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India's Proposed Revision of the Model BIT

Mains: *GS II – International Relations*

Why in News?

India is reportedly revising its 2015 Model Bilateral Investment Treaty (BIT), with the revised version expected to be placed before the Union Cabinet.

What is a Bilateral Investment Treaty?

- **Definition** – A bilateral investment treaty (BIT) is an international agreement between two countries that establishes the terms, conditions, and rules for private foreign investments made by nationals and companies of one country in the territory of the other
- **Key Protections and Guarantees**
    - **Fair and Equitable Treatment (FET) –** Requires the host government to treat foreign investors in a stable, predictable, and non-arbitrary manner.
    - **Protection from Expropriation –** Prevents the host state from seizing or nationalizing foreign property unless it serves a public purpose, follows due process, and includes prompt, adequate compensation.
    - **Free Transfer of Funds –** Guarantees that investors can move profits, dividends, and capital freely in and out of the host country.
    - **National and Most-Favored-Nation (MFN) Treatment –** Ensures foreign investors are treated no less favorably than domestic investors or investors from any third country.

What are the Recent Bilateral Investment Treaties?

- **Israel –** Signed in September 2025, making Israel the first OECD country to sign under India's model framework.
- **Uzbekistan –** Signed in September 2024 to boost economic cooperation and investor confidence.
- **United Arab Emirates (UAE) –** Signed in February 2014/2024 to strengthen trade and financial flows.
- **Brazil –** Signed an Investment Cooperation and Facilitation Treaty in January 2020.
- **Kyrgyzstan –** Signed in June 2019, replacing an older agreement
- The Indian Model Bilateral Investment Treaty (BIT) is the template India uses to negotiate foreign investment agreements, designed to balance foreign investor protection with the government's sovereign right to regulate.
- India adopted its current core framework in Model Bilateral Investment Treaty,

following high-profile international arbitration losses and disputes (such as with Vodafone and Cairn Energy).

What are the Features of the Indian Model BIT?

- **Enterprise-Based Definition –** Limits investment definitions mainly to physical enterprises rather than broad asset or portfolio definitions.
- **Exhaustion of Local Remedies –** Requires foreign investors to first pursue domestic legal remedies in Indian courts before turning to international arbitration.
- While the 2015 model required 5 years, recent tailored treaties (like with the UAE and Israel) have shortened or adjusted this timeframe.
- **Exclusion of Tax Matters –** Explicitly keeps taxation policies outside the scope of investor-state dispute settlements.
- **No MFN Clause –** Omits the Most-Favoured-Nation (MFN) clause to prevent "treaty shopping," where investors demand terms from India's other, more generous international agreements.
- **National Treatment –** Guarantees foreign investors treatment no less favorable than domestic entities, subject to exceptions
- The main issue with India's Model Bilateral Investment Treaty (BIT) is that it tilts heavily toward protecting state regulatory powers at the expense of foreign investor confidence, making it difficult to attract foreign direct investment.
- India adopted its strict Model BIT in 2015/2016 after facing multiple high-profile international arbitration claims (such as from Vodafone and White Industries).
- While this model successfully safeguarded sovereign policy space, it created several major hurdles that India is currently working to revise.

What are the Key Issues with India's Model BIT?

- **Exhaustion of Local Remedies –** Foreign investors must exhaust domestic legal remedies in Indian courts for up to five years (though proposals aim to reduce this to two years) before they can resort to international arbitration.
- This causes severe delays and high legal costs.
- **Exclusion of Key Protections –** The model drops the **Most-Favoured Nation (MFN)** clause and restricts **Fair and Equitable Treatment (FET)**. Investors view this lack of baseline guarantees as high risk
- **Narrow Definition of Investment –** Portfolio investments, government-issued debt securities, and certain intangible assets (like brand value or goodwill) are excluded from treaty protections.
- **Exclusion of Taxation Matters –** Tax disputes are kept entirely outside the scope of investment arbitration, which stems from retroactive tax disputes of the past. While good for state sovereignty, it creates unpredictability for foreign corporate tax planning.
- **Non-Membership in ICSID –** India is not a member of the International Centre for Settlement of Investment Disputes (ICSID), which complicates the enforcement of international arbitral awards.
- **Lack of Traction –** Because the terms are heavily skewed against foreign protection, the 2015 model struggled to gain traction or sign new agreements with major global

economic partners.

Why the 2015 Model BIT Needs Reform?

- **Claims by Investors** – The 2015 model was introduced after foreign investors brought several treaty claims against India.
- India subsequently terminated many existing BITs and used the new model as the basis for negotiating replacements.
- However, India has concluded only a few BITs based on the 2015 model.
- Its strong emphasis on **the state's right to regulate**, at the expense of investment protection, has made it difficult to attract agreement from capital-exporting countries. Regulatory uncertainty, weak governance mechanisms and delays in the judicial system further increase concerns for foreign investors.
- **Need to Balance Investment Protection and State Regulation –** The proposed revision should seek a better balance between two competing goals:
    - **Protecting foreign investments** through stronger substantive and procedural safeguards.
    - **Preserving the state's regulatory space** to pursue legitimate public policies.
    - Making it easier for investors to access **international arbitration** for treaty claims.
    - Strengthening investment protections and introducing greater **investment facilitation** measures.
- **India's Earlier Consultation Process –** India itself followed a consultative approach in **2015**, when it circulated its draft Model BIT for public comments.
- The **Law Commission of India** subsequently examined the draft and made recommendations in its 260th Report.
- Although India adopted a revised model in December 2015, several of the Law Commission's recommendations were not incorporated.

How India make the revision process more participatory?

- **Create an independent expert group** comprising international lawyers, economists, academics and researchers to advise the government.
- **Consult stakeholders**, including industry associations, arbitrators, law firms and civil society organisations.
- **Publish the draft Model BIT** and invite comments from the public.
- **Place the draft before Parliament**, allowing Parliament and relevant departmental committees to debate and scrutinise it.

What lies ahead?

- The revision of India's Model BIT is an opportunity not only to rebalance investment protection and regulatory autonomy, but also to improve the legitimacy of the treaty-making process.
- The article stresses that consultation must be genuine rather than a box-ticking exercise, with the government seriously engaging even with dissenting opinions.

Reference

The Hindu| BIT