BALANCING FOREIGN INVESTOR PROTECTION AND INDIA'S REGULATORY SOVEREIGNTY: A CRITICAL ANALYSIS OF INDIA'S MODEL BILATERAL INVESTMENT TREATY, 2016

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ABSTRACT

The relationship between foreign investment protection and the regulatory sovereignty of host States has become one of the most contested questions in contemporary international economic law. Bilateral investment treaties seek to promote cross-border investment by assuring investors that their investments will receive a minimum level of legal protection. At the same time, broadly worded treaty standards and investor–State dispute settlement mechanisms may expose governmental measures to international scrutiny and substantial financial liability. India's Model Bilateral Investment Treaty, approved in December 2015 and published in 2016, represents a deliberate recalibration of the country's investment treaty policy. It emerged against the background of disputes arising under earlier-generation treaties and seeks to narrow the scope of substantive protections, define investment through an enterprise-based approach, require the pursuit of domestic remedies, and preserve governmental authority in sensitive regulatory fields. This paper critically examines whether the Model BIT achieves a defensible balance between investor protection and India's right to regulate. It analyses the historical evolution of India's BIT programme, the treaty's principal substantive and procedural provisions, the implications of its exclusions and safeguards, and the concerns that its restrictive architecture may create for investment confidence. It argues that regulatory autonomy and investor protection are not mutually exclusive. A durable investment regime requires clear standards, predictable procedures, transparent administration, proportionate regulation, and effective remedies. The paper concludes with recommendations for refining India's treaty practice through calibrated protections, institutional transparency, responsible investment obligations, and dispute-prevention mechanisms.

Keywords: Bilateral Investment Treaty; foreign direct investment; regulatory sovereignty; investor–State dispute settlement; Model BIT 2016; fair and equitable treatment; India.

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1. INTRODUCTION

1.1 Background and context

Foreign direct investment has become an important component of economic development, technological advancement, infrastructure creation, employment generation, and integration into global value chains. For developing economies such as India, foreign capital can supplement domestic savings, introduce managerial and technical expertise, expand productive capacity, and connect domestic enterprises with international markets. However, investment decisions are influenced not only by market opportunities but also by the stability, transparency, and predictability of the legal environment in which an investment is made. Investors committing substantial resources over long periods may be concerned about arbitrary state action, discriminatory treatment, uncompensated expropriation, denial of justice, or sudden changes in the regulatory framework.[2]

BITs are instruments through which two States establish reciprocal standards for the treatment and protection of investments made by investors of one State in the territory of the other. Traditional treaties commonly contain protections relating to fair and equitable treatment, full protection and security, national treatment, most-favoured-nation treatment, protection against expropriation, and access to international arbitration. These provisions are intended to reduce political and legal risks. Yet, the same provisions can generate controversy when investors use them to challenge measures adopted for public purposes, including taxation, environmental protection, public health, natural resource management, financial stability, or social welfare.[3]The central difficulty is therefore structural. A State must remain capable of responding to changing social, economic, environmental, and technological conditions. It cannot be expected to freeze its regulatory framework merely because foreign investors have entered its market. Conversely, regulatory sovereignty cannot mean that the State is free to act arbitrarily, discriminate against foreign investors, or disregard procedural fairness. The legitimacy of an investment treaty depends on its ability to distinguish genuine public-interest regulation from abusive or discriminatory conduct.[4]

1.2 India's changing investment treaty approach

India began its BIT programme in the 1990s, signing its first bilateral investment treaty in 1994. The early treaty programme was part of a broader strategy to attract foreign capital following economic liberalisation. Many of the first-generation agreements were based on relatively broad formulations of investor protection. Their language often left substantial interpretive space to arbitral tribunals,

[2] Organisation for Economic Co-operation and Development [OECD], 2008; United Nations Conference on Trade and Development [UNCTAD], 2015
[3] UNCTAD, 2012, 2015
[4] OECD, 2004; UNCTAD, 2015

particularly in relation to fair and equitable treatment, indirect expropriation, and the relationship between treaty obligations and domestic regulatory measures.[5]

India's experience with investment arbitration exposed the potential consequences of these broad standards. Disputes involving taxation, telecommunications, natural resources, and regulatory decision-making raised questions about the scope of treaty protection and the extent to which domestic public measures could be reviewed by international tribunals. The adverse award in White Industries Australia Limited v. Republic of India, particularly its treatment of delay in the Indian judicial system through the most-favoured-nation clause, became an important point of reference in policy discussions. The disputes involving Vodafone and Cairn further intensified public debate about the interaction between taxation, retrospective legislation, and investment treaty commitments.[6]

Against this background, the Union Cabinet approved a revised Model BIT in December 2015, and the Department of Economic Affairs circulated the text in 2016. The instrument is commonly described as the Model BIT 2016, although the official approval and text date from December 2015. It was intended to guide the renegotiation of existing treaties and the negotiation of future investment agreements. Its architecture reflects a shift from broad investor-oriented protection towards a more carefully delimited framework that gives greater weight to domestic legal processes and the State's regulatory space.[7]

1.3 Statement of the research problem

The Model BIT attempts to protect investments without reproducing the perceived weaknesses of earlier treaties. However, a treaty that narrows investor rights too extensively may weaken the credibility of the protection it promises. Requirements such as exhaustion of local remedies, a limited definition of investment, exclusions for several categories of governmental measures, and restrictions on the remedies available to tribunals may be defended as safeguards for sovereignty. Yet, they may also increase the cost, duration, and uncertainty of dispute resolution. The research problem is whether the Model BIT has created a balanced and commercially credible system or has shifted the balance so far towards the State that its investment-protection function is diluted.

1.4 Research questions

1. How did India's investment treaty policy evolve from the first-generation BITs to the Model BIT 2016?

[5] Department of Economic Affairs, Ministry of Finance, Government of India, 2015; UNCTAD, 2015
[6] Cairn Energy PLC v. Republic of India, 2020; Republic of India v. Vodafone Group PLC, 2020; White Industries Australia Ltd. v. Republic of India, 2011
[7] Department of Economic Affairs, Ministry of Finance, Government of India, 2015; Press Information Bureau, Government of India, 2015, 2017

2. To what extent do the Model BIT's substantive provisions protect foreign investors against arbitrary, discriminatory, or procedurally unfair state conduct?

3. Do the treaty's exclusions, local-remedy requirement, and limits on arbitral relief adequately preserve India's regulatory sovereignty?

4. Does the Model BIT provide sufficient predictability and confidence to attract responsible long-term foreign investment?

1.5 Objectives, scope and methodology

Research Objectives

1. To examine the evolution of India's investment treaty policy from first-generation BITs to the Model BIT, 2016.

2. To analyse the extent of investor protection under the Model BIT, 2016, against arbitrary, discriminatory, and procedurally unfair State conduct.

3. To evaluate whether the Model BIT, 2016, adequately safeguards India's regulatory sovereignty through its exclusions, local-remedy requirement, and limitations on arbitral relief.

4. To assess whether the Model BIT, 2016, ensures sufficient legal predictability and investor confidence to attract responsible, long-term foreign investment.

The paper adopts a doctrinal and analytical research methodology. It relies on the text of the Model BIT, Indian constitutional and statutory principles, relevant judicial decisions, publicly available arbitral awards, government materials, and international investment law literature. A limited comparative perspective is used to identify broader treaty-making trends. The analysis is primarily concerned with the Model BIT as a model instrument and does not assume that every provision automatically applies to all of India's investment treaties. The terms of each treaty in force must be examined independently. The paper does not undertake an econometric assessment of the causal relationship between BITs and foreign investment inflows.

2. CONCEPTUAL FOUNDATIONS: INVESTOR PROTECTION AND REGULATORY SOVEREIGNTY

2.1 Meaning and purpose of bilateral investment treaties

A BIT is a treaty between two sovereign States that establishes legal standards for investments

made by qualifying investors of one contracting party in the territory of the other. It generally seeks to encourage investment by reducing non-commercial risks and by providing a legal framework for the treatment of foreign capital. A BIT may also protect the overseas investments of domestic investors, making the arrangement reciprocal in form and operation. The treaty does not ordinarily guarantee commercial success, profitability, or freedom from ordinary business risks. Rather, it seeks to protect investors against specified forms of state conduct that violate agreed international obligations.[8] The substantive protections found in investment treaties have traditionally included national treatment, most-favoured-nation treatment, fair and equitable treatment, full protection and security, and protection against direct or indirect expropriation. Procedural provisions may allow an investor to submit a treaty claim to international arbitration, subject to jurisdictional and admissibility requirements. The availability of ISDS is significant because it allows a qualifying investor to pursue a claim against a host State without relying exclusively on diplomatic protection by the investor's home State.[9]

The economic rationale for BITs is often expressed in terms of commitment and credibility. A host State may use a treaty to signal that it will not arbitrarily interfere with protected investments. This signal can be valuable where investors perceive institutional or political risks. Nevertheless, the empirical relationship between BITs and increased foreign investment is complex. Investment decisions are also influenced by market size, infrastructure, labour skills, macroeconomic stability, domestic demand, political conditions, tax policy, and the quality of public institutions. A BIT can contribute to investor confidence, but it cannot substitute for a sound domestic investment climate.[10]

2.2 Regulatory sovereignty and the right to regulate

Regulatory sovereignty refers to the authority of a State to govern its territory and population through legislation, executive action, administrative decisions, and judicial institutions. It includes the ability to regulate economic activity, protect public health and safety, preserve the environment, maintain financial stability, secure national interests, and pursue social and developmental objectives. In international law, sovereignty is not an unlimited licence to disregard international obligations. When a State consents to a treaty, it accepts binding commitments and must perform them in good faith. The legal challenge is to interpret those commitments consistently with the legitimate regulatory functions of the State.[11] The right to regulate is especially important for developing States because their regulatory priorities may change as their economies develop. A government may need to introduce stricter environmental standards, revise mining or telecommunications rules, reform public utilities, alter

[8] United Nations Conference on Trade and Development [UNCTAD], 2015; Organisation for Economic Co-operation and Development [OECD], 2008
[9] UNCTAD, 2012, 2015; Government of India, 2015
[10] OECD, 2008; UNCTAD, 2015
[11] United Nations, 1969; UNCTAD, 2015

financial regulations, or adopt public-health measures. These changes may affect the expected returns of investors. The fact that a measure has an economic impact, however, does not automatically make it unlawful under international investment law. The relevant question is whether the measure breaches a specific treaty obligation, taking account of the text, context, purpose, and applicable legal standards.[12]

Regulatory sovereignty is therefore best understood as a protected sphere of legitimate public decision-making within the limits of international law. It is not synonymous with immunity from review. Equally, investor protection should not be interpreted as a guarantee that the legal and commercial environment will remain unchanged. A balanced treaty must protect investors from abuse while preserving the State's ability to adopt bona fide, non-discriminatory, and proportionate public-interest measures.[13]

3. HISTORICAL EVOLUTION OF INDIA'S BIT POLICY

3.1 The first-generation BIT framework

India's early BITs were negotiated in the context of economic liberalisation and the desire to attract foreign capital. The agreements generally followed internationally familiar formulations and sought to assure investors of protection against discriminatory treatment and expropriation. The policy assumption was that credible treaty commitments could reduce perceived political risk and encourage investment. However, many early agreements contained broadly framed standards and did not always define their relationship with domestic regulatory powers in sufficient detail.[14]

The interpretation of such treaties depends on the language of each agreement. Some treaties contain broad fair and equitable treatment clauses, expansive most-favoured-nation provisions, or definitions of investment capable of covering a wide range of assets. Where the treaty does not clearly define the limits of these protections, tribunals may be required to determine their content by reference to customary international law, treaty context, and prior arbitral decisions. Different tribunals may reach different conclusions, creating uncertainty for both investors and States.[15]

3.2 Arbitration disputes and policy reassessment

India's investment disputes demonstrated that treaty exposure could arise from a wide range of governmental conduct. In White Industries Australia Limited v. Republic of India, the tribunal accepted an argument based on the most-favoured-nation clause of the India–Australia BIT to import a more

[12] OECD, 2004; UNCTAD, 2015
[13] Government of India, 2015; UNCTAD, 2015
[14] Government of India, 2015; UNCTAD, 2015
[15] UNCTAD, 2012, 2015

favourable dispute-settlement provision from another treaty. The decision raised concerns about treaty shopping through MFN clauses and about the possibility that procedural provisions could be imported in ways not clearly anticipated by the contracting parties.[16]

The Vodafone and Cairn disputes arose from the retrospective taxation controversy. The investors challenged the application of tax measures through investment treaty proceedings, while India maintained that taxation fell within its sovereign authority and that the measures were legitimate exercises of domestic law-making power. The disputes highlighted the difficult relationship between taxation, legal certainty, investor expectations, and the public authority to raise revenue. They also demonstrated that domestic legislative action may have consequences under international commitments, depending on the applicable treaty text and facts.[17]

4. KEY FEATURES OF INDIA'S MODEL BIT 2016

4.1 Enterprise-based definition of investment

One of the most consequential features of the Model BIT is its enterprise-based definition of investment. Instead of treating every asset owned or controlled by a foreign investor as an independently protected investment, the model focuses on an enterprise established, acquired, or expanded in accordance with the laws and regulations of the host State. The definition is accompanied by characteristics commonly associated with investment, including commitment of capital or other resources, expectation of gain or profit, assumption of risk, and a certain duration. The enterprise-based approach is intended to connect treaty protection with genuine productive economic activity in the host State.[18]

This approach can reduce the possibility that ordinary commercial transactions, short-term claims, or assets lacking a meaningful connection with productive activity will qualify for treaty protection. It may also help distinguish investment from trade in goods and services. At the same time, the approach can raise difficult questions about corporate structures, indirect ownership, minority shareholdings, financial instruments, and the treatment of investments made through complex international groups. If the definition is applied too rigidly, genuine forms of modern investment may be excluded despite involving substantial capital, risk, and long-term economic commitment.[19]

[16] White Industries Australia Ltd. v. Republic of India, 2011; UNCTAD, 2012
[17] Cairn Energy PLC & Cairn UK Holdings Ltd. v. Republic of India, 2020; Vodafone International Holdings B.V. v. Republic of India, 2020
[18] Government of India, 2015, art. 1.4
[19] Government of India, 2015, art. 1.4; UNCTAD, 2015

4.2 Treatment of investments and the limited protection standard

Article 3 of the Model BIT adopts a relatively narrow approach to the treatment of investments. Rather than reproducing an unrestricted fair and equitable treatment standard, it identifies specified forms of conduct that may violate customary international law. These include denial of justice in judicial or administrative proceedings, a fundamental breach of due process, targeted discrimination on manifestly unjustified grounds, and manifestly abusive treatment such as coercion, duress, or harassment. The formulation is intended to prevent tribunals from treating every unfair or commercially harmful measure as a treaty breach.[20]

The benefit of a defined standard is that it can improve predictability and preserve regulatory space. Governments should not be held internationally liable merely because an investor disagrees with a policy decision or because a regulation reduces expected profits. A requirement of serious misconduct can protect ordinary policy-making from being converted into an international compensation claim. It also signals that the treaty is concerned with fundamental standards of governmental conduct rather than guaranteeing an ideal investment environment.[21]

4.3 Full protection and security

The Model BIT clarifies that full protection and security relates to the physical security of investors and investments, rather than creating a general obligation to provide legal or commercial protection. This clarification responds to expansive interpretations in which the standard has sometimes been argued to include legal security or a stable regulatory environment. The physical-security focus recognises the State's duty to exercise appropriate care in protecting persons and property against violence or physical harm, while avoiding an open-ended guarantee against all forms of economic loss.[22]

The clarification strengthens the State's ability to regulate and reduces the risk that ordinary changes in law will be treated as breaches of full protection and security. Nevertheless, physical security remains a meaningful obligation. A State may still be responsible where it fails to exercise due diligence in circumstances requiring reasonable protective action. The treaty's formulation should be understood as a clarification of the subject matter of the standard, not as permission for authorities to disregard threats to investors or their property.[23]

4.4 National treatment and non-discrimination

National treatment is designed to prevent a host State from treating foreign investors less favourably

[20] Government of India, 2015, art. 3.1
[21] Government of India, 2015, art. 3; UNCTAD, 2012
[22] Government of India, 2015, art. 3.2; UNCTAD, 2012
[23] Government of India, 2015, art. 3.2; UNCTAD, 2012

than domestic investors in comparable circumstances. It seeks to ensure that foreign investors are not disadvantaged merely because of their nationality. The Model BIT includes a national-treatment obligation, subject to its terms and relevant qualifications. This protection is important because discriminatory licensing, regulatory enforcement, access to facilities, or administrative treatment can distort competition and undermine investor confidence.[24]

The concept of like circumstances is central to the operation of national treatment. A foreign investor and a domestic investor may operate in different sectors, face different regulatory risks, or contribute differently to public policy objectives. A difference in treatment is not necessarily discriminatory if it is based on legitimate and objective distinctions. The treaty should be interpreted to distinguish nationality-based disadvantage from reasonable differentiation grounded in public welfare, environmental protection, public security, or other legitimate regulatory objectives.[25]

The Model BIT does not reproduce the broadest possible combination of national treatment and MFN protection found in some older treaties. Its more restrained design reflects concern that MFN clauses can be used to import substantive or procedural benefits from third-party treaties. This caution is understandable, but a treaty must still ensure that investors receive a meaningful guarantee against nationality-based discrimination. Clear drafting on comparators, exceptions, and the relationship between national treatment and domestic regulatory classifications would improve certainty.[26]

5. INVESTOR–STATE DISPUTE SETTLEMENT UNDER THE MODEL BIT

5.1 The role of ISDS in investment protection

Investor–State dispute settlement is one of the most significant features of modern investment treaties. It allows a qualifying investor to bring a claim directly against the host State for an alleged breach of treaty obligations. This mechanism can depoliticise investment disputes by providing a legal forum independent of the domestic political institutions involved in the challenged measure. It can also strengthen the credibility of treaty commitments by ensuring that investors have access to an international remedy where domestic processes are ineffective or inadequate.[27]

At the same time, ISDS raises concerns about cost, transparency, consistency, and the relationship between arbitral tribunals and domestic courts. Proceedings can be expensive and lengthy, and awards may involve substantial public expenditure. Tribunals are generally constituted for individual disputes and do not operate as a single permanent court with a formal system of binding precedent. Differences

[24] Government of India, 2015, art. 4; UNCTAD, 2015
[25] Government of India, 2015, art. 4.1 and footnote 2; UNCTAD, 2015
[26] Government of India, 2015, art. 4; UNCTAD, 2015
[27] UNCTAD, 2015; Government of India, 2015, arts. 13–16

in treaty wording and arbitral interpretation can therefore create uncertainty. The Model BIT responds to these concerns by imposing procedural requirements intended to ensure that domestic institutions have a primary opportunity to address disputes.[28]

5.2 Exhaustion of local remedies

The Model BIT adopts a requirement that an investor pursue local remedies before commencing international arbitration, subject to the detailed conditions and exceptions contained in the treaty. The requirement reflects the principle that domestic courts and administrative bodies should ordinarily be given an opportunity to correct alleged violations. It may strengthen domestic judicial institutions, reduce premature international claims, and ensure that investment disputes are considered within the legal system that regulates the investment.[29] The requirement also raises practical concerns. Domestic litigation can be prolonged, particularly in jurisdictions where court dockets are heavily burdened. An investor may have to pursue proceedings through multiple levels of adjudication before obtaining access to arbitration. This can increase cost and uncertainty and may undermine the utility of international dispute settlement as a safeguard against serious state misconduct. The effectiveness of the local-remedy requirement therefore depends on the quality, independence, accessibility, and timeliness of domestic institutions.[30]

A carefully designed exhaustion requirement should include a clear time framework, rules on what constitutes an effective remedy, and exceptions where remedies are unavailable, manifestly ineffective, or incapable of providing meaningful redress. It should also clarify whether the requirement applies to the locally established enterprise, the foreign investor, or both, and how parallel proceedings are treated. Without such guidance, procedural disputes may become as complex as the substantive claims they are intended to filter.[31]

6. REGULATORY SOVEREIGNTY IN PRACTICE: PUBLIC POLICY AND STATE RESPONSIBILITY

6.1 Taxation and fiscal sovereignty

Taxation is an essential expression of sovereign authority. Governments require revenue to finance infrastructure, education, healthcare, social protection, defence, and public administration. Tax laws also shape economic behaviour and may be revised to respond to fiscal needs, prevent avoidance, or

[28] UNCTAD, 2015; Government of India, 2015, arts. 13–16
[29] Government of India, 2015, art. 15.1; UNCTAD, 2015
[30] Government of India, 2015, art. 15; White Industries Australia Ltd. v. Republic of India, 2011; UNCTAD, 2015
[31] Government of India, 2015, arts. 13–15; UNCTAD, 2015

address gaps in the tax system. The Vodafone and Cairn disputes demonstrated that retrospective tax measures can create significant investment treaty controversy, particularly where investors claim that a measure has defeated established expectations or has been applied in an arbitrary manner.[32]

The protection of fiscal sovereignty does not mean that all tax measures should be beyond legal scrutiny. Taxation can be used discriminatorily or as a disguised form of confiscation. A treaty should therefore protect bona fide tax policy while retaining safeguards against targeted abuse, denial of due process, and discriminatory enforcement. It should also promote coordination between tax authorities and investment treaty negotiators so that the State understands the international consequences of fiscal measures before disputes arise.[33]

6.2 Environmental regulation and sustainable development

Environmental regulation is a central test of the balance between investor protection and regulatory sovereignty. Investments in mining, energy, infrastructure, manufacturing, transport, and real estate may have significant environmental consequences. Governments must be able to impose pollution controls, conduct environmental impact assessments, protect forests and biodiversity, regulate water use, and respond to climate-related risks. These measures may increase costs or reduce the profitability of a project, but they can be essential to protecting constitutional and statutory commitments to public welfare and environmental protection.[34]

Investment treaties should recognise that sustainable development is not external to investment policy. Long-term investment depends on stable ecosystems, reliable water resources, public health, and resilient infrastructure. A treaty that discourages legitimate environmental regulation may undermine the very conditions necessary for sustainable economic activity. At the same time, environmental measures should be administered transparently and consistently. Investors should receive notice, an opportunity to be heard where appropriate, and access to review where authorities act unlawfully.[35]

The Model BIT's regulatory safeguards provide space for public-interest measures, but the treaty could be strengthened by more explicit language on environmental protection, climate action, labour standards, and responsible business conduct. Such provisions should not create vague obligations that are difficult to apply. Instead, they should clarify that bona fide, non-discriminatory measures adopted to protect the environment and public health will not ordinarily constitute treaty breaches merely

[32] Cairn Energy PLC & Cairn UK Holdings Ltd. v. Republic of India, 2020; Vodafone International Holdings B.V. v. Republic of India, 2020; UNCTAD, 2015
[33] Government of India, 2015, art. 2.4(ii); UNCTAD, 2015
[34] Government of India, 2015, art. 5.5; UNCTAD, 2015
[35] Government of India, 2015, preamble and arts. 5.5, 10; UNCTAD, 2015

because they affect investment value.[36]

7. CRITICAL EVALUATION OF THE MODEL BIT 2016

7.1 Strengthening the State's policy space

The strongest feature of the Model BIT is its attempt to restore a clearer boundary between legitimate governmental regulation and internationally wrongful conduct. By narrowing the definition of investment, specifying the treatment standard, clarifying full protection and security, and excluding selected policy areas, the model seeks to reduce the possibility that tribunals will interpret general treaty language as a guarantee of regulatory stability. This is particularly important for a developing country that must continue to reform its economy and respond to changing public needs.[37]

The model also recognises that domestic institutions have a role in resolving investment disputes. Requiring investors to pursue local remedies can strengthen the legitimacy of domestic adjudication and prevent international arbitration from becoming the first response to every regulatory disagreement. The emphasis on consultation may also encourage administrative solutions. In this respect, the Model BIT reflects a broader movement in investment treaty practice towards greater precision and recognition of the right to regulate.[38]

7.2 Risk of excessive restriction on investor protection

The same features that protect regulatory space may reduce the practical value of the treaty for foreign investors. A narrow treatment standard may not adequately address serious forms of arbitrary or inconsistent administrative conduct that fall short of denial of justice, fundamental due process violations, targeted discrimination, or manifest abuse. An enterprise-based definition may exclude certain genuine investments. Exhaustion of local remedies may make international relief inaccessible where domestic proceedings are unreasonably delayed. Broad exclusions may leave investors uncertain about whether important governmental measures are reviewable.[39]

The risk is not simply that investors may dislike a more demanding treaty. Sophisticated investors can assess legal risk and may accept reasonable limitations where the rules are clear. The greater concern is uncertainty about how the limitations will be interpreted and whether the system provides an effective remedy for serious wrongdoing. If a treaty appears to offer protection in principle but makes

[36] Government of India, 2015, arts. 5.5 and 12; OECD, 2004; UNCTAD, 2015
[37] Government of India, 2015, arts. 1, 2, 3 and 5; United Nations Conference on Trade and Development [UNCTAD], 2015
[38] Government of India, 2015, preamble and arts. 5.5, 10, 13 and 15; UNCTAD, 2015
[39] Government of India, 2015, arts. 1, 2, 3 and 15; UNCTAD, 2015

access to a remedy excessively difficult in practice, it may fail to perform its signalling function. Investor confidence depends on credible protection, not merely on the existence of a treaty document.[40]

8. COMPARATIVE PERSPECTIVES AND EVOLVING INDIAN TREATY PRACTICE

8.1 International movement towards calibrated treaty protections

International investment treaty practice has increasingly moved away from some of the broad formulations found in older-generation agreements. Several States have sought to define fair and equitable treatment by reference to specified elements, clarify the scope of indirect expropriation, include express right-to-regulate language, narrow MFN clauses, and introduce exceptions for public welfare measures. Other approaches include more detailed provisions on transparency, corporate social responsibility, sustainable development, and investor obligations. These developments demonstrate that the challenge faced by India is not unique.[41]

The European Union's approach to investment dispute settlement, including proposals for a standing investment court system in certain agreements, illustrates a different response to concerns about consistency and legitimacy. The United States–Mexico–Canada Agreement also reflects a more restricted approach to ISDS between certain parties, while preserving specific forms of investor protection in defined circumstances. These models are not directly transferable to India, but they show that States can recalibrate investment protection through a combination of substantive drafting and institutional reform.[42]

8.2 India's post-2016 treaty practice

India's subsequent treaty practice demonstrates that the Model BIT has functioned as a negotiating reference point rather than an unalterable text. The India–Belarus BIT, India–Kyrgyzstan BIT, India–Brazil Investment Cooperation and Facilitation Treaty, India–UAE BIT, and India–Uzbekistan BIT reflect the continuing evolution of India's investment arrangements. The India–UAE BIT, signed in February 2024 and entering into force on 31 August 2024, is particularly relevant because it provides a contemporary example of India's treaty practice and replaced the earlier India–UAE agreement.[43]

The India–UAE instrument illustrates the importance of examining actual treaty texts rather than assuming that every agreement reproduces the Model BIT word for word. Modern agreements may contain different formulations, tailored exceptions, or negotiated procedural arrangements. India's

[40] OECD, 2008; UNCTAD, 2015
[41] UNCTAD, 2015; United Nations Commission on International Trade Law [UNCITRAL], 2014
[42] European Commission, 2015; United States, Mexico, & Canada, 2018, Chapter 14
[43] Government of India, 2018, 2019, 2020, 2024a, 2024b

treaty practice should be assessed through a treaty-by-treaty comparison of substantive protections, investor eligibility, dispute settlement, public-policy exceptions, and termination provisions. This approach avoids over generalisation and helps identify whether India is moving towards a more flexible and commercially responsive model.[44]

8.3 The announced review of India's Model BIT

The Union Budget 2025–26 announced a review of the Model BIT with the stated objective of making it more conducive to attracting foreign investment while balancing the interests of investors and the public. This announcement is significant because it indicates recognition that the investment treaty framework requires continuing evaluation. A review should not be understood as a rejection of the sovereignty-oriented approach adopted in 2016. Rather, it creates an opportunity to assess which safeguards have worked, where uncertainty remains, and whether the treaty provides an adequate level of protection for contemporary forms of investment.[45]

Any revised framework should be informed by the experience of disputes, consultations with investors and public authorities, developments in international practice, and the practical operation of local remedies. It should also consider emerging investment sectors such as digital infrastructure, renewable energy, advanced manufacturing, data centres, and technology-intensive services. These sectors raise questions about intangible assets, data governance, cybersecurity, environmental impacts, and cross-border corporate structures that may not be fully addressed by a traditional enterprise-based model.[46]

9. CHALLENGES IN IMPLEMENTATION

9.1 Administrative capacity and regulatory consistency

A treaty cannot by itself ensure consistent administrative conduct. Investors interact with licensing authorities, tax departments, regulators, local bodies, public-sector enterprises, and courts. If these institutions issue conflicting directions, fail to communicate, or apply rules unpredictably, the risk of disputes increases. Regulatory sovereignty is strengthened, rather than weakened, when public authorities act transparently and consistently. A State that exercises its regulatory powers through clear procedures is less likely to face allegations of arbitrary treatment and is better positioned to defend legitimate measures.[47]

[44] Government of India, 2015, 2024a; UNCTAD, 2015
[45] Ministry of Finance, Government of India, 2025; UNCTAD, 2015
[46] OECD, 2011; UNCTAD, 2023
[47] OECD, 2011; UNCTAD, 2015

India should therefore treat investment treaty compliance as a whole-of-government responsibility. Officials involved in investment approvals and regulation should receive training on treaty obligations and dispute prevention. Major projects should be supported by coordinated administrative records, clear reasons for decisions, and accessible grievance mechanisms. Early legal review of measures that may significantly affect foreign investment can identify avoidable risks without giving investors a veto over public policy.[48]

9.2 Awareness of treaty obligations at the State level

Because investment projects are frequently implemented at the State and local levels, treaty awareness cannot remain confined to central ministries. State governments may negotiate project arrangements, issue permissions, acquire land, provide incentives, or impose compliance requirements. Their decisions may have consequences for India's international obligations. A structured communication mechanism between the Union and States can help ensure that public authorities understand the legal implications of their actions and that potential disputes are addressed before they escalate.[49]

9.3 Transparency and access to information

Transparency is necessary for both investor confidence and public accountability. Investors should be able to identify the applicable legal framework, relevant authorities, procedural requirements, and available remedies. The public should also be able to understand the commitments undertaken by the State and the financial implications of investment disputes. Publication of treaty texts, procedural rules, awards where legally permissible, and policy guidance can reduce uncertainty. Transparency should extend to the reasons for regulatory decisions, subject to legitimate confidentiality and national-security restrictions.[50]

9.4 Domestic judicial capacity and timely remedies

The requirement to pursue local remedies places greater importance on the effectiveness of domestic courts and administrative tribunals. If proceedings are excessively delayed or remedies are inaccessible, the requirement may become a barrier rather than a meaningful safeguard. Investment-related disputes may involve technical questions of taxation, infrastructure, energy, intellectual property, or financial regulation. Judicial capacity-building, specialised expertise, effective case management, and alternative dispute resolution can improve the quality and speed of domestic

[48] OECD, 2011; UNCTAD, 2015
[49] Government of India, 2015; UNCTAD, 2015
[50] UNCITRAL, 2014; UNCTAD, 2015

adjudication.[51]

10. RECOMMENDATIONS FOR REFORM

10.1 Adopt a calibrated and clearly defined treatment standard

India should retain a carefully defined treatment standard but clarify its relationship with customary international law and the specific categories of prohibited conduct. The treaty could expressly address serious arbitrariness, denial of justice, fundamental due process failures, targeted discrimination, coercion, and manifest abuse while making clear that ordinary regulatory change or mere frustration of commercial expectations does not establish a breach. Illustrative guidance and interpretive notes may reduce inconsistent readings. The standard should be sufficiently precise to prevent speculative claims without leaving investors unprotected against serious misconduct.[52]

10.2 Refine the definition of investment

The enterprise-based definition should be retained only if it is drafted and applied in a manner that recognises genuine modern investment structures. Guidance should clarify the treatment of indirect ownership, minority interests, branches, contractual arrangements, infrastructure concessions, and intangible assets. The decisive considerations should include a real contribution of capital or resources, duration, risk, and productive economic activity, together with compliance with host-State law. A substance-based approach would reduce formalistic exclusions while preserving the objective of excluding purely speculative or artificial claims.[53]

10.3 Make local-remedy requirements workable

The local-remedy requirement should be accompanied by clear time limits and a practical test of effectiveness. The treaty should explain when a remedy is unavailable, ineffective, or incapable of providing meaningful relief. It should also address unreasonable delay and clarify the relationship between domestic proceedings and international arbitration. A reasonable framework can respect domestic judicial authority without requiring investors to pursue futile proceedings. In parallel, India should improve the capacity and timeliness of domestic forums so that local remedies are genuinely effective.[54]

[51] Government of India, 2015, art. 15; UNCTAD, 2015; White Industries Australia Ltd. v. Republic of India, 2011
[52] Government of India, 2015, art. 3; UNCTAD, 2012, 2015
[53] Government of India, 2015, art. 1.4; UNCTAD, 2015
[54] Government of India, 2015, art. 15; UNCTAD, 2015

10.4 Draft public-policy exceptions with precision

Exceptions for taxation, national security, public health, environmental protection, subsidies, procurement, and other sensitive matters should be carefully defined. The treaty should protect bona fide measures adopted for legitimate public purposes, while preserving safeguards against disguised discrimination, bad faith, or manifest abuse. Where appropriate, the text may require a rational connection between the measure and the stated objective, without inviting tribunals to substitute their policy preferences for those of domestic authorities. Clear drafting will reduce jurisdictional disputes and improve the legitimacy of regulatory action.[55]

10.5 Incorporate sustainable development and responsible investment

Future Indian treaties should give greater recognition to sustainable development and responsible business conduct. Investors should be encouraged to comply with domestic laws relating to labour, environment, human rights, anti-corruption, and corporate governance. The treaty may refer to internationally recognised standards of responsible business conduct and require investors to maintain accurate records and avoid corrupt practices. Such provisions should be drafted with care so that they are legally meaningful and not merely aspirational. The aim is to make investment protection reciprocal in spirit: States must act lawfully, and investors must conduct their operations responsibly.[56]

10.6 Improve transparency and procedural legitimacy

India should promote publication of pleadings, procedural orders, and awards, subject to appropriate protections for confidential business information and national security. Rules on arbitrator independence, disclosure of conflicts, appointment procedures, and costs should be strengthened. Amicus curiae participation may be considered where disputes raise significant public-interest issues and where participation would assist the tribunal. Clear procedural rules can improve confidence in the dispute-settlement process without expanding the substantive scope of investor rights.[57]

11. CONCLUSION

India's Model Bilateral Investment Treaty, 2016 represents a significant change in the country's approach to international investment protection. It emerged from experience with earlier-generation treaties and from concerns that broadly worded standards and expansive dispute-settlement mechanisms could expose governmental measures to challenges that were difficult to reconcile with domestic policy

[55] Government of India, 2015, arts. 2 and 5; OECD, 2004; UNCTAD, 2015
[56] OECD, 2023; UNCTAD, 2015
[57] UNCITRAL, 2014; UNCTAD, 2015

priorities. The Model BIT responds through a narrower definition of investment, a more carefully specified treatment standard, a physical-security interpretation of full protection and security, regulatory exclusions, a requirement to pursue domestic remedies, and limits on arbitral relief. These features reflect a deliberate attempt to preserve India's regulatory sovereignty while continuing to offer protection to foreign investors.[58]

The Model BIT's central achievement is its recognition that investment protection must coexist with the State's responsibility to govern. Foreign investors cannot reasonably expect immunity from ordinary changes in law, taxation, environmental regulation, public-health measures, or social policy. At the same time, regulatory sovereignty does not justify arbitrary treatment, discrimination, denial of justice, or bad-faith conduct. A credible investment regime must protect investors against such conduct while allowing governments to pursue legitimate public objectives. The distinction between lawful regulation and treaty breach must be drawn through clear standards and reasoned procedures.[59]

The Model BIT nevertheless raises important concerns. Its restrictive provisions may limit access to remedies, create uncertainty about the scope of protected investment, and leave some forms of serious administrative misconduct insufficiently addressed. The exhaustion of local remedies requirement is defensible only if domestic remedies are effective and reasonably accessible. Exclusions are legitimate only when carefully defined and applied in good faith. A treaty that protects sovereignty but provides little practical assurance to investors may weaken its own ability to encourage long-term investment.[60]

The future of India's investment treaty policy should therefore be based on calibration rather than a choice between unrestricted investor rights and absolute State discretion. India should retain the core safeguards of the Model BIT while refining its treatment standard, clarifying the definition of investment, making local-remedy requirements workable, and drafting public-policy exceptions with precision. It should also strengthen transparency, dispute prevention, domestic adjudication, and responsible investment obligations. The review announced in the Union Budget 2025–26 provides an opportunity to incorporate these lessons and respond to emerging forms of investment.[61]

Ultimately, regulatory sovereignty and foreign investor protection are complementary elements of a stable investment environment when they are properly designed. Investors require predictable rules and meaningful remedies; governments require the freedom to protect public welfare and pursue development. The most effective treaty is not the one that maximises either side's power, but the one that establishes a transparent and proportionate framework in which both are accountable. India's Model

[58] Government of India, 2015; UNCTAD, 2015
[59] Government of India, 2015, arts. 3 and 5; OECD, 2004; UNCTAD, 2015
[60] Government of India, 2015, arts. 1, 2, 3 and 15; UNCTAD, 2015
[61] Ministry of Finance, Government of India, 2025; UNCTAD, 2015

BIT was an important step towards that objective. Its long-term success will depend on careful implementation, periodic review, and a continuing commitment to the rule of law.[62]

[62] OECD, 2008; UNCTAD, 2015

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