

TREATY PROTECTION FOR INDIAN INVESTMENTS ABROAD: THE CHANGED LANDSCAPE

India's investment treaties lower the political and sovereign risk of Indian cross-border investments by providing investors with enforceable international legal protections. Given India's recent policy of terminating its investment treaties, Indian investors must carefully consider how to best maintain or obtain these protections.

WHAT IS AN INVESTMENT TREATY?

Investment treaties are risk mitigation instruments that protect Indian investors abroad by prohibiting a State in which their investments are made ("**host State**") from:

- expropriating covered investments (e.g., through wrongful revocation of an essential permit for the operation of that asset);
- breaching its "fair and equitable treatment" ("**FET**") obligations toward covered investors (e.g., by frustrating an investor's expectation - based on specific governmental assurances - that certain tariffs will not change over a certain duration); and
- treating covered investments less favourably than:
 - investments of host State nationals (e.g., imposing a less stringent regulatory framework for local competitors); or
 - investments of (non-Indian) foreign investors (e.g., imposing less stringent permitting regulations on competing foreign investors).

Investment treaties usually entitle a covered investor to enforce these host State obligations through international arbitration. This dispute resolution mechanism ensures that the Indian investor's dispute with the host State will be resolved not in the host State's courts but rather before a neutral tribunal comprised of independent international arbitrators chosen by the disputing parties. Many investment treaties provide host State consent to arbitration. Under these treaties, no direct arbitration agreement is required between the host State and the investor for an investment treaty arbitration to be commenced by the investor.

Fleming DutyFree Shop v. Poland illustrates the effectiveness of investment treaties. In that case, an Indian investor instituted expropriation and FET claims against Poland under the India-Poland bilateral investment treaty in

Key issues

- Investment treaties provide enforceable protections to Indian investors who invest overseas, particularly guarding against expropriation and host State conduct that substantially affects the value of their investments
- India has terminated over 60 of its investment treaties since 2017, leaving a minimal level of treaty protection for Indian investors abroad
- Despite the low numbers of Indian investment treaties currently in force, treaty protections may still be obtained by routing the investment through a vehicle in a third State that is party to an appropriate investment treaty with the host State
- Corporate structuring through a third State to obtain treaty protection requires investment treaty planning
- Investment treaty planning is not effective if it takes place after an investor's dispute with the host State has arisen

respect of its indirect shareholding in a Polish company. The subject matter of the dispute concerned the termination of that company's lease agreements for retail stores in Warsaw's Chopin Airport. The arbitral tribunal found in favour of the Indian investor, awarding it 18 million Euros plus interest and costs.

INDIA'S INVESTMENT TREATIES

In 2017, India was a party to approximately 80 investment treaties. The map immediately below indicates (in orange) the States with whom India had investment treaties prior to that year.



However, during 2017 and thereafter, India embarked on a policy of terminating its investment treaties. To date, it has terminated more than 60. The countries with whom India currently has investment treaties are indicated (in orange) in the map below.



INVESTMENT TREATY PLANNING

Readily apparent from these maps is the significant reduction in India's investment treaty coverage. Despite the drastic reduction, Indian investors may still obtain treaty protection by routing their investments through a corporate vehicle in a third State that has entered into a robust investment treaty with the target host State. For this type of corporate structuring, investment treaty planning is recommended.

Investment treaty planning requires the Indian investor to examine treaties of potential third States. Third States that have a treaty with the host State

containing adequate arbitration and wide investor/investment definitions, as well as sufficient substantive provisions, should be short-listed. This short list will assist in choosing the third State out of which the Indian investment into the host State may be (indirectly) made. The treaty planning process must be implemented as early as possible. If it takes place after a dispute with the host State arises, it may be ineffective as a means of providing protections to investors.

Our investment treaty specialists represent investors in investor-State arbitration claims in Asia and around the world, and are well-positioned to provide you with further information on the process of investment treaty planning.

Content relating to India is based on our experience as international counsel representing clients in their business activities in India. We are not permitted to advise on the laws of India and should such advice be required we would work alongside a domestic law firm.

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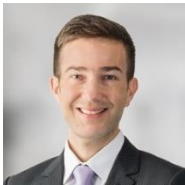
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