

## Govt, legal experts differ on Cairn compensation demand

The British company seeks compensation for steep fall in the value of its stake in Vedanta-controlled Cairn India

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Cairn Energy

Cairn Energy Plc's demand for compensation from India for the Rs 10,200 crore tax notice slapped on Cairn India earlier this month under the ambit of the India-UK Bilateral Investment Promotion and Protection Agreement (BIPA) has divided those in the government and those outside it.

The British oil exploration and production company has sought compensation for the steep fall in the value of its stake in the Vedanta-controlled Cairn India, which it is not allowed to sell until it settles the retrospective tax demand

of Rs 10,200 crore. Cairn was stopped from selling its 10 per cent stake in Cairn India by tax authorities in January.

"In the absence of any immediate relief in the form of a statutory amendment or exemption, Cairn will seek in the arbitration the withdrawal of all relevant orders, notices, attachments, assessments proceedings against Cairn, the release of the attached shares, and payment of full compensation for any resulting damages sustained by Cairn, including for the diminution in value of the attached shares," Cairn said in a statement it shared with *Business Standard*.

While independent legal experts say that invoking BIPA has made Cairn's claim for compensation stronger, government officials view it as a diversionary tactic.

The definition of Investment is very wide as these BIPAs were signed by India when it needed investments to come in from other countries. It was signed exactly to protect investors from exactly such instances," said Prateek Bagaria of Nishith Desai Associates. Bagaria specializes in Cross-border litigation and international dispute resolution. He said that if BIPA was invoked, Cairn may have a case.

"The agreements provide for compensation for expropriation, which means compensation for direct taking away of properties or for regulatory or taxation measures which deprives the Investor of the substantial benefits arising from the investment. The Indo-Mauritius BIPA recognizes the ability of shareholder of a company whose assets have been expropriated to initiate action to claim

compensation for his share value. And the most-favoured nation (MFN) clause makes a provision for applying the Mauritius treaty to the UK treaty," Bagaria said.

He added Cairn could seek compensation for 'unfair and unfavourable treatment' and could even approach a high court by a writ petition to claim compensation for expropriation as Indian BIPAs, signed with 83 countries, provide for the same.

In its statement, Cairn said that India's actions breached several of its obligations under the UK-India Investment Treaty, including its obligations to "create favourable conditions", and ensure "fair and equitable treatment" and "full protection and security" for Cairn's investments.

However, bureaucrats who spoke on the condition of anonymity, differed. "There is nothing in BIPA that makes provision for compensation. These companies have a battery of lawyers who will find any ambiguity or loophole. If you go by past instances of other companies, nothing stops Cairn from invoking BIPA," a senior government official told Business Standard on the condition of anonymity.

The official said that as the scope of protecting investments, which is one of the focal points of any bilateral investment agreement that India signs with other countries is so huge, any company can claim damages under it.

"I can argue that a certain move does nothing to undermine a company's investment in India and you can argue that it does. Companies are increasingly going for international arbitration against the government and have resorted to citing BIPA. That is one of the reasons we are replacing BIPA with a stronger, more well-defined bilateral agreement framework," the official said.

It was reported last year that the government plans to replace bilateral investment protection treaties with a new pact that seeks to plug loopholes and enhance legal protection of foreign investors in India as well as Indian investments abroad. The need for a review of the BIPA framework arose following several multinational companies invoking the treaty against the government.

British telecom major Vodafone had invoked the India-Netherlands BIPA, seeking international arbitration in its long-drawn Rs 20,000-crore tax dispute with the tax department following the cancellation of conciliation talks.

Similarly, the Finnish mobile handset maker Nokia resorted to the treaty to resolve the tax department's claim of over Rs 21,000 tax liability, both in form of existing and anticipated liability, for seven years from 2006-07.