

New model Bilateral Investment treaty (BIT)

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Source: *The Hindu*

Manifest pedagogy: Bilateral Investment Treaties strengthen investment protocols, encourage deeper integration of markets and also present growing confidence for enhancement of bilateral and multilateral relationships. BIT is important from the perspective of LPG reforms and foreign relations.

In news: India has inked an Investment Cooperation and Facilitation Treaty with Brazil.

Placing it in syllabus: India's bilateral investment treaty (explicitly mentioned)

Static dimensions: India's journey from 1993 & White goods industries case

Current dimensions: Model BIT & Arbitration hub

Content:

This is the first such pact after India adopted New Model BIT, 2016.

India's journey from 1993:

India's first BIT of 1993 was based on a model created by a developed country – where emphasis lied on protection of foreign investment, rather than internationally recognized regulatory powers of the state. India **signed its first BIT with the United Kingdom in 1994.**

The India-UK BIT served as the base template for India to negotiate further BITs. The **Indian model of BIT, 2003** contained close semblance with the India-UK BIT. **From 1994 to 2011, India had signed more than 80 BITs and ratified over 70.**

White goods industries case:

- **White Industries, an Australian mining company,** entered into a long-term mining contract with **Coal India Limited** in 1989.
- Disputes relating to quality, bonus and penalty payments arose between Coal India and White Industries, prompting the latter to commence **arbitration under the ICC Arbitration Rules.**
- In May 2002, the ICC tribunal awarded USD 4.08 million to White Industries.
- In September 2002, Coal India applied to the Calcutta High Court to set aside the ICC Award under the Indian Arbitration and Conciliation Act.
- Simultaneously, White Industries applied to the High Court of New Delhi to enforce the ICC Award in India.
- Both proceedings experienced significant delays.
- The enforcement proceedings were eventually stayed pending a decision in the set-aside proceedings.
- White Industries appealed to the Supreme Court while the High Court of New Delhi stayed the enforcement proceedings.
- The matter was pending before the Supreme Court for nine years until 2010.

- **White Industries finally invoked arbitration under the India- Australia BIT.**

- The **ICC Tribunal ultimately awarded White USD 4.08 million as compensation** as it found that India had

violated its obligation to provide to the investor 'effective means' of asserting claims and enforcing rights, a provision borrowed from the India-Korea BIT by way of a **most-favored nation (MFN)** clause in the India-Australia BIT.

After the White Industries case in 2011,

India's approach to investment treaties began to undergo a sea-change. The **government scrapped India's bilateral investment treaties with 58 countries** – all pacts had been based on the 1993 template. From the period **between 2011 and 2015, India signed only one BIT with the UAE.**

Model BIT:

The government brought a new Model BIT in 2016, which became effective from April 2017 onwards.

Features:

1. The Model has adopted an **'enterprise-based' definition of investment** under which investment is treated as the one made by an enterprise incorporated in the host state. Intellectual property assets are not considered.
2. It **dropped the Most Favoured Nation (MFN) status** which was previously included.
3. Actions of the state governments are included.
4. It links **"Fair and Equitable Treatment"** to international laws, aimed at countering a broad interpretation and risk misuse. Any potential violation listed in the provisions of denial of justice, breach of due process etc.. requires a violation of customary international law for a claim to be justified.
5. It provides that the **State cannot nationalise or expropriate** (nationalization of assets of foreign companies) an investment or take measures equivalent to expropriation, except "for reasons of public purpose". However any measure by a judicial body aiming to protect

public interest will be outside the purview of expropriation.

6. It **includes a new clause on non-discriminatory treatment for compensation of losses** in circumstances like armed conflict, natural disasters and in the state of national emergency.
7. It incorporates a **clause for transparency**, requiring the Parties to ensure that all the laws, regulations, procedures and administrative rulings regarding matters covered in the BIT are published.
8. It mandates foreign investors to voluntarily adopt internationally recognized standards of **corporate social responsibility(CSR)**.
9. It stipulates that the **aggrieved investor should use all local remedies as well as negotiations and consultations initiating arbitrations against the host State**.
10. It excludes matters relating to taxation.

Significance:

- The new Indian Model BIT text will provide appropriate protection to foreign investors in India and Indian investors in the foreign country.
- It helps in **maintaining a balance between the investor's rights and the Government obligations**.
- It boosts the confidence of investors by assuring a level playing field and non-discrimination in all matters.
- It provides for an **independent forum for dispute settlement by arbitration**.
- It helps **project India as a preferred foreign direct investment (FDI) destination** as well as protect outbound Indian FDI.

Arbitration hub:

- The New Model BIT, 2016 provides for an elaborate dispute resolution regime by arbitration following

exhaustion of local remedies.

- The **exhaustion of local remedies is a precondition 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,** the disputing parties may initiate arbitration by serving a notice of dispute.
- The initiation of arbitration is subject to strict **additional conditions –**

1) the elapse of six years since the investor first became aware of a loss caused to his/her investment,

2) the elapse of a maximum of twelve months since conclusion of any domestic proceedings,

3) a notice of arbitration 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 International Centre for Settlement of Investment Disputes (ICSID) Convention, (ii) the Additional Facility Rules of ICSID or (iii) the UNCITRAL Arbitration Rules.
- There is a summary procedure for the dismissal of frivolous claims.
- It gives an option for **contracting states to agree to an appellate body for review of investment tribunal awards.**