

Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments

Preamble

Recognizing the uncertainties and ambiguities that may arise regarding interpretation and application of the standards contained in the Bilateral Investment Protection and Promotion Agreement entered into between the Government of the Republic of India and the Government of the People's Republic of Bangladesh , done at Dhaka on 9th day of February, 2009 (the "Agreement");

Taking into account the power of the Contracting Parties to provide clarification on the object and purpose of the Agreement; and

Recalling the requirement under customary international law, that any interpretation of the Agreement take into account the Contracting Parties' subsequent statements and practice reflecting their shared understanding of the meaning of that Agreement,

The Contracting Parties, while recognizing that additional uncertainties and ambiguities may remain and need to be further clarified at a future date, issue the following notes (the "Notes") to resolve certain questions regarding, and affirm their understanding of, the scope and meaning of several of the Agreement's provisions.

General principles applicable for interpretation of the BIPA

1. This interpretative note shall be read together with the Agreement and shall form an integral part of the Agreement.
2. The term of this interpretative note shall be co-terminus with the Agreement.
3. Interpretation of this Agreement shall be done in accordance with the high level of deference international law accords to states with regard to their development and implementation of domestic policies. Interpretation and application of the Agreement shall also reflect the strong presumption of legitimacy and regularity international law provides to domestic legislative, administrative and judicial determinations made by the Contracting Parties.

Note on definition of "investor" - Article 1 (c)

1. For greater certainty regarding the definition of an "investor":



- a) the term “company” referred to in Article 1 (c) of this Agreement means only a company, corporation, firm or association of a Contracting Party that is incorporated or constituted or otherwise duly established pursuant to the laws and regulations of that Contracting Party, and that has its seat in that Contracting Party and is engaged in substantial business activities in the territory of that Contracting Party.¹
 - b) In the case of dual nationals, the term “national”, refers to his or her dominant and effective nationality.
2. The Contracting Parties affirm that the Agreement aims to protect investors that have direct, real and transparent links with the economies of both Contracting Parties. The term “investor”, therefore, does not include persons of one Contracting Party that (a) invest in another Contracting Party through a person of a non-Party, or (b) are owned or controlled by persons of a non-Party, or persons of the other Contracting Party.

Note on definition of “investment” – Article 1 (b)

1. The Contracting Parties confirm their understanding that nothing in this Agreement covers pre-establishment or pre-investment activities.
2. The existence, scope and nature of the different assets that may be deemed an “investment” shall be determined by the laws and regulations of the Contracting Party in the territory in which the investment is made.
3. In accordance with Article 1 (b) , the minimum characteristics of an “investment” are (a) the lasting contribution of capital or other resources; (b) the expectation of gain or profit; (c) the assumption of risk by the investor; and (d) significance for development of the Contracting Party receiving the investment.²
4. For the avoidance of doubt, an investor of one Contracting Party must make its investments “in the territory of” the other Contracting Party.

¹ “Substantial business activities” do not include activities such as (a) strategies/arrangements, the main purpose or one of the main purposes of which is to avoid tax liabilities, (b) the passive holding of stock, securities, land, or other property; or (c) the ownership or leasing of real or personal property used in a trade or business, unless the owner or lessor performs significant services with respect to the operation and management of the property.

² Interests or assets that do not typically possess the characteristics of “investments” include portfolio investments, claims to payment resulting from a sale of goods or services by an individual or entity in one Contracting Party to an individual or entity in the other, or an order or judgment sought or entered in a judicial, administrative, or arbitral action.



This means, for example, that claims to money arising solely from cross-border commercial contracts for the sale of goods or services, or the extension of trade financing in connection with a cross-border commercial transaction, or other relationships or instruments not involving an investor's actual investment project in the territory of the other Contracting Party, do not constitute covered investment. Furthermore, the mere fact that an investment "benefits" the Contracting Party in which it is made is insufficient to establish that it is an investment "in territory of" that Contracting Party.

Scope - Exclusion of taxation measures – Article 2

It is clarified that this Agreement does not apply to any law or measure regarding taxation including measures taken to enforce taxation obligations.

Note on "fair and equitable treatment" – Article 3(2)

1. The concept of "fair and equitable treatment" under Article 3(2) does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens, and does not create additional substantive rights.³
For greater certainty, a measure shall constitute a violation through customary international law minimum standard of treatment in case of:
 - (i) Denial of justice in any judicial or administrative proceedings; or
 - (ii) fundamental breach of due process; or
 - (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
 - (iv) manifestly abusive treatment, such as coercion, duress and harassment.
2. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
3. For further clarification, the "fair and equitable treatment" standard under Article 3(2) does not require compensation for measures designed or applied to further public policy objectives including but not limited

³"Customary international law" is law that results from evidence of general and consistent practice of States when acting out of a sense of legal obligation. The burden to establish the existence and applicability of a binding obligation under customary international law that meets the requirements of State practice and *opinio juris* is always on the claimant. Once a rule of customary international law has been established, a claimant must show that the Contracting Party has engaged in conduct that violated that binding obligation.



to:

- a) protection or improvement of natural resources and the environment;
 - b) protection or improvement of human, animal or plant life or health;
 - c) protection or improvement of human capital, conditions of work and human rights;
 - d) protection or improvement of economic conditions and the integrity of the financial system;
 - e) implementation of fiscal policy measures, including taxation
4. For the avoidance of doubt, “*measures*” referred to under subparagraph(3) herein include new laws and regulations, amendments to existing laws and regulations, as well as changes in interpretation and application of existing laws and regulations, provided such changes or amendments are in accordance with the law of the Contracting Party taking the measure.
5. a) The “fair and equitable treatment” requirement does not, alone, elevate alleged representations, contractual promises or other undertakings by the Contracting Party where the investment is made to the investor or investment to commitments binding or enforceable under the Agreement. The legal significance of those representations, contractual promises or other undertakings to the investor or investment are to be determined, (i) in the case of a written contract between the investor or investment and Contracting Party that specifies the applicable law, under that law; and (ii) in all other cases, under the law of the Contracting Party in which the investment is made. For greater certainty, the “law of the Contracting Party” in which the investment is made means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.
- b) Subparagraph (a) is without prejudice to the question of whether a Contracting Party has inappropriately interfered with representations, contractual promises or other undertakings in breach of the Agreement through, in particular, willful and egregious abuse of law amounting to a violation of Article 3(2) and Article 5.

Note on interpretation of national treatment and MFN – Article 4

1. The most-favoured nation (MFN) and national treatment provisions under Article 4 are designed to protect against illegitimate and



intentional discrimination against an investment, or investor with respect to its investment, on the basis of nationality.

2. a) The Contracting Parties further affirm that the MFN obligation is not intended to alter the Agreement's substantive content by, for example, permitting piecemeal incorporation of and reliance on provisions found in other treaties, investment or otherwise;
b) For greater certainty, the Contracting Parties note their agreement that the MFN obligation provided under Article 4 does not apply to the mechanism for settlement of investment disputes contained in this Agreement or to other procedural and jurisdictional issues under any circumstance.
3. a) Establishing a breach under Article 4 requires a comparison between investors and investments that are in "*like circumstances*".
b) Determining whether investors or investments are in "*like circumstances*" is a fact-specific inquiry that is highly dependent on context. It requires a case-by-case examination of all relevant factors, including:
 - i. the sectors and industries in which the investors and investments are operating;
 - ii. the activities and operations of the investors and investments;
 - iii. the nature of the enterprise in question, i.e., whether it is a public, private or a state-owned or -controlled enterprise.
 - iv. the nature of goods or services involved;
 - v. the legal and regulatory regimes governing the investors and investments and their activities;
 - vi. the actual and potential effects of the investments on third persons and the local community;
 - vii. the actual and potential effects of the investments on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
 - viii. the aim of the policies or measures concerned; and
 - ix. other factors directly relating to the investors and investments in relation to the policies or measures concerned.
4. For greater certainty, legitimate exercises of prosecutorial discretion, including decisions regarding whether, when and how to enforce or not enforce a law or regulation, are not a violation of Article 4 provided such decisions are taken to further a policy, law or regulation that is not

inconsistent with the Agreement.

Note on interpretation of expropriation – Article 5

1. Article 5 addresses two situations. The first is direct expropriation, where an investment is nationalized or expropriated. The second is where a measure or series of measures have the effect of a nationalization or expropriation.
2. The determination of whether a measure or series of measures have an effect equivalent to nationalisation or expropriation requires a case-by-case, fact-based inquiry, considering the following factors, including whether:
 - a) the measures result in a total or near total and permanent destruction of the value of the investment;
 - b) the measures deprive the investor of its rights of management and control over the investment⁴; and
 - c) there is an appropriation of the investment by a Contracting Party which results in transfer of the investment, in whole or significant part, to that Contracting Party or to an agency or instrumentality of the Contracting Party or a third party.
3. Notwithstanding paragraph 2, legislative, executive, regulatory, administrative or judicial measures or actions of general applicability that are designed or applied to further a Contracting Party's public policy objectives shall not constitute expropriation. These public policy objectives include, but are not limited to:
 - a) protection and improvement of natural resources and the environment;
 - b) protection and improvement of human, animal or plant life or health;
 - c) protection and improvement of human capital, conditions of work and human rights;
 - d) protection and improvement of economic conditions and the integrity of the financial system;
 - e) implementation of fiscal policy measures, including taxation.

Note on "essential security interests" – Article 12

Where the Contracting Party asserts as a defence that the measure alleged to be a breach of its obligations under this Agreement is for the protection of its

⁴ This does not prohibit a Contracting Party from interfering with management or control when done in good faith and in compliance with the law of the Contracting Party where the investment is made. This would cover, for example, requirements under financial or insolvency law of the relevant Contracting Party, or law regarding senior management positions in sensitive industries that the Contracting Party considers necessary.



“essential security interests” or in “circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis” as set out in Article 12, any decision of such Contracting Party taken on such security considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.

Note on Settlement of Disputes between an Investor and a Contracting Party – Article 9

1. For purposes of this Agreement, “any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement” is a dispute between a Contracting Party and an investment, or an investor with respect to its investment, arising of an alleged breach of an obligation of a Contracting Party under this Agreement. The Contracting Parties further confirm their understanding that to establish the existence of a dispute actionable under Article 9, a claimant bears the burden of demonstrating that the respondent has breached an obligation owed under the Agreement, and the claimant or, in the case of an investor bringing a claim on behalf of an enterprise pursuant to Article 9, an enterprise has:
 - a) suffered actual and non-speculative damages,
 - b) as a direct and foreseeable result of that breach, and
 - c) its claims are ripe for adjudication under the Agreement.⁵
2. Absent express language to the contrary, nothing in this Agreement shall be interpreted to constitute a waiver or limitation of any rights or defenses of either of the Contracting Parties under international law, including rights to regulate within their respective borders, and abilities to invoke defenses of necessity, force majeure and sovereign

⁵ To be “ripe”, claims must be based on government conduct that is final and legally binding, and inflicts a definitive and concrete injury capable of being assessed as a breach. It is related to, and serves similar functions as the requirement of “exhaustion”, but the two are separate doctrines: Whereas ripeness addresses whether issues are fit for review, exhaustion relates to the process that must be followed. Where the challenge is one for a denial of justice, the “ripeness” **requirement** means that unless there are extremely exceptional circumstances, such as where a claimant proves that continuing to pursue domestic relief would be manifestly and wholly ineffective or obviously futile, the claimant must have exhausted all local legal remedies.



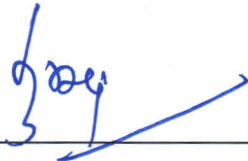
immunity.

3. Any interpretation of this Agreement, including any interpretation contained in these Notes, which is jointly agreed to and issued as such by the Contracting Parties shall be binding on tribunals established under Article 9 upon issuance of that interpretation. In accordance with the customary international law, other evidence of the Contracting Parties' agreement and practice regarding interpretation or application of this Agreement, including subsequent agreement and practice manifested through submissions made to tribunals on issues of treaty interpretation, shall similarly constitute authoritative interpretations of this Agreement and must be taken into account as such by tribunals constituted under Article 9 and Article 10 on Disputes between the Contracting Parties.⁶

In witness whereof the undersigned, duly authorized by their respective Governments, have signed this Joint Interpretative Note (JIN).

Signed in Dhaka on October 04, 2017, in two original copies in English, all texts being equally valid.

**For the Government of the
Republic of India**



**Secretary, Department of Economic
Affairs, Ministry of Finance**

Subhash Chandra Garg

**For the Government of the
People's Republic of Bangladesh**



Secretary, Ministry of Industries

Muhammad Abdullah

⁶ The failure of a non-disputing Contracting Party to make such a submission, however, shall not be interpreted to constitute agreement or disagreement with any issue of interpretation.

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