



## **Journal of Economics, Management and Trade**

**23(3): 1-5, 2019; Article no.JEMT.36893**

**ISSN: 2456-9216**

*(Past name: British Journal of Economics, Management & Trade, Past ISSN: 2278-098X)*

---

# **Model Text for the Indian Bilateral Investment Treaty, 2015: A Re-examination of the Provisions Defining Investment and Expropriation**

**Dipayan Chowdhury<sup>1\*</sup>**

<sup>1</sup>*Symbiosis Law School, Pune, India.*

### **Author's contribution**

*The sole author designed, analyzed, interpreted and prepared the manuscript.*

### **Article Information**

DOI: 10.9734/JEMT/2019/v23i330132

#### Editor(s):

(1) Dr. Stefano Bresciani, Professor, Department of Management, University of Turin, Italy.

#### Reviewers:

(1) Ahmed Adeshina Babatunde, Lagos City Polytechnic, Nigeria.

(2) Anupam Mitra, TeamLease Skills University, India.

(3) Paul Appiah-Konadu, J.S. Addo Business School, Marshalls University College, Ghana.

Complete Peer review History: <http://www.sdiarticle3.com/review-history/36893>

**Policy Article**

**Received 29 October 2017**

**Accepted 18 January 2018**

**Published 05 April 2019**

---

## **ABSTRACT**

This article was written in the wake of India's termination of its BITs in 2017 with several nations, including at least 22 EU countries, as a consequence of which new investments in and from concerned nations would no longer be governed by the investment treaties assigned between the Governments. However, India released a joint interpretative statement intending that the then existing treaties with nations that were un concluded would be aligned with the 2015 Model BIT Text. Therefore, touching on this issue, two specific provisions from the 2015 Text were examined in light of their impact on foreign inbound investments in the Indian subcontinent.

*Keywords: Trade; investment; law; bilateral treaty; India.*

## **1. INTRODUCTION**

The Indian Government has recently issued notices in respect of its intention to terminate its

Bilateral Investment Treaties (BITs) with several countries, including 22 EU countries. As a result, many of these BITs will reportedly cease to apply to new investments commencing in April 2017.

---

\*Corresponding author: E-mail: [d.chowdhury1993@gmail.com](mailto:d.chowdhury1993@gmail.com);

For the remaining BITs which are yet to come to a conclusion after the completion of their initial term, India has released a new joint interpretative statement clarifying provisions so as to align its existing Bilateral Investment Treaties with the new BIT Model Text. India has further expressed its intention to align all its future BITs, free trade agreements and other multilateral trade arrangements with the Model Text. Unlike countries which have previously terminated some or all of its BITs, India's action of releasing a joint interpretative statement appears to be a move towards negotiation with existing BIT counterparties on the substantive provisions of the Model BIT Text [1]. In light of this, two specific provisions are being critically looked at, their special significance arising from a reflection on the two way precipice which foreign investments flowing into the Indian landscape is presently positioned on, with both sides standing to lose; the provisions thus named concern the definitions of 'investment' and 'expropriation' respectively, as in the original Model BIT Text.

### 1.1 Research Questions

- (a) What are the implications of adopting an 'enterprise' based definition of investment as compared to the prior 'asset' based definition?
- (b) Does the new Model Text allow for 'indirect expropriation' in an investment context and whether if the same should be retained?

## 2. AN ANALYSIS OF RELEVANT PROVISIONS

### 2.1 Evaluating 'Asset' Based Definition of Investment

The new Indian BIT Model Text is an improvement from its predecessor models. Unlike the model dating back to 1993, which used an "asset" based definition of investment, covering potentially every kind of asset (e.g., cash deposit in a bank account), the new model text of the Indian Investment Treaty as released by the Government has adopted an "enterprise" based definition of investment, thereby narrowing it to foreign direct investment (FDI). The defining of investment in the following way: "...investment does not include the following assets of an enterprise: (i) portfolio investments of the enterprise or in another enterprise...(vi) claims to money that arises solely from the extension of credit in connection with any commercial

transaction..." only goes on to show the purported intention of excluding entities that do not have any actual or real or substantive commercial presence in the host state; the same is further made clear in the joint interpretative statement as well [2]. Unlike the assets based definition which would enable almost every kind of assets, moveable and immovable, to qualify as investment and enjoy protection under treaties whether or not they contributed to the development of host countries, under the enterprise based definition the investor would have to be an incorporated legal entity in compliance with domestic law in order to be able to qualify for protection [3].

An enterprise based definition mainly focuses on the establishment of foreign investment in the host state as a new enterprise or the acquisition of controlling stake in another enterprise in the territory of the host state. This kind of an approach has already gained ground from the definition of investment as laid down in the Canada States Free Trade Agreement (since superseded by NAFTA): "a) the establishment of a new business enterprise, or b) the acquisition of a business enterprise; and includes: c) as carried on, the new business enterprise so established or the business enterprise so acquired, and controlled by the investor who has made the investment; and d) the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor" [4]. However, there is potential scope for raising the argument that the need for preserving development objectives of host countries in a multilateral investment framework may be accounted for by not merely narrowing the definition of investment but rather by an inclusion of substantive provisions that include all countries, and especially developing countries to pursue their respective development objectives [5].

As has already been noted by UNCTAD, development policy objectives do not necessarily conflict with a broad definition since the coverage of an investment agreement may be adapted to the respective needs and obligations of the parties entering into an investment treaty thereto [6]. Taking the above into consideration, the term 'FDI' has to be laterally defined in order to cover within its ambit direct investment enterprises including incorporated (subsidiaries or associates) or unincorporated (branches) enterprises in which a direct investor owns 10%

or more of equity or voting power or an of its equivalents. Furthermore, in the instance the director investor is found to own less than 10% of shares then what must be taken into account is his possible representation in the Board of Directors or his participation in perhaps policy-making decisions of the company, etc [7].

## 2.2 Evaluating Relevance of 'Expropriation' Clause

Provisions describing expropriation being a common feature of bilateral and multilateral investment treaties seek to balance the conflicting interests of the investor's property rights and the host state's requirement of regulatory leeway in light of 'public purposes'. Expropriation may be carried out in two forms, namely, direct expropriation and indirect expropriation. Direct expropriation is executed when the host State follows a formal procedure of acquiring the title of the expropriated property from the investor while indirect expropriation is carried out when the acquisition is made through indirect and prolonged measures which ultimately divest the investor of his shareholding [8].

India's Model Bilateral Investment Treaty Text too provides under Article 5, in the same manner as in its 2003 Model, for both direct and indirect expropriation: "...Neither Party may nationalize or expropriate an investment of an investor (hereinafter "expropriate") of the other Party either directly or through measures having an effect equivalent to expropriation, except for reasons of public purpose, in accordance with the due process of law and on payment of adequate compensation..." In this way, it may be said that the present Model Text as forming the subject of discussion in this note provides, through the aforementioned definition as well as in collation with the words "...Each Party shall not apply to investor or to investments made by investors of the other Party, measures that accord less favourable treatment than that it accords, in like circumstances, to its own investors...", the emphasis being made here on "in like circumstances", an oblique sanctioning of indirect expropriation [9].

Host states have generally been provided with a right to regulate, under the customary international law, without any concomitant obligation to compensate, in order that it may protect or promote public interest or interests in connection to the public purpose such as public

health, national security, human rights, etc. A foreign investment, therefore, faces the risk of being adversely affected by measures taken on behalf of the host State that does not directly concern the investment or which do not exterminate the legal title of the investor with respect to the investment. Still, the State could casually propose the argument that the disputable measure had been passed in public interest and that therefore it would not be liable to compensate the investors for any damages caused purportedly unintentionally because of the measure is taken. The obvious implication arising here is that indirect expropriation, however it is termed or defined, would in its broadest sense cover potentially any measure taken by the host State causing an adverse impact on the foreign investment without any added consideration being taken into account [10].

Furthermore, Article 5.3(a)(ii) in the Model Text provides for a method of determining indirect expropriation wherein the determination is made by way of an appropriation of the investment by the host State. This would, therefore, require a transfer of complete or near complete value of the investment to the host State, implying thus that even if the investment was entirely divested in both a legal and economic sense no indirect expropriation would be seen to result unless the value of the investment was transferred to the host State [11]. However, if we take Article 300A of the Indian Constitution to be the strict authority for the purpose of any reading on this point, it clearly establishes the legality of expropriation by means of direct measures and the containment of an 'indirect expropriation' clause in the Indian BIT Model Text today would have to be strongly reproached since there is no coverage for indirect expropriation under Article 300A [12].

Thus, instead of the mechanism as has been laid out in the Indian Model text, the ideal recourse would be to incorporate the 'Sole effects' doctrine as a test for determination of expropriation. The said doctrine posits that the only determining factor in respect of whether an indirect expropriation has resulted would be to test the effect of the governmental measure on the investment. If the purported interference exceeded a certain level, there would be expropriation irrespective of the purpose behind the attempted measure. The *Metalclad* [13] example may be referred to in order to substantiate this line of reasoning. In *Metalclad*, the claimant had received the assurance of the

Federal Government of Mexico that a project of its meant for a hazardous landfill facility was in proper compliance with the relevant domestic environmental and planning regulations. Despite the assurance provided, the requisite construction permit was denied by the local municipal authorities and the regional government further declared the land in question to be a national area for the purpose of protecting a rare plant species. The tribunal, however, took account of only the effects and not the motives of the measure. The question that was determined was whether the investor had been deprived of his economic benefit in the investment and it was ultimately answered in the affirmative [14]. In *Vivendi II* [15], it was stated that 'if public purpose automatically immunizes the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose'.

### 3. CONCLUSION

From the discussion that has been carried out on the provisions as contained in the new Indian BIT Model Text, namely, definitions of investment and expropriation, the said two definitions having been picked for emphasis as opposed to the rest of the definitions contained in the Text because of its relevance from international/foreign inbound investments, what seems to form as the overarching conclusion is the need for adopting such uniform rules, tests and measures that reflect the nation's susceptibility to and stability for attracting inbound investments from abroad. However, it is also to be necessarily seen and verified that such concerns are balanced against the domestic financial position so as to not cause any disadvantage ultimately to the country's own internal financial controls, regulations, and dynamics through the risk of undue exploitation of potential loopholes in the governing Text.

### COMPETING INTERESTS

Author has declared that no competing interests exist.

### REFERENCES

1. Nicholas Peacock, Nihal Joseph. Mixed messages to investors as India quietly terminates bilateral investment treaties with 58 countries, Herberth Smith Freehills – Arbitration Notes; 2017.

- Available <http://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/> (Last Accessed on April 3, 2017)
2. The Contracting Parties affirm that the Agreement aims to protect investors that have direct, real and transparent links with the economies of both Contracting Parties. Paragraph 2.2 Consolidated Interpretative Statement, Department of Economic Affairs, Ministry of Finance, Government of India F.No. 26/07/2013 – IC.
  3. Kavaljit Singh. India and bilateral investment treaties – are they worth it? Beyond Brics, Financial Times; 2015. Available: <http://blogs.ft.com/beyond-brics/2015/01/21/guest-post-india-and-bilateral-investment-treaties-are-they-worth-it/> (Last Accessed on February 17, 2017)
  4. Key Terms and Concepts in IIAs: A Glossary, United Nations Conference on Trade and Development, United Nations Publications. 2004;94-96.
  5. Concept Paper on the Definition of Investment, Communication from the European Community and Its Member States, Working Group on the Relationship between Trade and Investment, World Trade Organization, WT/WGTI/W/115; 2012. Available: [http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc\\_111123.pdf](http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_111123.pdf) (Last Accessed on February 17, 2017)
  6. The Shift Towards Services, United Nations Conference on Trade and Development, United Nations Publications. 2004;225.
  7. Refer August Reinisch, An Investment Competence of the EU after the Lisbon Reform Treaty? Session 3: The Treaty of Lisbon and Investment Protection, European Law and Bilateral Investment Treaties: Exploring the Grey Areas, British Institute of International and Comparative Law & Lovells LLP; 2008. Available: [www.biicl.org/files/3972\\_august\\_reinisch.doc](http://www.biicl.org/files/3972_august_reinisch.doc) (Last Accessed on February 20, 2017)
  8. Prateek Bagaria, Vyapak Desai. Bilateral investment treaties and India, Nishith Desai Associates. Available: [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Bilateral\\_Investment\\_Treaties\\_and\\_India.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Bilateral_Investment_Treaties_and_India.pdf) (Last Accessed on February 20, 2017)

9. See Expropriation: UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, United Nations. 2012;8.  
Available:[http://unctad.org/en/Docs/unctad\\_diaeia2011d7\\_en.pdf](http://unctad.org/en/Docs/unctad_diaeia2011d7_en.pdf)  
(Last Accessed on February 20, 2017)
10. Suzy H. Nikiema. Best practices indirect expropriation, best practices series, International Institute for Sustainable Development; 2012.  
Available:[http://www.iisd.org/pdf/2012/best\\_practice\\_indirect\\_expropriation.pdf](http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf)  
(Last Accessed on February 20, 2017)
11. Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, Law Commission of India, Report No. 260, Article 3.2.3. 2015;18.  
Available:<http://lawcommissionofindia.nic.in/reports/Report260.pdf>  
(Last Accessed on February 20, 2017)
12. Constitution of India, 1950, Art. 300A.
13. Metalclad v. Mexico ICSID Case No. ARB(AF)/97/1.
14. Ursula Kriebaum. Regulatory takings: Balancing the interests of the investor and the State. The Journal of World Investment & Trade. 2007;724.  
Available:[http://www.univie.ac.at/intlaw/kriebaum/pub\\_uk\\_12.pdf](http://www.univie.ac.at/intlaw/kriebaum/pub_uk_12.pdf)  
(Last Accessed on February 20, 2017)
15. Vivendi v. Argentina ICSID Case No. ARB/97/3.

© 2019 Chowdhury; This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<http://creativecommons.org/licenses/by/4.0>), which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

*Peer-review history:*  
*The peer review history for this paper can be accessed here:*  
<http://www.sdiarticle3.com/review-history/36893>