P.L.RAJ IAS & IPS ACADEMY

Building Bureaucrats Since 2006

1. India's New Bilateral Investment Treaty Model - Economy

The Government of India is revising its 2016 Model Bilateral Investment Treaty (BIT) to make it more investor-friendly while safeguarding India's regulatory sovereignty and legal system.

1. This revision aims to attract increased foreign direct investment while preventing abuse of investor-state dispute settlement mechanisms that have historically challenged government policies.
2. The proposed changes represent a calibrated approach balancing investor confidence with national policy autonomy.

1.Understanding Bilateral Investment Treaties

Definition and Purpose

1. A Bilateral Investment Treaty (BIT) is an agreement between two countries that promotes and protects investments made by investors of one country in the other.
2. BITs provide legal safeguards including protection against expropriation, fair treatment, and dispute resolution mechanisms ensuring investor security.
3. BITs aim to improve investor confidence and facilitate foreign direct investment (FDI) flow between partner nations.

Core Features of BITs

1. National Treatment ensures foreign investors receive treatment no less favourable than domestic investors preventing discriminatory practices.
2. Protection Against Expropriation prevents governments from nationalizing or expropriating investments without due process and adequate compensation protecting investor assets.
3. Fair and Equitable Treatment (FET) protects investors from arbitrary or discriminatory actions by the host state ensuring predictable governance.
4. Free Transfer of Funds allows investors to transfer profits, dividends, and capital across borders subject to applicable regulations enabling capital mobility.
5. Dispute Settlement Mechanism provides procedures for resolving disputes between investors and host states or between states enabling recourse for grievances.

2.India's BIT Framework Evolution

Historical Development

1. India signed its first Model BIT in 1993, which was amended in 2003 reflecting early engagement with investment treaties.
2. Following several international arbitration disputes including high-profile cases with Vodafone and Cairn Energy, India adopted a new Model BIT in December 2015, which became operational in 2016.
3. The 2016 model represented a significant shift toward protecting India's regulatory sovereignty reflecting lessons from past disputes.

Recent BIT Agreements

1. India has signed BITs or investment agreements with countries including Belarus, Kyrgyz Republic, United Arab Emirates, Uzbekistan, and Brazil through an Investment Cooperation and Facilitation Treaty.
2. In Budget 2025-26, the Government announced a review of the BIT framework to make it more investor-friendly while safeguarding national interests.

3.Key Features of the Proposed New BIT Model

Two-Year Local Remedies Requirement

1. Foreign investors will be required to pursue remedies within India's domestic legal system for at least two years before initiating international arbitration.
2. For certain partner countries, a shorter one-year cooling-off period may also be considered during negotiations allowing more flexibility.
3. This requirement addresses investor concerns about costs and delays while ensuring domestic institutions handle disputes first.

Exclusion of Most-Favoured Nation (MFN) Clause

1. The revised model is likely to exclude the Most-Favoured Nation (MFN) clause that allows investors to claim more favourable treatment available under India's treaties with other countries.
2. MFN clauses create treaty-shopping opportunities where investors exploit most favourable terms negotiated with other nations.
3. Removing the clause will reduce legal uncertainties and prevent indirect constraints on India's policy flexibility.

Taxation Matters Excluded

1. Tax-related disputes will remain outside the scope of investment treaties reflecting India's sovereignty over tax policy.
2. This approach is influenced by past arbitration cases involving companies like Vodafone Group and Cairn Energy that challenged India's tax assessments.
3. The government maintains that taxation is a sovereign policy matter and should not be subject to investor-state arbitration.

4.Balancing Investor and Government Concerns

Investor Concerns

1. Mandatory exhaustion of local remedies before international arbitration increases costs and delays with lengthy judicial processes potentially discouraging foreign investors.
2. Absence of Most-Favoured Nation (MFN) clauses may reduce investor protections available under other treaties creating competitive disadvantage.

India's Concerns

1. Excessive investor rights constrain legitimate public policy measures needed for sustainable development and welfare goals.
2. Investor-State Dispute Settlement (ISDS) mechanisms challenge sovereign regulatory actions threatening government policy autonomy.
3. International arbitration awards impose significant financial liabilities on governments threatening fiscal stability.

Global Trends in Investment Dispute Settlement

1. Several countries are reconsidering traditional Investor-State Dispute Settlement mechanisms recognizing systemic imbalances.
2. The BIT between Australia and United Arab Emirates adopts State-to-State Dispute Settlement (SSDS) instead of ISDS ensuring governments negotiate directly rather than facing investor claims.
3. This trend reflects growing recognition that traditional ISDS mechanisms disproportionately favor investors over state interests.

5.Way Forward

1. **Adopt Balanced Framework** - Develop BIT model protecting investors while preserving India's regulatory sovereignty and policy space for public interest goals.
2. **Strengthen Commercial Courts** - Enhance quality and speed of India's commercial courts and contract enforcement systems building investor confidence in domestic institutions.
3. **Ensure Regulatory Stability** - Provide transparent and consistent policymaking frameworks enabling investors to plan long-term operations with regulatory certainty.
4. **Promote Alternative Dispute Resolution** - Expand mediation, conciliation, and state-to-state dispute settlement mechanisms as cost-effective alternatives to arbitration.

Source - https -//indianexpress.com/article/business/new-bilateral-investment-model-2-year-local-remedy-window-no-most-favoured-nation-clause-10730442/