

India Revamps Its Bilateral Investment Treaty Model to Balance FDI and Sovereignty

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Bilateral Investment Treaty Model Latest News

- India is remodelling its **Bilateral Investment Treaties (BITs)** framework around **three key principles**: a minimum two-year local remedy window before international arbitration, no Most Favoured Nation (MFN) clause, and exclusion of tax-related provisions.
- The Union Budget 2025-26 had announced a revamp of the existing 2016 BIT model to make it more investor-friendly.
- The new model is still being finalised, with the government considering tailoring terms country-by-country.

What Is a BIT and Why Does It Matter

- A Bilateral Investment Treaty (BIT) is an agreement between two countries to promote and protect investments made by investors of each country in the other's territory.

- It gives foreign investors certain guarantees — against arbitrary treatment, expropriation without compensation, and denial of justice.
- When disputes arise, BITs typically allow investors to take the host country to international arbitration.
- BITs are crucial for attracting Foreign Direct Investment (FDI). They signal to investors that the host country offers a stable, rules-based environment for investment.

India's BIT History: From 1993 to 2016

- India signed BITs with 83 countries based on its 1993 model (amended in 2003). Of these, 74 were ratified.
- The **1993 model** allowed foreign investors to go directly to international arbitration without exhausting domestic remedies first.
- A turning point came when global companies like **Vodafone and Cairn Energy filed international arbitration** cases against India in tax disputes — and won.
- These cases exposed India to significant financial liability and raised concerns about **regulatory sovereignty**. India responded by overhauling its BIT framework.
- The **2016 BIT model** introduced a major change: foreign investors must now exhaust all domestic remedies before initiating international arbitration.
- Of the 74 ratified BITs, India issued termination notices to 68 countries and asked them to renegotiate on the basis of the 2016 model.

The Three Pillars of the New Model

- **Two-Year Local Remedy Window**
 - The most debated feature of the 2016 model was the requirement to exhaust local remedies for five years before accessing international arbitration. Critics called this excessive and investor-unfriendly.
 - The new model proposes **reducing this to a minimum of two years**. For some countries, even a one-year cooling window is being considered during ongoing negotiations. The India-UAE BIT had already reduced this to three years.
 - The government's rationale is clear: India must protect its parliamentary sovereignty and judicial authority.
 - International arbitration — where India has limited representation and faces discretionary decisions — should be a last resort, not the first recourse.
- **No Most Favoured Nation (MFN) Clause**
 - The **MFN clause** in investment treaties requires a country to extend to the treaty partner whatever favourable treatment it gives to any third country.
 - If India signs a more liberal BIT with Country B, Country A can use the MFN clause to claim the same benefits.
 - Removing MFN gives India flexibility to negotiate different terms with different countries based on the nature of bilateral engagement — without being locked into automatic extension of better terms across all treaties.
- **Taxation Kept Outside BITs**
 - Tax disputes — like the Vodafone and Cairn cases — triggered India's BIT crisis in the first place.

- The new model explicitly excludes tax-related provisions from BITs, insulating domestic tax policy from investor-state arbitration.
- Finance Minister Nirmala Sitharaman reinforced this in February 2025, stating that BITs should be negotiated separately from Free Trade Agreements, by specialists with expertise in taxation and policy.

The Ongoing Debate

• Critics: The Local Remedy Window Is Still Too Long

- The experts argued that the “most damaging provision” in India’s BIT was the five-year local remedy requirement.
- Even the proposed two-year window, he argued, is far above global norms.
- They cited Indonesia’s model — which scrapped its old BITs in 2014 and restarted with a 12-month cooling period, a three-judge panel, and a presiding judge agreed upon by both parties who cannot be a national of either country.

• Government’s Defence

- Chief Economic Adviser V Anantha Nageswaran responded that academic research shows weak or no relationship between individual BIT signings and FDI inflows.
- What matters is the cumulative stock of treaties — which signals an overall regime of investor protection.
- He acknowledged that the investment climate needs continuous improvement and that the BIT revision is still incomplete.

• Global Trend: Moving Away from ISDS

- Many countries are moving away from Investor-State Dispute Settlement (ISDS) — the traditional model where investors can directly sue host governments in international tribunals.
- Australia and the UAE, for example, have shifted to State-to-State Dispute Settlement (SSDS) in their bilateral investment treaty, where disputes are resolved between governments rather than between investors and states.

Where Things Stand

- Since the 2016 model, India has signed new BITs with Belarus, Kyrgyz Republic, Brazil (as an Investment Cooperation and Facilitation Treaty), UAE, and Uzbekistan.
- A Bilateral Investment Agreement has also been signed with Taiwan (through the India Taipei Association).
- The new model being developed is expected to be country-specific and flexible — with terms calibrated to the nature of each bilateral relationship — rather than a single rigid template applied universally.

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