

F. No. 26/07/2013- IC
Government of India
Ministry of Finance
Department of Economic Affairs
Investment Division

North Block, New Delhi
Dated 8th February, 2016

OFFICE MEMORANDUM

Subject: Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties – regarding

The undersigned is directed to enclose a copy of India's Joint Interpretative Statement (JIS) as approved by the Committee of Secretaries in its meeting held on 4th January, 2016 and to request MEA to convey to the 25 countries with whom the initial duration, for which BITs were signed in the past, is not over, that India would like to sign Joint Interpretative Statements with these countries. The list of the 25 countries is at Annex. MEA is requested to share the Joint Interpretative Statement text with these 25 countries.


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Encl: As above

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To:
Secretary (ER & DPA)
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Issued
09/02/2016

Annex

List of Countries with which India has signed BIT and whose initial duration for which BIT was signed is not over

S. No.	Country	Date of signing of Agreement	Date of Enforcement of the Agreement	Duration	Date on which initial period for which the treaty was signed would be over
1.	Bahrain	13 th January, 2004	5 th December, 2007	10 years	4 th December, 2017
2.	Kuwait	27 th November, 2001	28 th June, 2003	15 years	27 th June, 2018
3.	Finland	7 th November, 2002	9 th April, 2003	15 years	8 th April, 2018
4.	Saudi Arabia	25 th January, 2006	20 th May, 2008	10 years	19 th May, 2018
5.	China	21 st November, 2006	1 st August, 2007	10 years	31 st July, 2017
6.	Jordan	1 st December, 2006	22 nd January, 2009	10 years	21 st January, 2019
7.	Libya	26 th May, 2007	25 th March, 2009	10 years	24 th March, 2019
8.	Iceland	29 th June, 2007	16 th December, 2008	10 years	15 th December, 2018
9.	Macedonia	17 th March, 2008	17 th October, 2008	10 years	16 th October, 2018
10.	Myanmar	24 th June, 2008	8 th February, 2009	10 years	7 th February, 2019
11.	Mozambique	19 th February, 2009	23 rd September, 2009	10 years	22 nd September, 2019
12.	Latvia	18 th February, 2010	27 th November, 2010	10 years	26 th November, 2020
13.	Bangladesh	9 th February, 2009	7 th July, 2011	10 years	6 th July, 2021
14.	Serbia (Yugoslavia)	31 st January, 2003	24 th February, 2009	10 years	23 rd February, 2019
15.	Sudan	22 nd October, 2003	18 th October, 2010	10 years	17 th October, 2020
16.	Turkey	17 th September, 1998	18 th October, 2007	10 years	17 th October, 2017
17.	Lao PDR	9 th November, 2000	5 th January, 2003	15 years	4 th January, 2018
18.	Bosnia & Herzegovina	12 th September, 2006	14 th February, 2008	10 years	13 th February, 2018
19.	Trinidad & Tobago	12 th March, 2007	7 th September, 2007	10 years	6 th September, 2017
20.	Mexico	21 st May, 2007	23 rd February, 2008	10 years	22 nd February, 2018
21.	Syrian Arab Republic	18 th June, 2008	22 nd January, 2009	10 years	21 st January, 2019
22.	Senegal	3 rd July, 2008	17 th October, 2009	15 years	16 th October, 2024
23.	Lithuania	31 st March, 2011	1 st December, 2011	15 years	30 th November, 2026
24.	Colombia	10th November 2009	02-July-2012	10 years	01-Jul-2022
25.	Brunei Darussalam	22 nd May, 2008	15 th February, 2009	10 years	14 th February, 2019

CONSOLIDATED - INTERPRETATIVE STATEMENTS

Recognizing the uncertainties and ambiguities that may arise regarding interpretation and application of the standards contained in the Bilateral Investment Protection and Promotion Agreement entered into between India and [name of other Contracting Party] at [name of the place] on [insert date] (the "Agreement");

Taking into account the power of the Contracting Parties to provide clarification on the object and purpose of the Agreement; and

Recalling the requirement under customary international law and Article 31 (3) (a) & (b) of Vienna Convention of Law of Treaties, that any interpretation of the Agreement take into account the Contracting Parties' subsequent statements and practice reflecting their shared understanding of the meaning of that Agreement,

The Contracting Parties, while recognizing that additional uncertainties and ambiguities may remain and need to be further clarified at a future date, issue the following notes (the "Notes") to resolve certain questions regarding, and affirm their understanding of, the scope and meaning of several of the Agreement's provisions.

1. General principles applicable for interpretation of the BIPA

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| <ol style="list-style-type: none"> 1. This interpretative note shall be read together with the Agreement and shall form an integral part of the Agreement. 2. The term of this interpretative note shall be co-terminus with the Agreement. 3. Interpretation of this Agreement shall be done in accordance with the high level of deference international law accords to states with regard to their development and implementation of domestic policies. Interpretation and application of the Agreement shall also reflect the strong presumption of legitimacy and regularity international law provides to domestic legislative, administrative and judicial determinations made by the Contracting Parties. |
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2. Note on definition of "investor"

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| <ol style="list-style-type: none"> 1. For greater certainty regarding the definition of an "investor": <ol style="list-style-type: none"> a) the term ["entity"]["company"]["juridical person"]["or any other entity"] referred to in Article [___] of this Agreement means only [a company, corporation, firm or association] [an enterprise] of a Contracting Party that is incorporated or constituted or otherwise duly established pursuant to the laws |
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and regulations of that Contracting Party, and that has its seat in that Contracting Party and is engaged in substantial business activities in the territory of that Contracting Party.¹

b) In the case of dual nationals, the term ["national"] ["natural person"], refers to his or her dominant and effective nationality.

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. The term "investor", therefore, does not include persons of one Contracting Party that (a) invest in another Contracting Party through a person of a non-Party, or (b) are owned or controlled by persons of a non-Party, or persons of the other Contracting Party.

3. Note on denial of benefits clause

1. The Contracting Parties affirm their understanding that they may deny the benefits of this Agreement pursuant to Article [] at any time, including after the initiation of arbitration proceedings under Article [].

4. Note on definition of "investment"

1. The Contracting Parties confirm their understanding that nothing in this Agreement covers pre-establishment or pre-investment activities.

2. The existence, scope and nature of the different assets that may be deemed an "investment" shall be determined by the laws and regulations of the Contracting Party in the territory in which the investment is made.

3. In accordance with Article [], the minimum characteristics of an "investment" are (a) the lasting contribution of capital or other resources; (b) the expectation of gain or profit; (c) the assumption of risk by the investor; and (d) significance for development of the Contracting Party receiving the investment.²

4. For the avoidance of doubt, an investor of one Contracting Party

¹ "Substantial business activities" do not include activities such as (a) strategies/arrangements, the main purpose or one of the main purposes of which is to avoid tax liabilities, (b) the passive holding of stock, securities, land, or other property; or (c) the ownership or leasing of real or personal property used in a trade or business, unless the owner or lessor performs significant services with respect to the operation and management of the property.

² Interests or assets that do not typically possess the characteristics of "investments" include portfolio investments, claims to payment resulting from a sale of goods or services by an individual or entity in one Contracting Party to an individual or entity in the other, or an order or judgment sought or entered in a judicial, administrative, or arbitral action.

must make its investments "in the territory of the other Contracting Party. This means, for example, that claims to money arising solely from cross-border commercial contracts for the sale of goods or services, or the extension of trade financing in connection with a cross-border commercial transaction, or other relationships or instruments not involving an investor's actual investment project in the territory of the other Contracting Party, do not constitute covered investment. Furthermore, the mere fact that an investment "benefits" the Contracting Party in which it is made is insufficient to establish that it is an investment "in territory of" that Contracting Party.

5. Scope - Exclusion of taxation measures

1. In the treaties which are silent on inclusion or exclusion of taxation measures from scope, it is implied that such treaties do not apply to any law or measure regarding taxation including measures taken to enforce taxation obligations.

6. Note on "fair and equitable treatment" and "full protection and security"

1. The concept of "fair and equitable treatment" under Article [] does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens, and does not create additional substantive rights.³
For greater certainty, a measure shall constitute a violation through customary international law minimum standard of treatment in case of:
(i) Denial of justice in any judicial or administrative proceedings; or
(ii) fundamental breach of due process; or
(iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
(iv) manifestly abusive treatment, such as coercion, duress and harassment.

2. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does

³"Customary international law" is law that results from evidence of general and consistent practice of States when acting out of a sense of legal obligation. The burden to establish the existence and applicability of a binding obligation under customary international law that meets the requirements of State practice and *opinio juris* is always on the claimant. Once a rule of customary international law has been established, a claimant must show that the Contracting Party has engaged in conduct that violated that binding obligation.

not establish that there has been a breach of this Article.

3. For further clarification, the "fair and equitable treatment" standard under Article [] does not require compensation for measures designed or applied to further public policy objectives including but not limited to:
 - a) protection or improvement of natural resources and the environment;
 - b) protection or improvement of human, animal or plant life or health;
 - c) protection or improvement of human capital, conditions of work and human rights;
 - d) protection or improvement of economic conditions and the integrity of the financial system;
 - e) implementation of fiscal policy measures, including taxation
4. For the avoidance of doubt, "measures" referred to under subparagraph(3) herein include new laws and regulations, amendments to existing laws and regulations, as well as changes in interpretation and application of existing laws and regulations, provided such changes or amendments are in accordance with the law of the Contracting Party taking the measure.
5.
 - a) The "fair and equitable treatment" requirement does not, alone, elevate alleged representations, contractual promises or other undertakings by the Contracting Party where the investment is made to the investor or investment to commitments binding or enforceable under the Agreement. The legal significance of those representations, contractual promises or other undertakings to the investor or investment are to be determined, (i) in the case of a written contract between the investor or investment and Contracting Party that specifies the applicable law, under that law; and (ii) in all other cases, under the law of the Contracting Party in which the investment is made. For greater certainty, the "law of the Contracting Party" in which the investment is made means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.
 - b) Subparagraph (a) is without prejudice to the question of whether a Contracting Party has inappropriately interfered with representations, contractual promises or other undertakings in breach of the Agreement through, in particular, willful and egregious abuse of law amounting to a violation of [the article on fair and equitable treatment], or expropriation].
6.
 - a) The Contracting Parties understand that the obligation to provide "full protection and security" extends only to the physical

security of the investor and to its investments and does not impose any other obligation whatsoever

7. Note on the "effective means" obligation

- 1. The obligation in Article [] to provide "effective means" refers to the obligation not to deny access to legal or administrative adjudicatory proceedings in accordance with the procedure established by law. It does not create additional substantive rights.
- 2. A breach of this obligation will only occur if the claimant has exhausted all the available domestic remedies, including administrative and judicial remedies. Normal delays in judicial or administrative proceedings that are in accordance with the law of Contracting Parties do not violate the "effective means" requirement.

8. Note on interpreting "umbrella clauses"

- 1. a) The obligations "entered into" [or assumed or obligations entered] referred to in Article [] are the specific obligations entered in a written contract between a Contracting Party and an investor with respect to that investor's investment.
 b) For greater certainty, the expression "written contract" refers to a binding agreement in writing between a Contracting Party and an investment or investor that creates mutual rights and obligations. A "written contract" does not include acts by governmental, administrative or judicial authority solely in its regulatory capacity or an administrative or judicial consent decree or order.
- 2. Interpretation and application of the written contract, including determination of the scope and nature of any underlying rights or interests at issue, the obligation allegedly owed, and consideration of whether there has been a breach, shall be determined in accordance with the law specified in the relevant contract or, if no law is specified, under the law of the Contracting Party where the investment is made. For greater certainty, the term "law of the Contracting Party" where the investment is made means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.
- 3. To determine whether there has been a breach of the obligation under Article [], the claimant must pursue relief in accordance with any applicable dispute resolution procedures set forth in the underlying contract. Dispute resolution under Article [] of this Agreement is only applicable in the absence of the contractually

specified procedure, or, if no procedure is specified, in the absence of the normal local judicial remedy.

9. Note on interpretation of national treatment and MFN articles

1. The most-favoured nation (MFN) and national treatment provisions under Article [] are designed to protect against illegitimate and intentional discrimination against an investment, or investor with respect to its investment, on the basis of nationality.
2.
 - a) The Contracting Parties further affirm that the MFN obligation is not intended to alter the Agreement's substantive content by, for example, permitting piecemeal incorporation of and reliance on provisions found in other treaties, investment or otherwise;
 - b) For greater certainty, the Contracting Parties note their agreement that the MFN obligation provided under Article [] does not apply to the mechanism for settlement of investment disputes contained in this Agreement or to other procedural and jurisdictional issues under any circumstance.
3.
 - a) Establishing a breach under Article [] requires a comparison between investors and investments that are in "*like circumstances*".
 - b) Determining whether investors or investments are in "*like circumstances*" is a fact-specific inquiry that is highly dependent on context. It requires a case-by-case examination of all relevant factors, including:
 - i. the sectors and industries in which the investors and investments are operating;
 - ii. the activities and operations of the investors and investments;
 - iii. the nature of the enterprise in question, i.e., whether it is a public, private or a state-owned or -controlled enterprise.
 - iv. the nature of goods or services involved;
 - v. the legal and regulatory regimes governing the investors and investments and their activities;
 - vi. the actual and potential effects of the investments on third persons and the local community;
 - vii. the actual and potential effects of the investments on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
 - viii. the aim of the policies or measures concerned; and
 - ix. other factors directly relating to the investors and

investments in relation to the policies or measures concerned.

- 4. For greater certainty, legitimate exercises of prosecutorial discretion, including decisions regarding whether, when and how to enforce or not enforce a law or regulation, are not a violation of Article [] provided such decisions are taken to further a policy, law or regulation that is not inconsistent with the Agreement.

10. Note on interpretation of expropriation

- 1. Article [] addresses two situations. The first is direct expropriation, where an investment is nationalized or expropriated. The second is where a measure or series of measures have the effect of a nationalization or expropriation.
- 2. The determination of whether a measure or series of measures have an effect equivalent to nationalisation or expropriation requires a case-by-case, fact-based inquiry, considering the following factors, including whether:
 - a) the measures result in a total or near total and permanent destruction of the value of the investment;
 - b) the measures deprive the investor of its rights of management and control over the investment⁴; and
 - c) there is an appropriation of the investment by a Contracting Party which results in transfer of the investment, in whole or significant part, to that Contracting Party or to an agency or instrumentality of the Contracting Party or a third party.
- 3. Notwithstanding paragraph 2, legislative, executive, regulatory, administrative or judicial measures or actions of general applicability that are designed or applied to further a Contracting Party's public policy objectives shall not constitute expropriation. These public policy objectives include, but are not limited to:
 - a) protection and improvement of natural resources and the environment;
 - b) protection and improvement of human, animal or plant life or health;
 - c) protection and improvement of human capital, conditions of work and human rights;
 - d) protection and improvement of economic conditions and the integrity of the financial system;
 - e) implementation of fiscal policy measures, including taxation.

11. Note on "essential security interests"

- 1. Where the Contracting Party asserts as a defence that the measure alleged to be a breach of its obligations under this Agreement is for the protection of its "essential security

⁴ This does not prohibit a Contracting Party from interfering with management or control when done in good faith and in compliance with the law of the Contracting Party where the investment is made. This would cover, for example, requirements under financial or insolvency law of the relevant Contracting Party, or law regarding senior management positions in sensitive industries that the Contracting Party considers necessary.

interests" or in "circumstances of extreme emergency in accordance with its domestic laws applied on a reasonable basis" as set out in Article 13, any decision of such Contracting Party taken on such security considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.

12. Note on investor-state dispute settlement

1. For purposes of this Agreement, an "investment dispute" [or a "dispute concerning investment"] ["any dispute concerning the investments" "with respect to an investment", "in connection with an investment" or "in relation to an investment under this Agreement"] is a dispute between a Contracting Party and an investment, or an investor with respect to its investment, arising of an alleged breach of an obligation of a Contracting Party under this Agreement. The Contracting Parties further confirm their understanding that to establish the existence of a dispute actionable under Article [], a claimant bears the burden of demonstrating that the respondent has breached an obligation owed under the Agreement, and the claimant [or, in the case of an investor bringing a claim on behalf of an enterprise pursuant to [Article _]], an enterprise] has:
 - a) suffered actual and non-speculative damages,
 - b) as a direct and foreseeable result of that breach, and
 - c) its claims are ripe for adjudication under the Agreement.⁵
2. Absent express language to the contrary, nothing in this Agreement shall be interpreted to constitute a waiver or limitation of any rights or defenses of either of the Contracting Parties under international law, including rights to regulate within their respective borders, and abilities to invoke defenses of necessity, force majeure and sovereign immunity.
3. Any interpretation of this Agreement, including any interpretation contained in these Notes, which is jointly agreed to and issued

⁵ To be "ripe", claims must be based on government conduct that is final and legally binding, and inflicts a definitive and concrete injury capable of being assessed as a breach. It is related to, and serves similar functions as the requirement of "exhaustion", but the two are separate doctrines: Whereas ripeness addresses whether issues are fit for review, exhaustion relates to the process that must be followed. Where the challenge is one for a denial of justice [or breach of the "effective means" requirement], the "ripeness" requirement means that unless there are extremely exceptional circumstances, such as where a claimant proves that continuing to pursue domestic relief would be manifestly and wholly ineffective or obviously futile, the claimant must have exhausted all local legal remedies.

as such by the Contracting Parties shall be binding on tribunals established under Article [] upon issuance of that interpretation. In accordance with the Vienna Convention of the Law of Treaties and customary international law, other evidence of the Contracting Parties' agreement and practice regarding interpretation or application of this Agreement, including subsequent agreement and practice manifested through submissions made to tribunals on issues of treaty interpretation, shall similarly constitute authoritative interpretations of this Agreement and must be taken into account as such by tribunals constituted under Article [] [and Article [on state-state arbitration]].⁶

⁶ The failure of a non-disputing Contracting Party to make such a submission, however, shall not be interpreted to constitute agreement or disagreement with any issue of interpretation.