

India's Model Bilateral Investment Treaty

October 8, 2024 • vajiramandravi.com



What's in today's article?

- Why in the News?
- About Bilateral Investment Treaty
- India's Model Bilateral Investment Treaty (BIT)
- Benefits of Model BIT
- Challenges of Model BIT
- News Summary

Why in the News?

- India has eased certain conditions for UAE in the bilateral investment treaty.
- The India-UAE Bilateral Investment Treaty came into force on August 31 this year.

About Bilateral Investment Treaty

- A Bilateral Investment Treaty (BIT) is an agreement between two countries that establishes the terms and conditions for private investments by nationals and companies of one country in the other country.

- BITs are aimed at promoting and protecting investments, ensuring a stable legal environment for investors from both countries.

India's Model Bilateral Investment Treaty (BIT)

- India's Model Bilateral Investment Treaty (BIT), introduced in 2016, is a framework designed to guide India's negotiations of investment treaties with other countries.
- The objective of this Model BIT is **to strike a balance between investor protection and sovereign rights of the host state to regulate in public interest**.
- The introduction of the Model BIT came after several disputes arose under India's earlier BITs, prompting the country to revise its investment treaty policy to safeguard both investor interests and India's regulatory autonomy.
- **Key Features:**
 - **Protection of Investor Rights:**
 - The Model BIT ensures **fair and equitable treatment (FET)** of foreign investors but limits its scope.
 - Unlike traditional BITs, where FET is broadly interpreted, the Indian Model BIT provides a narrow definition, making it harder for investors to claim arbitrary treatment.
 - **National Treatment and Most-Favoured-Nation (MFN) Clauses:**
 - **National Treatment** guarantees foreign investors the same treatment as domestic investors.
 - However, the **MFN clause** has been excluded from India's Model BIT to prevent foreign investors from using provisions from other treaties to gain favourable treatment.
 - **Non-Expropriation:**
 - The Model BIT assures that **expropriation** (when the state takes private property for public use) will be carried out only for a public purpose and with due process.
 - It ensures that investors will be compensated fairly for expropriation, but it provides strong provisions to protect the state's right to regulate for public interest, such as health, environment, and social welfare.
 - **Right to Regulate:**
 - One of the most notable changes in India's Model BIT is the explicit **right to regulate** in areas like public health, environmental protection, and safety.
 - The Model BIT emphasizes that state actions taken to protect public interest should not be considered a breach of the treaty.
 - **Investor Obligations:**
 - India's Model BIT introduces the concept of **investor obligations**, which means that foreign investors must comply with the host country's laws and regulations, including environmental and social standards.
- **Exclusions in India's Model BIT:**
 - **No Protection for Tax-Related Issues:**
 - One of the significant exclusions is the lack of protection for **taxation matters**.
 - India's Model BIT explicitly states that taxation measures will not be subject to ISDS.
 - **No Most-Favoured-Nation Clause:**

- The **MFN clause** is absent in the Model BIT to avoid treaty-shopping by foreign investors (using favourable clauses from another treaty to their advantage).

Benefits of Model BIT

- **Balanced Approach:**
 - It strikes a balance between **investor protection** and the **state's right to regulate** in public interest, ensuring that India can pursue policy objectives without fear of excessive litigation.
- **Investor Obligations:**
 - The inclusion of investor obligations, such as compliance with local laws and regulations, ensures accountability and promotes responsible investment.
- **Limiting Arbitrary Claims:**
 - By narrowing the scope of **Fair and Equitable Treatment** and removing the **Most-Favoured-Nation** clause, the Model BIT reduces the likelihood of investors exploiting treaty provisions for arbitration.
- **Local Remedies Requirement:**
 - Requiring investors to exhaust local remedies before initiating **Investor-State Dispute Settlement (ISDS)** promotes the use of domestic legal systems, easing the burden of international arbitration.

Challenges of Model BIT

- **Investor Reluctance:**
 - Stricter conditions, such as the **local remedies clause** and limited ISDS scope, may deter foreign investors from investing in India, fearing lengthy legal processes or inadequate protection.
- **Absence of MFN Clause:**
 - The exclusion of the **MFN clause** could put Indian BITs at a disadvantage compared to treaties of other countries, reducing the attractiveness of India as an investment destination.
- **Complex Dispute Resolution:**
 - The requirement to resolve disputes through domestic courts first might lead to **delays** in settling disputes, making investors wary of India's dispute resolution framework.
- **Exclusion of Taxation Matters:**
 - By excluding **tax-related disputes** from arbitration, the Model BIT leaves investors vulnerable to unexpected tax policy changes without recourse to international arbitration.

News Summary

- The **India-UAE Bilateral Investment Treaty (BIT)**, which came into effect on **August 31, 2024**, reflects changes aimed at making the treaty more **investor-friendly**.
- According to the **Global Trade Research Initiative (GTRI)**, two key changes stand out:
 - **Reduction in Local Remedies Period:**
 - The period that investors must attempt to resolve disputes through India's legal system has been reduced from five years to three years.

- This change provides investors with quicker access to **Investor-State Dispute Settlement** mechanisms.
 - While it attracts investors by speeding up dispute resolution, it also **weakens India's ability** to handle disputes domestically, increasing the chances of costly international arbitration.
 - **Inclusion of Portfolio Investments:**
 - Unlike India's **Model BIT**, which excludes **portfolio investments** (such as stocks and bonds), the India-UAE BIT includes them as protected investments.
 - This broadens the treaty's scope and increases India's exposure to disputes over financial instruments, moving away from the Model BIT's focus on long-term, direct investments.
 - Overall, the treaty signals a shift towards a more open investment environment, but at the cost of some **regulatory sovereignty**.
 - While it may encourage more investment from the UAE, it also raises the risk of higher arbitration claims.
 - The **UAE is currently the seventh-largest investor in India**, with about **\$19 billion** in **Foreign Direct Investment (FDI)** from April 2000 to June 2024.
-

Q1. What is the difference between Tariff and Tax?

Tariffs are direct taxes levied on products coming from another country. On the other hand, duties are indirect taxes consumers of imported products have to pay. Tariffs and duties defend domestic industries by raising the cost of imports.

Q2. What is the difference between Free Trade Agreement & Preferential Trade Agreement?

The key difference between an FTA and a PTA is that while in a PTA there is a positive list of products on which duty is to be reduced; in an FTA there is a negative list on which duty is not reduced or eliminated.

Source: India eases certain conditions for UAE in bilateral investment treaty: GTRI

Source: <https://vajiramandravi.com/current-affairs/indias-model-bilateral-investment-treaty/>

© Vajiram & Ravi. For personal use only.