

Bilateral Investment Treaty - BIT 2016

written by Kulin Dave | May 11, 2019

The India Bilateral Investment Treaty 2016 (the "BIT 2016")^[1] significantly changed outlook towards investment treaty disputes. It contains 7 chapters into 38 articles. The BIT 2016 only applies to investments in existence as of the date of entry into force of this Treaty; and investments established, acquired, or expanded thereafter. The investments must qualify as being admitted in the host State in accordance with its law, regulations and policies as applicable from time to time.

The protection of the BIT 2016 does not extend to pre-investment activities related to establishment, acquisition or expansion of any investment, or any law or measure regulating such activities. It also does not extend to events that occurred before the treaty was entered into force. The BIT 2016 does not include measures by local government in its ambit. Local governments include urban, local and rural bodies. An exclusion of the actions of local government from the scope of the BIT 2016 provides immunity to local government from fulfilling obligations undertaken by the host State under the BIT. The treaty shall not apply to any law or measure regarding taxation, including measures taken to enforce taxation obligations.

Admissibility of BIT 2016:

The BIT 2016 restricts

the scope of dispute settlement only to disputes arising out of an alleged breach of an obligation of the Party under Chapter II of the BIT. It excludes from the scope disputes arising due to the breach of the obligations contained

in Article 9 and Article 10 of the BIT. A foreign investor can bring a claim against host State only for alleged violation of 'treatment of investments' under Chapter II of the BIT- which includes treatment of investments including

full protection and security, national treatment, expropriation, money transfer

provisions and compensation for losses. The Preamble in BIT 2016, in addition to promotion of bilateral co-operation, provides for promotion of sustainable development of the Parties. It lays out that Parties shall have the right to regulate the investments in accordance with the law and policy objectives.

Notability:

Once as arbitral tribunal

admits jurisdiction under the BIT, the next step is to adjudicate upon the merits of the claim. The BIT 2016 has restricted the scope of protection to investments whilst widening the ambit of legal expropriation. The BIT 2016 covers both direct and indirect expropriation. It provides a shared understanding of what would constitute direct and indirect expropriation. It provides that direct expropriation would constitute formal transfer of title or

outright seizure. Indirect expropriation would occur if measures substantially

or permanently deprives the investor of fundamental attributes of the property

in its investment such as right to use, enjoy and dispose the investment without formal transfer of title. It provides that indirect expropriation could

be determined by considering economic impact of the measure, duration and character of the measure. In addition to singular measures, indirect expropriation also covers series of measures thereby encompassing creeping expropriation.

Treatment of Investments:

The BIT 2016 does not

contain Fair and Equitable Treatment ("FET") clause but rather a treatment of investments clause and prohibits a country from subjecting foreign investments

to measures that constitute a violation of customary international law. The BIT

2016 however, does substantiate the protections that it will provide to investments as denial of justice (judicial and administrative), breaches of due

process, and targeted discrimination on manifestly unjustified grounds or manifestly abusive treatment, such as coercion, duress and harassment. The BIT

2016 provides for national treatment. It provides that a Party shall not apply

measures that accord less favourable treatment than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory. The BIT 2016 also provides guidance on what would constitute like circumstances. It provides that assessing whether treatment is accorded in like circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives. These circumstances include, but are not limited to the goods or services consumed or

produced by the investment; the actual and potential impact of the investment on third persons, the local community, or the environment; whether the investment in public, private, or state-owned or controlled; and the practical

challenges of regulating the investment. It recognizes the investor's right to

transfer all funds related to investment such as contribution to capital, profits, dividends, interest payments etc. The investor's right to transfer funds is subject to three restrictions. The Foreign Exchange Management Act (FEMA) which in Section 6(1), allows for capital account transactions; however,

this is subject to section 6(2), which gives the power to the Reserve Bank of India (RBI) to specify, in consultation with the central government – any class

or classes of capital account transactions which are permissible and the limit

up to which foreign exchange shall be admissible for such transactions. Also, section 6(3) gives power to the RBI to prohibit, restrict or regulate a number of

capital account transactions. Further, Article 6.3 of the BIT 2016 provides that 'nothing in this treaty shall prevent' the host State the good faith application of its laws, including actions relating to bankruptcy, insolvency, compliance with judicial decisions, labour obligations and laws

on
taxation, etc. Also, Article 6.4 of the India Model BIT provides that the host
State may temporarily restrict the investor's right to transfer funds in the event of serious Balance of Payment difficulties or in situations where movement of capital could cause or threaten to cause 'serious difficulties for macroeconomic management'. The money transfer provisions protect interest of foreign investors by allowing free transfer of funds. By subjecting these transfers to certain conditions it allows host State to exercise its right to regulate.

Exceptions to BIT 2016:

The BIT 2016 contains a separate chapter on exceptions covering both general and security exceptions. Article 32 contains general exceptions with list of permissible objectives.

The non-precluded measures contain necessary as the only nexus requirement for all the above-mentioned permissible objectives. The BIT 2016 also provides guidance to the arbitral tribunal in how to determine whether a measure is necessary. It

further provides that in considering whether a measure is necessary, the tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to the country or not. The BIT 2016 has reduced arbitral decision, and at the same time, by requiring that only least investment restrictive measure, which is reasonably available to the host

country be adopted, it ensures that foreign investment will get adequate protection.

Dispute Resolution: Chapter IV of the BIT 2016 deals with settlement of disputes between an investor and a party.

Chapter IV covers the following provisions: scope and definitions (Article 13), proceedings under different international agreements (Article 14), conditions precedent for submission of a claim to arbitration (Article 15), submission of claim to arbitration (Article 16), consent to arbitration (Article 17), arbitrator related provisions (Article 18 & 19), conduct of arbitral proceedings (Article 20), dismissal of frivolous claims (Article 21), transparency in arbitral proceedings (Article 22), burden of proof and governing law (Article 23), joint interpretation and expert reports (Articles 24 and 25), Award and finality and enforcement (Articles 26 and 27), costs (Article 28), appeals facility (Article 29) and diplomatic exchanges between Parties (Article 30).

Chapter IV applies only to disputes relating to investment and arising out of alleged breach(es) of obligation of a Party under Chapter II of the BIT 2016, barring Articles 9 and 10. Secondly, contract claims are outside the purview of dispute resolution under the BIT 2016.

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[1]https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf

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