INDIA'S MODEL BILATERAL INVESTMENT TREATY, 2016: AN ASSESSMENT OF INVESTOR PROTECTION AND REGULATORY AUTONOMY

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ABSTRACT

India's Model Bilateral Investment Treaty, 2016 represents a significant shift in the country's approach to international investment protection. Adopted against the background of investor-State disputes under earlier treaties, the model narrows the definition of investment, specifies substantive treatment obligations, omits most-favoured-nation treatment, excludes selected regulatory measures and requires investors to pursue local remedies before international arbitration. This paper evaluates whether these features achieve an appropriate balance between investor protection and the State's right to regulate. Using doctrinal and comparative legal methods, it analyses the model's provisions on investment, fair treatment, national treatment, expropriation, taxation, exceptions, investor obligations and dispute settlement. It also considers lessons from White Industries, Vodafone, Cairn and Devas-related disputes. The paper argues that the model's emphasis on regulatory autonomy is legitimate, but its cumulative restrictions may weaken meaningful investor protection. It recommends calibrated reforms to clarify substantive standards, tailor exceptions, improve procedural access and strengthen domestic dispute prevention. A balanced treaty framework should protect investors against arbitrary State conduct while preserving the ability of governments to regulate lawfully for public welfare and sustainable development.

Keywords: India's Model BIT; 2016 Model BIT; investor protection; regulatory autonomy; ISDS; expropriation; fair and equitable treatment.

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INTRODUCTION

Foreign direct investment is an important source of capital, technology, employment, managerial expertise and access to international markets. For a host State, foreign investment can support industrial development and infrastructure; for an investor, it creates opportunities to conduct business across jurisdictions. The legal environment governing investment is therefore relevant to both sides. Bilateral investment treaties are agreements through which two States establish standards for the treatment of covered investments and, commonly, consent to investor-State dispute settlement. They supplement domestic law by creating international obligations that investors may invoke against a host State.[2] The contemporary investment treaty regime is shaped by a continuing debate between investor protection and the sovereign right to regulate. Broad standards such as fair and equitable treatment, full protection and security, national treatment and protection against expropriation have sometimes been interpreted expansively. Claims involving taxation, licensing, natural resources, public health and environmental regulation have raised concerns that treaty liability may constrain legitimate public policy. At the same time, excessively restrictive treaty language may leave investors without meaningful remedies against discrimination, denial of justice, arbitrary treatment or uncompensated expropriation.[3]

India's experience contributed to this debate. Earlier Indian BITs, many based on the 1993 model, contained broad definitions of investment and substantive protections. Following investment disputes and a wider international reassessment of ISDS, India adopted a revised Model BIT in December 2015, published in January 2016. It marked a significant shift towards an enterprise-based definition of investment, more specific treatment standards, omission of most-favoured-nation treatment, a local-remedies requirement and express exclusions intended to preserve regulatory space. This paper evaluates whether that recalibration creates a fair and predictable balance.[4]

RESEARCH PROBLEM

The central problem is how India can attract and protect genuine foreign investment while

[2] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance.
[3] United Nations Conference on Trade and Development. (2015). World investment report 2015: Reforming international investment governance. United Nations.
[4] Law Commission of India. (2015). Analysis of the 2015 draft model Indian bilateral investment treaty (Report No. 260). Government of India.

retaining sufficient authority to regulate taxation, public health, the environment, financial stability, natural resources, national security and social welfare. A treaty with vague or excessively broad investor rights may expose public measures to costly claims and uncertain arbitral interpretation. Conversely, a treaty that narrows protection too far may fail to deter discriminatory or arbitrary conduct and may weaken confidence among foreign investors and Indian businesses investing abroad.

The 2016 Model BIT responds to concerns associated with the earlier framework, but its cumulative design raises questions. The enterprise-based definition may exclude certain economically significant interests. The treatment standard is framed through specified forms of misconduct rather than a broad fair and equitable treatment clause. The omission of MFN treatment limits reliance on more favourable provisions in other treaties. The local-remedies requirement may strengthen domestic accountability but also create delay and cost. Broad exclusions may preserve policy space while leaving uncertainty about the boundary between legitimate regulation and treaty responsibility. The study therefore asks whether the model's restrictions are proportionate and whether its protections remain practically effective.

RESEARCH QUESTIONS

The study addresses the following questions:

1) What historical and policy developments led India to adopt the 2016 Model BIT?

2) How does the model define investment and structure substantive standards of investor protection?

3) To what extent do its exceptions, exclusions and dispute-settlement provisions preserve regulatory autonomy?

4) What lessons emerge from investment disputes brought against India under earlier treaties?

OBJECTIVES OF THE STUDY

1) To examine the historical evolution and policy developments that led to the formulation and adoption of India's Model Bilateral Investment Treaty, 2016.

2) To analyse the definition of investment and substantive standards of investor protection incorporated under India's Model BIT, 2016, with particular reference to the rights and obligations of foreign investors.

3) To critically evaluate the exceptions, exclusions and dispute-settlement mechanisms under the Model BIT, 2016, in determining their effectiveness in safeguarding India's regulatory autonomy and public policy interests.

4) To examine the lessons emerging from investment disputes brought against India under its earlier bilateral investment treaties and assess their implications for the formulation and implementation of India's Model BIT, 2016.

HYPOTHESIS

The hypothesis is that the 2016 Model BIT appropriately recognises regulatory autonomy and responds to interpretive risks in earlier treaties, but its cumulative restrictions may produce an imbalance in favour of the host State. A more sustainable framework would retain a carefully defined investment threshold, protect due process and non-discrimination, clarify indirect expropriation, and provide accessible but disciplined dispute settlement. Treaty protection should not freeze domestic law or immunise investors from regulation; equally, regulatory autonomy should not shield arbitrary, discriminatory or bad-faith State conduct.

RESEARCH METHODOLOGY AND SCOPE

The paper adopts a doctrinal and analytical methodology. It examines the official Model BIT text, Indian policy materials, relevant legislation, international investment law instruments, arbitral decisions and scholarly commentary. A comparative method identifies selected drafting approaches in the European Union, United States, Brazil and other contemporary treaty practice. The study is primarily qualitative and does not claim to establish through econometric analysis that a particular BIT model causes an increase or decline in FDI. The analysis focuses on the treaty's legal design and institutional consequences.[5]

The Model BIT is a negotiating template, not a treaty that automatically binds India or foreign investors. Its provisions acquire binding force only when incorporated into a treaty concluded

[5] McConville, M., & Chui, W. H. (Eds.). (2017). Research methods for law (2nd ed.). Edinburgh University Press.

with another State and brought into force in accordance with the parties' procedures. The paper distinguishes the model's proposed text from the provisions of particular treaties and recognises that later negotiated agreements may differ. The scope is limited to the 2016 model's principal protections, obligations, exceptions and dispute-settlement architecture.[6]

EVOLUTION OF INDIA'S BIT POLICY

India signed its first BIT with the United Kingdom in 1994. During the following years, India concluded numerous treaties, many based on the 1993 model. These agreements reflected the first generation of investment treaties, which commonly used broad asset-based definitions and protections such as fair and equitable treatment, full protection and security, national treatment, most-favoured-nation treatment and protection against direct and indirect expropriation. Their purpose was to reassure foreign investors against political risk and signal a stable investment climate.[7] The growth of ISDS claims prompted a global debate over arbitral authority and the regulatory consequences of treaty commitments. India's experience with White Industries, Vodafone, Cairn and Devas-related proceedings brought the issue into domestic policy. The disputes arose under different treaties and concerned different facts, but collectively demonstrated the financial, legal and reputational consequences of treaty commitments. The Government reviewed its treaty policy and approved a revised model in December 2015. The Department of Economic Affairs was assigned a coordinating role in negotiations of standalone BITs and investment chapters in economic agreements.[8]

The Government presented the revised model as an effort to provide appropriate protection to foreign investors while maintaining a balance between investor rights and governmental obligations. Its essential features included an enterprise-based definition, specified non-discrimination and due-process protections, national treatment, protection against expropriation, exhaustion of local remedies before arbitration, and a limitation on tribunals' remedial powers. Exclusions relating to procurement, taxation, subsidies, compulsory licences and national security were intended to preserve regulatory authority. This policy choice sought

[6] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance.
[7] Government of India. (1994). Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the promotion and protection of investments.
[8] Law Commission of India. (2015). Analysis of the 2015 draft model Indian bilateral investment treaty (Report No. 260). Government of India.

to move away from open-ended standards without abandoning treaty-based protection.[9]

DEFINITION OF INVESTMENT AND INVESTOR

The definition of investment is the gateway to treaty protection. Earlier-generation BITs commonly adopted an asset-based definition covering property and economic interests such as shares, claims to money, contractual rights, intellectual property and concessions. The 2016 Model BIT adopts an enterprise-based approach. In broad terms, a covered investment is an enterprise constituted, organised and operated in good faith under the law of the host State, taken together with the enterprise's assets. The definition also requires characteristics associated with investment, including commitment of capital or other resources, a certain duration, expectation of gain or profit, assumption of risk and significance for the host economy.[10] The approach seeks to distinguish genuine productive investment from transient financial claims or transactions lacking a substantial connection with the host economy. The good-faith and domestic-law requirements can discourage treaty shopping and prevent investors from relying on protection for investments established through serious illegality. The characteristics resemble factors commonly associated with the Salini analysis in investment arbitration, although the model's wording must be applied according to its own text rather than mechanically importing another tribunal's test.[11]

The definition nevertheless creates potential gaps. Minority shareholdings, portfolio investments, certain debt instruments, pre-establishment expenditures and investments made through complex corporate structures may fall outside protection or generate jurisdictional disputes. The enterprise requirement may be difficult to apply to infrastructure concessions or investment vehicles that do not fit conventional corporate forms. The model should be interpreted with attention to economic reality and the treaty's purpose. Future treaties could clarify indirect ownership, investment funds, branches, restructuring, state-owned enterprises and the consequences of illegality, while retaining safeguards against abusive claims.[12]

[9] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance.
[10] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 1.
[11] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (2001).
[12] United Nations Conference on Trade and Development. (2011). Scope and definition: A sequel. United Nations.

SUBSTANTIVE STANDARD: TREATMENT OF INVESTMENTS

Article 3 of the model provides a carefully delimited treatment standard. It identifies denial of justice in judicial or administrative proceedings, fundamental breach of due process, targeted discrimination on manifestly unjustified grounds and manifestly abusive treatment, including coercion, duress and harassment. It also provides full protection and security, while clarifying that this obligation concerns physical security rather than an unlimited guarantee of legal or commercial stability. The text further indicates that breach of another treaty provision does not, by itself, establish a breach of the treatment article.[13] This drafting seeks to constrain tribunals from deriving additional obligations from broad notions of fairness or legitimate expectations. Denial of justice generally requires a serious defect in the administration of justice, not mere disagreement with a domestic judgment. Due process protection guards against fundamental procedural unfairness. Targeted discrimination addresses unequal treatment on manifestly unjustifiable grounds, while the prohibition on manifest abuse can reach extreme coercive or harassing conduct. These categories can provide meaningful protection against serious misconduct while leaving ordinary policy decisions to domestic institutions.[14]

The standard may, however, be too narrow if it excludes serious arbitrary or inconsistent conduct that does not fit neatly within the listed categories. A discriminatory licensing decision, bad-faith administration or repudiation of a specific assurance may cause substantial injury. A calibrated treaty could expressly prohibit arbitrary or discriminatory measures and clarify when specific, attributable and sufficiently clear representations may create legitimate expectations. It should also state that a general expectation of regulatory stability does not freeze the law or prevent bona fide legislative change.[15]

NATIONAL TREATMENT AND ABSENCE OF MFN

National treatment requires a host State to treat covered foreign investors and investments no less favourably than comparable domestic investors and investments in like circumstances. The comparator requirement is central. Different treatment is not necessarily discriminatory where investors operate in materially different circumstances or where a distinction pursues a

[13] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 3.
[14] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (2004).
[15] United Nations Conference on Trade and Development. (2012). Fair and equitable treatment: A sequel. United Nations.

legitimate regulatory objective. The Model BIT recognises that the totality of circumstances may be relevant, including the nature of the goods or services, effects on third parties or the environment, ownership structure and practical regulatory challenges. This assists States in differentiating between genuinely comparable situations.[16]

The model omits a most-favoured-nation clause. MFN provisions in other BITs may permit investors to claim treatment no less favourable than that accorded to investors of a third State, subject to the treaty's wording and applicable interpretive rules. In White Industries, the tribunal allowed reliance on an effective-means provision in another Indian treaty through the MFN clause in the India-Australia BIT. India's omission of MFN seeks to prevent treaty shopping and preserve negotiating autonomy, particularly over dispute-settlement provisions.[17]

The omission has costs. Investors under different treaties may receive different protection despite making comparable investments. India may also lose flexibility to offer a negotiated improvement across its treaty network through an MFN clause. The choice is ultimately a matter of treaty policy, but it should be made transparently. If MFN is excluded, the substantive standards in each treaty should be sufficiently clear and comprehensive to stand on their own.[18]

EXPROPRIATION AND COMPENSATION

Protection against expropriation is a core element of investment law. Direct expropriation occurs where the State formally takes title to or seizes an investment. Indirect expropriation may arise where State measures substantially deprive an investor of the use, enjoyment or economic value of an investment without formally transferring ownership. The Model BIT protects against expropriation while identifying conditions for a lawful taking, including public purpose, non-discrimination, due process and compensation in accordance with the treaty.[19]

The difficult issue is when regulation becomes indirect expropriation. States routinely regulate property and economic activity through environmental standards, taxation, public health measures, land-use controls, licensing and financial regulation. Such measures may reduce

[16] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 4.
[17] White Industries Australia Limited v. Republic of India, UNCITRAL, Final Award (2011).
[18] United Nations Conference on Trade and Development. (2010). Most-favoured-nation treatment: A sequel. United Nations.
[19] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 5.

profitability without amounting to a taking. If every significant economic impact triggered compensation, the State's ability to govern would be impaired. Conversely, a measure that effectively destroys an investment, targets a particular investor or defeats protected legal rights may warrant closer scrutiny.[20]

A sound treaty should provide a structured framework for assessing indirect expropriation. Relevant factors include economic impact, duration, interference with distinct and reasonable investment-backed expectations, the character and purpose of the measure, and the extent to which the investor retains control or use of the asset. Economic impact should not be decisive by itself. Non-discriminatory measures designed and applied to protect legitimate public welfare objectives should ordinarily not constitute indirect expropriation, except in rare circumstances where the impact is manifestly excessive in relation to the measure's purpose. Clear interpretive guidance would improve predictability for States and investors.[21]

TRANSFERS, COMPENSATION FOR LOSSES AND SUBROGATION

The model recognises the importance of transferring funds related to an investment, including capital contributions, profits, dividends, interest, proceeds from sale or liquidation, loan payments and compensation. Transfer guarantees support commercial confidence because investors need to repatriate lawful returns and meet financial obligations. However, unrestricted transfers can create difficulties during serious balance-of-payments crises or exceptional macroeconomic instability. The model therefore permits temporary restrictions in specified circumstances, including serious balance-of-payments difficulties or threats to macroeconomic management, subject to the treaty's conditions. This reflects the need to balance capital mobility with monetary stability.[22] The compensation-for-losses provision addresses non-discriminatory treatment where investments suffer losses owing to war, armed conflict, civil strife, a state of national emergency or natural disaster. It does not necessarily guarantee compensation for every loss arising from such events; rather, it seeks to ensure that investors receive treatment no less favourable than comparable investors in relation to measures adopted to address those losses. This distinction preserves a standard of equality

[20] Organisation for Economic Co-operation and Development. (2004). Indirect expropriation and the right to regulate in international investment law. OECD Working Papers on International Investment.
[21] United Nations Conference on Trade and Development. (2012). Expropriation: A sequel. United Nations.
[22] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 6.

without converting the State into an insurer against all political or natural risks.[23]

Subrogation allows a State or designated agency that pays an investor under an insurance or guarantee arrangement to assume the investor's relevant rights against the host State. This prevents double recovery and allows public investment-insurance agencies to pursue claims after making payment. The treaty should ensure that the subrogated entity obtains no greater rights than the original investor and remains subject to applicable jurisdictional and procedural conditions. These provisions are commercially important but should be read alongside domestic foreign-exchange regulation and the treaty's exceptions.[24]

TRANSPARENCY, PERSONNEL AND INVESTOR OBLIGATIONS

The model includes provisions concerning transparency and the entry and sojourn of personnel. Transparency promotes publication or accessibility of laws, regulations and administrative procedures relevant to investments, subject to exceptions for confidential information, law enforcement and essential public interests. Accessible rules reduce information asymmetry and help investors plan operations. Transparency should operate reciprocally: investors should provide accurate information where lawfully required, and States should communicate regulatory requirements in a timely and non-discriminatory manner.[25]

The entry and sojourn provision recognises that investors may need to bring managerial, technical and specialist personnel into the host State for investment-related activities. Such provisions facilitate business operations but do not displace domestic immigration, employment, security or qualification requirements. The State retains authority to regulate entry and stay in accordance with its laws and treaty commitments. A carefully framed provision can facilitate investment without creating an unconditional right of entry or employment.[26]

Investor obligations are addressed through compliance with domestic laws and a corporate social responsibility provision. Investors are expected to comply with laws concerning

[23] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 7.
[24] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 8.
[25] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 9.
[26] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 10.

establishment, acquisition, management, operation and disposition of investments, refrain from bribery and provide information required for legitimate regulatory purposes. The CSR clause encourages internationally recognised standards relating to labour, environment, human rights, community relations and anti-corruption. Its language is largely aspirational. Future treaties could improve accountability through clearer due-diligence expectations, disclosure duties and defined consequences for serious misconduct, while avoiding vague obligations that create uncertainty.[27]

EXCEPTIONS AND REGULATORY AUTONOMY

Regulatory autonomy is the State's authority to adopt and enforce laws in pursuit of legitimate public objectives. It is not unlimited immunity from international responsibility: States remain bound by treaty commitments and other applicable international law. The Model BIT preserves policy space through exclusions and exceptions concerning sensitive matters such as taxation, government procurement, subsidies, compulsory licences and national security. These provisions reduce the risk that investment arbitration will become a general appeal mechanism against ordinary policy choices.[28]

Exclusions must nevertheless be drafted carefully. A blanket tax exclusion may leave investors without treaty protection against discriminatory or confiscatory tax conduct, depending on the exact wording. Taxation is essential to public finance, but it can also be used to target an investor or defeat a specific legal commitment. A more calibrated approach would preserve ordinary tax measures while allowing narrowly defined claims involving discriminatory treatment or direct expropriation through taxation, subject to consultation between competent authorities and strict thresholds.[29]

Compulsory licensing is important for public health, access to knowledge and other public interests. International intellectual property law recognises specified flexibilities, including under the TRIPS Agreement. Excluding compliant compulsory licences from treaty claims can prevent investment arbitration from undermining legitimate IP policy. National security

[27] Organisation for Economic Co-operation and Development. (2023). OECD guidelines for multinational enterprises on responsible business conduct. OECD Publishing.
[28] United Nations Conference on Trade and Development. (2015). Investment policy framework for sustainable development. United Nations.
[29] Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India, PCA Case No. 2016-07, Final Award (2020).

exceptions similarly require balance: governments must respond to genuine threats, but broad self-judging language may create unreviewable discretion. Good faith, a plausible connection to the asserted security objective and procedural transparency to the extent compatible with confidentiality can help maintain that balance.[30]

INVESTOR-STATE DISPUTE SETTLEMENT

ISDS permits a qualifying foreign investor to bring a treaty claim directly against the host State before an international arbitral tribunal. It is intended to provide a neutral forum where domestic remedies may be perceived as ineffective or insufficiently independent. Yet ISDS raises concerns about cost, transparency, consistency, arbitrator independence and the possibility that public-law disputes will be decided through private adjudicative processes. The Model BIT retains investor-State arbitration but narrows its scope to specified treaty obligations and limits the remedies available to tribunals.[31]

A distinctive feature is the requirement to exhaust local judicial and administrative remedies for a period of up to five years, subject to an exception where no available domestic remedy is capable of reasonably providing relief in respect of the relevant measure or similar factual matters. The investor must also engage in good-faith consultations or negotiations before arbitration and comply with waiver requirements intended to prevent parallel proceedings. These conditions prioritise domestic courts and reduce the possibility of immediate international claims.[32]

The approach can strengthen domestic accountability and give national institutions the first opportunity to resolve disputes. However, five years of litigation may be expensive and commercially impractical. A rigid requirement may be especially problematic where remedies are unavailable, subject to unreasonable delay or incapable of addressing the treaty breach. The exception should therefore be interpreted in a practical manner. The model's preliminary dismissal mechanism for frivolous or jurisdictionally defective claims, transparency provisions and rules on costs are also important safeguards. They should be implemented consistently so

[30] World Trade Organization. (1994). Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 31.
[31] United Nations Conference on Trade and Development. (2014). Investor-State dispute settlement: A sequel. United Nations.
[32] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 15.

that procedural discipline does not become denial of an effective remedy.[33]

REMEDIES, ARBITRAL PROCEDURE AND STATE-STATE DISPUTES

The Model BIT limits the tribunal's remedial authority primarily to monetary compensation and interest, rather than empowering it to order repeal or reversal of legislation. This protects the institutional space of domestic authorities and avoids direct arbitral control over general lawmaking. Compensation must nevertheless provide effective redress for a proven treaty breach. Valuation should address causation, mitigation, contributory fault, evidence, interest and the date at which loss is assessed. Tribunals should avoid speculative damages and explain the evidentiary basis for awards.[34]

The model contains procedural provisions concerning appointment and challenge of arbitrators, conduct and transparency of proceedings, burden of proof, governing law, expert reports, joint interpretations by the treaty parties, finality and enforcement of awards, costs and a possible appeals facility. These provisions respond to concerns about conflicts of interest, inconsistent interpretation and excessive litigation costs. Joint interpretations are particularly significant because the States parties retain authority to clarify the meaning of their treaty, provided the process is not used to interfere unfairly with a pending dispute. An appeals mechanism may improve consistency, but its practical value depends on institutional design and availability.[35]

The model also provides for State-State dispute settlement. This allows the treaty parties to address disagreements about interpretation or application through consultations and, where necessary, an inter-State process. State-State procedures can clarify treaty meaning and resolve systemic disputes without requiring every issue to be litigated by an individual investor.[36]

SELECTED DISPUTES INVOLVING INDIA

In White Industries Australia Limited v. India, the dispute arose from prolonged delay in

[33] Law Commission of India. (2015). Analysis of the 2015 draft model Indian bilateral investment treaty (Report No. 260). Government of India.
[34] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Chapter IV.
[35] United Nations Commission on International Trade Law. (2014). UNCITRAL rules on transparency in treaty-based investor-State arbitration. United Nations.
[36] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Chapter V.

enforcement of a commercial arbitration award.[37]

The Vodafone and Cairn disputes concerned retrospective tax measures and treaty claims under India's earlier BITs. They raised questions about the interaction between sovereign taxation powers, fair and equitable treatment and international commitments.[38]

The Devas-related proceedings involved cancellation of an agreement concerning satellite capacity and allegations relating to State conduct, fraud and public policy. Multiple proceedings illustrated the complexity of parallel domestic, commercial and investment processes.[39]

These cases do not establish that every public-interest measure is vulnerable to successful claims. Their more general lesson is that treaty risk is shaped by the quality of domestic governance.[40]

COMPARATIVE PERSPECTIVES

The European Union has pursued reforms including the investment court system in agreements such as CETA, emphasising standing adjudicators, appellate review and transparency.[41]

Brazil's Cooperation and Facilitation Investment Agreements provide a different model, emphasising investment facilitation, joint committees, cooperation and State-to-State mechanisms rather than conventional investor-initiated arbitration.[42]

No single model is suitable for every treaty relationship. The appropriate design depends on investment flows, legal systems, institutional capacity and public policy priorities. India's model is distinctive in its enterprise-based definition and local-remedies requirement.[43]

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[37] White Industries Australia Limited v. Republic of India, UNCITRAL, Final Award (2011).
[38] Vodafone International Holdings B.V. v. Republic of India, UNCITRAL, Final Award (2020).
[39] CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India, PCA Case No. 2013-09, Award on Jurisdiction and Merits (2016).
[40] Law Commission of India. (2015). Analysis of the 2015 draft model Indian bilateral investment treaty (Report No. 260). Government of India.
[41] European Union and Canada. (2016). Comprehensive Economic and Trade Agreement (CETA), Chapter 8, Section F.
[42] Ministry of Development, Industry, Trade and Services, Government of Brazil. (2016). The cooperation and facilitation investment agreement (CFIA): Presentation.
[43] United Nations Conference on Trade and Development. (2015). World investment report 2015: Reforming international investment governance. United Nations.

CRITICAL ASSESSMENT AND RECOMMENDATIONS

India's Model BIT, 2016 represents a significant effort to address the shortcomings of earlier investment treaties by narrowing substantive protections and preserving regulatory autonomy. Its enterprise-based definition of investment, specific treatment standards and local-remedies requirement provide greater control over investment claims. However, excessive restrictions may weaken investor confidence and reduce the effectiveness of treaty protection. A balanced approach therefore requires the following reforms.[44]

First, the enterprise-based definition should be clarified to address minority shareholdings, indirect ownership, infrastructure concessions and investment funds without compromising safeguards against speculative claims.[45]

Secondly, the treatment standard should expressly address arbitrary and discriminatory administrative conduct while maintaining protection against denial of justice and fundamental procedural violations. Legitimate expectations should arise only from specific and sufficiently clear State representations.[46]

Thirdly, the expropriation provision should incorporate clearer criteria concerning economic impact, duration, investment-backed expectations and the character of governmental measures.[47]

Fourthly, the five-year local-remedies requirement should be made more flexible where domestic remedies are unavailable, ineffective or subject to unreasonable delay.[48]

Fifthly, taxation and national security exceptions should incorporate appropriate safeguards against discriminatory or arbitrary application.[49]

[44] Law Commission of India. (2015). Analysis of the 2015 draft model Indian bilateral investment treaty (Report No. 260). Government of India.
[45] United Nations Conference on Trade and Development. (2011). Scope and definition: A sequel. United Nations.
[46] United Nations Conference on Trade and Development. (2012). Fair and equitable treatment: A sequel. United Nations.
[47] Organisation for Economic Co-operation and Development. (2004). Indirect expropriation and the right to regulate in international investment law. OECD Working Papers on International Investment.
[48] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance, Article 15.
[49] United Nations Conference on Trade and Development. (2015). Investment policy framework for sustainable development. United Nations.

Finally, India should strengthen transparency, arbitrator independence, reasoned awards and early dismissal of unmeritorious claims. These reforms would preserve regulatory autonomy while ensuring meaningful and predictable investor protection.[50]

CONCLUSION

India's Model Bilateral Investment Treaty, 2016 represents a major recalibration of the country's international investment policy. It reflects the intention to protect governmental regulatory authority while addressing concerns arising from expansive interpretations of earlier investment treaties. Through its enterprise-based definition, restricted treatment standards, omission of most-favoured-nation treatment and local-remedies requirement, the model seeks to establish a more controlled investment protection framework.[51]

The analysis demonstrates that although these provisions strengthen regulatory autonomy, their cumulative restrictions may create difficulties for foreign investors seeking effective remedies against arbitrary State conduct. The five-year local-remedies requirement, narrow treatment standards and broad regulatory exclusions may particularly affect the accessibility and practical effectiveness of treaty protection.[52]

The examination of disputes involving India, including White Industries, Vodafone and Cairn, illustrates the importance of predictable governance, consistent administration and respect for international obligations. These disputes also demonstrate that investment protection and sovereign regulatory authority must operate within a coherent legal framework.[53]

Accordingly, India should pursue calibrated reforms rather than return to broadly worded earlier-generation treaties. Clearer substantive standards, effective dispute-resolution mechanisms and appropriate safeguards against regulatory abuse can improve the credibility of its investment regime.[54] Investor protection and regulatory autonomy are complementary elements of sustainable economic development. A balanced treaty framework should

[50] United Nations Commission on International Trade Law. (2014). UNCITRAL rules on transparency in treaty-based investor-State arbitration. United Nations.
[51] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance.
[52] United Nations Conference on Trade and Development. (2014). Investor-State dispute settlement: A sequel. United Nations.
[53] Law Commission of India. (2015). Analysis of the 2015 draft model Indian bilateral investment treaty (Report No. 260). Government of India.
[54] United Nations Conference on Trade and Development. (2015). World investment report 2015: Reforming international investment governance. United Nations.

encourage genuine foreign investment, protect legitimate public-interest regulation and strengthen confidence in India's legal and institutional environment.[55]

IMPLEMENTATION, RESPONSIBLE INVESTMENT AND INSTITUTIONAL CAPACITY

Effective implementation of India's investment treaty policy requires institutional mechanisms beyond the drafting of treaty provisions. The Government should establish a central investment treaty coordination mechanism involving the Department of Economic Affairs, relevant ministries and sectoral regulators. Such a mechanism could maintain a comprehensive repository of investment treaties, arbitral awards, notices of disputes and interpretive materials to promote consistency in treaty negotiations and implementation.[56]

Institutional capacity building should also extend to domestic courts and administrative authorities. Since the Model BIT requires investors to pursue local remedies before initiating international arbitration, domestic institutions must provide accessible, independent and reasonably efficient dispute-resolution mechanisms. Delays and procedural inefficiencies could otherwise undermine the practical effectiveness of this requirement. Responsible investment should become an integral component of India's investment policy. Foreign investors operating in infrastructure, mining, energy, telecommunications and manufacturing should be encouraged to comply with environmental standards, labour protections, human rights principles and anti-corruption requirements. Corporate social responsibility and responsible business conduct should be supported through appropriate disclosure and accountability mechanisms.[57]

The government should also promote institutional cooperation between investment authorities, environmental regulators and local administrations. This would facilitate investment while ensuring that economic development does not adversely affect communities or environmental sustainability. Strengthening institutional capacity and responsible business practices would improve investor confidence and ensure that foreign investment contributes to India's long-

[55] United Nations Conference on Trade and Development. (2015). Investment policy framework for sustainable development. United Nations.
[56] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance.
[57] United Nations. (2011). Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework. Office of the United Nations High Commissioner for Human Rights.

term developmental objectives.[58]

DISPUTE PREVENTION AND POLICY COHERENCE

Preventing investment disputes is equally important as establishing mechanisms for their resolution. Many disputes arise from inconsistent administrative decisions, inadequate communication, regulatory uncertainty and delays in governmental approvals. India should therefore adopt an institutional dispute-prevention mechanism through which potential conflicts between foreign investors and government authorities can be identified and addressed at an early stage.[59]

A designated investment ombudsman or inter-ministerial grievance-resolution mechanism could facilitate communication between investors, central authorities and State governments. Such institutions would provide opportunities for consultation and administrative resolution before disagreements develop into formal treaty disputes.[60]

Policy coherence is also essential. Investment-related decisions should remain consistent with domestic legislation, international treaty commitments and broader public-interest objectives. Coordination between taxation authorities, environmental regulators, industrial departments and investment agencies would reduce conflicting administrative approaches.[61]

Government officials involved in investment-related decision-making should receive training concerning India's BIT obligations, international arbitration and regulatory responsibilities. Standardised administrative procedures and transparent decision-making would further reduce the possibility of avoidable disputes.[62]

Importantly, dispute prevention should not result in preferential treatment for foreign investors or restrict legitimate governmental regulation. Its objective should be to ensure lawful, transparent and consistent administration. Such an approach would reduce litigation costs,

[58] Organisation for Economic Co-operation and Development. (2023). OECD guidelines for multinational enterprises on responsible business conduct. OECD Publishing.
[59] United Nations Conference on Trade and Development. (2015). World investment report 2015: Reforming international investment governance. United Nations.
[60] Ministry of Development, Industry, Trade and Services, Government of Brazil. (2016). The cooperation and facilitation investment agreement (CFIA): Presentation.
[61] Organisation for Economic Co-operation and Development. (2015). Policy framework for investment. OECD Publishing.
[62] United Nations Conference on Trade and Development. (2015). Investment policy framework for sustainable development. United Nations.

improve institutional accountability and strengthen India's reputation as a predictable investment destination while preserving its regulatory autonomy.[63]

FINAL POLICY OBSERVATION

India's Model BIT, 2016 should be understood as an important policy framework rather than a final or universally applicable solution to the challenges of international investment governance. Its emphasis on regulatory autonomy reflects legitimate concerns regarding the potential consequences of broadly interpreted investment protections. However, the effectiveness of the framework ultimately depends upon whether it can provide investors with meaningful protection against arbitrary, discriminatory and procedurally unfair governmental conduct.[64]

India's future investment treaty policy should therefore prioritise clarity, consistency and proportionality. Treaty provisions must distinguish between legitimate public-welfare regulation and governmental conduct that violates international obligations. Similarly, investor protection should be accompanied by responsible business conduct and respect for domestic laws.[65]

The government should periodically review its treaty practices in light of international developments, arbitral decisions and the experiences of Indian investors operating abroad. Such review would enable India to respond to changing investment requirements without compromising its developmental priorities.[66]

The ultimate objective should be to create an investment environment that encourages genuine capital formation, technological advancement, employment generation and sustainable development. A predictable legal framework, supported by efficient institutions and balanced dispute-resolution mechanisms, can strengthen India's position in the international investment

[63] United Nations Conference on Trade and Development. (2014). Investor-State dispute settlement: A sequel. United Nations.
[64] Government of India, Department of Economic Affairs. (2016). Model text for the Indian bilateral investment treaty. Ministry of Finance.
[65] United Nations Conference on Trade and Development. (2015). Investment policy framework for sustainable development. United Nations.
[66] United Nations Conference on Trade and Development. (2023). Recent developments in the international investment regime. IIA Issues Note. United Nations.

system.[67]

The success of India's investment treaty policy should therefore be measured not merely by its ability to limit investor claims, but by its capacity to protect legitimate investments while preserving the State's authority to govern in the public interest.[68]

[67] United Nations Conference on Trade and Development. (2024). World investment report 2024: Investment facilitation and digital government. United Nations.
[68] United Nations Conference on Trade and Development. (2015). World investment report 2015: Reforming international investment governance. United Nations.

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