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# Kluwer Arbitration Blog

## New Indian Model BIT on the Anvil

Ashutosh Ray (Assistant Editor for South Asia) · Friday, January 9th, 2015

India lost its first Investment Treaty Arbitration (ITA) claim in 2012 against White Industries, an Australian company. Taking a cue from the *White Industries* case, (read more on it [here](#)) around 17 fresh ITAs have been filed against India in last two years.

Beleaguered with these claims, a new model BIT is being considered by the Indian government for future negotiations of BITs with other States. USA would probably be the first country with which a BIT would be negotiated by the yardstick of the new model BIT. This piece discusses the features of the new Model BIT that is being contemplated.

### Definition of Investment

The definition of “investment” in the new model BIT might be amended to make it exclusive and narrow. It is believed that “investment” would be restricted to financial investments directly made by an investor by incorporating an entity in India. The new model BIT would mandate real and substantial business operation as a precursor to be eligible for the benefits under the BIT. Investments made through holding companies overseas will not be covered under the new model BIT. It is also believed that intangible rights like goodwill, investments in government debt and public sector undertakings, as well as investments made before the commencement of real and substantial business operations in the host State, would not be entitled to investors under the new model BIT. Furthermore, investors would have to make disclosures concerning their activities, proprietorship and capital.

In the *White Industries* case, the arbitral tribunal had held that since India is not a party to ICSID, it does not matter if the investment was made long-term to qualify as one. To avoid such situations in the future, short-term investments are set to be excluded from the purview of the definition of “investments”.

### Bar on Treaty Shopping

India’s loss in the *White Industries* case can be attributed to the use of Most Favoured Nation (MFN) clause by White Industries to benefit from a favorable clause from India-Kuwait BIT. It is a strong likelihood that the new model BIT will have a limitation on the scope of the MFN clause. Removal of the MFN clause altogether is also a possibility. Likewise, the government is likely to devise a mechanism in the new Model BIT to restrict foreign companies having a presence in multiple countries to pick and choose the most favourable BIT, depending upon the nature and scope of the dispute.

## **Limiting Liability**

The new model BIT would seek to limit the liability of the State to the extent of a decision by the Executive only. Further, the new model BIT will entail in it time limits within which the decisions of the Executive could be challenged. This measure too, if finally incorporated, stems from the experience from *White Industries* case where the matter was initiated not because of an Executive decision but because of judicial delay in deciding the case.

## **Explicit Exclusions**

To avoid ITA claims such as one initiated by Vodafone against India where the issue revolves around the change in taxation policy by the government, the new model BIT may exclude taxation related disputes altogether from the model new BIT. The taxation related matters will be instead dealt only under the Double Taxation Avoidance Agreements. Similarly, patent disabling compulsory licensing would be kept out of the scope of the model BIT.

## **Expropriation Redefined**

Presently, the model BIT mentions that expropriation shall not be done “except for a public purpose in accordance with law”. This phrase may be expanded in the new model BIT. Additional categories of exception may be added to justify the need for expropriation. This would include a) public health and safety, b) stability of the financial system, c) protection of the environment, and d) conservation of natural resources.

## **Exhaustion of Legal Remedies**

A significant change, likely to be incorporated, is exhaustion of legal remedies in the host state before initiating ITA. However, it would also mean that the clause would state that such legal remedies be exhausted in a set time period. Post-exhaustion of legal remedies, both the State and the investor would engage in conciliatory dialogue before being able to initiate ITA.

## **Counter-Claim by Host State**

Another possible clause in the new Model BIT may state that hiring lobbying firms would not be permitted on behalf of any investor. Further, the new model BIT may contain a clause stating that an investor would not offer any kind of bribe to public servants of the host state in lieu of furtherance of their support. Although a bold move, it is possible that the new Model BIT would allow the host State to counterclaim against the investor for their illegal acts.

## ***Analysis***

India’s experience with various ITA claims is the reason for the aforementioned terms which are under consideration. While a new model BIT might be helpful in negotiating fresh BITs, it is unclear how useful it will be to tackle the existing claims and future claims which may arise from the BITs already signed. This becomes more important because of the fact that India has already signed BITs with 82 States, of which around 72 have been ratified. The new model BIT will have no effect on these BITs until they are renegotiated on terms of India, which is a difficult task. These States include major trading partners of India. As regards future BITs with new States also, it is not an easy task to get them sign it on the lines of a new model BIT which is heavily tilted in

favour of either the investor or host State. A BIT, like any other treaty, is the process of mutually agreeing to a set of terms. A very crucial fact that should be borne by India while finalizing the new model BIT is that presently around 40 BITs entered into by India are with States where India is the capital exporting nation. As Indian companies are expanding and are investing elsewhere rapidly, it is important that BITs are also looked at from the perspective of the role of India as a capital exporting nation. A model BIT which is balanced and looks into the future instead of one being tailored on the recent experiences would be advantageous not only to build the confidence of investors but would also give courage to Indian investors to expand and grow in partner States.

*A fair evaluation of the new model BIT would only be possible once the draft has been finalized is put in the public realm.*

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