
STATEMENT

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Background

1. Pursuant to Economic Reforms Program in 1991, essentially to attract FDI into India, the Government of India initiated the exercise to negotiate and enter into BITs, also aimed to create a stable legal regime for espousal of claims of foreign investors as per international law. India signed BITs with 83 countries, out of which 73 had been ratified. These reciprocal agreements had been negotiated on the basis of the Model Text adopted in 1993, and as amended in 2003. The 1993 Model BIT contained provisions which were susceptible to broad and ambiguous interpretations by arbitral tribunals regarding provisions of existing Indian BITs that do not adequately take into account the socio-economic conditions found in India and the broad objectives of government policy. As a result, the Government began receiving a number of dispute notices under these treaties since 2009.
2. The aforesaid developments led to the exercise of understanding and identifying the legal and policy challenges emanating from existing BITs. As part of this exercise, the Government completed the review of the earlier Model BIT and came out with a revised Model Text of the BIT, which received the requisite approvals in December, 2015. The revised model BIT is now being used for re-negotiation of the 58 existing BITs whose initial validity period has expired and for the remaining 25, a Joint Interpretative Statement is proposed to be issued.

Main goals/objective behind the revised Model BIT

3. The Indian BIT regime is based on the premise that while it is important to have investment treaties to provide a normative institutional framework to foreign investors to enforce their rights and claims, it is also important to ensure that BITs do not impede on the policy space or impede the Government's power to regulate foreign investments for legitimate public purposes. The important goals behind the Model BIT may be summarized as follows:
 - (i) Address issues related to **overly broad interpretations** of certain provisions by arbitral tribunals, to adequately reflect and take into account **India's socio-economic policy realities**. Accordingly, the Model BIT attempts a delicate balancing act between the competing interests of investors to protect their investments and obligations of the investors and host state/Government's right to regulate.
 - (ii) Provide appropriate protections for foreign investors in India, in the light of the relevant international precedents and practices, while appropriately preserving the regulatory powers of the Government.

- (iii) The scope of investment treaties is a key concern reflected in the Model BIT. Traditionally, the fundamental premise for investment treaties is to protect foreign direct investments (**FDI**), i.e., investments which are **long term in nature**. The classical definition of FDI as per the OECD benchmark is that FDI reflects the objective of establishing a lasting interest by a resident enterprise. Current treaties do not reflect this approach and as a result of this, all kinds of indirect and minority shareholders and their reflective losses are protected under BITs. The new model is to align the IIA regime with the FDI regime by taking into account the fundamental basis of FDI, which is that it is long term in nature. Keeping in view this objective, “investment” has been defined in the Model BIT as an enterprise and reflects the objective of establishing a lasting interest by a resident enterprise by an investor.
- (i) The Model recognizes the need to **change the asymmetry** in the current BIT system, by which investors are provided protections and procedural avenues irrespective of their conduct. From an Indian perspective, investment treaties are not just instruments of investor protection, but also a valid tool promote sustainable development goals, transparency in corporate dealings and prevent unethical business practices. The Indian Model BIT text has adopted a substantive approach to promoting these legitimate policy goals by having a chapter on investor obligations.
- (ii) The Model recognizes that there is **no substitute for well drafted treaties**. Another change has been in the form and structure of the agreement itself. Until now, Indian IIAs adopted a minimalistic approach with a typical 10-12 page model containing vague and innocuous provision, which left too much interpretative authority in the hands of the tribunal. This approach has been attempted to be done away with in the new Model, which is now fairly detailed in its provisions, especially in its approach to substantive protections and dispute settlement.
- (iii) The BIT provides **an additional layer of protection for foreign investors** with well-drafted commercial contracts between investors and State/private agencies being the primary source of protection. The intention behind the text is to ensure that only the “hard cases”, i.e., those involving genuine and gross violations of investor rights or manifestly arbitrary treatment by the State are adjudicated before tribunals, whereas the ordinary cases are settled before domestic Courts. It is expected that investors will give precedence to the Indian domestic court system rather than invoke BITs for settling all types of disputes. Towards this end, further steps to reform commercial laws and court system to ensure access and efficiency of justice delivery for all investors are underway to complement the objectives of the Model BIT.

Second phase of IIA reform

- (i) The Indian Model BIT is based on the realistic proposition, that, there are no magic wands or tailor-made solutions for resolving the IIA system in an instant. Reforming the regime is a gradual process, which must be done step by step taking each treaty and action into account. The Model is merely a first *macro* level step in the overhaul of the entire system.

- (ii) Despite the widespread existence of BITs, there is no empirical evidence to establish a link between the existence of BITs between nations and their FDI flows. This is one area which requires substantial work in order to re-inforce state's trust in the legitimacy of IIAs.
- (iii) A record high of 70 ISDS cases were filed in 2015¹ which is not a good sign. We believe that substantial changes are required in the existing system of international arbitration which seems to be extremely ad-hoc, unpredictable and arbitrary. It is important to deal and address the ongoing ad-hoc ism in the international arbitration system. Attempts should also be made to strike a balance between the costs and benefits of ISDS. We need to also focus on other modes of disputes settlement including compulsory negotiations and mediations.
- (iv) It is apparent that there is something which is seriously wrong with the existing mechanism, that we see other countries proposing their own mechanism, with EU proposing the Investment Court system, Brazil proposing an Ombudsman and State to State dispute settlement mechanism, and South Africa's legislation on Protection of Investment Act.
- (v) Emphasis is also needed on other connected and relevant issues, including, prevention of conflict of interest for arbitrators, transparency, and an appeal/review mechanism to safeguard the interest of State parties to ensure no exposure to undue liability.
- (vi) The distortions that are occurring in investment and capital flows due to existence of low tax regimes (or tax havens) across the globe need to receive greater attention. Availability of such options to investors often forces states to bring in different regulations, in order to address their genuine concerns leading to further complications.
- (vii) Lastly, it is relevant to ensure that in this process of overhauling of the entire system, policy space of the government to regulate for legitimate public purposes is not compromised upon. We have noted that some countries in their treaties have specially recognized the State's "Right to regulate" and we need to develop upon that concept further.