
Frequently Asked Questions

For

Foreign Investors

Wanting to Seek Relief under

Their Country's Investment Treaty

with the Republic of India

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Table of Contents

	Question in Brief	Page No.
1.	Countries with whom India has signed BIPA	1
2.	Countries with whom India has signed CECA	2
3.	Download copies of BIPA / CECA executed by India	2
4.	Difference between BIPA and CECA	2
5.	Whether to proceed under BIPA or CECA	2
6.	Dispute with Municipal Corporation – covered under treaty	2
7.	Relationship with state government covered under BIPA	3
8.	Public Sector Undertaking – whether organ of Republic	3
9.	Non-treaty country, investment routed through treaty country	6
10.	Treaty country's investment through non-treaty country	6
11.	Investment in debentures	7
12.	Matter pending in Indian court	7
13.	First step to be taken	8
14.	After request for amicable settlement	8
15.	Options during negotiations	8
16.	What if settlement talks fail	9
17.	Appeal against award of Arbitration Tribunal	9
18.	Time taken	9
19.	Is international arbitration expensive	10
20.	Contact person in Government of India	11
	About Us	12

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Frequently Asked Questions

for

Seeking Relief under India's Investment Treaty

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

India has Bilateral Investment Protection Agreement with the following countries:

Argentina	Finland	Mexico	Spain
Armenia	France	Mongolia	Sri Lanka
Australia	Germany	Morocco	Sudan
Austria	Ghana	Mozambique	Sweden
Bahrain	Greece	Myanmar	Switzerland
Bangladesh	Hungary	Nepal	Syrian Arab Republic
Belarus	Iceland	Netherlands	Taiwan
Belgium	Indonesia	Oman	Tajikistan
Bosnia & Herzegovina	Israel	Philippines	Thailand
Brunei Darussalam	Italy	Poland	Trinidad & Tobago
Bulgaria	Jordan	Portugal	Turkey
China	Kazakhstan	Qatar	Turkmenistan
Colombia	Kuwait	Romania	Ukraine
Croatia	Kyrgyz Republic	Russian Federation	United Kingdom
Cyprus	Lao PDR	Saudi Arabia	Uruguay
Czech. Republic	Latvia	Senegal	Uzbekistan
Dem. Rep. of Congo	Libya	Serbia (Yugoslavia)	Vietnam
Denmark	Lithuania	Seychelles	Yemen
Djibouti	Macedonia	Slovak Republic	Zimbabwe
Egypt	Malaysia	Slovenia	
Ethiopia	Mauritius	South Korea	

Q.2 Which are the countries with whom India has Comprehensive Economic Cooperation Agreement (CECA)?

India has CECA with only four countries as on date – Japan, Malaysia, Republic of Korea, and Singapore.

Q.3 Where can I get a copy of India's BIPA / CECA with my country?

All BIPA's executed by India are available at
http://finmin.nic.in/bipa/bipa_index.asp

All CECA's executed by India are available at
http://commerce.nic.in/trade/international_ta.asp?id=2&trade=i

One can also download copies of all international investment treaties from
http://www.unctadxi.org/templates/DocSearch_779.aspx

Q.4 What is the difference between BIPA and CECA?

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

Q.5 A foreign investor is from a country that has signed both BIPA and CECA. In a dispute with Republic of India, should he proceed under BIPA or CECA?

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

Q.6 Our company had been assigned work by Municipal Corporation in India. 10% shares of the company are held by a foreign company incorporated in a country having BIPA with India. Can our dispute with the Municipal Corporation be taken up under BIPA?

State Governments, Municipal Bodies and even Gram Panchayats are organs of the Republic of India. They are constitutional bodies exercising governmental functions. Article 4 of the Draft Articles on Responsibility of

States for Internationally Wrong Acts adopted by the International Law Commission reads as follows:

Article 4. Conduct of organs of a State

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

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

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

Q.7 Is a relationship with State Government also covered under BIPA / CECA?

Yes, please see the reply to Q.6.

Q.8 Our company is partially owned by a foreign company. We had been assigned work by a Public Sector Undertaking (PSU). After the completion of the work, the PSU did not release the Security Deposit as well as the last payment. Can we ask our foreign shareholders to take action under BIPA?

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

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

Article 5. Conduct of persons or entities exercising elements of governmental authority

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

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

(2) The generic term “entity” reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal’s jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.¹²⁷

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

Article 8. Conduct directed or controlled by a State

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

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

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

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

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

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

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

Q.9 We are a company located in the United States of America. Our country does not have investment treaty arrangements with India. We made investments in an Indian company through our wholly owned subsidiary in Mauritius. The Indian company signed an Agreement with a state Government. Now there are some problems in the working of the agreement. Can we benefit from India-Mauritius BIPA?

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

Q.10 We are a Malaysia-based company. We have made some investments in India through a tax haven country which does not have any treaties with India. Can we take benefit of India-Malaysia BIPA / CECA?

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

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

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

Q.11 We (a foreign company) had invested in debentures of an Indian company. The company is defaulting on the debentures citing a force majeure condition created by some legislative changes made by Indian Parliament. The new law has made it impossible for the Indian company to do business. Can we claim relief under the BIPA treaty that our country has with India?

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

- (a) "investments" means every kind of asset invested in accordance with the laws, regulations and national policies of the Contracting Parties in whose territory the investment is made and in particular, though not exclusively, includes:
- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
 - (ii) shares, stocks and debentures of companies or interests in the property of such companies;
 - (iii) rights to money or a claim to any performance having financial value;
 - (iv) intellectual property rights, including rights with respect to copyrights, patents, trademarks, tradenames, industrial designs, trade secrets, technical processes and know-how and goodwill in accordance with the relevant laws of the respective Contracting Party;
 - (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract, or exploit natural resources.

Q.12 We (a foreign company) own shares (minority) in an Indian company. The Indian company had taken up some contract with a State Government. A dispute had taken place between the Indian company and the State Government. The matter was referred to arbitration. After the decision of the arbitrator, the matter now is before High Court where it has been pending for past eleven years. Can we take recourse to the provisions of BIPA?

All courts are organs of the Republic of India. Excessive delays by courts have been viewed internationally as "breach of India's voluntarily assumed

obligation of providing with effective means of asserting claims and enforcing rights”.

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

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

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

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

Q.13 What is the first step to be taken in case of a dispute between a foreign investor and Republic of India?

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

Q.14 What happens after the issue of Request for Amicable Settlement?

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

Q.15 What are the options available to the parties during negotiations?

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

- (a) Submit the dispute to resolution to any judicial body of India; or
- (b) Submit the dispute for international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

Q.16 What happens if the parties fail to agree to anything or in other words if the talks fail?

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

Q.17 Can there be an appeal against the award of the International Arbitration Tribunal in a matter between an Investor and the Republic of India?

No, there is no appeal against the award in any court in India.

Q.18 How much time is the International Arbitration process likely to take?

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

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

Activity	Start Date (Ref. Zero Date)	End Date (Ref. Zero Date)
Notice Period provided in the Notice for Arbitration	190 th Day	280 th Day
International Arbitration Proceedings under BIPA / CECA	280 th Day	645 th Day

Broadly speaking, if the dispute is resolved at the amicable settlement by negotiations, the process can be resolved within six months. However, if amicable settlement is not reached the international arbitration process may further take about 12 to 18 months.

Q.19 Is international arbitration expensive?

Yes and No! In absolute terms, the answer is yes, while in relative terms the answer is no.

It is expensive when seen in absolute or Rupee / Dollar terms. For example, please look at the following claims of costs made by both parties in White Industries Australia Limited versus the Republic of India.

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

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

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

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

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

These are large sums when viewed in isolation. However, when one keeps in mind the long time that the company had been struggling for and also sees it in comparison to the amount that White Industries was awarded (about Rs. 258 million), the sums spent on international arbitration are not large.

Q.20 Who is the officer in Government of India whom one should contact in connection with any matter related to BIPA?

All notices relating to disputes under BIPA should be served to The Secretary, Department of Economic Affairs, Ministry of Finance, North Block, New Delhi - 110001.

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