Tax Carve Outs Under Bilateral Investment Protection Agreements: A Review

Foreword by
Hon'ble Justice (Retd.) AK Sikri

April, 2023

BMR Legal
ADVOCATES

VIDH | Centre for Legal Policy

This report is the product of a collaboration between BMR Legal Advocates, a law firm specialising in the areas of Corporate and International Tax Law, and the Vidhi Centre for Legal Policy, an independent think-tank doing legal research to help make better laws.

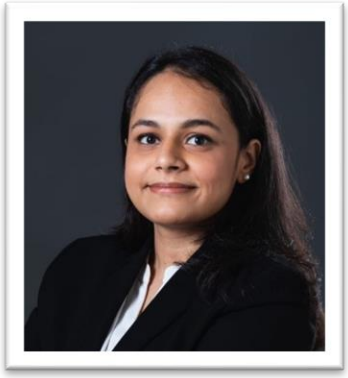
About the Authors

Mukesh Butani

Mukesh is the founder and managing partner of BMR Legal Advocates, a law firm specializing in the areas of corporate international tax, transfer pricing and indirect tax, with expertise in litigation services, controversy management, strategic transaction advisory and tax policy. He was recently appointed as a Reserve Panel Member at the Singapore International Arbitration Centre.

With specialization in domestic corporate international tax and transfer pricing, Mukesh has over three decades of experience in advising multinationals and Indian conglomerates on a wide range of matters relating to FDI policy, business re-organizations, cross-border tax structuring, tax controversy and regulatory policy. He is an acknowledged expert in the area of international tax policy, controversy and advocacy and has to his credit several landmark judicial pronouncements and depositions before expert committees. He has been deposed as an expert witness on contentious cross-border tax treaties, and Transfer Pricing matters in foreign jurisdictions. His most recent books include *Transfer Pricing–The Indian Landscape, Two Decades On* (2021), *Taxpayer Rights – Deciphering the Indian Charter* (2021) and *General Anti-Avoidance Rules: The Final Tax Frontier?* (2021).

Akshara Rao



Akshara is an Associate at BMR Legal Advocates. She is involved with the firm's advisory, litigation, research and policy work covering matters relating to International Tax, Transfer Pricing and Direct Tax. She has represented and advised leading international and domestic clients. She has contributed to several reputed publications, including Tax Notes International, Bulletin for International Taxation (IBFD), and Asia-Pacific Tax Bulletin (IBFD). Her research covers crucial topics relating to international tax dispute resolution and digital taxation. She was honoured as a 'FIT Fellow' by the Foundation for International Taxation and received the prestigious Uma Sathnur – FIT Scholarship to pursue her LL.M. in International Taxation at the renowned Institute for Austrian and International Tax Law in Vienna, Austria. She obtained her Bachelor of Law degree from the Jindal Global Law School, Sonipat.

Yeesha Shriyan

Yeesha is a Senior Resident Fellow at Vidhi Centre for Legal Policy, Maharashtra. At Vidhi, she has worked on subjects such as digitalisation of assessment and dispute resolution under the Income-tax and Goods and Services Tax Law, taxation of cryptocurrencies and the interplay between tax and investment protection regimes. Her most recent study explored the impact of taxpayer behaviour and tax morale on tax compliance and how poor tax morale impacted the Central Government's spending ability during the COVID-19 pandemic. Yeesha completed her LL.B from K.C. Law College, Mumbai, in 2020, after qualifying as a Chartered Accountant in 2016. Prior to joining Vidhi, Yeesha worked as a member of the Excise litigation team at Lakshmikumaran & Sridharan Attorneys, Mumbai and as a GST Trainee with Economic Law Practices, Mumbai.

The authors would like to thank Abhinand Siddharth S. and Aashima Sawhney for their participation and valuable contribution to the report.

Foreword

The power to control and impose taxes is a cornerstone of state sovereignty. States impose taxes to generate revenue that enables investment in human capital, infrastructure, and services for citizens and businesses. But the globalization of economies and developments in industry, trade and commerce, along with the advancement of technology, has diluted the state's exercise of sovereignty in tax-related issues.

In tackling the issues of double taxation and tax avoidance, states have sought to implement Double Taxation Conventions (DTCs) to assert their sovereignty, delineate the allocation of taxing rights, improve coordination among states regarding the taxation of individuals and businesses as well as guarantee the rights of taxpayers. With over 3,000 DTCs in place, these instruments have gained prominence and play a critical role in international tax practice. However, several states, including India, have opted out of mandatory arbitration under DTCs. Arbitrability of tax measures has been a sensitive subject in the international tax community as it is considered to encroach on a state's sovereign right to tax. Hence, the standard form of dispute resolution under DTCs continues to be the Mutual Agreement Procedure (MAP). Since bilateral investment protection agreements (BIPAs) allow for arbitration, especially investor-state arbitration, states have expressly excluded tax-related claims from the ambit of such agreements. This is being done by incorporating 'carve-out' clauses for tax measures.

Over the years, various regulatory measures adopted by India have been challenged on the basis of BIPAs signed by India. The subject matters of these disputes include the cancellation of telecom licenses, the cancellation of an agreement to lease capacity in the electromagnetic spectrum, and, most importantly, retrospective taxation. Regardless of the importance associated with DTCs in international tax practice, and the specific provisions to exclude tax measures from the ambit of BIPAs, the rise of arbitral disputes on tax-related standards is a reality. The cases of Vodafone International Holdings BV and Cairn UK Holdings Limited are central in this context. After these instances, India has become highly vary about the downside of entering into BIPAs, which is reflected by the fact that India terminated most of its BIPAs after introducing a Revised Model BIPA in 2015. A major revision was the introduction of a comprehensive tax carve-out, making it known that tax-related measures are not arbitrable.

Against this backdrop, this initiative by BMR Legal, Advocates and the Vidhi Centre for Legal Policy is both timely and necessary, considering India is negotiating BIPAs with several countries. The authors undertake a deep dive into the nuances of tax carve-outs under BIPAs to assess the landscape and cull out the open issues that require attention from policy and academic standpoints. The report presents tangible action points besides enlisting a list of variables that need deeper reflection to address the outstanding issues in any meaningful way. This would provide stakeholders from diverse backgrounds with an incisive and insightful experience of the tax carve-outs under various BIPAs.

The report is divided into six sections. Section 1 introduces BIPAs and their growing importance in the twentieth century. Section 2 critically analyses the relevance, types and interpretation of tax carve-outs under BIPAs. Interestingly, the section also maps the changing landscape around tax carve-outs. Section 3 introduces DTCs to understand their role in regulating international tax law, highlights the nuances of the interplay between DTCs and BIPAs, and analyses DTC-related tax carve-outs in BIPAs through the lens of arbitral tribunals. Section 4 provides a comparative analysis of the revised model BIPAs introduced by India and Canada, focusing on the treatment of taxation-related measures under both regimes. The section also provides insights into the types of tax carve-outs incorporated by other states in their revised models. Section 5 discusses the enforcement of arbitral awards under international law and highlights the challenges faced while enforcing such awards by focussing on India's experiences. Lastly, Section 6 concludes the report by questioning the priority given to investor protection, highlighting the changing policy priorities and their impact on ongoing negotiations, and the benefits of a multilateral platform in reshaping the investment regime.

In the age of global interconnectivity and interdependence, where several international and domestic transactions involve interplay between BIPAs and DTCs, this report, being one of its kind, becomes essential. The authors, researchers and publishers have done a splendid job accentuating such a critical yet under-examined topic with their vital research and non-partisan analysis. The report is a must-read for policymakers, academic researchers and tax lawyers interested in the interface between tax and investment protection regimes. I congratulate BMR Legal and Vidhi Centre for Legal Policy, and more specifically, the authors for this outstanding treatise, which will serve as a reference for years to come.

Justice Arjan Kumar Sikri
Judge, Singapore International Commercial Court
Former Judge, Supreme Court of India

Table of Contents

1. Setting the Scene

1.1. Background

International agreements or treaties to promote and protect trade and investment are not a recent phenomenon. While countries across the globe have tailored their investment protection agreements to suit their economy and politics, the United States of America ("**US**") was at the helm of trade promotion and investment protection regimes. The US signed several treaties to establish trade relations in the late 1700s. While some of these treaties incorporated provisions on the protection of ***property*** of nationals of one state in the territory of another state, the focus remained on trade promotion.[1] Under these treaties:

1. Property of nationals of one state in the territory of another state was guaranteed 'special protection' or 'full and perfect protection'.
2. If a host state expropriated the property of a foreign national, adequate compensation for the same was also guaranteed.
3. Most Favoured Nation ("**MFN**") treatment and National Treatment were offered with respect to the right to engage in various business activities in the host state.[2]

There was no global consensus or framework for investment protection in the colonial era, and there were few treaties. Even with treaties, the level of protection was weak, and there were no means to enforce treaty obligations.[3] Non-legal mechanisms, like the use of military force and diplomacy, were a means of protecting foreign investment that characterised the colonial era.[4]

1.1.1. Learnings from the First World War

Diplomacy, trade liberalization, international cooperation and political independence – a counter to the European Order

The First World War made it abundantly clear that the old European Order could not continue.[5] The US remained neutral in the First World War until 1917 despite aggression from Germany on several occasions. In 1918, however, they launched an allied offensive that attacked the German front in France. The result was that Germany was forced to call a ceasefire.[6] The objective of the US in entering the First World War was to defend the principle of peace and justice against a selfish autocratic power.[7] President Woodrow Wilson, played an important role in ushering in a collective approach to maintain enduring peace after the First World War. In 1918, he enunciated the 'Fourteen Points' before the Congress, which later inspired the founding of the League of Nations ("**the League**") in 1920.

---

[1] Kenneth Vandeleve, '*A brief history of International Investment Agreements*', U.C.-Davis Journal of International Law & Policy (2005), Volume 12, Issue 1, at 163 available at http://ssrn.com/abstract=1478757. [Accessed on 29 March 2023]
[2] *Ibid.*
[3] Karl Sauvant and Lisa E. Sachs, '*Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain*', 46, HARV. INT'L L.J. 67,68 (2005).
[4] Kenneth Vandevelde, supra note 1.
[5] Christian Tams, '*League of Nations, Max Planck Encyclopedia of Public International Law*', Oxford 2007, available at: https://ssrn.com/abstract=1413851. [Accessed on 29 March 2023]
[6] Steve Jones, '*The Fourteen Points of Woodrow Wilson's Plan for Peace*' Thought Co. July 7, 2019, available at https://www.thoughtco.com/the-fourteen-points-3310117. [Accessed on 29 March 2023]
[7] Anca Oltean, *'The Creation of the League of Nations, The European space: borders and issues*', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3259074. [Accessed on 29 March 2023]

The three significant points in Wilson's proposed foreign policy were:

1. Open covenants of peace and transparent diplomacy
2. Removal of economic and trade barriers
3. A general association of nations to guarantee political independence and territorial integrity to great and small states alike.[8]

The League Convention was included in the draft of the Treaty of Versailles and the League was finally established in 1920 when the first of the Peace Treaties came into force. An important field of activity of the League was its role in functional cooperation, including the codification of international law. This field of activity wasn't very popular as it was perceived to be technical as opposed to political matters relating to peace and security. However, this function of the League led to the ratification of more than 100 conventions by league members and non-members. Towards this objective of functional cooperation, the League not only promoted specific agreements but also streamlined the codification of international law.

Arbitration as a dispute resolution mechanism

Around the same time when the League was set up, a group of entrepreneurs set out to create an organisation that would put forth and represent business interests across the globe. The organisation was called the International Chamber of Commerce ("**ICC**") and it perceived that the private sector is best qualified to lay standards for business. Its objective was to minimise or avoid disputes and it did so by promoting self-regulation as opposed to regulation by a third party. This model has been called the relation-based model, where the driving force of business is the maintenance of business relationships.[9]

The ICC was set up in 1923, but the first ICC arbitration rules were introduced in 1922, and businesses have been approaching the ICC Banking Commission since 1921. Traders, investors, and even States approached the ICC for assistance in settling their disputes.

The ICC was a repository of information that facilitated dispute settlement. It did so by creating a network of National Committees which fostered ties with local businesses. The ICC encouraged conciliation instead of arbitration but gradually pressured parties into accepting settlements citing the significance of business relations.[10]

1.1.2. Developments after the Second World War

Before the second world war, customary international law was still the only source of protection for investments, which guaranteed minimum standards of treatment to foreign investment. However, these standards were inadequate, vague and arguably not particularly demanding.[11] Some states went as far as disputing the sheer fact of the existence of such minimum standards.[12]

---

[8] Steve Jones, '*The Fourteen Points of Woodrow Wilson's Plan for Peace*', Thought Co, July 7 2019, available at https://www.thoughtco.com/the-fourteen-points-3310117 [Accessed on 29 March 2023]

[9] International Chamber of Commerce, '*About us*', available at https://iccwbo.org/about-us/who-we-are/history/. [Accessed on 30 March 2023]

[10] Florian Grisel, '*Arbitration as a Dispute Resolution Process: Historical Developments*', Cambridge Compendium on International Commercial and Investment Arbitration (Cambridge University Press, 2019), available at https://www.cambridge.org/core/books/abs/cambridge-compendium-of-international-commercial-and-investment-arbitration/arbitration-as-a-dispute-resolution-process-historical-developments/A5398E698A6DBB2C8207776CE4707AFA. [Accessed on 29 March 2023]

[11] Ian Brownlie, '*Principles of Public International Law*' 527-528 (Oxford University Press, 5th Ed. 1998); Kenneth J. Vandeleve, '*A brief history of International Investment Agreements*', 12 U.C.-Davis Journal of International Law & Policy 157 (2005), available at http://ssrn.com/abstract=1478757. [Accessed on 29 March 2023]

[12] *Ibid.*

In the absence of a dispute resolution mechanism embedded into treaties, a host state cannot be subject to the jurisdiction of an international tribunal without its consent.[13] Therefore, before the Second World War, as per customary norms, an injured national's state could assume the national's claim as its own and present the same against the host state, popularly known as espousal.[14] Espousal was an unsatisfactory mechanism for multiple reasons. Firstly, the injured national's state was under no obligation to espouse the claim, especially when it came at the cost of straining relations with the host state.[15] Secondly, in most cases, the home state could only espouse a claim after the injured national had exhausted all remedies under host states' laws – understandably, a time consuming and expensive exercise. Thirdly, like any other diplomatic process, the outcome of an espousal process was never certain as the home state could settle the claim in any way it wanted.[16]

Diplomacy was, however, better than using military force.[17] The US, in fact, persuaded Latin American countries to submit claims of injuries by its nationals to arbitration.[18]

Rise of bilateral investment protection agreements

After the two wars, the United Nations ("**UN**") was founded in 1945 to maintain international peace and security. Decolonisation was born with the UN and was the UN's first success. Decolonisation created newly independent but economically underdeveloped countries. These countries were protective of their independence – in all aspects and believed that allowing foreign investment was synonymous with letting the colonisers sneak in again.[19]

Some developing countries took a more aggressive approach by expropriating existing investments.[20] Many socialised states led by the Soviet Union undertook massive expropriations of the private sector, not sparing foreign-held assets.[21] Showing a more concerted effort, several developing and socialist countries sought for a right to expropriate foreign investment without payment of fair market value for the expropriated assets at the United Nations General Assembly.[22] Consequently, the Declaration of the New International Economic Order adopted by the UN General Assembly declared that states would enjoy *'full permanent sovereignty over their natural resources and other economic activity'. State Sovereignty included 'the right of nationalisation or transfer of ownership to its nationals'*. The Declaration did not specify any obligation to pay compensation.[23]

In December 1947, however, the Charter of Economic Rights and Duties of States was adopted by the United Nations General Assembly, which upheld that each State had the right to nationalise, expropriate or transfer ownership of foreign property. It also stated that appropriate compensation should be paid by the state adopting such measures taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.[24] However, this Charter has also been severely criticised on two counts:

---

[13] Kenneth Vandevelde, supra note 1 citing Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 177-178 (April 11).
[14] Marjorie Whiteman, '*Digest of an International Law'*, (U.S. Government Printing Office, Volume 6, 1967), 1216-1219.
[15] *Ibid.*, Kenneth Vandevelde, supra note 1.
[16] Marjorie Whiteman, supra note 14.
[17] Kenneth Vandevelde, supra note 1; Edwin Borchard, '*Limitations on Coercive Protection*', 21 AM. J. INT'L L. 303 (1927); Luis Drago, '*State Loans in Their Relation to International Policy'*, 1 AM. J. INT'L L. 692 (1907).
[18] Kenneth Vandevelde, supra note 1, citing Lionel M. Summers, *Arbitration and Latin America*, 3 CAL. W. INT'L L.J. 1,7 (1972).
[19] Kenneth Vandevelde, supra note 1.
[20] Kenneth Vandevelde, supra note 1; Jeswald Salacuse, '*The Three Laws of International Investment: National, Contractual, And International Frameworks for Foreign Capital' 398–400 (2013) (Providing A Brief Overview on Treaty Exceptions).*
[21] Michael Brown, '*Models in Political Economy'* 193-267 (Penguin Books 2nd Ed. 1995); John Rapley, *Understanding Development: Theory and Practice in the Third World*, (Lynne Reinner Publishers, 1996) 44
[22] Kenneth Vandevelde, supra note 1.
[23] *Ibid*.
[24] Charter of Economic Rights and Duties of States, art. 2. 2(c).

1. For stating that compensation should be paid and not asserting that it must be paid, and
2. The compensation was based on national law rather than international law.[25]

To assuage the economic depression that followed the war,[26] the victorious allies agreed to liberalise trade[27] which led to the conclusion of the General Agreement on Tariffs and Trade ("**GATT**")[28] in 1947. The GATT was a legal agreement minimising barriers to international trade by eliminating or reducing quotas, tariffs and subsidies while preserving significant regulations. The GATT subsumed the primary legal framework for international trade relations from bilateral to multilateral agreements.[29]

A separate treaty, the Havana Charter, intended to create a liberal investment regime for trade and investment, never entered into force.[30] Therefore, investment was still not a focus area.

Using military force was no longer an alternative to protect investment since Article 2(4) of the United Nations Charter adopted at the war's end specifically prohibited it.[31] Developed countries responded to the threat of uncompensated expropriation by creating Bilateral Investment Protection Agreements ("**BIPAs**")[32]. Developing countries, which were seen as having unstable and risky business environments and were starved for capital developing countries, entered into BIPAs to attract foreign investment without fully appreciating the legal consequences.[33]

Formation of the OECD

In the aftermath of the Second World War, inter-European trade took a setback due to a lack of foreign exchange coupled with the absence of international authority to organise international trade. The US, on the other hand, was proactive in ensuring its prosperity and aimed at alleviating the risk of national overproduction. In pursuit of strengthening its exports, the US sought to help the European economy by fighting hunger and poverty via a large-scale structural recovery programme. General George C. Marshall proposed granting economic and financial assistance to all the countries of Europe, subject to closer European cooperation. This was branded the "Marshall Plan" or "European Recovery Program" or the ERP. Charity wasn't the sole objective of the US, in that it feared the spread of communism in Europe.[34]

---

[25] Charles Brower & John Tepe, Jr., '*The Charter of Economic Rights and Duties of States: A Reflection or a Rejection of International Law?*', 9 INT'L LAW. 295 (1975); Burns Weston, *The Charter of Economic Rights and Duties of States and the Depravation of Foreign Owned Wealth*, 75 AM. J. INT'L L. 437 (1981).
[26] Bernard Hoekman & Michael Kostecki, '*The Political Economy of the World Trading System*' (Oxford University Press, 1995) at 2-3.
[27] Rondo Cameron and Larry Neal, '*A Concise Economic History of the World*', (Oxford University Press 3rd Ed. 1997) 370-371.
[28] Kenneth Vandevelde, supra note 1.
[29] Kenneth Vandevelde, supra note 1 citing John Croome, *'Reshaping the World Trading System'* (Springer, 1995).
[30] Bernard Hoekman & Michael Kostecki, *'The Political Economy of the World Trading System',* (Oxford University Press, 1995) at 12-13.
[31] Kenneth Vandevelde, supra note 1.
[32] According to UNCTAD methodology, international investment agreements (IIAs) are divided into two types: (1) bilateral investment treaties and (2) treaties with investment provisions. A bilateral investment treaty (BIT) is an agreement between two countries regarding the promotion and protection of investments made by investors from the respective countries in each other's territory. The great majority of IIAs are BITs. The category of treaties with investment provisions (TIPs) brings together various types of investment treaties that are not BITs, such as broad economic treaties that include obligations commonly found in BITs (e.g., free trade agreements with investment chapters). In this report, the acronym 'BIPA' has been used instead of 'IIA' while citing secondary material but making sure the statements are factually correct.
[33] See Lisa Sachs & Karl Sauvant, *"BITs, DTTs, and FDI Flows: An Overview*, in Karl Sauvant & Lisa Sachs eds. The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows (Oxford Union Press, 2009) at xxvii.
[34] *Centre Virtuel de la Connaissance sur l'Europe 'The Marshall Plan and the establishment of the OEEC*' (2021) available at https://www.cvce.eu/en/education/unit-content/-/unit/55c09dcc-a9f2-45e9-b240-eaef64452cae/164c96b3-4d46-4c09-a177-2e6d35a832b2 [Accessed on 29 March 2023]

Many countries, particularly Russia and countries controlled by or in close proximity to Russia, refused US aid. This widened the divide between Eastern and Western Europe. The 16 countries that did sign up for the Marshall Plan set up the Committee of European Economic Cooperation ("**CEEC**"). Upon insistence from the US that the countries themselves ought to control the management and distribution of these funds, in 1948, the CEEC set up a permanent body for this purpose. The 16 countries signed a convention to establish the Organization for European Economic Cooperation or OEEC. In 1960, when the US joined, it was re-branded as the Organisation for Economic Cooperation and Development ("**OECD**")[35] and came into operation on Sept. 30, 1961.

Colonial Era

- From the 1800s till the end of the Second World War
- The focus was on protecting property as opposed to investments
- Use of military force and diplomacy to protection foreign investment.

Post Colonial Era

- Began with the end of the Second World War and continued until approximately 1990 with the collapse of the Soviet Union
- Signing of General Agreement on Tarrifs and Trade that liberalised trade
- FCNs extended protection to investments
- Inclusion of dispute resolution process in FCNs
- Decolonisation leading to newly independent but economically underdeveloped economies
- Large scale expropriation of private sector including foreign held assets by developing socialist countries
- Several BIPAs were signed
- Formation of the OECD

Global Era

- Began in approximately 1990 and continues until the present

Source: Kenneth J. Vandeleve, note 1

Although the OECD had no role to play in the development of the international legal system for investments, it has aided in the development of a network of BIPAs. The OECD has provided legal materials which were crucial for the development of BIPAs. The 1962 draft convention on protection of foreign assets inspired several reforms in investment law. The OECD developed the model on which several capital-exporting countries based their BIPAs.[36]

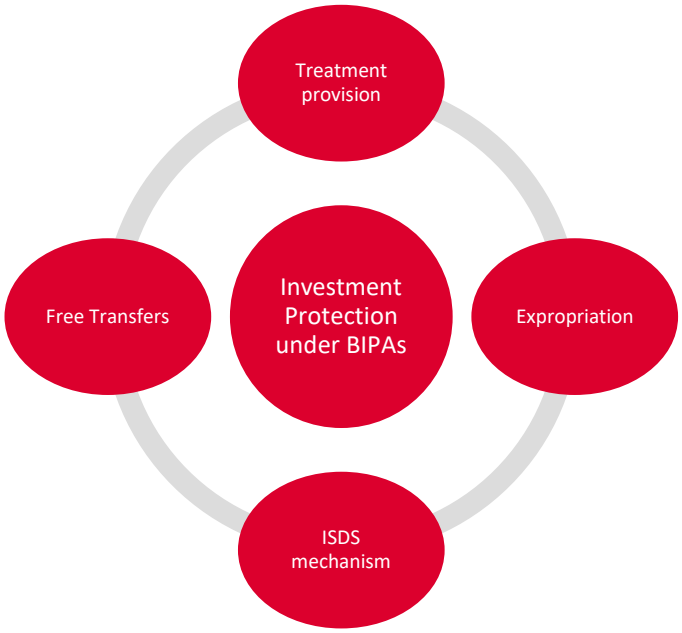
[35] Kimberly Amadeo, '*The OECD and Member Countries: How the OECD can help you?', the balance*, January 7, 2022, available at https://www.thebalance.com/organization-economic-cooperation-development-3305871#toc-statistics. [Accessed on 29 March 2023]

[36] Prof. Patrick Julliard, '*Bilateral Investment Treaties In The Context Of Investment Law, Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe'*, OECD, 28 - 29 May, 2001 available at https://www.oecd.org/investment/internationalinvestmentagreements/1894794.pdf#:~:text=Rather%2C%20the%20role%20of%20the%20OECD%20has%20been,have%20been%20used%20as%20building%20blocks%20of%20BITs. [Accessed on 29 March 2023]

1.2. Understanding BIPAs

A Bilateral Investment Protection Agreement also known as a Bilateral Investment Treaty ("**BIT**") refers to an agreement between two countries that seek to protect and promote the investments made by investors of such countries by imposing conditions on the regulatory behaviour of the host State.[37]

The BIPA regime emerged in 1959, with the first BIPA signed between Germany and Pakistan. France, Switzerland, Netherlands, and Italy followed suit starting in the 1960s. Other countries like the United Kingdom, Austria, Japan and the US only joined the game in the 1970s following a massive episode of expropriations.[38] Even then, the network of treaties remained weak, because developing countries lacked confidence in these agreements.[39]



Core protections under BIPAs

At the core of BIPAs are four provisions – treatment provision, protection from expropriation, transfers provision and the Investor-State Dispute Settlement ("**ISDS**") mechanism. The ***treatment provision*** imposes both relative and absolute standards. Besides prohibiting discriminatory treatment, the absolute standard obligates the host state to provide investments with fair and equitable treatment, full protection and security, and treatment not falling short of what international law prescribes. The relative standard, on the other hand, mandates the host state to treat investment no less favourably than an investment of its nationals (also known as 'national treatment') or of nationals of any third country (also known as 'Most Favoured Nation' or 'MFN' treatment).[40]

The ***expropriation provision*** prohibits unlawful expropriation of investment. In exceptional circumstances, where expropriation is permitted, it is followed by prompt, adequate and effective compensation. The ***transfers provision*** permits free flow of transfers, for instance, returns, payments arising out of investment dispute or under contract, compensation, etc.

Over the past century, there have been efforts on a global level to create a regime that would coordinate investment protections more coherently throughout the international community, starting with the establishment of the International Centre for Settlement of Investment Disputes ("**ICSID**") – an entity affiliated with the World Bank by the Washington Convention in 1965. While the above three provisions of BIPAs have some antecedents in investment treaty laws that came before BIPAs, the most striking and novel feature of the BIPA regime is the **ISDS mechanism,** which provides for arbitration of investment disputes between investors and states.[41]

---

[37] Rudolf Dolzer & Christoph Schreur, '*Principles of International Investment Law*', (Oxford University Press, 2nd ed, 2012), at 13.
[38] Countries like Cuba expropriated private assets, and Libya and Iran expropriated petroleum assets well into the 1970s.
[39] Kenneth Vandevelde, supra note 1.
[40] Kenneth Vandevelde, '*The Bilateral Investment Treaty Program of the United States*', Cornell International Law Journal, (1988) Vol. 21: Issue 2, available at http://scholarship.law.cornell.edu/cilj/vol21/iss2/1. [Accessed on 29 March 2023]
[41] *Ibid*

Earlier, foreign investors had to convince their home states to raise claims with host countries. The ISDS mechanism facilitated the depoliticization of investment disputes since it is now no longer a dispute between states but between the government of a host state and a private entity, which has arguably led to a more legal-based outcome.[42] Doing away with the use of military force and espousal or any diplomatic process, BIPAs depoliticised foreign investment.[43]

Earlier, BIPAs were viewed only in the context of unlawful taking of foreign property by the State or direct expropriation of foreign investors' property in the host State. However, in recent times, indirect State acts leading to deprivation of foreign investment or breach of the minimum standard of treatment are also considered treaty breaches.[44] BIPAs are believed to boost investor confidence in the contracting parties. As of the end of the first decade of the twenty-first century, over 2,500 BIPAs had been signed around the world.[45]

1.2.1. Standard Carve-outs under BIPAs

To appreciate carve-outs, it is first imperative to understand the backdrop against which they were introduced. As mentioned in the previous section of this report, BIPAs were primarily introduced as a response to the threat of uncompensated expropriation to developed countries. For developing countries like India, they were a tool to compensate for their unstable political climate and attract foreign investments. However, the need for a policy carve-out practice was highlighted when investor-state arbitrations were brought against developing states and developed states alike.[46]

States may not always be in a position to discharge their obligations where there are exigent circumstances that fundamentally alter or endanger their policy priorities. General exceptions, also known as non-precluded measure ("**NPM**"), clauses essentially ring-fence several policy issues where the host state is permitted to take measures or deviate from substantive obligations that would otherwise be considered a violation of its obligations under the treaty.[47] The wide range of exceptions in BIPAs strives to strike a balance between obligations under international agreements and the development interests of states.[48] Therefore, treaty exceptions offer some correction to the investment treaty regimes that were heavily skewed in favour of investment protection. The areas typically covered under NPM

---

[42] Gilbert Gagné, '*The Canadian Policy on the Protection of Foreign Investment and the Canada-China Bilateral Investment Treaty*', Beijing Law Review, (2019) 10, at 361-377.

[43] Kenneth Vandevelde, '*Bilateral Investment Treaties: History, Policy and Interpretation'*, (Oxford University Press 2010) at 178

[44]Nishith Desai & Associates, '*Bilateral Investment Treaty Arbitration and India',* Nishith Desai & Associates February 2018, available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf. [Accessed on 29 March 2023]

[45] United Nations, '*The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*', UNCTAD Series on International Investment Policies on Development (2009), available at https://unctad.org/system/files/official-document/diaeia20095_en.pdf. [Accessed on 29 March 2023]

[46]*See*, United Nations Conference on Trade & Development, *"World Investment Report 2013: Global Value Chains: Investment And Trade For Development"* UNCTAD (2014) at 101–02, available at https://unctad.org/system/files/official-document/wir2013_en.pdf.; Julie Kim, *'Balancing regulatory interests through an exceptions framework under the right to Regulate provision in international investment agreements',* The Geo. Wash. Int'l L. Rev. (2017), Vol. 50, pp.290, available at https://149801758.v2.pressablecdn.com/wp-content/uploads/_pda/ILR-Vol-50.2-Kim.pdf. [Accessed on 29 March 2023]

[47]Dilini Pathirana and Mark McLaughlin, "*Non-precluded Measures Clauses: Regime, Trends, and Practice"*, Handbook of International Investment Law and Policy (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3690358. [Accessed on 29 March 2023]; Prabhash Ranjan, *"Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation"* (2012) Asian Journal of International Law Vol 1 Issue 2 at 24, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309185. [Accessed on 29 March 2023]

[48] Prabhash Ranjan, *"Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation"* (2012) Asian Journal of International Law Vol 1 Issue 2 at 24, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309185. [Accessed on 29 March 2023]

clauses were national security, public order, environment protection, preserving natural resources, and public health. NPM clauses find mention even in the first BIPA between Germany and Pakistan.[49]

Although NPM clauses are widely used now, the historical roots of NPM clauses can be traced back to the Friendship, Commerce and Navigation ("**FCN**") treaties signed after the Second World War.[50] In recent times, countries are becoming far more protectionist. Sustainable development of the state has taken precedence over the thirst for foreign capital. And while some experts argue that the addition of exceptions has the effect of rebalancing the treaty as a whole[51], some point out that the addition of a treaty exception in relation to any specific treaty obligations does not counterbalance the obligation but overbalances it. Meaning thereby, whenever an exception applies, a treaty obligation is extinguished and not merely weakened.[52]

NPM clauses were first debated when, in the backdrop of a financial emergency in 2001, Argentina enacted several measures, including restrictions on transfers out of its territory, rescheduling of cash deposits, pesification of U.S. dollar deposits and pesification and defaults on its debt obligations. Several ICSID cases were brought against Argentina[53]. In the said cases, ICSID had to determine whether these measures were necessary for:

(i) the maintenance of public order (the public order carve-out),
(ii) the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or
(iii) the protection of its essential security interests.[54]

The Tribunal, however, did not dive deep into the issue of whether these emergency measures were legal under the public order carve-out of Article XI but focused on whether they were necessary.[55] This was when states began to realise that concluding BIPAs came with consequences on their sovereign right to regulate various aspects of public interest.

It is also worthwhile to mention that even though states slowly realised the importance of these carve-outs, most of the BIPAs in force until 2010 did not contain treaty exceptions as these agreements were signed before the Argentine ICSID cases, which highlighted their importance in treaty practice.[56] However, countries now approach BIPAs very cautiously and retain their sovereignty over a host of

---

[49] Article 2 of the Protocol to the Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed on 25 November 1959 (entered into force 28 April 1962).
[50] Dilini Pathirana and Mark McLaughlin, '*Non-precluded Measures Clauses: Regime, Trends, and Practice*', Handbook of International Investment Law and Policy (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3690358. [Accessed on 29 March 2023]
[51] Mir Hossein Abedian Kalkhoran, & Sabzevari, H. (2021), '*Standards of Review for the Non-Precluded Measures Clause in Investment Treaties: Different Wording, Different Levels of Scrutiny*', Netherlands International Law Review (2021) Vol 68, available at https://doi.org/10.1007/s40802-021-00196-5. [Accessed on 30 March 2023]
[52] Kenneth Vandevelde, supra note 1.
[53] *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005).
[54] CMS, Continental Casualty, Enron, LG&E, and Sempra cases. *See*, *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005).
[55] Jurgen Kurtz, '*Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*', 59 Int'l & Comp. L.Q. (2010) 325, at 353.
[56] Kenneth Vandevelde, '*Rebalancing Through Exceptions*', 17 Lewis & Clark L. Rev. (2013) 449, at 451.

policy areas to establish limits on the substantive obligations under BIPAs.[57] The table below shows the policy areas that states have carved out from the application of BIPAs.

Sr. No.	Type of exception	Description	Relevant Treaty
1	Essential Security Exception	Excludes matters relating to measures or actions that it considers necessary for the protection of its essential security interests.	Albania – Turkey BIT (1992)
			Israel – Japan BIT (2017)
			Brazil – Mexico BIT (2015)
			Colombia – France BIT (2014)
			Bangladesh – Turkey BIT (2012)
2	General Public Policy exceptions as to health and environment	Excludes measures, including environmental measures: (a) necessary for the maintenance of public order; (b) necessary to protect human, animal or plant life or health.	Armenia – Latvia BIT (2005)
			Canada – Mongolia BIT (2016)
			Japan – Uruguay BIT (2015)
			Egypt – Mauritius BIT (2014)
			Georgia – Switzerland BIT (2014)
3	Other Public Policy Exceptions (e.g., cultural heritage, public order, etc.)	Measure adopted or maintained by a Party with respect to a person engaged in a cultural industry.	Burkina Faso – Canada BIT (2015)
			Colombia – France BIT (2014)
			India – United Arab Emirates BIT (2013)
			Mali – Morocco BIT (2014)
			Korea – Republic of Myanmar BIT (2014)
4	Prudential carve-out (concerns financial measure)	Measures relating to financial services for prudential reasons	India – Japan EPA (2011)
			Austria – Tajikistan BIT (2010)
			Azerbaijan – Montenegro BIT (2011)
			Colombia – France BIT (2014)
5	Tax carveouts	Minimum Standard of Treatment, Compensation for Losses, Senior Management, Boards of Directors and Entry of Personnel, Performance Requirements and Transfers do not apply to taxation measures; or Agreement does not affect the rights and obligations of either Contracting Party under any tax convention. In the event of any inconsistency between	Canada – Mongolia BIT (2016)
			Armenia – Japan BIT (2018)
			Mexico – UAE BIT (2016)
			Turkey – Guatemala BIT (2015)

[57] Kenneth Vandevelde, '*Rebalancing Through Exceptions*', 17 Lewis & Clark L. Rev. (2013) 449, at 451; Jeswald Salacuse, *'The Three Laws of International Investment: National, Contractual, And International Frameworks for Foreign Capital* (Oxford University Press, 2013) at *398–400*; United Nations Conference on Trade & Development, *Bilateral Investment Treaties: 1995–2006: Trends in Investment Rulemaking*, UNCTAD (2007) at 81.

		the Agreement and any such convention, the convention shall prevail to the extent of the inconsistency.	

1.2.2. Contextualising Tax Carveouts

Taxes are a fundamental way for countries, especially for developing countries, to generate revenues that enable investments in human capital, infrastructure, and services for citizens and businesses. States heavily rely on taxation to sustain the government and support social welfare and other governmental measures.

While trade and investment treaties have long been understood to be revenue-neutral, studies have proved that the assumption is far from the truth.[58] Most states want to retain a high level of taxation sovereignty. Logically, states carve out taxation matters from the application of BIPAs, reserving their flexibility on their tax policy.[59]

Sovereign Right to Tax

Authority to tax is one of the fundamental features of sovereignty, and infringing on the right to tax is an infringement on sovereignty itself.[60] Impairing a state's ability to raise and collect taxes would gravely affect its ability to build and maintain infrastructure, provide defence, and, in some places, provide education, health care, or other benefits to its people.[61] Therefore, the right to tax or even to not tax is at the very core of sovereignty.[62] Despite the impulse to retain tax sovereignty, states enter into several bilateral and multilateral treaties that confine their otherwise wide latitude of taxing rights.

Let's look at the same issue in the context of Double Taxation Conventions ("**DTCs**"). With the rise of cross-border investments, the issue of multiple jurisdictions arises and so does the issue of double taxation. An individual who earns any income has to pay income tax in the country in which the income was earned, and in the country where such a person was resident.[63] Countries enter into DTCs with one another to avoid such a hardship to individuals and to see that national economic growth does not suffer. DTCs provide full protection to taxpayers against double taxation by allocating taxing rights between the source and resident countries,[64] thus preventing the discouragement that double taxation may provide in the free flow of international trade and international investment. DTCs typically also provide for mutual exchange of information and dispute resolution mechanisms to reduce litigation.[65] In the case of tax treaties like the DTCs, scholars believe that there is no 'cession' of sovereignty, but 'pooling' of

---

[58] Sonia Rolland, '*The Impact of Trade and Investment Treaties on Mobilization of Taxation in Developing Countries*', Boston University, Global Development Policy Center, GEGI Working Paper 31 (October 2019), available at https://www.bu.edu/gdp/files/2019/11/Rolland-22Impact-of-Trade-and-Investment-Treaties...22.pdf. [Accessed on 29 March 2023]

[59]Hui-Heng Hong, '*Reconciling International Investment Agreements with Domestic Tax Laws Through Restructuring Taxation Clauses in International Investment Agreements'*. Contemporary Asia Arbitration Journal (2019), Vol. 12, No. 1, pp. 41-70, available at https://ssrn.com/abstract=3409324 [Accessed on 29 March 2023]

[60] Allison Christians, '*Sovereignty, Taxation, and Social Contract*' 18 MINN. J. INT'L. L. (2009) 99, at 104 citing Arthur Cockfield, The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenges, 8 YALE J.L. & TECH. (2006)136, at 139.

[61] Diane Ring, '*What's at Stake in the Sovereignty Debate?: International Tax and the Nation State*' 49 VA. J. INT'L. L. (2008) 155, at 158.

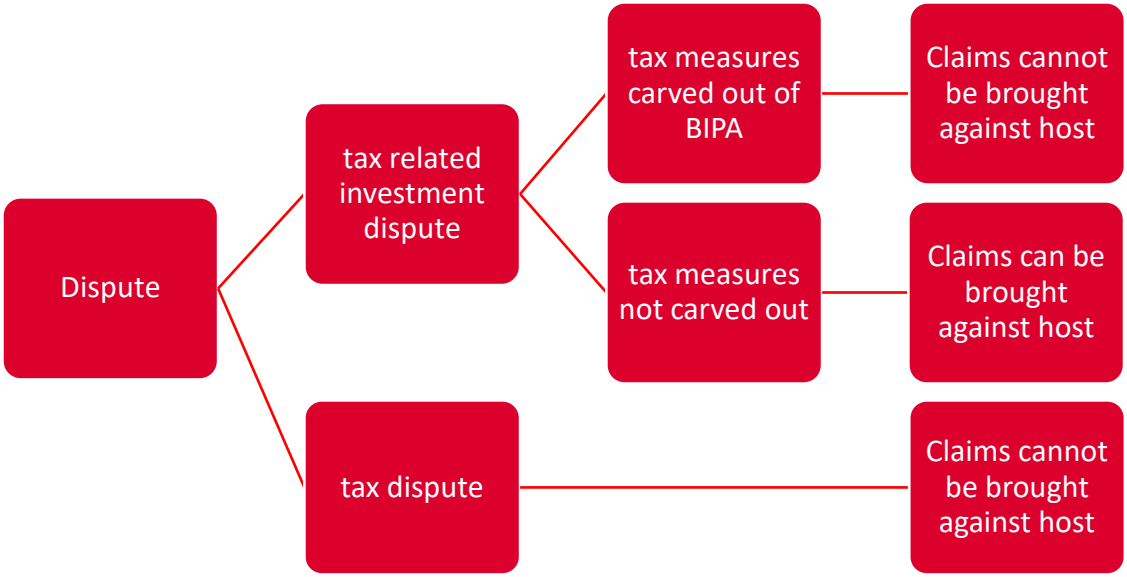
[62] Jennifer Bird-Pollan, '*The Sovereign Right to Tax: How Bilateral Investment Treaties Threaten Sovereignty*' Notre Dame Journal of Law (2018), Ethics and Public Policy, Vol. 32, No. 1.

[63] Alii Chowdhury, '*Double Taxation Avoidance Agreement & Explanation of some articles of DTAA between Bangladesh & USA*', February 16, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733159. [Accessed on 29 March 2023]

[64] Julien Chaisse, '*Investor-State Arbitration In International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?*', Virginia Tax Review (2016), Vol. 35, 155, at 159.

[65] Alii Chowdhury, '*Double Taxation Avoidance Agreement & Explanation of some articles of DTAA between Bangladesh & USA*', February 16, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733159. [Accessed on 29 March 2023]

sovereignty as the treaty partners collaborate to define their respective taxing entitlements.[66] Therefore, DTCs are largely understood to promote the recognition of a state's sovereignty over tax-related issues.



Claims that can and cannot be brought against Host nations

Let us assume that the concept of tax carveouts did not exist in the BIPA regime. A private individual can, of his own volition, bring a dispute with a host country to arbitration if the dispute arises under a BIPA. As a result, an individual investor's claim that a tax measure of the host country violates any of the protections guaranteed under a BIPA can challenge the policy choices of a country, thereby having a direct consequence on the sovereignty of a nation and, in particular the sovereign right to tax. Therefore, it is often argued that BIPAs present a challenge to the sovereign right to tax of a nation.[67] For instance, in the *Cairn* dispute,[68] while commenting on the tax sovereignty of a nation, the Tribunal held that absent an exclusion by the terms of the relevant treaty or a derogation by a subsequent treaty, the contracting States would be deemed to have agreed to arbitrate all matters that fall under the scope of the BIPA. When a State enters into a BIPA, it cannot argue that its sovereign conduct is not arbitrable under the BIPA. According to the Tribunal, to transpose the domestic law concept of arbitrability to investment arbitration would deprive investment treaties of any useful meaning. [69]

On the other hand, certain scholars argue that signing a BIPA is a voluntary act, and as a result, any consequences from enforcement of the BIPA cannot be said to violate the sovereignty of a nation, since

---

[66] Tarun Jain & Shankey Agarwal, '*Investment Treaties Interjecting Taxation's Realm: The Latest in Vodafone's India Saga*' Kluwer International Tax Blog, 20 October 2020, available at http://kluwertaxblog.com/2020/10/13/investment-treaties-interjecting-taxations-realm-the-latest-in-vodafones-india-saga/. [Accessed on 29 March 2023]

[67] Martin Hearson & Todd Tucker, '*An Unacceptable Surrender of Fiscal Sovereignty: The Neoliberal Turn to International Tax Arbitration*', (Cambridge University Press, 2021) at 1–16.

[68] *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020, available at https://jusmundi.com/en/document/decision/en-cairn-energy-plc-and-cairn-uk-holdings-limited-v-the-republic-of-india-final-award-wednesday-23rd-december-2020#decision_14307. [Accessed on 29 March 2023]

[69] Due to the pressure caused by the unfavourable investment arbitral awards, including the Cairn Award, the Parliament of India passed the Taxation Laws (Amendment) Act, 2021, to withdraw the retrospective tax amendment. It allows the impacted investors to claim inapplicability of the retrospective amendment and claim a refund of the tax collected upon fulfilment of certain conditions, including, withdrawal of any claims before investment arbitral tribunals. As a result, Cairn agreed to settle the dispute with the Indian government by accepting to set aside the arbitral award by the Hague Court of Appeal (*See, The Republic of India v. Cairn Energy PLC and Cairn UK Holdings Limited*, Judgment of the Hague Court of Appeal dated 21 December 2021(Case No. 200.300.263/01, para. 2.3-2.4).

the nation freely entered into the agreement upon signing the BIPA. However, the assumption of equality in contractual bargaining power between two parties, one of which is a developing nation, is inappropriate.[70]

Given that the authority to impose taxes is a fundamental sovereign right of governing authorities, and because independent international arbitral tribunals adjudicate disputes that arise under BIPAs as per international law, there has been an upward trend in tax provisions being carved out from BIPAs in a complete or limited manner which we will discuss in the later parts of this report.

BIPAs that do not carve out tax measures

Around 2200 odd BIPAs are currently in force, which typically have broad provisions and include few exceptions or safeguards. Most of these BIPAs were negotiated and signed in the 1990s or earlier. Most claims brought under BIPAs have been pursuant to pre-2000 era BIPAs. While many BIPAs carve out tax measures from their scope, the erstwhile treaties did not contain comprehensive tax carve-outs, perhaps because parties had not fathomed the consequences of the implied inclusion.

However, the implied inclusion does not mean that tax disputes are arbitrable. For instance, in the *Cairn* dispute, the investors submitted that India breached its obligations under the India-United Kingdom BIT (1994) by retrospectively amending the Income-tax Act, 1961 in 2012, which made the transactions it undertook in 2006, taxable. The India-UK BIT (1994) does not carve out tax measures from its scope.[71] India's argument was that the dispute was a 'tax dispute', and tax disputes are not arbitrable. However, the Tribunal distinguished between a tax dispute and a tax-related investment dispute. A tax dispute is a dispute where the court is dealing with whether a transaction or a set of transactions leads to a tax liability or where the dispute relates to the quantification of tax demand. On the other hand, tax-related investment disputes are disputes wherein the Tribunal is tasked with determining whether certain fiscal measures imposed by a state breach its substantive obligation under a treaty. Therefore, tax disputes are inherently excluded from the purview of BIPAs. But if not specifically carved out from BIPAs, tax-related investment disputes are arbitrable.

1.3. Conclusion

As the world witnessed a change in the economy that led to a drastic increase in cross-border activity, treaties became the tools for communication, cooperation and for fostering harmony. Amidst this, with a promise to promote trade in developing countries and to provide investors belonging to developed countries protection and certainty for their investment, BIPAs found their way to becoming one of the crucial treaties signed between States.

Regardless of the promises that BIPAs came with, signing a treaty also meant to compromise. It meant that irrespective of the socio-economic differences that existed between the States, they had to tailor their policies in line with the treaty, even if this meant providing the foreign nationals with differential and more favourable treatment. To ensure that this does not evade a State's right to govern its policies and other fundamental regulations, carve-outs were found to be a useful inclusion in the treaties. Amongst these carve-outs, the tax carve-out especially became a commonly included carve-out. However, these tax carve-outs were not given much attention as the States did not speculate any use of the same. As will be discussed, tax carve-outs turned out to be more crucial than expected and are undergoing drastic modifications as the States realise a shift in the treaties from being shields to becoming swords.

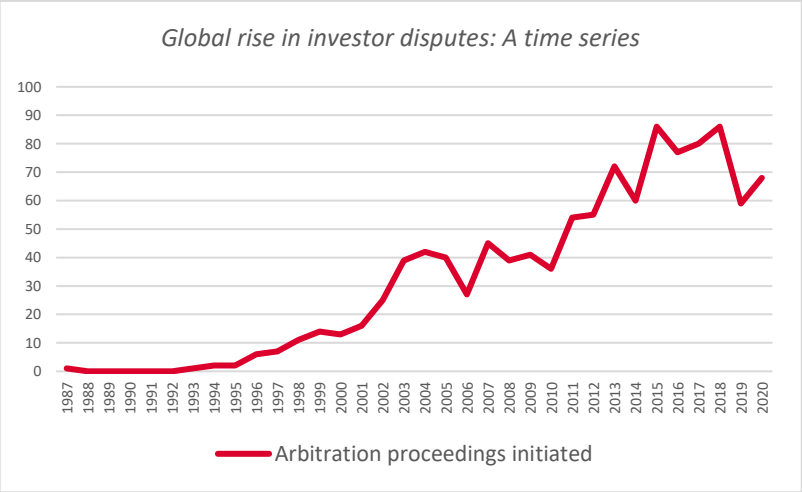
[70] Jeongho Nam, '*Mode BIT: An Ideal Prototype or A Tool for Efficient Breach*', Georgetown Journal of International Law (2017), 1275, at 1280, available at https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/05/48-4-Model-BIT.pdf. [Accessed on 29 March 2023]

[71] The India-UK BIT (1994) consists of a limited tax carve-out, the implications of which are discussed in further sections.

2. Tax Carve-outs: Exposing the Nuances

Between 1987 and 1997, very few investment disputes arose globally, and arbitration proceedings were rare. However, in the last two decades, there has been a growing trend in the number of arbitration disputes.

The surge in investment disputes involving tax matters has led to the creation of solid jurisprudence on the interplay of tax and investment protection that fortifies a global economic regulation for tax matters.[72]



Source: UNCTAD, Investment Dispute Settlement Navigator

Taxation is explicitly addressed in two ways in investment treaties: First, a compliance provision might reassert investors' obligation to comply with local law, including tax law. Second, the treaty protections might not extend to *taxation measures* through the operation of carve-out clauses similar to those included in trade treaties.[73] Crucial for the current discussion is the relevance of a tax carve-out in an investment treaty. However, before looking into the scope and type of tax carveouts, it is imperative to understand what a taxation measure is.

2.1. Taxation measures under BIPAs

Most BIPAs do not define what constitutes a 'tax measure'. Few of the BIPAs that do, define taxation measures as any measure relating to direct or indirect taxes but do not include:

(a) customs duties; or
(b) anti-dumping, countervailing or safeguard duties applied in accordance with Chapter 8 (Trade Remedies) of Free Trade Agreements ("**FTA**"); or
(c) fees or other charges that are covered by Article VIII of GATT 1994.[74]

Taxation measures under some treaties mean any measure relating to direct taxes and indirect taxes.[75]

---

[72] Julien Chaisse, '*Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?*' Virginia Tax Review (2016), Vol. 35, 149, at 200.
[73] Sonia Rolland, '*The Impact of Trade and Investment Treaties on Mobilization of Taxation in Developing Countries*', Boston University, Global Development Policy Center, GEGI Working Paper 031, October 2019, available at https://www.bu.edu/gdp/files/2019/11/Rolland-22Impact-of-Trade-and-Investment-Treaties...22.pdf. [Accessed on 29 March 2023]
[74] Chile – Hong Kong, China SAR BIT, Article 1, definition of taxation measure read with definition of customs duties.
[75] Benin – Canada BIT (2013), Article 1.

A more specific definition can be found under Article 21 of the Energy Charter Treaty ("**ECT**").

Article 21(7) of the ECT
"(a) The term "Taxation Measure" includes: *(i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and* *(ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound."*

Since there is no standardised definition of the term 'tax measure' under the BIPA regime, it is left to the Tribunals to determine what constitutes a tax measure. It is often interpreted by relying on the Vienna Convention on the Law of Treaties ("**Vienna Convention**"). Article 31(1) of the Vienna Convention requires that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given on the terms of the treaty in their context and in light of its object and purpose.

The most comprehensive and commonly cited definition was provided in 2006 by the Tribunal in the case of *EnCana Corporation v. Republic of Ecuador*[76]. Based on the Canada-Ecuador BIT (1996)[77], the investor challenged the denial of VAT refunds which they claimed were due to its subsidiaries present in Ecuador. The protections under the Canada-Ecuador BIT (1996) do not apply to taxation measures. [78] The term 'measure' was defined to include "any law, regulation, procedure, requirement or practice". While deciding on whether the challenged measure is a tax measure, the Tribunal stated that since a 'tax measure' is not defined under the relevant BIPA, it must be interpreted as per the ordinary meaning in the context of the Treaty.[79]

Hence, the Tribunal observed that a measure shall constitute a tax measure if it "*creates a new legal liability on a class of persons to pay money to the State in respect of some defined class of transactions, the money to be used for public purposes*."[80] This lays down a five-stage test:

[76] LCIA Case No. UN3481, Final Award dated 03 February 2006.
[77] On 16 May 2017, Ecuador withdrew from BITs with 16 countries, including the BIT with Canada, after an auditing process revealed that the treaties do not facilitate attracting additional investment, did not advance the country's development plan and cost the government millions of dollars to fighting costly lawsuits. *See*, https://www.iisd.org/itn/en/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/ [Accessed on 29 March 2023]
[78] Article XII.1, Canada-Ecuador BIT (1996).
[79] Encana Final Award, para. 141-142.
[80] *Ibid*., para. 177.

Further observations made by the Tribunal regarding the meaning of the term 'taxation measure' include:

- The term 'taxation' need not be limited to mean direct taxation. Hence, indirect taxes such as VAT are also covered.
- With respect to the breadth of the term 'measure', the Tribunal observes that this is not limited to the provisions of the law that imposes the tax, but also all those aspects of the tax regime that determines the tax liability or the refund. This includes deductions, allowances or rebates.
- Taxation measure equally covers measures that provide relief from taxation.

On this basis, the EnCana Tribunal concluded that the investor's claims on the VAT refunds are excluded from the scope of the Tribunal. Several Tribunals applied the definition laid by the EnCana Tribunal while determining a tax measure.[81]

While this Award grants some spectrum of certainty in understanding the term 'tax measures' within the BIPAs, there still remains ambiguity with respect to certain surrounding aspects, such as the relevance of domestic law in interpretation, application of the *bona fide* test and distinguishing from tax-related measures. Tribunals have taken varied views concerning these aspects, leaving several questions unanswered for future disputes regarding the interpretation of the term.

2.1.1. Relevance of Domestic Law for Interpreting 'tax measure'

The Contracting States can agree to include within their BIPAs the applicable law for disputes arising from such treaties. An exclusive mention of the same makes a Tribunal's interpretation generally certain.[82] When the Contracting States do not agree upon the applicable law, a Tribunal has the authority to determine the applicable law in an ISDS dispute.[83] This becomes highly crucial when defining 'tax measures' as these are argued to be matters of a sovereign right. Where the applicable law is not specified in the BIPA, the Tribunal can choose between domestic and international law to determine what constitutes a 'tax measure'.

In cases where the Parties have not agreed upon the applicable law, a commonly referred provision is Article 42(1) of the ICSID Convention, which states:

Article 42(1) of the ICSID
"(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

The above Article does not lay any hierarchy to be followed and trusts the Tribunal for a harmonious interpretation of domestic and international laws. The lack of formal precedential status that Tribunal awards possess, invites uncertainties for the investors as there is no uniformity with respect to the choice of the applicable law by the Tribunals.

[81] For instance, the cases of *Duke Energy v. Republic of Ecuador* (ICSID Case No. ARB/04/2019) and *Burlington Resources v. Ecuador* (ICSID Case No. ARB/08/05).
[82] Christopher Thomas, & Harpreet Dhillion., '*Applicable Law under International Investment Treaties',* 26 Singapore Academy of Law Journal (2014), para. 29.
[83] Zachary Douglas, '*The International Law of Investment Claims',* (Cambridge University Press, 2009), at 40.

The Tribunal awards based on the ECT held that a measure must first qualify as a tax measure under domestic law and then under international law.[84] Therefore, being characterised as a tax measure under domestic law though necessary, will not suffice to satisfy Article 21 of the ECT.[85] Due to the diversity in the wording of BIPAs, uniformity with respect to a Tribunal's determination of the applicable law is absent. For instance, in the case of *Burlington v. Ecuador*[86], the relevant investment treaty did not define 'tax measures' and did not mention the applicable law. Hence, when the Tribunal had to choose the applicable law, it was observed that the investment treaties are governed by international law, as a result, it is irrelevant what Ecuadorian law holds.[87] The Tribunal relied on certain past tribunal decisions to conclude that the measure constituted a 'tax measure' under international law.[88]

Most of the investment treaties that India was[89] party to, had an exclusive mention under Article 11 that the applicable law shall be the laws in force in the territory of the Contracting State in which such investments are made.[90] As a result, in the *Cairn* dispute, when the Indian government argued for the application of Indian law on disputes rooted in its investment treaty, the Tribunal agreed on this aspect. The Indian government claimed that "*whilst the interpretation of the terms of the BIT may be a matter of international law, the application of those terms to the facts of this case will depend upon Indian law.*".[91] The Tribunal stated that while an international treaty is governed by international law, it is not the only relevant law for the Tribunal's inquiry, especially when domestic law is the subject-matter.[92] Hence, this highlights the importance of mentioning the applicable law.

2.1.2. Reference of bona fide for determining the applicability of BIPAs on a tax measure

As identified in *Encana*, one of the essential components required for a measure to qualify as a tax measure is the need for a public purpose. The State must prove that the tax imposed by it is with the objective of raising revenue for the public and is not implemented with any other intent, such as targeting any specific taxpayer. Thus, the intent behind a tax measure must be *bona fide*. If the Tribunal finds the measure was implemented without a *bona fide* intent, then the Tribunal can deny the measure any differential treatment accorded under the Treaty.

For instance, in the case of *RosInvest v. Russia*, the investors challenged the VAT assessments and imposition of profit tax on the basis that the regulatory powers of a State are exempted from international scrutiny only when they are implemented in a *bona fide*, non-discriminatory and non-confiscatory manner.[93] The Tribunal observed that the challenged measures were not imposed *bona fide* as similar treatment was not accorded towards comparable companies, hence, the State was found targeting a specific taxpayer.[94] This Award was referred to and applied in the case of *Yukos v. Russia*, wherein similar measures were challenged through the ECT. The investors argued that the State's

---

[84] *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, The Energy Charter Treaty (1994), Decision on Jurisdiction, Liability and Directions on Quantum dated 31 August 2020, para. 383-384.
[85] *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, The Energy Charter Treaty (1994), Decision on Jurisdiction, Liability and Directions on Quantum dated 09 March 2020, para. 511-512.
[86] *Burlington Resources v. Ecuador* (ICSID Case No. ARB/08/05), Ecuador-USA BIT (1993), Decision on Jurisdiction dated 02 June 02, 2010.
[87] *Ibid*, para. 162.
[88] The Tribunal relied on the case of *Encana* (supported by the *Duke Energy* case), which states, *"taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes"*, (para.142(4)); Burlington Decision on Jurisdiction, para. 164.
[89] India terminated treaties with 58 countries in 2017.
[90] For instance, India-UK BIT (1994) and India-Netherlands BIT (1995).
[91] *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-7, India-UK BIT (1994), Final Award dated 21 December 2020, para. 648.
[92] *Ibid*., para. 651.
[93] *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Russian-UK BIT (1989), Final Award dated 12 September 2010, para. 2.
[94] *Ibid*., para. 620.

measures were "under the guise of taxation", which does not constitute *bona fide* tax measures.[95] They further argued that the purpose of the measure had nothing to do with taxation.[96] The Tribunal agreed with the investors and refused to identify the measures as tax measures under the Treaty.[97]

Interestingly, in the *Cairn* dispute, the Tribunal tested the presence of *bona fide* intent, however, not with respect to the tax measure itself but the retroactive application of the tax measure. The Tribunal stated that it is its duty to determine whether a *bone fide* public purpose exists.[98] It was noted that a State's power to regulate in the public interest could be justified when there is a balance between such purpose and an individual's interests of legal certainty, stability and predictability, along with reference to the principles of reasonableness and proportionality.[99] In these lines, the Tribunal found the retrospective application unreasonable and disproportionate.[100]

Despite the favourable awards, an investor must note that challenging the *bona fide* intent behind a measure of the State will be difficult. For instance, in the case of *Micula v. Romania (II)*, the investors challenged the *bona fide* behind the application of tax measures and the Tribunal stated that a claim questioning the "state of mind" of a State requires a high standard of proof.[101] Due to the absence of any substantial evidence, the Tribunal refused to entertain the claim.[102]

2.1.3. Tax measures v. Tax-related measures

The understanding of a 'tax measure' may not permanently be restricted to the law itself but may also include the measures undertaken by the State to implement and enforce the law and other related actions, allowing a broad meaning to the term. The Tribunals have taken contradictory stands when deciding if the related measures are covered under the term.

Some of the Tribunals observed that, though the tax law itself might be outside the jurisdiction of a Tribunal, the impact on the investment due to the enforcement of the law will fall within its jurisdiction. On this basis,, the Tribunal, in the case of *Spyridon Roussalis v. Romania*, held that general measures of a State that are enacted through its public powers would fall within the Tribunal's jurisdiction if they affect investments and are in violation of the relevant BIPA.[103] This covers decisions taken by the tax authorities and the courts, including the actions of the State's authorities enforcing such decisions.[104] A similar stand was taken by the Tribunal in the *Cairn* dispute, wherein, while discussing the State's contention that the challenged measure is a tax measure, the Tribunal distinguished a tax dispute from a tax-related investment dispute. According to the Tribunal, a tax dispute arises when it is regarding the taxability of a specific transaction, i.e., how a transaction is taxed under domestic laws.[105] On the other hand, a tax-related investment dispute is regarding whether substantive standards of treatment guaranteed under the Treaty were violated due to the exercise of the State's authority in the field of taxation.[106] Therefore, as per the Tribunal, the tax measure is different from the measures a state undertakes during the exercise of its authority.[107] Both these awards, stress on the reasoning that the jurisdiction is being applied on the impact caused and not the tax law itself.

---

[95] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, The Energy Charter Treaty (1994), Final Award dated 18 July 2014, para. 1379.
[96] *Ibid*., para. 1379.
[97] *Ibid.*, para. 1407. Tribunals followed this conclusion in *Isolux v. Spain* (2016), para. 734-735 and *Watkins v. Spain* (2020), para. 268-270.
[98] Cairn Final Award at para. 1794.
[99] *Ibid*., para. 1801.
[100] Ibid., para 1801.
[101] *Ioan Micula, Viorel Micula and others v. Romania (II)*, ICSID Case No. ARB/14/29, Romania-Sweden BIT (2002), Award dated 5 March 2020, para. 378.
[102] *Ibid*. para 413.
[103] *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Greece-Romania BIT (1997), Award dated 07 December 2011, para. 493.
[104] *Ibid*., para 493.
[105] Cairn Final Award, para. 793.
[106] *Ibid*.
[107] *Ibid*.

In contrast, several Tribunals have refused to differentiate the law from its implementation. In *Encana*, the investors challenged the non-refund of VAT to its subsidiaries which they claimed to be entitled to under Ecuadorian laws. The Tribunal held that the entire VAT system, i.e., including the VAT collection measures by intermediate manufacturers or producers, would also be covered as "tax measures".[108] It further held that any executive acts implementing the law should also be considered a tax measure.[109] Similarly, in *Ryan v. Poland*, wherein disallowance of deductions claimed by the investor was challenged, the Tribunal observed that taxation has three aspects, levy of taxes, assessment of taxes and collection of taxes.[110]

Therefore, when deciding what constitutes to be included in "taxation measures", the former set of cases differentiated the tax law from the measures adopted to implement the law and the impact caused, while in the latter set of cases, the Tribunals concluded that the measures adopted to implement the law are a part of the taxation measures. In such cases, the line separating tax measures from the measures that affect the investor's rights guaranteed under the treaty are dependent on the evidence produced by the parties.[111]

2.2. Types of tax carve-outs vis-à-vis tax measures under BIPAs and their interpretation

2.2.1. Tax Carve-outs under existing BIPAs[112]

The jurisdiction of a Tribunal depends on the type of tax carve-out incorporated in the BIPA. Some of the BIPAs completely exclude tax measures from the scope of the BIPA. On the other hand, some BIPAs provide limited exclusions to ensure that the broader protections under the BIPA are still available to investors, irrespective of the nature of the measure. Another common type of BIPA is wherein Double Tax Conventions are prioritised over the BIPAs to avoid any overlap. These types are discussed in detail below.

General Tax Carve-outs

A general tax carve-out is also known as a total or an unconditional exclusion. It operates as a blanket exclusion of tax matters from the treaty's scope of application, without reservation. It is impossible to bring a tax-related claim before a tribunal. This type of carve-out is gaining popularity as states are learning that tax-related matters that were not envisaged to be arbitrable under BIPAs are nevertheless brought within the ambit, leading to a significant outflow of government money in the form of compensation to foreign investors. Therefore, a general tax carve-out assists a State by completely extinguishing treaty protection in respect of tax matters. While the intention behind a general tax carve out is to ensure that tax related claims altogether may not be brought before the Tribunal, the status of tax-related measures is unclear given the contrasting judgements discussed in Section 1.3 above.

---

[108] EnCana Final Award, para. 142.
[109] *Ibid.*, para 143.
[110] *Vincent Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Poland-USA BIT (1990), Award dated 24 November 2015, para. 284 and 289. Due to a limited tax carve-out, the Tribunal restricted its jurisdiction to matters of taxation relating to expropriation.
[111] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Argentina-USA BIT (1991), decision on Jurisdiction dated 14 January 2014, para. 31.
[112] This classification is inspired by Julien Chaisse, '*Investor-State Arbitration In International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?*', Virginia Tax Review (2016), Vol. 35, 149, at 185.

Denmark - Russian Federation BIT (1993)	•The provisions of this Agreement shall not apply to taxation **[Article 11(3)]**
Hong Kong, China SAR - New Zealand BIT (1995)	•The provisions of this Agreement shall not apply to matters of taxation in the area of either Contracting Party. Such matters shall be governed by the domestic laws of each Contracting Party and the terms of any agreement relating to taxation concluded between the Contracting Parties. **[Article 8(2)]**
ASEAN Investment Agreement (1987)	•The Provision of this Agreement shall not apply to matters of taxation in the territory of the Contracting Parties. Such matters shall be governed by Avoidance of Double Taxation between Contracting Parties and the domestic laws of each Contracting Party. **[Article V]**

Conflict clauses against the application of BIPAs

Tax conventions typically include DTCs but can extend to cover any international tax agreements or arrangements regarding taxes. Several treaties prioritise tax conventions over BIPAs primarily because of concerns over treaty shopping. However, this does not mean that in the existence of such a prioritisation, investment treaties will cease to apply to taxation matters. Such treaties may also clarify how and who shall decide whether an inconsistency exists.

Armenia - Korea Republic BIT (2019)	•Nothing in this Agreement shall affect the rights and obligations of either Contracting Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Contracting Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Agreement and that convention. **[Article 18(3)]**
Canada - Moldova BIT (2019)	•This Agreement does not affect the rights and obligations of a Party under a tax convention. In the event of inconsistency between this Agreement and a tax convention, that convention prevails. **[Article 14(2)]**

Carve-outs based on the distinction between the type of taxes (direct and indirect taxes)

This type of provision distinguishes between the type of tax measure – direct or indirect tax and then selectively excludes one from its application. It is not a very popular practice. In most cases, treaty protections are not available in respect of direct tax measures.

Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (2005)	• Subject to paragraph 7, Article 3 and Article 4 shall apply to all **taxation measures, other than taxation measures relating to direct taxes** (which, for purposes of this paragraph, are taxation measures on income, capital gains, or on the taxable capital of corporations or individuals, taxes on estates, inheritances, gifts, and generation-skipping transfers), except that nothing in those Articles shall apply: (a) any most-favored-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention; (b) to a nonconforming provision of any existing taxation measure; (c) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure; (d) to an amendment to a nonconforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with those Articles . . . . **[Article 21]**

Sometimes the exclusion of certain tax measures may also not be expressed but can be inferred from an express inclusion of another tax measure. For instance, the Singapore-Myanmar BIT (2019) lists the adoption or enforcement by a Party of measures aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments of investors of a Party as an exception to measures that are arbitrable.[113]

Veto clauses

The protection against expropriation is perhaps the driving force behind the existence and development of BIPAs. Tax being a sensitive policy issue, several BIPAs empower national tax authorities to 'veto' a complaint by an investor alleging expropriation arising from a taxation measure by the host state. Some treaties may require both contracting parties to agree that the taxation measure is an expropriation. Such clauses have the effect of making tax matters political in character by requiring the contracting parties to come to an understanding instead of the investor and the host state arbitrating on the matter.

[113] Singapore - Myanmar BIT (2019), Article 29(f).

Canada - Romania BIT (2009)	•Article VIII (Expropriation) may be applied to a taxation measure unless the taxation authorities of the Contracting Parties, no later than six months after being notified by an investor that he disputes a taxation measure, jointly determine that the measure is not an expropriation. **[Article XII(4)]**
Armenia - Korea Republic BIT (2019)	•Article 5 (Expropriation and Compensation) shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Article 10 (Settlement of Disputes between Contracting Parties) or Article 11 (Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party) only if: (a) the claimant has first referred to the competent tax authorities) of both Contracting Parties, in writing, the issue of whether that taxation measure involves an expropriation; and (b) within one hundred and eighty (180) days after the date of such referral, the competent tax authorities of both Contracting Parties fail to agree that the taxation measure is not an expropriation. **[Article 18(2)]**
Slovakia - UAE BIT (2016)	•Article 7 of this Agreement shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves expropriation, such as excessive taxation, may submit a claim to arbitration under Section C of this Agreement only if: a) the claimant has first referred to the competent tax authorities of both Contracting Parties in writing the issue of whether that taxation measure involves expropriation; and b) within 180 days after the date of such referral, the competent tax authorities of both Contracting Parties fail to agree that the taxation measure is not an expropriation. **[Article 10(2)]**

Limiting scope of non-discrimination standards (NT and/or MFN standards)

When a country is a party to several BIPAs, it offers some assurance of protection to investors and operates as a sign of stability and reliability of the host. A blanket exclusion of tax matters from the applicability of BIPAs may be perceived to be extremely harsh. Therefore, excluding tax matters from the scope of only specific protections may help with retaining some autonomy with states while continuing to offer investment protection. Allowing some manoeuvrability to States, the exclusion of tax matters from the NT allows states to discriminate between their nationals and foreigners, and the exclusion of tax matters from MFN treatment allows states to discriminate among foreigners while designing their tax policies. Generally, tax matters are excluded from MFN treatment in BIPAs.

Japan - UAE BIT (2018)	• Paragraph 1 shall not be construed so as to oblige a Contracting Party to extend to investors of the other Contracting Party special tax advantages accorded to investors of a non-Contracting Party, on the basis of reciprocity with the non-Contracting Party or by virtue of any agreement relating to taxes in force between the former Contracting Party and the non-Contracting Party. **[Article 4(7)]**
Austria - Krygyzstan BIT (2016)	• No provision of this Agreement shall be construed.... (d) as to oblige a Contracting Party to extend to the investors of the other Contracting Party and to their investments or returns the present or future benefit of any treatment, preference or privilege resulting from obligations of a Contracting Party under an international agreement, international arrangement or domestic legislation regarding taxation. **[Article 3(4)]**
Israel - Myanmar BIT (2014)	• The provisions of this Agreement relative to the granting of treatment not less favourable than that accorded to the investors and investments of investors of either Contracting Party or of any third state shall not be construed so as to oblige one Contracting Party to extend to the investors and investments of investors of the other Contracting Party, the benefit of any treatment, preference or privilege resulting from: (i) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation **[Article 7(2)]**

In some treaties, even though tax matters may be an exception to national treatment protection, some basic protections are still offered. For instance, foreigners and nationals are required to be afforded the same level of access to justice when it comes to taxation matters, even though tax matters are excluded from the overall national treatment protection.

Specific and explicit exclusion to Fair and Equitable Treatment

The Fair and Equitable Treatment ("**FET**") is the minimum standard of protection offered under BIPAs. There is no standard definition of what constitutes fair and equitable treatment even though it is an absolute standard. The standard is often explained with instances that would not constitute fair and equitable treatment. Due to its vague nature, several claims have been pinned on this standard. This is perhaps why the FET standard does not apply to taxation measures in some treaties.

Japan - Oman BIT (2015)	•1. Nothing in this Agreement shall apply to taxation measures except as expressly provided for in paragraphs 3 and 4 of this Article. 2. Nothing in this Agreement shall affect the rights and obligations of either Contracting Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency. 3. Article 10 (Expropriation and Compensation) shall apply to taxation measures. 4. Article 15 (Settlement of Investment Disputes between a Contracting Party and an Investor of the Other Contracting Party) shall apply to disputes regarding taxation measures to the extent covered by paragraph 3. **[Article 20]**
Canada - Tanzania BIT (2013)	•Subject to paragraph 2, the provisions of Articles 4 (National Treatment) and 5 (Most Favoured Nation Treatment) shall apply to all taxation measures, other than taxation measures on income, capital gains or on the taxable capital of corporations,...**[Article 14(4)]**

Combination of diverse exceptions within an exclusion

States are at liberty to use a mixed bag of inclusions and exclusions from substantive protections under their BIPAs. BIPAs nowadays have complex structures that warrant a detailed understanding of their scope. For instance, the Canada – Tanzania BIT (2013), lays out various treatments that either apply or do not apply to taxation measures. The taxation measures further exclude taxes that are in the nature of direct taxes. It also provides the procedure to be followed by the respective tax authorities for the determination of tax measures that are subject to the Tribunal's jurisdiction.[114]

[114] Canada – Tanzania BIT (2013), Article 14 (Taxation Measures).

2.2.2. Interpretation of tax carve-out under the BIPAs

For the purpose of understanding the interpretation adopted by arbitral tribunals, the above-discussed tax carve-outs can be brought under three broad categories general tax carve-outs, limited tax carve-outs and claw-backs. While general tax carve-outs can provide a State's tax measures complete impunity from treaty scrutiny, limited tax carve-outs ensure the investor some, if not all, forms of protection. Contrary to the functions of a tax carve-out, a clawback is commonly found within a carve-out provision, allowing the Tribunal to reclaim its jurisdiction over certain matters.

For arbitral tribunals, deciding whether measures are carve-out or not is crucial, and usually, the first step to determining their jurisdiction over the dispute. Therefore, it is pertinent to understand the interpretations adopted by the Tribunals so far.

General Tax-Carve Out

It is the most convenient type of tax carve-out for States who strongly oppose the jurisdiction of the Tribunal over their tax measures. A general tax carve-out makes the entire treaty inapplicable to a claim against tax measures. Hence, the State has no duty to ensure the substantive protections provided under the treaty.

Regardless of the complete protection that such type of tax carve-out provides to a State, most investment treaties do not contain a general tax carve-out. States did not anticipate the increasing usage of the investment treaties for disputing tax matters, hence, negotiating a general tax carve-out was not found essential.[115] A general tax carve-out is gradually becoming more common than before in the new generation of investment treaties. However, States must note that a general tax carve-out does not assure complete immunity. The Tribunals continue to provide certain treaty protections against tax measures despite a general tax care-out.

Regardless of the blanket exemption imposed against the application of the treaty to tax measures, the Tribunals have limited the scope of the general tax carve-out when the measure was found not to be a *bona fide* tax measure. Prominent cases in this context are those filed by investors against the tax measures imposed by Russia during the Yukos saga.[116] The Russian government was dragged to international arbitration tribunals by investors who claimed that the measures of the State violated the substantive protections provided under the relevant treaties. Regardless of the general tax carve-out, the Tribunals awarded in favour of the investors as they observed that no kind of tax carve-out could justify the arbitrary and coercive measures taken by the State. Two BIPA disputes emerged during the Yukos saga, the cases of *Renta v. Russia*[117] and *RosInvest v. Russia*, wherein the investors invoked the

[115] Prabhash Ranjan, '*India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash'*, (Oxford University Press, 2019).

[116] "The Yukos saga started in 2005 when VPL, YUL and Hulley (Yukos's shareholders) filed requests for arbitration in United Nations Commission on International Trade Law arbitration proceedings administrated by the Permanent Court of Arbitration seated in The Hague. In 2014 Russia was ordered to pay $50 billion in damages to Yukos's shareholders under the Energy Charter Treaty (ECT) (the Yukos awards). The tribunal held that Russia, by expropriating Yukos's shareholders' investments in OAO Yukos Oil Company, had breached Articles 10 (fair and equitable treatment of investors) and 13 (wrongful expropriation) of the ECT." *See*, Klinger B., *'End of Yukos Saga may be in sight – Ultimate Attempts to Set Aside $57 billion awards are likely to fail'*, Freshfields Bruckhaus Deringer, available at: https://www.lexology.com/commentary/arbitration-adr/netherlands/freshfields-bruckhaus-deringer-llp/end-of-yukos-saga-may-be-in-sight-ultimate-attempts-to-set-aside-57-billion-awards-are-likely-to-fail. [Accessed on 29 March 2023]

[117] *Renta 4 S.V.S.A. and others v. The Russian Federation*, SCC Case No. 24/2007, Russia-Spain BIT (1990).

Most-Favoured Nations clause[118] provided under their respective BIPAs[119] to claim substantive protections under the Denmark-Russia BIPA (1993). The Russian government opposed the application of the Danish BIPA on the basis that the said BIPA contains a general tax carve-out.[120] However, both Tribunals refused to apply the general tax carve-out due to the lack of *bona fide* intent behind the application of tax measures by the Russian government. In *RosInvest*, the Tribunal refused to consider the expropriation caused by tax measures independent from the expropriation caused by a cumulative combination of other measures.[121] Similarly, the Tribunal in the case of *Renta*, referred to the government decree which stated, "*all tax inspectors are henceforth instructed to collect everything they can get their hands on from Danish investors*" and refused to allow the general tax carve-out by stating that the State was abusing its power to tax and allowing such treatment of investors escape through a "*loophole*" would be absurd.[122]

From both these cases, it is evident that though general tax carve-outs make the entire treaty inapplicable on the tax measure, the same cannot be misused by states to defend tax measures imposed without a *bona fide* intent. Therefore, the Tribunal can still assert its jurisdiction over tax measures if it finds that the same was implemented without a *bona fide* intent, irrespective of a general tax carve-out.

Limited tax carve-out

The common form of tax carve-out present in most investment treaties is a limited tax carve-out. There are types of limited tax carve-outs that differ with respect to substantive protections covered under such provisions. Such tax carve-outs ensure that, other than the protections carved-out, the rest are guaranteed to the investors under the investment treaty when challenging the tax measures. Despite the specificity of such provisions, several disputes before the Tribunals challenged the application of the limited tax carve-outs, inviting the Tribunals' interpretation, which followed the trend of inconsistency through their decisions.

It is generally understood that a limited tax carve-out implies that the specific provision referred to by the tax carve-out is not applicable in the cases of tax measures. This simpler understanding was adopted by several Tribunals, such as in the case of *Burlington v. Ecuador*, wherein it was held that the limited tax carve-out under Article X of Ecuador-US BIT (1993) does not permit the Tribunal to hear matters of taxation which do not fall within its limited scope.[123] An obvious implication of a limited tax carve-out is that the remaining provisions of the Treaty are applicable to the investor. This was acknowledged by the Tribunal of *Alghanim v. Jordan*, which held that a limited tax carve-out under Article 4 of the Jordan-Kuwait BIT (2001) that guarantees most-favoured nations treatment, national treatment and fair and equitable treatment could not be the basis to refuse any remaining protections to the investors.[124] Similarly, the Tribunal in the *Cairn* dispute refused to admit the Indian government's argument that a tax carve-out under Article 4 of the India-UK BIT (1994), which guaranteed MFN and NT, should be applied to Article 3 which guaranteed fair and equitable treatment to the investments.[125]

---

[118] As per the principle of Most Favoured Nation, a country must treat all its treaty partners equally, i.e., no country shall be granted treatment that makes it more favoured than the rest. In a treaty context, an MFN provision allows the claimant to adopt provisions from other treaties signed by the country that provide more favourable treatment.
[119] The MFN treatment is guaranteed under Article 5 of the Russia-Spain BIT (1990) and Article 3 of Russia– UK BIT (1989).
[120] RosInvest Final Award, para. 263; Renta Award of Preliminary Objections, para. 74.
[121] RosInvest Final Award, para. 271.
[122] "*To think that ten words appearing in a miscellany of incidental provisions near the end of the Danish BIT would provide a loophole to escape the central undertakings of investor protection would be absurd. Complaints about types and levels of taxation are one thing. Complaints about abuse of the power to tax are something else. A "decree" to the effect that "all tax inspectors are henceforth instructed to collect everything they can get their hands on from Danish investors" would not be insulated because of Article 11(3) of the BIT. Abuse and pretext are at the heart of the Claimants' allegations. Whether they are true is a matter for the merits.".* Renta Award Preliminary Objections, para. 74.
[123] Burlington Decision of Jurisdiction, para. 249.
[124] *Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Jordan-Kuwait BIT (2001), Award dated 14 December 2017, para. 124.
[125] Cairn Final Award, para. 827.

An implied limited tax carve-out is also found in treaties where a carve-out resulted from a specific inclusion in the provisions. This was observed in the case of *Mobil v. Venezuela*, where the investors challenged the sudden increase in royalty and income tax rates. As per the applicable treaty of Netherlands-Venezuela BIT (1991), tax measures were subject to merely the MFN and NT provision of the Treaty.[126] The investors claimed protection under Article 3 of the Treaty, which provided fair and equitable treatment by arguing that no tax carve-out was mentioned under the said provision.[127] The Tribunal observed that an express inclusion of taxation measures under Article 4 implies an exclusion from the remaining provisions of the Treaty.[128] Hence, the Tribunal interpreted the limited tax carve-out (or, in this case, a limited inclusion of tax measures) to hold that the tax measures cannot be subject the to remaining provisions of the Treaty.

Nonetheless, a limited tax carve-out can be overlooked if it is found that the remaining provisions of the treaty are linked with the relevant provisions. For instance, Article XII of the Argentina-US BIT allows claims against matters of taxation under limited circumstances which includes, *inter alia*, for cases of expropriation. When this provision was invoked in the case of *Enron v. Argentina*, the Tribunal held that once expropriation is established, the remaining provisions become operational as well, forming a "*chain of linkages between the pertinent provisions*".[129] Therefore, the remaining protections under the Treaty including, FET, full protection and security, non-discrimination provisions, transparency and, most importantly, Article VII of the treaty which guarantees settlement of disputes for matters of taxation become available to the investor.[130] This interpretation ensures a logical link between the protections, i.e., protections are not rendered infructuous for the mere reason of inapplicability of selected provisions.

Claw-back Provisions

A claw-back provision is usually found within a tax carve-out which allows "clawing back" of certain protections which would have otherwise been carved-out from the treaty. It is akin to being an exception to the exception as it nullifies the impact of a tax carve-out with respect to certain protections that are brought back as exceptions. A common claw back provision is related to expropriation. For instance, several claims against Russia during the Yukos saga were based on Article 21 of the ECT, which provides a general tax carve-out under clause (1) but further lists several exceptions to the carve-out, especially regarding expropriation and non-discrimination clauses. The Tribunal of *Hulley v. Russia* emphasises the need for an interpretation that ensures a balance between tax carve-outs and claw-backs. In this case, sub-clause (1) of the provision carves-out "taxation measures" which is defined to include provisions of domestic law and tax treaties. Sub-clause (5) provided a claw-back which referred to just "taxes" and did not define the same. The State, whose collection and enforcement measures were being challenged, argued that these measures constitute "taxation measures" and not "taxes", hence, carved-out from the application of ECT protections and not subject to the claw-back.[131] The Tribunal disagreed with this interpretation and stated that an interpretation which results in a broad carve-out and a narrow claw-back would defeat the object and purpose of a claw-back and the treaty.[132] Therefore, any measure covered by the carve-out was to be equally covered by the claw-back[133] and hence, the Tribunal shall have jurisdiction over the same.[134] The Tribunal of *Yukos v. Russia* called this an "indirect jurisdiction" as the claimed carve-out was brought back by the claw-back.[135]

---

[126] Article 4 of the Netherlands-Venezuela BIT (1991).
[127] *Mobil and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Netherlands-Venezuela BIT (1991), Award dated 09 October 2014, para. 228.
[128] Mobil Award, para 247.
[129] Enron Decision of Jurisdiction, para. 65-66.
[130] Enron Decision of Jurisdiction, para. 66.
[131] *Hulley Enterprises Ltd. v. The Russian Federation*, PCA Case No. 2005-03/AA226, The Energy Charter Treaty (1994), Final Award dated 18 July 2014, para. 1410-1411.
[132] *Ibid.*, para. 1413.
[133] *Ibid.*, para. 1416.
[134] *Ibid.*, para. 1429.
[135] Yukos Final Award, para. 1406.

Several BIPAs also provide similar clawbacks. For instance, the series of claims brought against Argentina that challenged the tax assessments conducted by the government were based on the Argentina-US BIT (1991). Article XII (2) of the Treaty begins by stating, "*Nevertheless, the provisions of this Treaty, and in particular Article VII and VIII, shall apply to matters of taxation only with respect to the following…*". The Tribunal interpreted this sentence in the case of *El Paso v. Argentina* to imply "exceptions to exceptions".[136] This meant that investors could challenge the taxation measures under the specific provisions listed by the claw-back provision. A claw-back is essential for understanding carve-outs as the scope of the latter can be limited by the former, therefore, creating 'exceptions to exceptions' as referred to by the *El Paso* Tribunal.

2.3. Emerging Trend: Instituting Carve-outs as a Jurisdictional Proposition

With the increasing instances of Tribunals asserting their jurisdictions over what the States contend to be tax measures, several of these States have begun to adopt defensive measures to prevent such disputes in the future. An emerging trend amongst States to defend their tax laws from the scrutiny of a Tribunal is denying the very power of a Tribunal to determine its jurisdiction.

The determination of a 'tax measure' and the application of a tax carve-out thereof, for the purpose of applicability of a BIPA, is part of a Tribunal's power to determine its own jurisdiction. This power to determine a Tribunal's jurisdiction is commonly referred to as the principle of *Kompetenz-Kompetenz*. This principle is particularly of concern when it comes to tax measures as it allows a Tribunal to determine what constitutes a 'tax measure' and whether its jurisdiction is limited by the carve-out. It is at this stage that States' contentions are raised.

Several States, including India, attempted to restrict this power of the Tribunal. BIPAs are amended to include in their tax carve-out a clause that provides the competent authorities of the concerned States the power to determine the nature of a measure. If the competent authorities decide that it is a tax measure and falls within the tax carve-out, then the same will be outside the jurisdiction of the Tribunals. These clauses also do not permit investors to challenge this decision.

There are certain variations within these types of tax carve-outs as well. For instance, the tax carve-out under the Norway Model BIT[137] provides for a general carve-out for tax measures. To determine the applicability of the Agreement, it proposes the formation of a Joint Committee that consists of competent authorities from the Contracting States. The Committee decides the nature of the measure and determines the application of the BIPA, specifically the application of the dispute settlement provisions. A similar provision is found in the Model BIPA of Canada (2021), wherein a concerned investor can request a joint determination by the taxation authorities.[138] The Model also provides for limitation periods within which the decision must be rendered. India's Revised Model BIT grants similar power to the competent authorities. However, it neither provides for any specific committee to be formed nor includes limitation periods. In addition, the clause specifies that the decision of the competent authority can be exercised even after the commencement of the arbitral proceedings, and the same is non-justiciable and shall not be open to review.[139]

Such provisions go against the principle of *Kompetenz-Kompetenz* and limit the jurisdiction of Tribunals when it comes to tax measures. While this may answer the contradictions between awards of Tribunals, it only extends the uncertainty around such disputes. Norway's and India's Revised Model BITs do not consist of any limitation periods within which the decisions of the competent authority are to be rendered. In India's case, the decision can be rendered even after the Tribunal has passed an award,

[136] *El Paso Energy International Company v. Argentina Republic*, ICSID Case No. ARB/03/15, Argentina-USA BIT (1991), Decision on Jurisdiction dated 27 April 2006, para. 113-114.
[137] The tax carve-out is similar under Norway's 2007 Model BIT and the Revised Model BIT (2015), Article 28.
[138] Article 11, Canada, Foreign Investment Promotion and Protection Model.
[139] Article 2.4 (ii), Indian Revised Model BIT (2015).

therefore, if an award is passed against the interests of a State, the concerned competent authorities can decide against the jurisdiction of the Tribunal and cause the award to be *void ab initio*.

Nonetheless, these treaties showcase the direction that States are now heading towards. As the States continue to base their future BIPAs on these Models, it will become difficult for an investor to bring a claim under the Tribunal's jurisdiction if States believe that the challenged measure constitutes a tax measure.

2.4. Conclusion

So far, the interpretation of Tribunals with respect to what constitutes to 'tax measure' and the type of tax carve-out provides equal scope for investors and States to make a case in their favour. This uncertainty reflects possible disputes in the future. However, as discussed, there is an increasing trend in favour of restricting the jurisdiction of the Tribunal. It can only be speculated how determination by a State's tax authority will change the landscape. There are arguments on both the ends. On one end, it can be understood to be providing States with the power to protect their sovereign right to tax and leave investors with uncertainty. On the other end, this may be the foundation for a more unified approach toward such disputes as several States seem to take a similar stand. Either way, it is clear that States are, and will continue to be, protective when it comes to their tax measures.

3. DTCs as International Tax Law

The sovereign right of a State to tax is not unlimited, there must be a nexus.[140] Due to the increase in cross-border transactions, to avoid instances of double taxation and double non-taxation (prevention of fiscal evasion) caused by cross-border transactions or activities, States agree to share their taxing rights through DTCs. With over 3,000 DTCs currently in effect[141,] they have gained prominence and play a crucial role in international tax practice. Considering the discussions surrounding DTCs on international platforms, such as OECD and the UN, it is evident that DTCs are utilised as the primary instruments to address issues arising from cross-border taxation.

Regardless of the importance associated with DTCs in international tax practice, tax disputes are becoming common in international investment practice. An uncertain tax regime of a country impacts its foreign investments.[142] Hence, a strong relationship can be identified between the two fields, which generates a question over the possible overlap between the two jurisprudences. Several provisions of BIPAs, such as fair and equitable treatment, transfer of funds, expropriation, and public policy exception, are identified to impact tax policymaking and tax-related measures.[143] Likewise, investment tribunals have witnessed a number of disputes arising out of taxation measures, decisions which are reshaping the jurisprudence surrounding tax matters.[144] Considering this, it is crucial to discuss the interplay between DTCs and BIPAs when addressing disputes arising from tax measures.

To understand the interplay between DTCs and BIPAs, this Chapter:

(a) Introduces DTCs and discusses their role in regulating international tax law;
(b) Highlights the relevance of understanding DTCs and BIPAs together by listing the differences and overlaps between both regimes;
(c) Analyses DTC-related tax carve-outs in BIPAs and how the investment arbitral tribunals interpret them.

3.1. DTCs as International Tax Law

The consistent increase in cross-border transactions and labour mobility is mirrored by the changes taking place in the field of international taxation. An evident consequence of the increase in a cross-border transaction is instances of double taxation, wherein, the same income is taxed by two jurisdictions due to unclear allocation of taxing rights between the States. Since taxing rights are dear to a sovereign, the international tax community agreed on using a medium, i.e. DTCs, through which they commit to surrender, entirely or partially, their taxing rights over certain cross-border transactions.

To ensure uniformity amongst DTCs, countries base their negotiations on Model Tax Conventions ("**MTC**"). Initiated by the League of Nations, an MTC consists of several clauses that allocate taxing rights between States and address, *inter alia*, prevention of double taxation, non-discrimination, dispute

---

[140] Michael Lang, '*Introduction to the Law of Double Taxation Conventions*', (IBFD 3rd ed 2021) at 1.
[141] Brian Arnold, '*An introduction to Tax Treaties*', United Nations, available at https://www.un.org/development/desa/financing/document/introduction-tax-treaties-brian-arnold. [Accessed on 29 March 2023]
142 Luis Flavio Neto, Baseball Arbitration: The Trendiest Alternative Dispute Resolution Mechanism in International Taxation (October 3, 2019). In: International Tax Studies (ITAXS). - Amsterdam. - Vol. 2 (2019), no. 8 (special issue); at 2., available at SSRN: https://ssrn.com/abstract=4231140. [Accessed on 05 April 2023]
[143] UNCTAD, International Investment Agreements and Their Implications for Tax Measures, UNCTAD/DIAE/PCB/INF/2021/3 at 8.
[144] Julien Chaisse, '*Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?*', Virginia Tax Review Vol. 42, Issue 2, at 149.

prevention, dispute resolution and exchange of information. The work on MTCs was continued by the OECD, which has ever since revised and released several MTCs on income and on capital for States' consideration.[145] Parallelly, the United Nations independently releases the UN Model, which deviates from the OECD MTC by providing more taxing rights to developing countries.[146]

Apart from these two models, countries independently maintain their own models for the purpose of negotiations with other countries. In some cases, these country models are published and publicly available (such as in the case of the United States). In some cases, the countries keep their model DTC confidential and use them as the base for negotiations with their prospective treaty partners. The significance of the models, both multilateral (i.e., OECD/UN Model) and bilateral (i.e., country-specific model), are multi-fold and crucial because these (a) give consistency to the tax treaty structure, (b) provide insights on the relative importance of a particular aspect (either on the distribution of taxation rights or other salient features of the tax law), (c) provide the basis for comparison and interpretation of tax treaties and thus, doubles up as the context and means of interpretation in terms of the settled principles of interpretation of treaties under the customary international law, (d) act as evidence of State practice which is a necessary ingredient under the standard international law principles, (e) the pivot and standard referencing point towards global harmonisation and codification as customary international law, etc. In other words, DTCs serve as the starting point and the basis for the evolution of customary international law in the area of international tax policy and law. Thus, it is perhaps not an outrageous or misplaced conclusion that the DTCs are the international law on this subject.

3.1.1. Scope of DTCs

Chapter 1 of the OECD MTC defines the scope of a DTC, i.e., it includes the persons covered (Article 1) and the taxes covered (Article 2). The terms of the DTC are applicable to persons that are residents of one or both the Contracting States (States signing the agreement). The term "person" includes a natural (an individual) or a juridical person (a company or body of persons),[147] and their residence is determined by several criterions such as domicile, residence, place of management, etc.[148] Article 4 of the OECD addresses circumstances wherein the person is a resident of both the Contracting States. It states that the status of the residence in such circumstances shall be determined based on the location of the permanent home, centre of vital interest, habitual abode or as decided by the competent authorities (in this specific order).[149] If none of these criteria are sufficient to determine the residence, then nationality is considered to determine the residence of an individual and the place of effective management (POEM) for a corporation. Hence, nationality is not the primary criterion.[150] Further, regardless of establishing one's residency, benefits under the DTC can still be rejected in certain circumstances.[151]

Article 2 of the OECD MTC covers the taxes covered, which are mentioned as taxes on income and on capital, instead of 'direct taxes' as the same is considered to be imprecise.[152] The authority levying taxes and the method of levying taxes are considered immaterial.[153] In some DTCs, the taxes covered also include the duties and charges "accessory" to them though not exclusively mentioned, i.e., it also covers

---

[145] Released models in 1963, 1977 and 1992. Developed them further in 1994, 1995, 1997, 2000, 2002, 2005, 2008, 2010, 2014 and 2017. *See*, Michael Lang, *'Introduction to the Law of Double Taxation Conventions'*, (IBFD & Linde International 3rd edition, 2021), para. 24.

[146] First published in 1980 and subsequently revised models in 2001, 2011 and 2017. *See*. Michael Lang, *'Introduction to the Law of Double Taxation Conventions'*, (IBFD & Linde International 3rd edition, 2021), para. 25-26.

[147] Article 3(1)(a) of the OECD Model Tax Convention.

[148] Article 4 of the OECD MTC.

[149] Article 4 of the OECD MTC.

[150] Article 1, para. 1, OECD Commentary on MTC 2017. Also mentioned under Article 4(2), OECD Commentary.

[151] For instance, Article 29(9) of the OECD MTC encapsulates the Principal Purpose Test, according to which, benefits can be denied to a resident if it is found that the principal purpose of the transaction was to obtain the benefit.

[152] Article 2, OECD Commentary on MTC, at 225.

[153] *Ibid.*

the related costs, interests, penalties, etc.[154] The Article provides for the Contracting States to agree upon an exhaustive list of taxes that are to be covered by the DTC. Further to the taxes listed, any identical or substantially similar taxes also fall within the scope of the DTC.[155]

3.1.2. Rights Emanating from DTCs

In addition to the aforesaid observations on the nature and significance of DTC, it is evident that the primary function of a DTC is the allocation of taxing rights between the Contracting States. This benefits the nationals subject to the DTC by preventing their income from being taxed more than once. Chapter III (Article 6 to 21) of the OECD MTC covers the allocation of rights over taxation of income and Chapter IV (Article 22) covers the allocation of rights over taxation of capital. These rights are divided between a 'resident state', i.e., where the person is liable to tax due to their domicile, residence, place of management or any other criterion[156], and a 'source state', i.e., where the income or capital gain is generated[157]. The provisions of the OECD and the UN largely vary in these aspects, for instance, Article 12 of the OECD MTC gives the resident state the exclusive right to tax royalties, however, Article 12 of the UN MTC deviates from the same by providing the source state with limited taxing rights over royalties that are deemed to have arisen from the source state.[158] Further, there are several other provisions that further support the primary function of allocating taxing rights. For instance, the OECD MTC also provides methods for the elimination of double taxation[159] that can be utilized by the Contracting States when determining the tax liability.

To ensure that the benefits are provided uniformly between nationals of various States, the OECD MTC also includes a provision for non-discrimination (Article 24 of the OECD MTC), which provides that a State cannot discriminate between national and foreign entities for the purpose of taxation.[160] That is, the treatment accorded to nationals of the Contracting State must be treated equal to the treatment accorded to the nationals of the State (National Treatment) and to the nationals of any third State (Most-Favoured Nation). However, benefits can also be denied if the transaction fails the Principal Purpose Test ("**PPT**"). The concept of PPT was introduced under Action 6 of the OECD BEPS Project[161]. It states that the benefits of the MTC will be denied if it can be reasonably concluded that the principal purpose of an arrangement or transaction was to only benefit from the treaty. This is a crucial concept as a taxpayer can be denied of any benefits under the DTCs, hence, may lead to double taxation as there are no limitations on the taxing rights of the Contracting States.

3.1.3. Dispute Resolution as an Independent, Significant and Integral Part

In case a taxpayer is aggrieved due to differences in understanding or interpretation of a DTC between the two Contracting States, legal protection can be opted.[162] This is provided through the Mutual Agreement Procedure ("**MAP**") under Article 25 of the OECD MTC, wherein a taxpayer can approach

---

[154] *Ibid.*, at 226.
[155] OECD Commentary on MTC, at 227.
[156] Article 4, OECD MTC.
[157] Either due to the presence of a permanent establishment (As per Article 5 of the OECD MTC, a 'permanent establishment' is a fixed place of business through which the business of an enterprise is wholly or partially carried on), or due to accrual of income such as dividends (Article 10), interest (Article 11) and royalty (Article 12).
[158] Michael Lang, *'Introduction to the Law of Double Taxation Conventions'*, Linde International, para. 298-305.
[159] Chapter V of the OECD MTC provides for Exemption Method and Credit Method.
[160] Michael Lang, *'Introduction to the Law of Double Taxation Conventions'*, Linde International, para. 476.
[161] In 2013, the OECD introduced *Addressing Base Erosion and Profit Shifting Project*, following which, along with the G-20 countries, the OECD/G20 BEPS Project was adopted, wherein it identified 15-point Action Plan to address BEPS. Action 6 of the OECD/G20 BEPS Project identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns.
[162] Michael Lang, *'Introduction to the Law of Double Taxation Conventions'*, (IBFD & Linde International 3rd edition, 2021), para. 493.

the authority in charge ("competent authority" or "CA") of either of the States[163] and request for initiation of the MAP. This helps a taxpayer avoid difficulties that may arise due to differential interpretation of the DTC by domestic forums of the Contracting States.[164] To initiate MAP, it is not necessary that a taxpayer must be treated in a manner contrary to the DTC, an anticipation of the same is also sufficient to invoke the DTC.[165] Therefore, establishing the probability of an impact due to a country's tax provisions can be a sufficient ground for a taxpayer.

Once MAP is initiated, the CA of each of the Contracting States negotiate and attempt to reach a mutual understanding of the DTC. However, it is not necessary that the CA must reach a common understanding. Hence, it is possible that a taxpayer may not receive any solution from the MAP. To address this concern of uncertainty under the MAP, the OECD MTC also provides for Arbitration. Article 25(5) provides for arbitration in two situations:

(a) When the outcome of the MAP resulted in taxation not in accordance with the DTC and,
(b) When the CAs were unable to reach a conclusion within two years from the date of receiving all the relevant information from the taxpayer. Article 25 of the UN MTC allows only the CAs to initiate arbitration proceedings when the dispute is not resolved through MAP within three years and allows for the CAs to deviate from the Arbitral decision if a solution is reached within six months from the date of the arbitration decision.

3.1.4. Shift towards Multilateralism

Unlike the indirect tax law, there is a limited inclination for direct tax convergence under a multilateral framework. To illustrate, the customs law framework is internationally aligned under the aegis of the World Customs Organisation ("**WCO**"), whereas most areas of international convergence in the area of indirect taxes occur by way of binding agreements under the framework of the World Trade Organisation ("**WTO**"). The WCO framework has been consistently unifying, *inter alia*, the trade-related categorisation of the goods subject to international trade, besides resolving the differences amongst different countries on the classification, etc. and has been in vogue for many decades now. The WTO has taken over from its precursor, the GATT, to provide a multilateral framework covering *inter alia* trade in goods and services, intellectual property rights, trade-related investment measures, etc. Thus, it is evident that there exists significant multilateral harmonisation in the indirect tax framework. In comparison, the attempt of the international tax community to shift from a bilateral to a multilateral framework is comparatively new and fairly unprecedented.

The first real attempt towards introducing a multilateral framework in the international tax fraternity is perhaps the OECD/G20 BEPS Project. The OECD/ G20 BEPS Project aimed at filling the gaps existing between the DTCs, which were exploited by multinational entities to evade taxes. One of the outcomes of the BEPS Project is the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**Multilateral Instrument**" or "**MLI**"), which was introduced in 2016.[166] It came into force on 1st July 2018 and covers 100 jurisdictions.[167] The MLI functions parallel to the existing DTCs, i.e., once a jurisdiction signs the MLI and notifies the list of treaties it agrees to apply the MLI to, then the same gets automatically amended, provided the Contracting State performs the same.[168] While States have the option to make reservations against certain provisions of the MLI, the

[163] As per the UN MTC, only the Competent Authority of the resident state can be approached.
[164] OECD Commentary on MTC, paragraphs 1 & 2 of Article 25, at 1182.
[165] OECD Commentary on MTC, paragraphs 1 & 2 of Article 25, at 1184.
[166] OECD, '*Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*', available at https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm. [Accessed on 28 March 2023]
[167] OECD, Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Status as of 28 June 2022, available at https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm. [Accessed on 28 March 2023]
[168] OECD, Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, para 13, available at https://www.oecd.org/tax/treaties/explanatory-

provisions that are introduced to enact the minimum standards of the BEPS Project must be followed by the States without any reservations.

The minimum standards under the BEPS Project include Action Plans- 5 (countering harmful tax practices through a focus on improving tax transparency), 6 (prevention of tax treaty abuse), 13 (country-by-country reporting) and 14 (Mutual Agreement Procedure).[169] The MLI also provides for a mandatory and binding arbitration procedure which is opted by 31 States.[170] This is provided under Article 19 of the MLI, which begins with text similar to Article 25 of the OECD MTC but thereafter extends to lay down the formal and procedural aspects of the arbitration procedure.[171] States can adopt either the last-best-offer type of arbitration (also called a final offer or 'baseball' arbitration) or independent opinion arbitration. The former is considered the default procedure unless the CAs agree to different rules.[172] Under this type of arbitration, both the CAs will each submit a proposed resolution that covers all the issues raised and the arbitration panel will then, through a simple majority, adopt one of the proposed resolutions. The latter type of arbitration, i.e., the independent opinion arbitration becomes the default approach if the last-best-offer is disagreed by the CAs. This type of arbitration provides for each of the CAs to provide the Arbitration Panel with information that is necessary for the Arbitration Panel to reach its independent opinion.[173] Mandatory and binding arbitration is also suggested under Pillar One that was introduced by the OECD to address the taxation of the digital economy. Unlike the arbitration under MLI, Pillar One suggests a review panel that is constituted by tax administrations belonging to each impacted jurisdiction, hence, attempting to settle concerns regarding the adjudication of tax matters by independent arbitrators.

The introduction of MLI marks an important touchstone for the international tax community as the bilateral nature of DTCs have for long created hurdles regardless of the efforts made by the international organisations and the States. Therefore, once the jurisdictions have signed and incorporated the provisions of the MLI, the differences in DTCs will minimise and they will function as a multilateral instrument due to the similarities in their provisions.

3.2. Positioning DTCs vis-à-vis BIPAs

Though both the treaties are negotiated separately and are usually not discussed in the same context, States anticipated a possible overlap when it comes to matters of taxation and, hence, used DTC-specific tax carve-outs in their respective BIPAs.[174] One of the most common forms of tax carve-outs, that even traditional BIPAs consist , prioritize DTCs over BIPAs in case of conflict between the provisions of the treaties. While the treaties differ with respect to their object and purpose and other fundamental provisions, several issues may arise if either of the treaties are interpreted without considering the other.

---

statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf. [Accessed on 28 March 2023]

[169] OECD, BEPS Actions, available at https://www.oecd.org/tax/beps/beps-actions/. [Accessed on 28 March 2023]

[170] The 31 States are: Andorra, Australia, Austria, Barbados, Belgium, Canada, Curaçao, Fiji, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Lesotho, Liechtenstein, Luxembourg, Malta, Mauritius, the Netherlands, New Zealand, Papua New Guinea, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. The positions of these states are available at: https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf. [Accessed on 28 March 2023]

[171] Harm Pit, '*Arbitration under the OECD Multilateral Instrument: Reservations, Options and Choices'*, Bulletin for International Taxation, (2017) Vol. 71, No. 10.

[172] OECD, *'Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting'*, para. 242, available at https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf. [Accessed on 30 March 2023]

[173] *Ibid*, para. 245.

[174] Cairn Final Award, para. 800.

3.2.1. Differences between the frameworks of DTCs and BIPAs

At the framework level, the purpose, design and mechanisms which form the basis of DTCs and BIPAs, do not echo each other. To mention a few differences, a DTC is entered with the objective to avoid double taxation and prevent fiscal evasion, whereas a BIPA is entered to ensure the promotion of investment and that the investments of foreign nationals are protected. The scope of the DTC is limited to direct taxes, i.e., tax on income and capital, whereas the scope of BIPA covers every matter that impacts foreign investment, hence, consists of a broader implication. Further, a DTC can be invoked if there exists a 'nexus' between the State and the fiscal activity.[175] On the other hand, a BIPA requires the investor to be a national of one of the States. A crucial difference is the method of dispute resolution adopted under both treaties. While a BIPA allows for arbitration, including investor-state arbitration, a DTC is restricted to the MAP (arbitration in a few cases, however, it is still debated and is not a common practice).

Particulars	**Double Taxation Conventions**	**Bilateral Investment Protection Agreements**
Object	• Avoidance of double taxation • Prevention of fiscal evasion • Promote Economic Cooperation between two countries	Promote and Protect Foreign Private Investment
Scope	Persons who are residents and taxes on income and capital	Foreign investors and investments
Foundational principles	Nexus based	Nationality based
Prominent guiding rules	OECD & UN MTC along with their Commentaries	ICSID & UNCITRAL rules
Benefits	Relief from double taxation	Substantive Protections (such as, FET and expropriation)
Dispute Resolution	MAP & Arbitration (only a few)	Arbitration
Parties to a Dispute	State-State	State-State & Investor-State
Number of Parties to the Treaty	Bilateral and/or Multilateral	Bilateral

3.2.2. Overlap between DTC and BIPA: Concomitant Issues

Regardless of these differences, the provisions of BIPAs may have an overreaching impact on DTCs. The primary objective of BIPAs is to promote foreign investments. The promotion of foreign investments is also one of the desired outcomes of DTC, as it encourages the same by promising investors (taxpayers) certainty in taxation. These agreements are bilateral international law instruments that have a comparable method of being applied to domestic tax regimes and, hence, share an identical status under domestic law. Both agreements are premised on the residence and can be applied only if the parties reside in one of the contracting states.

[175] OECD, '*Action 1 Tax Challenges Arising from Digitalisation*', available at https://www.oecd.org/tax/beps/beps-actions/action1/. [Accessed on 29 March 2023]

Another similarity is the presence of a MFN clause in these agreements, i.e., they provide for equal treatment of foreign individuals and businesses. The agreements also provide a system for resolving disputes, ensuring that foreign individuals and businesses have an effective remedy in the event of breach of the agreement.

Thus, despite their diverse application and methodology, BIPAs and DTCs contain several shared objectives, such as

- To aid the facilitation of foreign investment;
- To offer taxpayers greater certainty regarding the repercussions of an investment decision;
- To avoid discrimination against foreign investors and to ensure a level playing field;
- To establish a system for resolving disputes.

However, the provisions under BIPAs, when applied in matters of taxation, may facilitate unintended contradictions to the State's tax policy. BIPAs allow for investors to engage in nationality planning which facilitates investment structures that can be utilized to evade taxes. BIPAs also consist of broad provisions that do not take into account the impact they may cause in the context of taxation. Further, BIPAs provide for Investor-State arbitration which is greatly debated in the international tax community and opposed by States, especially the developing countries.

Nationality Planning Contravening PPT as a Conflict Between Competing Objectives of DTC versus BIPA

Establishing nationality is crucial for invoking provisions of a BIPA. In the case of companies, the criteria to be met for proving nationality, most of the times, is merely proving incorporation in a State.[176] If a company can establish that they are incorporated in a State as per the domestic legislation and can furnish a certificate of incorporation, then the same shall suffice to invoke the provisions of BIPA. Tribunals usually do not inquire further if this minimal criterion is satisfied. For instance, the Tribunal in *ADC v. Hungary*, was of the opinion that an inquiry into a corporate's nationality ends at establishing the State of incorporation and any further inquiry regarding the source of capital and the place of control, is irrelevant.[177] In this regard, the Tribunal denied the State's content to '*pierce the corporate veil'* of the corporation.[178] A similar stand was taken by the Tribunal in *Tokios Tokeles v. Ukraine*, wherein it was held that meeting the definition of nationality under the domestic law was sufficient and refused to look into the aspect of substantial business activity[179] since the relevant Lithuania – Ukraine BIT (1994) did not contain a denial of benefits clause.[180] In furtherance of the low threshold that is required to be met for establishing nationality, the Tribunals also do not interfere with nationality planning engaged by the investors. For instance, the Tribunal in *Aguas del Tunari v. Republic of Bolivia*, held that nationality planning is well within the purpose of a BIPA, i.e., the treaties can be used as *"portals"* through which investments are channelled.[181]

The above understanding of Tribunals can directly contradict the object and provisions of DTCs. Investors engage in treaty shopping by channelling their investments solely for the purpose of gaining benefits from the treaties . The DTCs incorporating the MLI framework, support the PPT which focuses on the purpose behind a transaction and does not allow treaty benefits if the principal purpose was to merely obtain treaty benefits. This is discussed in the OECD MTC (2017), which also states that benefits under the DTCs shall not be granted if it can be reasonably established that the principal purpose of the

---

[176] Christoph Schreuer, '*Nationality Planning, Contemporary Issues in International Arbitration and Mediation*: *The Fordham Papers'* (Brill, 2012), at 18.
[177] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Cyprus-Hungary BIT (1989), Award dated 02 October 2006, para. 357.
[178] *Ibid*., para. 358.
[179] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Lithuania-Ukraine BIT (1994), Decision of Jurisdiction dated 29 April 2004, para 37.
[180] *Ibid*., para. 36.
[181] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Bolivia-Netherlands BIT (1992), Decision on Respondent's Objections on Jurisdiction, ICSID Case No. ARB/02/3, para. 332.

transaction was to derive treaty benefits.[182] Until the incorporation of the MLI framework, a tax residency certificate was used as the basis for treaty claims.[183] However, with MLI framework in place and introduction of domestic tax anti-avoidance rules, mere holding of a tax residency certificate will not suffice if the tax administration finds that the fiscal domicile of the company is not matching the domicile under the certificate. Therefore, nationality planning that is permitted under BIPAs can directly contribute to violating the PPT, which is a crucial test under DTCs.[184]

Broad Protections under BIPA Crying Foul of Tax Evasion – Concerns under DTC?

DTCs cover taxation measures which are considered to either cause double taxation or double non-taxation. Relatively, BIPAs have a much broader scope as they cover any tax measures (subject to a tax carve-out), that deny any of the substantive protections provided. These protections can vary from specific protections (such as non-discrimination clauses) to broad protections (such as fair and equitable treatment). Such broad nature of BIPAs may, at times, intervene with the object of DTCs as these broad protections can lead to treaty shopping or nationality planning through 'mailbox' companies.[185]

Unless specifically denied under a BIPA, the protections provided may allow the routing of investments through 'mailbox' companies, i.e., entities that are established for the sole purpose of tax evasion. For instance, BIPAs generally provide a broad definition of 'investor', i.e., one can constitute an 'investor' under the treaties even without having a direct or majority ownership over the investment.[186] The term 'investment' is usually defined as "every kind of asset", therefore, an investor can channel their investments through any entity, even if it is incorporated merely to benefit from the favourable treatment under the relevant BIPAs.[187] Further, BIPAs obligate a Host State to ensure free inward and outward movement of funds, without the mention of restrictions that allow a Host State to restrict the transfer in case any tax obligations are not complied with.[188] Since BIPAs were drafted without taking into consideration the possible international tax implications, they lack the precautions that are essential for ensuring that treaties are not utilised to gain protection for actions resulting in tax evasion.

Objections to DTC-based Arbitration versus Arbitration as a BIPA Standard

One of the common concerns States have with matters of taxation being within the scope of BIPAs is that investment arbitral tribunals can assert their jurisdiction and adjudicate upon such matters. The dispute resolution mechanism provided under most BIPAs[189] includes the ISDS mechanism which provides for investors to challenge measures of the State which they consider to be in violation of the substantive measures guaranteed under the BIPA. Under this mechanism, investors and States are placed on a levelled platform, hence, providing investors with direct access to the dispute resolution mechanisms provided under the BIPAs. Due to this, several States have experienced important public

---

[182] Article 29(9), OECD Model Tax Convention on Income and on Capital, 2017.
[183] *Union of India vs Azadi Bachao Andolan*; (2004) 10 SCC 1.
[184] Hugues Salome, '*Is the End of Nationality Planning Nigh? Key Parallels between Double Taxation Treaties and IIAs',* Kluwer Arbitration Blog, November 17 2021, available at https://arbitrationblog.kluwerarbitration.com/2021/11/17/is-the-end-of-nationality-planning-nigh-key-parallels-between-double-taxation-treaties-and-iias/.
[185] UNCTAD, International Investment Agreements and Their Implications for Tax Measures, United Nations Conference on Trade and Development, UNCTAD/DIAE/PCB/INF/2021/3, at 9.
[186] *Ibid.*, at 13.
[187] *Ibid.*, at 13.
[188] *Ibid.*, at 34.
[189] As per David Gaukrodger & Kathryn Gordon, '*Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community'*, OECD Working Papers on International Investment 2012/03*, "96% of the sample treaties contain language on ISDS including both domestic courts and international arbitration (see treaty survey, figure 1). ISDS through international arbitration has become a common feature of IIAs – only 108 treaties, or 7% of the sample, do not provide for international arbitration. However, a few recent treaties, such as the Australia-United States FTA (2004), do not provide for investor-state arbitration*", p. 64, available at https://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf [Accessed on 29 March 2023]

policies being challenged by foreign investors.[190] Especially, when it comes to disputing taxation measures, States become more cautious as they attempt to protect their sovereign right.

Whether matters of taxation can be arbitrated is a debate that is ongoing for decades in the international tax community. The dispute resolution mechanism provided under most DTCs is the MAP (Article 25 of the OECD MTC). Under this mechanism, nationals who wish to raise a dispute are required to approach the competent authorities of their State or the Host State (under the UN Model the national can only approach their respective competent authority). Whether the competent authority is obligated to initiate MAP is still a point of debate as the provision only provides that the authority shall "endeavour", therefore, not obligated to initiate proceedings upon intimation by the national.[191] If the proceedings are initiated, it leads to the competent authorities negotiating the issue and attempting to reach a solution. The outcome of such proceedings is uncertain as authorities may or may not reach a solution favourable to the national or, at times, not reach a solution at all.[192]

The international tax community is engaged in the discussion of including mandatory arbitration under DTCs.[193] However, just a few States have agreed to it so far. The OECD conducted a virtual public consultation on February 1st 2021[194], to discuss its proposals regarding dispute prevention and resolution, one of which is mandatory arbitration. Several tax experts, especially those belonging to the developing countries, expressed concerns over mandatory arbitration. These concerns include, compromise of sovereignty, loss of revenue, politically motivated decisions, lack of jurisprudence, lack of common understanding of treaty interpretation, biased arbitrators, and finally, that it is not a level playing field as developing countries lack expertise and resources for engaging in an arbitration which can be expensive.[195]

These concerns of developing countries get side-lined when investors approach the ISDS mechanism under BIPAs. This issue is further supported by the fact that most tax disputes under the ISDS were lost by the developing countries.[196]

3.2.3. Understanding DTC-related Tax Carve-outs

Given the extent of interface and overlap, it is crucial to enlist the experience of the States to isolate the two treaties from each other and whether such attempts were sufficient. A DTC-related tax carve-out is common under BIPAs.[197] Several BIPAs contain tax carve-outs that specifically state that if there is a conflict between the provisions of the two treaties, then the provisions of the DTC shall prevail. However, there are variations within this form of a tax carve-out and Tribunals have also observed the relevance of the same.

---

[190] *Ibid*.
[191] Michael Lang, 'Introduction to the Law of Double Taxation Conventions', (IBFD & Linde International 3rd edn. 2021), para. 499 and 500.
[192] *Ibid*, para. 499 and 502.
[193] Action 14 of the OECD BEPS Action Plans.
[194] OECD, BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review, 18 November 2020 - 11 January 2021, available at https://www.oecd.org/tax/beps/public-consultation-document-beps-action-14-2020-review-november-2020.pdf [Accessed on 29 March 2023]
[195] OECD, Public Consultation Meeting on the 2020 Review of BEPS Action 14, 01 February 2021, available at https://www.oecd.org/tax/beps/public-consultation-meeting-2020-review-beps-action-14.htm [Accessed on 29 March 2023]
[196] Until 2016, 15 tax-related disputes were lost by 7 States, all of which are developing countries or transition economies: Mexico, Burundi, Peru, Argentina, Ecuador, Venezuela, and Russia. *See* Julien Chaisse, *'Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?'*, Virginia Tax Review, Vol 42, Issue 2, at 180.
[197] As per the UNCTAD Investment Policy database, over 500 Bilateral Investment Treaties refer to double taxation avoidance treaties.

General Tax Carve-out
Similar to the way a general tax carve-out functions, a DTC-related general tax carve-out excludes the application of the entire treaty to the extent the subject-matters are covered under the relevant DTC between the Contracting States. Such form of carve-out gives utmost priority to DTCs signed between the States and if any dispute arises, the States can utilize this carve-out in their defence if they believe that the subject-matter is already addressed under their respective DTC.

Brazil - United Arab Emirates BIT (2019)

Article 11 (2) Tax Measures

"For greater certainty, nothing in this Agreement shall:

a) affect the rights and obligations of the Parties arising out of any agreement to avoid, double taxation, current or future, of which a Party to this Agreement is a party or becomes a party;..."

Specific carve-out relating to MFN & NT provisions
The non-discrimination clauses under a DTC and BIPA are usually similarly worded, though their relevance differs since the treaties work towards different objectives. Nonetheless, to avoid any conflict that could be caused due to the similarities, some BIPAs include a DTC-related tax carve-out specifically within the MFN and NT provisions. These carve-outs specify that an investor cannot obligate the host State to accord them any benefits that are otherwise provided to investors of the third State through a DTC between the host State and the third State.

India - Lithuania BIT (2011)
ARTICLE 4

National Treatment and Most-Favoured-Nation Treatment

"The provisions of the paragraphs 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege accorded to the investors of any third State by virtue of ...

b) any existing or future agreements relating to avoidance of double taxation or any other matters relating to taxation"

Carve-out giving primacy to DTC dispute resolution mechanism
Finally, addressing the primary concern of the States, i.e., including a carve-out relating to the dispute resolution mechanism provided under BIPAs. These carve-outs specifically prioritize the dispute settlement mechanisms provided under the DTCs for matters covered by the same. As per this DTC-related tax carve-out, the provisions of the BIPA cannot be applied to matters that fall within the scope

Sri Lanka - United States of America BIT (1991)
Article XI (2)

"Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following: ...

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b), **to the extent they are not subject to the dispute settlement provisions of a convention for the avoidance of double taxation between the two Parties or** have been raised under such settlement provisions and are not resolved under the convention within a reasonable period of time."

of the dispute settlement mechanism provided under the DTC. Hence, ensuring that MAP is applicable to its fullest extent and arbitration can be avoided.

3.3. Tribunal's Jurisprudential Reflections

A common contention of States is that tax measures cannot be disputed under the provisions of BIPA since a specific treaty exists for that purpose, i.e., a DTC. However, as discussed, taxation measures or taxation-related measures were held to be within the jurisdiction of the Tribunal due to the interpretation adopted, regardless of the type of tax carve-out.

A DTC-related tax carve-out does not bar the Tribunal from affirming its jurisdiction on all matters of taxation. It is commonly observed by the Tribunals that the subject matter of both the treaties differ from each other. It is only restricted to the matters of taxation that are covered under a DTC, which are usually limited types of taxes, i.e., taxes relating to income and capital. For instance, in the case of *Occidental v. Ecuador (I)*, Article X of the Ecuador-US BIT (1993) was utilised by the State to contend that matters of taxation do not fall within the jurisdiction of the Tribunal.[198] The Article carved out matters that were within the scope of the dispute resolution under the relevant DTC. The investors opposed this contention by stating that DTC concerns only with matters of direct taxation, whereas the measure in dispute was a matter of indirect taxation.[199] The Tribunal sided with the investors on this aspect by stating that if all matters of taxation are covered under such type of carve-out then the BIPA would be rendered meaningless.[200]

Similarly, in *Ryan v. Poland*, the State made a similar contention that the Tribunal lacks jurisdiction over matters of taxation due to the DTC that Poland has with the US. Similar to the Ecuador-US BIT (1993), Article VI (2) of the Poland-US BIT (1990) also consists of a DTC-related tax carve-out that excludes only the matters covered under the dispute resolution mechanism of the DTC. In this case, the investor was denied deduction claimed for expenses towards management services availed by them. The State argued that this challenged measure is covered by Article 8 (Business Profits), 11 (Dividends), 13 (Royalties) and 15 (Personal Service) of the relevant DTC. However, the Tribunal disagreed with the State's contention by stating that deductions do not fall under any of the mentioned Articles of the DTC, hence, are not subject to the dispute resolution clause of the DTC.[201]

The discussion of the Tribunal in the *Cairn* dispute also becomes relevant for the current discussion. Though the dispute did not involve a DTC-related tax carve-out, the State argued that matters of taxation are covered by the relevant DTC, hence, are outside the scope of the BIPA.[202] This contention invited the Tribunal to delve into the distinction between the two treaties. The Tribunal first stated that both the treaties address different subject-matters, i.e., the former covers issues pertaining to double taxation and prevention of fiscal evasion with respect to taxes on income and capital, while the latter covers issues pertaining to certain standards of treatment guaranteed under the treaty.[203] The Tribunal further discussed that even if one considers both the treaties to be covering the same subject-matter, the BIPA shall prevail. The Tribunal reached this conclusion by applying Article 30 of the VCLT, which states that the rights and obligations covered under the successive treaty shall apply. In this case, the India-UK DTC (1994) predated the India-UK BIT (1995), hence, the Tribunal held that the provisions of the BIPA shall apply.[204]

---

[198] *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Ecuador-USA BIT (1993), Final Award dated 01 July 2014, para. 64.
[199] The investors also observe that there is no relevant DTC in place between Ecuador and the US for the State to take such a defence. See, Occidental Final Award, para. 66.
[200] *Ibid*, para. 68.
[201] *Vincent Ryan and others v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Poland-USA BIT (1990), Award dated 24 November 2015, para. 314-320.
[202] Cairn Final Award, para. 801.
[203] *Ibid*., para. 803.
[204] *Ibid*., para. 804.

3.4. Conclusion

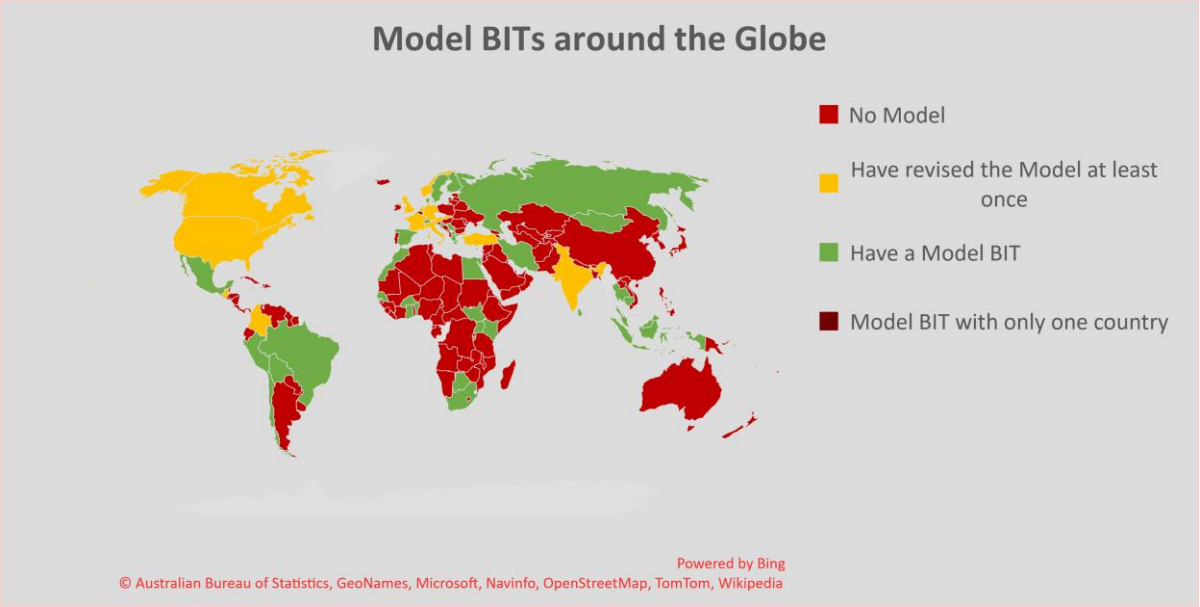
Though the DTCs and BIPAs belong to different regimes of international law, the possible overlap can be concerning for the international tax community. The provisions of BIPAs and the dispute resolution mechanism under these treaties provide investors with wider protections than that accorded by DTCs. It allows investors to be direct parties to disputes raised by them and provides a comprehensive solution, rather than a solution which is an outcome of negotiations between two sovereigns. Investors observed the greater certainty that came with disputing under BIPAs compared to DTCs. As a result, BIPAs became increasingly popular for resolving disputes relating to matters of taxation.

This overlap is a concern for States as shifting tax disputes from the tax regime to the investment regime can render the decades-long discussions amongst the international tax community futile. States considered these issues and accordingly formulated their Revised Model BIPAs. Unlike the traditional BIPAs, the revised versions aim at the complete exclusion of taxation matters from the ambit of BIPAs, avoiding any possible overlap between the regimes.

4. Model BIPAs – A study on Indian and Canadian Revised Models

A Model Bilateral Investment Protection Agreement ("**Model BIT**" or "**Model BIPA**") is a pre-drafted template of an investment protection agreement that is designed by a country and may be used as a starting point for negotiating future treaties. It is also used to negotiate investment chapters of FTA, Comprehensive Economic Partnership Agreements ("**CEPA**") and Comprehensive Economic Cooperation Agreements.[205]

The practice of developing such models is commonly found in countries with more investors and capital. The underlying idea of developing a Model BIPA is not to discourage extensive negotiation but to impose obligations that parties can realistically commit to.[206] It also offers some semblance of equality in contractual bargaining power between countries which may be absent if one of the countries is developed and the other developing. However, some scholars argue that instead of blindly adopting a Model BIPA, an effective BIPA is one that is drafted and negotiated on a case-by-case basis, being cognisant of the parties' circumstances, including their politics, economy, culture, and geography.[207]



Source: Model Agreements, (UNCTAD, International Investment Agreements Navigator)

[205] Ministry of External Affairs, '*India and Bilateral Investment Treaties*, Tenth Report, Parliamentary Committee on External Affairs (2020-2021), available at https://eparlib.nic.in/bitstream/123456789/811585/1/17_External_Affairs_10.pdf. [Accessed on 30 March 2023]
[206] Jeongho Nam, '*Model BIT: An Ideal Prototype or A Tool for Efficient Breach*', Georgetown Journal of International Law (2017), Vol. 48, Issue 4, at 1275, available at https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/05/48-4-Model-BIT.pdf. [Accessed on 30 March 2023]
[207] *Ibid.*

4.1. The Indian Experience

4.1.1. Background

India's treaty-making power is evident from Article 253 of the Constitution and this treaty making power is an aspect of external sovereignty. Further, Article 51 of the Constitution emphasises on the importance of amicably settling disputes arising out of an international convention by way of arbitration.

Article 253 of the Constitution of India
"Legislation for giving effect to international agreements—*Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."*

The oil crisis of 1973[208] created huge pressure on the balance of payments front in India, which continued for several years. To regulate or conserve foreign exchange, the Indian government decided to introduce a law. Thus, the Foreign Exchange Regulation Act, 1973 ("**FERA**"), came in the backdrop of major inflationary pressures and an adverse turn on the balance of payments front.[209]

Under section 29 of FERA, all non-banking foreign branch companies and rupee companies with foreign equity of more than 40% required RBI's permission to (a) carry on (b) establish (c) purchase shares of and (d) acquire wholly or partly any undertaking engaged in activities whether of trading, commercial or industrial nature. If no application was made or permission was rejected, the company would have to shut shop. In 1978, Union Law Minister, emphasised the need for self-reliance rather than inviting big foreign capital. Other ministers also showed that they were against any liberal policy towards foreign capital.[210]

Later, the 1991 Gulf War led to a dramatic rise in oil prices, which coupled with falling remittances from Indians working overseas, translated into a sharp dip in India's forex reserves.[211] Around the same time, India also struggled with a deteriorating fiscal deficit, ever-increasing foreign debt and double-digit inflation.[212] The government came up with several immediate measures to mitigate the crisis and also ushered in structural reforms by way of revamping its licensing process, introducing tradeable Exim scrips, and allowing the private sector to make its own imports, etc. The country was compelled to pledge its gold holdings with the Bank of England, which it did in four tranches and managed to raise $400 million.

India's reluctance to take a stand against Iraq during the Gulf War was criticised for multiple reasons. Some questioned the wisdom of applying old standards to the first major crisis of the post-cold war era.

---

[208] The members of the Organisation of Arab Petroleum Exporting Countries proclaimed an oil embargo that was targeted against nations that had supported Israel in the Yom Kippur War. The embargo sent oil prices through the roof.

[209] Shaji Vikraman, *'Express Economic History Series- 3: How 'draconian' FERA clause triggered flush of retail investors'*, Indian Express, updated on 5 April 2017, available at https://indianexpress.com/article/explained/express-economic-history-series-3-how-draconian-fera-clause-triggered-flush-of-retail-investors/. [Accessed on 29 March 2023]

[210] Sudip Chaudhuri, "*FERA: Appearance and Reality*." Economic and Political Weekly, vol. 14, no. 16, at 734–44, available at http://www.jstor.org/stable/4367526. [Accessed on 29 March 2023]

[211] Remya Nair, *'How Narasimha Rao and Manmohan Singh rescued India in 1991 and made history'*, 23 July 2021, The Print, available at https://theprint.in/economy/how-narasimha-rao-and-manmohan-singh-rescued-india-in-1991-and-made-history/700893/. [Accessed on 29 March 2023]

[212] Budget Speech 1991-1992, 24 July 1991, available at https://www.indiabudget.gov.in/doc/bspeech/bs199192.pdf. [Accessed on 29 March 2023]

India did eventually join hands with the US against Iraq.[213] Due to India's apprehension in fighting against Iraq but also its inability to broker peace, India, in the aftermath of the crisis, was side-lined on the international scene.

In the 1991 Budget, the Finance Minister Dr. Manmohan Singh stated that the country had come of age and reliance on borrowed money was no longer an option. Though India followed the mixed economy model, the framers of the Constitution recognised the importance of international relations in the context of finance and commerce.

The Finance Minister announced the liberalisation of the policy regime for direct foreign investment – a game changer. This, he stated, would be implemented in three ways:

1. If equity inflows are sufficient to finance the import of capital goods at the stage of investment and if dividends are balanced by export earnings over a period of time, prompt approval would be given to direct foreign investment in specified high priority industries, with a raised limit for foreign equity at 51%.
2. Foreign equity of up to 51% would be allowed for trading companies primarily engaged in export activities.
3. A special board would be constituted to negotiate with a number of large international firms and approve direct foreign investment in selected areas to attract substantial investment that would provide access to high technology and to world markets.[214]

Thereafter, during a visit to the United Kingdom in 1992, Dr Singh was queried about the protection offered to foreign investments in India, especially considering section 29 of FERA.[215] In the 1993 budget, to offset the negative perception of investors caused due to India's stand on section 29 of FERA and to demonstrate a commitment from India's end to truly reform its economy, Dr. Singh emphasised the importance of establishing global linkages and attracting foreign private investments that were then flowing to other developing countries in Asia.[216] India was also wary of China attracting huge foreign investment inflows.[217] The United Kingdom, Germany, the US and many other countries had already expressed their interest in signing bilateral investment treaties with India and India responded positively to this offer of entering into bilateral negotiations.[218]

Following Dr. Singh's commitment, India came up with a Model BIT in 1993, based on OECD's Draft Convention for Protection of Foreign Property of 1967 which enshrined protections like fair and equitable treatment, just compensation for expropriation of property, principles of freedom of transfer, and submission of claims to arbitration[219].

---

[213] J. Mohan Malik, '*India's Response to the Gulf Crisis: Implications for Indian Foreign Policy*', Asian Survey (Sept., 1991), Vol. 31, Issue 9, at 847-861.

[214] Budget Speech 1991-1992, 24 July 1991, available at https://www.indiabudget.gov.in/doc/bspeech/bs199192.pdf. [Accessed on 29 March 2023]

[215] Prabhash Ranjan, '*How Manmohan Singh played a key role in India signing its first bilateral investment treaty*', The Print, 21 August 2019, available at https://theprint.in/pageturner/excerpt/how-manmohan-singh-played-a-key-role-in-india-signing-its-first-bilateral-investment-treaty/279710/. [Accessed on 29 March 2023]

[216] Budget Speech 1993-1994, 27 February 1993, available at https://www.indiabudget.gov.in/doc/bspeech/bs199394.pdf. [Accessed on 29 March 2023]

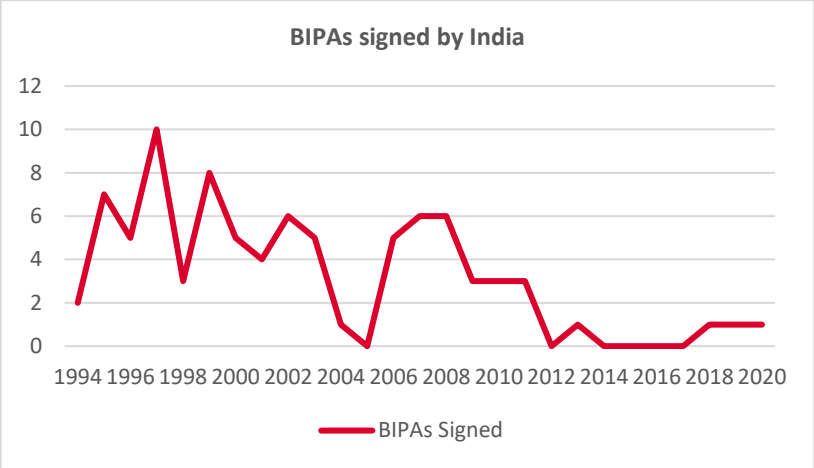
[217] Prabhash Ranjan, '*How Manmohan Singh played a key role in India signing its first bilateral investment treaty*', The Print, 21 August 2019, available at https://theprint.in/pageturner/excerpt/how-manmohan-singh-played-a-key-role-in-india-signing-its-first-bilateral-investment-treaty/279710/. [Accessed on 29 March 2023]

[218] Budget Speech 1993-1994, 27 February 1993, available at https://www.indiabudget.gov.in/doc/bspeech/bs199394.pdf. [Accessed on 29 March 2023]

[219] Organisation for Economic Co-operation and Development (1967), Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention (Paris: OECD), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2812/download. [Accessed on 29 March 2023]

4.1.2. Initial Journey of Indian BIPA Claims

India signed its first BIPA with the United Kingdom in 1994 and between then and 2021, India has signed a total of 86 BIPAs. All the BIPAs signed before 2015 were largely negotiated based on the Indian Model BIT text of 1993.[220] As opposed to the conservative approach to foreign investment that India demonstrated in the 60s and 70s, these BIPAs offered fairly high investor protections. A revised model[221] was developed in 2003 which shared similarities to the 1993 model.



Source: IIAs by Economy: India (UNCTAD, International Investment Agreements Navigator)

Before 2010, BIPAs did not make it to the news in India. However, BIPAs started becoming a hangnail for India in 2010 when White Industries filed a notice of arbitration under the India-Australia BIT (1999) claiming that a delay of over nine years to enforce an international arbitral award in a country which is a party to the New York Convention represents an unacceptable delay by objective and international standards. White Industries claimed that India's failure to enforce the Award constitutes a breach of the Republic's obligation to provide 'effective means of asserting claims and enforcing rights' with respect to White's investments.

The article on effective means of asserting claims did not feature in the India-Australia BIT, however, the Tribunal allowed[222] White Industries' claim of borrowing the same from the India-Kuwait BIT (2001)[223] as the India-Australia BIT (1999) consisted of an MFN clause[224]. Further, the Tribunal held that while a nine-year delay in deciding an eventually set-aside application does not amount to a denial of justice, the judicial system's inability to decide the matter in nine years and the Supreme Court's inability to hear the matter in over five years amounts to undue delay. As per the Tribunal, this delay constituted a breach of India's obligation of providing White Industries with an effective means of asserting claims and enforcing its rights. The Tribunal reached this conclusion despite observing that White either knew or ought to have known, at the time it entered into the contract, that the domestic court structure in India was overburdened.

---

[220] Ministry of External Affairs, India and Bilateral Investment Treaties, Tenth Report, Parliamentary Committee on External Affairs (2020-2021), available at https://eparlib.nic.in/bitstream/123456789/811585/1/17_External_Affairs_10.pdf. [Accessed on 29 March 2023]

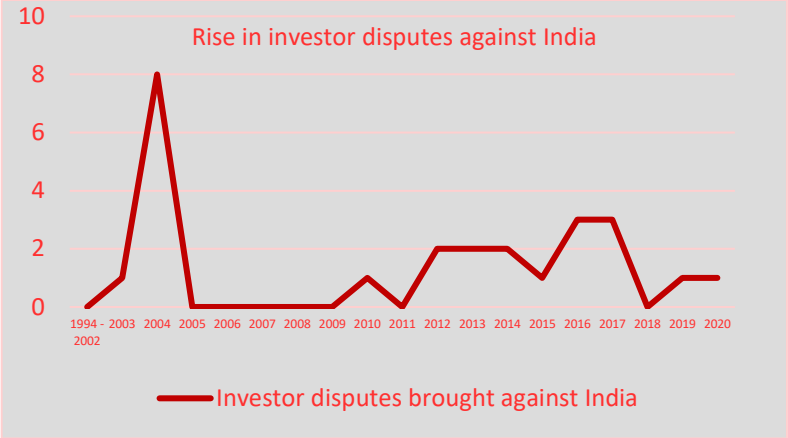
[221] Indian Model Text of Bilateral Investment Promotion and Protection Agreement (2003), available at http://www.italaw.com/sites/default/files/archive/ita1026.pdf. [Accessed on 29 March 2023]

[222] *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (November 30, 2011).

[223] Article 4(5) of the India-Kuwait BIT (20001) provided that "*Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall, in accordance with its applicable laws and regulations, provide effective means of asserting claims and enforcing rights with respect to investments ...*".

[224] Article 4(2) of the India-Australia BIT (1999) provided that "*A Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments or investors of any third country.*"

White Industries was the first of the many disputes that India would face under its investment protection regime. Various regulatory measures adopted by India were challenged, including retrospective taxation[225], cancellation of telecom licences[226], cancellation of an agreement to lease capacity in the S-Band part of the electromagnetic spectrum[227], reversal in the energy policy of the local government[228], etc.



Source: Country-wise details of Disputes: India (UNCTAD, International Investment Disputes Navigator)

Below is an illustrative list of claims brought against India.[229]

Sr. No.	Claimant	Trigger	Year of initiation
1	Bechtel	Bechtel had partnered with General Electric and Enron to build a power project in Dabhol, Maharashtra. Bechtel owned a 10% interest in the Dabhol Power Company, which was to build two power plants to supply electricity, under the terms of an exclusive Power Purchase Agreement ("**PPA**") to the Maharashtra State Electricity Board ("**MSEB**"). Due to a change in the ruling party in Maharashtra, the energy policy in the state changed. It was alleged that Bechtel was prevented from: • operating Phase I of the project; • completing construction for Phase II; • reimbursing contractors; • servicing debt: and • paying dividends to the project sponsors. It was also alleged that MSEB's refusal to make payments under the PPA, improperly rescinding the PPA, and ceasing to buy power from DPC effectively destroyed the PPA - the primary asset of DPC - and represent an improper taking of the plant itself.	2003
2	Standard Chartered Bank	Several lenders and other stakeholders filed arbitration claims under various bilateral investment treaties with India following the failure of the Dabhol project (mentioned in Sr. No.1 above).	2004
3	Offshore power		
4	Erste Bank		
5	Credit Suisse		
6	Credit Lyonnais		
7	BNP Paribas		
8	ANZEF		

[225] *Vodafone International Holdings BV v. India (I)*, PCA Case No. 2016-35; *Cairn v. India*, supra note 68; *Vodafone Group Plc and Vodafone Consolidated Holdings Limited v. India (II)*.
[226] *Khaitan Holdings Mauritius Limited v. India*, PCA Case No. 2018-50.
[227] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India (I)*, PCA Case No. 2013-09.
[228] *Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v. The Government of India*.
[229] List drawn on 28 March 2023 from a summary prepared by the UNCTAD ©.

9	ABN Amro		
10	White Industries	A delay of 9 years to enforce an international arbitral award by the Government of India.	2010
11	Naumchenko and others	Cancellation of Letters of Intent for the issuance of telecommunications licences to provide 2G services in five telecommunications circles in India by reason, inter alia, of India's essential security interests.	2012
12	Devas	Antrix, operating as the marketing arm of India's International Space Research Organization ("**ISRO**"), entered into an agreement with Devas in 2005 for the long-term lease of two ISRO satellites operating in the S-band. However, the Indian Government denied the commercial use of the S-band spectrum by annulling the contract.	2012
13	KHML	122 2G licenses issued to 9 telecom operators by the UPA government in January 2008 were cancelled by the Supreme Court in India. These licenses were issued under an unusual first-come-first-serve policy, with an arbitrary cut-off date set. KHML was a 27% in Loop Telecom which was a holder of 21 such licenses.	2012
14	Deutsche Telekom	Between 2008 and 2009, Deutsche Telekom's wholly owned Singaporean subsidiary (Deutsche Telekom Asia Pvt. Ltd.) acquired roughly USD 97 million worth of shares in Devas (Sr. No.12 above), reaching a shareholding of 19.62 per cent.	2013
15	Vodafone (I)	India retrospectively amended the Income-tax Act, 1961 in 2012 so as to tax a transaction undertaken by Vodafone in 2007.	2014
16	LDA	The Haldia Dock Complex of the Kolkata Port Trust had awarded a supply, maintenance and operation contract for Berths 2 and 8 to ABG Infralogistics and ABG Kolkata Container Terminal in 2009. Later, LDA was inducted as a partner in this joint venture, Haldia Bulk Terminals Pvt Ltd ("**HBT**"). In 2012 when HBT terminated the contract citing mounting losses, non-allocation of cargo to Berths 2 and 8 and other factors like declining law and order issues.	2014
17	Cairn	India retrospectively amended the Income-tax Act, 1961 in 2012 that taxed a transaction undertaken by Cairn in 2006.	2015
18	Vedanta	Vedanta was a 59.9% shareholder in Cairn (Sr. No. 17 above).	2016
19	Strategic Infrasol and Thakur Family Trust	Claims arising out of the Government's alleged non-investigation of allegations of forgery and criminal actions by the Indian construction company Shapoorji Pallonji Group. According to the claimant, the Shapoorji Pallonji Group was initially the claimants' co-developer on two real estate projects in Mumbai and then allegedly used forged documents to "maliciously" acquire control of the projects. The claimant alleged non-investigation of allegations of forgery and criminal actions by the Indian construction company Shapoorji Pallonji Group.	2016
20	RAKIA	A memorandum of understanding was signed in 2007 between the Government of Andhra Pradesh and the	2016

		claimant. In the memorandum, the state government agreed to direct a state-owned mining company to supply bauxite to ANRAK, a company in which the claimant held shares, in order for ANRAK to operate an alumina and aluminium refinery and smelter. However, later, the Andhra Pradesh Government decided to cancel the bauxite supply agreement it had signed with the Anrak Aluminium Ltd	
21	Astro and South Asia Entertainment	The notice of arbitration claimed that the Central Bureau of Investigation had accused them of making "illegal payment" as part of investment into Indian company Sun Direct TV. As per the claimant, India initiated an improperly motivated and unmeritorious investment charge against the claimant.	2016
22	Vodafone (II)	India retrospectively amended the Income-tax Act, 1961 in 2012 that taxed a transaction undertaken by Vodafone in 2007.	2017
23	Nissan	In 2008, Nissan and its partner - France's Renault SA agreed to set up a car plant in Chennai. The Tamil Nadu state government did not provide the several incentives, including tax breaks that were promised to Nissan.	2017
24	Carissa	An Indian company, InduTech Zone IT SEZ, was unable to take off after the Central Bureau of Investigation accused an opposition leader in Andhra Pradesh opposition leader of a scam involving the land allocated for this purpose. Carissa Investments LLC held 49% of stake in InduTech Zone IT SEZ.[230]	2017
25	Kowepo	Korea Western Power Co (Kowepo) owns a majority stake in Pioneer Gas Power Plant Ltd, which operates a 388 MW project in Maharashtra's Raigad district. It is alleged that PGPL's commissioning had initially been delayed due to lack of gas allocation, and that it could not participate in the government's scheme for stranded gas-based plants as GAIL did not complete its pipeline in time.	2019
26	Maxis and Global Communication	Details not available.	2020
27	GPIX	Details not available.	2020
28	Earlyguard	Details not available.	2021
29	Devas (II)	Details not available.	2022

[230] U Sudhakar Reddy, *'Mauritius drags India to international court over Andhra SEZ'*, The Times of India, February 22, 2018, available at *http://timesofindia.indiatimes.com/articleshow/63021815.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst*, [Accessed 05 April 2023]

4.1.3. Changing Tide and India's Revised BIPA Model

With the rising ISDS claims, the Government of India ensued an in-depth review of the existing Indian BIPAs. In 2016, India decided to terminate existing BIPAs whose initial validity period had expired. Consequently, out of the 83 treaties signed until July 2016, the government issued termination notices to 58 countries [231] following the path of South Africa[232] and Indonesia.

Between July 2016 and January 2022, India terminated 75 treaties and released two joint interpretational statements with Columbia and Bangladesh. As a result of the review process, India introduced a revised Model Text ("**Revised Model BIPA**") as the basis for India's future BIPAs. To date, India has signed four BIPAs based on the Revised Model BIPA with Belarus, Taiwan, Kyrgyz Republic and Brazil and negotiations with 37 countries are ongoing.[233]

India's Revised BIPA has been criticised for being extremely protectionist and a knee-jerk reaction to the White Industries' case (supra note 222). It is also said to provide more exceptions to protections than protections themselves.

4.1.4. Tax Carve-outs under Revised Model BIPA of 2015

At the outset, the Indian Revised Model BIPA carves out any law or measure regarding taxation from its overall scope. It also carves out any measures taken to enforce a tax obligation which could be anything from a tax bill to a reporting requirement to filing a return under tax law. Therefore, none of the treaty protections provided under the Revised Model are applicable to tax law or related measures.

Article 2.4 - Scope of the Revised Model BIPA

- Any law or measure regarding taxation, including measures taken to enforce taxation obligations.

Earlier, the BIPAs signed by India did not exclude tax measures from its scope but instead included a limited tax carve-out. Three known treaty-based ISDS have been instituted against India on matters relating to taxation.[234] The *Cairn* case allowed the investors to successfully challenge India's retrospective tax amendment due to the limited tax carve-out under the India-UK BIT (1994). However, if India had adopted a general tax carve-out that is now under the Revised Model BIPA, Cairn might not have been successful in its endeavour to bring a tax claim for arbitration. Whether it's a tax dispute or a

---

[231] As per Lok Sabha, the number is 58 (Lok Sabha, Unstarred Question No. 1290, available at https://dipp.gov.in/sites/default/files/lu1290.pdf. [Accessed on 29 March 2023]). However, as per the Ministry of External Affairs, 57 termination notices were issued in March 2016 (India and Bilateral Investment Treaties, Tenth Report, Parliamentary Committee on External Affairs (2020-2021), available at https://eparlib.nic.in/bitstream/123456789/811585/1/17_External_Affairs_10.pdf [Accessed on 05 April 2023])

[232] South Africa changed its inward FDI strategy from a freedom of investment model to an investment for sustainable development model. A review of their BIPAs was conducted in 2010. The review concluded that BIPAs were encroaching upon the policy sphere and were incompatible with the constitution and domestic legislation in South Africa. In addition, they also concluded that BIPAs also allowed for legal challenges to regulatory changes, which were in pursuance of public interest. Alternatively, South Africa released a draft of the Promotion and Protection of Investment Bill ('PPIB') for public comments in November 2013. The PPIB was an overhaul of the regulatory framework for foreign investment in South Africa. The PPIB replaces BIPAs with domestic legislation that elucidates the rights and obligations of the government, and of all investors. Many other developing nations have also performed a cost-benefit analysis and decided to exit the BIPA regime.

[233] Ministry of External Affairs, India and Bilateral Investment Treaties, Tenth Report, Parliamentary Committee on External Affairs (2020-2021), available at https://eparlib.nic.in/bitstream/123456789/811585/1/17_External_Affairs_10.pdf. [Accessed on 29 March 2023]

[234] *Cairn v. India*, supra note 68; *Vedanta Resources PLC. v. The Republic of India*, PCA Case No. 2016-05; *Vodafone v. India*, supra note 225.

tax-related investment dispute, both would have fallen outside the purview of BIPAs and, hence, would not be arbitrable.

Including enforcement obligations

The Revised Model BIPA also excludes from its application measures taken to enforce tax obligations, meaning, expropriation by tax authorities for meeting the tax demand can no longer be challenged through a BIPA. This addition seems to be borrowed from new Model BIPAs around the globe and not merely due to India's poor experience with enforcing tax obligations under a BIPA. This could be a step backwards for India. Taking protection from expropriation off the table, which is pivotal protection under BIPAs, is regressive as India can theoretically employ very aggressive tax recovery methods and the same cannot be challenged.

Nature of dispute to be determined by the host state

The Revised Model BIPA further clarifies that where the State in which investment is made decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be non-justiciable and it shall not be open to any arbitration tribunal to review such decision.[235]

The above clarification sits uncomfortably against the *Kompetenz-kompetenz* principle as per which an arbitral tribunal is the judge of its own competence and is empowered to determine whether it has jurisdiction under the parties' arbitration agreement. Therefore, an arbitral tribunal determines disputes regarding its own jurisdiction. This is also why, even in the absence of a jurisdictional challenge, Tribunal's rule on their jurisdiction *proprio motu*. This also implies that the arbitral tribunals determination of jurisdiction supersedes the parties' position on jurisdiction. If India succeeds in including such a clause in its future treaties, India would be promoting and also signing up for absolute uncertainty in respect of tax laws which ranks high among the concerns of investors.

Prevention of transfers not in compliance with tax laws

Article 6.3 of the Model BIT - The transfer provision

- Nothing in this Treaty shall prevent a Party from conditioning or preventing a transfer through a good faith application of its law, including actions relating to... compliance with the law on taxation.

The Revised Model BIPA provides for free transfer of investment, but a State may prevent a transfer through good faith application of its laws including actions relating to compliance with the law on taxation.

The exception of good faith application of laws to free transfers is not a new feature of Indian treaty practice.[236] The good faith principle requires parties to deal honestly and fairly with each other, to represent their motives and purposes truthfully and to refrain from taking unfair advantage.[237]

The principle is well recognised under international law[238] and in all national legal systems. It is a keystone to the law of treaties.[239] The availability of secure legal systems has a close connection to such

[235] Clarification to Article 2.4 of the 2015 Indian Revised Model BIT.
[236] For instance, it featured in the Colombia – India BIT (2009), and India-Slovenia BIT (2011).
[237] *Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, para. 266.
[238] *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, para. 187; Article 2(2) of the Charter of the United Nations, 1945; Article 26 and Article 31(1) of the Vienna Convention on the Law of Treaties, 1969.
[239] *David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, para. 224.

principles.[240] It is generally presumed that parties have acted in good faith unless there is evidence to the contrary.[241] Even when the principle of good faith is not referred to in investment treaties, the assumption is that it is still applicable as it is a rule of international law and a matter of international public policy. It is the fundamental duty of international law to safeguard this principle. However, some Tribunals have held that it performs a complementary function and is not a standalone rule.[242]

In several judgements, the Tribunals have held that corrupt practices or fraudulent behaviour leave the investment without protection.[243] In fact, in several cases, Tribunals have dismissed a claim or denied jurisdiction purely because the claim was brought in bad faith.[244]

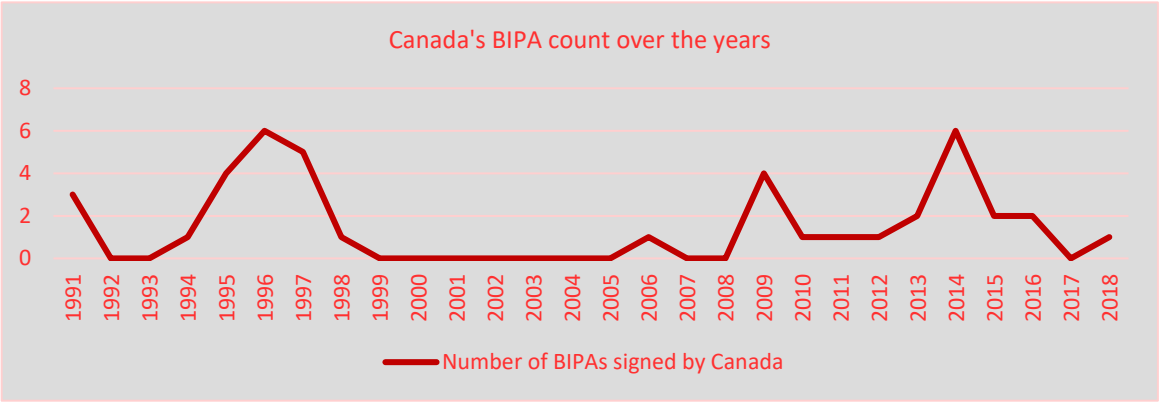
In *Cavalum SGPS v. Spain*[245], the Tribunal opined that it is for the investor to meet the heavy burden of showing bad faith. As per the Tribunal, it is a serious matter for a Tribunal to find that the exercise of the sovereign power to tax was exercised in bad faith. In another case, the Tribunal held that for a bad faith or *mala fide* intent to be established, a wilfulness or intention on the host state's part must be established. Every unfair or inequitable action does not constitute an action in bad faith.[246] Tribunals have also distinguished ineffective measures from measures taken in bad faith.[247]

In respect of taxation measures, the good faith principle has been discussed in the context of the ECT. There is a presumption that taxation measures are applied *bona fide*.[248]The question in some ECT cases was whether only good faith taxation measures were carved out of the ECT. For instance, in *Yukos v. Russia*, the Tribunal held that while Yukos was vulnerable on some aspects of its tax optimisation scheme, the Russian Federation also did not limit itself to *bona fide* taxation measures and therefore, such measures were susceptible to tribunal's scrutiny under the substantive protections of the treaty.

---

[240] *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, para. 187.
[241] *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award dated 26 February 2014, para 153 and *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award dated 20 July 2012, para. 18.
[242] *Mobil Investment Canada v. Government of Canada*, ICSID Case No. ARB/15/6, Jurisdiction and Admissibility, Decision (13 July 2018), para 169; *Malicorp v. Egypt*, Award para. 116.
[243] *Inceysa v. El Salvador*, Award, para. 226, 229, 230, 237, 239; *World Duty Free Company Limited v. Kenya*, Award, para 157; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award (22 October 2018), para 308; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), para. 129.
[244] *Cementownia v. Turkey*, Award, para 179; *Europe Cement v. Turkey*, Award, para. 175.
[245] *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on jurisdiction, liability and directions on quantum dated 31 August 2020, para. 393.
[246] *SunReserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, Final Award dated 25 March 2020, para. 740.
[247] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award dated 8 July 2016, para. 409.
[248] *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC Case No. V2013/153, Award (17 July 2016), para. 739.

4.2. Canadian Experience



Source: IIAs by Economy: Canada (UNCTAD, International Investment Agreements Navigator)

Canada began negotiating BIPAs in 1989 by signing an agreement with Russia. To date, Canada has signed 45 BIPAs out of which 6 have been terminated and 37 are in force. Interestingly, Canada has not signed any BIPAs in the last three years.

The first Canadian Model BIT came out in 1994, five years after Canada had signed its first treaty. Canadian models have largely borrowed from the United States' North American Free Trade Agreement ("**NAFTA**"). The 1994 Canadian Model was based on the investment chapter in NAFTA. The said Model was amended in 2004 following the emergence of issues in implementing NAFTA's investment provisions.[249]

After extensive public consultations initiated in 2018 with a broad range of stakeholders, including, civil society and labour unions, legal experts, business representatives, representatives of provinces and territories, etc., on May 13 2021, Canada finalised its 2021 Model Foreign Investment Promotion and Protection Agreement ("**FIPA**" or "**Canada's Revised Model BIPA**").

Canada's Revised Model BIPA contains a very extensive article – Article 11 on taxation measures. Nothing apart from Article 11 applies to taxation measures.[250]

4.2.1. Tax Carve outs in Canada's Revised Model BIPA

Canada's Revised Model BIPA envisages a combination tax carve-out. It does not afford protections in the form of National Treatment and MFN Treatment from tax measures of a host state on income, capital gains, and taxable capital of corporations. This means that foreign investments can be taxed differently from local investments under an income tax, or capital gains tax perspective.[251]

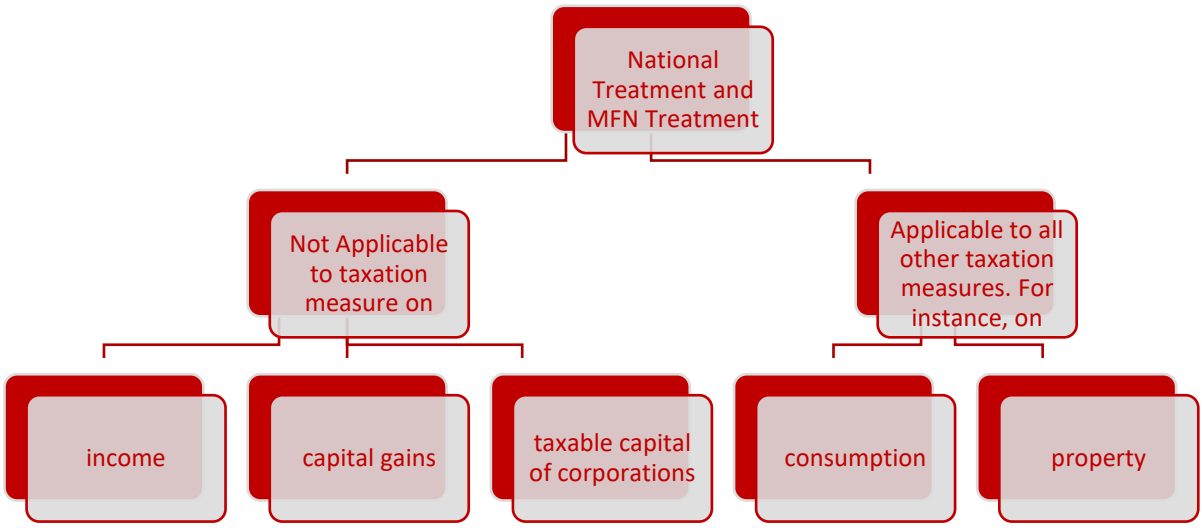
Even where National Treatment or MFN treatment is available against taxation measures (for instance VAT/GST) some provisions of these statutes are further carved out like:

1. Measures existing on the date the agreement is signed;
2. Continuation or prompt renewal of taxation measures existing on the date the agreement is signed;

---

[249] Gilbert Gagné, '*The Canadian Policy on the Protection of Foreign Investment and the Canada-China Bilateral Investment Treaty*', Beijing Law Review (2019), Volume 10, at 364.
[250] Article 11.1, Canada's 2021 Revised Model BIPA.
[251] *Ibid.*, Article 11.2.

3. Amendment to measures existing on the date the agreement was signed, so long as the amendment does not decrease non-conformity;
4. A new taxation measure aimed at ensuring equitable and effective imposition or collection of taxes which does not arbitrarily discriminate between persons, goods or services of the parties.[252]



Treatment of tax measures under Canada's Revised Model BIPA

Determining what constitutes a tax measure

An investor alleging breach of the agreement due to a taxation measure shall make a claim of the same to both parties as per Canada's Revised Model BIPA. One of the parties shall then submit a written request to the other to jointly determine the claim. Such joint determination must be made within a period of six months of making the claim. If the parties do reach a conclusion that the tax measure breaches the agreement, or they do not render a decision within six months of the investor making such a claim, it is assumed that the agreement has been breached.[253]

Similarly, when a claim is made by an investor, and there is uncertainty as to what constitutes a tax measure or what matters are covered by a tax convention while deciding the claim, Canada's Revised Model BIPA requires one party to make a written request to the other party for a joint determination. The matter has to be jointly determined within six months of the written request, and such a decision is binding on the Tribunal. Where no decision is made within six months, the Tribunal shall decide on the matter.[254] This practice of joint determination is in sharp contrast to the extremely protectionist stance taken by India, wherein the host state may unilaterally decide what constitutes a tax measure and what is arbitrable.

DTC related carved out

The rights and obligations under a double tax avoidance agreement prevail over the rights and obligations under Canada's Revised Model BIPA.[255] Since DTCs are specific treaties to address double taxation and non-taxation, and therefore, narrower in a sense than BIPAs, the dispute resolution mechanism is better suited to deal with disputes relating to double taxation and non-taxation.

[252] *Ibid.*, Article 11.3.
[253] *Ibid.*, Article 11.5.
[254] *Ibid.*, Article 11.6.
[255] *Ibid.*, Article 11.2.

Claw-back provision

Canada's Revised Model BIPA contains a claw-back provision. Even though a general carve-out in respect of taxation measures is employed in Canada's Revised Model BIPA, as per Article 11.4 (b), the protections against expropriation apply to taxation measures. As explained in the earlier sections, a clawback provision is an exception to an exception. This provision makes a state's tax measures susceptible to challenge to the extent it culminates into expropriation, whether direct or indirect.

4.3. Select Reflections from other Jurisdictions

The Revised Model BIPAs of India and Canada are some of the recent policy changes that were adopted considering the drastic increase in importance granted to BIPAs by the investors. However, within the last decade, over twenty States (or regions) have introduced Model BIPAs. Almost all these Models consist of tax carve-outs. The tax carve-outs under these Models consist of varied types of tax carve-outs. To summarise some of these:

BIPA	Type of tax carve-out	Relevant Article
Italy Model BIPA (2021)	- Non-discrimination - DTC-related "relating wholly or mainly to taxation"	Non-discrimination Treatment (Article 5)
Belgium-Luxembourg Economic Union BIPA (2019)	- DTC-related	Scope (Article 3.6)
Netherlands Model BIPA (2019)	- Non-discrimination - DTC-related	Fiscal Treatment (Article 10)
Slovakia Model BIPA (2019)	- Authority to determine tax measure - Claws-back expropriation - Transfers require compliance of taxation laws	Taxation measures (Article 13) Transfers (Article 9)
Colombia Model BIPA (2017)	- General tax carve-out - Denial of Treaty benefits if committed serious fraudulent actions against the tax laws - Transfers require compliance of taxation laws	Scope Denial of Benefits Freedom of Transfers
Czech Republic Model BIPA (2016)	- Non-discrimination - "relating wholly or mainly taxation" - DTC-related - Transfers require compliance of taxation laws	National and Most-Favoured-Nation Treatment (Article 3) Transfers (Article 6)
Russia Model BIPA (2016)	- DTC-related - Expropriation	Article 4 (Protection of Investments or Investors)
Norway Model BIPA (2015)	- General tax carve-out - Direct and indirect taxes - Imposition, enforcement or collection - DTC-related - Authority to determine tax measure	Taxation (Article 28)
The United States of America Model BIPA (2012)	- Claws-back expropriation - Authority to determine tax measure - DTC-related	Taxation (Article 21)

From the above, it becomes evident that tax carve-outs continue to be a crucial aspect of Model BIPAs. Common to the previous regime of traditional tax carve-outs, DTCs continue to be provided with specific exclusion from the Model BIPAs. However, the new Models are increasingly adopting tax carve-out that provide the tax authorities with the power to determine the nature of the measure. As discussed, this has become an emerging trend, therefore, reducing the power of the Tribunal in determining its jurisdiction.

4.4. Conclusion

Model BIPAs reflect the future of the investment treaty policies. These Models are the basis on which the current BIPAs are being negotiated between States. While many criticised India to be adopting a conservative and protectionist approach due to its BIPAs, it needs to be noted that several States are taking similar precautions, especially when it comes to taxation measures. Currently, India and Canada are negotiating their BIPAs. Knowing the models of both countries and especially the similarities, it can be predicted that treatment of tax measures, especially, will be the focus of their future BIPAs. A similar pattern will probably be followed by other jurisdictions as well. However, the jurisdictions must ensure that while the safeguards are put in place, these should not become the basis to justify aggressive tax collections.

5. Enforceability of Arbitral Awards

The success of international investment arbitration finally depends on the enforceability of the awards. Once the arbitration proceedings are concluded, the award creditor can seek the recognition and enforcement of the award. The process of enforcing an award rendered under investment treaties can be more challenging than enforcing the awards that are rendered through commercial arbitration. Unlike the latter, which is emerging from failure to fulfil contractual obligations, the subject matter of investment arbitration under the BIPAs is the actions of a sovereign State. Hence, outcomes of investment arbitration which is against a State continue to face several challenges of enforcement even after the award is rendered.

Enforcement of investment arbitral awards also depends on the membership or signatory status of states to international conventions. The Conventions that address the recognition and enforcement of arbitral awards are the Convention for Settlement of Disputes, also known as the ICSID Convention and the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**New York Convention"** or "**NYC**"). The procedures under both conventions vary drastically. As will be discussed, the ICSID Convention aims to provide a mandatory enforcement structure to ensure efficiency for the investors, while the New York Convention is more focused on balancing the concerns of the investors and the State. Several developing countries, including India, adopted the enforcement procedure provided under NYC as it permits the States to incorporate certain exceptions to enforcement that protects the State's interests.

This chapter discusses the enforcement proceedings[256] under both conventions, highlights the challenges in the enforcement of awards and provides India's experience with respect to both.

5.1. Convention for Settlement of Disputes (ICSID Convention)

5.1.1. Background

The ICSID Convention is a multilateral treaty introduced by the Executive Directors of the World Bank and is ratified by 158 States.[257] Though the World Bank is usually regarded as an international institute providing loans for member countries, the founders of the World Bank were of the view that lending would be a secondary function and primarily, the World Bank should focus on encouraging international investment by private investors.[258] In pursuance of this aim, the ICSID Convention was introduced in 1966, which further formed the International Centre for Settlement of Investment Disputes.

[256] Both conventions provide procedures for the recognition and enforcement of a foreign arbitral award. The former relates to confirmation of the validity of an award, while the latter relates to ensuring compliance with the award. This section limits its discussion and analysis to the enforcement of a foreign arbitral award only.

[257] ICSID, List of Contracting States and Other Signatories of the Convention (as of October 25, 2022), available at: https://icsid.worldbank.org/sites/default/files/ICSID%203/ICSID-3--ENG.pdf [Accessed on 29 March 2023]

[258] Ibrahim Shihata, '*The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*', American University International Law Review (1986), Volume 1, Issue 1, at 97.

The purpose behind ICSID is to facilitate conflict resolution by providing a "depoliticized" forum that balances the interests and requirements of the parties involved in the dispute.[259] The investors are provided direct access to an international forum to claim protection against a State's unilateral measures that impacts their investments.[260] On the other hand, States are permitted to mandate investors to exhaust local remedies prior to initiating arbitration proceedings, hence, making it a pre-condition to its consent for arbitration.[261] Additionally, unless otherwise agreed by the Contracting States, the law of the host state is considered the applicable law under ICSID.[262]

5.1.2. General Procedure for Arbitration under the ICSID Convention

The procedure for arbitration provided under the ICSID Convention is "self-contained" and "delocalized", meaning that the provisions under the Convention are independent of domestic laws of the Contracting States and, hence, domestic courts cannot intervene with the process.[263] The provisions on arbitration are provided under Chapter IV of the ICSID Convention. The Convention is further supported by Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules"**) that lay down the procedure for arbitration in detail.

Chapter IV of the ICSID Convention

Arbitration proceedings are initiated when a Contracting State or a national of the Contracting State makes a request of arbitration with the Secretary-General.[264] In the request of arbitration, the party must mention the issue pertaining to the dispute, their identity and must express their consent to arbitrate.[265] Based on this information, the Secretary-General decides whether the request can be registered or refused due to lack of jurisdiction of the ICSID.[266] Once the request is registered, the Arbitral Tribunal is formed with an uneven number of arbitrators, usually three[267] with one appointed by each party and the third appointed by the President of the Tribunal upon agreement of the parties.[268] Further, the ICSID Convention provides for the various functions of the Tribunal[269], one of the essential functions being the determination of their own competence wherein the Tribunal determines its jurisdiction over the dispute[270]. Finally, the Award is rendered based on majority votes of the Tribunal members and the same is published only with the consent of the parties.[271]

---

[259] Ibrahim Shihata, , '*Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*', World Bank (1986), available at: https://documents1.worldbank.org/curated/en/335931468315286974/pdf/Towards-a-greater-depoliticization-of-investment-disputes-the-roles-of-ICSID-and-MIGA.pdf. [Accessed on 29 March 2023]

[260] Vincent Nmehielle, '*Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)',* Annual Survey of International & Comparative Law (2001), Volume 7, Issue 1, at 23-24, available at: http://digitalcommons.law.ggu.edu/annlsurvey/vol7/iss1/4. [Accessed on 29 March 2023]

[261] *Ibid.*

[262] *Ibid.*

[263] World Bank, '*Special Features and Benefits of ICSID Membership*', available on: https://icsid.worldbank.org/sites/default/files/publications/ICSID_Benefits_English.23.2020.pdf. [Accessed on 29 March 2023]

[264] Article 36, Section 1, Chapter IV, ICSID Convention.

[265] *Ibid.*

[266] *Ibid.*

[267] Though rare, the Tribunal can also be constituted with a sole arbitrator.

[268] Article 37, Section 2, Chapter IV. In case a Tribunal is not constituted within 90 days after notice of registration of arbitration request, then the Chairman can appoint Arbitrators who are not nationals of either of the parties (Article 38).

[269] Such as, can ask the parties to produce documents or evidence pertaining to the dispute (Article 43), the rules or laws that are to be followed (Article 42 & 44), and can recommend provisional measures that are necessary to preserve the rights of the parties (Article 47).

[270] Article 41, Section 3, Chapter IV.

[271] Article 48, Section 4, Chapter IV.

The ICSID Convention also provides for procedural rules that are to be followed during arbitration. It contains Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("**Institution Rules**") which provides for rules concerning request for arbitration, the contents of such request, registration, notice and so on.[272] These rules are common for request for conciliation and arbitration. Specific to arbitration, rules under Arbitration Rules require a comprehensive procedure that needs to be followed throughout the arbitration proceedings.

Post-Award Remedies

Though the award is rendered, the process does not end there. While neither of the parties can appeal an ICSID award[273], the award can be subject to review through certain post-award remedies available under the ICSID Convention. Apart from enforcement that is discussed in the next section, the parties can request for interpretation, revision, and annulment of an award.

Article 50 provides that in cases where the parties have differences in interpreting the meaning or scope of the award rendered, the parties can address to the Secretary-General requesting for an interpretation of the award. The award is then re-submitted to the Tribunal which adjudicated the dispute at the first place, otherwise, a new Tribunal is constituted for this purpose.[274] During the pendency of such dispute, the Tribunal also has the power to stay enforcement of the award. [275] Similar process of Tribunal constitution and stay on enforcement can take place during revision proceedings. If either of the parties discover a fact that was unknown during the initial proceedings and the ignorance of the fact was not due to the negligence of the party, then the party may apply to the Secretary-General, within the prescribed time limit[276], requesting for the revision of an award. The party shall demonstrate to the Secretary-General that the discovered fact is capable of decisively affecting the award rendered.[277]

5.1.3. Enforcement under ICSID

Articles 53 to 55 of the ICSID Convention address the recognition and enforcement of an award.

Article 53 lays down the effects of an arbitral award. First, the Article states that the award is binding on the parties to the dispute, i.e., it decides upon the finality of the award and that the parties cannot seek a remedy under any other forum.[278] Second, the only exceptions to the finality of the award are the review system provided under the remaining provisions of the ICSID Convention, such as Article 50 (Interpretation of the Award), Article 51 (Revision of the Award) and Article 52 (Annulment of the Award).[279] Third, the Article 53 creates a legal obligation against the State to abide and comply with the award.[280] Hence, non-compliance with the same can lead to a breach of the Contracting State's legal obligation.[281]

Once the legal obligation under Article 53 arises, the enforcement procedure provided under Article 54 of the ICSID Convention becomes applicable. The Article states that the Contracting States "shall"

---

[272] Rules for Procedure for the Institution of Conciliation and Arbitration Proceedings.
[273] ICSID, '*ICSID, Award - ICSID Convention*', The World Bank, available at: https://icsid.worldbank.org/services/arbitration/convention/process/award. [Accessed on 29 March 2023]
[274] Article 50(2), ICSID Convention.
[275] *Ibid*.
[276] As per Article 51, ICSID Convention, the application for revision of the award shall be made within 90 days after the discovery of the new fact and within three years from the date on which the award was rendered.
[277] Article 51(1), ICSID Convention.
[278] Christoph Schreuer, '*Article 53 – Binding Force, Chapter IV, The ICSID Convention: A Commentary*', (Cambridge University Press, 2010).
[279] *Ibid*.
[280] *Ibid*.
[281] UNCTAD, *'Dispute Settlement: International Centre for Settlement of Investment Disputes: Binding Force and Enforcement'*, United Nations Conference on Trade and Development, at 5, available at: https://unctad.org/es/system/files/official-document/edmmisc232add8_en.pdf. [Accessed on 29 March 2023]

recognize an ICSID award and enforce the pecuniary obligations imposed by the same. The award needs to be recognised and enforced by the courts of all the Contracting States and shall be accorded treatment similar to the final awards rendered by domestic courts of such States. The Article also provides for procedural directions, i.e., there shall be a competent authority designated for the recognition and enforcement of the award, the award creditor must approach such CA with a certified copy of the award and the law governing the execution of the award shall be the law governing the execution of judgements rendered within the State executing the award.[282]

Finally, Article 55 provides for an exception to the enforcement by allowing state immunity as a defence against enforcement of the awards. This article is a continuation of the provisions of Article 54, which mandates Contracting States to accord the arbitral award treatment similar to the treatment accorded to the judgements of its national courts.[283] Therefore, the Article further provides that laws governing the execution of the award shall be the same as the law governing the execution of the judgements rendered by its domestic courts.[284] This is a crucial provision for the execution of the award as the immunity laws of the State are applied.

5.1.4. Challenges to Enforcement

State Immunity

The article on state immunity - Article 55 - was included much later during the drafting process of the ICSID Convention and was included to ensure that the state immunity of the Host State was not taken for granted.[285] State immunity breaks the "logical link" between the adjudication of a dispute and the execution of its award, introducing two types of immunities: jurisdictional immunity and immunity from execution.[286] By being a signatory to the ICSID Convention, a State waives its jurisdictional immunity, hence, can be made a party to the arbitration. However, this immunity is independent of the immunity from enforcement that challenges the arbitration award from being executed against a State's assets.

Immunity from execution can be derived from Article 55 of the ICSID Convention, which provides that enforcement of the arbitral award is subject to the national laws of the State enforcing the award. This provision can be understood to act as a carve-out since the legal obligation to enforce an award is now subject to the domestic sovereign immunity laws.[287]

Several immunity laws provide that a State is immune from execution unless the State has either explicitly waived such immunity under an agreement or when the State property attached for execution is used for commercial purposes. For instance, the US Foreign State Immunity Act, 1976, provides that the property of a foreign State in the United States is immune from arrest and execution unless the foreign State has waived its immunity from the execution or if the property is used for commercial activity.[288] The Act states that the commercial nature of an activity must be determined not based on the purpose of the activity but based on the nature of the course of conduct, transaction or act.[289]

---

[282] Christoph Schreuer, '*Article 54 – Enforcement, Chapter IV, The ICSID Convention: A Commentary*', (Cambridge University Press, 2010).
[283] Article 54(1), ICSID Convention, "*A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*"
[284] Article 54(3), ICSID Convention, "*Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.*"
[285] Christoph Schreuer, '*Article 54 – Enforcement, Chapter IV, The ICSID Convention: A Commentary*', (Cambridge University Press, 2010).
[286] Zixin Meng, '*State Immunity and International Investment Law*', (Springer, 2020), at 109.
[287] Claudio Matute, '*Forum shopping in the Execution of ICSID Awards: Is it Time to Revive the UN Convention on State Immunity?*', Kluwer Arbitration Blog, June 24, 2016, available at https://arbitrationblog.kluwerarbitration.com/2016/06/24/preventing-forum-shopping-in-the-execution-of-icsid-awards-is-it-time-to-revive-the-un-convention-on-state-immunity/.
[288] Section 1603, US Foreign State Immunity Act, 1976.
[289] *Ibid*.

Therefore, though the purpose of the property attached could be to meet sovereign needs, if it undertakes commercial activities, then the same can be the basis to determine the commercial nature of the property. A similar provision can be found under the United Kingdom State Immunity Act, 1978, which provides that the property of the State cannot be subject to enforcement of arbitration award unless it is being used for a commercial purpose at the time of the enforcement. [290] Under the Act, the property is understood to be for commercial purposes when it undertakes commercial transactions such as the supply of goods or services.[291]

Annulment proceedings

Under Article 52 of the ICSID Convention, either of the parties to the dispute can request for annulment of the award. The Article prescribes the method with respect to the annulment application, the time period within which the application must be made and the constitution of an *ad hoc* Committee. More importantly, the Article provides the grounds on which annulment can be requested. This includes, improper constitution of the Tribunal; the Tribunal manifestly exceeded its powers; a member of the Tribunal was involved in corruption; there has been a departure from the fundamental rule of procedure; or the award was rendered without any basis. Successfully proving at least one of the said grounds is sufficient for the annulment of an award.

The ICSID Convention does not provide for an appeal mechanism. This is clearly stated under Article 53 of the ICSID Convention and is also upheld by Tribunals[292]. Annulment differs from appeal as the former only looks at the procedural legitimacy of a Tribunal's decision while the latter covers substantive and procedural legitimacy.[293] However, many consider the annulment mechanism under ICSID to be similar to an appeal system.[294] This leads to forming an additional step against the finality of awards.

One of the earliest cases for providing annulment of the award was *Klockner v. the Republic of Cameroon*[295], wherein, though the Tribunal annulled the arbitral award on the ground that the Tribunal manifestly exceeded its power, the Committee firmly held that it is not for an *ad hoc* committee constituted under Article 52 to decide upon the correctness of the interpretation adopted in the Award.[296] Regardless of this firm stand, several argued that the decision in *Klockner* allows for an internal appeal process that disturbs the fundamental principle of arbitration, i.e., efficient and effective evaluation of a dispute.[297] Thereafter several concerns have been raised regarding annulment proceedings. For instance, it is argued that annulment awards by several *ad hoc* Committees, which held that failure to apply the proper law could constitute to manifest excess of power, blurred the difference between misapplication of law and non-application of law.[298] Several *ad hoc* Committees also

---

[290] Section 13(4), United Kingdom State Immunity Act, 1978.

[291] Section 17(1) read with Section 3(3) United Kingdom State Immunity Act, 1978. Similar provisions are reflected under the immunity laws of the Singapore State Immunity Act, 1979 (Section 15(4) read with Section 5).

[292] *Victory Pey Casado and Foundation President Allende v. The Republic of Chile*, Decision on Annulment, ICSID Case No. ARB/98/2, para. 187.

[293] Claire Stockford, '*Appeal versus Annulment: is the ICSID Annulment Process Working or is it Now Time for an Appellate Mechanism?',* Crowell & Morning (2011), available at crowell.com/files/Is-the-ICSID-Annulment-Process-Working-or-is-it-Now-Time-for-an-Appellate-Mechanism.pdf. [Accessed on 29 March 2023]

[294] David Sedlak, '*ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold'*, Penn State International Law Review (2004), Volume 23, Issue 1, at 161, available at http://elibrary.law.psu.edu/psilr/vol23/iss1/7. [Accessed on 29 March 2023]

[295] ICSID Case No. ARB/81/2 dated October 21, 1983.

[296] *Ibid*., para. 52.

[297] David Sedlak, '*ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold'*, Penn State International Law Review (2004), Volume 23, Issue 1, at 161, available at http://elibrary.law.psu.edu/psilr/vol23/iss1/7. [Accessed on 29 March 2023]

[298] Anna De Luca, et al., '*Responding to Incorrect ISDS Decision-Making: Policy Options',* Academic Forum on ISDS Concept Paper 2020/1, (2020), at 9-10, available at https://discovery.ucl.ac.uk/id/eprint/10085392/3/Paparinskis%20WG4-Correctness%20%2828%20Oct%29.pdf. [Accessed on 29 March 2023]

adjudicated upon the interpretation adopted by the Tribunals, and their conclusions that equated a Tribunal's "frivolous" and "contradictory" reasons to no reason, were also found incorrect decisions.[299]

5.1.5. Indian Perspective

Despite the challenges, due to its promise for an automatic and efficient manner of enforcement, ICSID Convention continues to stay popular amongst several developed jurisdictions that reside the investors. However, when it comes to developing countries, there remain concerns about adopting or being party to ICSID-based arbitration. These concerns root from the point of the very introduction of the ICSID Convention. In what is popularly known as the 'Tokyo No', 21 developing-country governments voted against the adoption of the ICSID Convention during the World Bank annual meeting in 1964, making it one of the largest collective votes against a World Bank initiative.[300] It was primarily opposed due to the concern that it results in differential treatment between domestic investors and foreign investors, i.e., by providing a foreign investor with the right to sue a sovereign state outside the national territory.[301] Additionally, developing countries also took a stand that expropriation on the grounds of public policy can be justified through fair compensation.[302] Several such concerns were raised by the developing countries that opposed being party to the convention and insisted that domestic remedies be resorted by foreign investors.[303]

Similar concerns are usually raised in the Indian context as well. During the drafting of the ICSID Convention, the Indian government took the view that enforcement of international arbitral awards is subject to the arbitrability of the subject-matter under domestic law and public policy of the country.[304] As it is evident, despite these objections, there are no such exceptions provided under the convention. However, the Indian domestic arbitration law and jurisprudence around the same clearly reflect these objections. With respect to the arbitrability of a subject-matter, though the law does not specifically categorise disputes as not arbitrable, it provides that an arbitral award can be set aside if the subject-matter of the dispute is *'not capable of settlement by arbitration under the law'*[305]. In a 2011 judgment, the Apex Court provided a test to determine the arbitrability of a subject-matter, i.e., the subject-matter must not be right in *rem* (right exercisable against the world at large).[306] Thereafter, a 2020 judgment expanded the test to a four-fold test. It provided that a subject matter of a dispute in an arbitration agreement is not arbitrable when[307],

(a) cause of action and subject matter of the dispute relates to actions in rem;
(b) cause of action and subject matter of the dispute affects third party rights;
(c) cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable;
(d) the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

---

[299] *Ibid*., at 10.
[300] Robin Broad, *'Remembering the "Tokyo No" Fifty Years Later, Triple Crisis'*, (2015), available at http://hdl.handle.net/1961/auislandora:64089. [Accessed on 30 March 2023]
[301] *ibid*.
[302] *ibid*.
[303] Commonly known as the '*Cavlo Clause*', Latin American countries included this clause in their contracts with foreign investors which insisted that foreign investors must use domestic forums before resorting to diplomatic channels. *See*, Manuel Garcia-Mora, '*The Calvo Clause in Latin American Constitutions and International Law*', Marquette Law Review (1950), Volume 33, Issue 4, at 206, available at https://scholarship.law.marquette.edu/mulr/vol33/iss4/1/. [Accessed on 30 March 2023]
[304] James Nedumpara & Aditya Laddha. '*India Joining the ICSID: Is it a Valid Debate?',* Discussion Paper No. 1, Centre for Trade and Investment Law, (2017), at 14.
[305] Section 34 (2)(b)(i), Arbitration and Conciliation Act, 1996.
[306] *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors*., Civil Appeal No. 5440 of 2002, para. 23.
[307] *Vidya Drolia & Ors. v. Durga Trading Corporation*, SLP No. 5605-5606 of 2019 and SLP No. 11877 of 2020, para. 45.

Though these judgments were pronounced in the context of commercial arbitration, the same is applicable in the case of investment arbitration. With respect to public policy, the law provides conflict with public policy as a ground for setting aside an arbitral award and also provides for a list regarding what constitutes public policy.[308]

The Indian government was also advised against becoming a signatory to the convention since it does not permit the awards to be reviewed by the domestic courts.[309] Therefore, though there are not many statements by the Indian government that address its reservations against becoming a signatory to the ICSID[310], the limited objections raised are similar to those raised by other developing countries.

5.2. The New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the NYC was introduced on June 10th, 1958.[311] It was established to address the criticism faced by the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 ("**Geneva Treaties**").[312] These erstwhile conventions were criticised for several legal and practical reasons, such as ambiguity in the scope of application of the treaties, difficulty in enforcement and the possibility of contesting the validity of the award.[313] Therefore, compliance with the Geneva Treaties was found to be cumbersome[314] The NYC began to be widely recognised as a foundational instrument of international arbitration.[315] It was also found more suitable for the needs of a developing country as it does not accord an arbitral award absolute finality and allows the domestic courts to set aside the arbitral award if found to be within the exceptions.

5.2.1. Enforcement Under the New York Convention

Unlike the ICSID Convention, which provides for an arbitration procedure along with the enforcement of the arbitral award, the NYC solely focuses on the recognition and enforcement of the awards. Hence, investors and States follow the procedure for arbitration laid down under other conventions (such as the UNCITRAL) and utilise the NYC to achieve recognition and enforcement of their award.

Beginning with the scope, Article I of the NYC limits its application to foreign arbitral awards rendered by appointed arbitrators or permanent arbitral bodies and awards that do not fall under any reservations made by the States. In the context of NYC, a foreign arbitral award is of two types- first are those that are passed outside the State where the recognition and enforcement are sought; and second, an arbitral award that is not considered a domestic award by the enforcing State. The latter requirement that the arbitral award must not be considered a domestic award covers situations wherein, though the place of

---

[308] Section 34, The Arbitration and Conciliation Act, 1996.

[309] Editor, Hindu Business Line, *'ICA against India joining global dispute settlement body'*, June 10, 2000, available at https://www.thehindubusinessline.com/todays-paper/tp-others/article29064097.ece. [Accessed on 05 April 2023]

[310] James Nedumpara & Aditya Laddha. '*India Joining the ICSID: Is it a Valid Debate?',* Discussion Paper No. 1, Centre for Trade and Investment Law, (2017), at 14.

[311] Came into force on June 07, 1959.

[312] New York Arbitration Convention, History: 1923 – 1958, available at https://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958#:~:text=The%20New%20York%20Convention%20was,Foreign%20Arbitral%20Awards%20of%201927. [Accessed on 30 March 2023]

[313] Sankalp Jain, '*Enforcement of Foreign Arbitral Awards: International Conventions and Legal Regime in India*', (2015), at 4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778548. [Accessed on 30 March 2023]

[314] Guide on the New York Convention, at 307, para. 57.

[315] *Ibid.*, p. ix.

arbitration is within the jurisdiction of the enforcing State, the governing law of the arbitration is not a domestic law.[316] With respect to reservations, there are two types, reciprocity reservation and commercial reservation. A State that makes a reciprocity reservation agrees to enforce only those arbitral awards that are rendered within a State that is a party to the NYC.[317] A commercial reservation implies that the State shall apply the NYC only to arbitral awards that are considered commercial in nature under domestic law. As will be discussed, this reservation becomes a hindrance, especially when seeking to enforce an investment arbitral award.

Article II creates an obligation on a State by providing that a State "shall" recognize an agreement between the parties that provides for arbitration. The Article provides for a broad application as it consists of terms such as "all or any differences" that have "arisen or may arise" from a legal relationship that is "contractual or not", implying the broadest interpretation possible. [318] Therefore, if at least one of the parties, whose dispute falls within this broad category, requests for arbitration, then the national court has an obligation to refer the parties to the arbitration.[319] The only way out from this obligation is when the court finds that the agreement, on the basis of which the request was made, is found to be null and void, inoperative or incapable of being performed.[320]

The general rule for the recognition and enforcement of arbitral awards is laid under Article III of the NYC. The Article provides for two essential principles, it obligates a State to recognize and enforce arbitral awards and provides for the procedure that is required to be followed for the same. Several courts considered this Article to be demonstrating the Convention's pro-enforcement bias.[321]

5.2.2. Challenges to Enforcement

Commercial Reservation

From the perspective of investment arbitration, a commercial reservation becomes specifically crucial. Commercial disputes drastically vary from investment disputes as the former refers to disputes arising out of freely negotiated contracts, whereas the latter refers to disputes arising out of international treaty obligations agreed upon between two States.[322] Around one-third of the States that are party to the NYC have made a commercial reservation to Article 1.[323] [324]

A commercial reservation allows a State to restrict the application of the NYC to "*differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration*". Therefore, only those awards that are considered commercial can be enforced through the NYC. The convention does not define what constitutes to be "commercial". Instead, this determination must be done as per the national law of a State. Hence, when a State makes a commercial reservation to the NYC, it is upon their national courts to determine whether a dispute rooted in a BIPA could be considered a "commercial" dispute, hence, enforceable under the NYC.

---

[316] This was added upon the request of countries such as France and Germany, which believed that the place of arbitration was often "*fortuitous or artificial*", hence, the governing procedural law shall determine the foreign nature of an arbitral award. *See*, Guide on the New York Convention, at 62, para. 5-6.
[317] Guide on the New York Convention, 1958, at 30, para. 71.
[318] Several national courts accorded the term a broad interpretation. For instance, the Court of Appeal of England, in the case of *Fiona Trust & Holding Corp. v. Privalov* (2006 2353 A3 QBCMF), held that an arbitration clause must be accorded the broadest interpretation possible. This was also cited by Guide on the New York Convention, at 48, para. 27.
[319] Article II (3), New York Convention, 1958.
[320] *Ibid*.
[321] J William Rowley, '*The Guide to Challenging and Enforcing Arbitration Awards*', (The Global Arbitration Review, 2019), at 2.
[322] James Nedumpara, Aditya Laddha & Sparsha Janardhan, '*Mapping Indian Judiciary's Approach to Investment Treaty Arbitration*', (2019) 1 NLUD Journal of Legal Studies 21, at 32.
[323] Albert Jan van den Berg, '*Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions*', ICSID Review - Foreign Investment Law Journal (2019), Volume 34, Issue 1, at 28.
[324] These countries include Algeria, Argentina, Canada, China, Cyprus, Denmark, Greece, Hong Kong, Hungary, Iran, Korea, Nigeria, Central African Republic, Romania, Serbia, Seychelles, Turkey & USA.

National courts have taken varying views when defining "commercial" in the context of the reservation. Several of these courts held that the term must be interpreted in its broadest sense. For instance, Courts in the US[325] and Canada[326] have agreed with the stand that "commercial" must be interpreted broadly. Specifically, the court in the *Island Territory of Curacao*[327], discussed the commercial reservation under the Convention to state that the reservation made by the US was intended to only exclude awards relating to matrimonial disputes and other domestic relations awards, political awards and so on.[328] Therefore, as per this understanding of the court, disputes arising out of BIPAs are covered by the Convention.

Public Policy Exemption

The NYC was drafted with the aim of reducing the difficulties that an award creditor would face for the recognition and enforcement of their award.[329] Hence, the Convention tried to limit the number of grounds on which recognition and enforcement of an arbitral award can be made.[330]

The enforcing authorities, usually the national courts, are provided with discretion.[331] Drafted as a "may" provision, the Article states that recognition and enforcement may be refused on certain grounds. These grounds are exhaustive and include, *inter alia*, the invalidity of the arbitration agreement, violation of due process, excess of authority, irregularity in arbitral tribunal or arbitral procedure, an award not binding, arbitrability and public policy.[332] These grounds do not permit courts to investigate the merits of the dispute and restrict the scope to only those concerned that may affect the "*fundamental structural integrity of the arbitration proceedings*"[333].

Of these grounds, public policy becomes crucial as the interpretation of what constitutes being contrary to "*public policy"* is yet not certain. The ground is unique to NYC as ICSID does not include public policy as a ground for annulment.[334] The interpretation of what constitutes "public policy" is an ongoing, century-long discussion. In 1853, the English House of Lords described public policy as a principle of law which provides that one cannot lawfully act in a way that has the tendency to be injurious to the public or against the public good.[335] In *D.S.T. v. Rakoil*[336], the English Court of Appeal held that "public policy" must be interpreted exhaustively, however, with extreme caution. Several legislations and courts restrict the scope of public policy to "international public policy" or "transactional public policy" and not just the "public policy" of a country.[337] Scope of international public policy is narrower than domestic public

---

[325] *Island Territory of Curacao v. Solitron Devices Inc.* [US District Court for the Southern District of New York - 356 F. Supp. 1 (S.D.N.Y. 1973) February 14, 1973]; *BCB Holdings Ltd. & The Belize Bank Ltd. v. The Government of Belize* [Civil Action No. 14-1123 (CKK), June 24, 2015].
[326] The court in *Canada Packers Inc. v. Terra Nova Tankers*, [11 O.R. (3d) 382, [1992] O.J. No. 2035] adopted a broad interpretation of "commercial" to include contractual and non-contractual commercial relationships.
[327] US District Court for the Southern District of New York - 356 F. Supp. 1 (S.D.N.Y. 1973) February 14, 1973.
[328] *Ibid*., para. 9.
[329] J William Rowley, '*The Guide to Challenging and Enforcing Arbitration Awards'*, (The Global Arbitration Review, 2019), at 124.
[330] *Ibid*.
[331] *Ibid*.
[332] NYC, Topic List of Court Decisions on the New York Convention Cases, available at: https://www.newyorkconvention.org/court+decisions/decisions+per+topic. [Accessed on 30 March 2023].
[333] *Kanoria & Others v. Guinness*, [2006] 1 Lloyd's Rep 701, England and Wales Court of Appeal, February 21, 2006, para. 30.
[334] Albert Jan Van Den Berg, '*Should the Setting Aside of the Arbitral Award be Abolished?*', ICSID Review - Foreign Investment Law Journal, Volume 29, Issue 2, Spring 2014, at 263–288, available at https://doi.org/10.1093/icsidreview/sit053. [Accessed on 30 March 2023]
[335] Committee on International Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, International Law Association, London Conference (2000), p. 4.
[336] *Deutsche Schachtbau-und Tiefbohrgesellscaft mbh v. Ras Al Khaimah National Oil Company*, [1987] 2 Lloyd's Rep. 246 at 254.
[337] Pierre Mayer & Audley Sheppard, '*Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Award*', Arbitration International, Volume 19, Issue 2, at 241.

policy, however, there is no clear definition for it yet.[338] The purpose behind the importance granted to international public policy is to make the exception of public policy available only in rare circumstances.[339]

5.2.3. Indian Perspective

India ratified the New York Convention in 1960 and also incorporated provisions under its domestic arbitration law for the enforcement of arbitral awards based on the NYC. The text of the domestic law is largely adopted from the convention, with a few variations. Specifically, with respect to public policy, while the domestic law lists public policy as one of the exceptions for the enforcement of an arbitral award (as also provided under the NYC), it further explains what constitutes justified public policy. This includes,[340]

i. If the award is affected by fraud or corruption or violated confidentiality or based on impermissible evidence;
ii. It is in contravention with the fundamental policy of Indian law; and
iii. It is in conflict with basic notions of morality and justice.

Therefore, there does not exist any friction between the NYC and domestic law with respect to the enforceability of arbitral awards.

However, a specific point of concern is with respect to the commercial reservation made by the Indian government when ratifying the convention. India adopted both the reservations under NYC, i.e., reciprocity and commercial reservation. As discussed, the latter reservation can cause a hindrance in enforcing investment tribunal awards. As per the domestic arbitration law, only commercial awards are identified as 'foreign awards' that are enforceable under the law.[341] Similar to the rulings of the US and Canadian courts, Indian courts have held that the term 'commercial' must be interpreted broadly, covering the *'manifold activities that are an integral part of the international trade.'*.[342] However, when it comes to disputes arising from a BIPA, the courts have differentiated between commercial and investment disputes. For instance, in the case of *UOI v. Khaitan Holdings (Mauritius) Limited & Ors.*,[343] wherein the Indian government argued for an anti-arbitration injunction against arbitral proceedings arising out of a BIPA, the court held that arbitration under BIPAs belongs to another species of arbitration when compared to commercial arbitration.[344] The court distinguishes between both arbitrations by observing that disputes arising from commercial contracts are between individuals and companies, whereas the disputes arising out of BIPAs are based on the agreements signed between two sovereign nations.[345] On this basis, the court refused to interfere with the investment arbitration proceedings pending at an international arbitral tribunal.[346] While the courts do not comprehensively discuss the commercial reservation under NYC, the courts disagree with treating investment disputes on the same line as commercial disputes. Similar claims were also made by the Indian government in the case of *UOI v. Vodafone Group PLC United Kingdom*,[347] wherein it was held that the domestic arbitration law only covers commercial arbitration and also took into account the commercial reservation made by India under the NYC.[348] Therefore, the domestic law and the judgment of the domestic courts made it clear that investment arbitral awards cannot take the enforcement route of commercial arbitral awards.

---

[338] *Ibid.*, at 242.
[339] *Ibid.*, at 243.
[340] Section 57, The Arbitration and Conciliation Act, 1996.
[341] *Ibid.*, Section 45.
[342] *R. M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co.* [AIR 1994 SC 1136, para. 12, February 10, 1994].
[343] IAs 1235/2019 and 1238/2019 in CS (OS) 46/2019, 2019 SCC Online Del 6755.
[344] *Ibid.*, para. 1.
[345] *Ibid.*, para. 1.
[346] *Ibid.*, para. 23.
[347] CS(OS) 383/2017.
[348] *Ibid.*, para. 91.

India's Revised Model BIPA attempts to ease this challenge by specifically stating that for the purpose of application of the NYC, any claim submitted for finality and enforcement of an award rendered based on the BIT, must be considered to be arising out of a commercial relationship.[349] This clause is reflected in the recently signed BITs with Belarus, Taiwan, Kyrgyz Republic and Brazil. However, since there have been no claims basing out of these treaties yet, it can only be speculated that this change will provide investors with more certainty regarding the enforcement of investment arbitral awards. Additionally, it is also hypothetical whether the change in BITs will suffice for the national courts to apply the domestic arbitration law on the issues relating to investment arbitration.

5.3. Conclusion

The adoption of an efficient enforcement procedure is crucial for the relevance of BIPAs. The protections guaranteed under a BIPA can be futile if there is no mechanism to counter possible violations. The ICSID Convention is considered more promising from an investors' point of view. Its credibility roots in the availability of automatic enforcement. However, this perception might not be entirely accurate due to the annulment proceedings beginning to take the form of an appellate mechanism. On the other end lies the procedure provided under the New York Convention. With the aim of balancing the interests of the State and investors, the convention gained popularity amongst developing nations. However, this convention poses specific challenges with respect to investment arbitral awards due to the option of commercial reservation and possible scrutiny by the domestic courts on the grounds of public policy.

India has adopted the New York Convention quite prominently by incorporating it into domestic legislation. However, this route is commonly used for the enforcement of the commercial arbitral award, keeping its role in the enforcement of investment arbitral awards at speculation. The Revised Model BIT seems more promising by expressly characterising claims under BIPA as 'commercial' for the purpose of enforcement under the New York Convention. The efficiency of the mechanism can only be tested through possible investment arbitral disputes.

[349] Article 27.5, Revised Model BIT (2015), states, "*A claim that is submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.*"

6. Conclusion & Recommendations

6.1. Prioritising investor protection: A fruitless exercise or only a cautionary tale

6.1.1. Reflections on Revised Model BIT

The Government of India is currently in the process of negotiating bilateral investment treaties on various fronts. It has already set out a commitment to execute an international investment treaty with the UAE in the recently unveiled comprehensive economic partnership agreement on 1st May 2022.[350] One lesson to be explored is whether to go ahead with the Revised Model BIPA, which India has set out to the world as the negotiating backgrounder. Another option is to mend ways and revisit the Revised Model BIPA so as to bring it in alignment with international best practices and ensure that the promises made in these investment treaties are not hollow but pragmatic and meaningful to the investors. Insofar as tax and tax obligations are concerned, a change in the taxation environment, not just the taxation laws, carries widespread ramifications for doing business. The fact that the very purpose of the national authorities exercising rights which effectively translate into veto, is an indication that the commitment in the bilateral investment treaty is only for namesake. The commitments can be revisited by the concerned government in hindsight so as to cover its actions which mayhem the investment but nonetheless cannot be questioned under the concerned BIPA.

The long and short of the above is that, despite having issued a Revised Model BIPA, the current circumstances are such that a review is warranted, in a calibrated fashion. In this regard, the learnings and experiences from the disputes in the past are factored but not factored in such a way that the baby is thrown out along with the bathwater, which is possibly a way of putting the reactions to the Model BIPAs from pre-2015 to post 2015. The reason to make such a recommendation is that an absolute tax carve-out implies that tax is no longer considered a variable relevant for doing business which factually and conceptually can never be the case. Thus, the Revised Model BIPA can translate into a roadblock in the negotiations and may hamper the possibility of execution of a comprehensive economic partnership which goes much beyond a bilateral treaty framework for the protection of investment. The larger consequence of such a scenario is that the bilateral relationship is seriously derailed, if not completely deprived, of a comprehensive economic partnership due to the strenuous effect of the carve-outs relating to tax in the Revised Model BIPA.

Another reason for a relook is the fact that India of 2023 is not India of 2015 and certainly, India of 2047 will not be India of 2015. Why is this aspect relevant? This is relevant because India of 2023 is aspiring to be a developed nation on a fast-track path of economic prosperity, and the cost of 100 years of independence signified by 2047 which, in unequivocal terms, has been expressed by the government to be the golden objective towards which it is pursuing the path of economic progress and all-rounded development. A negative outlook or a sceptical attitude cannot be the basis on which a country progresses, and much less it certainly cannot be the approach on which one can hinge the fate of national priorities. In other words, a country such as India, which aspires to be a global powerhouse in the economic, political and other terms, must necessarily factor, rather lead, the framing of best practices at the global level, which certainly does not go in parallel with a restrictive outlook in the domestic space. If the entire idea of a bilateral investment treaty or any investment treaty for that matter, is to ensure that global business houses operate seamlessly in India under an assurance that they shall not be

[350] Article 12, India – UAE Comprehensive Economic Partnership Agreement (2022).

subjected to any harmful practices, then such idea of an investment treaty is not just militated but absolutely written off when there are expensive carve-outs from such treaties and that too on potent issues such as tax which, specifically and materially affect the business sentiment on which such investment treaties try to carry an assuaging effect.

For these few reasons, which are only representative in nature, there is an urgent need to revisit the Revised Model BIPA of 2015 and ensure that it is aligned with the larger objective of the need for an expanded economic paradigm and a refined model. A revised 2023 model investment Treaty of India should become a showstopper for the Indian government to represent to the world in what sense India actually means business for international investors to make India their home.

Basing the negotiations of BIPAs on the Revised Model BIPA of 2015 will result in continued delays in reaching an agreement between states. This is because, while a few states have accepted the provisions of the 2015 revised model, the provisions continue to carry ambiguity and complexities which may not be acceptable to several states, specifically investment-sourcing states. The provisions of the Revised Model BIPA of 2015 can keep foreign investors at risk without sufficient remedies to raise any future concerns.

Specific to tax disputes, the tax carve-out under the Revised Model BIPA of 2015 needs to be relooked for it to be more acceptable by potential treaty partners. The following changes are recommended:

Defining a tax measure

In *Cairn*, India argued that investment treaty tribunals cannot second-guess a State's policy decisions.[351] This has been followed even in India's Revised Model BIPA. India does not want to negotiate its sovereign right to tax under investment protection agreements as is evident from its Revised Model BIPA.

The tax carve-out merely mentions that a treaty shall not apply to '*measure regarding taxation*', but it does not mention what constitutes a measure regarding taxation. The absence of a definition seems deliberate to ensure that the Host State retains the power to make its determination as and when it is required.

However, this might have an adverse impact on investors. In the event of an allegation of a breach of treaty obligations, the Revised Model BIPA allows a contracting state to decide whether the breach is a subject matter of tax, and such a decision is not open to review.

While such an approach does not warrant defining a "taxation measure" and does away with the uncertainty regarding the coverage of the phrase completely, it is overly protectionist. Arguably, a state can decide that any of its measures is a taxation measure and, therefore, not arbitrable, extinguishing all the treaty protections available against such a measure. Instead of the above existing approach, the treaty must define a taxation measure, perhaps, in line with the decision in the case of *Encana*.

Definition of a tax measure as per *Encana*
A measure shall constitute a tax measure if it creates a new legal liability on a class of persons to pay money to the State in respect of some defined class of transactions, the money to be used for public purposes.

[351] *Cairn v. India*, supra note 68, para. 1794.

Determining applicable law

As per India's Revised Model BIPA, the applicable or governing law for interpretation are:

(e) the Treaty itself;
(f) the general principles of public international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which States are party; and
(g) for matters relating to domestic law, the Law of the Host State.

Experts have argued that such a formulation of applicable law provisions are not strictly a "choice of law" rule which typically assign particular questions to a particular law based on a connecting factor.[352] Instead, it only indicates the diversity of laws that might apply to an investment dispute. Instead of burdening tribunals with determining the applicable law, specific choice of rules should be determined and then applied depending on the characterisation of the dispute and the connecting factor which will bring them closer to the choice of law rules. The applicable law to determine whether a measure of a state is a tax measure may be the law of the host state.

Accessibility to ICSID

By adopting the applicability of the ICSID Convention, India can assure its investors with predictability and certainty in the investment environment as a result of the binding nature of awards. Nonetheless, India's stand regarding its membership with the ICSID Convention continues to be uncertain.

While the government has not indicated any intent in joining the Convention, the Revised Model BIPA contains comprehensive provisions adopted in relation to the ICSID Convention. For instance, Article 17 (Consent to Arbitration) of the Revised Model refers to Chapter II (Jurisdiction of the Centre) of the ICSID Convention. Further, Article 27 (Finality and Enforcement of Awards) of the Revised Model provides the procedure for enforcing an arbitral award made under the ICSID Convention, including the timelines.

The relevance of such provisions remains questionable as one of the pre-conditions for submission of an arbitration claim continues to be a requirement of both the contracting parties to be members of the ICSID Convention. Therefore, the above provisions are only academic until India joins the ICSID Convention.

Undoing Commercial Reservation

India's commercial reservation restricts the application of the NYC only to awards in respect of commercial arbitration.

The Calcutta High Court in *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS*[353] assumed the applicability of the Arbitration and Conciliation Act, 1966, to investment treaty disputes. Prior to this judgement, no arguments as to the applicability of the Arbitration and Conciliation Act, 1966 were raised and neither were the relationships arising out of international treaties considered.

In *UOI v. Vodafone Group PLC United Kingdom & Anr.*[354], the Delhi High Court relied on a decision of the Apex court in *State of U.P. v. Synthetics and Chemicals Ltd*[355] where the court had discussed how the rule of *sub silentio* is an exception to the rule of precedents, which in the said case was the decision in the case of *The Board of Trustees of the Port of Kolkata* (supra note 353).

---

[352] Zachary Douglas, '*The International Law of Investment Claims*', (Cambridge University Press, 2009), at 129; Dafina Atanasova, '*Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?*', Journal of International Dispute Settlement (2019), Volume 10, Issue 3, at 399.
[353] 2014 SCC Online Cal 17695.
[354] 2018 SCC Online Del 8842.
[355] (1991) 4 SCC 139.

Further, Article 51 (c) of the Constitution of India was discussed in Vodafone (supra note 354) which held that:

- even where India is not a party to an international treaty, rules of international law which are not contrary to domestic law are followed by the courts.
- where India is a signatory, and a statute is made pursuant to or in furtherance of a treaty, the statute would be given a "purposive" construction rather than a narrow literal construction. The interpretation of such a statute should be construed on broad principles of general acceptance rather than earlier domestic precedents, with an intent to carry out treaty obligations, and not to be inconsistent with them.
- where India is a signatory to an international treaty, and a statute is made to enforce a treaty obligation, and if there be any difference between the language of such statute and a corresponding provision of the treaty, the statutory language should be construed in the same sense as that of the treaty.

Since India has made a commercial reservation to Article 1 of the NYC, Indian courts refuse to enforce investment arbitration awards.[356] Even though the Revised Model BIPA of India deems an award made in respect of a claim brought under the treaty to have arisen out of a commercial relationship or transaction for purposes of Article I of the New York Convention, Section 44 specifies that Part II of the Arbitration and Conciliation Act, 1996 on enforcement of foreign awards will only apply to an arbitration considered to be commercial under the Indian law. To resolve the lack of clarity in this aspect, sufficient changes in domestic law is recommended, including, awards arising out of investment arbitration being included within the ambit of foreign awards under Section 44 of the Arbitration and Conciliation Act, 1996.

Introduce clarity on functions of the State Authorities, process and timelines

Article 2.4 of the Revised Model BIPA provides for the determination of what constitutes a 'tax measure' by state authorities. However, the provision lacks clarity with respect to the process or timelines that obligate the state authorities to deliver the decision in an efficient and time-bound manner. Several model BIPAs[357] have proposed the determination of tax measures by state authorities. However, these models differ from India's Revised Model BIPA in two aspects. First, they propose setting up a Joint Committee that consists of authorities from both the treaty partners, unlike the Indian proposal that allows for a unilateral decision by the Host State. Second, these models also prescribe fixed timelines within which the decision must be rendered, therefore, assuring certainty. On the other hand, the Indian Revised Model BIPA does not prescribe any timelines, therefore, allowing unreasonable delays. Further, the provision also permits the state authorities to intervene subsequent to the initiation of arbitral proceedings, consequently, interfering with the functions of the arbitral tribunal and rendering the time of the arbitral tribunal, and resources of the investors wasteful if the measure is determined as a 'tax measure'. Therefore, the Indian model can draw inspiration from other investment treaty models and amend its current provision, which has the threat of uncertainty and arbitrary unilateral decisions.

Conduct public consultations with Indian investors

The language of the Revised Model BIPA of 2015 reflects India's apprehension of being subject to claims initiated by foreign investors. The revised model is occupied with provisions that protect the interests of a host state. This ignores the fact that the provisions of the Revised Model BIPA, if accepted by the treaty partner, will place Indian investors with investments in the jurisdiction of the contracting state, in the same position as foreign investors with investments in India. The lack of clarity and arbitrariness that will impact foreign investors will equally be applicable to such Indian investors. Therefore, Indian investors are equal stakeholders in the discussion, and their perspectives/concerns must be taken into consideration.

[356] *UOI v. Khaitan*, supra note 226.
[357] For instance, the Model BITs of Canada, Norway and Slovakia.

In response to the Ministry of External Affairs' recommendation to conduct an in-depth study of the working and the outcome of the Revised Model BIPA, the Indian government mentioned that the Ministry of External Affairs consults with in-house consultants and legal experts, however, there is no mention of Indian investors or industry experts being consulted. Therefore, the Indian government must realise that one of the primary stakeholders are being left behind during the consultation process and their opinions are crucial to ensure that investments flow smoothly inwards and outwards.

6.2. Changing Policy Priorities and Their Implications

6.2.1. Dynamics of the Revised Model

After *White Industries*, *Cairn* and *Vodafone* cases, India has become extremely wary of the downside of entering into BIPAs, which is reflected clearly in the Revised Model BIPA. India's Revised Model BIPA does not contain an MFN provision. The FET provision has also been skipped primarily because Tribunals interpret this protection in a very broad manner. Instead, it features a "Treatment of Investments" provision which prohibits a country from subjecting foreign investments to measures that constitute a violation of customary international law 'through':

a. denial of justice, which covers both judicial and administrative proceedings; or
b. fundamental breach of due process; or
c. targeted discrimination on manifestly unjustified grounds such as gender, race or religious belief or
d. manifestly abusive treatment such as coercion, duress, and harassment.

India's Revised Model BIT fails to strike a balance between investor protection and the host states' right to regulate. India is no longer just an importer of capital. As of February 2023, India has an outward Foreign Direct Investment to the tune of $1473.95 million.[358] A weak investment treaty will become a double-edged sword for India. There is an urgent need to rationalise provisions of investor protection under India's BIPAs.

Instead of excluding taxation measures from the protections guaranteed under BIPAS, India should consider offering protection against taxation as resulting in expropriation in certain cases, as provided by the US Model BIT and Canada's Revised Model BIPA.

6.2.2. Jurisdictional issues

The access to the ISDS mechanism under the Revised Model BIT is significantly diluted as only disputes arising out of alleged breach of an obligation of the host State under Chapter II of the Revised Model BIT can be settled under ISDS.[359] Therefore, any dispute with respect to the breach of the obligations contained in Articles 9 on Entry and Sojourn of Personnel or Article 10 on Transparency of the Treaty cannot be brought under ISDS. Additionally, disputes arising solely from an alleged breach of a contract between a state and an investor cannot be arbitrated under ISDS. Therefore, the Revised Model BIT lacks an umbrella clause.

As per the Revised Model BIT, when the host decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, the decision of the host, whether before or after the commencement of arbitral proceedings, shall be non-justiciable and it shall not be open to any arbitration tribunal to review such decision[360]. While a state would refrain from undertaking any

[358] Reserve Bank of India, *'Overseas Direct Investment for February 2023'*, available at: https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=55374. [Accessed on 29 March 2023]
[359] Article 13.2, India Revised Model BIT, 2015.
[360] Article 2.4.ii, India Revised Model BIT, 2015.

obligation that impinges on its sovereign right to tax, for a state to unilaterally be able to determine what a "taxation measure", thereby completely avoiding the possible jurisdiction of investment tribunals, is excessive. Instead, Canada's approach outlined earlier in this respect is far more just or impartial. Akin to Canada's Revised Model BIPA, India should consider a mechanism for a joint determination between both states. Such joint determination shall then be binding on the Tribunal. A reasonable timeline to complete such determination can be set so as to not hold up timely resolution of disputes.

6.2.3. Multilateral Investment Courts

The United Nations Commission on International Trade had been deliberating on different ways to reform the ISDS. As per the EU, the major issues with the ISDS mechanism of ad-hoc tribunals are:

(i) Inconsistent judgements;
(ii) Multiplicity of proceedings; and
(iii) The need to protect businesses from conflicting with the state and its judicial system.

In March of 2018, the Council of the European Union gave a mandate to the Commission of the EU to negotiate a Multilateral Investment Court ("**MIC**"). The UNCITRAL Working Group was required to:

1) identify and consider concerns regarding ISDS;
2) consider whether reform was desirable in light of any identified concerns; and
3) develop relevant solutions to be recommended to the Commission.

The ISDS system, experts opine is opaque, biased and doesn't feature an appellate mechanism. As opposed to ISDS, MICs would boast of tenured judges. While India has been opposed to the idea of investors dragging states to the MIC, a possible solution to the deadlock India has found itself with the EU on the India – EU Free Trade Agreement (FTA) front can be the implementation of a MIC. There have been concerns about how MICs inherently put corporations on a higher pedestal. This is because several interest groups like Non-Governmental Organisations cannot approach MICs against corporations, and consequently, corporations can easily circumvent domestic laws. [361]

It is perhaps also time for India to consider including MIC in its BIPAs while ensuring that all the concerns associated with it are ironed out.

6.3. Vis-à-vis Impact on Ongoing Negotiations

Since the termination of its erstwhile BIPAs, India has signed only four BIPAs that are based on its revised model. While these BIPAs reflect successful negotiations for the Indian government, especially considering that the tax carve-out in these BIPAs largely[362] follows the text of the revised model, there is still much ground to be covered. India is yet to sign BIPAs with some of the major jurisdictions, including India's FDI-sourcing countries. While BIPAs alone do not influence the FDI inflow, they contribute towards an investment regime that assures protection for investments, which helps the FDI flow into the country.[363] BIPAs are also considered to have the potential to attract FDIs into the country

[361] Aditi Vasani, '*The Multilateral Investment Court: India's tightrope walk between Free Trade and Justice*', Society for International Trade and Competition Law Blog, available at https://nujssitc.wordpress.com/2018/03/12/the-multilateral-investment-court-indias-tightrope-walk-between-free-trade-and-justice/. [Accessed on 30 March 2023]

[362] Only the BIT with Brazil differs with respect to the justiciability of a decision by the Host State regarding tax measures.

[363] Jaivir Singh, Vatsala Shreeti & Parnil Urdhwareshe, *'The Impact of Bilateral Investment Treaties on FDI inflows into India: Some Empirical Results, Indian Council for Research on International Economic Relations*', ICRIER, Working Paper, available at https://icrier.org/pdf/Working_Paper_391.pdf. [Accessed on 30 March 2023]

as they provide investors with confidence in their investments in the country.[364] Thus, the absence of BIPA with such countries, at the very least, remains a point of consideration.

This observation stands vindicated in view of recent developments wherein, when reviewing the progress made by the Indian government with respect to negotiations of BIPAs, the Parliamentary Committee of the External Affairs Ministry observed that the efforts made by the Indian government in negotiating BIPAs have been inadequate.[365] The Committee highlighted the importance of BIPAs in attracting investors and questioned the slow pace at which the BIPAs are being negotiated. The Committee recommended that the Ministry of External Affairs actively facilitate the process to ensure more BIPAs are signed.[366]

A disproportionate review of the state of affairs reveals that the Government of India is alive to the pragmatic realities and influence of BIPA on increased trade and economic aspects. This is evident from the recently concluded trade pacts which distinctively feature BIPAs as a critical link.

6.3.1. India – UAE Comprehensive Economic Partnership Agreement

The India-UAE Comprehensive Economic Partnership Agreement ("**India-UAE CEPA**") came into force on 1st May 2022. It consists of 18 chapters that cover various aspects of facilitating trade between the two states.

Crucial for this discussion is chapter 12 which is in relation to investments. The chapter titled 'Investment and Trade' provides for an agreement between the two states to finalise a bilateral investment treaty by June 2022. However, as of date, no progress is reported. It is important to note that India and UAE do have a BIPA in force that was agreed upon by the states in 2013, which continues notwithstanding the 2015 revised model. The 2013 BIPA carves out tax from the very scope of the agreement, however, the tax carve-out is not as comprehensive as the one provided under the revised model of India. This BIPA (a) states that the provisions of the agreement do not apply to any matter relating to taxation, (b) it provides the host state with the power to determine that measure as a tax measure and therefore (c) allows arbitral tribunals to exercise their jurisdiction over tax-related measures. It will be interesting to see the revised India-UAE BIPA and how it will be influenced by the 2015 revised model.

6.3.2. European Union-India BIPA

Until the termination of its BIPAs, India negotiated independent BIPAs with each of the EU nations. However, since 2007, the Indian government has been negotiating a broad-based India-EU Trade and Investment Agreement.[367] Additionally, in 2020, due to certain intra-EU developments, the EU members agreed to terminate their existing independent BIPAs and the EU is leading the negotiations on behalf of its members to ensure consistency.

The negotiations for an India-EU trade and investment agreements were halted in 2013 due to differences regarding crucial issues such as tariff rules and market access.[368] However, in May 2021, the

---

[364] Ministry of External Affairs, Parliamentary Committee on External Affairs (2021-22), Fourteenth Report, April 2022, at 12.
[365] *Ibid*., at 2.
[366] *Ibid.*
[367] Department of Commerce, '*India-EU Based Trade and Investment agreement (BTIA) Negotiations*', International Trade, Ministry of Commerce and Industry, available at https://commerce.gov.in/international-trade-trade-agreements-indias-current-engagements-in-rtas/india-eu-broad-based-trade-and-investment-agreement-btia-negotiations/. [Accessed on 30 March 2023]
[368] Press Trust of India, '*India, EU decide to resume negotiations on Free Trade Agreement after 8 yrs*', Business Standard, available at https://www.business-standard.com/article/economy-policy/india-eu-decide-to-resume-negotiations-on-free-trade-agreement-after-8-yrs-121050801019_1.html. [Accessed on 30 March 2023]

Indian government and the EU leaders agreed to resume the negotiations[369] and the first round of negotiations pertaining to India-EU Investment Protection Agreement concluded in June 2022[370]. This round was focused on the textual proposal presented by the EU. India announced that it would place its textual proposal ahead of the second round of negotiations. During the second round of negotiations in October 2022, the discussions were focused on the EU's proposal for an Investment Court System and other provisions on dispute settlement provided in its textual proposal. The Indian text proposal on investment protection was also discussed.[371] During the third round of negotiations, both sides aimed to consolidate their texts and clarify the possible areas of convergence and divergence between the respective positions, especially with respect to dispute settlement.[372] While the details of the negotiations are not in the public domain, the EU textual proposal was made available in March 2022, i.e., prior to the negotiations. The EU textual proposal reflects several points of differences when compared to the 2015 Indian Revised Model BIPA. The tax carve-out proposed by the EU is a limited tax carve-out that restricts the application of the investment agreement on tax measures only with respect to the MFN treatment.

The negotiations are expected to conclude by 2024.[373] These agreements can be one of the crucial agreements as EU is India's second largest trading partner[374] and several of India's past tussles have been with claims arising from its BIPAs signed with some of the EU nations.

6.3.3. Australia-India Comprehensive Economic Cooperation Agreement (CECA)

The Indian and the Australian governments initiated negotiations for a Comprehensive Economic Cooperation Agreement ("CECA") in May 2011. However, after nine rounds of negotiations, the initiative was suspended in September 2015.[375] Thereafter, on 30th September 2021, both states agreed to relaunch their negotiations for a CECA by the end of 2022. Meanwhile, the governments have agreed to an interim agreement which was signed by the parties on 2nd April 2022.

Unlike the India-UAE CEPA, the interim agreement does not contain any exclusive provisions addressing investment protections. However, important for the current discussions is Chapter 11, which lists the general exceptions. One of the general exceptions provided under the chapter is on Direct Taxation

---

[369] European Union, '*EU Trade Relations with India. Facts, Figures and Latest Developments'*, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india_en. [Accessed on 30 March 2023]

[370] Press Information Bureau, *'India-EU Conclude 1st Round of Negotiations for India-EU Trade and Investment Agreements*', Ministry of Commerce and Industry, 02 July 2022, available at https://pib.gov.in/Pressreleaseshare.aspx?PRID=1838839. [Accessed on 30 March 2023]

[371] European Commission, '*Report of the Second Round of Negotiations on a Free Trade Agreement between the European Union and India*', 3–7 October 2022, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement/documents_en. [Accessed on 30 March 2023].

[372] European Commission, '*Report of the Third Round of Negotiations on a Free Trade Agreement between the European Union and India*', 28 November–2 December 2022, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement/documents_en. [Accessed on 30 March 2023].

[373] Rezaul Laskar, '*In New Roadmap for India-EU Trade Deal, 2023 is the Deadline to Conclude Talks*', Hindustan Times, 29 April 2022, available at https://www.hindustantimes.com/india-news/in-new-roadmap-for-india-eu-trade-deal-2024-is-the-deadline-to-conclude-talks-101651237728358.html. [Accessed on 30 March 2023]

[374] Press Information Bureau, *'India-EU Conclude 1st Round of Negotiations for India-EU Trade and Investment Agreements*', Ministry of Commerce and Industry, 02 July 2022, available at https://pib.gov.in/Pressreleaseshare.aspx?PRID=1838839. [Accessed on 30 March 2023]

[375] Department of Foreign Affairs and Trade, *'Australia-India Comprehensive Economic Cooperation Agreement (AI-CECA)',* Australian Government, available at https://www.dfat.gov.au/trade/agreements/negotiations/aifta/australia-india-comprehensive-economic-cooperation-agreement. [Accessed on 30 March 2023]

Measures. Article 11.3 of the CECA has two types of tax carve-outs. First, it states that the provisions of the agreement shall not be applicable to direct taxation measures. Second, it excludes the applicability of the provisions on rights and obligations granted under a direct tax convention. In case there is a conflict between the CECA and a direct tax convention, the Article states that the latter must prevail.

Since the unilateral termination of the Australia-India BIPA in 2017, there has been no public statement by either of the states regarding any negotiations relating to a BIPA. Australia becomes yet another vital treaty partner from the perspective of BIPA since one of India's most controversial BIPA disputes – White Industries – was based on the then-existing BIPA between the states.

6.3.4. Other Treaty Negotiations

Apart from the above agreements, the Indian government has initiated discussions and negotiations with several states, however, information regarding very few is in the public domain. For illustration, the Indian government is currently in active discussions with the UK government for agreeing to a Foreign Trade Agreement and had set March 2023 as the deadline.[376] On 11th May 2022, through a 'Joint Outcome Statement', both states announced that a total of 60 separate sessions have been conducted between the officials and that their discussions covered 23 policy areas.[377] Other than this, the states have not released any further information regarding the FTA or regarding a possible BIPA between the states.

6.4. Possible Multilateral Outcomes

6.4.1. The Ongoing Friction with the BIPAs

The historical context or the background during which investment treaties were signed drastically varies from the current investment environment. These decades-old treaties were drafted during a post-war era when the developed countries were safeguarding the investments made by their nationals from the threat of a developing country's fluctuating economy and the threat of nationalisation of these investments. Thus, the language and structure of the BIPAs do not reflect a balance of interests of the contracting states and their respective investors. As discussed, several aspects or provisions of the BIPAs are facing friction, especially from developing countries. For instance, the dispute settlement mechanism, which is one of the primary reasons for investors to invoke a BIPA, has been criticised for undermining the sovereignty of states, especially when it comes to arbitration of taxation measures. Further, the fact that a BIPA can be invoked without being required to first raise the issue before the domestic courts brings the status of domestic courts under question. Finding it to be a tilted scale, India terminated its decades-old BIPAs and introduced a Revised Model BIPA which requires the exhaustion of domestic remedies and provides a general carve-out against the application of the BIPAs on taxation measures.

Interestingly, developing countries are not alone troubled by the outcomes of BIPA and, specifically, the dispute settlement mechanism provided under it. Even developed countries have become cautious of the repercussions of the erstwhile treaties. For instance, on 5th May 2020, the EU released an international agreement signed by its member states agreeing to terminate their existing BIPAs. Several BIPAs have already been terminated by EU nations, and some are in process of being terminated.

---

[376] Press Trust of India, '*India-UK FTA on Fast Track as Third Round of Talks Covers Most Policy Areas*', CNBC, available at https://www.cnbctv18.com/economy/india-uk-fta-on-fast-track-as-third-round-of-talks-covers-most-policy-areas-13451082.htm. [Accessed on 06 April 2023]

[377] Department for International Trade, *'Round Three of Negotiations for a Free Trade Agreement between the Republic of India and the United Kingdom*', Government of the United Kingdom, 11 May 2022, available at https://www.gov.uk/government/news/joint-outcome-statement-india-uk-round-three-fta-negotiations. [Accessed on 30 March 2023]

The termination of BIPAs by the EU was a response to a concerning BIPA arbitral tribunal award passed in the case of *Achmea*, wherein the investors invoked the Netherlands-Slovakia BIT (1993) to challenge Slovakia's measure to reverse the liberalisation measures in their health insurance sector, which was the basis of the investments.[378] The Arbitral Tribunal decided in favour of the investors and held Slovakia liable for the breach of fair and equitable treatment guaranteed under the relevant Treaty. Subsequent to the award, the Slovakian Government initiated annulment proceedings against the award on the grounds that it was contrary to EU law. When the matter reached the European Court[379], the main issue was whether the investor-state dispute settlement provision in the BIT was incompatible with the EU law. Several of the BIPAs signed by the EU nations were concluded prior to the formation of the EU. Therefore, these BIPAs did not necessarily reflect the principles that were agreed upon between the nations during the formation of the Union. Therefore, the European Court held that the BIPAs signed by the EU nations were not in line with the EU law and were perceived to undermine its authority by providing dispute settlement mechanisms that are outside its ambit.

6.4.2. Platform to Facilitate Multilateral Consensus

From the above, it is evident that several states are facing concerns with their erstwhile BIPAs and are working towards transforming these treaties. It becomes a need of the hour for the states to engage in dialogue and discuss their respective concerns. If countries continue to independently work on their BIPAs, then this will only lead to a diversity of BIPAs and, as discussed, this will result in excessive delays in agreements between the states.

Therefore, we recommend that states consider establishing a common platform to discuss BIPA-related matters. Currently, the investment treaty regime does not consist of a common platform that can encourage and host discussions between the states. The treaties are negotiated behind closed doors and carry the risk of uncertainty and lack of uniformity. Thus, a common platform can facilitate dialogue and guide the states towards a uniform regime without having to compromise on their sovereignty. Of course, this will not be the first attempt towards a multilateral platform. Several attempts were made in the past to bring the investment regime under the same roof. It is therefore expedient, instead of reinventing the wheel, to take note of such attempts in order to derive inspiration for future reforms.

OECD - Multilateral Agreement on Investments

In 1995, the OECD initiated discussions for a Multilateral Agreement on Investments ("**MAI**"). It was decided that negotiations would take place between the OECD Members, and once the framework is finalised, the text will be open to non-members for signatures. Thereafter, the draft MAI was published in 1998, along with a commentary on the text. While the OECD Members focused on finalising an MAI framework, these negotiations were taking place during the time OECD was still viewed as a restricted group of developed countries. Therefore, this attempt of the OECD received serious criticism for undermining the interests of the developing countries and also keeping a developed country's sovereignty, environment and consumer interests at risk for the sake of foreign investments. Due to these objections, the OECD halted the discussions by the end of 1998.

World Trade Organisation's Agreement on Trade-Related Investment Measures

The World Trade Organisation largely concerns itself with trade aspects between the states. However, the relationship between trade and investments is increasing. The trade and investment regimes were treated as substitutes, i.e., MNEs invested in a jurisdiction only when production in their home country

[378] Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I), PCA Case No. 2008-13, Netherlands-Slovakia BIT (1991).
[379] Prior to this, the Slovakian Government had approached the Frankfurt Court and the German Federal Civil Court, both the courts did not accept the contentions of Slovakia.

cost them higher.[380] However, with the growth of global value chains wherein MNEs locate their productions and activities in different countries based on the most advantageous location factors, the two regimes are now being viewed as complementary to each other (also being referred to as 'two sides of the same coin').[381] The WTO attempted to address this relationship between trade and investment through a WTO agreement - the Agreement on Trade-Related Investment Measures ("**TRIMS**"). The TRIMS covers measures of a government that require or encourage specific behaviour by foreign investors.[382] This includes provisions for incentives or subsidies for investing in a certain sector of the country. While this seems to have close relations to the functions facilitated through a BIPA, the TRIMs has a limited scope. TRIMs is concerned only with the trade-motivated investment, i.e., the foreign investment falls within the scope of TRIMs only when it facilitates trade in the country.[383] Unlike BIPAs which usually contain a broad definition of 'investment' that covers any kind of asset, TRIMS is applicable only to investment measures related to goods and does not cover measures relating to manufacturing, production or services. For factors such as those discussed, the role of WTO in facilitating investments is limited, irrespective of the relationship between trade and investment.

United Nations Conference on Trade and Development (UNCTAD)

During the 1996 UNCTAD IX Conference in Midrand, the UNCTAD was mandated to provide a forum for international dialogue considering the rapid growth in FDI.[384] UNCTAD was required to identify and analyse the implications of a possible multilateral framework on investment. Unlike the OECD and the UN, the task conferred on UNCTAD was to work towards a multilateral platform, not a framework. The proposal of a multilateral platform instead of a framework was also supported by India.[385] A Multilateral Agreement for Investment ("**MAI**") was understood to be beneficial for reasons such as - reduction and elimination of obstacles to foreign investment, open markets, elimination of discriminatory treatment, reducing risk and relocation of capital.[386] UNCTAD has also been working towards a multilateral instrument on investor-state dispute settlement reform. Under this instrument, discussions are being held regarding a possible multilateral dispute settlement mechanism that could provide for a minimum standard or certain core elements that are to be adopted by the states mandatorily.[387] However, there is yet no clarity regarding its implementation or even acceptance by the states.

Benefits of a Multilateral Platform.

There are variable larger benefits in the event the discussions shift from a bilateral to a multilateral platform. It is, therefore, expedient to enlist a few.

---

[380] OECD, *'International Trade and Investment: Two Sides of the Same Coin?'*, May 2018, available at https://www.oecd.org/industry/ind/international-trade-investment-policy-note.pdf. [Accessed on 30 March 2023]
[381] *Ibid*.
[382] Amit Banerji, & Tarun Jain, *'WTO Rules on Investment: Futility Manifold'*, Journal of International Business Research (2007), Volume 6, Issue 2, at 69-96, available at https://ssrn.com/abstract=1087334. [Accessed on 30 March 2023].
[383] *Ibid*.
[384] World Investment Report 1996, *'Towards a Multilateral Framework for Foreign Direct Investment?'*, United Nations Cooperation for Trade and Development, available at https://worldinvestmentreport.unctad.org/wir1996/part-3-towards-a-multilateral-framework-for-foreign-direct-investment/. [Accessed on 30 March 2023].
[385] Bolla Bulli Ramaiah, '*Towards a Multilateral Framework on Investment?, Transactional Corporations*', Volume 5, Issue 3, United Nations Cooperation for Trade and Development, available at https://unctad.org/system/files/official-document/iteiitv6n1a7_en.pdf. [Accessed on 30 March 2023]
[386] Joel Messing, '*Towards a Multilateral Framework on Investment?, Transactional Corporations*', Vol. 5, No. 3, United Nations Cooperation for Trade and Development, available at https://unctad.org/system/files/official-document/iteiitv6n1a7_en.pdf. [Accessed on 30 March 2023]
[387] United Nations Cooperation for Trade and Development, *'Investment Policy Monitor'*, Issue 24, February 2021, at 22, available at https://unctad.org/system/files/official-document/diaepcbinf2021d2_en.pdf. [Accessed on 30 March 2023]

(a) Facilitation of dialogue and collaboration.

The platform will facilitate and encourage dialogue between the states. As discussed, states are increasingly raising their independent concerns regarding the existing investment regime. As a result of these concerns, states are reworking their frameworks, such as revising their Model BIPAs. The relevance of these Model BIPAs will be tested only when they are accepted by the contracting state. Since these revisions were made without taking into consideration the views and perspectives of states, delays will be caused when the negotiation between states is initiated based on these Model BIPAs. For instance, the delay in signing a BIPA between India and the US was accounted towards disagreement of the US regarding the requirement of exhaustion of local remedies. Therefore, these hindrances can be avoided by adopting a collaborative approach between the states.

(b) Balance between interests of developed and developing countries

Several of the past attempts failed due to an imbalance between the interests of developed and developing states. For a sustainable and mutually agreeable mechanism, the concerns of developing countries must be taken seriously. Being market jurisdictions, developing countries play a larger role when it comes to the protection of investments. Unlike the environment of the post-war era, the concerns of developing countries have greater importance in the current investment environment. If the developing countries withdraw themselves from signing or maintaining any BIPAs with the developed countries, the impact can be adverse. Several Latin American countries have already withdrawn from the ICSID Convention.[388] To ensure that the concerns of developing countries are heard and taken into consideration, a multilateral platform will play a vital role.

(c) Ability to provide Uniformity in BIPA

A multilateral platform will also work towards achieving a common consensus between states. A common consensus will ensure uniformity between the investment policies and frameworks. This will promote harmony between states and will ultimately benefit the investors. Uniformity need not necessarily mean that the policies require to be absolute reflections of each other. It merely requires achieving a common foundation. A foundation that embodies certain basic principles or protections that investors can rely on will facilitate cross-border investments. For instance, the model BIPAs introduced by various countries differ in several aspects. For instance, the US model BIPA contains the national treatment and MFN principle, however, India's revised model BIPA omitted these principles. Similarly, the tax carve-out adopted by India is also dissimilar from the limited tax carve-out under the US model.

(d) Scope for greater certainty for investors

Having been discussed and debated, a policy or a framework that is enacted by a state after taking into account the perspectives expressed by states in the multilateral platform will benefit the investors with greater certainty. The position of each state, against or in favor of a policy, will provide investors with better clarity. This will assist investors in understanding the investment regimes better. For instance, any policy introduced by the OECD contains a section which lists the reservations made by a state. This provides a better understanding and permits investors to predict the state's behaviour towards certain measures.

6.5. Conclusion

While several attempts have been made to develop either a multilateral agreement or a multilateral platform, they have fallen short due to some form of criticism. The attempts were criticised either for favouring developed nations or for their limited scope.

[388] For instance, withdrawal by Bolivia, Ecuador, Venezuela and Argentina.

However, unlike the previous circumstances, the need for a multilateral platform is becoming increasingly important due to the reshaping of the investment regime as a consequence of states reworking their erstwhile investment frameworks. Therefore, attempts must be made by the states to reconsider the need for a multilateral platform. A multilateral agreement creates rights and obligations between the states, and this might lead to either failing to address the concerns of states or resulting in addressing only broad concerns. On the other hand, the objective of a multilateral platform is to provide a common space where states can discuss their concerns and find a mutual ground that addresses each of these concerns.

As several countries take a step back from their erstwhile BIPAs and have begun to renegotiate them, the time could not be more apt and crucial for proposing a multilateral engagement rather than a bilateral one. As developing and developed countries face their respective challenges with the erstwhile BIPAs, states need collaboration and dialogue to ensure that the future BIPAs are sustainable. Each state is working towards a framework which may miss the opportunity to establish a stable investment protection framework for their investors if not built on a mutual consensus. Therefore, reconsidering and initiating discussions for a multilateral platform will benefit the states and the investors.