The Plurality of Definitions of Investor in International Investment Law:
A Survey of the South Asian BITs

Forhad Ahmed

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LIST OF ABBREVIATIONS

AAPL	Asian Agricultural Products Ltd
ANDS	Afghanistan National Development Strategy
BIMSTEC	Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation
BIT	Bilateral Investment Treaty
BLEU	Belgium-Luxembourg Economic Union
CIL	Customary International Law
DR-CAFTA	Dominican Republic – Central America – United States Free Trade Agreement
ECT	Energy Charter Treaty
FDI	Foreign Direct Investment
FII	Foreign Institutional Investor
FIPA	Foreign Investment Promotion and Protection Agreement
G7	Group of Seven
GAMI	Great American Management and Investment, Inc.
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Arbitration
IIL	International Investment Law
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
ITA	India Taipei Association
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
OPIC	Overseas Private Investment Corporation
PML-N	Pakistan Muslim League (N)
SAARC	South Asian Association for Regional Cooperation
SAFTA	South Asian Free Trade Area
SARSO	South Asian Regional Standards Organization
SATIS	SAARC Agreement on Trade in Services
SDG	Sustainable Development Goals
TECC	Taipei and Taipei Economic and Cultural Center
TIFA	Trade and Investment Framework Agreement
TWAIL	Third World Approaches to International Law
UAE	United Arab Emirates
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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4. Bangladesh - Germany BIT (1981)
5. Bangladesh - India BIT (2009)
6. Bangladesh - Indonesia BIT (1998)
7. Bangladesh - Iran, Islamic Republic of BIT (2001)
8. Bangladesh - Italy BIT (1990)
9. Bangladesh - Japan BIT (1998)
10. Bangladesh - Korea, Republic of BIT (1986)
11. Bangladesh - Malaysia BIT (1994)
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15. Bangladesh - Romania BIT (1987)
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6. Pakistan - Denmark BIT (1996)
7. Pakistan - Germany BIT (1959)
8. Pakistan - Indonesia BIT (1996)
9. Pakistan - Islamic Republic of Iran BIT (1995)
10. Pakistan - Italy BIT (1997)
11. Pakistan - Japan BIT (1998)
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24. Pakistan - Switzerland BIT (1995)
25. Pakistan - Syrian Arab Republic BIT (1996)
26. Pakistan - Tajikistan BIT (2004)
27. Pakistan - Turkey BIT (1995)
28. Pakistan - United Arab Emirates BIT (1995)
29. Pakistan - United Kingdom BIT (1994)
30. Pakistan - Uzbekistan BIT (1992)

Sri Lanka

1. Sri Lanka - Australia BIT (2002)
2. Sri Lanka - BLEU (Belgium-Luxembourg Economic Union) BIT (1982)
3. Sri Lanka - China BIT (1986)
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CHAPTER – 1: INTRODUCTION

1.1. Introduction:

Investors and investment are two core subject matters of international investment law. As subject matters, the definitions of these two are an obvious legal question. Yet, the definitions are not uniformly present in any Investment Treaties nor the Convention on the Settlement of Investment Disputes (hereafter ICSID Convention). Therefore, it can be said the definitions are not standard and vary from BIT to BIT.

The ever-existing plurality of definitions of investors in Investment Law has created a variety of discourses in the jurisdiction and admissibility of the ISDS, such as jurisdictional limitation, ambiguity, etc., causing the states to recalibrate their investment treaties in a manner to protect investors ensuring a better right to regulate, thereafter forming an era of backlash in the regime, of which South Asian host states are not devoid of.

This autonomy of the state parties in deciding the definition of investment and investor has been a challenging task for the Investor-State Dispute Settlement (hereafter ISDS) Tribunals to determine their respective cases following the jurisdiction and admissibility. Among these two, the findings show that more work has been done on the definitional discourse of 'investment' than that of the 'investor'. It is evident by the redundancy of literature available on investment rather than the investor. The book wants to examine the definitional shortcomings of the *Investor* in the International Investment Law (IIL).

1.2. Scholarships on the Standards of Investor Definitions

The aspect that is the driving factor is the existence of 'Plurality'. Plurality in a general legal sense provides "that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs."[1] The definition of the protected foreign investor is a fundamental issue

[1] J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1, 2. See also R. Michaels, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Sciences* 243, 245 (.a situation in which two or more laws (or legal systems) coexist in (or are obeyed by) one social field (or a population or an individual).); J. Vanderlinden, 'Le pluralisme juridique - Essai de synthèse' in J. Gilissen (ed.), *Le pluralisme juridique* (Bruxelles: l.Université de Bruxelles, 1971) 19 (.l.existence, au sein d.une société determine, de mechanismes juridiques différents s.appliquant à des situations identiques.).

for those States which are signatories to BITs.[2] It is true that each country clearly defines its policy on attracting investment.[3] Firstly, a country has a sovereign right to opt to make protection available to as many investors as possible. Conversely, it can choose to limit that protection to specific investors.[4] Secondly, by signing a bilateral and reciprocal agreement, it does not, in principle, intend investors of non-party States, or its nationals, to be able to benefit from a BIT specially negotiated with another State in a particular context and for specific interests.[5] It is therefore essential to include provisions for the definition of persons that can be used by the international arbitration mechanism provided by the BITs.[6] However, the diversity of the definitions of investors as autonomously drafted by the States in different BITs causes the plurality of definitions of investors. In another way, each BIT can adopt it's kind of definition of investors with or without reference to a predetermined framework.

Additionally, a single party may enter into multiple BITs with numerous other parties who use a non-identical or distinct template for the investors' definition. Even though this definitional autonomy was flexible for the state parties, several nations in the recent decade have realized that it diminishes the position of a state party in the IIA. As a result, several nations are developing their Model BIT to establish a standard, bargain for a better BIT with the other party, and avert further arbitration disputes. If the States adopt a standard and detailed definition of an investor, the IIA claims, ambiguity in interpretation and jurisdictional restrictions might be reduced.

An investor is first and foremost a natural or legal person in the broader lens. The Organization for Economic Co-operation and Development (OECD) published its factual survey book on the definitions of investors and investment in 2008. The book discussed the two types of investors, natural and legal persons, and elaborated on the respective sources. It found the investors as;

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[2] Nikièma S, *Best Practices: Definition of Investor* (International Institute for Sustainable Development 2012), https://www.iisd.org/library/best-practices-definition-investor, accessed August 8, 2023, pg. 01
[3] ibid
[4] ibid
[5] ibid
[6] Ibid, pg. 2

> It is a firmly established principle in international law that the nationality of the investor as a natural person is determined by the national law of the state whose nationality is claimed.[7] However, some investment agreements introduce alternative criteria, such as a requirement of residency or domicile.[8]

Moreover,

> The ICSID Convention requires nationality to be established on two important dates: the date of consent to arbitration and the date of registration.[9] The Convention does not cover dual nationals when one of the nationalities is one of the Contracting States.[10] The jurisprudence as to the nationality of natural persons is so far limited to four cases brought by dual nationals.[11]

The OECD report went on to discuss the sources of the definitions of investors, referencing the ICSID Convention for natural persons, International Investment Agreements (IIA), and Customary International Law (CIL).

The following is how the study discussed the applicability of CIL;

> The right to grant and withdraw the nationality of natural persons remains part of the sovereign domain.[12] The question before tribunals has been whether and to what extent a state can refuse to recognize the nationality of a claimant.[13] International law practice on questions of nationality has developed primarily in the context of diplomatic protection.[14]

The book has also quoted the ICJ case to relate the CIL as a source of the definition of investors;

> In the *Nottebohm case*, the ICJ held that even though a state may decide on its own accord and in terms of its own legislation whether to grant nationality to a specific person, there must be a real connection between the state and the national.[15]

And the ILC Draft Articles on Diplomatic Protection; Article 7 states;

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[7] See, OECD 2008, *Definition of Investor and Investment in International investment Agreements,* International Investment Law: Understanding Concepts and Tracking Innovations, ISBN 978-92-64-04202-5, https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf, accessed August 8, 2023, pg. 10
[8] ibid
[9] ibid
[10] ibid
[11] ibid
[12] Ibid, pg. 11
[13] ibid
[14] ibid
[15] ibid

> "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and the date of the official presentation of the claim."[16]

Second, the book cites investment treaties as one of the sources of definitions of natural persons as examples, citing the Energy Charter Treaty (ECT), NAFTA, the Canada Model FIPA, and BITs between Finland and Egypt, the United States and Uruguay, Germany, and Israel, and Canada and Argentina.

The OECD report reviewed Article 25(2) of the ICSID Convention, which stipulates what is meant by "National of another Contracting State" in relation to the third source for the definition of natural persons as investors, in the following language;

> "a) Any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute."[17]

However, this discussion does not address the possibility of the natural person having dual citizenship or permanent residency.

Later the book discusses the legal person as an investor given in investment agreements, the ICSID Convention, the nature of investors, and shareholders' rights to make claims. The book referred to the ICSID Convention Article 25(2) concerning legal persons' definition of nationality. The article also inquired about the investor's status as a public or private business. It went on to examine shareholder rights to bring claims referring to numerous pertinent cases including; the US-Argentina BIT case, Barcelona Traction, AAPL v. Sri Lanka, Lanco v. Argentina, CMS v. Argentina, Sempra v. Argentina, GAMI v. Mexico, Azurix v. Argentina, Gas Natural SDG S.A. v. Argentina, Siemens v. Argentina, Enron v. Argentina.[18]

[16] Ibid, pg. 12
[17] Ibid, pg. 13
[18] Ibid, pg. 40-46

Nonetheless, the preceding discussions were limited to personality-based definitions of investors and omitted substantial business activity as well as ownership and control of the legal entity in defining the investor.

Suzy H. Nikièma has comprehensively researched the many parts of investor definitions in her essay titled "Best Practices; Definition of Investor,"[19] published by The International Institute for Sustainable Development. On a factual basis, the book light on issues relating to defining protected investors, such as dual nationality of natural persons and 'treaty shopping' by transnational company groups, and further elaborated on general clauses in BITs, pointing them as a door opened to abusive practices, and limiting clauses in BITs as towards stricter parameters for defining protected investors. Most notably, it addresses the interpretation of Arbitration Tribunals, with pertinent case references, and concludes with recommendations. However, the legal personality details of an investor's definition are missing.

Barton Legum presented a book titled "Defining Investment and Investor: Who Is Entitled to Claim?"[20] at the Symposium Co-organized by ICSID, OECD, and UNCTAD on December 12, 2005, at the OECD Headquarters in Paris, where he stated, "I can say with confidence that the definition of "investor" and "investment" is the key to making the most of international investment agreements." and he attempted to figure out what the key was. He discovered that many, if not all, of the BITs in the United Kingdom and Germany, lack specific definitions, leaving unanswered the question of whether the treaty's provisions encompass indirectly controlled investments. The author has also examined the US BITs and framed out two features; **firstly**, the protection is affected in part through the definition in U.S. BITs of “investor of a Party" as including “a national or enterprise of a Party, which *attempts to make*, is making or has made an investment...”. Because of this definition, the few substantive obligations in U.S. BITs that apply to “investors of a Party” – national and most-favored-nation treatment – cover activity before the investment is established as well as post establishment activity. The **second** feature of U.S. BITs relevant here is the denial-of-benefits provision. This provision effectively gives the

[19] *Nikièma* (n 2)

[20] Barton Legum, Defining Investment and Investor: Who Is Entitled to Claim? SYMPOSIUM CO-ORGANISED BY ICSID, OECD AND UNCTAD MAKING THE MOST OF INTERNATIONAL INVESTMENT AGREEMENTS: A COMMON AGENDA, 12 December 2005, OECD Headquarters, Paris.

host State the authority to carve out from the definition of "investor" shell companies owned by nationals of a third country or the host State and companies held by enemy aliens.

According to a UNCTAD book titled *Scope and Definition*,[21] published under the UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2011, the definition of the term "investor" is as important as that of "investment" in determining the scope of an agreement. Arbitral tribunals have interpreted the definitions of "investor" and "nationality" in ways that have substantial ramifications for the use of IIAs.[22] Recent awards have concentrated on two particular issues.[23] First, to determine jurisdiction, *ratione personae* arbitral tribunals have considered the relevant criteria for determining the nationality of natural and/ or legal persons.[24] Second, tribunals have considered what rights standing minority shareholders, non-controlling, and indirect shareholders may have under investor-state dispute settlement provisions of IIAs.[25] It mirrors whether such minority and indirect interests can be considered investments, which was discussed in the book.[26] The book discussed the different approaches in the definitions of investors between bilateral parties; for example, Article 1(c) of the Argentina–Australia BIT (1995) defines a natural person as an "investor" as follows:[27]

> "(i) in respect of Australia:
>
> > *(A) a natural person who is a citizen or permanent resident of Australia; […] and*
>
> (ii) in respect of the Argentine Republic:
>
> > *(A) a natural person who is a national of the Argentine Republic in accordance with its laws on nationality […]"*

The book also addressed the question of dual nationality in the home and host countries, the consequences for treaty negotiating, corporate nationality tests, and challenges emerging from formal country-of-organization appropriately tested.

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[21] UNCTAD Series on Issues in International Investment Agreements II, *SCOPE AND DEFINITION*, New York and Geneva, 2011, https://unctad.org/en/Docs/diaeia20102_en.pdf, accessed August 8, 2023, pg. 72
[22] ibid
[23] ibid
[24] Ibid, pg. 73
[25] ibid
[26] ibid
[27] Ibid, pg. 74

Jeswald W. Salacuse in chapter 2 in his book titled *The Law of Investment Treaties*[28] discussed the nature of investors briefly and divides them into four basic categories (i) private investors, (ii) state investors, (iii) international organizations, and (iv) mixed enterprises. It is also a general classification with no nuances of the investors' definition.

Rudolf Dolzer and Christoph Schreuer reviewed Article 25(2)(b) of the ICSID Convention in Chapter III of their book *"Principles of International Investment Law,"* [29] indicating agreements to regard a local firm as a foreign national due to foreign control. It included topics such as private foreign investors, the nationality of individuals, corporations, shareholders as investors, the nationality of planning, and the denial of benefits. However, for an investment treaty, it was unable to provide a full picture of investors.

Whereas in Chapter 10 of the book *International Investment Law and Arbitration*[30] by Chin L. Lim, Jean Ho, and Martins Paparinskis (2018), the authors maintained a detailed study on the nature and classifications of investors with special emphasis on the relevant cases providing the excerpts of the case decisions. It examined nationality-based eligibility for investor protection, critical dates of national possession, circumstances of nationality acquisition, round-tripping, and litigation-oriented nationality acquisition with respective case references, and decisions. It also covered individual investors and the authentication of individual investors' nationality referring to the cases of *Soufraki v. UAE*[31] and *Siag v. Egypt*[32] for an in-depth comprehension. Then it moves on to investor discourses on dual nationality and permanent residents, corporate

[28] Salacuse Jeswald, The Law of Investment Treaties (Oxford University Press 2015)
[29] Dolzer, Rudolf and C. Schreuer. Principles of International Investment Law (Oxford University Press 2012: Oxford: 2nd edition)
[30] Chin L. Lim, Jean Ho, and Martins Paparinskis, International Investment Law and Arbitration, (Cambridge University Press 2018)
[31] *Hussein Nauman Soufraki v. United Arab Emirates*, (ICSID Case No. ARB/02/7), Claims arising out of the cancellation by the respondent of a concession agreement between the Dubai Department of Ports and Customs and the investor for the purpose of developing, managing and operating the Port of Al Hamriya and its surrounding area.
[32] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Claims arising out of a series of acts and omissions by the respondent that allegedly expropriated claimants' property of oceanfront land, including the issuance of a ministerial resolution cancelling the project's contract and the physical seizure of the property on two occasions.

investors, and their location of incorporation, with a particular reference to the *Barcelona Traction Case*[33], foreign control, and divisible investors.

1.3. Dynamics of BITs in South Asia

South Asia as a region has been failing to reap the benefit of economic liberalism since the advent of it. Foreign investment in the South Asian (SA) region has not flourished much as it was supposed to due to its social, political, and economic unsteadiness. This region is a potential manufacturing hub for its labor-oriented economy and the investors as always may prefer a cost-friendly investment. Hence this region is a developing one aspiring to accelerate its economy via the foreign flow of money in way of investments. The governments are now focusing on the investment-friendly infrastructure and economic environment to attract foreign investors. Although the focus lacks much in the domestic and international framework by the SA countries. While the total number of BIT is 2827 in the world[34], and this region comprises 20.80% of the world population[35], it possesses only 216 BITs which is 7.64% of the total BITs of the world. Moreover, among these BITs, a significant portion (88 BITs) are terminated which counts 40.74% of the total South Asian BITs.

India, the largest part of South Asia has been experiencing several ISDS cases and terminated 76 BITs out of total 87 BITs with a purpose to recalibrate the treaties.[36] India is the only SA State to adopt a Model BIT in 2016 by replacing the first Indian Model BIT 2003 to follow certain standard in negotiating and drafting better BITs that balances the rights and obligations of the Investors and State respectively regarding the protection and promotion of foreign investment in India. Although the Model BIT 2016 has been criticized for some of its textual limitations. Prof. Prabhash Ranjan in his book has criticized it for its failure in reconciling the interests of foreign investors with the regulatory right of the host states and also criticized the narrow definition of

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[33] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (New Application: 1962), The court observed that adoption of the theory of diplomatic protection of the shareholders would open the doors to competing claims on the part of different States, which would create an atmosphere of insecurity in international economic relations. Thus, the court held that the Belgium government did not have the *jus standi* in the present case and therefore it did not find any reason to examine other aspects of the case.

[34] Data collected from the Country Navigator of the Investment Policy Hub, https://investmentpolicy.unctad.org/country-navigator/, accessed August 7, 2023

[35] Southern Asia Population (LIVE), https://www.worldometers.info/world-population/southern-asia-population/#:~:text=The%20current%20population%20of%20Southern,of%20the%20total%20world%20population., accessed August 7, 2023

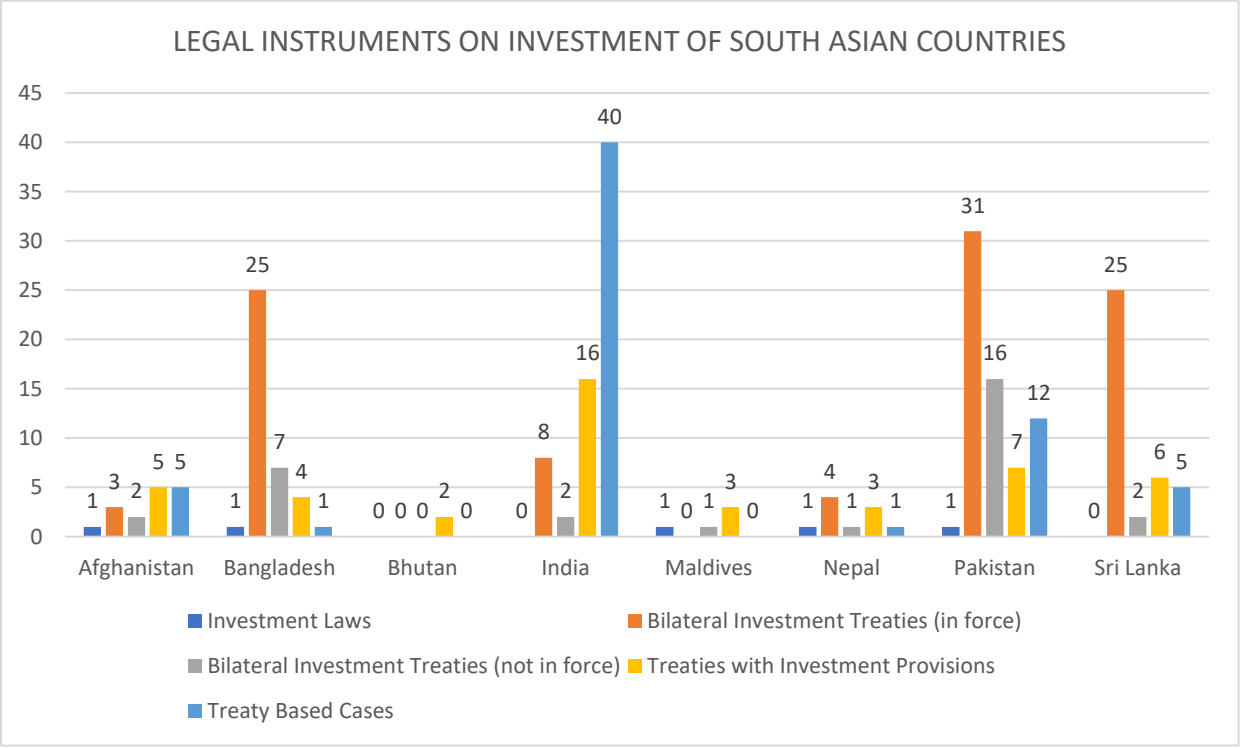
[36] *See* Table 1

investment it offers.[37] This argument suggests that the definition of investor is also neglected in these South Asian BITs as the Indian Model BIT 2016 offers a non-comprehensive definition of investment.

The below chart and table of statistics show that the situation is quite not impressive in terms of the active role of the BITs in stabilizing the investment regime in this region. Afghanistan, Bhutan, Maldives, and Nepal are having very less or zero BITs in their account for various reasons. Whereas, other major SA economies like Bangladesh, Pakistan, and Sri Lanka are showing comparatively a better position in their account, where the number of terminated BITs is much lesser than the Indian position. Nonetheless, it is quite evident from the discussion and statistics that SA countries have yet to create a vibrant state of international investment law framework by drafting comprehensive and effective BITs on their accounts.

[37] Ranjan, Prabhash, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (Delhi, 2019; online edn, Oxford Academic, 22 Aug. 2019), https://doi.org/10.1093/oso/9780199493746.001.0001, accessed 7 Aug. 2023.

Figure 1: Chart showing the statistics of the legal instruments on investment adopted by the South Asian Countries until April 2020.[38]



[38] Data collected from the Country Navigator of the Investment Policy Hub, https://investmentpolicy.unctad.org/country-navigator/, accessed August 7, 2023

Table 1: Data breakdown showing the exact count of the legal & policy instruments on investment adopted by the South Asian Countries until April 2020.[39]

South Asian Countries	Policy Review	Policy Measures	Investment Laws	Bilateral Investment Treaties (BITs)				Treaties with Investment Provisions (TIPs)	Treaty Based Cases
				Total	Terminated	Signed (not in force)	In-Force		
Afghanistan	0	0	1	5	0	2	3	5	5
Bangladesh	1	2	1	34	2	7	25	4	1
Bhutan	0	1	0	0	0	0	0	2	0
India	0	90	1	87	76	2	9[40]	16	40
Maldives	0	2	1	1	0	1	0	3	0
Nepal	2	6	1	6	1	1	4	3	1
Pakistan	0	6	1	53	6	16	31	7	12
Sri Lanka	1	11	0	30	3	2	25	6	5
Total	**4**	**118**	**6**	**216[41]**	**88**	**31**	**97**	**46**	**64**

As shown in *Figure 1* and *Table 1*, South Asia, in terms of BIT counts, has been led by India (87), then followed by Pakistan (53), Bangladesh (34), Sri Lanka (30), Nepal (6), Afghanistan (5), and Maldives (1), and Bhutan with none. It is of much significance and relevance for this book to mention that the modern-day BIT regime had been initiated by one of the South Asian countries. The world's first BIT was signed between Pakistan and Germany on November 25,

[39] ibid

[40] Included one agreement, named *Bilateral Investment Agreement between India Taipei Association (ITA) in Taipei and Taipei Economic and Cultural Center (TECC) in India (hereafter BIA between ITA and TECC)*, signed on 18 December, 2018 at Taipei, and entered into force on 14 February, 2019. Not available in UNCTAD website, available in the Department of Economic Affairs of India website, https://dea.gov.in/bipa?page=7, accessed August 8, 2023.

[41] Among this, 4 BITs are mutual between *Bangladesh – India, India – Nepal, Sri Lanka – India, Pakistan – Sri Lanka*. Thus minus 4 the actual total number of the BITs of South Asia is 212. Moreover, among these 4 mutual BITs only two are in force. Thus, the number of surveyed BITs is 97-2 = 95 only.

1959, and it is still not outdated or terminated but in force successively. Although, a new BIT is signed in 2009 between Pakistan and Germany to replace the previous one yet not in force.[42]

1.4. Conclusion

After a careful scan and discussion on the above scholarships, it is found that the inclusivity of investors' definitions is largely missing everywhere. On the other hand, this study has fetched out a few features that are imperatives for constructing a comprehensive definition of investor. These are whether the *(i) definitions included*[43], *(ii) specifying natural persons covered*[44], *(iii) includes permanent residents*[45], *(iv) excludes dual nationals*[46] *and includes dominant and effective nationality*[47], *(v) specifying legal entities covered*[48], *(vi) includes the requirement of substantial business activity*[49]*and (vii) defines ownership and control of legal entities or not?*[50] This book restricts by examining only the in-force BITs of South Asia based on the above-mentioned Seven-prong components of a comprehensive definition of investor.

Therefore, the book aims to study the primary and secondary sources of definitions of investor for the *Chapter 2* discussion and survey only the BITs which are in force and not those which are terminated or signed yet not in force for the *Chapter 3* discussion. Therefore, this book has taken the help of the UNCTAD archive to collect all the available in-force BITs of this region available out of a total of 216 signed BITs. Finally, 95 in-force available texts of BITs are examined in this book. Among these 95 BITs, Pakistan has 30, Sri Lanka has 23, Bangladesh has 22, India has 17, Nepal has 3, Afghanistan has 2, Maldives' only BIT is not in force, and Bhutan has no BIT signed for its own. (Pakistan & Sri Lanka, and Bangladesh & India has mutual BITs each).

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[42] Germany - Pakistan BIT (2009), Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1733/germany---pakistan-bit-2009-, accessed August 8, 2023.
[43] *OECD 2008* (n 8)
[44] ibid
[45] ibid
[46] ibid
[47] The latest *US Model BIT* has been adopted in 2012
[48] *OECD 2008* (n 8)
[49] ibid
[50] ibid

CHAPTER – 2: DEFINITIONS OF INVESTORS UNDER INTERNATIONAL INVESTMENT LAW

2.1. Introduction

According to the Cambridge English dictionary, a person who puts money into something to profit or gain an advantage. In other words, a person or group puts its money into a business or other organization to make a profit. In a purely business sense, the dictionary further added that a person, organization, or country puts money into something to make a profit or receive interest.[51] Investors must be distinguished from traders since an investor uses capital for long-term gains. A trader, on the other hand, seeks to make short-term profits by repeatedly buying and selling things, products, and securities.

> A distinction can also be made between the terms "investor" and "trader" in that investors typically hold positions for years to decades (also called a "position trader" or "buy and hold investor"). In contrast, traders generally have positions for shorter periods.[52] Scalp traders, for example, hold positions for as little as a few seconds.[53] Swing traders, on the other hand, seek positions that are held from several days to several weeks.[54]

Investors are defined in BITs as either natural persons (individuals) or legal persons (companies/businesses).[55] However, this is too common and inadequate to define the term "investor." The treaty is the legal basis for investment arbitration, and it must provide an inclusive definition of the investor so that the arbitration tribunal can adhere to the treaty language and assess the nature of the investor in the case comprehensively. Hereafter the discussion is structured below based on the seven prong components of a comprehensive definition of investor.

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[51] Cambridge English Dictionary online, https://dictionary.cambridge.org/dictionary/english/investor, accessed August 8, 2023.

[52] Investor Definition, Investopedia, https://www.investopedia.com/terms/i/investor.asp, para six, accessed August 8, 2023.

[53] ibid

[54] ibid

[55] Today, foreign private investors are largely constituted by transnational company groups, also called multinational enterprises or international companies. Despite this terminology, the group does not have its own specific nationality. Rather, each company within the group holds its own nationality

2.2.The Unavoidability of Definitions of Investors:

The definition of investors is vital in every Bilateral Investment Treaty. The definition is important because it specifies who among all other investors in any host nation is eligible to be beneficiaries of the BIT. The identification of the investor is a prerequisite for establishing a bilateral investment relationship in the form of a treaty between States.

The investors who are the beneficiaries of BITs are not specifically named.[56] They are merely identifiable.[57] This means that the treaties stipulate a criterion that will allow, when appropriate and on a case-by-case basis, the identification of those investors who may benefit from the protection of a treaty.[58] The criterion in question is the nationality link between an investor and a signatory State.[59] Indeed, the purpose of a BIT is to protect the nationals of one contracting party who make investments in the territory of the other contracting party.[60] In a positive sense, this means that only those investors holding the nationality of a contracting State have the right to make a claim against the other contracting State which hosts their investments.[61] In a negative sense, it also means that investors who are nationals of a state that is not a party to the BIT, and investors who are nationals of the contracting State in which their investment is made, cannot have recourse to international arbitration against that State pursuant to the treaty.[62]

In the ICSID case, *Soufraki v. The UAE*[63], based on the **Italy-UAE BIT,**[64] referred to the definition of the 'Investor' provided in Article 1, clauses 2,3, and 4.

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[56] *Nikièma* (n 3), pg. 1
[57] ibid
[58] ibid
[59] ibid
[60] ibid
[61] ibid
[62] ibid
[63] *Soufraki* (n 32)
[64] *Italy-The United Arab Emirates BIT,* Article 1,

> Clause (2) The term 'investor' shall mean the Government of a Contracting State or any of its natural or legal person who invest in the territory of the other Contracting State;
> Clause (3) The 'natural person' shall mean with respect to either Contracting State a natural person holding the nationality of that State in accordance with its laws;
> (4) The term 'legal person' shall mean with respect to either Contracting State. any entity established in accordance with, and recognized as legal person by the law of the State. such as public and private companies. corporations. partnerships. business associations. foundations. firms, authorities. institutions, establishments, agencies, development funds, enterprises, cooperatives, and organizations or other similar entities irrespective of whether their liabilities are limited or otherwise; and any entity established

2.3.Specifying Natural Persons in the Definition:

It is a firmly established principle in international law that the nationality of the investor as a natural person is determined by the national law of the state whose nationality is claimed.[65] However, some investment agreements introduce alternative criteria, such as a requirement of residency or domicile.

The ICSID Convention requires nationality to be established on two important dates: the date of consent to arbitration[66] and the date of registration[67]. The Convention does not cover dual nationals when one of the nationalities is one of the Contracting States.

i. *Customary International Law*: The right to grant and withdraw the nationality of natural persons remains part of the sovereign domain.[68] The question before tribunals has been whether and to what extent a state can refuse to recognize the nationality of a claimant.[69] International law practice on questions of nationality has progressed primarily in diplomatic protection.

The ICJ, in the *Nottebohm case*,[70] held that even though a state may decide on its own accord and in terms of its legislation whether to grant nationality to a specific person,

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outside the jurisdiction of a Contracting State as a legal person and in which such State or any of its nationals or any legal person established within its jurisdiction has a predominating interest;

[65] *OECD 2008* (n 7), pg. 10

[66] Consent to Arbitration, https://unctad.org/en/Docs/edmmisc232add2_en.pdf, accessed August 8, 2023,

> Arbitration is always based on a consent agreement between the parties. But the fact that ICSID arbitration is, by necessity, between a host State and a foreign investor leads to some peculiarities in the giving of consent. The most conspicuous peculiarity is that consent agreements need not be based on a document that is signed by both parties. Rather, the host State may make a general offer to foreign investors or to certain categories of foreign investors to submit to arbitration. This offer may be contained in legislation or in a treaty to which the host State is party. To perfect a consent agreement, the investor has to accept this offer in writing. This acceptance can be quite informal and may even be expressed through the act of instituting proceedings.
>
> Consent to ICSID arbitration, once it is perfected, carries a number of important consequences. These include the irrevocability of consent, the exclusion of other remedies and the prohibition of diplomatic protection. Therefore, the time of consent must be considered carefully.

[67] An investment company that is organized or otherwise created under the laws of a foreign country may not register as an investment company, or publicly offer its securities through interstate commerce in the host state, unless the company applies to the Commission for an order permitting the company to register under the Investment Company Act, and to make a public offering in the Host State. More, https://www.sec.gov/investment/fast-answers/divisionsinvestmentinvcoreg121504htm.html#P91_16908, accessed August 8, 2023.

[68] *OECD 2008* (n 7), pg.11

[69] Ibid

[70] *The Nottebohm case (Liechtenstein v. Guatemala)*, 2nd phase, Judgment of 6 April 1955, 1955 ICJ Reports 4, at 23. The case concerned Mr. Nottebohm, a German national who resided in Guatemala (since 1905). In 1939, he travelled to Lichtenstein to visit his brother and obtained Liechtenstein nationality "in exceptional circumstances of

there must be a real connection between the state and the national.[71] The Court made the following statement:

> "Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him it's national."

However, in today's modern world, demonstrating effective nationality based on *Nottebohm* factors, i.e., the person's attachment to the state through tradition, interests, activities, or familial ties, would be difficult.[72] The International Law Commission's (ILC) Report on Diplomatic Protection recognized the limitations presented by the *Nottebohm* ruling in the context of modern economic relations:

> "[…] it is necessary to be mindful of the fact that if the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection."[73]

Under customary international law, a State may exercise diplomatic protection on behalf of one of its nationals concerning a claim against another State, even if its national also possessed the nationality of the other state; provided that the dominant and effective

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speed and accommodation" in order to gain the status of a neutral State instead of the one of a belligerent State. He returned to Guatemala in 1940 and remained there until his deportation to the US in 1943. He then tried to rely on his Liechtenstein nationality to seek diplomatic protection against Guatemala. In these circumstances, the Court said he could not assert his Liechtenstein nationality against Guatemala where he had settled for 34 years.

[71] *OECD 2008* (n 7), pg. 11

[72] ibid

[73] ILC, "Report of the International Law Commission on the Work of its fifty-eighth Session" (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, Chapter IV, 33. Pg. 33, Or see *Draft articles on diplomatic protection, with commentaries (2006)*, Article 4, Commentary para 5, pg. 30

nationality of the person was that of the state exercising diplomatic protection.[74] In this respect, customary law has evolved from the earlier rule of non-responsibility under which diplomatic protection could not be exercised in those circumstances.[75]

ii. *Investment Agreements*: Some Bilateral Investment Treaties (BITs) include a single definition of "national," which applies to both parties. Other BITs offer two definitions, one relating to one Contracting Party and the other to the second Contracting Party. For example, the **Finland- Malaysia BIT (1985)**[76] provides that the term "national" means:

> "(c) "National" means:
>
> (i) With respect to Finland, physical person who is a citizen according to Finnish laws;
>
> (ii) With respect to Malaysia, any person who is a citizen according to the Malaysian constitution;"

The **US-Uruguay BIT (2005)**[77] defines national to mean:

> "a) For the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act.
>
> b) For Uruguay, a natural person possessing the citizenship of Uruguay, in accordance with its laws."

iii. *ICSID Convention*: Article 25(1) of the ICSID Convention provides that,

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State […] and a national of another Contracting State […]".

Concerning natural persons, Article 25(2) of the Convention defines "National of another Contracting State" to mean:

> "a) Any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute."

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[74] *OECD 2008* (n 7), pg. 12
[75] ibid
[76] *Finland- Malaysia BIT (1985)*, Article 1, Clause (c), treaty entered into force on 03 January 1988
[77] *United States of America - Uruguay BIT (2005)*, Article 1, pg. 5, treaty entered into force on 31 October 2006

The ICSID Convention requires claimants to establish that they held the nationality of a Contracting State on two distinct dates: the date the parties consented to ICSID's jurisdiction and the date the request for arbitration was registered.

An extension of treaty rights to permanent residents cannot extend ICSID's jurisdiction beyond nationals of Contracting States to the ICSID Convention.[78]

2.4.Inclusion of Permanent Residents in the Definition:

Some investment agreements require links beyond nationality. For example, the Germany-Israel BIT provides in its article (1)(3)(b) that the term "nationals" means, in the case of Israel, "Israeli nationals being permanent residents of the State of Israel."

The criterion of permanent residence is sometimes used as an alternative to citizenship or nationality. For instance, in the Canada-Argentina BIT (1991), the term "investor" means *"i) any natural person possessing the citizenship of or permanently residing in a Contracting Party in accordance with its laws."*[79]

Natural persons that are covered by the *Energy Charter Treaty (ECT)*[80] are similarly defined by reference to each state's domestic laws determining citizenship or nationality but also extends coverage to permanent residents: "Investor" means: "a) with respect to a Contracting Party: i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law".

Article 201 of NAFTA equally provides that: "National means a natural person who is a citizen or permanent resident of a Party."

The new Canada Model FIPA, which replaces the 2004 Model FIPA, covers citizens as well as permanent residents of Canada, but it expressly provides that a natural person who is a national of both contracting parties shall be deemed to be exclusively a national of the party of his or her dominant or effective nationality. Not many investment agreements address the

[78] Schreuer refers to the Report of the Executive Directors which explains the provision of dual nationality as follows: "It should be noted that under clause a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent" in "ICSID Convention: A Commentary" (CUP, Cambridge 2000).

[79] *Canada-Argentina BIT (1991)*, Article 1, Clause (b), entered into force on 29 April 1993.

[80] *Energy Charter Treaty*, entered into force in April 1998.

issue of dual nationality.[81] Nevertheless, *Dolzer and Stevens*[82] say that in the absence of treaty regulation, general principles of international law would apply, according to which the "effective" nationality of the individual would govern.

2.5.Excluding Dual Nationals and Including Dominant and Effective Nationality Test:

Investors who benefit from the protection of BIT must be holding the nationality of any state party, which is not the host state and not any third-party state. In ISDS, cases for determining dual nationalities are more complicated for natural persons than legal persons. Nationality is the most significant aspect of defining 'Investor.' Determining nationality is a core need of the Bilateral Investment Treaty between states. A secondary explanation lies in the fact that companies themselves, together with their shareholders, are generally deemed investors by BITs.[83] On this basis, where the nationality of the company presents a problem, every shareholder can claim the benefit of a treaty in his or her name.[84]

In the case of dual nationality, Article 7 of the ILC Draft Articles on Diplomatic Protection states:

> "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and the date of the official presentation of the claim."

For natural persons, two dual nationality scenarios can be noted.

Situation 1: A BIT has been signed between States A and B. An investor holding the nationalities of A and B invests in State B. Should the dispute between this investor and State B be considered an internal dispute between a country and its national, outside the protection of the BIT, or should it be considered an international dispute between a country and a foreign investor within the scope of the BIT?[85]

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[81] See also the 2005 United States-Uruguay BIT, Art. 1: Investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship.

[82] R. Dolzer and M. Stevens, Bilateral Investment Treaties (Martinus Nijhoff Publishers, The Hague/Boston/London, 1995).

[83] Shares in a company are defined as investments by most BITs. Consequently, each shareholder is an investor with its own right protected under the treaty.

[84] *Nikièma* (n 2), pg. 2

[85] ibid

Situation 2: A BIT has been signed between States A and B. An investor holding the nationalities of A and State C invests in country B. Should a dispute between the investor and State B be considered a dispute involving an investor from a State party to the BIT (A) or an investor from a State not party to the BIT (C)?[86]

These two scenarios escalate a significant question, such as while signing a BIT, did the State also envisage subjecting itself to international arbitration with its own nationals or with the nationals of any country not a party to the treaty?[87] The answer is negative in principle; however, it may depend on both the definitions of investor protected by the BIT and the rules governing the jurisdiction of the established tribunal. The only exception permitted by the Centre concerns the situation in which, to make its investment, a foreign investor was required to create a company under local law but that company is controlled by the foreign investor.[88] In this case, Article 25(2)(b) of the ICSID Convention stipulates that the State may expressly agree to consider this local company as a foreign company.[89]

There have been a few examples where an investor with dual nationality has filed a claim against one of their home states. The most recent example is the Dominican Republic, which won the first investment arbitration dealing with a treaty provision permitting dual nationals to sue one of their home States. In the recent PCA case, *Lisa Ballantine and Michael Ballantine v. The Dominican Republic*[90], this dispute was decided by the tribunal on a majority award declining jurisdiction dated September 3, 2019.[91] The Ballantines are American citizens who accused the Dominican Republic of violating its obligations under the Dominican Republic – Central America – United States Free Trade Agreement[92] (the "DR-

[86] ibid
[87] ibid
[88] ibid
[89] Article 25(2)(b) of ICSID Convention, "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."
[90] *Lisa Ballantine and Michael Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, final award on 3 September 2019, <https://www.italaw.com/sites/default/files/case-documents/italaw10818.pdf>, accessed March 6, 2020.
[91] Ibid, pg. 2
[92] *Dominican Republic – Central America – United States Free Trade Agreement*, The Dominican Republic-Central America FTA (CAFTA-DR) is the first free trade agreement between the United States and a group of smaller

CAFTA"). From 2005 onwards, the Claimants began developing Jamaca de Dios, a luxury residential housing project located in Jarabacoa, Dominican Republic.[93] The present dispute arose after the Claimants encountered certain difficulties when carrying out their activities in Jamaca de Dios.[94] In particular, the Claimants allege that certain environmental regulations established by the Respondent, and its corresponding enforcement, violated the Claimants' rights under DR-CAFTA.[95]

In September 2014, the Ballantines submitted their dispute to arbitration, claiming that the Dominican Republic gave them less favorable treatment than its nationals and failed to give them fair and equitable treatment.[96]

The Ballantines were also citizens of the Dominican Republic, i.e., dual nationals. The DR-CAFTA is one of the few treaties to allow claims by dual nationals against one of the countries of their nationality (the host country) if and only if the claimant's "*dominant and effective nationality*" is that of the non-host country.[97]

For that reason, the Dominican Republic objected to the Tribunal's jurisdiction, contending that the Ballantines did not qualify as "claimants" under the treaty since their *dominant and effective nationality* at the time when they submitted their claims to arbitration was the Dominican one.[98] As for the Ballantines, although they acknowledged that they have to comply with the definition of "claimant" under the DR-CAFTA, they contended that the only relevant date was the time when they made their investment in the Dominican Republic and that, in any event, their *dominant and effective nationality* was always the one of the U.S.[99]

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developing economies, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> accessed August 8, 2023.

[93] *Ballantine* (n 86), pg. 2

[94] ibid

[95] ibid

[96] Pablo Mori Bregante, *'New Trends for Dual Nationals Claims. Is the Ballantines Award Relevant for Cases Where A Dual Nationals-Related Provision Is Not Incorporated in The Relevant Treaty?'*, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2019/10/30/new-trends-for-dual-nationals-claims-is-the-ballantines-award-relevant-for-cases-where-a-dual-nationals-related-provision-is-not-incorporated-in-the-relevant-treaty/?doing_wp_cron=1591439341.4095990657806396484375, accessed August 8, 2023.

[97] *USA - Uruguay BIT* (n 71), Article 1. "**Investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship;"

[98] *Ballantine* (n 86), para 163-194

[99] ibid, para 195-221

The Tribunal upheld the Dominican Republic's objection and rejected jurisdiction dismissing the case without any further analysis of the merits.[100]

The ***Nottebohm*** *principles*[101] are still helpful in cases of dual or multiple nationalities when the claimant's nationality is "predominant." The ICSID Convention excludes dual nationality if one of the nationalities is that of the host state.[102] In practice, investment treaty jurisprudence under the ICSID Convention as to the nationality of natural persons is so far limited to four cases brought by dual nationals.[103]

Eudoro A. Olguín v. Republic of Paraguay[104] is the first case in this regard. Mr. Olguín, a dual national of Peru and the United States, filed a claim against the Republic of Paraguay under the Peru-Paraguay BIT for alleged treatment by Paraguayan authorities regarding his investment in a company for the manufacture and distribution of food products in Paraguay. The arbitral tribunal overruled Paraguay's objection to jurisdiction based on the claimant's dual nationality, citing the fact that Mr. Olgun's Peruvian nationality was effective, which was sufficient for the purposes of the ICSID Convention and the BIT.

In *Soufraki v. the United Arab Emirates*,[105] the claim was related to a port concession in Dubai. When a dispute arose, Mr. Soufraki, a dual Italian and Canadian national, invoked the Italy-United Arab Emirates BIT to bring a claim based on his Italian nationality. The Tribunal investigated his claim of Italian nationality and found that he had lost it when he acquired Canadian citizenship.

The fact that he could present certificates of nationality only provided *prima facie* evidence of his Italian nationality.[106] The tribunal, therefore, held that he was not entitled to bring a claim under the Italy-U.A.E. BIT as an Italian national.[107]

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[100] Ibid, para 597-600
[101] *Nottebohm* (n 65)
[102] Amerasinghe, C.F. 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes'. Indian Journal of International Law 19 (1979): 205.
[103] *OECD* (n 8), pg. 15
[104] *Eudoro A. Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001.
[105] *Soufraki* (n 32)
[106] ibid, para. 63

The Tribunal recognized the difference between the ease with which an investor may incorporate investment in a favorable jurisdiction to have the most favorable BIT coverage and the many difficulties faced by Mr. Soufraki as a natural person in proving that he had Italian nationality when he had previously lost it:

> "… had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the Tribunal can only take the facts as they are and as it has found them to be."[108]

On 4 November 2004, Mr. Soufraki submitted a request for annulment of the Arbitral Award issued on 7 July 2004 because of a manifest excess of power by the Tribunal and its failure to state reasons. The core issue was whether the Tribunal could make an independent determination of the claimant's nationality or whether it was bound by the same made by the Italian authorities relying on passports and certificates of nationality issued to the claimant. The ad hoc committee found that the arbitral tribunal correctly stated that certificates issued by consular authorities are not binding on the tribunal's determination of the claimant's nationality to ascertain its jurisdiction. The presumption in favor of the existence of the Italian nationality was not corroborated by further evidence showing that Mr. Soufraki had reacquired his lost Italian nationality.

In *Champion Trading v. Egypt*,[109] US nationals who were also found to be Egyptian nationals were denied the right to bring a claim against Egypt (based on the US-Egypt BIT) due to the rule in Article 25(2)(a) that excludes nationals of the Contracting State Party to the dispute. The tribunal dismissed three claims brought by these individual shareholders in the National Cotton Company (NCC), a cotton processing and trading firm. It did, however, uphold jurisdiction over two related claims made by US corporate entities, Champion Trading Company and Ameritrade International Inc., both of which had significant stakes in the NCC.

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[107] An interesting argument was raised by the defendant but was not elaborated by the Tribunal: had Mr. Soufraki qualified as an Italian national, would he still need to meet a further test of "effective" or "dominant" nationality under international law? Such a test might have required that, as a dual passport-holder, he demonstrate that he had closer or more "effective" ties with the "home" State under whose BIT he sought to bring a claim (i.e. Italy).

[108] *Soufraki* (n 32), para. 83.

[109] *Champion Trading Company Ameritrade International Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction 21 February 2003. (hereafter Champion Trading v. Egypt)

Individual claimants argued that the tribunal should use the international law test of "real or effective nationality," claiming that this would demonstrate that they "have not effectively acquired Egyptian nationality." Finally, the tribunal did not completely rule out the use of such a test in the ICSID context, where it would be manifestly absurd or unreasonable for a person to be classified as a dual national, such as where a third or fourth-generation individual "has no ties whatsoever with the country of its forefathers" - and where a test of real or effective nationality might be appropriate to use in ICSID. The panel, on the other hand, was convinced that there was little dispute that the plaintiffs, in this case, had substantial links to Egypt and were thus plainly barred from ICSID arbitration. It was relevant that they had utilized their Egyptian nationality to register their firm. After dismissing jurisdiction for the individual claims, the panel affirmed jurisdiction for the claims made by the two corporate entities, observing that ICSID claims by firms whose shares were owned by dual nationals of the two parties involved in the arbitration were not barred.

In the case of *Siag and Vecchi v. Egypt*,[110] Mr. Siag and his mother, Ms. Vecchi, former Egyptian nationals, submitted a claim under the Italy-Egypt BIT as Italian nationals. Because the ICSID Convention does not allow persons to initiate arbitration against their State, the tribunal examined Egyptian law extensively to determine whether they had ceased to be Egyptian nationals. Although all three arbitrators held that Ms. Vecchi had lost her Egyptian nationality on the date, she re-acquired her Italian nationality. In a partially dissenting opinion, one tribunal member disagreed that this was the case with Mr. Waguih Siag. Two of the three arbitrators held that Mr. Waguih Siag had lost his Egyptian nationality by failing to take proper steps to retain it.

2.6.Specifying the Legal Entities:

Both natural persons and legal persons can have the status of investors. Most investors are legal or juridical persons, precisely or broadly, in their respective BITs. Some BITs contain language indicating that all legal entities may be considered investors, regardless of the form.

[110] *Siag* (n 33), Mr. Siag and his mother Ms. Vecchi claimed that Egypt confiscated a property which had been purchased by their Egyptian company and slated for development into a resort property.

The US and Canada Model BITs[111] , for instance, provide that investors may consist of legal entities, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of any such enterprise.

The Swiss Model BIT[112] also provides that the term investor refers to "legal entities including companies, corporations, business associations, and other organizations."

In addition to the above forms of companies, the German Model BIT[113] also includes non-profit entities in the definition of "investor." Article 1.2(a), defines "companies" to include "any juridical person as well as any commercial or other company or association with or without legal personality […] irrespective of whether or not its activities are directed at profit" [emphasis added].

Many BITs also covered specifically the state entities and the governments of the contracting parties in the definition of investors by considering them under legal entities.

For instance, the 2004 US Model BIT and Canada Model FIPA cover governmentally owned or controlled entities. According to Article 1, Definitions, enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled […] [emphasis added].

Similarly, Article 13(a)(iii) of the *Convention establishing the Multilateral Investment Agency* defines eligible investors to include a juridical person "whether or not is privately owned […]" [emphasis added].

The Government qualifies as an investor in the 1996 Czech Republic-Kuwait BIT and the 2001 Belgium-Saudi Arabia BIT.[114]

In *Siemens v. Argentina*,[115] the underlying BIT between Germany and Argentina defined investment to include shares and other forms of interest in legal entities.

All these practices are evidence that legal entities are an integral part of an authoritative definition of investors. Moreover, the legal entities cover corporations, organizations,

[111] The latest *US Model BIT* has been adopted in 2012, The Canada Model BIT, which Canada calls the Model Foreign Investment Protection and Promotion Agreement or "FIPA", has been adopted since 2014, and previous one since 2004

[112] *Switzerland Model BIT* adopted since 1995

[113] The latest *German Model BIT* has been adopted in 2008, previously 1991 and 1998.

[114] A number of governments expressed some concern about the insistence of their counterparts in BIT negotiations to include the Government itself as an investor, in particular with respect to national security issues.

[115] *Siemens A.G. v. Argentine Republic*, ICSID case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005).

agencies, companies, trusts, partnerships, associations, etc., as well as state entities and government-controlled entities under the definition broadly or specifically.

2.7.Inclusion of the Requirement of Substantial Business Activity:

The investors tend to build the legal structure in their favor. At the same time, the states may also seek to find a way to claim from certain entities to which they are not intended to offer treaty protection. For this purpose, some treaties include a *denial of benefits*[116] clause by which the state party to the Treaty is entitled to deny the treaty protection to investors incorporated in one of the state parties to the treaty but under the control of investors of a third country, not a party to the treaty or when they do not have any substantial activity in the country of incorporation.[117]

The **draft MAI**[118] provided for a choice of clauses for the denial of benefits.

> "a. [Subject to prior notification to and consultation with the Contracting Party of the investor] a Contracting Party may deny the benefits of the Agreement to an investor [as defined in 1ii)] and to its investments if investors of a non-Party own or control the first mentioned investor and that investor has no *substantial business activities* in the territory of the Contracting Party under whose law it is constituted or organized.
>
> b. [Subject to prior notification and consultation in accordance with Articles XXX (Transparency) and XXX (Consultations),] a Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of such Contracting Party and to investments of such investors if investors of a non-Contracting Party own or control the enterprise and the enterprise has no *substantial business activities* in the territory of the Contracting Party under whose law it is constituted or organized."

Article 17(2) of the **US Model BIT** provides as follows:

> 2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise."

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[116] Denial-of-benefits clauses in investment treaties are generally designed to exclude from treaty protections nationals of third States which, through mailbox or shell companies, seek to benefit from provisions that the State parties to the treaty did not intend to grant them. [Lindsay Gastrell and Paul-Jean Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, ICSID Review, Vol. 30, No. 1 (2015), pp. 78–97]

[117] *OECD* (n 8), pg. 28

[118] The Multilateral Agreement on Investment was a draft agreement negotiated in secret between members of the Organization for Economic Co-operation and Development between 1995 and 1998.

This clause is also found in Part III, Article 17 of the **Energy Charter Treaty**[119] , which stipulates:

> "Each Contracting Party reserves the right to deny the advantages of this Part to:
>
> 1) a legal entity if citizens or nationals of a third State own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized."

The *Plama v. Bulgaria*[120] decision on jurisdiction rendered by an ICSID tribunal under the Energy Charter Treaty guides the interpretation of the denial of benefits clauses' meaning concerning its conditions of exercise and substantial requirements.

On the substantial business requirement, the tribunal held that the lack of substantial business activity *"cannot be made good with business activities undertaken by an associated but different legal entity"* [121] *, even where the latter owns or controls the claimant. The requirement of ownership and control by a third party is also difficult to determine and may prove highly controversial. In the tribunal's view, "ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal entity's management, operation and the selection of members of its board of directors or any other managing body"*[122]. The burden of proof to establish the lack of substantial business activity falls with the respondent state.

The *Generation Ukraine v. Ukraine*[123] case also confirmed this. In this case, the claimant was a company registered in the US that had established a Ukraine subsidiary. Ukraine invoked

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[119] The Energy Charter Treaty is an international investment agreement that establishes a multilateral framework for energy cooperation that is unique under international law. It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998. Currently there are fifty-three Signatories and Contracting Parties to the Treaty. This includes both the European Union and Euratom. [https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/]

[120] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, reprinted in 20 ICSID Rev.-FILJ 262 (2005).

[121] Ibid, pg. 54, para 169

[122] Ibid, pg. 54, para 170

[123] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, 16 September 2003.

Article 1(2) of the **US-Ukraine BIT**[124] to deny the claimant the advantages of the BIT because the claimant had no substantial business in the US and was controlled by Canadians. Article 1(2) provides: "Each Party reserves the right to deny to any company the advantages of this treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations."

2.8.Specifying the Ownership and Control of Legal Entities:

Investment in the host state is required to be owned by the majority and controlled by the member nationals except for the host state itself. The majority of shares in the investment made in the host state must be owned and controlled by a natural or legal entity other than the origin of the host state.

The *Convention establishing the Multilateral Investment Guarantee Agency*[125] combines the tests of the place of incorporation with the company seat but also allows the use of the place of ownership or control as an alternative. Article 13a)ii) provides that a legal entity is an eligible investor under the Agency's insurance program provided that "such juridical person is incorporated and has its principal place of business in a member or the majority of its capital is owned by a member or members or nationals thereof, provided that such member is not the host country in any of the above cases".

In *Plama v Bulgaria case*, the tribunal viewed that "ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal entity's management, operation and the selection of members of its board of directors or any other managing body."[126]

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[124] *US-Ukraine BIT*, signed in 1994, and entered into force in 1996

[125] The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) was submitted to the Board of Governors of the International Bank for Reconstruction and Development on October 11, 1985, and went into effect on April 12, 1988. The Convention was amended by the Council of Governors of MIGA effective November 14, 2010. [https://www.miga.org/miga-convention]

[126] *Plama* (n 117)

2.9.Treaty Interpretation by the VCLT Articles 31 and 32:

Bilateral Investment Treaties are international agreements governed by the rules of the Vienna Convention on the Law of Treaties of 1969. Especially, to address the definitional quandary of the investment treaties, the established arbitration tribunals may resort to the VCLT Articles 31 and 32 for interpretation purposes. The ambiguities of the definitions of investors in the BITs leads to various jurisdictional limitation and often leaves the door open to abusive practices. Once a treaty is drafted, its interpretation shall be governed by the VCLT rules. Many bilateral investment treaties, do not include the word "investor" in the defining section. Still, it defines the other related characters, e.g., In Bangladesh - Germany BIT (1981), the definition doesn't provide the word investor *per se* but provides the definitions of the characters of investors.[127] Whereas, in Bangladesh - BLEU (Belgium-Luxembourg Economic Union) BIT (1981), the word *investor* has not been mentioned as such but indirectly defined, and the word *company* has been considered an investor in this BIT.[128] Similarly, in Bangladesh - United Kingdom BIT (1980)[129] and in Bangladesh - Turkey BIT (1987)[130] , the word *investor* itself has not been defined; however, the characters of investors are mentioned in the definition Article of this BIT particularly. Moreover, in Bangladesh - United States of America BIT (1986), the word investor has been indirectly defined as the "*Company of a Party*".[131]

In Germany - Nepal BIT (1986)[132] and Nepal - United Kingdom BIT (1993)[133], the definitions don't contain the word 'investor' yet define its characters specifically. In Germany - Pakistan BIT (1959)**,** there is no mention of the word *'investor'* in the whole BIT text, only defining the terms *'nationals'* and *'company'.*[134] Few BITs didn't mention the word 'investor' *per se* but

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[127] *Bangladesh - Germany BIT (1981),* Article 8, Clause 3-4, pg. 5

[128] *Bangladesh - BLEU (Belgium-Luxembourg Economic Union) BIT (1981),* Article 1, Clause 1-2, pg. 2

[129] *Bangladesh - United Kingdom BIT (1980),* Article 1, Clause (c)-(d)

[130] *Bangladesh - Turkey BIT (1987)*, Article 1, Clause 1 (a)-(b)

[131] *Bangladesh - United States of America BIT (1986)*, Article 1, Clause (a)-(b), pg. 1-2

(b) "Company of a Party" means a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or a *political subdivision* thereof in which

[132] *Germany - Nepal BIT (1986)*, Article 1, Clause 3-4, pg.1-2

[133] *Nepal - United Kingdom BIT (1993)*, Article 1, Clause (c)-(d)

[134] *Germany - Pakistan BIT (1959)*, Article 8(3) and 8(4)

defined the characters of investors. e.g., *nationals*, *legal persons*, *and companies* in many Sri Lankan BITs.[135]

Article 31 of the VCLT provides for the general rule of interpretation. According to the rules of VCLT, these definitions shall be interpreted in good faith, with the ordinary meaning to be given to the treaty's terms in their context and light of their object and purpose.[136]

In the Indonesia – Pakistan BIT (1996)[137] and the Netherlands – Pakistan BIT (1997) [138], it is written in the text that 'nationals' are defined as both a *natural person* and a *legal person*. The short text of the definition of investor contained in Indonesia – Pakistan BIT left room for vagueness in deciding the *ownership and control of legal entities*.

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[135] Finland - Sri Lanka BIT (1985), Malaysia - Sri Lanka BIT (1982), Netherlands - Sri Lanka BIT (1984), Republic of Korea - Sri Lanka BIT (1980), Japan - Sri Lanka BIT (1982), Indonesia - Sri Lanka BIT (1996). Germany - Sri Lanka BIT (2000), Sri Lanka - United States of America BIT (1991), Sri Lanka - Sweden BIT (1982), Norway - Sri Lanka BIT (1985), Singapore - Sri Lanka BIT (1980), Sri Lanka - United Kingdom BIT (1980), Sri Lanka - Switzerland BIT (1981). Germany - Sri Lanka BIT (2000).

[136] *Vienna Convention on the Law of Treaties of 1969*, Article 31 General rule of interpretation:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
    a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
    b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
    a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
    b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
    c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

[137] *Indonesia - Pakistan BIT (1996)*, Article 1, Clause 2, "The term 'nationals' shall comprise with regard to either contracting party; (i) natural persons having the nationality of that contracting party. (ii) legal persons constituted under the law of that contracting party."

[138] *Netherlands - Pakistan BIT (1997)*, Article 1(b), pg. 1-2.

(b) the term 'nationals' shall comprise with regard to either Contracting Party:

i. natural persons having the nationality of that Contracting Party in accordance with its laws;

ii. without prejudice to the provisions of (iii) hereafter, legal persons constituted in accordance with the laws of that Contracting Party;

iii. legal persons controlled, directly or indirectly, by nationals of that Contracting Party but constituted in accordance with the laws of the other Contracting Party.

Nationality is the prime factor in defining the term investor. Thus, many BITs give an extended definition of nationals by including both a natural person and a legal person to be considered nationals. Moreover, no mention of the word investor in the text. In this ambiguous situation, Article 32 provides the recourse when Article 31 leaves the meaning vague or obscure or leads to a manifestly absurd or unreasonable result.[139]

Article 32 of the VCLT addresses ambiguity and suggests supplementary ways of interpretations, i.e. the preparatory work of the treaty and the circumstances of its conclusion to confirm the meaning emerging from the application of Article 31 or to ascertain the meaning where the interpretation according to Article 31 is not possible. These provisions can provide guidance when the wording of a treaty is ambiguous; nevertheless, they are ineffective if the text fails to be comprehensive or remains incomplete in the definition.

2.10. Ambiguity Leads to Jurisdictional Limitation:

International Investment Arbitration (IIA) often faces ambiguity regarding the investor's nationality and the tribunal's jurisdiction *ratione personae* which tantamount to be the jurisdictional limits of the IIA. This jurisdictional limitation is caused by the existing ambiguity in the ICSID Convention Article 25 and many of BIT's definitions to investors. In IIA, the term jurisdiction denotes the tribunal's authority to hear the case, and the notion is also equated with the tribunal's competence, which is generally based on the parties' consent. Notably, one of the four key elements[140] that must be satisfied to establish jurisdiction under the Convention is – *the investment must be between a Contracting State and a national of another Contracting State*. Thus, Article 25(2)(a) creates both 'positive' and 'negative' nationality requirements: the

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[139] Ibid, Article 32 - Supplementary means of interpretation:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

[140] Yugandhara Pawar Jha , Kunal Verma and Vipul Agrawal, *Worldwide: Jurisdictional Limitations And The Definition Of 'Investment' In The ICSID Convention*, https://www.mondaq.com/india/trials-appeals-compensation/938940/jurisdictional-limitations-and-the-definition-of-investment39-in-the-icsid-convention, "Four key elements must be satisfied in order to establish jurisdiction under the Convention namely, *the existence of a legal dispute; the legal dispute must be arising directly out of an investment; the investment must be between a Contracting State and a national of another Contracting State and lastly the necessity of consent in writing."* accessed August 8, 2023.

investor must have the nationality of the home state but cannot also have the nationality of the host state.[141]

Regarding the jurisdiction *ratione personae* of the Centre (International Centre for Settlement of Investment Disputes), it is noteworthy that the Convention categorically requires the dispute to be between the national of a Contracting State and a Contracting State or any constituent subdivision or agency of the state designated to the Centre by the State.[142] The term national of a contracting State includes both *natural* and *juristic persons*.[143] However, persons with *dual nationality* are expressly excluded from the nationality of the Respondent State in the Convention[144]. In contrast, the Centre's jurisdiction could extend to foreign-controlled juridical persons with the State's nationality that is a party to the dispute in the event of a specific agreement.[145] Moreover, the Convention merely states the outer limits of who may be the national of a Contracting State and leaves the ultimate question of determining nationality to the Contracting State itself.[146]

The *Canevaro case*[147], decided by the Permanent Court of Arbitration in 1912, is frequently cited in this connection. It is the first case in which an international tribunal has considered the issue of dual nationality in diplomatic protection. The Court had to decide whether Italy was entitled to claim against Peru for damages suffered by Mr. Canevaro, a dual Italian-Peruvian national. Peru objected to the claim because, besides being a Peruvian national, Mr. Canevaro was more strongly and effectively connected to Peru than to the claimant State, Italy.

In *Champion Trading v. Egypt*, the claimants were found to be dual nationals of the US and Egypt at the relevant times. Egypt challenged jurisdiction on the ground that the claimants had

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[141] Javier García Olmedo, *Claims by Dual Nationals under Investment Treaties: Are Investors Entitled to Sue Their Own States?* Forthcoming, The Journal of International Dispute Settlement, September 20, 2017,

[142] Article 25(1) of the ICSID Convention
[143] Article 25(2) of the ICSID Convention
[144] Article 25(2)(a) of the ICSID Convention
[145] Article 25(2)(b) of the ICSID Convention
[146] Article 25(2) of the ICSID Convention; also see, David Williams, Jurisdiction and Admissibility, in The Oxford Handbook of International Investment Law 890 (Peter Muchlinski, Federico Ortino and Christoph Schreuer eds., Oxford University Press 2008).

[147] *Canevaro claim (Italy v. Peru)*, Permanent Court of Arbitration (PCA), 1910-01, date of issue of final award 03 May 1912

failed to satisfy the 'negative' requirement of Article 25(2)(a) of the ICSID Convention. The claimants responded that the customary rule of *dominant and effective* nationality applied to dual nationals, even if they were expressly excluded from the Convention's scope of protection. In this respect, the claimants contended that, since they had more substantive ties with the US (the home state) than with Egypt, the Egyptian nationality could be disregarded when considering the application of Article 25(2)(a).

The tribunal rejected the claimants' argument, holding that the ICSID Convention left no room for applying the *dominant and effective nationality* test, precisely in light of the 'clear and specific rule' in Article 25(2)(a).[148]

In the case, the *Iran/US Claims Tribunal*[149] observed that "unless an exception is clearly stated"[150] in the Algiers Accords, the rule of *dominant and effective nationality* should apply to claims by dual nationals. It can be argued that, by relying on the Case A/18 jurisprudence, the Champion Trading tribunal implicitly agreed that when a treaty does not expressly exclude dual nationals or simply fails to regulate this issue, the rule of *dominant and effective nationality* may apply as a lacuna filing instrument.

However, even when the IIA prohibits an investor's claims against his/her own country, it doesn't restrict the investors from holding multiple nationalities. e.g., Article 25(2)(a) of the ICSID Convention explicitly excludes the dual nationality of the investor of a party for its jurisdiction. The same is true of the Mauritius-Egypt BIT*[151]*, the Switzerland-Egypt BIT [152], and the Romania-Canada BIT*[153]*. Therefore, a tribunal still needs to determine the scope of its

[148] Ibid., at 16.

[149] See *Case No. A/18*, 5 Iran-U.S.C.T.R (1984) (hereinafter: Case *A/18*).

[150] Ibid, at 25

[151] *Mauritius-Egypt BIT (2014)*, Article 1, Clause 3(a)

(a) the natural person derives his or her nationality in virtue of the laws of one of the Contracting Parties and is not simultaneously a national of the other Contracting Party;

[152] *Switzerland-Egypt BIT (2010)*, Article 1, Clause 2(a)

(a) A natural person who, according to the law of that Contracting Party, is considered to be its national. This shall not include a natural person that holds the nationality of both Contracting Parties.

[153] *Romania-Canada BIT (1996)*, Article 1, Clause (g)

(g) Investor means, in the case of Romania

(I) any natural person who, according to the Romanian law. Is considered to be its Citizen and who does not possess the citizenship of Canada,

jurisdiction by deciding whether it will consider both nationalities as equal or identify the effective nationality, eventually determining the tribunal's jurisdiction.[154]

Coming to the South Asian BITs, none of the surveyed BITs of this region has accommodated the dominant and effective nationality provision in the definition part of the text except the only one that was very recently signed (September 2018) and enforced (March 2020) India – Belarus BIT (2018)[155]. This BIT's definition of investors has been at par with the *Seven-Prong test* standards with full marks. It shows the growing concern of India in understanding the significance of having inclusivity and comprehensiveness in the definition part of any BIT which is especially evident after the recalibration process undertaken by the Govt. of India since the termination of 58 BITs and introducing the Model India BIT in 2016. The other two exceptions in this regard are the Islamic Republic of Iran – Sri Lanka BIT (2000) and the Colombia – India BIT (2009), where the *dual nationality* has been expressly excluded in the text yet lacks the inclusion of the *dominant and effective nationality*, and *permanent residents'* provisions in it. Thus, the BITs scored 5.5 out of 7, according to the finding. Other than these two instances, there are no other available BIT texts from the South Asian countries which excelled with a score of 5/7 according to this survey. This finding shows the vulnerability of the definitions of investors provided in the BITs of the South Asian countries, which are not so efficient for the IIA as well as for the contracting parties and investors themselves for the sake of determining the jurisdiction and safeguarding the respective party interests.

2.11. Conclusion

After analyzing the above discussions of the convention, treaties, and cases from the IIL regime, it is evident to draw upon a comprehensive definition of investors where the following features can be checked;

- ***i.*** To keep the definition of investor directly or indirectly
- ***ii.*** To specify natural persons
- ***iii.*** To include permanent residents

[154] See "Investment Arbitration and Double Nationality of the Investor", https://arbitrationacademy.org/wp-content/uploads/2019/07/AN-4.pdf, accessed August 8, 2023.

[155] *India – Belarus BIT (2018)*, entered into force on 5 March 2020, the *in-force* status of this BIT is not updated in the UNCTAD archive but in the Department of Economic Affairs of India website, https://dea.gov.in/bipa?page=7, accessed August 8, 2023. The previous India – Belarus BIT (2002) was terminated on March 22, 2017 by the Govt. of India.

iv. To exclude dual nationals and include dominant and effective nationality

v. To specify legal entities

vi. To include the requirement of substantial business activity

vii. To define the ownership and control of legal entities

Therefore, a *Seven Prong Test* shall be conducted in *Chapter 2* of the book with the help of these seven findings to testify to the comprehensiveness of the definitions of investor contained in the BITs of the South Asian countries.

CHAPTER – 3: DEFINITIONS OF INVESTORS IN SOUTH ASIAN BITS: A SURVEY FINDINGS

3.1. Introduction:

The ICSID Convention is a treaty ratified by 158 Contracting States. It entered into force on October 14, 1966, 30 days after ratification by the first 20 States.[156] But only five South Asian countries have signed and ratified the convention so far, except India, Bhutan, and the Maldives.

Table 2: List of South Asian Countries Party to the ICSID Convention 1966:[157]

State	**Signature**	**Deposit of Ratification**	**Entry into force of Convention**
Afghanistan	September 30, 1966	June 25, 1968	July 25, 1968
Bangladesh	November 20, 1979	March 27, 1980	April 26, 1980
Nepal	September 28, 1965	January 7, 1969	February 6, 1969
Pakistan	July 6, 1965	September 15, 1966	October 15, 1966
Sri Lanka	August 30, 1967	October 12, 1967	November 11, 1967
**Bhutan, India, and the Maldives did not sign and are not a party to the ICSID Convention 1966*			

The trend toward drafting definitions of investors in South Asia has been typical and non-progressive. The innovation and improvisation are hardly evident, following the same definition template for a long. After that, it was only in 2003 that India introduced the first Model BIT of her own yet contains a close resemblance with the India - United Kingdom BIT (1994)[158]. As a

[156] See ICSID Convention, https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx, accessed August 8, 2023.

[157] 'List of Contracting States and Other Signatories of the Convention (as of June 9, 2020)' https://icsid.worldbank.org/sites/default/files/ICSID-3.pdf#:~:text=LIST%20OF%20CONTRACTING%20STATES%20AND%20OTHER%20SIGNATORIES%20OF,Nationals%20of%20Other%20States%20on%20the%20dates%20indicated. accessed August 8, 2023.

[158] India's first BIT, which had been terminated later

consequence of the *White Industries case*[159] in 2011, the government of India scrapped her BITs with 58 countries in 2016 – all pacts had been based on the 1993 template (India – UK BIT) and followed by the 2003 Model BIT of India.[160] Between 2011 and 2015, India signed only one BIT with the UAE. It suggests the non-comprehensiveness of the BIT texts of India till then. In 2015, India adopted a newer version of Model BIT (named India Model BIT 2016), containing an improved version of the definition of investor though not providing for the *permanent residents*, exclusion of *dual nationals*, and inclusion of the *dominant and effective nationality* clauses. The other South Asian countries are yet to introduce their Model BITs and set a standard for better treaty negotiation.

Definitions have been included in all the BITs of the region. All the BITs specified the *natural persons*, mentioned both *legal and non-legal personality*, and mostly indirectly the *ownership or any control over the legal entities*. What significantly lacks, in general, is the inclusion of *permanent residents*, the exclusion of *dual nationals*, the inclusion of the *dominant and effective nationality*, and no specification of the *requirement of having substantial business activity* in most BIT texts.

3.2. The Survey Findings

The eight countries of South Asia are necessarily the capital importer countries and aspire to attract foreign investment in their respective economies. The main concern of the BITs of these countries is to promise protection to foreign investors from domestic interruptions. For this purpose, a well-comprehensive text of the treaty can help achieve that goal by not getting affected by the privilege of IIA offered to the investors. Below, the book discusses the survey findings of South Asian nations' trends and practices surrounding investor definitions, particularly with the help of a *comprehensive definition of investors* provided in the *Chapter 2* discussion.

3.2.1. Afghanistan

Afghanistan being a land of prolonged violence, continue to thrive towards development by attracting foreign investments. The country has concluded five BITs, and only three

[159] *White Industries Australia Limited v. The Republic of India*, Final Award dated 30 November 2011, awarded 4.10 M AUD (4.10 M USD) to the investor. It was under the *Australia - India BIT (1999)*, which was a semblance of 1993 template also followed by the 2003 Model BIT of India.

[160] Ondrej Svoboda, *EU–India Investment Negotiations and their Prospects in Era of Backlash and Reform*, Transnational Dispute Management, Vol. 15, issue 2, February 2018

are in force. Among these three in-force instruments, only two of the instruments' texts are available in the UNCTAD online database. These two BITs defined investors and specified whether the entity should be legal, non-legal, or both. These contain no provisions for permanent resident-ship, dual nationals, and substantial business activity.

The Afghanistan legal system is not developed enough to handle complex commercial issues, and local authorities do not have enough experience in project management and dealing with Western companies.[161] Afghan law guarantees foreign companies the same investment opportunities as domestic enterprises, and official support for open markets and private sector participation is restated in the Afghanistan National Development Strategy (ANDS).[162] Foreign investors are not required to have an Afghan partner, but due to the restriction on land ownership, they almost always choose to work with one.[163] Private investors have the right to transfer their capital and profits out of Afghanistan, including for debt service for offshore loans.[164]

However, to breakdown the reasons behind the lack of international investment Treaties with Afghanistan other than that of being an armed conflict zone are political violence, weak regulations regarding property protection, a substantial lack of skilled workforce, under-developed financial markets, and insufficient infrastructures, which limit the country's potential for attracting foreign investors. The country was ranked 173rd out of 190 economies on the 2020 edition of the *Doing Business Report*[165] of the World Bank, down by six spots from a year earlier.[166] It was mainly due to increased bureaucracy concerning paying taxes.[167]

According to the survey's findings, the general feature of Afghanistan's definitions of investor is rated 4 out of 7 prong feature tests, e.g., definitions included, natural persons covered, legal entities covered, defines the ownership and control of legal entities

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[161] Afghanistan: Foreign Investment, https://santandertrade.com/en/portal/establish-overseas/afghanistan/investing?&actualiser_id_banque=oui&id_banque=0&memoriser_choix=memoriser, accessed 30 March 2020

[162] ibid

[163] ibid

[164] ibid

[165] See 'Ease of Doing Business rankings (Benchmark: May 2019)', https://www.doingbusiness.org/en/rankings

[166] *Afghanistan* (n 121)

[167] ibid

covered. This survey suggests a generic idea of comprehensiveness of the definitions of Investors in the BITs of Afghanistan. The percentage of comprehensiveness of the definitions of investors in the BITs of Afghanistan is 57.14%, the positive-negative ratio 4:3, and the rating came out the same as all the other in-force-BIT signed South Asian countries, which are 4/7 according to the survey findings.[168] This numeric outcome suggests being the sixth and bottom place among all the South Asian countries having in-force BITs, given that only two available in-force BITs among four signed BITs are surveyed for the book.

Seven Prong Test: whether the.

i. Definitions included: **Yes**, Definitions have been included in all the BITs.

ii. Specifying natural persons covered: **Yes**, specified the natural persons.

iii. Includes permanent residents: **No**, not covered specifically

iv. Excludes dual nationals and includes dominant and effective nationality: **No**, dual nationals are not excluded, and the dominant and effective nationality is not included.

v. Specifying legal entities covered: **Yes**, mentioned both legal and non-legal personality

vi. Includes requirement of substantial business activity: **No**, there is no requirement specified of having substantial business activity.

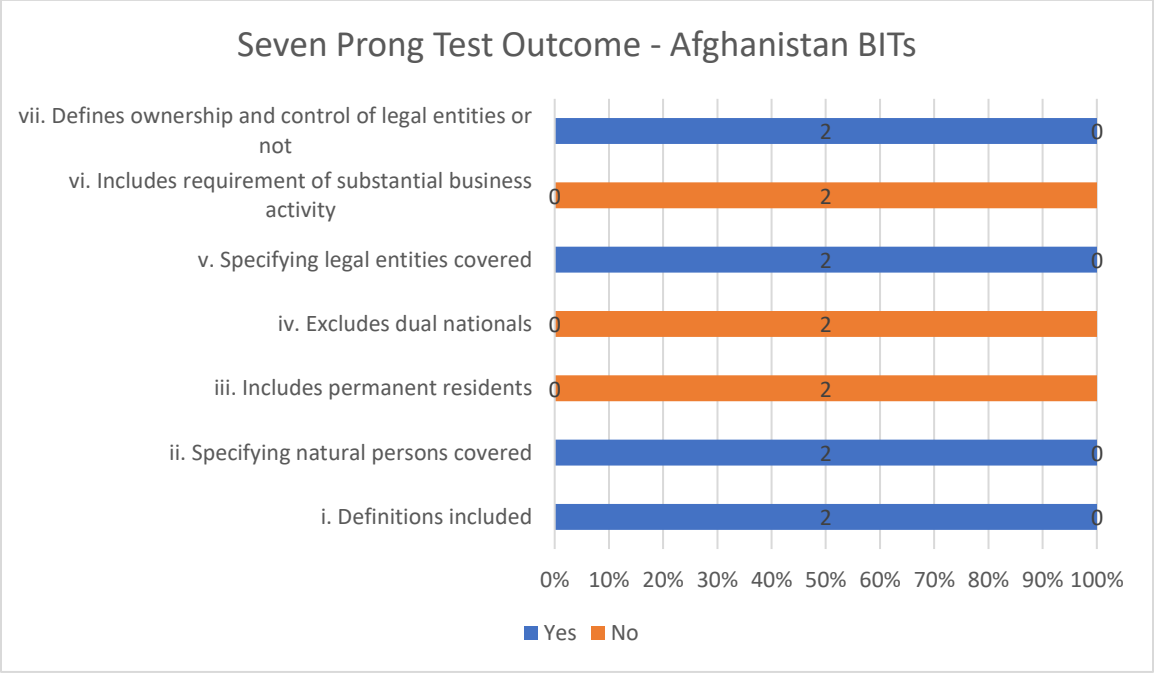
vii. Defines ownership and control of legal entities or not: **Yes**, ownership or any control over the legal entities is provided in the definitions.

[168] See the Seven Prong Test table below

Table 3. I. Seven Prong Tests of Afghanistan BITs

Test Number	Seven Prong Tests of Afghanistan BITs	Status		Balance
		YES	NO	
I	Definitions included	2	0	Yes
II	Specifying natural persons covered	2	0	Yes
III	Includes permanent residents	0	2	*No*
IV	Excludes dual nationals and includes dominant and effective nationality	0	2	*No*
V	Specifying legal entities covered	2	0	Yes
VI	Includes requirement of substantial business activity	0	2	*No*
VII	Defines ownership and control of legal entities or not	2	0	Yes
Total		**8**	**6**	**14**
	Ratio (Positive: Negative)	**4:3**		
	Comprehensiveness Percentage	**57.14%**		
	Comprehensiveness Rating	**4/7**		

Figure 2. I. Seven Prong Test Outcome – Afghanistan BITs



3.2.2. Bangladesh

Bangladesh, an emerging South Asian economy endorsed by many mainstream international organizations and development banks, is ambitious to attract foreign investment in the domestic economy. Bangladesh signed the ICSID Convention on 29 November 1979, deposited the ratification on 27 March 1980, and entered into force on 26 April 1980.[169]

The survey done for this study demonstrates the features and standards of the investor definitions in Bangladesh's in-force BITs with other nations. Aside from the seven-prong test result, certain distinct traits from select BITs are shown below.

In Bangladesh - Germany BIT (1981), the definition doesn't provide the word investor *per se* but provides the definitions of the characters of investors.[170] Whereas, in Bangladesh - BLEU (Belgium-Luxembourg Economic Union) BIT (1981), the word *investor* has not been mentioned as such but indirectly defined, and the word *company* has been considered an investor in this BIT.[171] Similarly, in Bangladesh - United Kingdom BIT (1980)[172] and Bangladesh - Turkey BIT (1987)[173], the word *investor* itself has not been defined; however, the characters of investors are kept in the definition Article of this BIT. Again, in Bangladesh - United States of America BIT (1986), the word investor has been indirectly defined as the "*Company of a Party*".[174]

In Bangladesh - Philippines BIT (1997) mentioned the 'actually doing business' in the definition.[175] It signifies the emphasis given to the *real economic activity* in the host state, which is more lucidly included in Bangladesh - Poland BIT (1997).[176]

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[169] List (n157)

[170] *Bangladesh - Germany BIT (1981),* Article 8, Clause 3-4, pg. 5

[171] *Bangladesh - BLEU (Belgium-Luxembourg Economic Union) BIT (1981),* Article 1, Clause 1-2, pg. 2

[172] *Bangladesh - United Kingdom BIT (1980),* Article 1, Clause (c)-(d)

[173] *Bangladesh - Turkey BIT (1987)*, Article 1, Clause 1 (a)-(b)

[174] *Bangladesh - United States of America BIT (1986)*, Article 1, Clause (a)-(b), pg. 1-2

(b) "Company of a Party" means a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or a *political subdivision* thereof in which

[175] *Bangladesh - Philippines BIT (1997)*, Article 1, Clause 2, pg. 2

Clause 2(c). (c) With respect to both countries, legal entities, including companies, associations of companies, trading corporate entities and other organizations that are incorporated or, in any event; are properly organized and *actually doing business* under the laws of the respective Party and have their headquarters in the territory of the respective Party where effective management is carried out.

Not so often *permanent residents* are included in an investor's definition, as mentioned in the Bangladesh – Malaysia BIT (1994).[177] This feature has also been found in Bangladesh – Uzbekistan BIT (2000), where *permanent residentship* is defined as the investors. One interesting addition to this BIT is that it specifically mentioned the States of the contracting parties as investors.[178]

In the terminated BIT of Bangladesh and Thailand (1988), '*natural person'* was not mentioned, and the *real economic activities* as a criterion were not mentioned, provided in the updated and latest Bangladesh – Thailand BIT (2002) along with the commonalities.[179]

One significant addition to the definition provided in the Bangladesh – Switzerland BIT (2000) is the *Effective Control* of the legal entities which are not established under the law of that Contracting Party by the natural person from the contracting parties shall be considered as an investor under the BIT. The text read below;

> 2. (c) legal entities not established under the law of that Contracting Party but effectively controlled by natural persons as defined in (a) above or by legal entities as defined in (b) above.[180]

However, according to the survey's findings, the general feature of Bangladesh's definitions to investors is rated 4 out of 7 prong feature tests, e.g., definitions included, natural persons covered, legal entities covered, defines the ownership and control of legal entities covered. This survey suggests a generic idea of comprehensiveness of the definitions of investors in the BITs of Bangladesh. The percentage of comprehensiveness of the definitions of investors in the BITs of Bangladesh is 61.03%, the positive-negative ratio 47:30, and the rating came out the same as all the other in-force-BIT signed South Asian countries, which are 4/7 according to the survey findings.[181] This numeric outcome happens to be the second-best result from all the South Asian countries, although it has

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[176] *Bangladesh - Poland BIT (1997)*, Article 1, Clause 1, pg. 3

[177] *Bangladesh - Malaysia BIT (1994)*, Article 1, Clause (c)
Clause (c)(i) any natural person possessing the citizenship of or *permanently residing* in the territory or a Contracting Party in accordance with its laws;

[178] *Bangladesh - Uzbekistan BIT (2000)*, Article 1, Clause 1, pg. 1

[179] *Bangladesh – Thailand BIT (2002)*, Article 1, Clause 2

[180] *Bangladesh - Switzerland BIT (2000),* Article 1, Clause 1, Sub-clause (c)

[181] See the Seven Prong Test table below.

more BITs surveyed than the best result found in the Indian part of the survey. Bangladesh has signed 34 BITs in total, and 22 available BIT texts are being surveyed for the book.[182] Thus considering these facts, Bangladesh's outcome of comprehensiveness of the definitions of investor is the best result to date among all the South Asian countries.

Seven Prong Test: whether the

i. Definitions included: **Yes**, Definitions have been included in all the BITs.

ii. Specifying natural persons covered: **Yes**, specified the natural persons.

iii. Includes permanent residents: **No**, not covered specifically

iv. Excludes dual nationals and includes dominant and effective nationality: **No**, *dual nationality* is not excluded, and the *dominant and effective nationality* is not included.

v. Specifying legal entities covered: **Yes**, mentioned both legal and non-legal personality

vi. Includes requirement of substantial business activity: **No**, there is no requirement of having *substantial business activity* specified.

vii. Defines ownership and control of legal entities or not: **Yes**, ownership or any control over the legal entities is provided in the definitions.

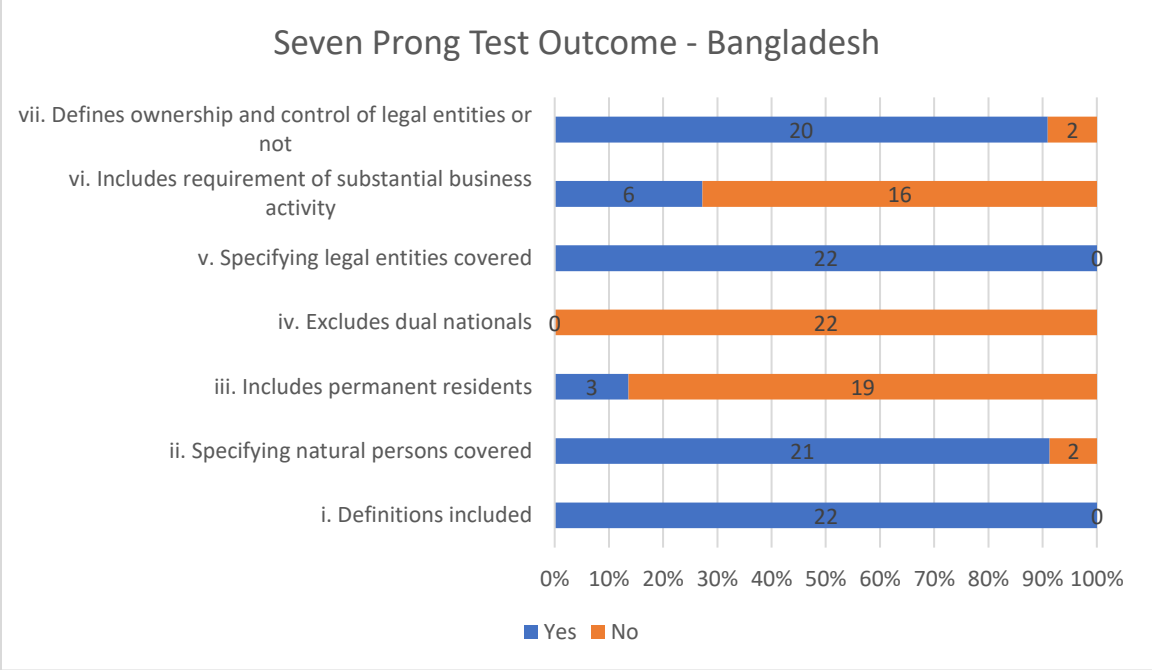
Table 3. II. Seven Prong Tests of Bangladesh BITs

Test	Seven Prong Tests of Bangladesh BITs	Status	Balance

[182] See International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh, accessed August 8, 2023.

Number		YES	NO	
I	Definitions included	22	0	Yes
II	Specifying natural persons covered	21	1	Yes
III	Includes permanent residents	3	19	*No*
IV	Excludes dual nationals and includes dominant and effective nationality	0	22	*No*
V	Specifying legal entities covered	22	0	Yes
VI	Includes requirement of substantial business activity	6	16	*No*
VII	Defines ownership and control of legal entities or not	20	2	Yes
Total		**94**	**60**	**154**
	Ratio (Positive: Negative)	**47:30**		
	Comprehensiveness Percentage	**61.03%**		
	Comprehensiveness Rating	**4/7**		

Figure 2. II. Seven Prong Test Outcome – Bangladesh BITs



3.2.3. Bhutan

Bhutan has no BIT signed and in force with any country. Only signed two agreements in 2004 relating to investment, namely the South Asian Free Trade Area Accord (SAFTA)

and Framework Agreement on the BIMSTEC Free Trade Area (BIMSTEC Framework Agreement) on January 6, 2004, and February 8, 2004, respectively. Bhutan is not a member of ICSID.

The Government of Bhutan has been among the most active in South Asia in terms of introducing reforms, creating public information and credit register, and simplifying the procedures necessary for business establishment.[183] In 2015, the Government relaxed Foreign Direct Investment (FDI) regulations, and foreign investors can now buy land and invest in Bhutan with a minimum stake of 10%.[184] In selected sectors, ownership is permitted up to 100%, and the pharmaceutical industry is now open to FDI.[185] A measure has been introduced which makes it easier to exchange local currency for foreign currencies.[186] However, outside of concerns to protect its culture and environment, geographical factors hold back the region: the country has a small territory, is landlocked, and is very mountainous, thus making infrastructure construction very difficult and costly.[187] In addition, FDI development is limited by a substantially controlled system and an inadequate policy in industrial licensing, trade, work, and finance.[188] The shortage of skilled labor is also a hindrance to development.

Furthermore, the government of Bhutan wishes to continue restricting FDI in specific sectors to avoid competition with local traders.[189] Bhutan is ranked 89th out of 190 countries in the World Bank's *2019 Doing Business Report*.[190] For a small landlocked country, this ranking can be considered satisfactory.

[183] Bhutan: Foreign Investment, https://santandertrade.com/en/portal/establish-overseas/bhutan/investing-3, accessed 14 March 2020
[184] ibid
[185] ibid
[186] ibid
[187] ibid
[188] ibid
[189] ibid
[190] See 'Ease of Doing Business rankings (Benchmark: May 2019)', https://www.doingbusiness.org/en/rankings, accessed 2 June 2020

Bhutan has rules and regulations to deal with foreign investment, which were recently adopted in 2019. The Foreign Direct Investment Rules and Regulations 2019[191] contains the definitions of investors, which can be tested below;

Rule 117. Unless otherwise repugnant to any other laws:

> *(13) 'Foreign Investor' means*
>
> > *(a) person who is a citizen of a country other than Bhutan; or*
> >
> > *(b) an entity which is incorporated or registered outside Bhutan.*
>
> *(14) 'Foreign Institutional Investor (FII)' means entities such as pension funds, insurance companies, saving institutions and investment companies that pool together funds on behalf of others and invest those funds in a variety of different financial instruments and asset classes.*

With slight differences only, the FDI Policy holds the definition of *Foreign Institutional Investor (FII)* such as below:

> ***15. Definitions***
>
> ***"Foreign Institutional Investor (FII)"*** *means entities such as pension funds, insurance companies, saving institutions and registered/licensed investment companies that pool together funds on behalf of others and invest those funds in a variety of different financial instruments and asset classes."*[192]

The words *registered/licensed* before the term investment companies have been erased to give a broader meaning to the foreign investor.

Seven Prong Test: whether the

i. Definitions included: **Yes**, Definitions have been included in all the BITs.

ii. Specifying natural persons covered: **No**, not specified the natural persons.

iii. Includes permanent residents: **No**, not covered specifically

[191] Foreign Direct Investment Rules and Regulations 2019, http://www.moea.gov.bt/wp-content/uploads/2019/08/FDI-Rules-Regulations-2019.pdf, accessed 17 March 2020

[192] Foreign Direct Investment Policy 2019, https://www.moea.gov.bt/wp-content/uploads/2017/07/FDI-Policy-2019.pdf, accessed 17 March 2020

iv. Excludes dual nationals and includes dominant and effective nationality: **No**, dual nationals are not excluded, and the dominant and effective nationality is not included.

v. Specifying legal entities covered: **Yes**, mentioned both legal and non-legal personality

vi. Includes requirement of substantial business activity: **No**, there is no requirement specified of having substantial business activity.

vii. Defines ownership and control of legal entities or not: **No**, ownership or any control over the legal entities is not provided in the definitions.

Table 3. III. Seven Prong Tests of Bhutan Rules and Regulations

Number	Seven Prong Tests of Bhutan Rules and Regulations	Status		Comprehensiveness Rating
I	Definitions included	Yes		**2/7**
II	Specifying natural persons covered		No	
III	Includes permanent residents		No	
IV	Excludes dual nationals and includes dominant and effective nationality		No	
V	Specifying legal entities covered	Yes		
VI	Includes requirement of substantial business activity		No	
VII	Defines ownership and control of legal entities or not		No	
	Total	**2**	**5**	

3.2.4. India

India has been considered one of the fastest-growing economies with a heavy load of population and poverty to work on.[193] India is the third most attractive destination for FDI, after China and the US.[194] It is for a reason, much expected for India to be the capital importing country to help flourish her economy and draw solutions to strengthen the economy. Likewise many other developing countries today, India is also ahead in exporting capital in the form of investment. India is the fourth largest investor in the UK.[195] India's GDP has risen quickly in the past 25 years, leapfrogging France and the UK by some economic measures. India is the fifth-largest economy in the world by nominal GDP.[196] Thus, India cannot look at the investment regime purely from a capital-importing country perspective – something it could do two decades back.[197] Since 1990, the share of the G7 group – Canada, France, Germany, Italy, Japan, the UK, and the US – in the global GDP has fallen from 50 percent to 30.9 percent in 2016. The share of countries like India, in the global GDP, over the same period has doubled to an estimated 7.3 percent from 3.6 percent.[198] It shows that the engine of the world economy is moving from the First World to the Third World, as Professor Prabhash Ranjan recommends - a fact that hopefully should help TWAIL-ers update their somewhat dated North-South analytical framework.[199]

Crucially, India is not a party to the ICSID Convention and is consequently under no obligation to recognize any investment arbitral awards like final judgments of its courts,

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[193] "India's economy: how the world's fastest growing nation went off the rails", https://theconversation.com/indias-economy-how-the-worlds-fastest-growing-nation-went-off-the-rails-129714 India's GDP was growing at between 7% and 8% for the past few years, the fastest rate in the world. But in the last year it has been decelerating markedly: the growth rate slumped to 4.5% in the third quarter of 2019, the slowest in six years. accessed August 8, 2023.

[194] UNCTAD. 2016. 'Global Investment Trends Monitor, No. 24', available at https://unctad.org/system/files/official-document/webdiaeia2016d3_en.pdf, accessed 30 May 2020

[195] "India slips to be 4th largest investor into UK", https://economictimes.indiatimes.com/news/politics-and-nation/india-slips-to-be-4th-largest-investor-into-uk/articleshow/59473832.cms, accessed August 8, 2023.

[196] "The Top 20 Economies in the World", https://www.investopedia.com/insights/worlds-top-economies/, accessed August 8, 2023.

[197] Ranjan P, *India And Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP 2019), pg. 30

[198] M. Chakravarty. 2017. "Which Countries have Benefitted the most from Globalization." https://www.livemint.com/Money/cNmmQJZdnMhbk3Ydbs26wI/Which-countries-have-benefited-the-most-from-globalization.html , accessed August 8, 2023.

[199] Ranjan P, *India And Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP 2019), pg. 31

as provided for by Article 54.[200] It suggests that India is not bound to adhere to the definition part of the convention. Post-2011, India was swamped by numerous ISDS claims brought by foreign investors under different Indian BITs.[201] India was concerned with the impact of these BITs on sovereign regulatory measures. In reaction to these ISDS claims, India reviewed its BITs and adopted a new Model BIT in 2016.[202] It replaced the previous version of the 2003 Model Indian BIT and happened to be the first and only Model BIT adopted by any South Asian country. Eventually, India has also terminated BITs with many countries[203] and wishes to renegotiate investment treaties with all of these countries based on its new Model BIT.[204] However, despite this termination, all the provisions of the terminated BITs through *survival clauses*[205] remain effective for investments made before the termination date for a further period of 15 years.[206]

The survey conducted for this book shows the feature and standards of the definitions of investors in the BITs entered into force by India with other countries. Almost all of the definitions of investor are reflections of the 2016 Indian Model BIT definition. Apart from the seven-prong test outcome, some unique characters are highlighted below from a few BITs. In India - Jordan BIT (2006) mentioned the requirement of the registered

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[200] Siddharth S. Aatreya, "Can Investment Arbitral Awards be Enforced in India?", http://arbitrationblog.kluwerarbitration.com/2019/04/04/can-investment-arbitral-awards-be-enforced-in-india/?doing_wp_cron=1590920720.2442970275878906250000, accessed August 8, 2023.

[201] See chapter 6 and 7, Ranjan P, *India And Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP 2019)

[202] Government of India 2016. 'Model Text for the Indian Investment Treaty 2016', https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf. Important to keep in mind that Indian Model BIT contains two dates – 28 December 2015 given in the letter accompanying the text; and 14 January 2016 on the website of the Ministry of Finance, Government of India as the date of publication of the BIT - https://finmin.nic.in/office-memorandum, accessed August 8, 2023. In this book, the author uses the 14 January 2016 date, and thus call the Model BIT as 2016 Indian Model BIT and *not* 2015 Indian Model BIT.

[203] See, Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, 'Lok Sabha Unstarred Question No. 1290' (25 July 2016), 58, accessed 12 March 2018.

[204] Press information Bureau, Government of India, Ministry of Finance, 2015, 'Model Text of the Bilateral Investment Treaty', http://pib.nic.in/newsite/PrintRelease.aspx?relid=133412, accessed 12 March 2018.

[205] For example, Article 15(1) of *Croatia – India BIT (2001)*, which was terminated on March 22, 2017, provides that either contracting party can give '*a written notice of its intention to terminate the Agreement'*. Moreover, in Article 15(2) of the same BIT, provides that, *'Notwithstanding termination of this Agreement pursuant to paragraph 1 of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.'*

[206] For example, see Article 16(1) of the India-Netherland BIT, also see the Chapter 7, Ranjan P, *India And Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP 2019)

office, central administration of business in the territory of Jordan, *"…which has its registered office, central administration or principal place of business in the territory of the Hashemite Kingdom of Jordan…."*.[207] In India - Lithuania BIT (2011), *substantial business activity* is explicitly mentioned.[208] It is a requirement to ensure the non-manipulation of the investor's nationality. In India - Philippines BIT (2000) emphasizes *substantial economic activity*, mentioning '*actually doing business,' effective management* to further specify the nature of the Investor.[209] The unique part of this BIT is the inclusion of "… *Provided that any particular company may be excluded from the foregoing definition by mutual agreement between the Contracting Parties on grounds of the need to maintain public order, to protect essential security interest or to fulfill commitments relating to peace and security."* This line of reservation empowers the state organ to control the investors on certain grounds, which have been the keywords here, e.g., *public order, essential security interest, commitment to peace, and security*. The inclusion of these grounds is certainly an outcome of the state parties' negotiations to safeguard the interest of the governments. Among all the surveyed BITs of India, the standout BIT is Belarus – India BIT (2018)[210], of which the definition part has been designed inclusively so that it completes the *Seven-Prong test* with full marks. It is a product of India's consciousness of the inclusivity of the definitions contained in the BITs and their significance to IIA.

Moreover, India has signed *Joint Interpretative Notes* with Bangladesh to supplement the India – Bangladesh BIT (2009).[211] The preamble of the notes states, *'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*

[207] *India - Jordan BIT (2006)*, Article 1, Clause (b)-(d), pg. 2

[208] *India - Lithuania BIT (2011)*, Article 1, Clause 2, pg. 2-3
Clause 2(iii). ii) An "entity" means in particular, though not exclusively, a company, an enterprise, a corporation or association incorporated or constituted in accordance with the laws of that Contracting Party and engaged in substantial business activities in the territory of that Contracting Party.

[209] *India - Philippines BIT (2000)*, Article 1, Clause 2-4, pg. 1-2

[210] *Belarus – India BIT* (n 152)

[211] *India- Bangladesh JIN (2017)*, signed on 4 October, 2017 at Dhaka, and entered into force on 4 October, 2017. Available in the Department of Economic Affairs of India website, https://dea.gov.in/bipa?page=7, accessed June 27, 2020

People's Republic of Bangladesh, done at Dhaka on 9th day of February 2009 (the 'Agreement')'. The note added in the agreement all the features except the *Permanent residents*. Previous to this addition, the treaty contained only 4 out of 7 features lacking the inclusion of *permanent residents*, exclusion of *dual nationals* and inclusion of *dominant and effective nationality*, and inclusion of the requirement of *substantial business activity*.

Similarly, India has also signed a *Joint Interpretative Declaration* with Colombia to supplement further the treaty Colombia – India BIT (2009).[212] But the definition remained the same in the treaty, providing six features out of seven, leaving out only the *permanent residents*. But in the main treaty, it only scored 5.5/7, keeping away the *inclusion of permanent residents* and the *inclusion of dominant and effective nationality* in its definition of investors.

Among all the BITs, one agreement was signed in recent years between India Taipei Association (ITA) and Taipei and Taipei Economic and Cultural Center (TECC) in India (BIA between ITA and TECC) in 2018 and enforced in 2019. It was not signed between the governments of the two countries thus having the status of the agreement only with almost all the features of a BIT. The definition of investor maintained a 5/7 rating, lacking *permanent residents, exclusion of dual nationality, and inclusion of dominant and effective nationality*. Previously, the India – Taiwan Province of China BIT (2002) was terminated by India.

However, according to the survey's findings, the general feature of India's definitions to investors is rated 4 out of 7 prong feature tests, e.g., definitions included, natural persons covered, legal entities covered, defines the ownership and control of legal entities covered. This survey suggests a generic idea of comprehensiveness of the definitions of investors in the BITs of India. The percentage of comprehensiveness of the definitions of investors in the BITs of India is 66.38%, the positive-negative ratio 79:40, and the rating came out the same as all the other in-force-BIT signed South Asian countries, which are 4/7 according to the survey findings. Numerically it is the best result among all the South

[212] *India – Colombia JID (2018)*, signed on 4 October, 2018 at Bogota, and entered into force on 4 October, 2018. Available in the Department of Economic Affairs of India website, https://dea.gov.in/bipa?page=7, accessed June 27, 2020

Asian countries, given that India had terminated almost all the pre-Indian Model BIT (2016) BITs which count 67 out of the total 87 signed BITs of India.[213] Also, the number of available BIT text surveyed here is 17 BITs only. Thus, the smaller number of BIT gives rise to the survey outcome. Another fact is that all the surveyed BITs are from or after the year 2000, not before that, as the latest drafts of the treaty are the results of continuous dynamism in the treaty negotiations and growing concern over the non-inclusivity of the definitions of investors.

Seven Prong Test: whether the

i. Definitions included: **Yes**, Definitions have been included in all the BITs.

ii. Specifying natural persons covered: **Yes**, specified the natural persons.

iii. Includes permanent residents: **No**, not covered specifically

iv. Excludes dual nationals and includes dominant and effective nationality: **No**, dual nationals are not excluded, and the dominant and effective nationality is not included.

v. Specifying legal entities covered: **Yes**, mentioned both legal and non-legal personality

vi. Includes requirement of substantial business activity: **No**, there is no requirement specified of having substantial business activity.

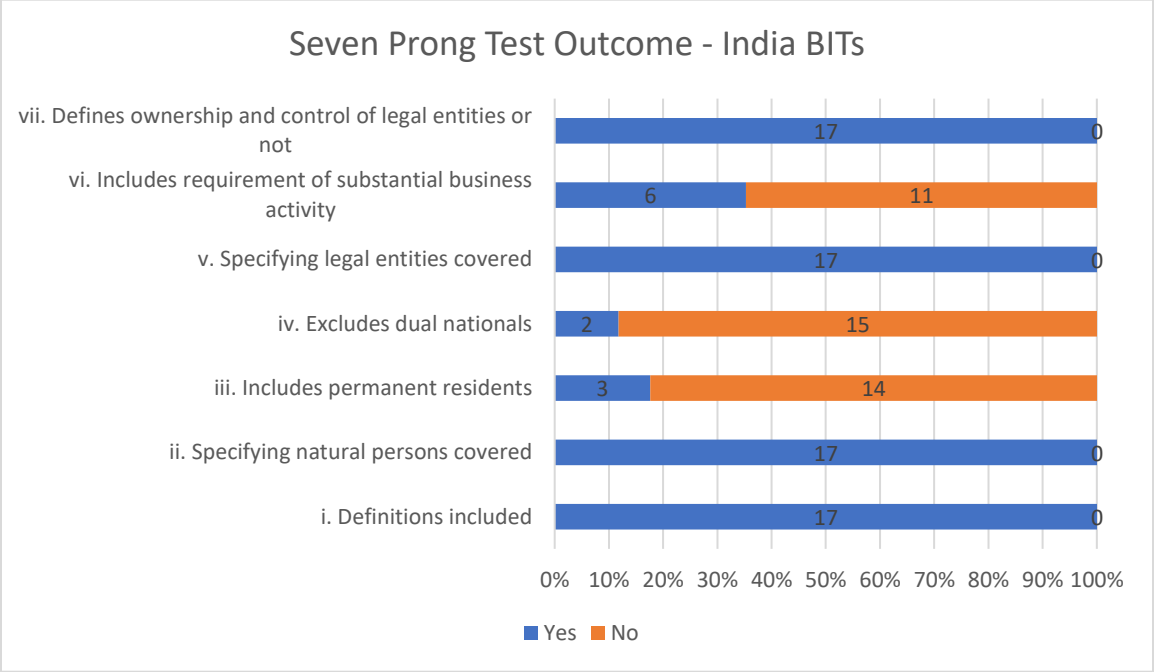
vii. Defines ownership and control of legal entities or not: **Yes**, ownership or any control over the legal entities is provided in the definitions.

[213] See International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india, accessed 1 June 2020

Table 3. IV. Seven Prong Tests of India BITs

Test Number	Seven Prong Tests of India BITs	Status		Balance
		YES	NO	
I	Definitions included	17	0	Yes
II	Specifying natural persons covered	17	0	Yes
III	Includes permanent residents	3	14	*No*
IV	Excludes dual nationals and includes dominant and effective nationality	2[214]	15	*No*
V	Specifying legal entities covered	17	0	Yes
VI	Includes requirement of substantial business activity	6	11	*No*
VII	Defines ownership and control of legal entities or not	17	0	Yes
Total		**74**	**79**	**40**
	Ratio (Positive: Negative)	**79:40**		
	Comprehensiveness Percentage	**66.38%**		
	Comprehensiveness Rating	**4/7**		

Figure 2. III. Seven Prong Test Outcome – India BITs



[214] Although excluded the *dual nationals* but not included *dominant and effective nationality* combinedly required by the fourth test in the *Colombia – India BIT (2009)*, therefore the score is 5.5 out of 7. In this book, the score has been considered 6 out of 7 for a convenience of total round figure.

3.2.5. Maldives

Maldives has signed only a single BIT so far in protecting the country's investment regime, which is with the United Arab Emirates (UAE). The United Arab Emirates-Maldives BIT was signed on 17 October 2017 but has not been in force since its signature. But the BIT text has not been found in the available sources, and the definition of investor from the treaty could not be examined for the seven-prong test.

Apart from this BIT, Maldives has a trade agreement with the Government of India to improve trade and economic relations from 31st March 1981, an agreement on trade and economic cooperation with China to achieve and enhance coordination and cooperation in the fields of standardization and conformity assessment and develop harmonized standards for the region and to facilitate intra-regional trade and to facilitate better access to the global market from 28th March 2004, a Trade and Investment Framework Agreement (TIFA) with the USA to strengthen economic relations between the two countries from 17th October 2009, USA Investment Incentive Agreement (OPIC) to facilitate financial resources for investments by US companies in other countries from 15th March 2010, an Agreement on Economic, Commercial and Technical Cooperation with Qatar from 15th April 2013.[215]

Maldives has signed regional agreements such as the Agreement on South Asian Free Trade Area (SAFTA) signed on 6th January 2004 with the SAARC member states, the SAARC Agreement on Trade in Services (SATIS) on April 2010 during the 16th SAARC Summit with the SAARC member states, Agreement on the Establishment of South Asian Regional Standards Organization (SARSO) on August 2008 with the SAARC member states.[216]

Maldives is a signatory to the World Trade Organization (WTO). Maldives became a founder of the WTO on 31 May 1995; before that, Maldives had been a contracting party to the General Agreement on Tariff and Trade (GATT) since 19 April 1983. The General

[215] BILATERAL ARRANGEMENTS, http://www.trade.gov.mv/page/bilateral, accessed 15 March 2020
[216] REGIONAL ARRANGEMENTS, http://www.trade.gov.mv/page/regional, accessed 15 March 2020

Agreement on Tariffs and Trade.[217] As a Member of the WTO, the Maldives accords MFN treatment to all WTO Members.

3.2.6. Nepal

"In view of the effective role that foreign investments can play in the economic development of a country like Nepal, it is time for us to realize the need to make foreign investments attractive by framing a timely, liberal, and open policy."[218] Due to the narrow fiscal space in government finance and the feeble capacity of the private sector, foreign investment is essential for developing economies like Nepal.[219] Nepal is ranked 94th out of 190 countries in the World Bank's *2019 Doing Business Report*[220]. For a small landlocked country, this ranking can be considered satisfactory. Though surprisingly, Nepal has signed only six BITs so far. Among these BITs, one is terminated (with India), one is signed but not in force (with Mauritius), and four are in force, but only three of these in-force BITs texts are available for the survey. These in-force BITs are with Finland, the United Kingdom, Germany, and France.

Nepal has realized the high importance of foreign investment in the economy and has taken steps to attract FDI.[221] Alongside the investment treaties, a few rules and regulations relating to investment are inserted in the definitions of investor and currently prevail in Nepal. Foreign Investment and Technology Transfer Act, 1992[222], and Foreign Exchange (Regulation) Act, 1963[223] are examples. Many of these laws need to be updated in the present context.[224]

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[217] MULTILATERAL ARRANGEMENTS, http://www.trade.gov.mv/page/multilateral, accessed 15 March 2020

[218] Ministry of Industry, Nepal, *Foreign Investments and the Single Window System*, 1992.

[219] See Investment Policy and Regulatory Framework in Nepal, FY 2073-74 (2016-2017), https://www.unescap.org/sites/default/files/Investment%20Policy%20and%20Regulatory%20Framework%20modified%204-Nepal.pdf, accessed August 8, 2023.

[220] See 'Ease of Doing Business rankings (Benchmark: May 2019)', https://www.doingbusiness.org/en/rankings, accessed 2 June 2020

[221] *Investment Policy* (n 217)

[222] *Foreign Investment and Technology Transfers Act, 1992,* 2(d) "Foreign Investor" means any foreign individual, firm, company or corporate body involved in foreign investment or technology transfer including foreign government or international agency.

[223] *Foreign Exchange (Regulation) Act,1962 (2019 amendment)*, 2(g3) "foreign investor" means any foreign person, firm, company or body making a foreign investment or technology transfer and this term also includes a foreign government or international agency;

[224] *Investment Policy* (n 217)

In Germany - Nepal BIT (1986)[225] and Nepal - United Kingdom BIT (1993)[226], the definitions don't contain the word 'investor' yet define its characters specifically.

However, according to the survey's findings, the general feature of Nepal's definitions to investors is rated 4 out of 7 prong feature tests, e.g., definitions included, natural persons covered, legal entities covered, defines the ownership and control of legal entities covered. This survey suggests a generic idea of comprehensiveness of the definitions of investors in the BITs of Nepal. The percentage of comprehensiveness of the definitions of investors in the BITs of Nepal is 57.14%, the positive-negative ratio 4:3, and the rating came out the same as all the other in-force-BIT signed South Asian countries, which are 4/7 according to the survey findings.[227] This numeric outcome is the fifth-best result from all the South Asian countries, given that Nepal has signed only 6 BITs in total, four are in force and among these, only three available BIT texts are being surveyed for the book.[228]

Seven Prong Test: whether the...

i. Definitions included: **Yes**, Definitions have been included in all the BITs.

ii. Specifying natural persons covered: **Yes**, specified the natural persons.

iii. Includes permanent residents: **No**, not covered specifically

iv. Excludes dual nationals and includes dominant and effective nationality: **No**, dual nationals are not excluded and the dominant and effective nationality is not included.

v. Specifying legal entities covered: **Yes**, mentioned both legal and non-legal personality

vi. Includes requirement of substantial business activity: **No**, there is no requirement specified of having substantial business activity.

vii. Defines ownership and control of legal entities or not: **Yes**, ownership or any control over the legal entities is provided in the definitions.

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[225] *Germany - Nepal BIT (1986)*, Article 1, Clause 3-4, pg.1-2

[226] *Nepal - United Kingdom BIT (1993)*, Article 1, Clause (c)-(d)

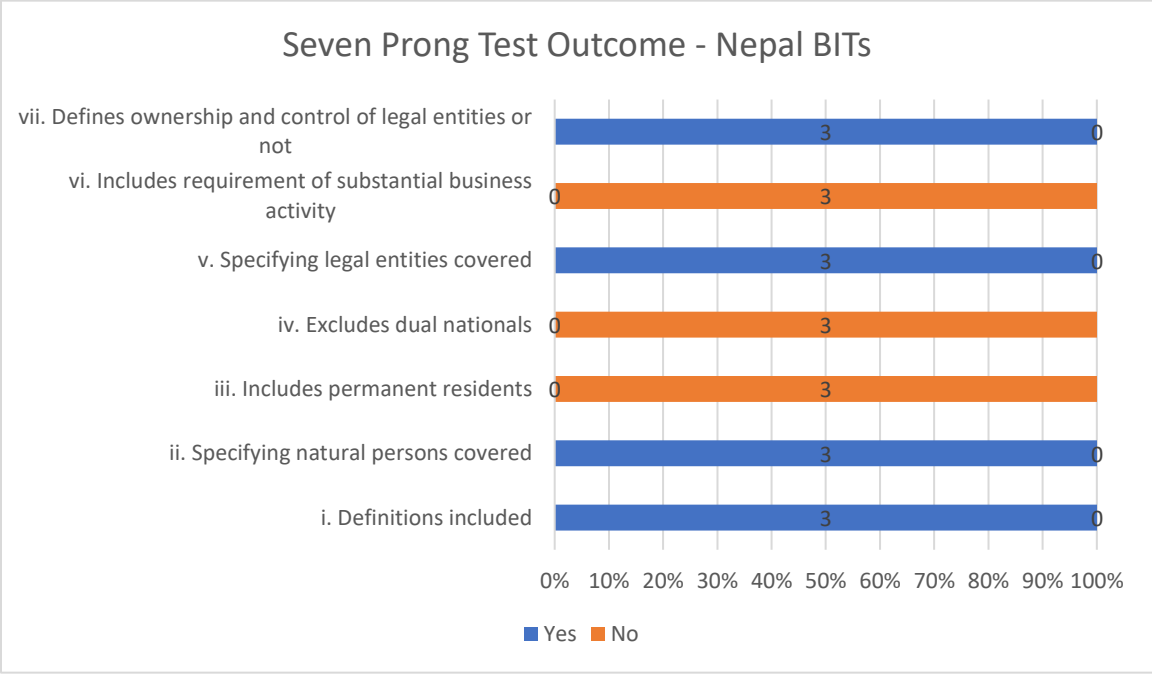
[227] See the Seven Prong Test table below.

[228] See International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/countries/147/nepal, accessed August 8, 2023.

Table 3. V. Seven Prong Tests of Nepal BITs

Test Number	Seven Prong Tests of Nepal BITs	Status		Balance
		YES	NO	
I	Definitions included	3	0	Yes
II	Specifying natural persons covered	3	0	Yes
III	Includes permanent residents	0	3	*No*
IV	Excludes dual nationals and includes dominant and effective nationality	0	3	*No*
V	Specifying legal entities covered	3	0	Yes
VI	Includes requirement of substantial business activity	0	3	*No*
VII	Defines ownership and control of legal entities or not	3	0	Yes
Total		**12**	**9**	**21**
	Ratio (Positive: Negative)	**4:3**		
	Comprehensiveness Percentage	**57.14%**		
	Comprehensiveness Rating	**4/7**		

Figure 2. IV. Seven Prong Test Outcome – Nepal BITs



3.2.7. Pakistan

Pakistan is the country with Germany having the world's first BIT signed dated 25 November 1959.[229] It was a significant leap in the potential of Pakistan's economy, which should be facilitated with more BITs and growth in the country's investment regime. But as a matter of fact, it was only in 1997 that Pakistan established and maintained a largely open investment regime.[230] Furthermore, the PML-N[231] government introduced the Investment Policy 2013, further liberalizing investment policies in most sectors.[232] Pakistan ranked 108th in the world and 5th among the South Asian countries in the Ease of Doing Business rankings[233] Since the first BIT in 1959 till before 1997, in these 38 years only 28 BITs have been welcomed by Pakistan and since 1997 till present (2023) the number is 25 in last 24 years.[234] Among the first 38 BITs, only 18 are in force,[235] five are signed but not in force, and five are terminated BITs.[236] Among the latest 25 BITs, 13 only are in force,[237] 11 are signed but not in force, and 1 is terminated.[238]

One of the Well-structured and content definitions has been given in the Australia - Pakistan BIT (1998), providing the definitions in a segmented manner, yet lacking the mention of exclusion of dual nationals and requirement of substantial business activity.[239] In Germany - Pakistan BIT (1959), there is no mention of the word *'investor'* in the whole BIT text, only defining the terms *'nationals'* and *'company'*.[240] It is significant in

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[229] *Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes)*, Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 November 1962). http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef, accessed August 8, 2023

[230] '*2019 Investment Climate Statements: Pakistan'*, https://www.state.gov/reports/2019-investment-climate-statements/pakistan/#:~:text=Since%201997%2C%20Pakistan%20has%20established,investment%20policies%20in%20most%20sectors., accessed August 8, 2023.

[231] *Pakistan Muslim League (N),* The Pakistani Muslim League is a center-right conservative party in Pakistan. It was founded by former Prime Minister of Pakistan Nawaz Sharif in 1993. The party's platform is generally conservative, which involves supporting free market capitalism.

[232] *Pakistan* (n 228)

[233] Ease of Doing Business rankings (Benchmark: May 2019) https://www.doingbusiness.org/en/rankings?region=south-asia, accessed 2 June 2020

[234] See International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan, accessed August 8, 2023.

[235] See *Figure 2*

[236] *Navigator* (n 211)

[237] ibid

[238] ibid

[239] *Australia - Pakistan BIT (1998)*, Article 1, Clause 1(c) and 1(d), pg. 3

[240] *Germany - Pakistan BIT (1959)*, Article 8(3) and 8(4)

that it is the first Bilateral Investment Treaty signed in the regime of International Investment Law dated November 25, 1959. Only in the Indonesia - Pakistan BIT (1996)[241] and in the Netherlands - Pakistan BIT (1997) [242], it is written explicitly in the text that '*nationals'* are defined as both a *natural person* and a *legal person*. The short text of the definition of investor contained in Indonesia – Pakistan BIT left room for vagueness in deciding the *ownership and control of legal entities*. In Pakistan - United Arab Emirates BIT (1995), the *special clause provided for the government of the States and local and federal financial institutions as well as other agencies, etc., to be considered under the definition of an investor.*[243] Pakistan - Uzbekistan BIT (1992)[244] contains the shortest definition of investor among the Pakistan BITs. In Kuwait - Pakistan BIT (2011) the term *owned or effectively controlled by investor* is mentioned specifically, which is rare in the other BITs, which places this definition as the best example of the ***test no. vii***.[245] Lastly, the Pakistan – Switzerland BIT (1995) provides one of the best definitions of investors among all the Pakistan BITs.[246] It is precise and articulated to

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[241] *Indonesia - Pakistan BIT (1996)*, Article 1, Clause 2, "The term 'nationals' shall comprise with regard to either contracting party; (i) natural persons having the nationality of that contracting party. (ii) legal persons constituted under the law of that contracting party."

[242] *Netherlands - Pakistan BIT (1997)*, Article 1(b), pg. 1-2.

(b) the term 'nationals' shall comprise with regard to either Contracting Party:

i. natural persons having the nationality of that Contracting Party in accordance with its laws;

ii. without prejudice to the provisions of (iii) hereafter, legal persons constituted in accordance with the laws of that Contracting Party;

iii. legal persons controlled, directly or indirectly, by nationals of that Contracting Party but constituted in accordance with the laws of the other Contracting Party.

[243] *Pakistan - United Arab Emirates BIT (1995)*, Article 1, Clause 2, pg. 4-5.

Sub-clause (cc) The Government of the State of UAE indirectly through their local acting and either directly or federal financial institutions as well as development funds, agencies or other similar government institutions having their seats in UAE.

[244] *Pakistan - Uzbekistan BIT (1992)*, Article 1, Clause 1(a) ""Investor" - any physical entity being citizen of either Party and. any legal entity constituted in accordance with either Party's legislation;"

[245] *Kuwait - Pakistan BIT (2011)*, Article 1, Clause 2 and 3, pg. 3

Clause 3. The term "company" shall mean any legal entity, whether or not organized for pecuniary gain, and whether privately or governmentally owned or controlled, which is constituted under the laws of a Contracting State or is owned or effectively controlled by investors of a Contracting State, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or other similar organization.

[246] *Pakistan - Switzerland BIT (1995)*, Article 1, Clause (1),

Clause (1) The term "investor" refers with regard to either Contracting Party to

(a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;

(b) legal entities. including companies. corporations. business associations and other organizations. which

accommodate 5 out of 7 features of a comprehensive definition of investor, only lacking the inclusion of permanent residents and exclusion of dual nationals specifically in the text.

However, according to the survey's findings, the general feature of Pakistan's definitions to investors is rated 4 out of 7 prong feature tests, e.g., definitions included, natural persons covered, legal entities covered, defines the ownership and control of legal entities covered. This survey suggests a generic idea of comprehensiveness of the definitions of investors in the BITs of Pakistan. The percentage of comprehensiveness of the definitions of investors in the BITs of Pakistan is 59.04%, the positive-negative ratio 62:43, and the rating came out the same as all the other in-force-BIT signed South Asian countries, which are 4/7 according to the survey findings. This numeric outcome is the third-best result from all the South Asian countries, although it has more BITs surveyed than that all the other South Asian countries for this book. Pakistan has signed 53 BITs in total. Among these, 16 are signed but not in-force, 6 are terminated, 31 are in-force BITs, and 30 available in-force BIT texts are being surveyed for this book.

Seven Prong Test: whether the...

i. Definitions included: **Yes**, definitions have been included in all the BITs.

ii. Specifying natural persons covered: **Yes**, specified the natural persons.

iii. Includes permanent residents: **No**, not covered specifically

iv. Excludes dual nationals and includes dominant and effective nationality: **No**, dual nationals are not excluded and the dominant and effective nationality is not included.

v. Specifying legal entities covered: **Yes**, mentioned both legal and non-legal personality

vi. Includes requirement of substantial business activity: **No**, there is no requirement specified of having substantial business activity.

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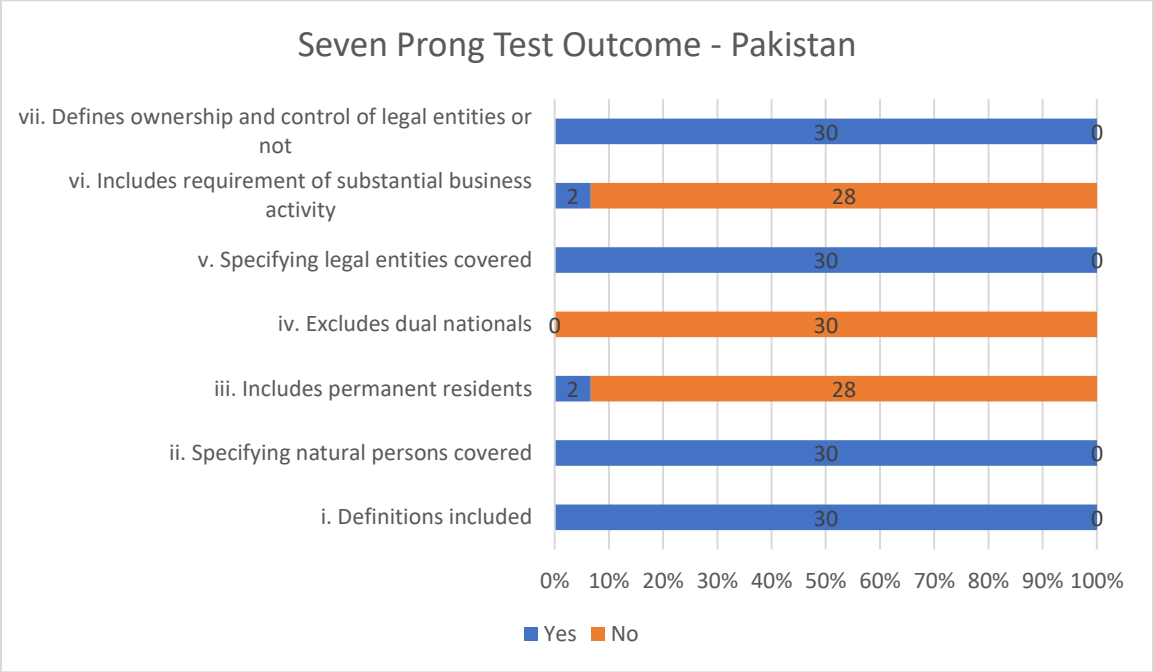
are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party;
(c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party.

vii. Defines ownership and control of legal entities or not: **Yes**, ownership or any control over the legal entities is provided in the definitions.

Table 3. VI. Seven Prong Tests of Pakistan BITs

Test Number	Seven Prong Tests of Pakistan BITs	Status		Balance
		YES	NO	
I	Definitions included	30	0	Yes
II	Specifying natural persons covered	30	0	Yes
III	Includes permanent residents	2	28	*No*
IV	Excludes dual nationals and includes dominant and effective nationality	0	30	*No*
V	Specifying legal entities covered	30	0	Yes
VI	Includes requirement of substantial business activity	2	28	*No*
VII	Defines ownership and control of legal entities or not	30	0	Yes
Total		**124**	**86**	**210**
	Ratio (Positive: Negative)	**62:43**		
	Comprehensiveness Percentage	**59.04%**		
	Comprehensiveness Rating	**4/7**		

Figure 2. V. Seven Prong Test Outcome – Pakistan BITs



3.2.8. Sri Lanka

Sri Lanka was among the first countries in South Asia to liberalize its economy and open up to foreign investment.[247] While these reforms certainly improved the business climate, they did not create a liberal investment framework for all investors by today's standards.[248] Sri Lanka has a GDP per capita of USD 4102.5 (2018)[249] , and the current unemployment rate is 4.5% [250] . It suggests the economic measures taken by the government of Sri Lanka in past decades were quite positive. Foreign Direct Investment in Sri Lanka averaged 162.84 USD Million from 2001 until 2019, reaching an all-time high of 961 USD Million in the fourth quarter of 2017 and a record low of 20 USD Million in the second quarter of 2001.[251] FDI in Sri Lanka for the year 2018 was 1.8% of the GDP, the second-highest in South Asia, following the Maldives.[252] Foreign Direct Investment in Sri Lanka increased by 235 USD Million in the fourth quarter of 2019.[253] Sri Lanka's goal to be the South Asian region's first-choice base for business operations is achievable if appropriate policy actions are taken.[254] In this light, the BITs definitions of investors are significant to attain the end of identifying the investors properly and decreasing the chances of investment disputes.

Few BITs didn't mention the word 'investor' *per se* but defined the characters of investors. e.g., *nationals, legal persons, company* in Finland - Sri Lanka BIT (1985), Malaysia - Sri Lanka BIT (1982), Netherlands - Sri Lanka BIT (1984), Republic of Korea - Sri Lanka BIT (1980), Japan - Sri Lanka BIT (1982), Indonesia - Sri Lanka BIT (1996).

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[247] Investment Policy Review of Sri Lanka, UNCTAD (2004), https://unctad.org/en/docs//iteipc20038_en.pdf, accessed August 8, 2023, pg. 23

[248] ibid

[249] World Bank national accounts data, and OECD National Accounts data files. https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=LK, accessed 10 June 2020

[250] Unemployment Rate in Sri Lanka decreased to 4.50 percent in the fourth quarter of 2019 from 5.10 percent in the third quarter of 2019. https://tradingeconomics.com/sri-lanka/unemployment-rate#:~:text=Unemployment%20Rate%20in%20Sri%20Lanka%20averaged%207.71%20percent%20from%201991,the%20fourth%20quarter%20of%202013, accessed 10 June 2020

[251] Sri Lanka Foreign Direct Investment - Net Inflows, 2001-2019 Data, https://tradingeconomics.com/sri-lanka/foreign-direct-investment#:~:text=Foreign%20Direct%20Investment%20in%20Sri%20Lanka%20averaged%20162.84%20USD%20Million,the%20second%20quarter%20of%202001, accessed 11 June 2020

[252] Foreign direct investment, net inflows (% of GDP) - Sri Lanka, https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?locations=LK, accessed 11 June 2020

[253] *Sri Lanka* (n 249)

[254] *Investment Policy* (n 245), pg. 51

Germany - Sri Lanka BIT (2000), Sri Lanka - United States of America BIT (1991), Sri Lanka - Sweden BIT (1982), Norway - Sri Lanka BIT (1985), Singapore - Sri Lanka BIT (1980), Sri Lanka - United Kingdom BIT (1980), Sri Lanka - Switzerland BIT (1981). Germany - Sri Lanka BIT (2000) is the replacement of the 1963 BIT. The definition of investor remains the same with no significant change. Interestingly in Egypt - Sri Lanka BIT (1996), the *permanent residence* has been mentioned in the juridical person definition, not in the natural person definition.[255] One unique inclusion in Sri Lanka - Switzerland BIT (1981) is that *"... in which the Swiss nationals have a direct controlling interest."*[256] The term *political subdivision* is used in Sri Lanka - United States of America BIT (1991).[257] Lastly, among all the Sri Lankan BITs, one of the best definitions found in the Islamic Republic of Iran - Sri Lanka BIT (2000), which scored 5.5/7, providing all the features except *permanent residents*, and *inclusion of dominant and effective nationality*.[258]

However, according to the survey findings, the general feature of Sri Lanka's definitions to investors is rated 4 out of 7 prong feature tests, e.g., definitions included, natural

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[255] *Egypt - Sri Lanka BIT (1996)*, Article 1, Clause (2), pg. 1-2

> Clause 2. The term "investor" means any natural or juridical person, including the Government of a Contracting Party, who invests in the territory of the other Contracting Party:
>
> (a) A "natural person" means with respect to either Contracting Party a natural person having the nationality of that Party in accordance with its laws; and
>
> (b) A "juridical person" means with respect to either Contracting Party any entity established in accordance with, and recognized as a juridical person by its laws - including the government of any of the Contracting Parties such as Public institutions, corporations, foundations, private companies, firms, establishments and organizations and having permanent residence in the territory of one of the Contracting Parties.

[256] *Sri Lanka - Switzerland BIT (1981)*, Article 1, Clause (d)(ii) "in respect of the Swiss Confederation, companies, institutions or foundations with legal personality, as well as partnership firms or limited partnerships and other associations without legal personality, in which Swiss nationals have directly or indirectly a controlling interest"

[257] *Sri Lanka - United States of America BIT (1991)*, Article I, Clause 1(b), pg. 1-2

> Clause 1(b). "company" of a Party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;
>
> (c) "national" of a Party means a natural person who is a national of a Party under its applicable law;

[258] *Islamic Republic of Iran - Sri Lanka BIT (2000)*, Article 1, Clause 2, pg. 2

> Clause 2. The term "investor" with regard to either Contracting Party means the following persons who invest in the territory of the other Contracting Party:
>
> (a) natural persons who, according to the laws of one Contracting Party, having its nationality and are not nationals of the other Contracting Party,
>
> (b) legal entities of either Contracting Party which are formed and incorporated under the laws of one Contracting Party and have their seat together with their substantial economic activities in the territory of that same Contracting Party.

persons covered, legal entities covered, defines the ownership and control of legal entities covered. This survey suggests a generic idea of comprehensiveness of the definitions of investors in the BITs of Sri Lanka. The percentage of comprehensiveness of the definitions of investors in the BITs of Sri Lanka is 58.38%, the positive-negative ratio 94:67, and the rating came out the same as all the other in-force-BIT signed South Asian countries, which are 4/7 according to the survey findings. This numeric outcome happens to be the fourth-best result among all the South Asian countries. Sri Lanka has signed 30 BITs in total. Among these, two are signed but not in force, three are terminated, 25 are in-force BITs, and 23 available in-force BIT texts are being surveyed for this book.

Seven Prong Test: whether the

i. Definitions included: **Yes**, Definitions have been included in all the BITs.

ii. Specifying natural persons covered: **Yes**, specified the natural persons.

iii. Includes permanent residents: **No**, not covered specifically.

iv. Excludes dual nationals and includes dominant and effective nationality: **No**, dual nationals are not excluded, and the dominant and effective nationality is not included.

v. Specifying legal entities covered: **Yes**, mentioned both legal and non-legal personality.

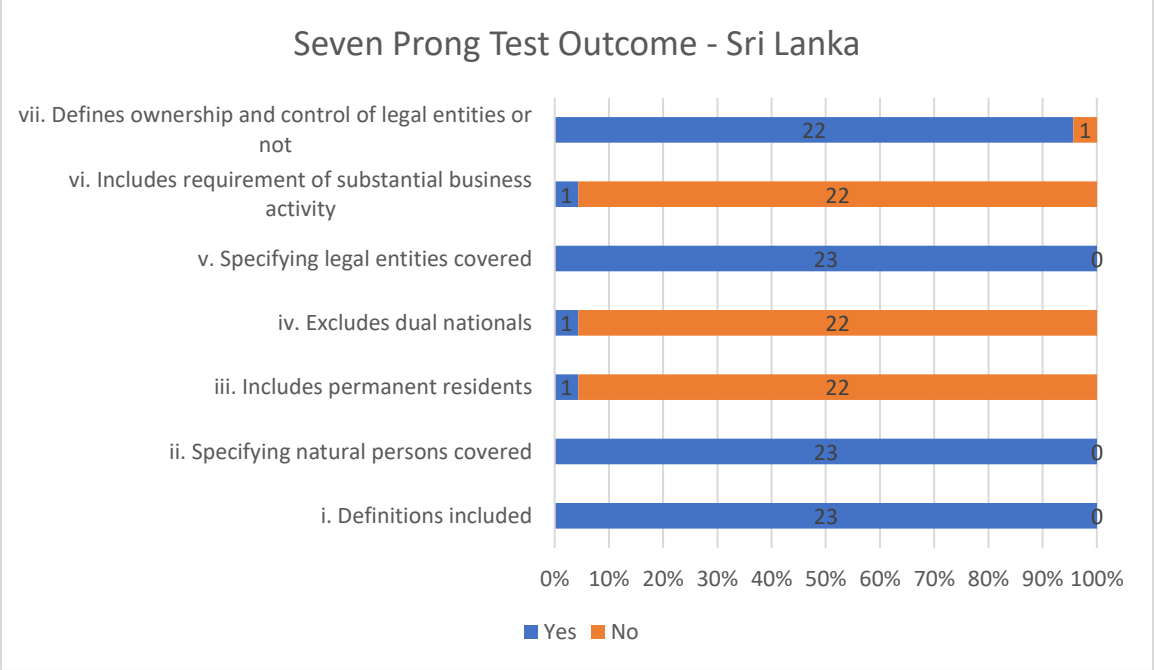
vi. Includes requirement of substantial business activity: **No**, there is no requirement specified of having substantial business activity.

vii. Defines ownership and control of legal entities or not: **Yes**, ownership or any control over the legal entities is provided in the definitions.

Table 3. VII. Seven Prong Tests of Sri Lanka BITs

Test Number	Seven Prong Tests of Sri Lanka BITs	Status		Balance
		YES	NO	
I	Definitions included	23		Yes
II	Specifying natural persons covered	23		Yes
III	Includes permanent residents	1	22	*No*
IV	Excludes dual nationals and includes dominant and effective nationality[259]	1	22	*No*
V	Specifying legal entities covered	23	0	Yes
VI	Includes requirement of substantial business activity	1	22	*No*
VII	Defines ownership and control of legal entities or not	22	1	Yes
Total		**94**	**67**	**161**
	Ratio (Positive: Negative)	**94:67**		
	Comprehensiveness Percentage	**58.38%**		
	Comprehensiveness Rating	**4/7**		

Figure 2. VI. Seven Prong Test Outcome – Sri Lanka BITs



[259] Although excluded the *dual nationals* but not included *dominant and effective nationality* combinedly required by the fourth test in the *Islamic Republic of Iran - Sri Lanka BIT (2000)*, therefore the score is 5.5 out of 7. In this book, the score has been considered 6 out of 7 for a convenience of total round figure.

3.3. Conclusion

Regarding South Asian BITs, none of the BITs surveyed in this region have accommodated the dominant and effective nationality requirement in the defining section of the text, except for the India-Belarus BIT (2018), the Islamic Republic of Iran – Sri Lanka BIT (2000) and the Colombia – India BIT (2009).

Table 4. According to the Survey findings, ranking is based on the Comprehensiveness of the Definitions of Investors in South Asian Countries.

Ranking Based on the Comprehensiveness of the Definitions of Investor	**Country-based BITs**	**Total Test Outcome[260]**		**Ratio (**Positive: Negative**)**	**Comprehensiveness Rating**	**Comprehensiveness Percentage**
		Yes	**No**			
1	India BITs	79	40	79:40	4/7	**66.38%**
2	Bangladesh BITs	94	60	47:30	4/7	**61.03%**
3	Pakistan BITs	124	86	62:43	4/7	**59.04%**
4	Sri Lanka BITs	94	67	94:67	4/7	**58.38%**
5	Nepal BITs	12	9	4:3	4/7	**57.14%**
6	Afghanistan BITs	8	6	4:3	4/7	**57.14%**
South Asia		**411**	**268**	**145:93**	**4/7**	**59.85%**
*Other South Asian countries, Bhutan and Maldives, don't have any in-force BITs signed to date.						

South Asian countries, mainly capital importing in nature, are also going through the backlash era. e.g., The government of India scrapped her BITs with 58 countries in 2016. That year, India introduced the latest Model India BIT 2016 to follow in negotiating with other state parties in signing BITs. But even that Model BIT doesn't contain an inclusive definition of investors, rating 5/7, not covering *permanent residents, exclusion of dual nationality,* and *inclusion of the dominant and effective nationality*. It is the scenario of the only Model BIT of the South Asian countries. The other countries do not have any impressive definitions of investors maintaining an average rating of 4/7 by all the countries, which is the overall rating of South Asia as a region.

[260] Sum of **Yes** and **No** shall be divided by 7 to get the number of surveyed BITs of each country

CHAPTER – 4: CONCLUSION

It is a well-established character of law to be specific and clear. while the ambiguity in the language of the law is unexpected in the course of justice. Moreover, the incoherence and plurality in the text of the legal instrument make it ambiguous for the arbitrator to rely upon the language of the instrument and decide thereby.

Like the title, the plurality of definitions of investors suggests the existing variety of templates of definitions of investors in the IIL regime. This plurality coming from the comfort of autonomy of the definition enjoyed by the state parties in terms of Bilateral Investment Treaties has a relative connection with the problems of this research. The IIA has often been facing ambiguity in deciding the investor's nationality and jurisdictional limitations regarding the *ratione personae*. For which the non-uniformity and non-comprehensiveness of the definitions of investors can be held responsible. Because the best resolution to disputes is the prevention of disputes before arising, and that is by signing a comprehensive or inclusive text of BIT. Particularly in this scenario, the inclusive definition of investors shall give the IIA tribunals relief from the jurisdictional limitations. It can also play a role in minimizing the number of future IIA. For example, a provision of a *dominant and effective nationality test* may empower the IIA tribunal to decide between the dual nationality of the investor wherever the *dual nationality* is excluded in the BIT's definition part. A vague and non-inclusive definition of investor may provoke the misuse of the provisions of BITs, an open door to abusive practices, and ultimately pushes the states to terminate or recalibrate the BITs and contribute to forming an era of backlash in the regime.

The autonomy of the definitions of investors exercised in every BIT causes the plurality of definitions of investors. International law has long been facing criticism for the lack of uniformity in provisions and thereby doubted the status of law. The autonomy of definitions of investors indicates that proposition by not allowing specificity in the language of the definitions in the BITs. The arbitration tribunal needs to adhere to the treaty text and comprehensively determine the nature of the investor in the proceeding. The above discussion shows the difficulties and ambiguity faced by the arbitrators in deciding an ISDS case and parties to it are the eventual subjects to it. Therefore, this genuine need for uniformity in the language of the

treaties forced the countries to come up with their Model BIT to set a standard, allowing them to negotiate a better BIT with the other party, and avoid future arbitration cases.

4.1. Trending a Model BIT?

It is sovereignty that allows states to have autonomy in the development and negotiation of bilateral and multilateral investment treaties. Thus, the variety of definitions of investor in host countries offers varied standards of the legality regarding investment protection and promotion to different states at the same time. This non-uniformity may cause State organs to get disoriented while responding to investors. Furthermore, there are no legal reasons to support the variety of definitions of investor. However, it is the effectiveness of the State's organs to negotiate and construct treaties in the best possible way to make them more effective and useful. Many nations throughout the world are now adopting Model BIT, which essentially gives the finest possible draft of an investment treaty to attain that efficiency in developing more self-explanatory BITs. This research provides the same in terms of the investor's definition in a BIT using self-explanatory and non-ambiguous vocabulary.

The IIL scenario is developing dramatically as a result of the conscious states' adoption of Model BITs. However, it may be another research examining the Model BITs definition of investors and undoubtedly employing this seven-prong test. The study's conclusions are based on the seven prongs of a comprehensive definition of an investor. It enables States to better manage and establish the identity of foreign investors, as well as eliminate uncertainty in interpretation and arbitration procedures.

4.2. Scope of the VCLT and the ICSID Convention

Furthermore, VCLT articles 31 and 32 exist for the interpretation of the equivocal wording of a treaty; nevertheless, they are ineffectual if the text fails to be comprehensive or incomplete.

International Investment Arbitration (IIA) sometimes encounters ambiguity over the investor's nationality and the tribunal's jurisdiction *ratione personae*, which equates to the IIA's jurisdictional boundaries. The current uncertainty in the ICSID Convention Article 25 and several of the BIT's definitions to investors has resulted in this jurisdictional constraint.

The IIA's jurisdiction in this regard is mainly based on the investor's *dual nationality*. Although the Convention specifically prohibited *dual nationality*, the *Iran/US Claims Tribunal*

(1984) remarked in *Case A/18* that "unless an exception is clearly stated" in the Algiers Accords, the rule of *dominant and effective nationality* should apply to claims by *dual nationals*. It is possible to argue that by relying on the Case A/18 jurisprudence, the *Champion Trading Tribunal* implicitly agreed that when a treaty does not expressly exclude dual nationals or simply fails to regulate this issue, the rule of dominant and effective nationality may apply as a lacuna filing instrument.

The Convention merely states the outer limits of who may be the national of a Contracting State and leaves the ultimate question of determining nationality to the Contracting State itself. This can be successfully regulated by including a dual nationality provision in the definition of investor, which would remove uncertainty and simplify the Arbitration tribunal's procedure.

4.3. Way Forward

The above scenario and discussions show South Asia, a promising economic region, must focus on the Investment protection mechanism by negotiating a better deal of investment treaties. For this purpose, it is suggested to bring inclusivity in the definition part further to avoid the discomfort of ambiguity and treaty termination complexity. It is time to set standards for each of the aspiring South Asian countries and the other countries of the world to formulate their own set of standard investment treaty provisions, which might be in the way of Model BIT as many countries follow. Furthermore, this region may attempt to form a regional investment treaty among the nations in order to reap the benefits of uniformity in investment protection and promotion. This can help by reducing the number of BITs among South Asian nations. Second, forming a regional arbitration tribunal can reduce the cost and time consumption of the ISDS process. However, given the economic situation and relations between South Asian states, this is a difficult task. However, it all hinges on the region's political will, which is ever complicated among regional powers.

Therefore, the above-found seven elements suggesting to form part of a comprehensive definition of investor used as a tool to test the comprehensiveness of the South Asian definitions of investor as per the respective BITs surveyed.

Based on the findings and the discussion in this book, the following template of a comprehensive definition of investors can be offered;

'Investor' means:[261]

a) a ***natural person***[262]who is a national or citizen of a Party in accordance with its law. A natural person who is a ***dual national or citizen, in accordance with its laws, shall be deemed to be exclusively a national or citizen of the country of her or his dominant and effective nationality/citizenship***[263], where she/he ordinarily or ***permanently resides***[264]. In no event, the investor shall be a national of a party in whose territory the investment is made; or

b) a ***legal entity***[265]other than a branch or representative office that is constituted, organized, and operated under the law of that Party and that has ***substantial business activities***[266] in the territory of that party; or

c) a legal entity other than a branch or representative office that is constituted, organized, and operated under the laws of that Party and that is ***directly or indirectly owned or controlled***[267] by a natural person of that Party or by a legal entity mentioned under sub-clause (b) herein, that has invested in the territory of the other Party.

The concept of substantial business activity shall require a comprehensive examination of all the circumstances on a case-by-case basis.

[261] **(i)** Definitions included: **Yes**.
[262] **(ii)** Specifying natural persons covered: **Yes.**
[263] **(iv)** Excludes dual nationals and includes dominant and effective nationality: **Yes**.
[264] **(iii)** Includes permanent residents: **Yes**.
[265] **(v)** Specifying legal entities covered: **Yes**.
[266] **(vi)** Includes requirement of substantial business activity: **Yes.**
[267] **(vii)** Defines ownership and control of legal entities: **Yes.**

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118. See chapter 6 and 7, Ranjan P, *India And Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP 2019)
119. Government of India 2016. 'Model Text for the Indian Investment Treaty 2016', https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf. Important to keep in mind that Indian Model BIT contains two dates – 28 December 2015 given in the letter accompanying the text; and 14 January 2016 on the website of the Ministry of Finance, Government of India as the date of publication of the BIT - https://finmin.nic.in/office-memorandum, accessed August 8, 2023. In this book, the author uses the 14 January 2016 date, and thus call the Model BIT as 2016 Indian Model BIT and *not* 2015 Indian Model BIT.
120. See, Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, 'Lok Sabha Unstarred Question No. 1290' (25 July 2016), 58, accessed 12 March 2018.
121. Press information Bureau, Government of India, Ministry of Finance, 2015, 'Model Text of the Bilateral Investment Treaty', http://pib.nic.in/newsite/PrintRelease.aspx?relid=133412, accessed 12 March 2018.
122. For example, Article 15(1) of *Croatia – India BIT (2001)*, which was terminated on March 22, 2017, provides that either contracting party can give '*a written notice of its intention to terminate the Agreement'*. Moreover, in Article 15(2) of the same BIT, provides that, *'Notwithstanding termination of this Agreement pursuant to paragraph 1 of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.'*
123. For example, see Article 16(1) of the India-Netherland BIT, also see the Chapter 7, Ranjan P, *India And Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP 2019)
124. *India - Jordan BIT (2006)*, Article 1, Clause (b)-(d), pg. 2
125. *India - Lithuania BIT (2011)*, Article 1, Clause 2, pg. 2-3
126. *India - Philippines BIT (2000)*, Article 1, Clause 2-4, pg. 1-2
127. *Belarus – India BIT* (n 152)
128. *India- Bangladesh JIN (2017)*, signed on 4 October, 2017 at Dhaka, and entered into force on 4 October, 2017. Available in the Department of Economic Affairs of India website, https://dea.gov.in/bipa?page=7, accessed June 27, 2020
129. *India – Colombia JID (2018)*, signed on 4 October, 2018 at Bogota, and entered into force on 4 October, 2018. Available in the Department of Economic Affairs of India website, https://dea.gov.in/bipa?page=7, accessed June 27, 2020
130. See International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india, accessed 1 June 2020
131. Although excluded the *dual nationals* but not included *dominant and effective nationality* combinedly required by the fourth test in the *Colombia – India BIT (2009)*, therefore the score is 5.5 out of 7. In this book, the score has been considered 6 out of 7 for a convenience of total round figure.
132. BILATERAL ARRANGEMENTS, http://www.trade.gov.mv/page/bilateral, accessed 15 March 2020
133. REGIONAL ARRANGEMENTS, http://www.trade.gov.mv/page/regional, accessed 15 March 2020
134. MULTILATERAL ARRANGEMENTS, http://www.trade.gov.mv/page/multilateral, accessed 15 March 2020
135. Ministry of Industry, Nepal, *Foreign Investments and the Single Window System*, 1992.

136. See Investment Policy and Regulatory Framework in Nepal, FY 2073-74 (2016-2017), https://www.unescap.org/sites/default/files/Investment%20Policy%20and%20Regulatory%20Framework%20modified%204-Nepal.pdf, accessed August 8, 2023.
137. See 'Ease of Doing Business rankings (Benchmark: May 2019)', https://www.doingbusiness.org/en/rankings, accessed 2 June 2020
138. *Investment Policy* (n 217)
139. *Foreign Investment and Technology Transfers Act, 1992,* 2(d) "Foreign Investor" means any foreign individual, firm, company or corporate body involved in foreign investment or technology transfer including foreign government or international agency.
140. *Foreign Exchange (Regulation) Act,1962 (2019 amendment)*, 2(g3) "foreign investor" means any foreign person, firm, company or body making a foreign investment or technology transfer and this term also includes a foreign government or international agency;
141. *Germany - Nepal BIT (1986)*, Article 1, Clause 3-4, pg.1-2
142. *Nepal - United Kingdom BIT (1993)*, Article 1, Clause (c)-(d)
143. See the Seven Prong Test table below.
144. See International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/countries/147/nepal, accessed August 8, 2023.
145. *Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes)*, Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 November 1962). http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef, accessed August 8, 2023
146. '*2019 Investment Climate Statements: Pakistan*', https://www.state.gov/reports/2019-investment-climate-statements/pakistan/#:~:text=Since%201997%2C%20Pakistan%20has%20established,investment%20policies%20in%20most%20sectors., accessed August 8, 2023.
147. *Pakistan Muslim League (N),* The Pakistani Muslim League is a center-right conservative party in Pakistan. It was founded by former Prime Minister of Pakistan Nawaz Sharif in 1993. The party's platform is generally conservative, which involves supporting free market capitalism.
148. Ease of Doing Business rankings (Benchmark: May 2019) https://www.doingbusiness.org/en/rankings?region=south-asia, accessed 2 June 2020
149. See International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan, accessed August 8, 2023.
150. *Australia - Pakistan BIT (1998)*, Article 1, Clause 1(c) and 1(d), pg. 3
151. *Germany - Pakistan BIT (1959)*, Article 8(3) and 8(4)
152. *Indonesia - Pakistan BIT (1996)*, Article 1, Clause 2, "The term 'nationals' shall comprise with regard to either contracting party; (i) natural persons having the nationality of that contracting party. (ii) legal persons constituted under the law of that contracting party."
153. *Netherlands - Pakistan BIT (1997)*, Article 1(b), pg. 1-2.
154. *Pakistan - United Arab Emirates BIT (1995)*, Article 1, Clause 2, pg. 4-5.
155. *Pakistan - Uzbekistan BIT (1992)*, Article 1, Clause 1(a) ""Investor" - any physical entity being citizen of either Party and. any legal entity constituted in accordance with either Party's legislation;"
156. *Kuwait - Pakistan BIT (2011)*, Article 1, Clause 2 and 3, pg. 3
157. *Pakistan - Switzerland BIT (1995)*, Article 1, Clause (1),
158. Investment Policy Review of Sri Lanka, UNCTAD (2004), https://unctad.org/en/docs//iteipc20038_en.pdf, accessed August 8, 2023, pg. 23
159. World Bank national accounts data, and OECD National Accounts data files. https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=LK, accessed 10 June 2020
160. Unemployment Rate in Sri Lanka decreased to 4.50 percent in the fourth quarter of 2019 from 5.10 percent in the third quarter of 2019. https://tradingeconomics.com/sri-lanka/unemployment-rate#:~:text=Unemployment%20Rate%20in%20Sri%20Lanka%20averaged%207.71%20percent%20from%201991,the%20fourth%20quarter%20of%202013, accessed 10 June 2020
161. Sri Lanka Foreign Direct Investment - Net Inflows, 2001-2019 Data, https://tradingeconomics.com/sri-lanka/foreign-direct-

investment#:~:text=Foreign%20Direct%20Investment%20in%20Sri%20Lanka%20averaged%20162.84%20USD%20Million,the%20second%20quarter%20of%202001, accessed 11 June 2020

162. Foreign direct investment, net inflows (% of GDP) - Sri Lanka, https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?locations=LK, accessed 11 June 2020
163. *Egypt - Sri Lanka BIT (1996)*, Article 1, Clause (2), pg. 1-2.
164. *Sri Lanka - Switzerland BIT (1981)*, Article 1, Clause (d)(ii) "in respect of the Swiss Confederation, companies, institutions or foundations with legal personality, as well as partnership firms or limited partnerships and other associations without legal personality, in which Swiss nationals have directly or indirectly a controlling interest"
165. *Sri Lanka - United States of America BIT (1991)*, Article I, Clause 1(b), pg. 1-2
166. *Islamic Republic of Iran - Sri Lanka BIT (2000)*, Article 1, Clause 2, pg. 2
167. Although excluded the *dual nationals* but not included *dominant and effective nationality* combinedly required by the fourth test in the *Islamic Republic of Iran - Sri Lanka BIT (2000)*, therefore the score is 5.5 out of 7. In this book, the score has been considered 6 out of 7 for a convenience of total round figure.
168. Sum of **Yes** and **No** shall be divided by 7 to get the number of surveyed BITs of each country
    (i) Definitions included: **Yes**.
    (ii) Specifying natural persons covered: **Yes.**
    (iv) Excludes dual nationals and includes dominant and effective nationality: **Yes**.
    (iii) Includes permanent residents: **Yes**.
    (v) Specifying legal entities covered: **Yes**.
    (vi) Includes requirement of substantial business activity: **Yes.**
    (vii) Defines ownership and control of legal entities: **Yes.**