

India's revised Model BIT: Every bit worth it!

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The Government of the Republic of India has adopted a revised text of the former 2003 version of its Model Bilateral Investment Treaty (BIT). Having entered into effect in December 2015, this text is intended to serve as a template for negotiations of India's existing and future investment relations with countries around the world, including important trading partners, such as the European Union, the United States and Canada. India is presently a member to over eighty BITs and Free Trade Agreements (FTAs) and as such has a strong interest in managing its exposure to investor claims under existing and future BITs and FTAs. India has faced around a dozen investor-State arbitrations since 2011 to date and is well advised to safeguard its position as a host State for foreign investment.

India's revised Model BIT is the result of a public consultation exercise and detailed scrutiny from the Law Commission of India (see Report No. 260, Law Commission of India, Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, August 2015). The revised Model BIT addresses a number of semantic and conceptual difficulties that have arisen from the interpretation of the 2003 version or that have emerged more generally from arbitrations before ICSID Tribunals under other countries bi-lateral investment treaty or free trade arrangements. Doing so, the revised Model BIT is anticipated to remove interpretative uncertainties that persisted in its previous 2003 version and mitigate India's exposure to unmeritorious investment claims arising from the formerly ambiguous wording of a number of Model BIT provisions as do culturally/environmentally

motivated State measures and those adopted for the security of the State.

The changes introduced by the revised Model BIT variously bear on (i) the definitional scope of protected investments and investors qualifying for protection, (ii) the regime of substantive protections and guarantees benefiting foreign investors and their investments, (iii) the substantive obligations of investors and the host State and (iv) the substantive entitlement to local remedies as a pre-arbitral requirement and the procedural technicalities involved in the resolution of investor-State disputes by arbitration.

Definition of protected investment and investor

The revised Model BIT adopts a functional definition of protected investment, extending to an *“enterprise [...] that has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain and profit, the assumption of risk and a significance for the development of the [host State]”* (see Art. 1.4, revised Model BIT). This definition essentially takes note of the test applied to protected investments in *Salini* (see ICSID Case No. ARB/00/4 – *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*) and makes the protection of an investment dependent on whether it makes a tangible contribution to or bears tangible risk for the development of economic activity in the host State. This more restrictive definition of protected investment also seems to surface in the itemized list of investments set out at the same Article, including in particular – apart from the usual tangible and non-tangible assets – a reference to *“any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value”* (see Art. 1.4(h), revised Model BIT). Express exclusions from the list of protected investments reinforce the inbuilt limitations of the concept of protected investment underlying the revised Model BIT: No protection will hence be granted over portfolio investments, loan or debt securities issued by the government, any pre-investment activities (including *“any pre-operational expenditure [...] before the commencement of substantial business operations [...]”*), money claims arising from trade in goods and services or from commercial transactions, goodwill/brand value/ market share or similar intangible rights as well as a judgment or an award (see Art. 1.4, revised Model BIT). For the avoidance of doubt, any *“pre-investment activities”* (see Art. 2.2, revised Model BIT), matters of taxation (see Art. 2.4(ii), revised Model BIT) and services that are supplied by the government on a non-commercial basis (see Art. 2.4(vi), revised Model BIT) fall

outside the scope of protection offered by the revised Model BIT.

Protected investors are equally narrowly defined in the terms of the revised Model BIT and are as such required to “*have substantial business activities*” in the host State (see Art. 1.5, revised Model BIT), although it is unclear as to whether this requirement applies to natural and legal persons alike. This restriction in scope of the revised Model BIT is clearly intended to curb forum-shopping by investors that look to most favourable BITs for redress. To similar effect, a natural person of dual nationality takes the nationality of the country of permanent residence (see Art. 1.9, revised Model BIT).

The regime of substantive protections

The regime of substantive protections put in place by the revised Model BIT is based on a system of “*full protection and security*” accorded to the investor (see Art. 3.2, revised Model BIT). This system is strictly limited to the provision of physical – as opposed to legal – security of investors, thus safeguarding against the wider interpretation lent to the concept of full protection and security by international investment tribunals in the past. The protective regime under the revised Model BIT is bolstered by a prohibition on the host State to commit violations of customary international law that amount to a denial of justice, fundamental breach of due process, targeted discrimination and manifestly abusive treatment (see Art. 3.1, revised Model BIT), but avoids inclusion of the broader fair and equitable (FET) standard, which is a common feature in international investment arrangements. For additional protection, the revised Model BIT relies on the national treatment standard (see Art. 4, revised Model BIT), whereby a foreign investor must not receive less favourable treatment than a domestic investor of the host State; it does not, however, implement a most favoured nation (MFN) clause, thus protecting against a foreign investor’s reliance on a more favourable regime of protection in place between India and a third party under another India BIT.

Substantive obligations of investors and host States

The main substantive obligation weighing on host States under the revised Model BIT is the prohibition to expropriate an investment of a foreign investor (see Art. 5, revised Model BIT): This naturally includes forms of direct, indirect and creeping expropriation (see Art. 5.3, revised Model BIT). Severe limitations are placed on the

effect of this prohibition in practice by the exception from its scope of actions taken by a host State in its commercial capacity (see Art. 5.4, revised Model BIT). In addition, as is commonly the case, measures of expropriation are permitted for public purposes, subject to compliance with due process of law and payment of adequate compensation (see Art. 5.1, revised Model BIT). Foreign investors are also entitled to compensation for losses owing to war, a state of national emergency or a natural disaster in the host State (see Art. 7, revised Model BIT). Last but not least, the host State is under an obligation to permit entry and sojourn of a foreign investor's staff (see Art. 9, revised Model BIT) and to facilitate the free movement of capital with the investor's home State (see Art. 6, revised Model BIT).

Apart from the aforementioned substantive obligations, the host State is also subject to a soft obligation of transparency, a concept newly introduced into the revised Model BIT (see Art. 10, revised Model BIT) and expressly subject to an overarching premise of confidentiality (see Art. 10.4, revised Model BIT): This new obligation requires the prompt publication by the host State of any laws and regulations of relevance to any matters covered by the BIT for the benefit of the other party and foreign investors. Any new regulatory measures proposed for adoption by the host State must be communicated for comment to the other party and foreign investors (see Art. 10.2, revised Model BIT). The soft nature of this obligation is confirmed by the non-availability of the dispute resolution regime in the event of its violation (see Art. 13.2, revised Model BIT).

Foreign investors, in turn, are required to comply with all laws and regulatory requirements of relevance to their investment in the host State (see Art. 11, revised Model BIT). This includes an express prohibition to obtain undue advantage over other investors through illicit practices, such as bribery and conspiracy with officials of the host State (see Art. 11(ii), revised Model BIT). Foreign investors are also subject to internationally recognised standards of corporate social responsibility (see Art. 12, revised Model BIT).

Exhaustion of local remedies and arbitration

The revised Model BIT provides for an elaborate dispute resolution regime, making reference to the resolution of disputes by arbitration following exhaustion of local remedies (see Art. 15, revised Model BIT). The exhaustion of local remedies is thus a pre-condition for referral to arbitration, except where the foreign investor can demonstrate that no local remedies capable of reasonably providing any relief are

available.

Following exhaustion of local, including both judicial and administrative, remedies for a minimum period of five years, and a further cooling-off period of six months (see Art. 15.2, revised Model BIT), the disputing parties may initiate arbitration by serving a notice of dispute. The initiation of arbitration is, however, subject to a number of strict additional conditions precedent, including inter alia (i) the elapse of six years since the investor first became aware of a loss caused to his/her investment, (ii) the elapse of a maximum of twelve months since conclusion of any domestic proceedings, and (iii) a notice of arbitration (by way of a formal consent to arbitration (see Art. 17, revised Model BIT)) having been served ninety days before initiation of the arbitration. A foreign investor that meets the conditions precedent has a choice to refer to arbitration under (i) the ICSID Convention, (ii) the Additional Facility Rules of ICSID or (iii) the UNCITRAL Arbitration Rules. The revised Model BIT contains the usual provisions on the appointment and challenges of the arbitral tribunal (see Arts 18-19, revised Model BIT). There is also a summary procedure for the dismissal of frivolous claims (see Art. 21, revised Model BIT). Other than that, the revised Model BIT expresses a preference for the conduct of the arbitral proceedings in a New York Convention country (see Art. 20.1, revised Model BIT), hence ensuring the enforceability of a resultant award under the New York Convention (on the understanding, of course, that that award is a non-ICSID award). The arbitration proceedings are intended to be accessible to the public, the host State being placed under an obligation to disclose and make publicly available all substantive pleadings, procedural orders, the recordings of hearings in a sanitized confidential version as the case may be, including provision of access to hearings (see Art. 22, revised Model BIT).

Appellate review body

The revised text also introduces an option for contracting States to agree to an appellate body for review of investment tribunal awards (see Art. 29, revised Model BIT). In the terms of the revised Model BIT, “[s]uch an appellate body or similar mechanism may be designed to provide coherence to the interpretation of provisions of this Treaty.” (*ibid.*) This is an important innovation in particular in the light of similar developments in the investment policies of the European Union, such as the European Commission’s proposal for a standing multilateral court of investment disputes.

Conclusion

In conclusion, it is fair to say that despite a number of both procedural and substantive safeguards in favour of the host State, India's revised Model BIT is every bit worth it, even from the point of view of a foreign investor. Provided the investor ensures that it is aware of the definitional and substantive limitations of the revised Model BIT, it should be able to place sufficient reliance on the substantive protections granted under the BIT to manage any investment risks with a measure of certainty and predictability. The revised Model BIT also provides some interesting new wording that is likely to advance the policy discourse around investor State dispute settlement more generally going forward.