Spotlight On India’s New Investment Treaty Initiative

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The government of India has published the final text of its new model bilateral investment treaty. This is a significant development, as India prepares to embark on a new phase in its investment treaty regime. In the new model treaty, India takes a stand on a number of key treaty interpretation issues that have plagued investor-state arbitrations. The model treaty seeks a new balance between foreign investors’ rights and the host states’ obligations, with attention to preserving the states’ regulatory powers.

The government released the draft text of the model treaty in March 2015 and opened it up for comments. The draft was also subject to detailed study and analysis by the Law Commission of India and a subcommittee of experts. The Law Commission of India provided extensive analysis and recommended specific amendments for the government’s consideration.[1] As a result, the draft underwent a number of material changes before the government released the final version on Dec. 28, 2015. The New Model BIT replaces India’s 2003 model BIT. It will provide a roadmap for conducting negotiations of India’s future investment treaties and investment chapters in free trade agreements (“FTAs”). This will be important in India’s negotiations with the United States, Canada or the European Union. The New Model BIT may also serve as the basis for any renegotiation of India’s current BITs and FTAs, which is also significant in light of the number of such treaties. India concluded its first BIT with Germany in 1994, and is a party to more than 80 BITs and FTAs in force today.

Starting in 2010, India began to face a number of investor-state arbitrations initiated against it under various investment treaties. The first reported investment treaty award against India was rendered in 2011 in White Industries Australia Limited v. Republic of India. The arbitration tribunal found that, through undue delays in its judicial system’s ability to deal with the investors’ claims, India had breached its obligation under the India-Australia BIT to provide “effective means of asserting claims and enforcing rights” — the obligation that the claimant investor borrowed from the India-Kuwait BIT through the India-Australia BIT’s most favored nation clause.[2] In the last few years since the White Industries
award, more than a dozen investment treaty arbitration proceedings have been launched against India.[3] In light of these developments, not surprisingly, the government of India refocused attention on its treaty regime, and embarked on redrafting its old model BIT.[4]

The New Model BIT

The New Model BIT clarifies the scope and the meaning of certain treaty provisions that would otherwise be subject to tribunal interpretation, as has been the case in many investor-state arbitrations. Further, the New Model BIT either excludes, or streamlines and limits, the application of certain treaty provisions, with a view to preserving state regulatory authority. The New Model BIT also contains provisions on certain matters that ordinarily are not covered in investment treaties, including provisions on transparency and investors’ obligations. One notable innovation is the possibility for the contracting states to agree to an appellate body for review of tribunal awards.

Some of the important provisions in India’s New Model BIT include the following:

Protected Investments and Investors

1. The New Model BIT specifies that to qualify as a protected “investment” under the BIT, an enterprise must have certain “characteristics of an investment,” such as “the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development” of the host state. Art. 1.4. Thus, the treaty explicitly incorporates the Salini test for evaluating investments, which requirements have been articulated and imposed by a number of tribunals. The New Model BIT also lists the types of assets that are specifically excluded from the definition of investment. These include: portfolio investments, intangible rights, interest in debt securities issued by a government, and judgments by judicial, regulatory, administrative or arbitral bodies. Also excluded from the coverage of the treaty are pre-investment activities. Id.[5]

2. Protected “investors” are defined as those who have “substantial business activities” in the home state where they are incorporated. Art. 1.5. The substantial business activity requirement is not completely new — it is present in about 12 of India’s current BITs (but not in India’s 2003 Model BIT).[6] The definition aims to exclude those investors who establish a minimal presence in the home state, especially for the purpose of treaty shopping.

Substantive Protections and Guarantees for Foreign Investors and Their Investments

3. The New Model BIT offers the full protection and security (“FPS”) guarantee, which is included (in various formulations) in many, but not all, of India’s current treaties.[7] International tribunals have often interpreted the FPS provisions broadly to include the host states’ obligation to guarantee both the physical and legal security of investors/investments. The New Model BIT, however, clarifies the scope of this guarantee, and expressly limits it to the host state’s obligation to protect only the physical security of investors and investments.

4. The New Model BIT does not include the fair and equitable treatment (“FET”) standard, which is commonly provided in investment treaties, and is the most frequently invoked treaty provision. Most of India’s current treaties do provide that the state shall accord FET in accordance with its laws.[8] Instead of FET, the New Model BIT protects investors from specific measures that would be found to constitute a violation of customary international law — denial of justice, breach of due process, discrimination on manifestly unjust grounds, or abusive treatment such as coercion, duress and harassment. Art. 3.1. The
New Model BIT also includes a new provision guaranteeing nondiscriminatory treatment with respect to compensation for losses suffered by investments due to war or another national emergency or a natural disaster. Art. 7.

5. Another provision absent from the New Model BIT is a most favored nation (“MFN”) clause. This is a significant change, as pretty much all of India’s current BITs include such a provision. A typical MFN clause guarantees treatment no less favorable than that afforded to investors from third countries under the host state’s other investment treaties. Investors have invoked MFN clauses to borrow more favorable substantive or procedural provisions from the host states’ other treaties. Use of MFN clauses in this fashion has sparked considerable controversy over the scope and intent of MFN clauses. Therefore, exclusion (or restriction) of the MFN clause can be viewed as a necessary step by the states wishing to ensure that the changes in the new BITs are not undermined by investors who borrow and invoke protections and guarantees from other (older) BITs.

**Transparency**

6. The New Model BIT includes a new clause on transparency. See Art. 10. Pursuant to the clause, the signatory states undertake to ensure that their laws, regulations, procedures and administrative rulings of general application regarding any matter covered in the investment treaty are promptly published or made available to the other state and interested persons. This undertaking does not apply to disclosure of confidential information that would negatively affect public policy and other legitimate interests of the state. Any breach of the transparency provisions, however, is not subject to an investor-state dispute resolution mechanism.

7. In addition, the New Model BIT provides that, subject to the need to protect confidential information or the safety of participants, the arbitration hearings and oral arguments shall be open to the public. Further, the respondent host state shall make publicly available the tribunals’ decisions and awards, as well as notices of dispute, notices of arbitration, and the parties’ written submissions. See Art. 22.

**Investors’ Obligations**

8. The New Model BIT includes provisions specifying investors’ obligations, but they are less comprehensive than the ones that were contemplated in the initial draft. The New Model BIT provides that the investors shall comply with the host state’s laws, regulations, administrative guidelines and policies concerning establishment, acquisition, management, operation and disposition of investments. See Art. 11. Further, an anti-corruption requirement is expressly stated — the investors shall not offer or provide pecuniary benefit to any public official as an inducement to obtain any advantage. Art. 11(ii).

9. The New Model BIT also includes a provision on corporate social responsibility. See Art. 12. It provides that the investors “shall endeavour” to voluntarily incorporate internationally recognized standards of corporate social responsibility into their practices and internal policies. The treaty specifies that these policies may address issues such as labor, the environment, human rights, community relations and anti-corruption. Id.

**State Measures Excluded from Treaty Coverage**

10. The New Model BIT excludes certain measures from the coverage of the treaty, although the list of exclusions is not as long as was provided in the earlier draft of the new model treaty. See Arts. 2.4, 32, 33. Notably, the treaty does not apply to any measures by local governments, noncommercial services
provided by the state in the exercise of governmental authority, and any “law or measure regarding taxation, including measures taken to enforce taxation obligations.” Art. 2.4.

11. The New Model BIT provision on general exceptions also aims to protect the states’ rights to adopt or enforce measures of general applicability that are nondiscriminatory and are “necessary” under the circumstances, such as to protect human, animal or plant life or health, public morals or public order. For example, the list of general exclusions includes measures that are necessary to “ensure compliance with law and regulations that are not inconsistent with the provisions of” the treaty. Art. 32.1. The treaty also clarifies the definition of “necessary,” and states that in determining whether a measure is necessary, the tribunal should consider “whether there were no less restrictive alternative measures reasonably available” to the state. Art. 32, fn. 6.

12. The New Model BIT also provides that investor-state dispute resolution under the treaty does not apply to disputes arising solely from an alleged breach of a contract between the investor and the host state. Art. 13.3.

**Pre-Arbitration Requirements and the Exhaustion of Local Remedies**

13. Pre-arbitration steps in bilateral investment treaties have been hotly contested in a number of investor-state arbitrations. Are they meant to be mandatory or optional? In what circumstances can the investor be excused from strictly complying with such steps? Are the requirements preconditions to consent and thus a jurisdictional hurdle, or do they only raise admissibility issues? The New Model BIT sets forth detailed pre-arbitration requirements and attempts to clarify that the pre-arbitration steps must be followed before an investor may initiate investor-state arbitration. See Art. 15.

14. First, an investor must exhaust local remedies. The action for local remedies must be initiated within one year from the date the investor first learned or should have learned of the host state’s measures in question and the resulting harm. However, the exhaustion requirement may be avoided if the investor demonstrates that there are no available domestic legal remedies capable of reasonably providing relief for the investor’s claims. Second, if local action does not result in a satisfactory result for the investor after five years from the date the investor first learned of the measures in question, the investor must send a notice of dispute to the host state. Third, for a period of six months after the notice of dispute has been sent, the parties shall use their best efforts to amicably settle the dispute. Fourth, if the parties cannot settle the dispute within six months, the investor may then send a notice of arbitration to the host state. Fifth, the investor may initiate arbitration 90 days after the submission of the notice of arbitration.

15. In addition, the New Model BIT specifies the statute of limitations for investors’ treaty claims. This is a departure from current practice because statute of limitations periods are seldom included in investment treaties and only a few of India’s current BITs reference such time limits.[10] The New Model BIT states that a claim has to be brought within six years after the investor becomes aware of the measures in dispute. Art. 15.5(i). Considering that at least a nine-month cooling off period is built in after the five-year time period for exhaustion of local remedies, the investors have to act promptly and cannot sit on their claims. On the other hand, the statute of limitations provision may avoid potential uncertainties and disputes over applicable statutes of limitations.[11]

16. The draft model treaty provided specifically for the submission of a host state’s counterclaims. That provision on counterclaims is absent from the final version.
Arbitration Venues — ICSID, Appellate Body

17. The New Model BIT provides that an aggrieved investor may initiate arbitration: (i) at the ICSID Centre, (ii) at the ICSID Additional Facility, or (iii) in an ad hoc arbitration under the UNCITRAL Arbitration Rules. Art. 16. Inclusion of the ICSID Centre as an option is not new (although it was not included in the draft model BIT): almost all of India’s current BITs provide a right to ICSID arbitration.[12] India is not yet a party to the ICSID Convention, but the door is left open for ICSID jurisdiction when India becomes a contracting state to the ICSID Convention.

18. The New Model BIT also opens the door for the contracting states to agree to the establishment of an appellate body that would review arbitration awards rendered under the treaty. See Art. 29. This is a very important addition - it is in line with the EU Commission’s proposal for a standing multilateral court for investment disputes, which is an aspect of the ongoing debate around investor-state dispute resolution in the Transatlantic Trade and Investment Partnership.

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[5] The Model provides a non-exhaustive list of the types of assets that may constitute an investment, including shares, stocks, licenses, permits, rights conferred by long-term contracts, and “any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value,” etc. Art. 1.4.


[7] Id. at ¶7.
[8] Id. at ¶ 4.

[9] Id. at ¶ 6.

[10] Id. at ¶ 10.

[11] In this regard, the New Model BIT spells out when a claim is considered “submitted.” Art. 16.3. For example, with respect to an arbitration before an ICSID tribunal, the claim is submitted when the request for arbitration is received by the Secretary General of ICSID. Art. 16.3(a). This is contrary to the ICSID Institution Rules, which provides that the arbitration is deemed “instituted” when the request for arbitration is registered by the Secretary General, which can take a month or longer and potentially raise disputes over the timeliness of the claims.


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