakule III site by force, calling the performance bond, seizing all of the money in the Project sales account and leaving the Tulip brand without its founding project, Respondent expropriated Claimant's entire investment in Turkey.[443] According to the Claimant, the termination of the Contract was not commercial in nature but rather an act that attracts the protection of the BIT.[444] The Claimant refers to the recommendation of the Supreme Audit Board, a Turkish State organ, to Emlak to terminate the Contract.[445] According to the Claimant, the recommendation was a catalyst for the termination.[446]

417. The Tribunal has concluded unanimously that the evidence offered by the Claimant falls short of establishing a violation of the BIT, inasmuch as the termination was pursued within the framework of the Contract and in Emlak's perceived commercial best interests.

418. As regards the recommendation of the Supreme Audit Board, suggesting that Emlak consider termination of the project in light of the slow pace of construction, the record does not reveal that any such recommendation had any particular influence on Emlak. What is more, Claimant offers no basis on which the Tribunal could find a mere recommendation to consider taking an action as an improper exercise of sovereign power. Especially is that so in the absence of any evidence that the Board exerted pressure on Emlak to terminate the Contract or that its recommendation was motivated by an improper purpose.

X. Decision of the Tribunal about Costs

Costs incurred by the Claimant and the Respondent were as follows:

a. The Claimant's legal fees and expenses total USD 9,368,621.48. This amount consisted of the following items: (i) Crowell & Moring fees: USD 6,215,000; (ii) Crowell & Moring expenses: USD 1,461,952.16; (iii) expert fees and expenses: USD 1,360,846.74; (iv) Dutch and Turkish counsel fees: USD 323,644.85; and (v) additional direct travel expenses: USD 7,177.73. The Claimant had advanced USD 500,000 to ICSID to cover the costs of arbitration, as well as a lodging fee of USD 25,000.

b. In addition, the Claimant had incurred USD 506,032.04 in connection with the Bifurcated Jurisdictional Issue (USD 466,422.75 Crowell & Moring fees, USD 25,089.29 Crowell & Moring expenses, and USD 14,520 expert fee).

c. The Respondent's legal fees and expenses amounted to USD 2,194,884 and EUR 1,605,082.00. These amounts consisted of the following items: (i) Kuseyri Hukuk Bürosu fees and expenses:

USD 874,898; (ii) Nixon Peabody fees and expenses: USD 660,000; (iii) LALIVE fees and expenses: USD 659,986; (iv) expert fees and expenses: EUR 1,501,740; (v) travel and accommodation: EUR 72,598; and (vi) hearing expenses: EUR 30,744. The Respondent had advanced USD 499,847.86 to ICSID to cover the costs of arbitration.

d. The Respondent estimated that it had incurred USD 300,000 in connection with the pleadings and hearing on the Bifurcated Jurisdictional Issue.

The Tribunal decided as follows in respect of the above costs:

466. There is no rule in ICSID arbitration that 'costs follow the event', nor does the broad body of arbitral practice suggest that this is the approach which should be followed in ICSID arbitration proceedings. However, in the exercise of its discretion to allocate costs, the Tribunal has the authority to award all or part of a party's costs of the arbitration and its legal fees and expenses. Taking into account all factors in this case, the Tribunal has decided partially to apply this principle.

467. As the Respondent ultimately prevails in this arbitration, the Tribunal determines that the Claimant shall bear USD 450,000 of the costs of arbitration (the advances paid to ICSID to cover the fees and expenses of the Members of the Tribunal and the charges for the use of ICSID's facilities) incurred by the Respondent.[475]

468. As to the Art 8(2) proceeding, the Claimant was successful in establishing compliance with the requirements of Art 8(2) of the BIT. However, the Tribunal indicated in its Decision on the Bifurcated Jurisdictional Issue that the Claimant should not have its costs of the Art 8(2) application and that Respondent may contend upon finality that it should have its costs, which are estimated to USD 300,000. The Tribunal determines that these costs should be paid by the Claimant. While the Claimant prevailed on the application, it could have been avoided by an explicit notice to the Respondent of an investment dispute pursuant to Art 8(2) of the BIT.

469. Accordingly, the Claimant shall pay to the Respondent USD 750,000.

XI. Final Order

The Tribunal's final order was as follows:

The Tribunal determines as follows:

1. **The Claimant has made an investment into Turkey within the terms of the BIT and the ICSID Convention.**
2. **The claims of Mr Benitah are inadmissible.**
3. **By majority, the acts of Emlak are not attributable to Turkey.**
4. **Unanimously, and in any event, the acts of Emlak do not constitute breaches of the BIT.**
5. **Also unanimously, the acts of TOKI, the Supreme Audit Board, the Turkish police and Turkish government officials are attributable to Turkey but do not constitute breaches of the BIT.**

Accordingly, the Claimant's claims are dismissed.

The Claimant is ordered to pay the Respondent USD 750,000, constituted by:

(a) USD 450,000 in part reimbursement of the advances paid by the Respondent to ICSID; and

(b) USD 300,000 for its other costs.

B8. Apotex Inc. versus Government of USA

In The Matter Of Two Arbitrations Under Chapter 11 Of The NAFTA
And The UNCITRAL Arbitration Rules (1976)

B e t w e e n:

APOTEX INC.

Claimant

– and –

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent

AWARD ON JURISDICTION AND ADMISSIBILITY

The Arbitral Tribunal:

Hon. Fern M. Smith
Mr. Clifford M. Davidson
Mr. Toby T. Landau QC *(Presiding Arbitrator)*

Secretary to the Tribunal: Ms. Aurélia Antonietti

Claimant	Apotex, Inc, a company incorporated and existing under the laws of Canada (hereinafter referred to as "**Apotex**" or the "**Claimant**")
Respondent	Government of the United States of America (hereinafter referred to as "**USA**" or "**Respondent**")
Applicable Rules	UNCITRAL Arbitration Rules
Date of Notice of Arbitration	Notice dated 10 December 2008 (the "**Sertraline Claim**") Notice dated 4 June 2009 (the "**Pravastatin Claim**")
Date of Award	14 June 2013
Agreement governing the Parties	North American Free Trade Agreement (hereinafter referred to as NAFTA)
Place of Arbitration	Seat of Arbitration – New York, USA Place of Hearings – Washington D.C., USA

I. Brief facts of the case

1. Apotex develops and manufactures generic drugs, including solid oral dosage forms such as capsules and tablets. Generic drugs are usually non-patented (and often less expensive) versions of brand-name pioneer drugs that are, may be, or were previously protected by patents.

2. Apotex's activities in this regard include, in particular, the design and formulation of proposed drug products; the procuring or

manufacturing of active pharmaceutical ingredients; the preparation and filing of applications with the U.S. Food and Drug Administration ("**FDA**"); the seeking of approval to market and sell its drug products in the United States; and the manufacture of the finished drug products.

3. Both of Apotex's claims related to the treatment said to have been accorded to it by the USA, its agencies and Federal Courts, in the course of its efforts to bring new generic drugs to market in the United States.

4. The Sertraline Claim arose out of three decisions of the US Federal Courts in relation to Apotex's application seeking FDA approval for a generic version of a drug manufactured by Pfizer Inc., called "Zoloft®", which is used to treat depression; obsessive-compulsive disorders; panic attacks; and post-traumatic stress disorder.

5. The Pravastatin Claim arose out of a decision of the FDA, and three decisions of the US Federal Courts, in relation to Apotex's new drug application seeking FDA approval for a generic version of a drug manufactured by Bristol Myers Squibb, called "Pravachol®", which is commonly used for lowering cholesterol and preventing cardiovascular disease.

II. Nature of Preliminary Objections

This Award addressed three preliminary objections that were raised by the Respondent.

a. The first objection was whether there was an "*investment*" and an "*investor*" within the scope of NAFTA Chapter Eleven. This objection applied to both arbitrations.

b. The second objection was whether the judicial acts complained of were "final". This also related to both arbitrations.

c. The third objection was about limitation under the NAFTA. This related only to the Pravastatin Claim.

III. Decision of the Tribunal about Investment

The Tribunal analyzed the nature of alleged "investments" as follows:

157. Overall, it would appear that - across all its submissions - Apotex has advanced three distinct alleged "*investments*":

(a) the formulation, development and manufacture of approved generic pharmaceutical products for sale in the United States;

(b) the preparation of ANDAs for filing in the United States, including all the effort and expenditure that this entails, and the resulting ANDAs themselves;

(c) other significant investments made in the territory of the United States, including (*inter alia*) utilisation of its US affiliate, Apotex Corp.; the purchase of raw materials and ingredients in the United States; and expenditure on US litigation.

158. *Analysis:* Having carefully considered the entire record in this case, the Tribunal is clear that none of Apotex's characterisations of its alleged "*investment*" meet the requirements of NAFTA Article 1139, whether considered separately or together.

165. By its own admission, it does not reside or have a place of business in the United States.[33]

166. It is to be noted that Apotex has not brought its claims under NAFTA Article 1117, which is entitled "*Claim by an Investor of a Party on behalf of an enterprise.*" In other words, it has brought its claims on its own behalf and not on behalf of any enterprise established in the U.S. - because Apotex does not claim to have established an enterprise there.

167. Similarly, Apotex has not claimed to have an equity or a debt interest in any U.S. company. It has not claimed to have purchased property or to have built facilities or to have hired a workforce in the U.S. And it has not claimed to have developed, tested, or manufactured its drugs in the United States.

174. **Thus, on the basis of Apotex's own regulatory filings, it is clear that both its sertraline and pravastatin products are formulated, developed, manufactured, tested and labelled outside the United States, and then exported by Apotex to (separate) U.S.-based distributors.**

176. It follows that Apotex's formulation, development, and manufacture of the pharmaceuticals in issue does not qualify for the purposes of NAFTA Chapter Eleven, since these are all activities conducted outside of the United States.

177. Apotex's second characterisation of its alleged "*investment*" focuses upon the actual ANDA submissions themselves. Properly analysed, this submission has two distinct elements:

(a) the activity of preparing each ANDA for filing in the United States, and

(b) the actual ANDA itself, as an item of "*property*".

178. In the Tribunal's view, neither element qualifies for the purposes of NAFTA Chapter Eleven.

186. The Tribunal is unpersuaded that the costs and effort expended in preparing ANDAs either constitutes or evidences an "*investment*" in the United States, for the purposes of NAFTA Chapter Eleven. This is for a number of reasons.

242. Having concluded that Apotex has made no "*investment*" in the territory of the United States within the scope of NAFTA Chapter Eleven, it necessarily follows that Apotex itself does not qualify as an "*investor*" for these purposes. As noted above, the scope and coverage of the protections of NAFTA Chapter Eleven extend to "*investors*" only to the extent that they have made, or have sought to make, "*investments*" in the territory of another NAFTA Party.

243. Apotex has failed to establish that it made or sought to make an "*investment*" in the United States. It therefore does not qualify as an "*investor*" under NAFTA Article 1116.

245. Apotex, like any company that intends to export generic drug products to the United States for sale in the U.S. market, sought regulatory approval from the FDA through the submission of ANDAs. But this process cannot change the nature of the underlying activity, or constitute an "*investment*" in and of itself, within the meaning and scope of NAFTA Article 1139.

246. It follows that the Tribunal lacks jurisdiction over Apotex's claims, which must be dismissed in their entirety.

IV. Decision of the Tribunal about Judicial Finality

The Claimant had approached courts in USA and had received judgments against its claims. The Claimant decided to approach the Tribunal instead of approaching higher court in USA. The Tribunal's analysis on the subject is as follows:

257. *The Nature of this Objection:* As explained in more detail below, this objection has been argued by both Parties on the basis of an agreed basic principle, namely that any claim under NAFTA which is based upon a judicial act, is subject to a requirement that all judicial remedies within the host State first be exhausted. In other words, both sides have proceeded upon a common assumption (a) that "judicial finality" must first be reached in the host State's domestic courts, (b) unless such recourse is "obviously futile".[113] The Parties have differed, however, on the precise calibration of the "obviously futile" exception.

261. *Relevant Chronology:* It is clear, as a matter of fact, that two further avenues of recourse within the U.S. judicial system were available to Apotex, and that Apotex elected not to pursue them.

262. First, Apotex never sought review in the U.S. Supreme Court of the pravastatin-related decisions by the U.S. Court of Appeals. In fact, none of the pravastatin-related judicial acts now relied upon by Apotex as breaching U.S. obligations under the NAFTA was finally reviewed within the U.S. judicial system.

263. Second, Apotex voluntarily agreed to the dismissal of its entire pravastatin claim in the U.S. courts, most of which was dismissed with prejudice, instead of proceeding at the District Court level.

277. The starting point is to recall the very serious nature of the allegations against the U.S. judicial system in Apotex's Pravastatin Claim. Apotex asserts that the U.S. District Court for the District of Columbia, and the U.S. Court of Appeals for the D.C. Circuit, administered justice so deficiently as to violate Apotex's rights under the U.S. Constitution, and to put the United States in breach of its international law obligations under the NAFTA. Yet, at the same time (and notwithstanding the gravity of the alleged breaches), Apotex elected not to allow the U.S. Supreme Court all possible opportunities to correct the alleged errors and transgressions. Instead, Apotex now requests that this Tribunal – in effect – substitute itself for the U.S. Supreme Court, and sit as a supranational appellate court, to review the judicial decisions of lower U.S. courts. The Tribunal declines to do so, for three reasons.

278. First, as a general proposition, it is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court. This has been repeatedly emphasised in previous decisions. For example:

279. Second, and related to this, the "obvious futility" threshold is a high one. This necessarily follows from the nature of the rule to which it is an exception.

284. Because each judicial system must be allowed to correct itself, the "obvious finality" exception must be construed narrowly. It requires an actual <u>unavailability</u> of recourse, or recourse that is proven to be "*manifestly ineffective*"[148] – which, in turn, requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued.[149]

285. It is not enough, therefore, to allege the "*absence of a reasonable prospect of success or the improbability of success, which are both less strict tests*."[150] In the (frequently quoted) words of Professor Borchard, a claimant is not:

> "relieved from exhausting his local remedies by alleging … a pretended impossibility or uselessness of action before the local courts."[151]

287. Third, on the facts of this case, even if the chance of the U.S. Supreme Court agreeing to hear Apotex's case was remote, the availability of a remedy was certain. Pursuant to 28 U.S.C. § 1254(1), Apotex could have sought U.S. Supreme Court review on an expedited basis of the Court of Appeals decision on injunctive relief, even after its petition for rehearing *en banc* was denied.[154]

V. Decision of the Tribunal about Limitation

315. *Analysis:* In relation to the Pravastatin Claim, the relevant cut-off date is 5 June 2006 (*i.e.* three years before Apotex filed its Notice of Arbitration).

316. As set out in its Statement of Claims (and summarised in **Section IV** above), Apotex's Pravastatin Claim arises out of:

(a) the decision of the FDA on 11 April 2006;

(b) the subsequent denial of emergency injunctive relief seeking to overturn that decision by the D.C. District Court on 19 April 2006;

(c) the 6 June 2006 affirmation by the D.C. Circuit denying Apotex's request for emergency relief; and

(d) the 17 August 2006 denial of rehearing *en banc* by the same D.C. Court.

317. In the Tribunal's view, a distinction must be drawn between:

(a) claims based upon the FDA decision itself; and

(b) claims based upon the 6 June 2006 and 17 August 2006 decisions of the D.C. Circuit, which may entail reference to the earlier FDA and District Court decisions.

318. *Claims Based on the FDA Decision Itself:* In so far as Apotex seeks to advance any claim based exclusively on the FDA decision of 11 April 2006, this clearly falls outside of the NAFTA three-year limitation period, and is therefore time-barred. In other words, Apotex cannot now assert that the FDA decision constituted – in and of itself – a breach of NAFTA Articles 1102, 1105, and 1110.

324. Accordingly, the Tribunal accepts the Respondent's submission that by reason of NAFTA Article 1116(2), all claims based exclusively upon the FDA decision of 11 April 2006 are time-barred, and so must be dismissed.

331. The position, therefore, is that any challenge to the FDA decision itself had to be brought within three years, and could not be delayed by resort to court action. Any conclusion otherwise would provide a very easy means to evade the clear rule in NAFTA Article 1116(2) in most cases (*i.e.* by filing any court action, however hopeless).

332. Whilst this provides the certainty and finality intended by NAFTA Article 1116(2), and forces parties to initiate proceedings with respect to (as here) administrative decisions, it obviously does not preclude the exercise of discretion on the part of NAFTA tribunals, once constituted, to stay arbitral proceedings pending court proceedings, in appropriate cases.

333. *Claims Based on the 6 June & 17 August 2006 D.C. Decisions:* Having so ruled, it must be made clear that there is no time-bar difficulty with respect to Apotex's claims based upon the 6 June 2006 and 17 August 2006 decisions of the D.C. Circuit. And clearly, any claim that these judicial decisions constituted a breach of the NAFTA would require at least some consideration of the prior administrative and judicial decisions.[200]

334. But the two types of claim are clearly analytically distinct. One is a claim that a breach occurred, and loss was incurred, as at 11 April 2006, by reason of the FDA's (administrative) ruling that the dismissal of Apotex's declaratory judgment action against the patent owner did not constitute a "court decision trigger". The other is a claim that a breach occurred, and loss was incurred, as at 6 June 2006, or alternatively 17 August 2006, by reason of the (judicial) decisions of the Court of Appeals for the D.C. Circuit.

335. It follows that, even if Apotex qualified as an "*investor*", who has made an "*investment*" in the U.S. for the purposes of NAFTA Articles 1116 and 1139, the Tribunal would have no jurisdiction *ratione temporis* with respect to Apotex's allegation in its Pravastatin Notice of Arbitration that the FDA's letter decision of 11 April 2006 (determining that the 180-day exclusivity period had not been triggered) itself constituted a violation of NAFTA Articles 1102, 1105, and 1110. This particular claim would therefore fall to be dismissed on this basis in any event.

VI. Overall Decision of the Tribunal

Claims of Apotex were dismissed on all the three preliminary grounds. Relevant order of the Tribunal reads as follows:

336. It follows that both the Sertraline and Pravastatin Claims must be dismissed in their entirety, on the basis that Apotex does not qualify as an "*investor*", who has made an "*investment*" in the U.S., for the purposes of NAFTA Articles 1116 and 1139, and the Tribunal therefore lacks jurisdiction.

337. Even if Apotex did qualify as an "*investor*", who has made an "*investment*" in the U.S. for the purposes of NAFTA Articles 1116 and 1139:

(a) all claims within Apotex's Pravastatin Claim that the judicial acts of the D.C. District Court and the D.C. Circuit breached Articles 1102, 1105, and 1110 of the NAFTA would have to be dismissed in any event, on the basis that Apotex has failed to exhaust all local judicial remedies, and the Tribunal therefore lacks jurisdiction *ratione materiae* in relation thereto, or alternatively the said claims are inadmissible; and

(b) Apotex's claim in its Pravastatin Notice of Arbitration that the FDA's letter decision of 11 April 2006 itself constituted a violation of Articles 1102, 1105, and 1110 of the NAFTA would have to be dismissed in any event, on the basis that the Tribunal lacks jurisdiction *ratione temporis* in relation thereto.

VII. Decision about the Cost of Arbitration

The Tribunal considered that the cost of the Arbitration including the Respondent's cost of representation must be borne by Apotex.

Relevant extracts of the Tribunal's order are as follows:

344. The Respondent has claimed costs in relation to these two arbitrations in the total amount of US$ 705,814, which it describes as an "*exceptionally conservative*" quantification.

345. This figure includes US$ 180,000 in respect of the Respondent's half share of the total advances to cover the Tribunal's fees and reimbursable expenses (as to which, see below). Aside from this amount, the balance of US$ 525,814 comprises the following elements:

(a) US$ 498,575 in respect of attorney and paralegal time;

(b) US$ 13,750 in respect of expert consultant advice; and

(c) US$ 13,489 in respect of contractor paralegal services.

346. The Tribunal has carefully considered this claim, together with the detailed evidence and statements filed in support, and concludes that each element is reasonable, and ought to be reimbursed in full by Apotex.

355. Pursuant to Article 40(3) of the UNCITRAL Rules, the Tribunal hereby fixes the following amounts in respect of its fees and expenses, and ICSID's charges and expenses for the administration of both arbitrations:

Total Tribunal's fees and expenses:	US$ 233,658.94

comprising:

Mr. Toby Landau QC:	Fees:	US$ 113,298.75
	Expenses:	US$ 23,594.40
Mr. Clifford Davidson:	Fees:	US$ 63,990.00
	Expenses:	US$ 2,411.04
Judge Fern Smith:	Fees:	US$ 25,875.00
	Expenses:	US$ 4,489.75
Total ICSID charges and expenses:[202]		US$ 44,204.68
Total:		**US$ 277,863.62**

357. Apotex must therefore reimburse the Respondent as follows:

(a) US$ 525,814 in respect of the Respondent's costs of legal representation and assistance; and

(b) 50% (*i.e.* the Respondent's share) of the Tribunal's and ICSID's total fees, charges and expenses, as notified by ICSID to the Parties within 90 days of the dispatch of this Award.

B9. Devas (Mauritius) Ltd. & others versus Republic of India

PCA CASE Nº 2013-09

IN THE MATTER OF AN ARBITRATION ARISING UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS AND THE GOVERNMENT OF THE REPUBLIC OF INDIA FOR THE PROMOTION AND THE PROTECTION OF INVESTMENTS ENTERING INTO FORCE JUNE 20, 2000 AND THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (1976)

- between -

CC/DEVAS (MAURITIUS) LTD.,
DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED, and
TELCOM DEVAS MAURITIUS LIMITED

("Claimants")

- and -

THE REPUBLIC OF INDIA

("Respondent")

Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator

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By the Appointing Authority:

H.E. Judge Peter Tomka
President, International Court of Justice

September 30, 2013

Claimants	CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited (hereinafter referred to as "**Devas**" or the "**Claimants**")
Respondent	Republic of India (hereinafter referred to as "**India**" or "**Respondent**")
Applicable Rules	UNCITRAL Arbitration Rules
Date of Notice of Arbitration	4 July 2012
Date of Decision on Challenge to appointment of arbitrators	30 September 2013
Agreement governing the Parties	Agreement between the Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and Protection of Investments (hereinafter referred to as "**India-Mauritius BIPA**" or "**the Treaty**")
Place of Challenge to Arbitrators	International Court of Justice, Hague, Netherlands

The dispute between Devas and India has now been decided by the Arbitration Panel. As reported in the press, the award has been against India. However, both parties have not made the award or any part of the proceedings public. Hence, we are unable to present the summary of the case here.

The respondent had challenged the appointment of the Arbitrator appointed by the Claimant as well as the appointment of the Presiding Arbitrator. The Appointing Authority, President International Court of Justice, decided on the challenge. Here, we present a summary of the decision of the Appointing Authority.

I. Brief facts of the case

1. The Claimants allege that the Respondent violated the Treaty by taking measures affecting the Claimants' investments in an Indian company, Devas Multimedia Private Limited, which in 2005 entered into a contract with an Indian state entity under the control of the Indian Space Research Organization, Antrix Corporation Limited.

2. According to the Claimants, pursuant to this agreement, Antrix agreed to lease capacity in the S-Band, part of the electromagnetic spectrum, to Devas Multimedia Private Limited to provide multimedia services to mobile users across India. The Claimants contend that the Respondent endeavored to cancel the agreement in breach of its international obligations under the Treaty.

3. The Claimants appointed Professor Orrego Vicuna as co-arbitrator on 3 July 2012 and notified the Respondent of his appointment in their Notice of Arbitration dated 4 July 2012.

4. On 26 December 2012, the Respondent appointed the Hon. Shri Justice Anil Dev Singh as co-arbitrator.

5. The two party-appointed arbitrators chose the Hon. Marc Lalonde, P.C., O.C., Q.C., to serve as the third, presiding arbitrator pursuant to Article 7(1) of the 1976 UNCITRAL Arbitration Rules.

6. By e-mail dated 11 May 2013, the Respondent notified the Claimants and the Tribunal of its intention to challenge the appointments of Professor Orrego Vicuna and the Hon. Marc Lalonde.

II. Grounds for challenge to the appointment of Arbitrators

1. The Respondent challenged the appointments of the Hon. Marc Lalonde and Prof. Orrego Vicuna on the basis of a "*lack of the requisite impartiality under Article 10(1) of the 1976 UNCITRAL Arbitration Rules due to an 'issue conflict*'".

2. The Respondent believed that "*strongly held and articulated positions by two of three arbitrators in this case on a controversial legal standard of relevance here 'give rise to justifiable doubts' as to their*

impartiality and constitute a valid reason for concern on the part of the Government of India".

3. The controversial legal standard to which the Respondent referred is that of "*essential security interests*" as found in Article 11(3) of the Treaty.

4. The Respondent's challenge was based on the fact that Professor Orrego Vicuna and the Hon. Marc Lalonde participated in two cases together in which the legal interpretation of an essential security interests provision arose.

5. The Respondent identified three International Centre for Settlement of Investment Disputes ("ICSID") arbitrations chaired by Professor Orrego Vicuna in which the tribunals decided that the essential security interests provision of the U.S.-Argentina bilateral investment treaty incorporated the "state of necessity" defense under customary international law as reflected in Article 25 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts.

6. The Respondent further noted that annulment committees were constituted to review the three arbitral awards rendered by the tribunals in those cases. According to the Respondent, the annulment committees in the two cases in which the arbitrators served together both concluded that the ruling on this legal point by the original tribunals constituted manifest error, while the third award was annulled because the original tribunal erred in its interpretation of the state of necessity defense.

7. In respect of its challenge to Professor Orrego Vicuna, the Respondent further argued that his "*strong public declarations on the subject have included at least one clear writing in addition to the three decisions in the aforementioned cases, a chapter in a book published in 2011 in which he strongly defended his position*". In the Respondent's view, Professor Orrego Vicuna's chapter demonstrates his sympathy toward a legal issue in this arbitration that would call into question the fundamental fairness of the proceedings.

8. It was the Respondent's position that its challenge was timely, despite the Claimants' view that the fifteen-day limitation under Article 11(1)

of the 1976 UNCITRAL Arbitration Rules expired by the fifteenth day after each arbitrator's appointment. The Respondent argues that the fifteen-day limitation applies from the day on which the circumstances underlying the challenge became known to the challenging party, emphasizing that actual knowledge is required. The Respondent asserts that it "*only became aware of the basis for the challenge ... on 11 May 2013*" three days after having retained new counsel.

III. Decision of the Appointing Authority

The Appointing Authority decided as follows:

a) The Respondent challenged the appointments within fifteen days of coming to know of the facts which form basis of the challenge. Hence, the challenge was timely.

b) Professor Orrego Vicuna had expressed the opinion about the essential security interests in a chapter in a book even after annulment of decisions related to the subject. Given his strong views, it seemed unlikely that he would examine the subject with an open mind. Hence, the Appointing Authority accepted the challenge to the appointment of Professor Orrego Vicuna and asked him to withdraw from the Arbitration.

c) In case of Mr. Lalonde, there was no reason to believe that he held such strong views on the subject and that he would not approach the subject with an open mind. Hence, he was allowed to continue as the Presiding Arbitrator.

Relevant extracts from the decision of the Appointing Authority are given below.

47. In my view, the text of Article 11(1) is clear enough when it speaks of "the circumstances . . . became known to the party". According to one leading commentary on the UNCITRAL Rules, Article 11 requires actual knowledge of the fact(s) invoked as a basis for the challenge. Thus, the Parties agree that these facts, which I have found to be those relevant to the timeliness evaluation, became known to the Respondent on May 11, 2013, at which point the Respondent informed the Claimants about its forthcoming challenge, which was then formally raised at the First Procedural Meeting of the Tribunal on May 15, 2013. The Respondent's Request is therefore timely pursuant to Article 11 of the 1976 UNCITRAL Arbitration Rules.

58. I also note that the basis for the alleged conflict of interest in a challenge invoking an "issue conflict" is a narrow one as it does not involve a typical situation of bias directly for or against one of the parties. The conflict is based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view. In this respect, as discussed by the Parties, some challenge decisions and commentators have concluded that knowledge of the law or views expressed about the law are not *per se* sources of conflict that require removal of an arbitrator; likewise, a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality.[45] Thus, to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.

64. The standard to be applied here evaluates the objective reasonableness of the challenging party's concern.[50] In my view, being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to Professor Orrego Vicuña's ability to approach the question with an open mind. The later article in particular suggests that, despite having reviewed the analyses of three different annulment committees, his view remained unchanged. Would a reasonable observer believe that the Respondent has a chance to convince him to change his mind on the same legal concept?[51] Professor Orrego Vicuña is certainly entitled to his views, including to his academic freedom. But equally the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind. Here, the right of the latter has to prevail. For this reason, I agree with the Respondent that Professor Orrego Vicuña should withdraw from this arbitration.

66. The circumstances presented by the Respondent as giving rise to justifiable doubts about the Presiding Arbitrator's impartiality are more limited. The Respondent argues that Mr. Lalonde's participation on the two panels with Professor Orrego Vicuña, both of which discussed the "essential security interests" provision in their decisions, is sufficient to disqualify him from participating on this Tribunal. I, however, find that Mr. Lalonde's more limited pronouncements on the relevant text are not sufficient to give rise to justifiable doubts regarding his impartiality. Mr. Lalonde has not taken a position on the legal concept in issue subsequent to the decisions of the three annulment committees and thus I can accept his statement that "[his] intention is to approach the matter with an open mind and to give it full consideration" and that "[he] would certainly not feel bound by the *CMS* or the *Sempra* awards". In my view, there is no appearance of his prejudgment on the issue of "essential security interests" which will have to be considered by the Tribunal in the ongoing arbitration.

67. Therefore, I cannot sustain the Respondent's Request to disqualify the Hon. Marc Lalonde from serving as the Presiding Arbitrator in these proceedings.

B10. Flemingo Dutyfree Shop Private Limited Vs. The Republic of Poland

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND GOVERNMENT OF THE REPUBLIC OF POLAND FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, SIGNED ON 7 OCTOBER 1996

- and -

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULES OF ARBITRATION, ADOPTED ON 15 DECEMBER 1976

- between -

FLEMINGO DUTYFREE SHOP PRIVATE LIMITED

("Claimant")

and

THE REPUBLIC OF POLAND

("Respondent", and together with Claimant, the "Parties")

AWARD

Tribunal:
Dr. Wolfgang Kühn
Mr. John M. Townsend
Professor Hans van Houtte, Presiding Arbitrator

Registry:
Permanent Court of Arbitration

Date:
12 August 2016

Claimant	Flemingo Dutyfree Shop Private Limited, a company established under the laws of India (hereinafter referred to as "**Flemingo Dutyfree**" or "**the Claimant**")
Respondent	Republic of Poland (hereinafter referred to as "**Poland**" or "**the Respondent**")
Applicable Rules	UNCITRAL Arbitration Rules
Date of Notice of Arbitration	6 January 2014
Date of Award	12 August 2016
Agreement governing the Parties	Agreement between the Government of the Republic of Poland and the Republic of India for the Promotion and Protection of Investments dated 7 October 1996 (hereinafter referred to as "**India-Poland BIPA**" or "**the Treaty**")
Place of Arbitration	Hague, Netherlands

I. Brief facts of the case

1. In 2003, Mr. Atul Ahuja and Mr. Viren Ahuja, both of them being Indian nationals, established Flemingo Dutyfree Shop Private Limited (**the Claimant**) to establish duty-free shops in India.

2. The Claimant indirectly acquired majority stake in Przedsiębiorstwo Handlu Zagranicznego Baltona S.A. (hereinafter referred to as "**Baltona**"), the largest airport retail operator in Poland.

3. Polish Airports State Enterprise (hereinafter referred to as '**PPL**'), a legal entity wholly owned by Polish State Treasury, was responsible for development and operation of airports in Poland.

4. In May 2004, PPL began construction of a new terminal for Chopin Airport located in Warsaw, Poland.

5. In July 2005, PPL invited Baltona to participate in a tender for leasing and operating premises in both the terminals of Chopin Airport.

6. Baltona submitted an offer for lease of commercial space at Chopin Airport jointly with Gebruder Heinemann, a German retailer and distributor of duty-free goods (collectively hereinafter referred to as '**Baltona-Heinemann**').

7. In May 2006, Baltona-Heinemann established a joint venture company BH Travel Retail Poland Sp. z o.o. (hereinafter referred to as '**BH Travel**'), for the purpose of operating retail stores at Chopin Airport.

8. In 2008, PPL awarded BH Travel permission to operate retail stores at Terminal 1 and Terminal 2 of the Chopin Airport. The tender was subject to approval of State Treasury of Poland.

9. After approval from State Treasury, PPL and BH Travel signed 11 lease agreements for retail stores at Chopin Airport with a guaranteed lease period of four to seven years.

10. In 2009, PPL planned modernization of Terminal 1 of Chopin Airport.

11. PPL held discussions with Baltona about the proposed modernization. It further explained to Baltona that it was going to terminate the lease agreements for premises within Terminal 1.

12. In a meeting with Baltona, PPL confirmed that takeover of the leased premises from Baltona was scheduled from 4 July 2012 to 31 July 2012.

13. On 16 February 2012, PPL sent notices to BH Travel for termination of the lease agreements and requested BH Travel to return leased premises within 30 days of the receipt of notice.

14. PPL based the termination of the Lease Agreements on two grounds:(i) failure to submit, complete or renew bank guarantees under Article 13(1)(c) of the General Lease Conditions; and (ii) failure to renew and submit certified copies of insurance policies under Article 13(1)(d) of the General Lease Conditions which guided the lease agreement.

15. On 17 February 2012, the customs authorities applied customs seals on BH Travel's stores.

II. Dispute between the Parties

a. The Claimant was indirect owner of BH Travel which had leasehold rights in respect of duty-free shops in Terminal 1 of Chopin Airport, Warsaw.

b. The Respondent's agency, PPL wanted to modernize the Terminal 1 of Chopin airport. PPL cancelled the lease arrangements with the Claimant citing some reasons while the real reason was modernization of the terminal.

c. The Claimant suffered loss due to cancellation of the lease.

d. Loss suffered by the Claimant as a result of the cancellation of the lease was the core of the dispute in the case.

III. Claims of the Claimant under BIT

a. The Claimant falls squarely within the definition of investor as provided in the Treaty.

b. The Claimant had invested in acquisition of Baltona and BH Travel.

c. Investment for purposes of this arbitration consists of the Claimant's indirect controlling shareholding in BH Travel and all rights associated therewith.

d. The acts of PPL are attributable to the Respondent as PPL has been operating under the control and supervision of the Ministry of Transport of Government of Poland.

e. The Respondent violated the fair and equitable treatment standard.

f. PPL's unlawful actions substantially deprived the Claimant of economic value, use, and enjoyment of its investment in BH Travel.

g. The Claimant is entitled to compensation.

IV. Contentions of the Respondent

a. The Claimant is not an investor under the Treaty in light of its intermediate position.

b. The acquisition of Baltona's shares cannot be the Claimant's investment as it did not participate financially in the process of acquisition.

c. The Respondent denies that the Claimant has an 'investment' under the Treaty.

d. The Claimant still owns shares in Baltona and therefore there is no expropriation.

e. Lease agreements are not contained within the category of investments as defined under the Treaty.

f. The Claimant has engaged in forum shopping to find a better place for asserting its claims and avoiding the local legal route.

g. Activities of the Claimant and its companies were conducted in breach of the fundamental principles of the law – in bad faith and consequently the Claimant's actions do not deserve BIT Protection.

h. PPL is a State enterprise, and not a State organ.

i. PPL implemented actions against other businesses at Chopin Airport similar to those taken against BH Travel. Under the principle of Fair and Equitable Treatment, host States are not required to accord a specific standard of treatment to foreign entities.

j. The Claimant's claims of expropriation cannot be based on purported expropriation of its stock in Baltona, which is still the property of the Claimant.

k. There is not an adequate causal relationship between the termination of the Lease Agreements and BH Travel's financial loss.

V. Decision on Jurisdiction

The Tribunal considered the issue of jurisdiction at great length and decided on the basis of the following parameters:

Investment

There were two issues before the Tribunal – (a) whether lease agreements constituted investments and (b) whether indirect investments by the Claimant constituted investment as required under the Treaty.

The Tribunal decided as follows in respect of lease agreements.

296. Article 1(1) of the Treaty contains a very broad definition of the term 'investment', namely: "the term investment means every kind of asset established or acquired, in accordance with the national laws of the Contracting Party in whose territory the investment is made […]".

299. The Tribunal finds – contrary to Respondent's submissions – that the Lease Agreements and the related permits for conducting business in the DFZ of Chopin Airport have to be considered 'investments' under the Treaty.

300. Article 1(1) of the Treaty provides that "in particular, though not exclusively", investments include: "c) rights to any performance under contract having a financial value". Consequently, the Lease Agreements obtained by BH Travel, and the expenses to install and promote the shops, are investments made in Poland falling within the scope of the Treaty.

301. In addition, the Tribunal notes that, although this ground of jurisdiction was not pursued by Claimant,[403] Article 1(1) of the Treaty provides that, investments include: "(e) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals".

302. In this regard the Tribunal is of the view that a business concession does not necessarily need to be a concession for public works or for activities in areas that are key to the State's security, nor does it need to be granted by the State itself – as Respondent incorrectly alleges. The fact that the Lease Agreements must be obtained through a tender to be considered to be a 'concession' under Polish law does not exclude them from being considered 'investments' falling within the scope of the Treaty. The Lease Agreements and permits may therefore also fall within the scope of the Treaty as 'business concessions', as understood in Article 1(1)(e) of the Treaty.[404]

On the issue of treating Baltona's shares as investment, the Tribunal decided as follows:

304. The Tribunal notes that Article 1(1)(b) of the Treaty provides that 'investment' also means: "(b) shares in and stock and debentures of a company and any other similar forms of participation in a company".

305. Article 1(1) of the Treaty has a very broad definition of 'investment'. As other investment arbitration tribunals have decided with regard to similarly broad definitions of the term 'investment',[407] such definitions do not exclude indirect investments through controlling shareholding via intermediate companies. Consequently, the indirect shareholding in BH Travel, the holder of the Lease Agreements and concessions for the duty-free shops, equally qualifies as a protected investment under the Treaty.

306. The Tribunal observes that Article 1(1) of the Treaty not only covers investments that were "established" but also investments that were "acquired". This is markedly different, for instance, from the investment treaty between Canada and Venezuela, as applied in *Gold Reserve Inc.* and frequently referred to in this case.[408] As such, the definition of 'investment' under the Treaty encompasses the acquisition of shares.

310. In fact under investment treaties, investments can just as well consist of a shareholding in a local company, as of the investments made by a local company, controlled by successive intermediate companies. The investor "steps into the shoes" of the local company and claims for damages suffered by the local company as if it had been inflicted, on a *pro rata* basis, on itself. Those two different aspects of "upstream protection" of investors have clearly been identified by the International Court of Justice.[413] Each type of investment gives rise to specific legal questions: in the case of shares, whether the value of the shareholding is affected; in case of indirect investments, whether the rights of the local company have been violated. Of course both approaches may be combined. The actual investment may be made by a local company, but may lead to indirect investments through a series of intermediate shareholdings.[414]

Investor

The Respondent had argued that the Claimant was not an investor since he did not make any investments directly into Poland but had invested in some third country which had invested in Poland. The Respondent had also relied on Preamble of the Treaty to plead that the purpose of the Treaty was to promote investments from one country into another and not through third countries. The Tribunal rejected the contentions of the Respondent as follows:

320. According to the ordinary meaning of the definition in Article 1(2) of the Treaty, Claimant is an investor if it is "incorporated or constituted or established under the law of" India, which is the case. The definition contains no additional requirements for an entity to qualify as an 'investor'. The acquisition by Claimant of the shares of Flemingo International, therefore, made Claimant an 'investor' entitled to the protection of the Treaty.

321. The Tribunal does not agree with Respondent that the Treaty only protects entities that actually have invested in Poland. Respondent unsuccessfully relies upon the Treaty Preamble, which states that the Treaty is aimed at "fostering investments by investors of one State in the territory of another State", and argues that this statement implies that only entities which actually invest in Poland should be considered 'investors' under the Treaty. However, the Preamble cannot contradict the provisions of the Treaty itself. In fact, in *Tokios Tokelès* and *Société Générale v. Philippines,* the tribunals interpreted virtually identical language in treaty preambles to provide broad protection to investors and their investments.[418]

322. Article 1(1) of the Treaty does not only cover investors that "established" investments in the territory of the other Contracting State, but also those who "acquired" such an investment.

325. The Tribunal moreover finds itself unable to agree with Respondent that Claimant cannot be considered as an 'investor' for the purposes of the Treaty on the basis that it allegedly only occupies an intermediate position in the structure of the Flemingo Group, and is neither the direct owner of the Baltona shares, nor the ultimate beneficiary of the investment.

327. By virtue of corporate restructuring, Claimant became the indirect owner of the share capital of BH Travel, which held the Lease Agreements and the concessions to the duty-free shops at Chopin Airport in Poland. The Tribunal agrees with Claimant that Article 1(2) does not require that the investor be the "first foreign entity in the hierarchy" or "the ultimate beneficiary of the investment".

VI. Decision on Merits

Attribution – whether actions of PPL can be attributed to Poland

The Claimant had contended that PPL was an organ of the state of Poland pursuant to Articles 4 and 5 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. The Respondent had disputed this by stating that the Articles had no relevance to this case.

The Tribunal decided that PPL was an organ of the state of Poland and actions of PPL were attributable to Poland. Key extracts from the Tribunal's decision are as follows:

427. The Tribunal starts from the fact that PPL is owned and controlled by Poland. Indeed, as Respondent itself admits, all shares of PPL are wholly owned by the Polish State Treasury.[571] As outlined above, Claimant asserts that the State Treasury has actually shown a level of control in PPL's dealings with Baltona and BH Travel by requiring PPL to obtain: (i) approval of the Lease Agreements; (ii) approval of certain amendments thereto; and (iii) approval of a temporary rent reduction regarding one of the stores operated by BH Travel (see above, para. 57).[572]

428. Moreover, the operation and management of an international airport is an activity which is not usually carried out by private business, although a State may delegate, through well-defined concessions, part of this management and operation to private business. In the case at hand, however, the management and operation was not delegated to private business but to a State-owned entity, PPL.

429. Furthermore, as Respondent also confirmed, PPL "performs strategic functions for the existence of the State".[573] In explaining why Poland is the overall owner of PPL, Respondent stated that "the transfer of such an important area of functioning of the State to private hands would be too big a threat to internal security and the overall functioning of the State".[574] The PPL Act also recognises that it carries out "tasks under the general defense obligation of the People's Republic of Poland" (Article 5 of the PPL Act).

433. Respondent erroneously alleges that "account must be taken of [a State's] national rights to determine whether or not an entity is a State organ".[576] Article 4(2) of the ILC Articles, however, only provides that entities, which in accordance with the internal law of a State are qualified as State-organs, are State organs for purpose of State responsibility; it does not *per se* exclude entities which are not qualified as State organs under domestic law. In other words, although under Article 4(2), an entity is a State organ when it has such status attributed to it under domestic law, the circumstance that an entity is not considered a State organ under domestic law does not prevent that entity from being considered as such under international law for State responsibility purposes. Besides, under Article 3 of the ILC Articles, "[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

435. Considering all these elements, the Tribunal concludes that PPL is indeed a *de facto* State organ whose acts and omissions are attributable to Respondent.

437. Consequently, if PPL would not have been a State organ, alternatively for the purpose of Article 5 of the ILC Articles, the Tribunal accepts that PPL is an entity empowered by the law of Poland to exercise elements of governmental authority.

439. The Ministry of Transport, by statutory provisions, delegated to PPL the task of modernising and operating Polish airports, controlled PPL, and held it accountable for the exercise of its powers. It is thus an entity exercising governmental authority, as envisaged by Article 5 of the ILC Articles.

440. In reaching this conclusion, the Tribunal draws support from the ILC Commentary which state that "entities" may be State organs under Article 5:

> The generic term 'entity' reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law if the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.[582]

Fair and equitable treatment

The Claimant argued that the Respondent had violated the fair and equitable treatment (FET) standard in Article 3(2) of the Treaty by: (i) abusively implementing pretextual measures in violation of its duties of good faith, transparency, and candour; (ii) refusing to negotiate a resolution of the dispute in good faith; (iii) implementing arbitrary and coercive measures in violation of court-ordered injunctions; and (iv) denying BH Travel due process with respect to the Governor of Mazovia's decision.

The Claimant submitted that the FET standard requires that States treat investors in a just, even-handed, unbiased, and legitimate manner, a standard which is well-established in investment treaty jurisprudence. Further, the Claimant explained that the FET standard has evolved to encompass a number of widely-recognized "concrete principles" which oblige States to: (i) act in good faith;(ii) not act in a manner that is arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; (iii) respect procedural propriety and due process; and (iv) respect the investor's reasonable and legitimate expectations.

The Claimant contended further that a breach of the FET standard can result from "a series of circumstances" and "need not necessarily arise out of individual isolated acts". The Claimant added that there could be "creeping violations" of the FET standard, which the El Paso v. Argentina tribunal described as "a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result".

The Respondent submitted that the FET standard "has never had a uniform definition" and that tribunals have adopted their own definitions for their particular proceedings. The Respondent argued that host States are not required under the principle of FET to accord a specific standard of treatment to foreign entities. Instead, FET requires a host State to treat foreign entities in a predictable manner, and in principle, equal to the treatment that national entities receive.

The Tribunal applied its mind to the question of fair and equitable treatment and held as under:

531. However, Respondent is not correct when it argues that 'fair and equitable treatment' boils down to treating foreign investors the same way as domestic and other foreign investors which also operated businesses at Chopin Airport. Equal treatment with domestic and other foreign entities is another specific standard, which is laid down in Article 4(1) of the Treaty: "[e]ach Contracting Party shall accord to investments of Investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third state". It is not because the host State would treat all investors – domestic as well as foreign – in the same way that such treatment could not be unfair or inequitable.

535. As was stated in *Saluka*, 'fair and equitable' means "just", "even-handed", "unbiased", "legitimate". Its assessment requires "a weighing of the [investor's] legitimate and reasonable expectations on the one hand and the [host State's] legitimate regulatory interests on the other". When unjust or arbitrary treatment rises to a level that is unacceptable from the international perspective the 'fair and equitable treatment' obligation is breached.[743]

536. The Tribunal observes that Article 3(2) of the Treaty requires fair and equal treatment "at all times". Claimant, referring to *El Paso*, is thus correct that a succession of acts – whether or not individually significant – can build up to unfair and inequitable treatment until Article 3(2) is breached.

555. The Tribunal applies standards of international law to conclude that PPL abused its rights. However, it is comforted by the fact that courts in Warsaw, including the Court of Appeal, have decided in two separate injunction proceedings that PPL's terminations were *prima facie* an abuse of right under Polish law. The Tribunal is aware that injunction proceedings under Polish law are only *prima facie* decisions and do not involve a final determination of the merits. Nevertheless, the Polish decisions indicate that, also under Polish law, the terminations were – *prima facie* – an abuse of right.

557. PPL could have remedied the effects of its illegal terminations by entering into negotiations and reaching a settlement with BH Travel. However, it refused to do so, because, as a precautionary measure, BH Travel had commenced court proceedings to try to safeguard under Polish law and in the Polish courts what PPL had denied. The Tribunal notes again that PPL refused to engage in good faith settlement discussions.

560. For the foregoing reasons, the Tribunal finds that PPL's actions in terminating the Lease Agreements – which are attributable to Respondent – constitute a breach of the FET obligation under Article 3(2) of the Treaty.

Expropriation

The Claimant pleaded that PPL's unlawful actions substantially deprived the Claimant of economic value, use, and enjoyment of its investment in BH Travel in violation of Article 5 of the Treaty. The Claimant based its expropriation claim on the unlawful termination of the Lease Agreements, which it considered to be "valuable concessions".

The Claimant observed that, under international law, expropriation may occur directly or indirectly. Article 5 of the Treaty covers both direct and indirect expropriation by providing investor protection against nationalisation and expropriation (direct expropriation) as well as against measures having effects equivalent to nationalisation or expropriation (indirect expropriation).

The Claimant argued that indirect expropriation need not occur through one single event and instead may arise through a series of measures over time - so-called "creeping expropriation". Moreover, the intent to expropriate is not a necessary element; instead the effect of the measure on the investor is what matters.

The Claimant contended that PPL's actions, taken cumulatively, brought BH Travel's operations at Chopin Airport, which were its only operations at that time, to a complete standstill. In doing so, PPL indirectly expropriated the Claimant's investment in BH Travel by depriving Claimant "of the use and economic value of its investment in BH Travel".

The Tribunal accepted the Claimant's contention giving reasons as follows:

590. The Tribunal has concluded that the Lease Agreements were investments, under Article 1(1)(c) of the Treaty, because they granted BH Travel – and thus also indirectly Claimant under the Treaty – "[r]ights to any performance under contract having a financial value".

591. Alternatively, although not argued by Claimant, the Lease Agreements could also be considered to be investments as "business concessions conferred under contract", explicitly mentioned in Article 1(1)(e) of the Treaty. Indeed, the Lease Agreements for operating shops at Chopin Airport, with the accompanying duty-free status, granted BH Travel exclusive rights which only public authorities could grant. For the international law qualification of 'concession' for Treaty purposes, it is irrelevant whether or not the Lease Agreements would be qualified as 'concessions' under Polish domestic law.

592. The Tribunal agrees with Claimant that Article 5(1) of the Treaty protects the investor not only against direct but also against indirect expropriations through a series of measures leading to a deprivation from the benefits of the investment.

593. The Tribunal disagrees with Respondent's argument that Claimant's relevant investment is the shareholding in Baltona and that the Flemingo Group continues to have full possession of these Baltona shares. As stated before, the relevant investments, protected by the Treaty in the case at stake, are the Lease Agreements entered into by BH Travel. The respective and successive shareholdings are legal investment vehicles which led to the duty-free shop Lease Agreements as the investment.

596. The Tribunal observes that, for the purpose of Article 5(1) of the Treaty, Respondent, through the actions of PPL, which are attributable to it, has expropriated Claimant's investment and deprived Claimant of its benefits without payment of compensation, as Article 5(1) requires.

597. The Tribunal therefore concludes that Respondent has not only breached its FET obligation under Article 3(2) of the Treaty but also breached Article 5(1) of the Treaty.

Compensation

The Claimant submitted that it was entitled to compensation sufficient to wipeout the financial consequences of the Respondent's breach of its obligations under the Treaty.

The Claimant noted that the Treaty did not set forth the standard of compensation for unlawful expropriation or other violations. Accordingly, the Claimant contended that the applicable standard of compensation in this case was the principle of full reparation under customary international law. According to the Claimant, this principle provides that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".

The Tribunal decided that the Claimant was entitled to compensation. Relevant extracts are as follows:

864. The Tribunal has established (see paras. 529-560 and 590-597 above) that Respondent breached Articles 3(2) and 5 of the Treaty as a result of PPL's termination of the Lease Agreements on 16 February 2012 with immediate effect and without compensation, by hindering further exploitation of the duty-free shops, and by obtaining BH Travel's eviction from its premises at Chopin Airport on 14 August 2012.

865. The Treaty itself does not set forth the standard of compensation for these breaches. Under customary international law, as codified in Article 31(1) of the ILC Articles, Claimant is entitled to full reparation in an amount sufficient to wipe out all of the injury it has incurred due to Respondent's wrongful acts. Full reparation encompasses both actual losses (*damnum emergens*) and loss of profits (*lucrum cessans*).

942. Taking the above into account, the Tribunal finds that the total amount of damages recoverable by Claimant is EUR 17,902,790.

VII. Decision about costs of Arbitration

The Treaty contains no provisions on allocation of costs of arbitration. Therefore, the Tribunal decided on allocation of costs according to UNCITRAL rules. The Tribunal provided as follows:

965. The fees of Dr. Wolfgang Kühn amount to EUR 237,000.00. The fees of Mr. John M. Townsend amount to EUR 178,800.00. The fees of Professor Hans van Houtte, the Presiding Arbitrator, amount to EUR 213,345.00.

Article 38(b): the travel and other expenses incurred by the arbitrators

966. The combined travel and other expenses incurred by the arbitrators totals EUR 23,489.77.

967. The cost of assistance required by the Tribunal includes the PCA's fees and expenses for registry services which amount to EUR 112,912.25. The cost of other assistance required by the Tribunal, including costs of court reporting, interpretation, catering, courier services, hearing venue services, office supplies and printing, support staff overtime (security, information technology), telecommunications, banking services, and award registration, totals EUR 63,875.47.

968. The Tribunal approves the travel and other expenses of witnesses submitted by the Parties, namely: EUR 9,728.19 + PLN 16,035.61 (*i.e.,* EUR 3,758.85),[1351] which total EUR 13,487.04.

969. Claimant is the successful party in these proceedings. It has claimed during these proceedings costs for legal representation and assistance in the amount of EUR 2,544,859.21. The Tribunal views these costs as reasonable.

971. In accordance with Article 38 of the UNCITRAL Rules, the Tribunal fixes the costs of arbitration at EUR 3,387,768.74.

974. In light of the fact that Claimant has prevailed only in part on its claims for damages, the Tribunal considers that the Parties should bear the costs of arbitration enumerated under Article 38(a), (b), and (c) in equal shares, that the Parties should bear their own "travel and other expenses of witnesses" under Article 38(d), and that Respondent should bear 60% of Claimant's costs of legal representation and assistance under Article 38(e). The Tribunal orders Respondent to bear 60% of Claimant's costs of legal representation and assistance under Article 38(e) in the amount of EUR 1,526,916.00. The Tribunal does not consider an award of interests on costs to be warranted.

975. The Parties deposited a total of EUR 850,000.00, in equal shares to cover the fees and expenses of the Tribunal and the PCA. The remaining balance on the deposit is EUR 20,577.51. This amount shall be reimbursed to the Parties in equal shares.

VIII. Final Decision of the Tribunal

976. The Tribunal hereby:

(i) DETERMINES, by majority, that it has jurisdiction over this dispute pursuant to Articles 1 and 2 of the Treaty;

(ii) DETERMINES that the actions taken by PPL in terminating the Lease Agreements are attributable to Respondent;

(iii) DETERMINES that Respondent violated Articles 3(2) and 5(1) of the Treaty;

(iv) ORDERS Respondent to pay compensation to Claimant in the amount of EUR 17,902,790 (which includes compensation for Claimant's share of BH Travel's actual losses (*damnum emergens*) and loss of profits (*lucrum cessans*));

(v) ORDERS Respondent to pay interest on EUR 17,902,790 equal to a 6-month EURIBOR increased by 2%, compounded every 6 months, for the period from the Valuation Date as determined by the Tribunal (16 February 2012) until the date of full payment;

(vi) ORDERS Respondent to pay compensation to Claimant in the amount of EUR 1,526,916, reflecting 60% of Claimant's costs for legal representation and assistance;

(vii) ORDERS that the Parties bear their own "travel and other expenses of witnesses", and that the Parties bear all other costs incurred in connection with this arbitration in equal shares;

(viii) ORDERS that the remainder of the deposit held by the PCA be reimbursed to the Parties in equal shares;

(ix) DISMISSES all other claims.

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