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# THE ROLE OF BILATERAL INVESTMENT TREATIES (BITS) IN REGULATING FDI IN INDIA

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## ABSTRACT

Foreign Direct Investment (FDI) has emerged as a cornerstone of modern economic growth, technological advancement, and global market integration. However, the steady inflow of foreign capital largely depends on the level of confidence international investors have in the host nation's legal and regulatory framework. To build and preserve this trust, countries often rely on Bilateral Investment Treaties (BITs), which establish reciprocal guarantees such as fair and equitable treatment, protection against arbitrary expropriation, and access to neutral dispute-settlement mechanisms.

India's experience with BITs has undergone a marked transformation—from an open and investor-oriented approach during the liberalization era of the 1990s to a more measured and sovereignty-conscious framework in the aftermath of several high-profile arbitral disputes. The broad and investor-favorable provisions in early treaties led to multiple claims against the state, as illustrated in *White Industries v. India*, *Vodafone International Holdings B.V. v. Union of India*, *Cairn Energy v. India*, and *Devas Multimedia v. India*. The policy repercussions of these cases motivated India to overhaul its treaty practice and introduce the 2016 Model BIT, which places greater emphasis on regulatory autonomy, precise definitions, and the exhaustion of local remedies before recourse to international arbitration.

This paper critically analyzes the evolving function of BITs in shaping India's investment regime and assesses how the restructured model seeks to balance investor protection with the state's developmental and constitutional priorities. It also offers a comparative assessment of India's policy orientation vis-à-vis global approaches such as the European Union's Investment Court System and the United States–Mexico–Canada Agreement (USMCA). The study concludes that India's present treaty framework represents a deliberate transition toward sustainable and equitable investment governance—aimed at attracting responsible foreign investment while preserving national regulatory space and policy sovereignty.

**Keywords:** *Bilateral Investment Treaties (BITs), Foreign Direct Investment (FDI), International Investment Law; Investor–State Dispute Settlement*

*(ISDS), Model BIT 2016, Investment Arbitration, Expropriation, Fair and Equitable Treatment (FET), India's Investment Policy.*

## 1. INTRODUCTION

### 1.1 BACKGROUND OF FDI IN INDIA

Foreign Direct Investment (FDI) has become a vital engine for economic expansion, technological development, and integration into the global marketplace<sup>1</sup>. It contributes not only to capital formation but also facilitates the transfer of technology, managerial expertise, and access to international markets. Since the economic liberalization of 1991, India has progressively opened its economy to foreign investment, making FDI an essential driver of growth in sectors such as manufacturing, information technology, infrastructure, and financial services.

However, attracting sustainable foreign investment depends heavily on the legal and regulatory environment of the host country. Investors seek assurance that their capital will be protected and that disputes can be resolved fairly. In this context, Bilateral Investment Treaties (BITs) have emerged as critical instruments to enhance investor confidence by providing legally binding protections, defining standards for treatment, and offering mechanisms for dispute resolution.

### 1.2 SIGNIFICANCE OF BITS FOR INDIA

India's engagement with BITs reflects its attempt to strike a balance between promoting investment and safeguarding national interests. Early treaties, signed in the 1990s, emphasized investor-friendly provisions to encourage FDI inflows. These agreements provided guarantees such as fair and equitable treatment, protection against expropriation, and access to Investor–State Dispute Settlement (ISDS) mechanisms.

While these BITs succeeded in attracting foreign investors and integrating India into the global investment network, they also exposed the country to arbitration claims, which highlighted the potential tension between investor rights and India's regulatory autonomy. Landmark disputes such as *White Industries v. India*, *Vodafone International Holdings v.*

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<sup>1</sup> K.P. Sauvant & L.E. Sachs, *The Evolution of Bilateral Investment Treaties: Recent Developments and Future Trends* 45–48 (Oxford Univ. Press 2017)

India, and *Cairn Energy v. India* underscored the challenges associated with overly broad treaty clauses.

### 1.3 RESEARCH OBJECTIVES AND QUESTIONS

The purpose of this research paper is to analyze the role of BITs in regulating FDI in India and to assess how India's treaty framework has evolved in response to both investor needs and domestic policy concerns. Specifically, the study seeks to:

- Examine the historical evolution of BITs in India.
- Analyze key provisions of Indian BITs and their impact on investor protection.
- Assess the effectiveness of BITs in attracting FDI and facilitating technology transfer.
- Evaluate the challenges and criticisms associated with India's BIT regime.
- Explore the policy reforms introduced under the 2016 Model BIT<sup>2</sup> and their implications for sustainable investment governance.

### 1.4 METHODOLOGY AND SCOPE OF STUDY

This paper employs a doctrinal research methodology, analyzing legal documents, case law, government policies, and international treaties. Primary sources include India's BITs, domestic investment laws, and arbitration awards, while secondary sources comprise academic articles, policy reports, and empirical studies on FDI trends. The scope of the study encompasses India's BITs with key partners, major investment disputes, and comparative perspectives with other countries' investment treaty practices.

The study is confined to the period from 1991, when India initiated major economic reforms, to the present, with a particular focus on the impact of the 2016 Model BIT. It integrates both legal and economic perspectives to provide a comprehensive understanding of how BITs influence foreign investment and regulatory governance in India.

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<sup>2</sup> Ministry of Finance, Govt. of India, *India Model Bilateral Investment Treaty 2016*, <https://finmin.nic.in>

## 2. LITERATURE REVIEW

### 2.1 HISTORICAL BACKGROUND OF BITs IN INDIA

The historical evolution of Bilateral Investment Treaties (BITs) in India reflects the country's transition from a closed, centrally planned economy to a liberalized and globally integrated market. In the decades following independence, India's economic policies were guided by the principles of self-reliance and state control. Foreign investment was permitted only in a limited number of sectors under strict regulatory supervision, primarily governed by the Foreign Exchange Regulation Act (FERA), 1973. Consequently, there was little engagement with international investment agreements during this period, as India maintained a cautious stance toward foreign capital.

The situation changed dramatically with the economic reforms of 1991, which were introduced in response to a severe balance-of-payments crisis. These reforms initiated liberalization, privatization, and globalization policies—collectively known as the LPG reforms—which opened the Indian economy to international trade and investment. To attract foreign investors and signal a stable legal environment, India began negotiating Bilateral Investment Treaties with its key trading partners.

India signed its first BIT with the United Kingdom in 1994, followed by a series of similar agreements with countries such as France, Germany, and Malaysia. These early BITs<sup>3</sup> were largely modeled on Western templates and provided comprehensive investor protections, including Fair and Equitable Treatment (FET), Most Favored Nation (MFN) status, protection against expropriation, and access to Investor–State Dispute Settlement (ISDS) mechanisms. Between 1994 and 2011, India concluded more than 80 BITs, reflecting its proactive engagement in the global investment regime and its growing confidence as a destination for foreign capital.

However, this liberal approach soon faced challenges. The broad and investor-friendly provisions of earlier BITs led to several arbitration claims against India in the 2000s and 2010s. Notable disputes such as *White Industries v. India* (2011), *Vodafone International Holdings B.V. v. Union of India* (2014), *Cairn Energy v. India* (2020), and *Devas Multimedia*

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<sup>3</sup> Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 102–105 (Oxford Univ. Press 2012)

*v. India (2021)* exposed the vulnerabilities of India's treaty framework. These cases revealed the potential for foreign investors to bypass domestic legal systems and directly challenge sovereign policy decisions under international arbitration.

In response to these developments, India undertook a comprehensive review of its BIT policy and adopted the Model BIT of 2016. The revised model sought to rebalance the relationship between investor rights and state sovereignty. It introduced narrower definitions of investment, a requirement to exhaust local remedies before arbitration, and clearer exceptions safeguarding public interest, national security, and regulatory autonomy.

The historical progression of India's BIT regime thus demonstrates a shift from investor liberalism to calibrated protectionism—an effort to attract responsible FDI while preserving constitutional and developmental priorities. This transformation underscores India's evolving understanding of international investment law and its attempt to establish a more sustainable, balanced, and sovereign investment environment.

## **2.2 LEGAL FRAMEWORK GOVERNING FDI AND BITs IN INDIA**

The legal framework regulating Foreign Direct Investment (FDI) and Bilateral Investment Treaties (BITs) in India operates through a combination of domestic legislation, executive policies, and international treaty obligations. This hybrid structure reflects India's effort to harmonize its sovereign regulatory powers with the global standards of investment protection and liberalization.

At the domestic level, the primary legislation governing foreign investment is the Foreign Exchange Management Act, 1999 (FEMA), which replaced the earlier Foreign Exchange Regulation Act (FERA), 1973. FEMA marked a fundamental policy shift—from strict control over foreign exchange transactions to the facilitation and management of external investment flows. The Act empowers the Reserve Bank of India (RBI) and the Department for Promotion of Industry and Internal Trade (DPIIT) (formerly DIPP) to frame regulations governing entry routes, sectoral caps, and procedural guidelines for FDI.

### **India permits foreign investment through two principal routes:**

1. *The Automatic Route*, where prior government approval is not required, and investors can directly invest subject to prescribed sectoral limits; and

2. *The Government Route*, where proposals are examined by the concerned administrative ministry or department based on strategic and security considerations.

These frameworks are supplemented by the Consolidated FDI Policy, which is periodically updated to reflect policy reforms, sectoral changes, and international best practices. The Companies Act, 2013, Securities and Exchange Board of India (SEBI) regulations, and sector-specific laws such as those governing insurance, telecommunications, and banking also contribute to shaping India's investment climate.

Parallel to the domestic regulatory system, Bilateral Investment Treaties form the international dimension of India's FDI framework. These treaties are negotiated by the Ministry of Finance and the Ministry of External Affairs, creating legally binding commitments toward foreign investors from partner countries. The provisions within BITs typically include guarantees of national treatment, most-favored-nation (MFN) status, fair and equitable treatment (FET), protection from expropriation without compensation, and access to Investor-State Dispute Settlement (ISDS) mechanisms.

However, the interaction between BITs and domestic law has often been complex. While BITs do not automatically override national legislation, their obligations can influence the interpretation and enforcement of domestic investment policies. For instance, in the *White Industries* case (2011), the tribunal relied on India's BIT with Australia to hold the state accountable for delays in the Indian judicial system—highlighting how international treaty commitments can impact domestic governance structures.

The Model BIT of 2016 introduced a paradigm shift in this relationship by reaffirming the primacy of domestic law and requiring investors to exhaust all local remedies for a minimum of five years before initiating international arbitration. This provision seeks to strengthen the role of Indian courts and reduce the risk of premature international claims. Additionally, the model incorporates explicit carve-outs to protect the government's right to regulate in areas such as public health, environmental protection, and national security.

Collectively, the legal framework for FDI and BITs in India embodies a delicate balance—facilitating foreign investment and ensuring investor confidence, while safeguarding national interests and regulatory sovereignty. The integration of international treaty commitments

with a robust domestic legal structure underscores India's evolving approach toward creating a predictable, transparent, and sustainable investment regime.

### **2.3 KEY PROVISIONS OF INDIAN BILATERAL INVESTMENT TREATIES (BITs)**

The structure and content of Bilateral Investment Treaties (BITs) reflect India's evolving strategy toward balancing investor protection with sovereign regulatory powers. BITs are international agreements between two states that define the standards of treatment to be accorded to investors from each contracting party. These provisions aim to ensure transparency, predictability, and fairness in the host state's investment environment while providing legal remedies in case of governmental misconduct.

Indian BITs—especially those concluded during the 1990s and early 2000s—were drafted using broad and investor-centric language. These treaties generally contained clauses guaranteeing Fair and Equitable Treatment (FET), Most-Favored Nation (MFN) treatment, protection against expropriation without compensation, and access to Investor–State Dispute Settlement (ISDS) mechanisms. However, the interpretation of these provisions by arbitral tribunals often expanded investor rights beyond the intentions of the Indian state, leading to several notable disputes.

#### **A. FAIR AND EQUITABLE TREATMENT (FET)**

The FET standard forms the cornerstone of most BITs. It obligates host states to act transparently, consistently, and in good faith toward foreign investors. In India's earlier treaties, the FET clause was broadly worded, which led to expansive interpretations by arbitral tribunals.

A key example is the *White Industries Australia Limited v. Republic of India (2011)* case. Here, the tribunal found India in breach of the FET obligation under the India–Australia BIT due to excessive judicial delays in enforcing an arbitral award. The tribunal observed that such delays denied the investor “effective means” of asserting its claims, thus violating international standards of fair treatment. This case marked India's first adverse award under a BIT and underscored the need for clearer and more limited treaty language.

The revised Model BIT of 2016 significantly narrows the FET clause, limiting its scope to denial of justice and fundamental breach of due process. This approach aligns with India's

policy objective to prevent arbitrary interpretations while maintaining a commitment to rule-of-law principles.

## **B. MOST-FAVOURLED NATION (MFN) TREATMENT**

The MFN clause ensures that investors from one treaty partner are not treated less favorably than those from another. Earlier Indian BITs included unrestricted MFN clauses that allowed investors to import more favorable provisions from other treaties.

In the *White Industries* case, the claimant successfully invoked the MFN clause to rely on the “effective means” provision contained in India’s BIT with Kuwait—thereby circumventing the limitations of the Australia–India BIT. This interpretation effectively expanded India’s treaty obligations and set a precedent for similar claims.

Recognizing this risk, the 2016 Model BIT omits the MFN clause altogether, signaling India’s intent to prevent treaty shopping and safeguard the coherence of its investment policy framework.

## **C. PROTECTION AGAINST EXPROPRIATION**

BITs universally prohibit direct or indirect expropriation of foreign investments except for public purposes, under due process of law, on a non-discriminatory basis, and against prompt, adequate, and effective compensation.

India faced a major challenge in the *Vodafone International Holdings B.V. v. Union of India (2014)* arbitration, where the investor alleged that India’s retrospective taxation amounted to indirect expropriation under the India–Netherlands BIT. The tribunal ruled in favor of Vodafone, holding that the retrospective tax amendment violated India’s treaty obligations and awarded damages to the investor. Similarly, in *Cairn Energy v. Republic of India (2020)*, the tribunal found India liable for retrospective tax measures under the same BIT framework.

In response, the 2016 Model BIT introduces a clearer definition of expropriation, distinguishing between legitimate regulatory measures and unlawful takings. It excludes non-discriminatory actions taken for public welfare objectives—such as health, environmental, or safety regulations—from being treated as expropriatory.

## **D. INVESTOR–STATE DISPUTE SETTLEMENT (ISDS)**

ISDS provisions allow foreign investors to bring claims directly against the host state before international arbitration tribunals, bypassing domestic courts. While these mechanisms enhance investor confidence, they have also exposed India to significant financial and reputational risks.

The *Devas Multimedia v. India* (2021) case illustrates the consequences of such disputes. The tribunal under the India–Mauritius BIT found India in violation of its treaty obligations for annulling a satellite contract between Devas and Antrix Corporation, awarding substantial compensation to the investor. The case reignited debate about the scope of ISDS and the limits of sovereign regulatory action.

The 2016 Model BIT attempts to recalibrate this balance by requiring investors to exhaust domestic remedies for at least five years before initiating arbitration. Additionally, it mandates that disputes must relate to breaches of specific BIT obligations rather than broad investment expectations, thereby narrowing the jurisdiction of arbitral tribunals.

### **2.4 ROLE OF BITs IN REGULATING AND PROMOTING FDI IN INDIA**

Bilateral Investment Treaties (BITs) play a pivotal role in shaping the legal and economic environment for Foreign Direct Investment (FDI) in India. By establishing binding commitments between states, BITs aim to create a predictable and transparent investment climate that encourages foreign investors to commit long-term resources to the host country. They perform a dual function—promotional, by signaling India’s openness to global investors, and regulatory, by defining the limits of state conduct toward foreign investments.

In the post-liberalization era of the 1990s, BITs became central to India’s strategy for attracting FDI. The early treaties, modeled on Western frameworks, provided broad assurances of fair and equitable treatment, protection from expropriation, and access to investor–state dispute settlement mechanisms. These clauses were designed to address investor concerns regarding the stability of India’s domestic legal system and bureaucratic inefficiencies. The signing of India’s first BIT with the United Kingdom in 1994 coincided with a noticeable surge in FDI inflows—from less than US\$ 100 million in 1990 to over US\$ 4 billion by 2000, illustrating how international legal assurances bolstered investor

confidence.

However, the regulatory implications of BITs became more evident during the 2000s, as foreign investors began invoking treaty provisions to challenge government actions. In *White Industries Australia Ltd. v. Republic of India* (2011), the tribunal found India in violation of its treaty obligations due to delays in judicial enforcement, interpreting this as a breach of the “effective means” standard. This case demonstrated that BITs not only attract investment but also impose accountability mechanisms on the state, compelling improvements in governance and dispute resolution efficiency.

Similarly, in *Vodafone International Holdings B.V. v. Union of India* (2014) and *Cairn Energy v. Republic of India* (2020), foreign investors contested retrospective tax measures under the India–Netherlands BIT, arguing that such actions violated principles of legal certainty and protection from indirect expropriation. Both cases concluded in favor of the investors, emphasizing that BITs serve as instruments for regulating state behavior and ensuring that policy changes do not undermine the legitimate expectations of investors. These disputes also highlighted the tension between India’s sovereign right to tax and its international treaty obligations.

Despite these challenges, BITs have contributed positively to India’s investment ecosystem by enhancing credibility and signaling adherence to global legal norms. Empirical studies show that the existence of BITs correlates with higher FDI inflows, especially from countries that have strong investment protection agreements with India. Furthermore, BITs facilitate technology transfer, employment generation, and infrastructure development, as foreign investors perceive India as a stable and rule-based destination.

The adoption of the Model BIT of 2016 marked a shift from unqualified investor protection to a more balanced framework that integrates developmental and regulatory priorities. By requiring investors to exhaust local remedies and recognizing the state’s right to regulate in areas such as public health, environment, and national security, the new model redefines the role of BITs—not merely as tools for investor promotion, but as mechanisms for responsible and sustainable investment governance.

In sum, BITs have evolved from being instruments of economic liberalization to becoming pillars of regulatory accountability and balanced governance. They continue to play a vital

role in shaping India's investment policy, providing both a legal foundation for investor protection and a framework for ensuring that foreign investments align with the nation's long-term developmental goals.

## **2.5 CHALLENGES AND CRITICISMS OF INDIA'S BIT REGIME**

While Bilateral Investment Treaties (BITs) have played a crucial role in attracting and regulating Foreign Direct Investment (FDI) in India, their practical implementation has generated significant controversies and challenges. These concerns revolve around issues of sovereignty, inconsistent arbitral interpretations, exposure to investor–state disputes, and imbalance between investor protection and public interest regulation. India's experience over the last three decades illustrates how the initial optimism surrounding BITs gradually gave way to a more cautious and strategic approach.

One of the major challenges lies in the broad and vague drafting of early BIT provisions. Clauses such as “fair and equitable treatment,” “legitimate expectations” and “indirect expropriation” were often open to wide interpretation by arbitral tribunals. For instance, in *White Industries Australia Ltd. v. Republic of India* (2011), the tribunal's expansive reading of the “effective means” standard held India liable for delays in judicial enforcement, even though the delay arose from systemic backlog rather than state negligence. Such outcomes raised concerns that arbitral bodies were effectively reviewing domestic judicial performance, thereby infringing on India's sovereign authority.

Similarly, the *Vodafone International Holdings B.V. v. Union of India* (2014) and *Cairn Energy PLC v. Republic of India* (2020) arbitrations revealed the potential financial and reputational risks associated with investor–state dispute settlement (ISDS). In both cases, foreign investors challenged India's retrospective taxation measures, arguing that these actions violated treaty protections against expropriation and unfair treatment. Although these claims were ultimately decided in favor of the investors, they exposed India to massive compensation liabilities—demonstrating that BIT commitments could restrict the state's fiscal policy autonomy.

Another criticism concerns the asymmetry of obligations embedded in traditional BITs. While investors are granted extensive rights and protections, the host state bears most of the obligations. The absence of reciprocal responsibilities—such as adherence to domestic laws,

corporate social responsibility, or environmental safeguards—creates an unequal relationship between the state and the investor. This imbalance often undermines the developmental objectives that FDI is meant to achieve, especially in sectors affecting natural resources and public welfare.

The opacity and inconsistency of arbitral proceedings have also drawn criticism. Many arbitral decisions lack transparency, and different tribunals interpreting similar clauses have arrived at contradictory conclusions. This unpredictability has weakened the confidence of developing states in the existing dispute settlement framework. Moreover, the high costs of arbitration and limited options for appeal further disadvantage host states, particularly when defending complex regulatory measures.

In response to these challenges, India has undertaken systemic reforms. Following a series of adverse awards, the government in 2015 initiated a comprehensive review of its BIT framework, culminating in the Model BIT of 2016. This model seeks to re-establish the balance between investor protection and state sovereignty by:

- Narrowing the definitions of “investment” and “investor”;
- Requiring the exhaustion of local remedies before initiating international arbitration;
- Excluding sensitive policy areas such as taxation, national security, and public health; and
- Emphasizing transparency and state control over dispute resolution processes.

However, these reforms have also sparked debate. Critics argue that the stringent conditions imposed by the 2016 Model BIT may deter foreign investors, as it limits their ability to seek quick and impartial remedies at the international level. The withdrawal of India from several older BITs and its cautious approach in signing new ones has temporarily created a treaty vacuum, leading to uncertainty for existing and prospective investors.

In essence, the challenges facing India’s BIT regime reflect a tension between two competing imperatives: ensuring a stable and predictable investment environment on one hand, and preserving the regulatory and developmental autonomy of the state on the other. India’s evolving treaty practice illustrates an effort to strike this delicate balance—seeking a middle

path between excessive exposure to international arbitration and the need to remain an attractive destination for global capital.

## **2.6 INDIA'S MODEL BIT, 2016 AND POLICY REFORMS**

India's experience with Bilateral Investment Treaties (BITs) over the past three decades has led to a fundamental reassessment of its approach toward investment protection. The period following multiple arbitration cases<sup>4</sup>, such as *White Industries and Vodafone*, underscored the need for a treaty framework that not only attracts foreign investment but also preserves the state's sovereign right to regulate in public interest. This re-evaluation culminated in the adoption of the Model BIT, 2016, which represents a significant policy shift from the earlier liberal and investor-centric agreements.

The Model BIT, 2016, was designed with three primary objectives: to ensure clarity in treaty interpretation, to limit India's exposure to international arbitration, and to align foreign investment protection with national development priorities. It marked a departure from the earlier generation of BITs, which contained open-ended provisions that often led to expansive arbitral interpretations.

One of the key reforms introduced in the 2016 Model BIT is the requirement that investors must exhaust all domestic legal remedies before initiating international arbitration. This clause reasserts the primacy of India's judicial system and aims to prevent premature or unnecessary recourse to international forums. By insisting on local remedy exhaustion, the Model BIT encourages greater reliance on domestic institutions and reinforces the idea that international arbitration should be a measure of last resort.

The Model BIT also narrows the definitions of "investment" and "investor." Under previous treaties, almost any asset, including indirect shareholding or portfolio investment, could qualify as an investment, thereby broadening India's potential liability. The new definition restricts investment to assets having characteristics of commitment of capital, expectation of gain, and certain duration, thereby excluding speculative and non-substantive investments. This ensures that only genuine, long-term investors can avail treaty protections.

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<sup>4</sup> *White Indus. Austl. Ltd. v. Republic of India*, UNCITRAL Arbitration (2011)

Another major reform concerns the exclusion of taxation, national security, and public health measures from the scope of investor–state dispute settlement. This exclusion emerged directly from disputes such as the Vodafone and Cairn Energy cases, which challenged India’s retrospective taxation policies. By explicitly removing tax-related disputes from arbitration, the Model BIT safeguards the state’s fiscal and policy autonomy.

Additionally, the Model BIT introduces provisions for transparency and responsible business conduct. It obligates investors to comply with host state laws, including those related to environmental protection, labor standards, and anti-corruption. This represents a shift toward a more balanced investment regime where both parties—the investor and the state—bear obligations. The inclusion of a clause recognizing the host state’s right to regulate for legitimate public purposes reflects India’s intention to integrate sustainable development objectives within the investment law framework.

From a policy standpoint, the adoption of the Model BIT, 2016, led India to terminate or seek renegotiation of several existing treaties. While this initially created uncertainty among investors, it also allowed India to renegotiate on more equitable terms. The government has since been pursuing new agreements based on the 2016 model, focusing on key trading partners and regional blocs. India’s recent engagement with countries like Brazil and the United Arab Emirates demonstrates a pragmatic approach aimed at creating balanced and development-oriented investment treaties.

Despite its advantages, the Model BIT has faced some criticism for being overly restrictive. Some commentators argue that the requirement of exhausting domestic remedies and the exclusion of broad investment definitions might discourage foreign investors seeking robust protection. Nonetheless, the 2016 Model BIT represents a deliberate attempt to reconcile the goals of investment promotion with constitutional and developmental imperatives.

In conclusion, India’s Model BIT, 2016, marks a decisive evolution in the country’s investment treaty practice. It reflects a maturing understanding of the complexities involved in balancing investor rights with national policy objectives. By embedding transparency, accountability, and sovereignty within the treaty framework, India has set the foundation for a more sustainable and equitable model of investment governance in the years ahead.

### 3. COMPARATIVE ANALYSIS OF INDIA'S BIT APPROACH

#### 3.1 BITs PRACTICES IN DEVELOPED ECONOMIES

Developed economies, including the European Union (EU)<sup>5</sup>, the United States, Canada, and Australia, have structured their BITs to offer strong legal protections to investors while maintaining sufficient policy space for governments. For example, the EU has moved towards the Investment Court System (ICS), which replaces ad hoc arbitration with a permanent multilateral tribunal. The ICS emphasizes transparency, consistency in jurisprudence, and procedural fairness. Decisions are publicly accessible, and the tribunal ensures uniform interpretation of treaty provisions, addressing criticisms associated with traditional Investor–State Dispute Settlement (ISDS) systems.

The United States employs a similar approach through treaties like the United States–Mexico–Canada Agreement (USMCA)<sup>6</sup>. In this treaty, investors are granted protections such as fair and equitable treatment and protection from expropriation, but governments retain clear rights to regulate public welfare, environmental protection, labor standards, and taxation. Notably, the treaty requires investors to follow domestic procedures before resorting to international arbitration in many cases, promoting reliance on local legal remedies.

Canada's BITs also illustrate careful balancing. While providing investors with substantive protections, Canadian treaties often include explicit carve-outs that allow the government to regulate in areas such as environmental standards, public health, and national security. This ensures that public policy objectives are not compromised in the pursuit of foreign investment.

In all these cases, the focus is on predictability for investors while retaining safeguards for state sovereignty. BITs in developed economies increasingly emphasize structured arbitration, compliance with domestic law, and the alignment of investment protection with broader societal objectives.

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<sup>5</sup> European Union, *Investment Court System (ICS) Framework* (2018)

<sup>6</sup> United States–Mexico–Canada Agreement, 2020

### 3.2 BIT PRACTICES IN KEY DEVELOPING ECONOMIES

Developing countries have adapted their BIT strategies to protect their policy space while still attracting foreign capital.<sup>7</sup> China, for instance, frequently adopts sector-specific investment agreements and includes multi-stage dispute resolution procedures that require consultation and negotiation before arbitration. Chinese treaties often emphasize joint ventures, technology transfer, and long-term investment, aligning investment promotion with domestic industrial policy objectives.

Singapore has actively renegotiated its older BITs to include sustainable development provisions and environmental protections. These treaties ensure that foreign investment contributes positively to economic growth while avoiding negative impacts on society or the environment.

Brazil, in contrast, traditionally avoided the ISDS mechanism and prefers treaties emphasizing trade and investment promotion without mandatory arbitration, reflecting a cautious approach to foreign investment claims. The Brazilian approach prioritizes national regulatory authority and minimizes potential exposure to arbitration, particularly in sectors affecting public interest.

Similarly, South Africa and Indonesia have introduced BIT provisions that require investors to comply with domestic law, including labor, environmental, and anti-corruption regulations. This shift ensures that foreign investment aligns with national development priorities rather than simply protecting investors' financial interests.

### 3.3 LESSONS FOR INDIA

A detailed comparative analysis yields several important lessons for India's BIT policy:

1. **Balanced Investor Protection and Regulatory Sovereignty:** Developed economies show that BITs can provide strong investor protections while safeguarding regulatory autonomy. India's Model BIT, 2016 aligns with this by narrowing FET and MFN clauses and excluding taxation and public welfare measures from ISDS.

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<sup>7</sup> UNCTAD, *International Investment Agreements: Reforming the International Investment Regime* 33–36 (United Nations 2019)

2. **Structured Dispute Resolution:** Systems like the EU's ICS demonstrate the benefits of predictable, transparent, and structured arbitration. India could explore mechanisms to standardize arbitral procedures, ensure public availability of decisions, and reduce inconsistent interpretations.
3. **Sustainable Development Integration:** Singapore, China, and Indonesia illustrate that BITs can integrate sustainable development objectives, including environmental protection, technology transfer, and local employment generation. India's treaties could incorporate similar provisions to ensure that FDI contributes to broader developmental goals.
4. **Policy Space for Developing Countries:** Brazil and other developing nations demonstrate that carefully limiting investor rights while clearly defining exceptions protects the state's ability to regulate in public interest. India's Model BIT partially addresses this but could further clarify rules regarding public health, education, and infrastructure sectors to minimize arbitration risks.
5. **Encouraging Long-Term Investment:** Both developed and developing countries emphasize treaties that favor long-term investments over short-term speculative capital. India's narrower definitions of "investment" and mandatory domestic remedies encourage genuine, stable investments, particularly in sectors like manufacturing, energy, and infrastructure.
6. **Importance of Monitoring and Periodic Review:** Successful countries regularly review their BIT frameworks to adapt to changing economic realities. India's phased review of treaties under the 2016 Model BIT provides a mechanism for renegotiation, termination, or modernization of older agreements, ensuring that its investment treaty framework remains contemporary and responsive.

In conclusion, India's BIT reforms under the 2016 Model demonstrate alignment with global best practices while reflecting the country's specific developmental and regulatory priorities. By integrating lessons from both developed and developing economies, India can strengthen its investment environment, reduce exposure to arbitration, and promote sustainable and responsible foreign direct investment.

#### **4. CASE STUDIES ON INDIA'S BITs DISPUTES**

India's engagement with Bilateral Investment Treaties (BITs) has led to several high-profile arbitration disputes that highlight the challenges of balancing investor protection with regulatory sovereignty. The following cases illustrate the practical impact of BIT provisions on India's policy-making, fiscal autonomy, and dispute settlement mechanisms.

##### **4.1 WHITE INDUSTRIES AUSTRALIA LTD. V. REPUBLIC OF INDIA**

White Industries Australia Ltd., an Australian investor, initiated arbitration against India under the India–Australia BIT following delays in the enforcement of an arbitral award related to a domestic contract. The investor claimed that India had breached the fair and equitable treatment (FET) obligation by failing to provide “effective means” to enforce its contractual rights.

The tribunal ruled in favor of White Industries, holding that prolonged judicial delays amounted to a violation of FET. This case was significant for several reasons:

1. It underscored the broad interpretation of FET in earlier Indian BITs.
2. It highlighted India's exposure to international arbitration due to systemic inefficiencies in its domestic courts.
3. It prompted the government to consider treaty reforms and the inclusion of domestic remedy exhaustion clauses in the Model BIT, 2016.

The White Industries case set a precedent that demonstrated how investors could leverage BIT provisions to challenge domestic judicial processes, raising concerns about sovereignty and the scope of investor rights.

##### **4.2 VODAFONE INTERNATIONAL HOLDINGS B.V. V. UNION OF INDIA**

The Vodafone case involved a dispute over retrospective taxation under India's Income Tax Act, which the investor argued amounted to indirect expropriation under the India–Netherlands BIT. Vodafone had acquired a controlling stake in an Indian subsidiary, and subsequent tax authorities sought to impose a capital gains tax on the transaction.

The Permanent Court of Arbitration held that India's retrospective taxation violated treaty protections. Key lessons from this case include:

1. The risk that broad BIT provisions can constrain fiscal policy.
2. The importance of explicitly excluding tax measures from ISDS, as later incorporated in the Model BIT, 2016.
3. The need for clarity in defining expropriation and investor expectations to avoid costly arbitration disputes.

The Vodafone dispute demonstrated how international arbitration can challenge sovereign policy decisions, particularly when domestic law is applied retrospectively or ambiguously.

#### **4.3 CAIRN ENERGY V. REPUBLIC OF INDIA**

In the Cairn Energy case<sup>8</sup>, the investor initiated arbitration against India following retrospective tax amendments that affected capital gains arising from corporate restructuring. Cairn argued that India had violated BIT provisions on fair treatment and expropriation.

The tribunal ruled in favor of Cairn Energy, awarding significant compensation. This case reinforced the lessons from Vodafone:

- Retrospective taxation can expose India to treaty claims.
- The broad language in earlier BITs contributed to investor leverage in international arbitration.
- It emphasized the importance of integrating carve-outs and safeguards for regulatory measures in the Model BIT, 2016.

Additionally, the Cairn case highlighted the reputational and financial risks associated with BIT disputes, influencing India's decision to renegotiate and terminate older treaties.

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<sup>8</sup> Cairn Energy PLC v. Republic of India, PCA Case No. 2012-13

#### **4.4 DEVAS MULTIMEDIA V. INDIA**

Devas Multimedia's dispute arose from the annulment of a satellite contract with Antrix Corporation, a government-owned entity, after foreign investment had been made in the venture. The investor initiated arbitration under the India–Mauritius BIT, alleging breach of fair and equitable treatment and expropriation.

The tribunal awarded significant compensation to Devas<sup>9</sup>, emphasizing that investor rights under BITs could extend beyond commercial agreements to governmental regulatory actions. This case underscored:

1. The need for clarity in defining the scope of expropriation and FET.
2. The importance of ensuring that policy decisions taken in the public interest are explicitly protected from BIT claims.
3. The role of the Model BIT, 2016, in requiring exhaustion of domestic remedies before arbitration.

Devas Multimedia illustrates the challenges of balancing investor expectations with the government's developmental and regulatory priorities.

#### **4.5 IMPLICATIONS FOR POLICY AND TREATY REFORMS**

Collectively, these cases have had a profound impact on India's investment treaty strategy. They revealed that:

- Earlier BITs were overly broad, giving investors extensive rights that sometimes conflicted with public policy objectives.
- The absence of clear limitations on ISDS exposure led to significant financial and reputational risks.
- Retrospective policy measures, particularly taxation, were vulnerable to challenge under BITs.

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<sup>9</sup> Devas Multimedia Pvt. Ltd. v. Antrix Corp. Ltd. & Govt. of India, PCA Case No. 2011-01

- Systemic delays in domestic judicial enforcement could be interpreted as breaches of treaty obligations.

In response, India adopted the Model BIT, 2016, introducing reforms to address these issues:

- Mandatory exhaustion of local remedies before arbitration.
- Narrower definitions of “investment” and “investor.”
- Exclusion of taxation, national security, and public health measures from ISDS.
- Explicit recognition of the government’s right to regulate for public welfare.

These reforms reflect a shift from investor-centered treaties to balanced agreements, which aim to attract responsible FDI while safeguarding regulatory and developmental autonomy.

## **5. IMPACT OF BITS ON FDI AND TECHNOLOGY TRANSFER**

Bilateral Investment Treaties (BITs) have played a crucial role in shaping India’s foreign direct investment (FDI) landscape. By providing legally binding protections, BITs signal to foreign investors that India is a stable and predictable destination for long-term investment. This chapter examines the impact of BITs on investor confidence, FDI inflows, technology transfer, and socio-economic development in India.

### **5.1 BITS AND INVESTOR CONFIDENCE**

The existence of BITs has historically been associated with increased investor confidence. Foreign investors often seek reassurance that their investments will be protected against arbitrary government actions, such as expropriation or unfair treatment. In the 1990s and early 2000s, India’s BITs contributed to a noticeable rise in FDI inflows, particularly from countries with which India had signed treaties. The predictability offered by BITs encouraged multinational corporations to commit resources to infrastructure projects, manufacturing facilities, and service industries.

However, early experiences also demonstrated that investor confidence could be affected by disputes. Arbitration cases such as White Industries and Vodafone highlighted that broad treaty provisions could be leveraged by investors to challenge government policy. As a

result, India's BIT reform under the 2016 Model BIT sought to balance investor confidence with regulatory sovereignty, ensuring that the country remains attractive for FDI while protecting national interests.

## 5.2 BITs AND FDI INFLOWS IN INDIA

Empirical studies indicate a correlation between BIT coverage and FDI inflows. Countries with which India has comprehensive BITs generally see higher investment flows compared to countries without treaties. The protection mechanisms embedded in BITs, such as fair and equitable treatment, protection from expropriation, and access to dispute settlement, reduce the perceived risk of investment, particularly in emerging sectors like information technology, renewable energy, and pharmaceuticals<sup>10</sup>.

India's liberalized sectors, including telecommunications, banking, and infrastructure, benefited from BIT-backed investment assurances. For example, investments in joint ventures and high-tech manufacturing projects have increased following the signing of BITs with technologically advanced countries, reinforcing the role of treaties in attracting quality foreign investment.

## 5.3 BITS AND TECHNOLOGY TRANSFER

Beyond capital inflows, BITs have also facilitated the transfer of technology to India. Foreign investors often bring advanced machinery, proprietary software, and management expertise, which contribute to domestic innovation and productivity. BITs assure investors that such transfers are protected under international law, making them more willing to share critical knowledge and intellectual property<sup>11</sup>.

For instance, technology-intensive sectors such as renewable energy, pharmaceuticals, and IT services have benefited from BIT-backed FDI. Agreements with countries like Germany, the United States, and Japan have enabled Indian firms to access state-of-the-art technologies, adopt global best practices, and enhance competitiveness in international markets. In this sense, BITs act not only as legal safeguards but also as instruments of

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<sup>10</sup> Department for Promotion of Industry and Internal Trade (DPIIT), *Foreign Direct Investment Policy, Annual Report 2022–23* (Govt. of India 2023)

<sup>11</sup> Reserve Bank of India, *FDI Statistics and Sectoral Analysis* (2022)

strategic economic development.

#### **5.4 SOCIO-ECONOMIC DEVELOPMENT IMPLICATIONS**

The inflow of FDI supported by BITs has broader socio-economic implications. It contributes to employment generation, skill development, and infrastructure expansion. In sectors like energy, manufacturing, and telecommunications, BIT-backed FDI has led to the creation of jobs, training of local personnel, and development of industrial clusters. Additionally, technology transfer facilitates the establishment of research and development centers, strengthening India's long-term innovation capacity.

At the same time, the need to balance investor protection with public interest has become apparent. Cases such as Vodafone and Cairn Energy illustrated that retrospective policy measures or tax reforms could be challenged under BITs, potentially affecting the government's revenue and development priorities. Consequently, India's Model BIT, 2016, aims to align investor protection with sustainable development, ensuring that foreign investments contribute positively without undermining national policies on taxation, health, or environmental protection.

#### **5.6 ROLE OF INDIA'S 2016 MODEL BIT IN FDI AND TECHNOLOGY TRANSFER**

The adoption of the Model BIT, 2016, marked a significant shift in India's approach to investment treaties. It reflects lessons learned from earlier disputes while aiming to maintain India's attractiveness as a destination for foreign capital. By integrating clear rules and safeguards, the 2016 Model BIT enhances investor confidence while preserving India's regulatory autonomy, which is critical for sustainable economic growth.

##### **5.6.1 ENHANCING INVESTOR CONFIDENCE**

The 2016 Model BIT introduces provisions that reassure investors regarding the legal treatment of their investments. By narrowing the definitions of "investment" and "investor," the treaty ensures that only genuine, long-term investors benefit from treaty protections. The requirement to exhaust domestic remedies before international arbitration also provides clarity and reduces uncertainty in dispute resolution.

This clarity has been particularly important in attracting investments in infrastructure,

renewable energy, and technology-intensive sectors, where long-term commitments and capital-intensive projects are common. Investors are more willing to invest when they are confident that their rights are recognized and protected under a transparent legal framework.

### **5.6.2 FACILITATING TECHNOLOGY TRANSFER**

One of the key benefits of BIT-backed FDI is technology transfer. Foreign investors bring advanced equipment, proprietary software, and managerial expertise, which domestic firms can adapt to enhance productivity. The 2016 Model BIT encourages such transfers by offering legal protections that make investors more willing to share knowledge and technology.

For example, in the renewable energy sector, foreign companies investing in solar and wind projects have introduced advanced turbine technology and solar panel manufacturing techniques. Similarly, in the information technology sector, BIT-protected investments have facilitated knowledge transfer in areas such as software development, cloud computing, and artificial intelligence.

By protecting investors while simultaneously allowing India to regulate public interests, the 2016 Model BIT ensures that technology transfer occurs in a controlled, mutually beneficial manner.

### **5.6.3 SECTORAL IMPACT**

The 2016 Model BIT has a significant impact on strategic sectors:

1. **Energy and Infrastructure:** Investors in renewable energy, power generation, and transport infrastructure benefit from protection against expropriation and unfair treatment. This encourages long-term investment, contributes to infrastructure modernization, and enhances energy security.
2. **Pharmaceuticals and Biotechnology:** The treaty provides confidence to multinational pharmaceutical companies to invest in research and development in India, facilitating the transfer of cutting-edge technologies and boosting domestic innovation.
3. **Telecommunications and IT:** Protection of intellectual property rights and investment

guarantees encourage foreign firms to establish IT hubs and software development centers, supporting knowledge-based growth.

#### **5.6.4 BALANCING SOVEREIGNTY AND DEVELOPMENT GOALS**

The most distinctive feature of the 2016 Model BIT is its emphasis on balancing investor rights with India's regulatory objectives. By explicitly excluding sensitive areas such as taxation, public health, and national security from ISDS, the treaty ensures that policy decisions necessary for development and welfare are not challenged by foreign investors.

This balance is crucial for sustainable FDI—investors gain predictable protections, but the government retains flexibility to implement social, environmental, and fiscal policies. The treaty thus acts as a tool for responsible investment, ensuring that capital inflows contribute to broader developmental objectives, including technology dissemination, job creation, and infrastructure development.

#### **5.6.5 OVERALL ASSESSMENT**

The 2016 Model BIT represents a mature and strategic approach to investment governance in India. It strengthens investor confidence, promotes technology transfer, and ensures that foreign investments align with national development goals. At the same time, by protecting policy space and limiting exposure to arbitration, it reduces the financial and reputational risks that arose from earlier BIT disputes.

In conclusion, the Model BIT enhances India's ability to attract high-quality, technology-driven investments while safeguarding regulatory autonomy. It provides a framework for sustainable growth<sup>12</sup> and sets the foundation for a long-term, development-oriented foreign investment strategy.

### **6. FINDINGS, RECOMMENDATIONS, AND CONCLUSION**

#### **6.1 KEY FINDINGS**

The analysis of India's Bilateral Investment Treaties (BITs) and their impact on Foreign

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<sup>12</sup> UNCTAD, *World Investment Report 2020: International Production Beyond the Pandemic* 112–116 (United Nations 2020)

Direct Investment (FDI) reveals several important insights:

1. **Evolving Investment Framework:** India's BIT framework has evolved significantly since the 1990s. Early treaties were investor-friendly, offering broad protections, which successfully attracted FDI but also exposed India to arbitration claims that sometimes conflicted with domestic policy objectives.
2. **Arbitration Experience Highlights Risks:** Landmark disputes such as *White Industries v. India*, *Vodafone International Holdings v. India*, *Cairn Energy v. India*, and *Devas Multimedia v. India* demonstrated that broad treaty provisions could create financial, policy, and reputational risks for India. These cases emphasized the need for a treaty framework that balances investor rights with regulatory sovereignty.
3. **Impact on FDI and Technology Transfer:** BITs have contributed positively to investor confidence, FDI inflows, and the transfer of technology. Sector-specific impacts are evident in infrastructure, renewable energy, pharmaceuticals, and information technology. Investments under BIT protection have facilitated modern machinery, proprietary software, managerial expertise, and global best practices.
4. **2016 Model BIT – A Balanced Approach:** The adoption of India's 2016 Model BIT reflects a strategic shift. By narrowing definitions, requiring exhaustion of domestic remedies, and excluding sensitive sectors from ISDS, India has strengthened investor protection while preserving policy space. This approach aligns with global best practices and demonstrates a maturity in India's investment governance.
5. **Lessons from Comparative Analysis:** A review of BIT practices in developed economies (EU, USA, Canada) and developing economies (China, Singapore, Brazil) shows that structured dispute resolution, transparency, and integration of sustainable development objectives are key to balancing investor confidence with sovereign regulatory authority. India's current BIT reforms incorporate several of these lessons.

## **6.2 POLICY RECOMMENDATIONS**

Based on the findings, several recommendations emerge to further strengthen India's investment treaty framework and maximize its developmental benefits:

1. **Clarify Expropriation and FET Provisions:** India should ensure that definitions of indirect expropriation and fair and equitable treatment are unambiguous to reduce the scope of arbitration claims and minimize disputes over domestic policy measures.
2. **Enhance Transparency in Dispute Settlement:** Following models like the EU's Investment Court System, India could implement measures to enhance transparency in arbitration proceedings, publish awards, and provide for consistent interpretation of treaty clauses.
3. **Promote Sector-Specific BITs:** India could negotiate BITs with provisions tailored to key sectors such as renewable energy, IT, pharmaceuticals, and infrastructure. Sector-specific clauses can encourage technology transfer, knowledge sharing, and skill development.
4. **Integrate Sustainable Development Objectives:** BITs should explicitly encourage investments that contribute to socio-economic development, environmental protection, and capacity building, ensuring that FDI aligns with national developmental priorities.
5. **Periodic Review of BITs:** Regular evaluation of existing treaties and potential renegotiations can ensure that India's BIT framework remains contemporary, balanced, and aligned with global investment trends.
6. **Strengthen Domestic Legal Recourse:** The requirement of exhausting local remedies before arbitration should be effectively supported by improving domestic judicial processes, reducing delays, and enhancing enforcement mechanisms to maintain investor confidence while protecting sovereignty.

### **6.3 CONCLUSION**

Bilateral Investment Treaties have played a critical role in shaping India's investment landscape. They have enhanced legal certainty, attracted foreign capital, facilitated technology transfer, and promoted socio-economic development. However, the early experience of disputes revealed the challenges of balancing investor protection with regulatory autonomy.

India's response, particularly through the adoption of the 2016 Model BIT, demonstrates a

mature and balanced approach. The treaty framework now ensures that foreign investors enjoy predictable protections while allowing the government to pursue public welfare, environmental, and fiscal objectives. Comparative analysis shows that India's reforms are consistent with global best practices, integrating lessons from both developed and developing economies.

Moving forward, India's BIT strategy must continue to balance these dual imperatives: attracting high-quality, long-term foreign investment while safeguarding national policy space. By doing so, India can ensure that FDI not only brings capital and technology but also contributes meaningfully to sustainable development, job creation, and innovation.

In essence, India's BIT regime, strengthened by the 2016 Model, represents a strategic instrument for responsible and development-oriented investment governance—a model for emerging economies navigating the complex interface between globalization and domestic priorities.

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