

# Bilateral Investment Treaties & India

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## About NDA

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Silicon Valley, Singapore, New Delhi & Munich. We specialize in strategic legal, regulatory and tax advice coupled with industry expertise in an integrated manner. We focus on niche areas in which we provide significant value and are invariably involved in select highly complex, innovative transactions. Our key clients include marquee repeat Fortune 500 clientele.

Our practice areas include International Tax, International Tax Litigation, Litigation & Dispute Resolution, Fund Formation, Fund Investments, Corporate & Securities Law, Mergers & Acquisitions, Competition Law, JVs & Restructuring, Capital Markets, Employment and HR, Intellectual Property, International Commercial Law and Private Client. Our specialized industry niches include funds, financial services, IT and telecom, pharma and healthcare, media and entertainment, real estate and infrastructure & education.

Nishith Desai Associates has been ranked as the Most Innovative Indian Law Firm (2014 & 2015) at the Innovative Lawyers Asia-Pacific Awards by the Financial Times - RSG Consulting. Nishith Desai Associates has been awarded for "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm", "Best Dispute Management Firm", and "M&A Deal of the year" by IDEX Legal 2015 in association with three legal charities; IDIA, iProbono and Thomson Reuters Foundation. Nishith Desai Associates has been recognized as a Recommended Tax Firm in India by World Tax 2015 (International Tax Review's directory). IBLJ (India Business Law Journal) has awarded Nishith Desai Associates for Private equity & venture capital, structured finance & securitization, TMT and Taxation in (2014/2015). IFLR1000 has ranked Nishith Desai Associates in Tier 1 for Private Equity (2014). Chambers and Partners ranked us as # 1 for Tax and Technology-Media-Telecom (2014/2015). Legal 500 ranked us in # 1 for Investment Funds, Tax and Technology-Media-Telecom (TMT) practices (2011/2012/2013/2014). IDEX Legal has recognized Nishith Desai as the Managing Partner of the Year (2014).

Legal Era, a prestigious Legal Media Group has recognized Nishith Desai Associates as the Best Tax Law Firm of the Year (2013). Chambers & Partners has ranked us as # 1 for Tax, TMT and Private Equity (2013). For the third consecutive year.

International Financial Law Review (a Euromoney publication) has recognized us as the Indian "Firm of the Year" (2012) for our Technology - Media - Telecom (TMT) practice. We have been named an Asian-Mena Counsel 'In-House Community Firm of the Year' in India for Life Sciences practice (2012) and also for International Arbitration (2011). We have received honorable mentions in Asian Mena Counsel Magazine for Alternative Investment Funds, Antitrust/Competition, Corporate and M&A, TMT and being Most Responsive Domestic Firm (2012).

We have been ranked as the best performing Indian law firm of the year by the RSG India Consulting in its client satisfaction report (2011). Chambers & Partners has ranked us # 1 for Tax, TMT and Real Estate – FDI (2011). We've received honorable mentions in Asian Mena Counsel Magazine for Alternative Investment Funds, International Arbitration, Real Estate and Taxation for the year 2010.

We have been adjudged the winner of the Indian Law Firm of the Year 2010 for TMT by IFLR. We have won the prestigious "Asian-Counsel's Socially Responsible Deals of the Year 2009" by Pacific Business Press.

In addition to being Asian-Counsel Firm of the Year 2009 for the practice areas of Private Equity and Taxation in India. Indian Business Law Journal listed our Tax, PE & VC and Technology-Media-Telecom (TMT) practices in the India Law Firm Awards 2009. Legal 500 (Asia-Pacific) has also ranked us #1 in these practices for 2009-2010. We have been ranked the highest for 'Quality' in the Financial Times – RSG Consulting ranking of Indian law firms in 2009. The Tax Directors Handbook, 2009 lauded us for our constant and innovative out-of-the-box ideas. Other past recognitions include being named the Indian Law Firm of the Year 2000 and Asian Law Firm of the Year (Pro Bono) 2001 by the International Financial Law Review, a Euromoney publication.

In an Asia survey by International Tax Review (September 2003), we were voted as a top-ranking law firm and recognized for our cross-border structuring work.

Our research oriented approach has also led to the team members being recognized and felicitated for thought leadership. NDAites have won the global competition for dissertations at the International Bar Association for 5 years. Nishith Desai, Founder of Nishith Desai Associates, has been voted 'External Counsel of the Year

2009' by Asian Counsel and Pacific Business Press and the 'Most in Demand Practitioners' by Chambers Asia 2009. He has also been ranked No. 28 in a global Top 50 "Gold List" by Tax Business, a UK-based journal for the international tax community. He is listed in the Lex Witness 'Hall of fame: Top 50' individuals who have helped shape the legal landscape of modern India. He is also the recipient of Prof. Yunus 'Social Business Pioneer of India' – 2010 award.

We believe strongly in constant knowledge expansion and have developed dynamic Knowledge Management ('KM') and Continuing Education ("CE") programs, conducted both in-house and for select invitees. KM and CE programs cover key events, global and national trends as they unfold and examine case studies, debate and analyze emerging legal, regulatory and tax issues, serving as an effective forum for cross pollination of ideas.

Our trust-based, non-hierarchical, democratically managed organization that leverages research and knowledge to deliver premium services, high value, and a unique employer proposition has now been developed into a global case study and published by John Wiley & Sons, USA in a feature titled 'Management by Trust in a Democratic Enterprise: A Law Firm Shapes Organizational Behavior to Create Competitive Advantage' in the September 2009 issue of Global Business and Organizational Excellence (GBOE).

**Please see the last page of this paper for the most recent research papers by our experts.**

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# 1. BITs: An Overview

Bilateral investment Treaties (BITs) are agreements between two Countries (States) for the reciprocal promotion and protection of investments in each other's territories by individuals and companies situated in either State. The following are the essential clauses covered under BITs:

- i. Applicability
- ii. Fair and Equitable Treatment and Full Protection & Security

- iii. National treatment and Most-favored-nation treatment,

- vi. Expropriation,

- v. Dispute settlement mechanisms, both between States and between an investor and a State.

BITs encourage foreign investors to invest in a State and there by contributing towards overall developments and advancements of the economy.

## 2. India and its Tryst with BITs

It was in mid 90s that the BITs were initiated by the Government of India. The pretext was to offer favourable conditions and treaty based protection to the foreign investors and investments. For example, the India-Singapore Comprehensive Economic Cooperation Agreement (CECA) provides for exemption on import duties for investment in infrastructure sector, which would eventually attract the investors from abroad to invest in the growing economy of India with enhanced securities against adverse changes, thus promoting investment inflow. Though it is difficult to quantify the benefits of BITs, it invariably results in increased investments inflows, encourage s transfer of technology and modern management skills.

A look at various BITs to which India is a party will make it clear that each BIT is quite different from the other in its own way although there are many common characters present. These common characters are in form of specific rights. The basic premise is that the government will not put the investors and their investments to risks which are either unreasonable or inappropriate.

One of the most noticeable features of the Indian BITs is that it does not give *'a right to make investments'* in India. All rights, under the BITs to which India is a party, can be exercised only after making investments in India. However, this issue can be debated considering Article 3.1 of Model BIT of India, which promises to provide favorable conditions to make investment in India. It is important to note that the Indian government retains the freedom to determine which sectors are open to foreign investments and under what terms and conditions can those investments be made. It is of utmost importance to note that the investments made in India must be established or acquired in accordance with the national laws of India.

### I. Applicability

With regard to applicability of the BITs, the general trend remains that the Indian BITs generally apply to existing and future investments pursuant to the date on which India entered into the BIT. Nevertheless, there remains exception to this rule. The BITs with few States like Egypt, Sweden, and Romania etc have a limited scope and their applicability is only to the investments which have

arisen after the treaty has come into force. The disputes that may have arisen prior to these BITs are excluded.

Indian BITs give a very broad definition to the terms "investment" and "investor". The foreign investor, in such circumstances, even if its home State is not having a BIT with India, can have the benefits by creating a Special Purpose Vehicle (SPV)/ Special Purpose Business (SPB) in a State , which has a BIT with India. However, there are few BITs which mandate that investor should be having substantive business operations where it has been incorporated for example the BITs with Netherland, Switzerland and Singapore.

### II. Fair & Equitable Treatment and Full Protection & Security

Almost all the Indian BITs contain the Fair and Equitable Treatment (FET) which again is a principle very strongly attached to the genesis of a BIT. The principle of FET creates minimum standards of treatment which has to be followed by the host state. A number of successful investment claims are based on breach of FET standard. In wide terms the FET principle mandates States to have a stable and predictable legal framework regulating investments which meets the reasonable expectations of the investors. The FET standard, though a common feature is an elastic concept which may vary in different treaties. The four basic "pillars" as has developed over the period are protection of legitimate expectations of investors, transparency and stability, non-denial of justice and prohibition of coercion and harassment.

Another principle near to the FET principle but different from it is the principle of Full Protection and Security (FPS). The understanding of the FPS is protection from physical violence, which might be against the assets of the investments. The violence may be by the host State or even by third parties, though the host State has only an obligation of due diligence and not binding obligations to prevent third party violence. In case of India , there are a number of BITs requiring the host State to provide protection and security. However, there are exceptions such as BITs with Egypt, Ghana, Sri Lanka, Australia etc which do not have an FPS clause. There are few BITs which require only "Protection and Security" which may be arguably

differentiated from “Full Protection and Security” as being a lesser degree of protection.

### III. National Treatment and Most favoured Nation Treatment

The principle of National Treatment which is quintessential is part of the all the Indian BITs but the Most Favored Nation (MFN) Treatment principal is not present under the investment chapter of CECA with Singapore and also Comprehensive Economic Partnership Agreement (CEPA) with Korea. While the principle of National Treatment ensures that a foreign investor is treated at par with the domestic investor and is not subject to any unfair treatment, a MFN clause enables the investor to claim any favorable right that is available to any other State having BIT with the host State. It is interesting to note a MFN clause offers both procedural and substantive protection to the investors. However, again both MFN and National Treatment clause are not absolute in nature and are subject to conditions and restrictions in some respects.

### IV. Expropriation

It is universally recognized the host States have limited conditions which give them right to expropriate investment of foreign investments. A legal expropriation should satisfy the following conditions: (1) It must have a public purpose, (2) It should be not be discriminatory or arbitrary, (3) It must be conducted in accordance with due process and (4) It must be accompanied by adequate compensation.

**Expropriation can be of 2 types:**

#### A. Direct Expropriation

It occurs where the host State formally takes title of the expropriated asset and

#### B. Indirect Expropriation

This happens where there is a substantial and lasting or longdrawn-out interference with the investment which divests the investor of host of incentives.

The Indian BIT is in lines with the international standards and is usually followed uniformly. The Indian Constitution also entails the principle in Article 300A which encompasses only to direct expropriation. Whether indirect expropriation is covered by Article 300 A remains a debatable issue.

### V. Investor-State Dispute Resolution

Probably, the most important factor that makes BIT very important in the eyes of investors is that under a BIT an investor can directly initiate arbitral proceeding against a State without approaching its own government. In Indian BITs, the investors have an option of approaching ICSID or initiating arbitration under the UNCITRAL rules. However, it is an important concern that India is not party to the ICSID convention. Though there is a possibility of having arbitration under the Additional Facility Rules of ICSID, it still remains different from a typical ICSID arbitration and a party will nevertheless have to enforce the award under the New York Convention.

### 3. The Journey so Far

India had an unpleasant experience with the Dabhol Project which led to a least 2 BIT claims by the project companies, as well as 7 BIT claims by the project lenders. All of these 9 claims against India have since been settled.<sup>1</sup> Post the dispute, India has been contemplating to amend its BITs so as to attenuate the protections accorded to foreign

investors under the BITs. Nothing has been evident so far on the papers. However, in light of increasing knowledge and publicity of BITs and increasing number of companies being interested to know more about it and use it in actuality a lot has to be seen in near future.

#### INDIAN BITs AT A GLANCE\*

- India signed its first BIT in 1994 with the United Kingdom.
- Since 1994, India has signed BITs with 75 States.
- Out of which 66 are already in force and 9 are yet to be entered into force.
- Negotiations with another 25 States are underway.
- Around 40 BITs are with developing and less developed States.
- Around 20 of the BITs enforced have been done in last five years.
- Also, India has concluded Comprehensive Economic Cooperation Agreements (CECAs), TYhis includes a chapter on investment with Korea and Singapore;

(\*source: - [www.unctad.org](http://www.unctad.org))

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1. source [http://www.unctad.org/en/docs/webiteit20052\\_en.pdf](http://www.unctad.org/en/docs/webiteit20052_en.pdf)



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## NDA Insights

TITLE	TYPE	DATE
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Reliance tunes into Network18!	M&A Lab	December 2014
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Jet Etihad Jet Gets a Co-Pilot	M&A Lab	May 2014
Apollo's Bumpy Ride in Pursuit of Cooper	M&A Lab	May 2014
Diageo-USL- 'King of Good Times; Hands over Crown Jewel to Diageo	M&A Lab	May 2014
Copyright Amendment Bill 2012 receives Indian Parliament's assent	IP Lab	September 2013
Public M&A's in India: Takeover Code Dissected	M&A Lab	August 2013
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Corporate Citizenry in the face of Corruption	Yes, Governance Matters!	September 2011
Funding Real Estate Projects - Exit Challenges	Realty Check	April 2011

## Research @ NDA

**Research is the DNA of NDA.** In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our "*Hotlines*". These *Hotlines* provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our *NDA Insights* dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with a much needed comparative base for rule making. Our *ThinkTank* discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports. Please feel free to contact us at [research@nishithdesai.com](mailto:research@nishithdesai.com)

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