

# **HURDLES IN WAY OF COMPULSORY LICENSING BY DEVELOPING NATIONS: MULTILATERAL MURDER OR BILATERAL SUICIDE?: AN EMPIRICAL ANALYSIS OF BILATERAL INVESTMENT TREATIES OF INDIA, BANGLADESH AND PAKISTAN**

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*The Agreement on Trade Related Aspects of Intellectual Property Rights is often said to raise hurdles in the path of developing countries in attaining their public health objectives. One of the concerns has been that the Article 31 of TRIPS is inadequate in allowing issuance of compulsory licenses as a regulatory tool by developing countries for meeting public health requirements. However, a close perusal of the Bilateral Investment Treaties of India, Pakistan and Bangladesh demonstrate how these countries voluntarily accepted more onerous requirements for issuance of compulsory licenses than what exists under the TRIPS agreement. These additional requirements under the Bilateral Investment Treaties have serious and far reaching implications which are not necessarily limited to a bilateral plane.*

## I. INTRODUCTION

The Agreement on Trade Related Aspects of Intellectual Property Rights (*hereinafter* TRIPS) is perhaps one of the most spoken about, most criticized and most misunderstood treaties of recent times. Rhetoric is abundant on both sides of the left-right/ north-south divide and so is scholarship. This can be attributed mostly to the implications that TRIPS is said to have on the pharmaceutical and agro chemical sectors which are crucial to the developing world.<sup>1</sup> In this

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<sup>1</sup> H. HESTEMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF ACCESS TO MEDICINES 18-75 (2007) available in PRABHASH RANJAN (COMP.), STUDY MATERIAL IN INTERNATIONAL PATENTS, TRADE AND REGULATION 1-74 (WBNUJS, 2008).

paper, we seek to refrain from the rhetoric, both leftist and rightist, and analyse the compulsory licensing provisions of TRIPS in comparison to the expropriation provisions of Bilateral Investment Treaties from a purely legal perspective. The TRIPS Agreement reflects a negotiated compromise between two polar positions: one seeking to minimise patent protection and the other seeking to maximize it.<sup>2</sup> Though there are differences as to the manner in which this compromise was attained and the direction in which the balance tilts, the major premise that there is a compromise is indisputable. Article 31 of TRIPS which deals with compulsory licensing was one of the pivots of the negotiating process.<sup>3</sup> Even after the agreement entered into force, further negotiations were undertaken surrounding this provision and further compromises reached.<sup>4</sup> The provision recognizes the inherent right of Members to issue compulsory licences and lays down the procedural safeguards to be met in this regard.

Bilateral Investment Treaties (*hereinafter* BITs) entered into by several nations recognize intellectual property as a form of investment and provide it protection against expropriation.<sup>5</sup> A close look at the BITs entered into by several nations demonstrates that they have, both before the entry into force of the TRIPS Agreement and thereafter, granted higher protection to intellectual property through these BITs than they were willing to give under TRIPS. This shows how these countries, while advocating wide powers to issue compulsory licenses on one hand have on the other, conceded these powers through their BITs. Moreover, these BITs raise more hurdles to issuance of compulsory licenses than the TRIPS agreement is blamed to have raised. In such cases, two parallel systems of protection exist for the patent holder against interference with intellectual property: one of TRIPS and the other under the specific BIT.<sup>6</sup>

India, Pakistan and Bangladesh, in spite of their geographical proximity, present stark contrast in terms of the stability of economic and political institutions and the complex modalities of internal decision making processes. While India is, by one of the most popular clichés, the largest democracy in the world and has a relatively stable economic and political machinery, Pakistan and Bangladesh have, at least intermittently and recurrently, suffered from a democratic deficit. While India has a fast growing and more or less stable economy with sound macro-

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<sup>2</sup> See generally PHILLIP CULLET, *INTELLECTUAL PROPERTY PROTECTION AND SUSTAINABLE DEVELOPMENT* (2005); See also CARLOS CORREA, *TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT* 421-69 (2008) available in RANJAN, *id.*; J. Watal, *Punta Del Este to Marrakesh: The TRIPS Negotiating Process*, in *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 11-47 (2001) available in RANJAN, *id.*

<sup>3</sup> CORREA, *id.*, 310.

<sup>4</sup> *Id.*

<sup>5</sup> See Table I in Appendix I, II & III

<sup>6</sup> Prabhash Ranjan, *Medical Patents and Expropriation in International Investment Law – With special reference to India*, 5 (3) *MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW* 72-104 (2008) (Duality of protection of intellectual property and issues related to compulsory licensing are discussed through an analysis of India's BITs.)

economic indicators, economies of Pakistan and Bangladesh do not demonstrate the same strength. Despite these differences, all three countries have been similar in the aggressive manner in which they pursued foreign investment through BITs. Our aim in this paper is to study provisions of the TRIPS Agreement and those of BITs entered into by India, Bangladesh and Pakistan to determine whether compulsory licensing amounts to expropriation under these BITs giving rise to two parallel and simultaneous sources of protection for the patent holder. If that is the case, we seek to examine whether and how such duality of protection acts as a hurdle for countries seeking to issue compulsory licences.

## II. COMPULSORY LICENSING – JURISPRUDENTIAL AND CONCEPTUAL UNDERSTANDING

Compulsory licensing is a mechanism through which the State permits a third-party to engage in production of a patented good without the consent of the patent holder.<sup>7</sup> The third party is conferred such rights as would have accrued to it under a license granted by the patent holder. This is clearly a limitation placed on the rights of patent holders in interest of the society at large and is mostly accompanied by a guarantee of compensation for the patent holder.<sup>8</sup> Compulsory licensing is certainly an interference with intellectual property rights. Whether it is justified or not depends on the facts of each case and the shade of the looking glass. However, to understand such interference in its legal context, we need to understand the exact nature of the rights interfered with. This is where a jurisprudential understanding of intellectual property rights and limitations thereon assumes significance. The first question to be answered is, whether a patent right is a right conferred by the State or it is an inherent right merely recognized by the State. If the former is the case, State's interference will amount only to a limited withdrawal by the State of a right which is its own creation. On the other hand, if the latter holds true, the action of the State will be as justified or otherwise as that of a parent stealing medicines to save his or her child. In the former case, the usurpation is completely legal and justified. In the latter case, though there may be moral justifications and mitigating circumstances, the legality of the action is, to say the least, questionable.

Advocates of patent right who base their claims on natural law theories claim that an inventor has an inherent right of exclusivity in his intellectual creation which is merely recognized and protected by the State.<sup>9</sup> However, this position is heavily criticized on account of its incompatibility with real life situations where patents are time bound. Critics argue that it is absurd to attribute the status of a

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<sup>7</sup> *Id.*

<sup>8</sup> Agreement on Trade Related aspects of Intellectual Property Rights, January 1, 1995, Article 31 (h), 33 I.L.M. 1125 (1994); *See also*, Table II in Appendix I, II & III.

<sup>9</sup> WJ Gordon, *A Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE LJ 1533-1609 (1992); J Hughes, *The Philosophy of Intellectual Property*, 77 GEORGETOWN LAW JOURNAL 287 (1988); HESTEMEYER, *supra* note 1.

natural right to something which expires after a statutorily defined period of time.<sup>10</sup> Utilitarian justification to patent regimes focuses on the benefit allocation under the regime and supports patent protection when the net benefit weighs in favour of the society at large.<sup>11</sup> Advocates of the contractual rationale to patents view patent as a contract between the society and the inventor through which the society accords a limited monopoly to the inventor in return for the benefits of the invention being made available to the society at large and the possible replication of the invention after the expiry of the patent.<sup>12</sup> While natural lawyers view patent rights as inherent rights merely recognized and protected by the State, Contractarians and Utilitarians view it as rights arising out of State's conferment. Therefore, State interference with patent rights, including issuance of compulsory licences, is more likely to find favour with the latter two schools than with the natural lawyers. Though there are more theories on the nature of patent rights, including the prominent ones like incentives theory and prospects theory,<sup>13</sup> all these more or less adhere to the position that patent rights are State-conferred. Therefore, these theories will be able to accommodate interference by the State in form of compulsory licensing in the same manner as the schools discussed here.

Having clarified the nature of the rights being interfered with and the acceptability of interferences under major doctrinal positions, the nature of interference and the nature of power exercised by the State in such interferences is to be analysed. The most important position in this regard to be discussed is that of Eminent Domain.<sup>14</sup> The doctrine of eminent domain is rooted in the history of the Anglo-Saxon legal system. After the Norman Conquest of 1066, William the Conqueror who became the first Norman King of England, distributed land as fiefs to landholders in return for monetary fees and military services. However, the absolute title over all lands was vested with the Crown. During the Hundred Years War when land became necessary for military purposes, Edward III used the Crown's "*right of purveyance*" for massive expropriations. Chapter 28 of Magna Carta provides for immediate compensation in event of such expropriations. After the early 1500s though the power shifted from the Crown to the Parliament, the doctrine was retained. However, the amount of compensation and methods of calculating the same have varied over a period of time. The former British colonies which founded their legal systems upon the rock of Common Law inherited the doctrine though often under different nomenclatures.<sup>15</sup>

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<sup>10</sup> HESTEMEYER, *supra* note 1.

<sup>11</sup> Gordon, *supra* note 10; *id.*

<sup>12</sup> HESTEMEYER, *supra* note 1.

<sup>13</sup> *Id.*

<sup>14</sup> RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN? (1985); JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES (1900).

<sup>15</sup> *Id.*

Compulsory licensing is often called the “*eminent domain of intellectual property*”.<sup>16</sup> This position presupposes the State as the giver and protector of intellectual property rights and therefore attributes to the State an inherent power to interfere with these rights where a public purpose requires to be fulfilled. The requirements of the society at large are weighed against the rights of the patent holder and where there are pressing public requirements, a compulsory license is issued to meet such requirements. Hence, most patent legislations recognise some form or the other of compulsory licensing. In the multilateral framework of TRIPS, compulsory licensing is recognised as a flexibility available to the Members for attaining purposes such as those relating to public health goals.<sup>17</sup>

### III. TRIPS ARTICLE 31 AND THE DOHA DECLARATION: A HARD EARNED BARGAIN

Prior to the TRIPS Agreement, one or the other form of compulsory licensing found recognition in most legal systems that provided for patent protection.<sup>18</sup> The Paris Convention of 1883 provided that each contracting State may take legislative measures for the grant of compulsory licences. Article 5A (2) of the Paris Convention reads, “Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licences to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.”<sup>19</sup>

In the TRIPS negotiations, while the developed nations wished to keep the government interference with intellectual property, including the interference through compulsory licensing to minimum, developing nations took the polar extreme trying to preserve their regulatory freedom.<sup>20</sup> The compromise is represented

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<sup>16</sup> Tamsen Valoir, *Compulsory Drug License Proposed: States Taking Drugs under Eminent Domain*, US HEALTHCARE & PHARMACEUTICAL NEWSLETTER, (June 2006), available at <http://www.bakernet.com/NR/rdonlyres/1E185790-6BDD-47E0-80BD-BAB95484DF4A/0/NAHealthcare0606.pdf>. (Last visited on January 29, 2009); David B. Resnik, *Bioterrorism and Patent Rights: “Compulsory Licensure” and the Case of Cipro*, 2(3) AM. J. BIOETHICS 29 – 39 (2002); Maththew S. Bethards, *Condemning a Patent: Taking Intellectual Property by Eminent Domain*, 32 AIPLA QUARTERLY JOURNAL 81 (2004).

<sup>17</sup> CORREA, *supra* note 2; Declaration on the TRIPS Agreement and Public Health, November 14, 2001, WT/MIN(01)/DEC/2 (*hereinafter*, Doha Declaration).

<sup>18</sup> WATAL, *supra* note 2.

<sup>19</sup> Article 5A (2), Paris Convention for the Protection of Industrial Property (March 20, 1883), 6 ILM 806.

<sup>20</sup> WATAL, *supra* note 2.

in the text of Article 31 of TRIPS.<sup>21</sup> It does not use the term ‘compulsory licensing’ but instead refers to “other use without authorization of the right holder”. This is perhaps to accommodate national legislations resorting to terminology other than ‘compulsory licensing’.

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<sup>21</sup> Article 31, TRIPS, *supra* note 8 (“Other Use Without Authorization of the Right Holder: Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected: (a) authorization of such use shall be considered on its individual merits; (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly; (c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive; (d) such use shall be non-exclusive; (e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use; (f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use; (g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances; (h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization; (i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member; (j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member; (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur; (l) where such use is authorized to permit the exploitation of a patent (‘the second patent’) which cannot be exploited without infringing another patent (‘the first patent’), the following additional conditions shall apply: (i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent; (ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and (iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent”).

The provision does not lay down the grounds on which a compulsory licence can be issued. It merely lays down the procedural safeguards to be complied with by Members while issuing compulsory licenses. These safeguards are: (i) consideration of compulsory license applications on individual merit;<sup>22</sup> (ii) prior undertaking and failure of negotiations to obtain voluntary license “on reasonable commercial terms and conditions” except in certain specified cases of extreme urgency;<sup>23</sup> (iii) Scope and duration of use under compulsory license being limited by the purpose for which it has been issued;<sup>24</sup> (iv) non-exclusivity of the rights conferred through compulsory licensing;<sup>25</sup> (v) non-assignability of the right under compulsory license;<sup>26</sup> (vi) requirement that compulsory license should be issued ‘predominantly’ to cater to the domestic market;<sup>27</sup> (vii) scope for review and termination of the license upon the expiry of circumstances warranting its grant;<sup>28</sup> (viii) adequate remuneration to the right holder, taking into account the economic value of the authorization;<sup>29</sup> (ix) access to judicial review<sup>30</sup>. In addition to these general requirements, certain special and additional requirements have been laid down for compulsory licensing in certain specific circumstances.<sup>31</sup>

From the provision, it is evident that the thrust is on procedural safeguards coupled with adequate remuneration. Moreover, it is important to note that the language of the Article is not one of creating a right to the Members to issue compulsory licenses. It merely refers to a situation where the national laws of a Member provide for such use without authorisation.<sup>32</sup> This appears to be in line with our assertion in an earlier part of this paper on how compulsory licensing is based on the philosophy of eminent domain. The sovereign right of eminent domain inherent in the Member nations is merely recognised and certain conditions for its exercise are laid down.<sup>33</sup> Secondly, it is important to note that the requirement of remuneration is qualified by the adjective ‘adequate’. Though no definition of ‘adequate’ has been provided, it is evident from the provision that economic value of the authorization is a guiding factor in determining the quantum of remuneration.<sup>34</sup>

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<sup>22</sup> Article 31(a), *id.*

<sup>23</sup> Article 31 (b), *id.*

<sup>24</sup> Article 31 (c), *id.*

<sup>25</sup> Article 31 (d), *id.*

<sup>26</sup> Article 31 (e), *id.*

<sup>27</sup> Article 31 (f), *id.*

<sup>28</sup> Article 31 (g), *id.*

<sup>29</sup> Article 31 (h), *id.*

<sup>30</sup> Article 31 (i), (j), *id.*

<sup>31</sup> Article 31 (l), *id.*

<sup>32</sup> *Supra* note 21.

<sup>33</sup> *See generally*, Ranjan, *Supra* note 6.

<sup>34</sup> *Supra* note 21.

Even after the Agreement entered into force, certain concerns remained, which were sought to be addressed by the Doha Declaration on TRIPS and Public Health.<sup>35</sup> The Declaration reiterated the commitment of the Members to the TRIPS Agreement as well as the importance of public health concerns.<sup>36</sup> In its operative part, the Declaration clarified that compulsory licenses could be issued by Members on any ground, thereby highlighting the sovereign right of individual Members to decide for themselves the circumstances warranting grant of compulsory licenses.<sup>37</sup> The Declaration as well as the subsequent General Council decision attempted to solve the problem posed to the countries without adequate manufacturing capacity by the requirement that the manufacture under a compulsory license should predominantly be to cater to the domestic market of the Member issuing the license.<sup>38</sup>

It is evident from this section that compulsory licensing is a regulatory tool that the developing countries have always been eager to preserve and expand. They did succeed, though in a limited manner, in both TRIPS agreement and the Doha Declaration in preserving this tool. In spite of this moderate success, several criticisms have been raised even to the current framework of compulsory licensing on account of it raising hurdles in the way of countries wishing to issue such licenses.<sup>39</sup>

#### IV. BILATERAL INVESTMENT TREATIES AND PROTECTION AGAINST EXPROPRIATION

An open economy attaches high value to investment from abroad. Foreign capital is often sought as a booster for the macroeconomic and developmental indicators of an economy.<sup>40</sup> Post the Second World War, there has been stiff competition among investment seeking nations to ensure the inflow of foreign investment.<sup>41</sup> However, legal barriers, monetary and financial policies, the

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<sup>35</sup> Doha Declaration, *supra* note 17.

<sup>36</sup> *Id.*, ¶ 4 (“We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all”).

<sup>37</sup> *Id.*, ¶ 5 (b) (“Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted”).

<sup>38</sup> Doha Declaration, *supra* note 17; Decision on the Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, August 30, 2003, WT/L/540; Decision on the Amendment of the TRIPS Agreement, December 6, 2005 WT/L/641.

<sup>39</sup> CORREA, *supra* note 2, 330.

<sup>40</sup> UNCTAD, WORLD INVESTMENT REPORT, 2008, UNCTAD/WIR/2008.

<sup>41</sup> Hamid Hosseini, *An economic theory of FDI: A behavioural economics and historical approach*, 34 J. SOCIO-ECONOMICS 528-41 (2005).



risk of government interference with the property so as to dispossess the investor, risk of political instabilities and the like often acted as a hurdle in the path of investment flow.<sup>42</sup> A BIT essentially seeks to address all or some of the concerns. Parties to a BIT mutually guarantee minimum standards of protection to investment of each other's nationals. There has been a rapid increase in the number of BITs in the 1990s with the total number of BITs entered into by various nations leaping from 385 in 1989 to a total of 2,265 in 2003. They now involve 176 countries.<sup>43</sup> Commonly found clauses in a BIT include definition of key terms like investment and investor, guarantee of fair and equitable treatment to the investor, non-discrimination requirements like the Most Favoured Nation clause, National Treatment clause or both, protection against expropriation, permission for entry and sojourn of personnel, so on and so forth.<sup>44</sup> According to United Nations Conference on Trade and Development (*hereinafter* UNCTAD):

“Bilateral investment treaties (BITs) are agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country. Treaties typically cover the following areas: scope and definition of investment, admission and establishment, national treatment, most-favoured-nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds, and dispute settlement mechanisms, both state-state and investor-state.”<sup>45</sup>

Expropriation is one of the major concerns sought to be addressed through most BITs. It has already been discussed how the State can interfere with private property in exercise of Eminent Domain in most Common Law Jurisdictions. Such measures have not been scarce in jurisdictions not belonging to the Common Law tradition too.<sup>46</sup> The circumstances under which such interference is legal and the entitlements of the person deprived of property through such interference to be compensated varies from jurisdiction to jurisdiction. Therefore, an investor may find his investment being interfered with by the government under situations other than those warranting the same interference in his home country and even worse, be paid less compensation than what he would be entitled to in his home

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<sup>42</sup> *Id.*

<sup>43</sup> UNCTAD, UNCTAD ANALYSIS OF BITs, available at [http://www.unctadxi.org/templates/Page\\_1007.aspx](http://www.unctadxi.org/templates/Page_1007.aspx) (Last visited on January 31, 2009).

<sup>44</sup> UNCTAD, WHAT ARE BITs?, available at [http://www.unctadxi.org/templates/Page\\_1006.aspx](http://www.unctadxi.org/templates/Page_1006.aspx), (Last visited on January 31, 2009).

<sup>45</sup> *Id.*

<sup>46</sup> FIONA BEVERIDGE, THE TREATMENT AND TAXATION OF FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: TOWARDS INTERNATIONAL DISCIPLINE (2000); HOWARD L. LAX, POLITICAL RISK IN THE INTERNATIONAL OIL AND GAS INDUSTRY 164 (1983).

country or no compensation at all. A BIT tries to prevent whimsical expropriations by laying down conditions under which an expropriation is permissible and the requirement of compensation in such cases.<sup>47</sup>

A distinction is often made between direct and indirect expropriation. Direct expropriation refers to those acts of the host State which actually take away the property of the investor. Indirect expropriation, on the other hand, interferes with the property, its economic value or enjoyment by the holder without taking it away actually.<sup>48</sup> In customary international law, both direct and indirect expropriations are recognised as expropriatory measures.<sup>49</sup> Most BITs are drafted in such a manner as to cover both direct and indirect expropriation and guarantee protection to investor against both.<sup>50</sup>

BITs often mandate that no expropriatory measure may be undertaken except for public purpose, in accordance with due process of law, against payment of compensation and in a non-discriminatory manner.<sup>51</sup> It may also be required under a BIT that the investor whose property is expropriated has a right to approach judicial fora of the host country for review of the expropriatory measure.<sup>52</sup> Moreover specific and often onerous requirements may be imposed as to the quantum of compensation and the manner in which it is paid. For instance, several BITs require the compensation to be 'full', 'adequate', 'fair', 'just', 'equitable', 'freely convertible', 'freely transferable', etc.<sup>53</sup>

## V. COMPULSORY LICENSING AS EXPROPRIATION: A STUDY OF BITS ENTERED INTO BY INDIA, BANGLADESH AND PAKISTAN

In the following paragraphs we seek to analyse whether issuance of a compulsory license amounts to an act of expropriation under the BITs entered into by India, Bangladesh and Pakistan with other countries. If it does, we seek to study the implications of the said proposition in a legal sense.

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<sup>47</sup> See Tables I, II & III, Appendix I, II & III.

<sup>48</sup> LY Fortier & SL Drymer, *Indirect Expropriation in the Law of International Investment: I Know it when I see it, or Caveat Investor*, 19 ICSID REV 293 (2004); O.E.C.D., *Indirect Expropriation and the Right to Regulate in International Investment Law*, Working Papers on International Investment, No. 2004/4 (2004).

<sup>49</sup> Chorzow Factory Case (Ger. v Pol.), PCIJ REPORTS, A/17, 46-8.

<sup>50</sup> See Table I, Appendix I, II & III.

<sup>51</sup> See Table II, *id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Table III, *id.*

This study analyses the BITs of India, Pakistan and Bangladesh which are currently listed on the Investment Treaty Database of UNCTAD.<sup>54</sup> The database lists twenty-three BITs of India, fifteen of Bangladesh and thirty-three of Pakistan.<sup>55</sup> This may not necessarily represent the entirety of the BITs entered into by these countries. For instance, an account on the number of BITs entered into by India reads, "Since 1995, India has signed IIAs with 63 countries; out of which 50 IIAs are already in force and 13 are in the process of being enforced. Negotiations towards signing IIAs with another 41 countries are underway."<sup>56</sup> However, this will not affect the outcome of the study in any manner as the Database lists BITs entered into by these countries at various periods of time including a few latest ones. The question we seek to answer in this study is whether the BITs entered into by these countries both prior to and after the commencement of the TRIPS Agreement create more onerous obligations upon them in respect of compulsory licensing. To answer that question the sample of BITs provided by the database will suffice.

### A. DOES ISSUANCE OF COMPULSORY LICENSE AMOUNT TO EXPROPRIATION?

All BITs of India which were part of this study expressly recognise intellectual property rights held by the investor as a form of investment and therefore extend protection against expropriation to intellectual property rights.<sup>57</sup> Such express recognition and consequent protection is also accorded by all BITs of Bangladesh except the Bangladesh-Germany BIT<sup>58</sup> which does not contain a definition of 'investment'.<sup>59</sup> Of Pakistan's thirty-three BITs, all except those with

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<sup>54</sup> UNCTAD, INVESTMENT INSTRUMENTS ONLINE, available at [http://www.unctadxi.org/templates/DocSearch\\_779.aspx](http://www.unctadxi.org/templates/DocSearch_779.aspx) (Last visited on January 31, 2009).

<sup>55</sup> *Id.*

<sup>56</sup> Ranjan, *supra* note 6.

<sup>57</sup> *See*, Table I, Appendix I.

<sup>58</sup> Agreement between the Federal Republic of Germany and the Peoples' Republic of Bangladesh Concerning the Promotion and Reciprocal Protection of Investments (Germany and Bangladesh), 1981, available at [http://www.unctad.org/sections/dite/ia/docs/bits/germany\\_bangladesh.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/germany_bangladesh.pdf) (Last visited on January 30, 2009).

<sup>59</sup> *See*, Table I, Appendix II.

Kuwait<sup>60</sup>, Sri Lanka<sup>61</sup>, Tunisia<sup>62</sup> and Turkmenistan<sup>63</sup> expressly recognise intellectual property rights as a form of investment.<sup>64</sup> Even in those BITs which do not accord such express recognition, it is arguable that the definition of investment impliedly includes intellectual property rights within its ambit.<sup>65</sup> It is pertinent to note that all the BITs of India, all BITs of Bangladesh with the exception of that with Germany<sup>66</sup> and all BITs of Pakistan except those with Kuwait<sup>67</sup>, Morocco<sup>68</sup> and Romania<sup>69</sup> grant protection against both direct and indirect expropriation.<sup>70</sup> Therefore, any measure affecting free economic use of any form of investment an investor will amount to expropriation and should comply with the requirements under the BIT.<sup>71</sup>

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<sup>60</sup> Agreement on the Promotion and Safeguarding of Capital Movement and Investment Between the Government of the State of Kuwait and the Government of Islamic Republic of Pakistan (Kuwait and Pakistan), 1983, available at [http://www.unctad.org/sections/dite/ia/docs/bits/pakistan\\_kuwait.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/pakistan_kuwait.pdf) (Last visited on January 30, 2009).

<sup>61</sup> Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Islamic Republic of Pakistan (Pakistan and Sri Lanka), 1997, available at [http://www.unctad.org/sections/dite/ia/docs/bits/pakistan\\_kuwait.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/pakistan_kuwait.pdf) (Last visited on January 30, 2009).

<sup>62</sup> Agreement between the Islamic Republic of Pakistan and the Republic of Tunisia on the Reciprocal Promotion and Protection of Investment (Pakistan and Tunisia), 1996, available at [http://www.unctad.org/sections/dite/ia/docs/bits/pakistan\\_tunisia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/pakistan_tunisia.pdf) (Last visited on January 30, 2009).

<sup>63</sup> Agreement Between the Government of the Islamic Republic of Pakistan and the Government of Turkmenistan on the Reciprocal Promotion and Protection of Investment (Pakistan and Turkmenistan), 1994 available at [http://www.unctad.org/sections/dite/ia/docs/bits/pakistan\\_turkmenistan.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/pakistan_turkmenistan.pdf) (Last visited on January 30, 2009).

<sup>64</sup> See, Table I, Appendix III.

<sup>65</sup> *E.g. See*, Article I (a), *supra* note 61 (“investment means any kind of asset established or acquired, including changes in the form of such investments invested in accordance with laws of the State in the territory of which the investment is made, in particular, though not limited to the following: (i) moveable and immoveable property and any other property rights such as mortgages, liens or pledges; (ii) shares, stock and debentures of companies or interests in the property of such companies.” (In this definition, intellectual property rights are not mentioned expressly. However, the expression “any kind of asset established or acquired, [...] in accordance with laws of the State in the territory of which the investment is made” is broad enough, especially viewed in light of the inclusive nature of the definition, to accommodate intellectual property rights).

<sup>66</sup> *Supra* note 58.

<sup>67</sup> *Supra* note 60.

<sup>68</sup> Agreement between the Government of the Islamic Republic of Pakistan and the Government of the Kingdom of Morocco for the Promotion and Protection of Investments, (Pakistan and Morocco), 2001, available at [http://www.unctad.org/sections/dite/ia/docs/bits/pakistan\\_morocco.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/pakistan_morocco.pdf) (Last visited on January 31, 2009).

<sup>69</sup> Agreement Between the Islamic Republic of Pakistan and the Socialist Republic of Romania on the Mutual Protection and Guarantee of Investment of Capital (Pakistan and Romania), 1978, available at [http://www.unctad.org/sections/dite/ia/docs/bits/pakistan\\_romania.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/pakistan_romania.pdf) (Last visited on January 31, 2009).

<sup>70</sup> See Table I, Appendix I, II & III.

<sup>71</sup> See generally, Ranjan, *supra* note 6.

What appears from these is that the BITs of India, Bangladesh and Pakistan treat intellectual property rights as a form of investment and hence grant them protection against any form of expropriation, direct or indirect. Issuance of compulsory licences interferes with the free enjoyment of intellectual property rights by their holders and causes a reduction in economic value that the patentee can extract out of his rights. Therefore, compulsory licensing in respect of intellectual property held by an investor certainly amounts to an act of expropriation under these treaties.

## B. THE IMPLICATIONS

It has been shown how the BITs entered into by India, Bangladesh and Pakistan treat compulsory licensing as an act of expropriation. The following paragraphs discuss the legal implications of such a proposition from the point of view of public health requirements.

First of all, as issuance of compulsory licences amounts to an act of expropriation, the conditions and requirements laid down in the BITs should be complied with. It is to be noted that these requirements are in addition to, and not in derogation of those under the TRIPS Agreement as they are parallelly existing norms. All Indian BITs recognise that no expropriation should be undertaken except when the following requirements are met: (i) expropriation should be for a public purpose or in public interest; (ii) it should be non-discriminatory in nature; (iii) it should be under the authority of and in compliance with law of the land; (iv) the patent holder should be compensated and (v) the patent holder should have access to judicial or other neutral fora in the host country for review of the expropriatory measure.<sup>72</sup> The criteria also find wide acceptance in BITs of Bangladesh and Pakistan.<sup>73</sup> Among these, the requirements other than remuneration and access to judicial review do not find explicit mention in the TRIPS Agreement. However, the requirement of compliance with law of the land is implied as TRIPS Article 31 covers only situations where the national laws provide for use without authorisation as evident from the opening words of the provision.<sup>74</sup> Moreover, non-discrimination is one of the fundamental tenets of WTO which finds mention

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<sup>72</sup> See, Table II, Appendix I.

<sup>73</sup> See, Table II, Appendix II & III.

<sup>74</sup> Article 31, TRIPS, *supra* note 21.

in most agreements including TRIPS.<sup>75</sup> Therefore, that requirement too is implied. Even the requirement of public interest or public purpose can be said to be implied in the very nature of compulsory licensing, or for that matter, any 'taking' in exercise of eminent domain.<sup>76</sup> Therefore, at a general level, these requirements do not appear to demand anything more than what the TRIPS Agreement mandates.

However, coming to specific requirements of implementation, especially those on remuneration/ compensation of the patent holder, there appears to be a divergence in the obligations in TRIPS Agreement and those under the BITS. TRIPS agreement mandates payment of 'adequate' compensation.<sup>77</sup> Though it lays down the market value of the assignment as a guiding consideration, it does not mandate the manner in which this value is to be calculated or the proportion of this market value that could be considered 'adequate' remuneration. Moreover, no stipulations are imposed by the TRIPS Agreement as to the time frame for payment

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<sup>75</sup> Article 3, TRIPS, *supra* note 8: National Treatment: ("1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection (3) of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS. (footnote original) 3 For the purposes of Articles 3 and 4, 'protection' shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement. 2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade."; Article 4, TRIPS, *supra* note 8: "Most-Favoured-Nation Treatment: With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member: (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property; (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country; (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement; (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members").

<sup>76</sup> *Supra* note 14.

<sup>77</sup> Article 31 (h), TRIPS, *supra* note 21.

of compensation, interest on the amount fixed as compensation and so on. This is in consonance with the general philosophy of TRIPS that the specific modalities of discharging TRIPS obligations are left to the Members to decide for themselves.<sup>78</sup> However, BITs mostly lay down more specific obligations as to the quantum and mode of payment of compensation. For instance fourteen out of the twenty-three BITs of India,<sup>79</sup> six each of BITs of Bangladesh<sup>80</sup> and Pakistan<sup>81</sup> mandate one or more of justness, fairness and equitability of compensation. Nineteen of the Indian BITs require that the compensation be based on market value of the asset before the impending expropriation became a matter of public knowledge.<sup>82</sup> Eleven BITs of Pakistan and twelve of Bangladesh incorporate this requirement.<sup>83</sup> BITs of India with Australia<sup>84</sup> and Austria<sup>85</sup> lay down resort to internationally recognised practices of valuation as an alternative in cases where the value of the asset prior to expropriation becoming public knowledge cannot be determined. A few of the BITs even call for payment of full and genuine value of the investment being expropriated<sup>86</sup> as opposed to the TRIPS agreement that allows the Members to determine adequacy according to their own sovereign judgment. All twenty-three of India's BITs require prompt payment of compensation without delay and all except the India – Sweden BIT<sup>87</sup> provide for payment of interest from the date of expropriation till the actual payment of compensation. Such requirements are also commonly found in the BITs of Bangladesh and Pakistan.<sup>88</sup> Seven of the Indian BITs, five BITs of Bangladesh and eight of Pakistan require the amount to be freely convertible.<sup>89</sup> Several of the BITs also require amount to be freely transferable, effectively realisable and so on.

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<sup>78</sup> Article 1(1), TRIPS, *supra* note 8 (“[...] Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”).

<sup>79</sup> *See*, Table III, Appendix I.

<sup>80</sup> *See*, Table III, Appendix II.

<sup>81</sup> *See*, Table III, Appendix III.

<sup>82</sup> *See*, Table III, Appendix I.

<sup>83</sup> *See*, Table III, Appendix II & III.

<sup>84</sup> Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments (India and Australia), 1999, available at [http://www.unctad.org/sections/dite/ia/docs/bits/australia\\_india.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/australia_india.pdf) (Last visited on January 31, 2009).

<sup>85</sup> Agreement between the Government of the Republic of Austria and the Government of the Republic of India for the Promotion and Protection of Investments (India and Austria), 2001, available at [http://www.unctad.org/sections/dite/ia/docs/bits/austria\\_india.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/austria_india.pdf) (Last visited on January 31, 2009).

<sup>86</sup> *E.g. see*, Article 4(1), *id.*

<sup>87</sup> Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of India for the Promotion and Reciprocal Protection of Investments (Sweden and India), 2000, available at [http://www.unctad.org/sections/dite/ia/docs/bits/sweden\\_india.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/sweden_india.pdf) (Last visited on January 31, 2009).

<sup>88</sup> *See*, Table III, Appendix II & III.

<sup>89</sup> *See*, Table III, Appendix I, II, III.

Thus, in addition to complying with the mandate of TRIPS that adequate compensation has to be paid, India, Bangladesh and Pakistan may also have to ensure the justness, fairness or equitability of the compensation awarded, prompt payment of compensation or payment of interest on the compensation depending on the nationality of the patent-holder. It may also have to ensure that its fiscal and monetary regulations do not come in the way of convertibility, transferability or effective realisation of the compensation amount.

A complete abandonment of the right to issue compulsory licenses on public health related grounds appears in the India-UK BIT.<sup>90</sup> An interesting requirement under this BIT mandates that expropriation can be undertaken only when the public purpose for which it is undertaken is “related to the internal requirements for regulating economic activity”.<sup>91</sup> An expropriation is illegal under this BIT even if it is undertaken in public interest or in furtherance of a public purpose unless such requirement is “related to the internal requirements for regulating economic activity.” A compulsory license on a pharmaceutical product is issued not for regulation of economic activity, but to cater to the requirements of public health. Therefore, such a compulsory license cannot be accommodated in a strict construction of this BIT. Curiously enough, this BIT does not even contain a public health exception that would entitle the parties to deviate from their obligations under the BIT in pursuance of public health requirements. Therefore, a direct and literal interpretation of this BIT does not appear to permit issuance of compulsory licenses on public health grounds. Also, several BITs contain a requirement that the expropriation should be for a public purpose related to the internal needs or requirements of the country adopting such measure.<sup>92</sup> This nullifies the benefits accruing from the WTO General Council Decision which permits nations to use compulsory licensing to produce and export pharmaceutical products to meet public health requirements of nations without adequate production capability.<sup>93</sup>

Though on a bilateral plane, these additional obligations and requirements may have a limited impact, they may couple with the non-discrimination requirements like MFN provisions in other BITs to produce endless ripples. For instance, assume country A has issued a compulsory license in respect of a pharmaceutical product of an investor from country B. A sum is a paid as

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<sup>90</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments (United Kingdom and India), 1994, UNTS 27 (1995).

<sup>91</sup> Article 5(1), *id.* (“Investment of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party *except for a public purpose related to the internal requirements for regulating economic activity [...]*”) (*emphasis added*).

<sup>92</sup> *E.g. see*, Article 4(1), Agreement for Promotion and Protection of Investments (Belgo-Luxembourg Economic Union and Bangladesh), 1981, UNTS 25493 (1987).

<sup>93</sup> *Supra* note 38.



compensation in the local currency which the patent-holder wishes to his local currency and transfer to his home country. The fiscal laws of the host country do not permit such conversion and transfer. TRIPS agreement is silent on it and it is assumed that the BIT between A and B does not mandate convertibility. However, if favourable provision in respect of convertibility exists in BIT of A with D, the investor from B may rely on the non-discrimination provision in BIT between A and B to claim access to such favourable treatment. Similar situations have arisen in respect of dispute settlement mechanisms under BITs.<sup>94</sup> Often investors claim better access to dispute settlement than what is granted to them under the BIT from their home country on account of the non-discrimination requirement and the existence of more favourable provisions in the BIT with a third country. Moreover, the MFN clause of the TRIPS Agreement may require such treatments to be accorded immediately and unconditionally to all Members of WTO.<sup>95</sup> This is more so because, BITs do not constitute an exception to the MFN obligation unlike regional trade agreements or custom unions. Therefore, an added protection against compulsory licensing granted to investors from a country on a bilateral basis can get multiplied manifold and have serious repercussions.

The additional requirements brought about by the BITs add to the cost of issuing a compulsory license. These requirements make it harder for countries to issue compulsory licenses than it is said to be made under the TRIPS Agreement.

## VI. CONCLUSION

From an analysis of the BITs entered into by India, Bangladesh and Pakistan, it appears that more hurdles have been raised to the issuance of compulsory licenses by these BITs at a bilateral plane than the TRIPS Agreement is alleged to have raised in the multilateral plane. While on the one hand, these countries have sought to preserve their regulatory freedom to issue compulsory licenses from encroachments by the multilateral trade system, on the other hand they have conceded these rights bilaterally through a number of BITs. More onerous obligations, both procedural and substantive, have been undertaken in this process which can interfere majorly with the issuance of compulsory licenses to meet public health requirements. This phenomenon appears to arise from a myopic approach to bilateral negotiations as compared to the seriousness attached to the multilateral talks. However, neither these nations nor the advocates of their positions seem to realise the chain reactions such arrangements can trigger off when they are coupled with MFN obligations, both under other BITs and under the WTO regime.

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<sup>94</sup> S. Vesel, *Clearing a Path through a Tangled jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 Yale J. Int'l L. 125 (2007); *Emilio Agustín Maffezini v Spain*, Decision on Objections to Jurisdiction, ICSID Case No ARB/97/7, IIC 85 (2000).

<sup>95</sup> Article 4, TRIPS *supra* note 75.

To conclude, of all the stones thrown at the WTO by proponents of public health requirements of developing nations, at least a few are due to be diverted back to these countries themselves who undertook the international legal suicide of surrendering their right to issue compulsory licenses through their BITs.

**APPENDIX I**  
**BILATERAL INVESTMENT TREATIES OF INDIA**  
**Table I**  
**(Definition of “Investment” and “Expropriation”)**

	Definition of Investment includes IPR Expressly	Definition of Investment includes IPR Impliedly	Covers Direct and Indirect Expropriation
Australia	Yes		Yes
Austria	Yes		Yes
Croatia	Yes		Yes
Czech Republic	Yes		Yes
Denmark	Yes		Yes
Egypt	Yes		Yes
Germany	Yes		Yes
Ghana	Yes		Yes
Hungary	Yes		Yes
Belgium	NA	NA	NA
Mauritius	Yes		Yes
Indonesia	Yes		Yes
Kazakhstan	Yes		Yes
R. of Korea	Yes		Yes
Netherlands	Yes		Yes
Oman	Yes		Yes
Spain	NA (Text in Spanish)	NA	NA
Sri Lanka	Yes		Yes
Sweden	Yes		Yes
Switzerland	Yes		Yes
Thailand	Yes		Yes
Turkey	Yes		Yes
U.K.	Yes		Yes

**Table II**  
**(Requirements for expropriation)**

	Public Purpose	Non Discrimination	Compliance with Domestic Laws	Compensation	Judicial Review
Australia	Yes	Yes	Yes	Yes	Yes
Austria	Yes	Yes	Yes	Yes	Yes
Croatia	Yes	Yes	Yes	Yes	Yes
Czech Republic	Yes	Yes	Yes	Yes	Yes
Denmark	Yes	Yes	Yes	Yes	Yes
Egypt	Yes	Yes	Yes	Yes	Yes
Germany	Yes	Yes	Yes	Yes	Yes
Ghana	Yes	Yes	Yes	Yes	Yes
Hungary	Yes	Yes	Yes	Yes	Yes
Belgium	NA	NA	NA	NA	NA
Mauritius	Yes	Yes	Yes	Yes	Yes
Indonesia	Yes	Yes	Yes	Yes	Yes
Kazakhstan	Yes	Yes	Yes	Yes	Yes
R. of Korea	Yes	Yes	Yes	Yes	Yes
Netherlands	Yes	Yes	Yes	Yes	Yes
Oman	Yes	Yes	Yes	Yes	Yes
Spain	NA	NA	NA	NA	NA
Sri Lanka	Yes	Yes	Yes	Yes	Yes
Sweden	Yes	Yes	Yes	Yes	Yes
Switzerland	Yes	Yes	Yes	Yes	Yes
Thailand	Yes	Yes	Yes	Yes	Yes
Turkey	Yes	Yes	Yes	Yes	Yes
U.K.	Yes <sup>96</sup>	Yes	Yes	Yes	Yes

<sup>96</sup> Additional requirement exists that the public purpose should be related to internal requirement for regulating economic activity, *supra* note 91.

**Table III**  
**(Specific requirements in respect of compensation)**

	Fair Equitable	Pre-publication market value	Other guidelines on calculation	Without Delay / Prompt Payment	Interest	Convertible	Transferable	Effective	Adequate
Australia	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Austria	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Croatia	Yes	Yes	No	Yes	Yes	No	Yes	Yes	No
Czech Republic	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No
Denmark	Yes	Yes	No	Yes	Yes	No	No	No	No
Egypt	Yes	Yes	No	Yes	Yes	No	Yes	Yes	No
Germany	No	Yes	No	Yes	Yes	Yes	Yes	Yes	No
Ghana	Yes	Yes	No	Yes	Yes	No	Yes	Yes	No
Hungary	Yes	Yes	No	Yes	Yes	Yes	Yes	Ye	No
Belgium	NA	NA	NA	NA	NA	NA	NA	NA	NA
Mauritius	Yes	Yes	No	Yes	Yes	No	Yes	Yes	No
Indonesia	Yes	Yes	No	Yes	Yes	No	Yes	Yes	No
Kazakhstan	Yes	Yes	No	Yes	Yes	No	Yes	Yes	No
R. of Korea	No	Yes	No	Yes	Yes	No	Yes	Yes	Yes
Netherlands	No	No	Yes	Yes	Yes	Yes	Yes	Ye	No
Oman	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No
Spain	NA	NA	NA	NA	NA	NA	NA	NA	NA
Sri Lanka	Yes	Yes	No	Yes	Yes	No	Yes	Yes	No
Sweden	No	Yes	No	Yes	No	No	Yes	Yes	No
Switzerland	No	Yes	No	Yes	Yes	No	Yes	Yes	No
Thailand	Yes	Yes	No	Yes	Yes	No	Yes	Yes	No
Turkey	No	Yes	No	Yes	Yes	No	Yes	Yes	No
U.K.	Yes	Yes	No	Yes	Yes	No	Yes	Yes	No

## APPENDIX II

## BILATERAL INVESTMENT TREATIES OF BANGLADESH

TABLE I  
 (Definition of “Investment” and “Expropriation”)

	Definition of Investment includes IPR Expressly	Definition of Investment includes IPR Impliedly	Covers Direct and Indirect Expropriation
Belgo-Luxembourg Economic Union	Yes		Yes
Germany	No <sup>97</sup>	No	No
Indonesia	Yes		Yes
Iran	Yes		NA
Italy	Yes		Yes
Japan	Yes		Yes
Korea	Yes		Yes
Netherlands	Yes		Yes
Philippines	Yes		Yes
Switzerland	Yes		NA
Thailand	Yes		Yes
Turkey	Yes		Yes
United Kingdom	Yes		Yes
United States of America	Yes		Yes
Uzbekistan	Yes		Yes

<sup>97</sup> The treaty provides no definition of investment. *See, supra* note 58.

**TABLE II**  
**(Requirements for expropriation)**

COUNTRY	PUBLIC PURPOSE	NON DISCRIMINATION	COMPLIANCE WITH DOMESTIC LAWS	COMPENSATION	JUDICIAL REVIEW
Belgo-Luxembourg Economic Union	Yes <sup>98</sup>	No	No	Yes	No
Germany	Yes	No	No	Yes	Yes
Indonesia	Yes	Yes	Yes	Yes	No
Iran	NA	NA	NA	NA	NA
Italy	Yes	Yes	Yes	Yes	No
Japan	Yes	Yes	Yes	Yes	No
Korea	Yes <sup>99</sup>	No <sup>100</sup>	No	Yes	Yes
Netherlands	Yes	Yes <sup>101</sup>	Yes	Yes	No
Philippines	Yes	Yes	Yes	Yes	No
Switzerland	NA	NA	NA	NA	NA
Thailand <sup>102</sup>	Yes	No	No	Yes	Yes

<sup>98</sup> *Supra* note 92 (The treaty requires the public requirement to be related to internal requirements of the Contracting Party).

<sup>99</sup> The treaty requires the public requirement to be related to internal requirements of the Contracting Party. Article 5(1), Agreement Between the Government of the Republic of Korea and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (Bangladesh and Korea), 1986, available at [http://www.unctad.org/sections/dite/iaa/docs/bits/korea\\_bangladesh.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/korea_bangladesh.pdf) (Last visited on February 1, 2009).

<sup>100</sup> *Id.* (Though the BIT provides for non-discriminatory payment of compensation, no such requirement is expressly mentioned in respect of expropriation itself. However, the same may be treated as implied in light of the general obligation of non-discriminatory treatment).

<sup>101</sup> Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the People's Republic of Bangladesh (Netherlands – Bangladesh) available at [http://www.unctad.org/sections/dite/iaa/docs/bits/netherlands\\_bangladesh.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/netherlands_bangladesh.pdf) (Last visited on February 1, 2009) (In addition, the expropriation should not be “contrary to any undertaking which the former Contracting Party may have given”).

<sup>102</sup> Article 5, Agreement Between the Government of the Kingdom of Thailand and the Government of the People's Republic of Bangladesh for the Promotion of the Investment of Capital and for the Protection of Investments, (Thailand and Bangladesh), 1988, available at [http://www.unctad.org/sections/dite/iaa/docs/bits/bangladesh\\_thailand.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/bangladesh_thailand.pdf) (Last visited on February 1, 2009) (In addition fair and equitable treatment as well as MFN and National Treatment obligations are reiterated in respect of such measures).

Turkey	Yes	Yes	Yes	Yes	No
United Kingdom	Yes <sup>103</sup>	No	Yes	Yes	Yes
United States of America <sup>104</sup>	Yes	Yes	Yes	Yes	Yes
Uzbekistan	Yes	Yes	Yes	Yes	No

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<sup>103</sup> Article 5(1), Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments (UK and Bangladesh), 1980, UNTS 73 (1980). (The treaty requires the public requirement to be related to internal requirements of the Contracting Party).

<sup>104</sup> Article III (1)(d), Treaty Between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment (US and Bangladesh), 1986 available at [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_bangladesh.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_bangladesh.pdf) (Last visited on February 1, 2009) (In addition, the expropriatory measure should not "violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation").

**TABLE III**  
**(Specific requirements in respect of compensation)**

	Fair / Equitable / Just	Pre-publication market value	Other guide lines on calculation	Without Delay/ Prompt Payment	Interest	Convertible	Transferable	Effective/Effectively realisable/Actually realisable	Adequate
Belgo-Luxembourg Economic Union	No	Yes	No	Yes	No	No	Yes	Yes	Yes
Germany	No	Yes	Yes	Yes	No	No	Yes	Yes	No
Indonesia	No	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Iran	NA	NA	NA	NA	NA	NA	NA	NA	NA
Italy	Yes	Yes	Yes	Yes	Yes	No	No	Yes	No
Japan	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes <sup>105</sup>	Yes
Korea	No	Yes	No	Yes	Yes	No	Yes	Yes	Yes
Netherlands	Yes	No	No	Yes	No	Yes	Yes	Yes	No
Philippines	Yes	Yes	No	Yes	No	No	Yes	Yes	No
Switzerland	NA	NA	NA	NA	NA	NA	NA	NA	NA
Thailand	Yes	No	No	Yes	No	No	Yes	Yes	Yes
Turkey	No	Yes	No	Yes	No	No	Yes	Yes	Yes
United Kingdom	No	Yes	No	Yes	No	No	Yes	Yes	Yes
United States of America	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Uzbekistan	Yes	Yes	No	Yes	Yes	Yes	Yes <sup>106</sup>	No	Yes

<sup>105</sup> Article 5(3), Agreement Between Japan and the People's Republic of Bangladesh Concerning the Promotion and Protection of Investment (Bangladesh and Japan), 1998, available at [http://www.unctad.org/sections/dite/ia/docs/bits/bangladesh\\_japan.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/bangladesh_japan.pdf) (Last visited on February 1, 2009) (Also, compensation is to be "paid in a manner which would place the investors in a position no favourable than the position in which such investors would have been if the compensation had been paid immediately on the date of expropriation, nationalization or any other measure the effect of which would be tantamount to expropriation or nationalization").

<sup>106</sup> Article 6, Agreement Between the Government of the People's Republic of Bangladesh and the Republic of Uzbekistan on Reciprocal Protection and Promotion of Investment (Bangladesh and Uzbekistan), 2000.( Transfer is to be completed in not more than three months from the date of application for the same).



## APPENDIX III

**BILATERAL INVESTMENT TREATIES OF PAKISTAN**  
**TABLE I**  
**(Definition of “Investment” and “Expropriation”)**

	Definition of Investment includes IPR Expressly	Definition of Investment includes IPR Impliedly	Covers Direct and Indirect Expropriation
Australia	Yes	No	Yes
Azerbaijan	Yes	No	Yes
Belarus	Yes	No	Yes
Belgo-Luxembourg	Yes	No	Yes
China	Yes	No	Yes
Denmark	Yes	No	Yes
Egypt	Yes	No	Yes
France	NA (Text in French)	NA	NA
Germany	Yes	No	Yes
Indonesia	Yes	No	Yes
Italy	Yes	No	Yes
Japan	Yes	No	Yes
Korea	Yes	No	Yes
Kuwait	No	Yes	No
Kyrgyzstan	Yes	No	Yes
Lebanon	Yes	No	Yes
Mauritius	Yes	No	Yes
Morocco	Yes	No	No
Netherlands	Yes	No	Yes
Oman	Yes	No	Yes
Philippines	Yes	No	Yes
Portugal	Yes	No	Yes

Romania	Yes	No	No
Singapore	Yes	No	Yes
Sri Lanka	No	Yes	Yes
Sweden	Yes	No	Yes
Switzerland	NA	NA	NA
Syria	Yes	No	Yes
Tunisia	No	Yes	Yes
Turkey	Yes	No	Yes
Turkmenistan	No	Yes	Yes
United Kingdom	Yes	No	Yes
Yemen	Yes	No	Yes

**TABLE II**  
**(Requirements for expropriation)**

COUNTRY	PUBLIC PURPOSE	NON DISCRIMINATION	COMPLIANCE WITH DOMESTIC LAWS	COMPENSATION	JUDICIAL REVIEW
Australia	Yes	Yes	Yes	Yes	No
Azerbaijan	Yes	Yes	Yes	Yes	No
Belarus	Yes	Yes	No	Yes	Yes
Belgium	Yes	Yes	Yes	Yes	No
China	Yes	Yes	Yes	Yes	Yes
Denmark	Yes	Yes	Yes	Yes	Yes
Egypt	Yes	Yes	Yes	Yes	Yes
France	NA	NA	NA	NA	NA
Germany	Yes	No	No	Yes	Yes
Indonesia	Yes	Yes	Yes	Yes	No
Italy	Yes	Yes	Yes	Yes	No
Japan	Yes	Yes	Yes	Yes	No
Korea	Yes	No	No <sup>107</sup>	Yes	Yes
Kuwait	Yes	No	No	Yes	No
Kyrgyzstan	Yes	Yes	Yes	Yes	No
Lebanon	Yes	Yes	Yes	Yes	Yes
Mauritius	Yes	Yes	Yes	Yes	Yes
Morocco	Yes	Yes	Yes	Yes	No
Netherlands	Yes	Yes	Yes	Yes	No
Oman	Yes	Yes	Yes	Yes	No
Philippines	Yes	Yes	Yes	Yes	No

<sup>107</sup> Article 5(1), Agreement Between the Government of the Republic of Korea and the Government of the Islamic Republic of Pakistan for the Promotion and Protection of Investments (Pakistan and Korea), 1988 available at [http://www.unctad.org/sections/dite/iiia/docs/bits/korea\\_pakistan.pdf](http://www.unctad.org/sections/dite/iiia/docs/bits/korea_pakistan.pdf) (Last visited on February 1, 2009) (However, "Compensation will be in accordance with the laws of the host country regulating such compensation").

Portugal	Yes	Yes	Yes	Yes	Yes
Romania	Yes	Yes	Yes	Yes	Yes
Singapore	No <sup>108</sup>	Yes	Yes	Yes	Yes
Sri Lanka	Yes	Yes	Yes	Yes	Yes
Sweden	Yes	Yes	Yes	Yes	No
Switzerland	NA	NA	NA	NA	NA
Syria	Yes <sup>109</sup>	Yes	Yes	Yes	Yes
Tunisia	Yes	Yes	Yes	Yes	No
Turkey	Yes	Yes	Yes	Yes	No
Turkmenistan	Yes	Yes	Yes	Yes	No
United Kingdom	Yes	Yes	No	Yes	Yes
Yemen	Yes	Yes	Yes	Yes	Yes

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<sup>108</sup> Article 6(1), Agreement Between the Government of the Republic of Singapore and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments (Pakistan and Singapore), 1995, available at [http://www.unctad.org/sections/dite/ia/docs/bits/pakistan\\_singapore.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/pakistan_singapore.pdf) (Last visited on February 1, 2009) (Expropriation may be undertaken for any purpose authorized by law).

<sup>109</sup> Article 3(1), Agreement Between the Government of the Syrian Arab Republic and the Government of the Islamic Republic of Pakistan on Mutual Promotion and Protection of Investments (Pakistan and Syria), 1996 available at [http://www.unctad.org/sections/dite/ia/docs/bits/pakistan\\_syria.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/pakistan_syria.pdf) (Last visited on January 30, 2009) (The language of the BIT implies that where the expropriation is pursuant to public purpose other requirements may not be complied with).

**TABLE III**  
**(Specific requirements in respect of compensation)**

	Fair / Equitable / Just	Pre-publication market value	Other guide lines on calculation	Without Delay / Prompt Payment	Interest	Convertible	Transferable	Effective/Effectively realisable/Actually realisable	Adquate
Australia	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Azerbaijan	No	Yes	No	Yes	No	No	Yes	Yes	Yes
Belarus	No	Yes	No	Yes	No	No	Yes	Yes	Yes
Belgo-Luxembourg	No	Yes	No	Yes	Yes	Yes	Yes	No	Yes
China	No	No	No	Yes	No	Yes	No	No	No
Denmark	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Egypt	No	Yes	No	Yes	Yes	No	Yes	Yes	Yes
France	NA	NA	NA	NA	NA	NA	NA	NA	NA
Germany	No	Yes	No	Yes	No	Yes <sup>110</sup>	Yes	Yes	No
Indonesia	No	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Italy	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Japan	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
Korea	No	Yes	No	Yes	No	No	Yes	Yes	Yes
Kuwait	Yes	Yes <sup>16</sup>	No	Yes	No	No	No	No	No
Kyrgyzstan	No	Yes	No	Yes	Yes	No	No	Yes	Yes
Lebanon	No	Yes	No	Yes	Yes	No	Yes	Yes	Yes

<sup>110</sup> Only conversion to the currency of the compensated party is guaranteed. Article 3(2), Treaty for Promotion and Protection of Investments (Pakistan and Germany), 1959 UNTS 6575 (1963).

<sup>111</sup> Evaluation is to be done within 12 months from the date of expropriation. Remittance is to be made in the same currency brought in for the purpose of approved investment within 6 months. Article 4, Agreement on the Promotion and Safeguarding of Capital Movement and Investment Between the Government of the State of Kuwait and the Government of Islamic Republic of Pakistan (Pakistan and Kuwait), 1983 available at [http://www.unctad.org/sections/dite/ia/docs/bits/pakistan\\_kuwait.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/pakistan_kuwait.pdf) (last visited on February 1, 2009).

Mauritius	No	No	No	Yes	No	No	No	Yes	Yes
Morocco	No	Yes	No	Yes	Yes	Yes	Yes	Yes	No
Netherlands	Yes	Yes	No	Yes	No	Yes	Yes	Yes	No
Oman	No	No	No	No	No	No	No	Yes	No
Philippines	Yes	Yes	No	Yes	No	No	Yes	Yes	No
Portugal	No	Yes	No	Yes	Yes	No	Yes	Yes	No
Romania	No	Yes	Yes	Yes	No	No	Yes	Yes	No
Singapore	Yes	Yes <sup>112</sup>	No	Yes	No	Yes	Yes	Yes	No
Sri Lanka	No	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Sweden	No	No	No	Yes	No	No	Yes	Yes	Yes
Switzerland	NA	NA	NA	NA	NA	NA	NA	NA	NA
Syria	Yes	Yes	Yes	No	No	No	No	Yes	No
Tunisia	No	Yes	No	Yes	No	No	Yes	Yes	Yes
Turkey	No	Yes	No	Yes	No	Yes	Yes	Yes	Yes
Turkmenistan	No	Yes	No	Yes	Yes	Yes	Yes	No	No
United Kingdom	No	Yes	No	Yes	Yes	No	Yes	Yes	Yes
Yemen <sup>113</sup>	Yes	Yes	Yes	Yes <sup>114</sup>	No	No	No	No	Yes

<sup>112</sup> But this is subject to domestic laws in respect of compensation. *Supra* note 108.

<sup>113</sup> The investor has a right to repurchase at market value the expropriated property if the property or any part of it is not used for the purpose for which it was expropriated. Article 4, Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the Republic of Yemen on the Reciprocal Promotion and Protection of Investments (Pakistan and Yemen, 1999), available at [http://www.unctad.org/sections/dite/ia/docs/bits/pakistan\\_yemen.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/pakistan_yemen.pdf) (last visited on February 1, 2009).

<sup>114</sup> *Id.*