
REFORMS IN INDIA'S MODEL BILATERAL INVESTMENT TREATY (BIT): BALANCING FOREIGN INVESTOR PROTECTION AND STATE SOVEREIGNTY

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ABSTRACT

India's 2015 Model Bilateral Investment Treaty marked a significant recalibration of the country's investment policy by narrowing substantive protections, conditioning investor-State dispute settlement, and expressly preserving regulatory space. The model emerged against the background of a growing global debate over the effect of investment treaties on governmental policy choices and India's experience with investor-State disputes. This paper examines whether the Model BIT strikes an appropriate balance between protecting foreign investors and preserving State sovereignty. It evaluates the treatment of fair and equitable treatment, expropriation, national treatment, performance requirements, taxation, compulsory licensing, general exceptions and investor-State dispute settlement. The paper argues that the Model BIT's emphasis on regulatory autonomy is justified but that some provisions are drafted so restrictively or ambiguously that they may reduce the treaty's capacity to provide meaningful protection and attract long-term investment. It proposes a calibrated reform model based on clearer substantive standards, stronger procedural safeguards, carefully framed public-interest exceptions, proportionality-sensitive expropriation rules, and a more accessible but disciplined dispute-settlement mechanism. The objective should be neither maximum investor protection nor maximum State discretion, but predictable regulatory sovereignty combined with credible legal protection.

Keywords: Bilateral Investment Treaty; Foreign Investor Protection; State Sovereignty; Fair and Equitable Treatment; Investor-State Dispute Settlement; Regulatory Autonomy.

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1. Introduction

1.1 Background and Evolution of India's BIT Policy

Bilateral investment treaties are designed to create a legal framework for promoting and protecting cross-border investment. Traditionally, they sought to reassure foreign investors that their investments would receive non-discriminatory treatment, protection against unlawful expropriation, minimum standards of treatment and access to international arbitration. For capital-importing States, the bargain was expected to improve investment confidence; for investors, the treaty provided a layer of protection beyond domestic law.² India's treaty practice developed substantially after economic liberalisation. The country concluded numerous bilateral investment agreements using an older treaty model that contained relatively broad standards of protection. Over time, however, India faced investor-State proceedings involving questions of taxation, judicial delay, contractual conduct and other regulatory matters. The Government subsequently reconsidered its treaty policy and approved a revised Model BIT on 28 December 2015. The Department of Economic Affairs states that the 2015 text replaced the earlier Indian model and placed responsibility for BIT negotiations with the Department of Economic Affairs.³

The 2015 Model BIT represents a shift from an investment-protection-centred approach toward a more sovereignty-conscious model. Its definition of investment is narrower than many older treaties, its fair and equitable treatment provision is tied to customary international law, and its dispute-settlement provisions impose preconditions before an investor can commence arbitration. It also contains exclusions covering taxation, government procurement, subsidies, certain intellectual-property measures and governmental services.⁴

This recalibration is understandable. A State must retain the ability to legislate for taxation, public health, environmental protection, social welfare, national security and economic policy. Yet a BIT that provides insufficiently clear or excessively limited protection may fail to perform its reciprocal function. The central policy question is therefore not whether sovereignty should prevail over investment protection, but how treaty rules can protect legitimate

² United Nations Conference on Trade and Development [UNCTAD], 2015; International Institute for Sustainable Development [IISD], 2016

³ Department of Economic Affairs, Ministry of Finance, Government of India, 2015; Law Commission of India, 2015

⁴ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, arts. 1–3, 11, 14–18

investments without constitutionalising every commercial expectation or exposing ordinary public regulation to excessive compensation claims.⁵

1.2 Research Problem

The principal research problem lies in balancing foreign investor protection with India's sovereign right to regulate in the public interest. Broad treaty standards can constrain governmental policy space when investors challenge regulatory measures, while overly restrictive treaty provisions may weaken investor confidence and reduce the practical value of investment protection. India's 2015 Model BIT attempts to address this tension, but questions remain concerning the scope of substantive protection, access to investor-State dispute settlement, the treatment of legitimate expectations and the relationship between treaty obligations and domestic regulatory autonomy.

The study therefore examines whether India's Model BIT provides an appropriate equilibrium between investment certainty and State sovereignty and identifies reforms that could preserve regulatory space while offering foreign investors predictable and meaningful legal protection.

1.3 Research Questions

- To what extent does India's 2015 Model BIT protect foreign investors?
- How does the Model BIT preserve India's regulatory and sovereign autonomy?
- What weaknesses or ambiguities exist in the present Model BIT?
- How can India reform substantive and procedural treaty provisions to achieve a more balanced investment regime?

1.4 Objectives, Scope and Methodology

The primary objective is to critically evaluate India's Model BIT as a legal instrument for reconciling investor protection and State sovereignty. The paper examines the principal substantive and procedural provisions of the 2015 Model BIT, relevant Indian investment-dispute experience and developments in international investment law. It does not attempt to

⁵ UNCTAD, 2015; International Institute for Sustainable Development [IISD], 2018

analyse every Indian BIT individually. Instead, the Model BIT is treated as the principal policy document, while selected treaties and arbitral decisions are used to test its design.

The research adopts a doctrinal methodology based on analysis of statutes, treaty texts, official government documents and arbitral decisions, supplemented by scholarly commentary. A comparative perspective is used selectively to identify drafting techniques that may improve India's treaty practice. The argument is normative as well as doctrinal: it assesses whether particular drafting choices are capable of producing an appropriate balance between investor confidence and sovereign regulatory authority.

2. Conceptual Framework: Investor Protection and State Sovereignty

2.1 Purpose and Function of BITs

BITs operate as instruments of risk allocation. They do not ordinarily guarantee investors a particular level of profit or freeze domestic law. Instead, they establish minimum standards against which State conduct may be assessed. Their value is strongest where domestic institutions may be perceived as uncertain, discriminatory or vulnerable to political interference. At the same time, treaty protection can create legitimacy concerns if private investors are able to challenge good-faith public regulation before international tribunals without adequate safeguards.⁶

The legitimacy of the treaty system consequently depends on an equilibrium between protection and regulatory space. Modern treaty drafting increasingly responds to this concern through precise definitions, exceptions, procedural filters and express recognition of the right to regulate. India's Model BIT is a particularly strong example of this sovereignty-oriented movement.⁷

2.2 State Sovereignty and the Right to Regulate

State sovereignty includes the authority to legislate and administer matters within domestic jurisdiction. In investment law, however, sovereignty operates within international commitments voluntarily undertaken by the State. Once India concludes a BIT, treaty obligations become part of the international legal framework governing covered investments.

⁶ UNCTAD, 2015; Sornarajah, 2021

⁷ UNCTAD, 2015; Department of Economic Affairs, Ministry of Finance, Government of India, 2015

The existence of regulatory power therefore does not mean that every governmental measure is immune from review.⁸

The appropriate conception is regulated sovereignty: the State retains policy freedom, but must exercise that freedom consistently with treaty obligations. Conversely, investor protection should not be transformed into a right to resist every regulatory change. The distinction between legitimate expectations and general expectations is central to maintaining this balance.⁹

3. India's 2015 Model BIT: Principal Features

3.1 Definition of Investment and Investor

The Model BIT adopts a relatively controlled definition of investment, requiring characteristics such as commitment of capital, expectation of gain or profit, assumption of risk and significance for the development of the host State. This approach seeks to exclude purely speculative claims and ensures that treaty protection is directed toward genuine investments. It is a defensible policy choice, but the developmental-significance element may create interpretive uncertainty unless tribunals apply it consistently.¹⁰

The Model BIT also defines investor by reference to nationality and incorporation or establishment criteria. Treaty planning can therefore become important in determining whether a corporate structure qualifies for protection. Clear nationality rules reduce the risk of treaty shopping, but they should not be so rigid that legitimate investment structures are unexpectedly excluded.¹¹

3.2 Fair and Equitable Treatment

One of the most significant reforms is the Model BIT's rejection of an open-ended FET standard. Article 3.1 links protection to violations of customary international law and identifies denial of justice, fundamental breach of due process, targeted discrimination on manifestly unjustified grounds and manifestly abusive treatment as examples. The accompanying explanation of customary international law seeks to anchor the standard in general and

⁸ United Nations, 2005; UNCTAD, 2015

⁹ UNCTAD, 2012; Salacuse, 2013

¹⁰ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 1.4; Chowdhury, 2019

¹¹ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 1.5; UNCTAD, 2015

consistent State practice accepted as legally obligatory.¹²

This formulation responds directly to concern that FET has sometimes been interpreted broadly. It narrows the possibility that a tribunal will treat regulatory inconsistency or disappointed commercial expectations as independently sufficient. However, the formulation may also be too restrictive. A serious denial of procedural fairness may occur without fitting neatly into the enumerated categories. A future treaty could preserve a customary-law baseline while expressly recognising minimum requirements of administrative due process, transparency and non-arbitrariness, without returning to an unlimited FET clause.¹³

3.3 Expropriation

The Model BIT protects investors against expropriation while distinguishing direct and indirect interference. The core challenge is separating compensable taking from ordinary regulation. An environmental, taxation or public-health measure may reduce the value of an investment without depriving the investor of property in the legal sense. International practice commonly considers factors including the severity and duration of interference, the character of the measure and the circumstances surrounding the investment.¹⁴

India's future treaty drafting should make this distinction more explicit. A carefully framed provision could state that non-discriminatory regulation designed and applied to protect legitimate public interests will not ordinarily constitute indirect expropriation merely because it affects investment value, while preserving protection against measures that are manifestly arbitrary, discriminatory or equivalent to a taking. This would reduce uncertainty for both sides.¹⁵

3.4 National Treatment and Most-Favoured-Nation Treatment

National treatment seeks to prevent discriminatory treatment of foreign investors in comparison with domestic investors in like circumstances. It is an important confidence-building mechanism because it limits protectionist discrimination. The Model BIT's approach should be retained, but future treaties should define the comparator methodology more clearly. A

¹² Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 3.1

¹³ UNCTAD, 2012; Salacuse, 2013; Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 3.1

¹⁴ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 5; UNCTAD, 2012

¹⁵ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 5; UNCTAD, 2012

domestic measure that differentiates between investors on the basis of objective risk or sectoral characteristics should not automatically constitute nationality discrimination.¹⁶

The Model BIT notably omits a broad MFN clause. This protects India from arguments that an investor can import more favourable substantive or procedural protections from another treaty. The policy advantage is predictability. The disadvantage is that investors covered by older or differently drafted treaties may enjoy materially different protection. A future approach could retain a limited MFN clause but expressly exclude the importation of dispute-settlement provisions unless the treaty partners specifically agree otherwise.¹⁷

4. Investor-State Dispute Settlement and Procedural Reform

4.1 The Model BIT's Approach to ISDS

The 2015 Model BIT does not provide an unrestricted right to commence investor-State arbitration. Article 15 requires, among other conditions, exhaustion of local remedies for a prescribed period before an investor can initiate arbitration. This is a major departure from many traditional BITs. The rationale is that domestic courts should have the first opportunity to address disputes and that international arbitration should operate as a secondary mechanism rather than a first resort.¹⁸

The approach is consistent with sovereign concerns, but a rigid local-remedies requirement can increase cost and delay. Investors may be reluctant to commit capital where treaty arbitration becomes practically unavailable. The optimal reform should therefore retain domestic-remedy engagement while establishing a reasonable time limit and exceptions where domestic proceedings are unavailable, manifestly ineffective or incapable of providing an adequate remedy.¹⁹

4.2 India's Experience with Investment Disputes

India's treaty disputes have influenced its contemporary treaty policy. In *White Industries Australia Limited v. Republic of India* (2011), the tribunal found a breach connected to the effectiveness of judicial proceedings under the applicable India-Australia BIT. Vodafone's

¹⁶ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 4; UNCTAD, 2012

¹⁷ Department of Economic Affairs, Ministry of Finance, Government of India, 2015; UNCTAD, 2016

¹⁸ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 15

¹⁹ UNCTAD, 2014; Law Commission of India, 2015

treaty proceedings concerned India's retrospective tax legislation, while Cairn Energy's arbitration challenged retrospective taxation measures. These cases are not identical and should not be treated as evidence that investment arbitration uniformly interferes with Indian sovereignty. Their significance lies in demonstrating the financial, procedural and reputational consequences of treaty commitments.²⁰

The lesson is that treaty drafting alone cannot solve every dispute. Administrative consistency, careful legislative design and inter-ministerial coordination are equally important. The Department of Economic Affairs presently manages BIT negotiations and disputes, indicating the institutional importance of central coordination.²¹

5. Strengthening State Sovereignty Without Weakening Investor Confidence

5.1 General Exceptions and Public Interest Regulation

A modern Indian BIT should contain a clear public-interest exception covering measures necessary or appropriately designed to protect public health, environment, climate, public order, cybersecurity, privacy and national security. The drafting should avoid an unrestricted self-judging clause, because excessive deference can undermine the treaty's credibility. Instead, tribunals could review whether the measure falls within the stated objective and whether it was applied in a non-discriminatory and good-faith manner.²²

The exception should also interact coherently with expropriation. If the same environmental measure is protected by a general exception but remains vulnerable under an independent expropriation clause, uncertainty persists. India's future text should make the relationship explicit so that legitimate regulation is not exposed through indirect routes.²³

5.2 Legitimate Expectations and Regulatory Change

Foreign investors need confidence that governments will not arbitrarily reverse commitments, but governments need freedom to update laws. The solution is to distinguish specific

²⁰ *White Industries Australia Limited v. Republic of India*, 2011; *Vodafone Group B.V. v. Republic of India*, 2020; *Cairn Energy PLC & Cairn UK Holdings Ltd. v. Republic of India*, 2020

²¹ Department of Economic Affairs, Ministry of Finance, Government of India, 2015; Law Commission of India, 2015

²² Department of Economic Affairs, Ministry of Finance, Government of India, 2015, arts. 16–17; UNCTAD, 2015

²³ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, arts. 5, 16; UNCTAD, 2012

assurances from general regulatory conditions. Where a competent authority gives a written, project-specific commitment, reliance may reasonably create stronger expectations. By contrast, broad policy statements should not be interpreted as guarantees that the regulatory framework will remain unchanged for the life of an investment.²⁴

Future treaties could expressly recognise the State's authority to modify legislation in good faith for legitimate public purposes, while protecting investors where the State has given specific commitments and then acted inconsistently with them without adequate justification. This approach would make the doctrine of legitimate expectations more predictable.²⁵

5.3 Proportionality and Police Powers

Proportionality can provide a useful bridge between investor protection and sovereignty. It asks whether governmental interference is connected to a legitimate objective and whether the burden imposed is justified by that objective. The police-powers doctrine similarly recognises that bona fide, non-discriminatory public regulation does not automatically become expropriation merely because it affects economic value. Neither doctrine should be treated as an absolute defence; their application must depend on treaty wording and the factual record.²⁶

6. Proposed Reforms to India's Model BIT

6.1 A Calibrated FET Clause

India should retain a high threshold for FET but replace excessive uncertainty with an illustrative, non-exhaustive list of minimum standards. These could include denial of justice, fundamental due process violations, manifest arbitrariness, targeted discrimination and manifestly abusive conduct. A separate clarification should state that a change in law, by itself, does not constitute a breach unless accompanied by conduct that violates the treaty standard or a specific legally protected commitment.²⁷

6.2 Clearer Expropriation Standards

The expropriation article should contain an annex or interpretive guidance identifying relevant

²⁴ UNCTAD, 2012; Salacuse, 2013

²⁵ UNCTAD, 2012; Department of Economic Affairs, Ministry of Finance, Government of India, 2015, arts. 2–3

²⁶ UNCTAD, 2012; Salacuse, 2013

²⁷ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 3.1; UNCTAD, 2012

factors for indirect expropriation. It should recognise the importance of economic impact while making clear that substantial economic effect is not conclusive. Duration, interference with distinct investment rights, the character of the measure, discrimination and reasonable alternatives should be considered. This would reduce the risk that every costly regulation becomes a potential compensation claim.²⁸

6.3 Reforming ISDS Through a Balanced Mechanism

India should reconsider an absolute or excessively burdensome exhaustion-of-local-remedies requirement. A better model would require the investor to pursue available domestic remedies for a defined period, such as three years, subject to exceptions for manifest futility, denial of access or unreasonable delay. The treaty should also contain a cooling-off period, mandatory consultation and mediation before arbitration. These filters would encourage settlement without eliminating international adjudication.

India could further consider an appellate or review mechanism in future treaty networks. Investment arbitration has faced criticism concerning consistency and predictability of awards. A structured review mechanism could improve coherence, although it would require agreement among treaty partners and careful institutional design.²⁹

6.4 Procedural Transparency and Anti-Treaty Shopping

Future treaties should strengthen transparency concerning ownership and control of investments. A denial-of-benefits provision can prevent treaty protection from being extended to entities established in a treaty jurisdiction without substantial business activity there. At the same time, legitimate corporate restructuring should not automatically eliminate protection where it occurred before a dispute and for genuine commercial reasons.³⁰

6.5 Sustainable Investment and Corporate Responsibilities

The Model BIT could expressly recognise investor responsibilities concerning compliance with domestic law, anti-corruption rules, labour standards and environmental obligations. Such provisions should not become vague independent causes of action without clear standards. Their primary value would be to establish that treaty protection operates within a broader

²⁸ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 5; UNCTAD, 2012

²⁹ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 15; UNCTAD, 2014

³⁰ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 20; UNCTAD, 2015

framework of responsible investment. The treaty could also encourage environmental, social and governance practices without imposing uncertain obligations that tribunals cannot administer consistently.³¹

7. Comparative Lessons for India

7.1 European and Contemporary Treaty Practice

Several modern investment treaties seek to preserve regulatory space through explicit right-to-regulate clauses, public-interest exceptions and more precise FET provisions. The EU's investment agreements and recent treaty practice show increasing concern with sustainable development, transparency and regulatory autonomy. The lesson for India is not to reproduce European drafting mechanically but to use precision to reduce interpretive disputes.³²

7.2 South Africa and Brazil

South Africa moved away from conventional BIT reliance and adopted a domestic investment statute, reflecting concern about the balance between investor protection and policy space. Brazil historically resisted conventional BIT structures but later developed Cooperation and Facilitation Investment Agreements focused more heavily on State-to-State cooperation and dispute prevention. These models demonstrate that investor protection need not depend exclusively on traditional investor-State arbitration.³³

For India, however, a complete shift away from ISDS may be unnecessary. India's status as a major capital-importing and capital-exporting economy creates an interest in reciprocal and credible protection. The more suitable approach is calibrated ISDS with stronger prevention, transparency and jurisdictional safeguards.³⁴

8. Critical Analysis

8.1 Is the 2015 Model BIT Too State-Centric?

The Model BIT successfully responds to legitimate concerns about excessive treaty exposure, but its sovereignty-oriented design can create an opposite risk: investors may perceive the

³¹ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, arts. 8–13; UNCTAD, 2015

³² European Union, 2016; UNCTAD, 2015

³³ Protection of Investment Act 22 of 2015, South Africa; UNCTAD, 2015; Government of Brazil, 2019

³⁴ UNCTAD, 2015; Department of Economic Affairs, Ministry of Finance, Government of India, 2015

treaty as providing protection only in exceptional circumstances. A BIT that is difficult to invoke may have limited signalling value in attracting investment. This is especially relevant for infrastructure projects requiring large sunk costs and long payback periods.³⁵

The problem is not that the Model BIT protects sovereignty. The problem is that sovereignty and investor protection are sometimes presented as a zero-sum choice. Clear standards can protect both. A State benefits when investors understand the boundaries of legitimate regulation, while investors benefit when arbitrary governmental conduct is clearly prohibited. Precision therefore offers a better route to sovereignty than simply narrowing every substantive obligation.³⁶

8.2 Towards Predictable Regulatory Sovereignty

Predictability should become the central principle of reform. Sovereignty is strongest when the State can regulate through transparent rules rather than ad hoc intervention. Investor protection is strongest when investors know what conduct is protected and what regulatory risks they have accepted. The treaty should therefore distinguish between legitimate regulatory risk and governmental misconduct.³⁷

This model would allow India to maintain strong powers in areas such as taxation, public health, environmental protection and national security while discouraging discriminatory or procedurally unfair treatment. It would also reduce the incentive for investors to frame ordinary regulatory disagreements as treaty disputes.³⁸

8.3 Institutional Coordination and Treaty Implementation

Treaty reform cannot be separated from the domestic institutions responsible for implementing investment policy. The Department of Economic Affairs has responsibility for negotiating BITs and handling investor-State disputes, while investment projects themselves may be regulated by several central ministries, regulators and State governments. This institutional distribution is inevitable in a federal and sectorally regulated economy, but it creates a risk that one authority may make a representation that another authority later cannot implement. A more

³⁵ Law Commission of India, 2015; Chowdhury, 2019

³⁶ UNCTAD, 2015; Salacuse, 2013

³⁷ UNCTAD, 2012; UNCTAD, 2015

³⁸ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, arts. 11, 16–17; UNCTAD, 2015

coherent treaty policy therefore requires an internal coordination mechanism capable of identifying treaty implications before major investment measures are adopted.

8.4 Regulatory Impact Assessment and Evidence-Based Rulemaking

India could strengthen its Model BIT position by improving the domestic process through which investment-relevant regulation is developed. Before introducing a measure with substantial effects on existing foreign investments, the responsible authority should, where practicable, assess its economic, social, environmental and legal consequences. The assessment should identify the policy objective, available alternatives, expected compliance costs and the reason for selecting the proposed measure. Such a record would not prevent a tribunal from reviewing State conduct, but it would provide objective evidence that the measure was adopted for a legitimate purpose rather than to target a particular investor.³⁹

8.5 Treatment of Subsidies, Incentives and Government Contracts

A further issue concerns the distinction between regulatory protection and commercial commitments. Foreign investors frequently negotiate incentives involving land, infrastructure, tax treatment, electricity arrangements or other benefits. The Model BIT excludes certain subsidies and government procurement matters from its scope, which protects policy space but can also create uncertainty where an investment depends heavily on a government contract or incentive package. Future treaties should therefore distinguish clearly between ordinary public subsidies, contractual commitments and regulatory approvals. Where a government enters into a specific investment agreement, the agreement should identify the authority granting it, its duration, conditions, modification rights and dispute-resolution mechanism. Clear drafting at the domestic level can reduce the temptation to use treaty standards to resolve what is essentially a contractual dispute.⁴⁰

8.6 Relationship Between Domestic Courts and International Arbitration

The Model BIT's emphasis on domestic remedies reflects the principle that national courts should have a meaningful opportunity to correct governmental wrongdoing. This approach can also strengthen institutional legitimacy because domestic judges are often better placed to

³⁹ UNCTAD, 2015; Organisation for Economic Co-operation and Development [OECD], 2020

⁴⁰ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, arts. 2, 11; UNCTAD, 2015

interpret national statutes and administrative law. Nevertheless, a requirement to litigate domestically for an excessive period can make treaty protection illusory. Reform should therefore combine local-remedy engagement with a definite outer time limit and exceptions for situations in which a remedy is unavailable or manifestly ineffective. International arbitration should remain a safety valve rather than a substitute for domestic adjudication.⁴¹

8.7 Sustainability, Human Rights and the Public Interest

The future of investment treaties will increasingly involve regulation that pursues several public objectives simultaneously. Climate policy, labour protection, public health, privacy and sustainable development can affect the operation of foreign-owned businesses without being directed against foreign investors. A modern Model BIT should acknowledge this reality. It should not create a hierarchy in which investment rights automatically outweigh competing public interests. At the same time, public-interest language should not become a blanket defence for discriminatory or arbitrary conduct. The better approach is to require a genuine connection between the measure and the protected objective, while preserving judicial or arbitral scrutiny of bad faith, discrimination and serious procedural defects.⁴²

8.8 Recommended Structure for a Revised Indian Model BIT

A revised Indian model could therefore be organised around five connected principles. First, covered investments and investors should be defined clearly enough to prevent speculative claims and treaty shopping. Secondly, substantive protection should establish a credible minimum baseline without converting commercial expectations into enforceable guarantees. Thirdly, public-interest exceptions should expressly preserve regulatory authority in areas such as environment, health, taxation, national security, privacy and digital governance, subject to safeguards against discrimination and abuse. Fourthly, dispute settlement should encourage consultation, mediation and domestic adjudication while retaining a credible international remedy for serious treaty breaches. Fifthly, investors should be expected to comply with domestic law and, where appropriate, meet clearly stated responsible-investment obligations.

⁴¹ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, art. 15; *White Industries Australia Limited v. Republic of India*, 2011

⁴² UNCTAD, 2015; Department of Economic Affairs, Ministry of Finance, Government of India, 2015, arts. 16–18

This architecture would make the treaty less defensive and more predictable.⁴³

8.9 The Preferred Balance

The appropriate reform philosophy is therefore not a return to the broad formulations of older Indian BITs, nor an approach in which the treaty offers little practical protection. The stronger model is calibrated protection. Under such a model, India accepts that foreign investment deserves protection from discrimination, denial of justice, fundamental procedural unfairness and unlawful taking, while investors accept that the regulatory environment can change for legitimate public purposes. The treaty becomes a framework for allocating regulatory risk rather than a guarantee of regulatory immobility. This is particularly important for long-term infrastructure, energy, telecommunications and digital-economy investments whose business models inevitably interact with changing public policy.⁴⁴

9. Limitations of the Study

The study is primarily doctrinal and does not empirically measure how particular treaty provisions influence foreign investment decisions. Investment arbitration is highly fact-specific, and conclusions drawn from selected cases cannot predict the outcome of every future dispute. India's treaty network is also evolving, meaning that the Model BIT does not necessarily represent the exact text applicable to every foreign investor. Finally, comparative jurisdictions have different constitutional, institutional and economic conditions; their approaches therefore provide drafting lessons rather than direct templates for India.

10. Conclusion

India's 2015 Model BIT represents an important shift in the country's approach to international investment law. It responds to concerns generated by broad treaty standards by narrowing FET, defining investment more carefully, limiting several categories of claims and imposing procedural conditions on investor-State arbitration. These reforms strengthen India's regulatory autonomy and reflect the legitimate sovereign interest in preserving policy space.

The objective of treaty reform should not be to make investor protection merely theoretical. Foreign investors require credible safeguards against arbitrary, discriminatory and

⁴³ Department of Economic Affairs, Ministry of Finance, Government of India, 2015; UNCTAD, 2015

⁴⁴ UNCTAD, 2015; Department of Economic Affairs, Ministry of Finance, Government of India, 2015

fundamentally unfair State conduct. Excessively restrictive drafting can weaken confidence and may encourage investors to seek protection through corporate structuring or alternative legal instruments. India's future treaty policy should therefore move from a defensive model toward a calibrated model of reciprocal protection.⁴⁵ The preferred reform framework would combine a clearly defined FET standard, a transparent indirect-expropriation test, effective national treatment, carefully drafted public-interest exceptions, reasonable local-remedy requirements, mandatory dispute prevention and stronger anti-treaty-shopping provisions. Specific governmental commitments should receive protection, while general policy statements should not freeze the law. Environmental, health, cybersecurity and other public-interest measures should receive appropriate protection when they are non-discriminatory, evidence-based and adopted in good faith.⁴⁶

The broader lesson is that State sovereignty and investment protection are not inherently incompatible. A well-drafted BIT can preserve sovereign regulatory authority while giving investors a reliable baseline of legal protection. India's next generation of investment treaties should therefore pursue predictable regulatory sovereignty: strong enough to permit legitimate public regulation, but disciplined enough to prevent arbitrary State conduct. Such a framework would better serve India's position as both a major destination for foreign investment and an increasingly significant outward investor in the global economy.⁴⁷

⁴⁵ UNCTAD, 2015; Salacuse, 2013

⁴⁶ Department of Economic Affairs, Ministry of Finance, Government of India, 2015, arts. 3–5, 15–20; UNCTAD, 2015

⁴⁷ UNCTAD, 2015; Department of Economic Affairs, Ministry of Finance, Government of India, 2015

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