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India's 2016 Model BIT Through the Lens of Private International Law: Implications for Investor-State Arbitration

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Abstract

This study examines India's Model Bilateral Investment Treaty (BIT) of 2016 through the lens of investor protection, legal certainty, and Investor–State Dispute Settlement (ISDS) from the perspective of Indian investors abroad. It also assesses whether the model BIT balances cross-border investment protection with preserving the host State's regulatory space. This study contributes a private international law perspective to recalibrating India's Model BIT for balanced investor protection. This study adopts a doctrinal approach and analyzes the 2016 Model BIT, arbitral awards, government and institutional documents. The study finds that the Model BIT departs from the more investment-friendly approach of earlier Indian treaties. By eliminating Fair and Equitable Treatment and Least Favored Nation status, along with the narrow definition of protected investment, the denial-of-benefits device, and regulatory exception clauses, it strengthens the host State's sovereignty but at the cost of substantive protection available to investors. From the perspective of private international law, the study finds that questions such as nationality, corporate structure, applicable law, jurisdiction, and exhaustion of domestic remedies affect the predictability and practicality of accessing treaty protection. They take prominence in investor-State arbitration, where restrictive jurisdictional and procedural requirements may deny or delay access to an international remedy. Hence, the study recommends recalibrating, not abolishing, the Model BIT, while preserving India's regulatory interests through clearer protection standards, a carefully delimited Most-Favoured-Nation (MFN) clause, greater clarity on corporate nationality and structure, and a proportionate response to local-remedy exhaustion.

Keywords: *Bilateral Investment Treaty, Fair and Equitable Treatment, Most-Favoured Nation, Arbitration, Private International Law*

Introduction

The framework of Bilateral Investment Treaties has been debated thoroughly, particularly with emerging economies like India in mind. India's BIT program dates to the early 1990s, as it moved toward economic liberalization and began opening its economy.[1] So far, the journey has taken many twists and turns, reflecting India's economic response to global trends in investment policies.

India's BIT program goals during 1990-2011 were two-fold. First, India hoped to create a good investment climate to attract FDI by providing adequate assurances to foreign investors about investment security, such as protection against expropriation without adequate compensation, fair and equitable treatment, and international arbitration for investment dispute redressal. Second, India hoped the BITs would signal to the international community that it was a safe and credible place for investment and would therefore bring reputational benefits (along with the expected investment inflows). In effect, between 1994, when India signed its first BIT with the United Kingdom, and 2010, India signed BITs with a wide range of states. In its early stage, India focused on signing BITs with major European states such as France, Germany, Italy, the Netherlands, Belgium, Denmark, Poland, Sweden, Switzerland, etc. These early BITs showed the influence of the OECD Draft Convention for the Protection of Foreign Property, 1967, and featured a broad range of investor rights and restricted Investor-State Dispute Settlement provisions.[2]

In the 2000s, as the Indian economy grew and its confidence in dealing with the global investment community strengthened, the reach of its BIT program also expanded. Meanwhile, India had concluded its BITs with several other developing countries such as Argentina, Mexico, China, Thailand, Indonesia, and Saudi Arabia, and LDCs, in its endeavor to seek greater foreign investment from both developed and emerging economies like Bangladesh, Sudan, and Mozambique, to name a few such countries.[3]

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[1] Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash*, 1st ed. (Oxford University Press, 2019), https://doi.org/10.1093/oso/9780199493746.001.0001.
[2] P. Ranjan, "India and Bilateral Investment Treaties: A Changing Landscape," *ICSID Review* 29, no. 2 (May 2014): 419–50, https://doi.org/10.1093/icsidreview/sit052.
[3] Kanu Agrawal, "Bilateral Investment Treaties: A Developing History," *Jindal Global Law Review* 7, no. 2 (October 2016): 175–99, https://doi.org/10.1007/s41020-016-0031-x.

The BITs signed in this phase were also not without problems. Facing investment arbitrations that reflected a divergence between investor protection and the State's regulatory autonomy, India ultimately decided to revisit its BIT policy. Perhaps a wake-up call for India was the outcome of White Industries v. India, where India was held internationally responsible under an investment treaty, reflecting the consequences of relying on broadly couched treaty protections.[4]

Other high-profile disputes, such as the Vodafone dispute and Cairn, tested the relationship between India's domestic regulatory measures and its obligations, prompting a further review of its policy on BITs and, finally, the 2016 Model BIT.[5] With the 2016 Model BIT, India's investment treaty policy has taken a different track; it places greater emphasis on retaining the contracting States and imposes stringent conditions for investors to gain protection and access to the international arbitral forum.[6]

The impact of the 2016 Model BIT changes also appears significant as viewed from the perspective of an Indian investor investing abroad. The legal status of an outward investor is to be determined not just by reference to the substantive protections enshrined in the BIT; it may also depend upon several cross-border connecting factors such as nationality, corporate personality and structure, the law governing investment, jurisdiction, domestic remedies and relationship between domestic adjudication and international arbitration.[7] This change is significant when examined in relation to Indian investors investing abroad, and the legal position of an outward investor can be evaluated not only on the substantive protections present in the applicable BIT(s). A cross-border investment may involve

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[4] Franz Baumann, "That Plan from Rio: The Promise and Limits of Multilateral Climate Governance," *Social Research: An International Quarterly* 90, no. 4 (December 2023): 649–73, https://doi.org/10.1353/sor.2023.a916349.

[5] James J. Nedumpara and Rubanya Nanda, "Thinking Beyond the International Investment Treaties: Alternative Models for Investment Protection and Dispute Resolution," in *India's Bilateral Investment Treaties 2.0*, ed. James J. Nedumpara (Singapore: Springer Nature Singapore, 2024), 51–79, https://doi.org/10.1007/978-981-97-3401-6_3.

[6] Shreyasee Mukherjee, Subramanian S R, and Narendran Thiruthy, "Should India Adopt ISDS for IP Disputes? Re-Evaluating the Model BIT from IP and Public Health Perspective," *Journal of Intellectual Property Rights* 31, no. 5 (2026), https://doi.org/10.56042/jipr.v31i5.18781.

[7] Sanyukta Chowdhury, "Investor State Dispute Settlement Provisions in India's Model Bilateral Investment Treaty: A Critique," *Indian Journal of International Law* 58, nos. 3–4 (December 2018): 327–51, https://doi.org/10.1007/s40901-019-00099-4.

connections to the law of the investor's home State, the law of the host State, the law governing the investment transaction, the law governing the dispute, etc. Further, questions concerning nationality, corporate personality, applicable law, and jurisdiction may define the scope of treaty protection for an investor.

Questions of nationality, corporate personality, applicable law and jurisdiction may determine whether an investor can invoke treaty protection and obtain an effective remedy. Therefore, in this study, the 2016 Model BIT will be treated not merely as a treaty for international investment protection, but also as subject to private international law analysis. However, this is not intended to include private international law as an element of the BIT, but to examine how an investor's legal position may be affected by cross-border connecting factors and conflicts of legal orders. This is crucially important for arbitration, since what national or corporate identity, jurisdictional and choice of law provisions a person falls under, or what domestic procedures he must exhaust, may ultimately determine whether he, as an investor, would reach an arbitral tribunal.

Existing scholarship on the 2016 Model BIT has examined its restrictive approach to investor protection, regulatory autonomy, substantive standards and Investor-State Dispute Settlement. Less attention, however, has been given to the Model BIT from the perspective of the cross-border legal relations of Indian outward investors and to how connecting factors derived from private international law may affect the practical availability of treaty protection. This article addresses this gap by examining how nationality, corporate structure, applicable law, jurisdiction and domestic procedural requirements interact with the treaty framework.

The purpose of the analysis is not to assert that the 2016 Model BIT is an instrument of private international law. It is a lens through which to examine an investor's cross-border legal positioning. The underlying idea is that treaty-based protection relies not merely on substantive standards. It also depends on whether investors meet the applicable jurisdictional and connective requirements and manage the interaction between domestic legal orders and international arbitration.

This paper considers the question in its background and examines whether new Model BIT achieves the right balance between protection and encouraging

investment with the right to maintain India's or home states' regulatory autonomy, also specifically concerning Indian investors making outbound investment, and whether its restrictive substantive provisions and procedural requirements affect the availability and predictability of investor-state arbitration in practice, given the fact that legal certainty must not only be assessed based on substantive standards but they also from the perspective of rules of jurisdiction and corporate nationality to applicable law, requirement for exhaustion of local remedy, and to obtain access to the investor-state dispute settlement procedure based on their impact of these provisions on legal certainty.

The study is structured as follows. First, the article examines the definitions and scope of treatment of the terms 'investor' and 'investment' under the 2016 Model BIT. Second, the paper analyzes this from the perspective of outgoing Indian investors in assessing the cross-border legal relations created by investment activity. Lastly, it examines the implications of these rules for investor-state arbitration, jurisdiction, domestic remedies, and the practical use of domestic arbitration mechanisms. The research suggests further reforms to improve the balance between protecting investors' interests and ensuring certainty and India's legitimate regulatory interests.

Methods

This research adopts a normative legal research methodology, or doctrinal approach,[8] involving a critical and analytical study of legal doctrines, statutes, treaties, arbitral awards, and other legal material related to India's BIT regime. Through the doctrinal approach, this research adopts structured, analytical legal reasoning to critically evaluate India's treaty-making practice, obligations regarding investment protection, and approach to Investor-State Dispute Settlement.

The research draws on primary sources such as India's Model BITs, India's bilateral investment treaties, UNCITRAL and ICSID materials, and investment

[8] Christopher McCrudden, "Legal Research and the Social Sciences," in *Legal Theory and the Social Sciences*, 1st ed., by MaksymilianDel Mar, ed. Del Mar Maksymilian and Michael Giudice (Routledge, 2017), 149–67, https://doi.org/10.4324/9781315091891-6.

arbitration awards, as well as secondary sources such as books and journal articles, government reports, policy texts, and articles.

In addition, the present study will use a private international law perspective not as a component of BITs but as an approach to analyzing the issue. The impact on the position of Indian outward investors arising out of the 2016 Model BIT-related issues of nationality, corporate structure, governing law, and jurisdiction of arbitration (the private international law issue on cross-border connection), where the possibility of two kinds of legal claims arising out 1 measure exists, would be analyzed. The domestic law-based measure is litigated in the domestic arena, while the BIT-based claim is litigated in the international arena, where international law and private international law seem to run in parallel while actually colliding on this issue.

This research is non-empirical. It is not based on surveys, interviews, or statistical analysis, or any other such mechanism to measure investor behavior. It examines the legal structure and functioning of the 2016 Model BIT, focusing on the predictability of its substantive and procedural requirements and the effective availability of treaty-based arbitration for Indian outward investors. At times, the study uses a comparative dimension, focusing on developments in international investment treaty practice to assess the balance between investor protection and the State's right to regulate.

This paper therefore assesses whether the 2016 Model BIT confers adequate legal certainty and effective arbitral protection for Indian investments abroad through its substantive and procedural provisions.

Discussion

Scope of Investor and Investment

To understand the scope of "investor" and "investment", one must distinguish between a bilateral investment treaty that has entered into force and India's 2016 Model BIT. This Model BIT provides no treaty protection to Indian outward investors but suggests India's treaty framework and negotiating policy for future foreign investment treaties. Its importance for Indian outward investors depends

only on the extent to which the proposed definitions, jurisdictional requirements, and other substantive and procedural protections of the Model BIT appear in the BITs India enters into soon. This distinction in the Indian Approach to Private International Law is especially important because it requires considering the treaties providing protection and their connecting factors, along with overlapping duties under the domestic laws of the States where Indian investors have invested.[9] The investor's fortunes would largely depend on which treaty ultimately protects them at the end of every claim.[10] In a Bilateral Investment Treaty, a precise definition of 'investor' plays a crucial role in determining who qualifies for protection under the BIT regime and has standing to bring claims; hence, it is indispensable to defining the scope of protection under the BIT.[11]

The 2016 Indian Model BIT offers a fairly specific definition that aims to delimit the scope of BIT protection to investors with a reasonable legal and economic nexus to one of the contracting States. Under Article 1.5, to be recognized as an investor, an investor or entity must be engaged in investment activities. Under the model draft, the investor may be an individual or an artificial person.[12]

From a cross-border perspective, the nationality of a juridical investor need not match the nationality of the persons ultimately controlling the investment. An Indian parent company may, for example, establish or acquire a subsidiary in the host State, while the subsidiary may possess the nationality of the State under whose law it is constituted. The legal consequences of such a structure therefore depend on the applicable treaty's definition of investor and its criteria for corporate

[9] Muhammad Trianda Kusuma, Tariq Hidayat Pangestu, and Ricky Raytona, "Establishment of a Sovereign Wealth Fund Through Investment Management Institution in Realizing Optimization of Foreign Investment," *Indonesia Private Law Review* 2, no. 2 (December 2021): 125–36, https://doi.org/10.25041/iplr.v2i2.2376.
[10] Oleh Prostybozhenko et al., "The Legal Regime of Joint Ownership in Management as a Tool for Enhancing State Investment Attractiveness," *Nusantara: Journal of Law Studies* 5, no. 1 (April 2026): 378–96, https://doi.org/10.66325/nusantaralaw.v5i1.267.
[11] Jarrod Hepburn and Ridhi Kabra, "India's New Model Investment Treaty: Fit for Purpose?," *Indian Law Review* 1, no. 2 (May 2017): 95–114, https://doi.org/10.1080/24730580.2017.1366774.
[12] Gaurav Rai, "Indian Model Bit 2015: An Alternate Approach to Investment Treaty Drafting," *SSRN Electronic Journal*, ahead of print, 2017, https://doi.org/10.2139/ssrn.3053410.

nationality, including incorporation, ownership, control and substantial business activity.[13]

In an investment arbitration case, the split between formal incorporation and actual economic ties was dealt with. In *Tokios Tokelės v. Ukraine*,[14] although a Lithuanian company, it was actually controlled in large part by Ukrainian investors; however, since the treaty emphasized formal nationality, it was eligible to file the case.[15] This case is relevant here as a comparative illustration of the importance of the treaty's chosen nationality test; it does not, however, determine the interpretation of India's 2016 Model BIT, whose definition of investor incorporates additional requirements.

In this context, the 2016 Model BIT goes beyond purely formal incorporation by making substantial B/A mandatory and may reduce options for potential Indian outward investors to hide behind entities set up merely to claim treaty protection benefits. In the same vein, it also raises an obligation to define the meaning and threshold test for proving B/A.

Another related instance was the arbitration of *Saluka Investments BV v. Czech Republic*, in which the tribunal had to determine the nationality of a Dutch company as part of a multinational corporate structure and found it appropriate to consider a company's nationality based on the state of incorporation prescribed by treaty.[16]

The tribunal in *Soufraki v. United Arab Emirates* considered the claimant's nationality and held that the treaty's requirements were not satisfied.[17] This

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[13] Souad Ezzerouali, "Establishing Specialized Courts for Investment Disputes in the Sultanate of Oman: A Bet to Realize Oman's Vision 2040 in Attracting Investments," *Pakistan Journal of Life and Social Sciences (PJLSS)* 22, no. 1 (2024), https://doi.org/10.57239/PJLSS-2024-22.1.00505.

[14] Marc-Antoine Couet, "Round-Tripping in International Investment Law: A Teleological Assessment," *The Journal of World Investment & Trade* 22, no. 3 (June 2021): 459–501, https://doi.org/10.1163/22119000-12340215.

[15] Mehmet Recai Uygur and Bahman Peyravi, "Business Resilience and Strategic Responses in Ukraine and Lithuania during the Russia-Ukraine Conflict: Insights from the Energy, Agriculture, and Manufacturing Sectors," *Business: Theory and Practice* 26, no. 1 (February 2025): 62–77, https://doi.org/10.3846/btp.2025.22164.

[16] Carlo De Stefano, "In Favor of Counterclaims by Hosts States in International Investment Proceedings," in *International Investment Arbitration*, 1st ed., by Mesut Akbaba and Giancarlo Capurro (London: Routledge, 2026), 64–86, https://doi.org/10.4324/9781003485285-5.

[17] You Kexin, "The Jurisdictional Maze: Dual Nationality in International Investment Arbitration," *Asian International Arbitration Journal* 21, no. Issue 1 (May 2025): 67–88, https://doi.org/10.54648/AIAJ2025001.

example illustrates why we should view nationality as more than a definitional question. It works as a jurisdictional connecting factor to determine if an arbitral tribunal can hear a dispute.[18] Therefore, for an Indian outward investor, the legal structure chosen at the time of investment may affect its access to treaty arbitration in later stages.

Scope of Protection and the Definition of Investment

A definition of investment is equally important since it delineates the material scope of treaty protection and could define the jurisdiction of an Investor-State arbitral tribunal. Earlier, many Indian BITs followed a broad, asset-based definition of investment that enumerated various types of property & economic interests. By contrast, the 2016 Model BIT follows a restrictive, enterprise-based approach.

The Model BIT states that investment means an enterprise established, organized and operated in good faith in accordance with the law of the host State together with the assets of the enterprise; that additionally, the investment must have the characteristics of commitment of either capital or other resource, should have a certain duration, expectation of gain or profit, assumption of risk and significance for development of host State.[19]

With impacts cascading to substantive definitions of investment, as treaty protection and arbitral jurisdiction depend on the existence of a qualifying investment,[20] where legal characterization of an economic activity can be the difference as to whether an investor can get access to international arbitration (or does not).[21]

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[18] Admiral Admiral et al., "Unfair Terms in Standard Digital Contracts: A Hidden Threat to Human Rights and Consumer Justice," *Yustisia Jurnal Hukum* 14, no. 3 (December 2025): 312, https://doi.org/10.20961/yustisia.v14i3.109656.

[19] Ranjan, *India and Bilateral Investment Treaties*.

[20] Ahmed Moustafa Aldabousi and Ibrahim Mohamed Shaker Ali, "Legal Safeguards against Market Rumors in UAE Securities: A Comparative Commercial Law Study," *Investment Management and Financial Innovations* 22, no. 4 (November 2025): 227–36, https://doi.org/10.21511/imfi.22(4).2025.18.

[21] Zain Alasfoor, Raed Alnimer, and Souad Ezzerouali, "Guarding the Private, Serving the Public Confidentiality Challenges in International Arbitration," in *Technological Innovation and Enhancing Decision Processes in Modern Enterprises*, vol. 631, ed. Reem Khamis Hamdan, Studies in Systems, Decision and Control (Cham: Springer Nature Switzerland, 2026), 913–20, https://doi.org/10.1007/978-3-032-04378-8_81.

As decisions on the meaning of investment show, applying general criteria is somewhat difficult. In Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco,[22] the tribunal identified several characteristics relevant to the existence of an investment, including contribution, duration, risk, and contribution to the host State's economic development. Although the so-called Salini criteria have not been applied uniformly across investment arbitration, the case illustrates the broader difficulty of determining whether an economic activity qualifies as a protected investment. This issue is particularly relevant under the 2016 Model BIT because its enterprise-based definition incorporates several cumulative characteristics that may affect both treaty protection and arbitral jurisdiction. The criteria the tribunal used to define investment include contribution, duration, risk, and contribution to the host state's development.[23]

India's 2016 Model BIT Through the Lens of Indian Outward Investors: A Critical Analysis

The 2016 Model BIT aims not only to regulate the treatment of foreign investors, but also to provide a framework to protect Indian investors who wish to invest abroad and to balance host States' regulatory interests with investors' rights. As India has developed from a capital-importing State to a significant source of outward investment, the legal adequacy of the Model BIT must be assessed not only against India's regulatory interests as a host State, but also against the protection it can offer Indian enterprises investing in foreign States.

As such, the 2016 Model BIT departs from India's earlier BIT practice, which adopted a largely unconstrained investor-protection approach, toward a more restrictive model that focuses on domestic remedies. The Model BIT might not grant protection to Indian outbound investors but is of relevance to them because it acts as a model that India is proposing to use in the negotiation of future investment treaties, and consequently the Model's restrictive definitions, substantive standards,

[22] Darius Chan and Justin Lai, "Two Decades After *Salini v Morocco* : The Case for Retaining the Salini Test with Modifications," *Arbitration International* 39, no. 1 (April 2023): 63–84, https://doi.org/10.1093/arbint/aiad007.

[23] Souad Ezzerouali, Ridwan Arifin, and Mohamed Cheick Banane, "Can Moroccan Law Ensure Substantive Justice in Protecting Private Life from AI's Impact?," *Substantive Justice International Journal of Law* 8, no. 1 (June 2025), https://doi.org/10.56087/substantivejustice.v8i1.333.

jurisdictional conditions and the dispute settlement clauses determine the investor protection that Indian investors can avail themselves of under future BITs. This is viewed not only in terms of the State's regulatory policies, but also to assess the legal certainty Indian investors can enjoy under future BITs after their implementation. Over the years, India's outward FDI has increased. Increasingly, Indian companies operate outward through subsidiaries and other bodies in foreign jurisdictions. When considering the importance of the 2016 Model BIT, it is important to bear in mind India's changing position in the investment system.[24] The concern is not whether the Model BIT protects India from becoming another victim (host State), but whether the more stringent approach of the 2016 Model BIT adopted becomes a problem for Indian investors.

This distinction becomes legally relevant because an investor and the vehicle through which an investment is made may determine whether treaty protection is available at all. In any dispute arising from cross-border investment, it matters not merely whether any money came from India, but whether the claimant satisfies the treaty's nationality and investment conditions as of the date of the alleged breach and when it brings proceedings. Corporate restructuring could further complicate the issue, since Indian parent companies often invest through a subsidiary incorporated abroad. The nationality of the legal person, under which law the company is incorporated, and what place the company carries on its business/connection between claimant and investment - these all could become jurisdictional issues before an arbitral tribunal.[25]

1) Objective of the 2016 Model BIT

It reflects three broad objectives: to identify and commit the parties to bilateral co-operation; to promote foreign investment; and to create a climate of mutually

[24] Amit Kumar Sinha, "Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries," *Asian Journal of International Law* 7, no. 2 (July 2017): 227–63, https://doi.org/10.1017/S2044251316000023.
[25] Epaminontas E. Triantafilou and Jagdish Menezes, "The Other Side of the Coin: India's 2015 Model BIT and Indian Investors Abroad," in *Adjudicating Global Business in and with India*, 1st ed., by Leïla Choukroune and Rahul Donde (London: Routledge, 2021), 26–46, https://doi.org/10.4324/9780429343773-4.

beneficial economic activity, balanced against a reaffirmation of States' right to regulate investment in line with their laws and public policy goals.

This last objective marks a clear policy departure from past Indian investment treaties. While the focus was previously primarily on promoting investment protection, the Model BIT again clearly stresses the host State's regulatory power. This also aligns with global shifts in investment treaty practice in the modern era: States want to retain policy space while defining the exact nature of their obligations to investors.[26]

However, for outward investors in India, the Model BIT's restrictive design raises a different question: whether the pursuit of greater regulatory autonomy has come at the cost of predictability and legal certainty in protecting Indian investments abroad. This question becomes increasingly important when the investor's nationality, corporate structure & governing law are considered alongside their access to dispute settlement provisions.

2) Scope and Applicability

In Art 2.1, the model can be understood as a non-retroactivity standard that excludes investments and investment activities existing before the treaty's entry into force. Art 2.2 restricts the admission phase protections by excluding admission phase activities as eligible for protection (BIT 2016). This means the BIT does not protect foreign investors as their admission instrument; its jurisdiction arises only after the investment qualifies under the treaty's requirements.[27]

Of special concern for investors wishing to establish themselves abroad is the exclusion of pre-investment activities. It may cost hundreds of thousands of dollars for an investor to incur expenses in negotiations, feasibility studies, and obtaining licenses and corporate forms necessary for the establishment phase, but which precede protection by treaty.[28] If, during that period, governmental conduct

[26] Chowdhury, "Investor State Dispute Settlement Provisions in India's Model Bilateral Investment Treaty."
[27] Chowdhury.
[28] Department of law, Sage University, Indore, India. and Priyanacy Gupta, "An Empirical Study on Indian Cybercrime Laws for the Protection of Senior Citizens of Indore City," *Kampala International University Law Journal* 7, no. 2 (December 2025): 1–13, https://doi.org/10.59568/KIULJ-2025-7-2-01.

prevents the investment from materializing, the investor may have no direct remedy under the treaty.

Accordingly, India is not following the "admission model".[29] In essence, it carves out certain pre-operational expenses and activities by defining Protected investment as anything other than such, effectively narrowing the treaty's reach before the investing business is well and truly established and operating. It carves out such activities that many other broader treaty models would cover for these; therefore, when India invests abroad, it would lead to a situation where the treaty protection might well depend not only on whether there exists an investment project but also on whether or not the project fulfills substantive requirements under the model to be recognized as Protected investment.

In Art 2.3, only expropriations taking place, or acts taken, after the contracting party's entry into force are covered. This provision is clear on completed historical occurrences; however, problems may arise in cases involving an ongoing or accumulating Government measure that takes effect before entry into force but produces its legally significant effects afterward. Whether a State's act was a completed historical act or an ongoing breach will determine jurisdiction in this dilemma.[30]

This issue is pertinent to Indian outward investors because the State measure may be an accumulation of administrative, legislative, or judicial acts rather than an isolated act. Careful attention should therefore be paid to the temporal distinction between the investment, the measure, and the alleged breach because temporal jurisdiction is a pre-threshold question for the tribunal; if not met, the tribunal cannot consider the substantive argument.

3) Standard of Treatment

The 2016 Model BIT has restricted the standard of treatment. Instead of a broad stand-alone FET standard, Article 3.1 refers to the types of conduct of a State that constitute a breach of the FET: denial of justice, fundamental breaches of due

[29] Agrawal, "Bilateral Investment Treaties."
[30] Georgios Dimitropoulos, "National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform," *The Journal of World Investment & Trade* 21, no. 1 (February 2020): 71–103, https://doi.org/10.1163/22119000-12340168.

process, targeted discrimination on manifestly unjustified grounds and manifestly abusive treatment.[31] This would limit the arbitral tribunal's ability to interpret the FET broadly through concepts like legitimate expectations or general notions of fairness. It would preserve the host States' right to regulate, but Indian inward investors would have less recourse on breach-of-rights grounds, affecting the predictability of protection for their investments.[32]

This restrictive formulation may not avoid all uncertainties, but it may shift the enquiry to whether the challenged conduct meets the higher bar under specifically defined types of misconduct. It may reduce the circumstances in which Indian outward investors can argue that regulatory or administrative conduct in the host State rises to the level of giving rise to a claim in the international arena. It may also affect their ability to use arbitral remedies where the conduct may have triggered a claim under a broad FET clause but falls short of meeting the threshold required by the article in question.

Moreover, the issue also raises a private international law question. When the alleged mistreatment results from administrative or judicial measures taken by the host State, investors must consider the available domestic remedies, the law governing those proceedings, and when the challenged conduct might become relevant in an international context. Furthermore, pursuant to Article 13.5, arbitral tribunals shall not review the merits of a decision by the judicial authority of the Parties. Hence, an investment arbitration cannot be treated simply as an appellate forum over domestic judgments; instead, it needs consideration whether the relevant State conduct, when looked at from a domestic legal framework perspective, involves an international obligation is another area worth noting by Indian outward investors to evaluate the reality of the treaty's protection to Indian outward investors when their dispute reaches the international arbitration stage.

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[31] Patrick Dumberry, "The 'Minimum Standard of Treatment' in International Investment Law: The Story of the Emergence, the Decline and the Recent Resurrection of a Concept," in *International Law and Time*, vol. 101, ed. Klara Polackova Van Der Ploeg, Luca Pasquet, and León Castellanos-Jankiewicz, Ius Gentium: Comparative Perspectives on Law and Justice (Cham: Springer International Publishing, 2022), 381–404, https://doi.org/10.1007/978-3-031-09465-1_18.

[32] Yoram Z. Haftel and Alexander Thompson, "When Do States Renegotiate Investment Agreements? The Impact of Arbitration," *The Review of International Organizations* 13, no. 1 (March 2018): 25–48, https://doi.org/10.1007/s11558-017-9276-1.

4) Most-Favoured-Nation Treatment

The Model BT deliberately avoided including a Most-Favoured-Nation clause. India's experience with the MFN claim, especially in White Industries, suggested that such a clause would allow investors to cherry-pick more favorable substantive or procedural protections from BITs with a third-party country.[33]

Avoiding MFN gives the State more autonomy in treaty negotiations, as concessions made may not necessarily have to be transferred to investors under a different treaty partner. However, completely omitting MFN means India will face difficulties when investors sign treaties with states other than its investment partner; those treaties may not grant the state much scope, as may turn out to be the case.[34]

Lack of MFN fragments the protective environment in cross-border legal relations.[35] Two investors located in the same host State may enjoy materially different levels of treaty protection merely because they are nationals of different States. This may not amount to discrimination in its essence, as bilateral treaty-making itself entails creating differentiated treaty commitments. But it lowers predictability for investors relying on a treaty network of their hosts to protect their interests when making choices, as the extent of legal safeguards would differ depending on which States enter into investment treaties with other counterparts that the specific host State is willing to enter into. The structural consequence of the missing MFN clause for the Indian outward investor is increased dependence on the host State's treaty network with other major outward-investing States. The investor can no longer count on the protections accorded to its co-investors by using such an MFN clause. Corporate structuring thus has to be assessed in the light of the actual treaty network rather than a general expectation of equal treaty protection.

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[33] Grant Hanessian and Kabir Duggal, "The 2015 Indian Model BIT: Is This Change the World Wishes to See?," *ICSID Review* 30, no. 3 (October 2015): 729–40, https://doi.org/10.1093/icsidreview/siv025.

[34] Tanjina Sharmin, "The MFN Clause in Investment Law and Arbitration: A Developing Countries Perspective," in *Handbook of International Investment Law and Policy*, ed. Julien Chaisse, Leïla Choukroune, and Sufian Jusoh (Singapore: Springer Singapore, 2021), 303–40, https://doi.org/10.1007/978-981-13-3615-7_92.

[35] Dumberry, "The 'Minimum Standard of Treatment' in International Investment Law."

For Indian companies, this matters most in multinational corporate structuring; when an Indian parent company invests through a subsidiary incorporated in a third State, the MFN issue becomes more relevant. The nationality of the intermediary company may decide which treaty (if any) is applicable. Corporate structuring may affect access to treaty protection, but it does not change the identity of the Indian enterprise so that it automatically becomes an investor under a treaty to which India is not a party.

The inclusion of the MFN clause can be restricted to allow equal treatment while excluding treaty shopping and the import of unrelated dispute-settlement mechanisms. Because the MFN clause is restricted for foreign investments made by Indian outward investors, they cannot invoke more beneficial substantive/procedural standards provided for by treaties entered into by the foreign state or a Contracting Party to obtain similar treatment under the MFN clause. Thus, the restricted formulation upholds the policy adopted in the Modern BIT of preventing treaty shopping and limiting the extent to which arbitration may be expanded by reference to comparisons with other treaties.

5) Expropriation

The Indian Model BIT 2016 protects against direct and indirect expropriation while recognizing the host state's regulatory power. Expropriations shall require a public purpose, be duly compensated, and follow due process. Direct expropriation occurs when the state formally seizes and transfers the title. Indirect expropriation, however, poses a challenge because the state retains ownership, but interference with economic activity can still affect investment. Thus, investment tribunals must distinguish expropriation from the exercise of regulatory powers.[36]

The Model BIT attempts to solve this difficulty by employing a fact-specific analysis and recognizing legitimate public welfare regulation. This approach matters for Indian investors, as investments abroad may face extensive regulation (in taxation, environmental regulation, public health, licensing, and other areas of public policy). The decisive question is therefore not whether regulation has

[36] Ranjan, "India and Bilateral Investment Treaties: A Changing Landscape."

adversely affected an investment but whether the cumulative legal and economic effect of the measure crosses the treaty threshold for indirect expropriation.[37]

The cross-border dimension gains prominence where an investment comprises multiple legally and individually distinct assets or entities, located across various jurisdictions. The Tribunal must characterize the protected investment, identify the proper claimant, and assess the relationship between the State measure and the protected investment. Corporate fragmentation can therefore not only complicate the characterization of the investment, but also the evaluation as to whether a substantial deprivation has occurred.

The Model BIT accordingly recognizes police powers as a justified instrument for protecting regulatory space, but it must be subject to principled adjudication; a wide regulatory exception does not mean automatic immunity from treaty responsibility. Otherwise, the distinction between legitimate and indirect expropriation would rely too heavily on the host State's subjective appraisal.[38]

6) Denial of Benefits

Denial of benefits seeks to ensure that treaty protection is not available to enterprises with no real economic linkage to the State of which they claim to be national.[39] The Model BIT specifically uses substantial business activity as the test to distinguish real investors from enterprises created primarily to obtain treaty protection. The concern is justifiable; States have every right to refuse to extend benefits to artificial corporate arrangements seeking treaty protection. Unfortunately, honest investors from India who have routed their investments through subsidiaries or holding companies in third States could also be impacted by the provision.[40]

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[37] Prabhash Ranjan, "'Necessary' in Non-Precluded Measures Provisions in Bilateral Investment Treaties: The Indian Contribution," *Netherlands International Law Review* 67, no. 3 (December 2020): 473–501, https://doi.org/10.1007/s40802-020-00180-5.

[38] Prabhash Ranjan, "Pharmaceutical Patents and Expropriation in Indian Bilateral Investment Treaties," preprint, SSRN, 2017, https://doi.org/10.2139/ssrn.2946101.

[39] Hanessian and Duggal, "*The 2015 Indian Model BIT*."

[40] Aniruddha Rajput, "India's Shifting Treaty Practice: A Comparative Analysis of the 2003 and 2015 Model BITs," *Jindal Global Law Review* 7, no. 2 (October 2016): 201–26, https://doi.org/10.1007/s41020-016-0032-9.

The significance of nationality as a connecting factor can be seen here in the private international law context; what one needs to determine might not even be where the capital is coming from ultimately, but whether the claimant complies with the definition of an investor established in the treaty and the required legal and economic connection to the Party is maintained. The choice of legal entity has direct implications for eligibility for claims under this treaty, including whether the case could be considered an investment under the treaty.

The main challenge outside this country is for Indian outward investors who route their investment via subsidiaries, holdings, or other entities. The structure may be appropriate in business terms, but it might jeopardize treaty eligibility if the Model BIT requires substantial operations within the company or some other qualifying connection. The issue, then, is not the abusive nature of corporate structuring but whether the entity's legal design meets the treaty's jurisdictional requirements.

Furthermore, given that the tribunal is asked not to find in favor of the investor on a denial-of-benefits claim once a matter goes to arbitration, the problem escalates further, since such an approach may create uncertainty about the stability of the investor's treaty rights. From the investor's perspective, whether the host state invokes denial of benefits late in the arbitration is crucial to the predictability of the jurisdiction. Denial of benefits is therefore not merely a technical argument; it is closely related to arbitral jurisdiction and the timing at which jurisdiction arguments can be raised.[41]

This corporate experience shows that, when restructuring for any genuine or natural corporate purpose, arbitral tribunals have needed to distinguish between legitimate corporate organization and corporate structuring carried out mainly to obtain treaty protection by setting up a shell company. Hence, the question should

[41] Elena Kotyrlo and Hryhorii M. Kalachyhin, "The Effects of India's Bilateral Investment Treaties Termination on Foreign Direct Investment Inflows," *Economics of Transition and Institutional Change* 31, no. 4 (October 2023): 1007–33, https://doi.org/10.1111/ecot.12363.

be the actual economic and legal link between the investor and the host state, rather than merely the existence of a foreign corporation.[42]

7) Taxation and Other Exceptions

Many of the treaty's taxation measures are excluded from the Model BIT; India favored this because of disputes with Vodafone and Cairn over taxation measures, making taxation a key element India wanted excluded from the BIT's scope. This exclusion reflects India's emphasis on protecting its domestic taxation authority. Conversely, the taxation exclusion might carry a risk for Indian investors wishing to invest abroad. The Host State might take measures that severely affect the economic value of their investment, without the investors enjoying treaty protection.[43]

This does not remove taxation from the regulatory field of the host State. The legal challenge is demarcating whether the exclusion is sufficiently narrow to distinguish between normal State taxation of foreign investment holdings and abusive/confiscating measures. Domestic tax law, the distribution of taxing competency through a treaty, and the exclusions within the investment treaty itself all come into play in cross-border contexts. The interaction of the three will determine whether the dispute is confined to domestic tax law or may also involve international investment.[44] In addition, the Model BIT includes the familiar general and security exceptions, which preserve the State's ability to adopt measures to pursue legitimate public interests. These provisions are becoming more common in modern investment treaties, signaling a move toward a more balanced approach to investment governance that departs from the exclusively investor-centered model.[45]

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[42] M. Feldman, "Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration," *ICSID Review* 27, no. 2 (December 2012): 281–302, https://doi.org/10.1093/icsidreview/sis026.
[43] Freya Baetens, "Protecting Foreign Investment and Public Health Through Arbitral Balancing and Treaty Design," *International and Comparative Law Quarterly* 71, no. 1 (January 2022): 139–82, https://doi.org/10.1017/S0020589321000488.
[44] Błażej Kuźniacki and Stef Van Weeghel, "Cairn Energy: When Retroactive Taxation Not Justified by Prevention of Tax Avoidance Is Unfair and Inequitable," *Arbitration International* 39, no. 1 (April 2023): 125–54, https://doi.org/10.1093/arbint/aiad003.
[45] Leïla Choukroune, "Indian International Investment Agreements and 'Non Investment Concerns': Time for a Right(s) Approach," *Jindal Global Law Review* 7, no. 2 (October 2016): 157–74, https://doi.org/10.1007/s41020-016-0030-y.

However, any exception should be formulated and interpreted narrowly enough to leave sufficient guidance for the arbitral tribunal; too much vagueness allows discretion beyond the negotiated treaty rules. The goal, therefore, should be to strike a balance between preserving such autonomy and maintaining certain predictability for regulated cross-border investment.[46]

8) Non-Precluded Measures

As indicated by its reference, NPM, if appropriately devised, could act as a guardian of the host State's regulatory flexibility to a certain extent, considering that they allow the non-precluded measures to be taken to pursue legitimate public interests within their territory, such as those of public health and public order or national security, etc.[47] The 2016 Model BIT framework to reduce investment treaty protection incorporates a relatively detailed set of exceptions for non-precluded measures (NPM) and allows them, provided there is no reasonably practicable alternative measure that is less restrictive or impairing. This attempt by India appears to ensure its regulatory autonomy by keeping it away from investment treaty protection.[48]

But where such exceptions apply, they may adversely affect the predictability of treaty protection for Indian outward investors.[49] In effect, the issue is not simply the existence of regulatory exceptions, but whether the conditions relating to them are specific enough to distinguish regulatory measures from those that unjustifiably interfere with protected investments from the investors' and the arbitral tribunal's perspective. These provisions allow host countries to prioritize non-investment objectives over investment protections under specific circumstances. While these

[46] Luca G. Radicati Di Brozolo, "International Commercial Arbitration and Private International Law," in *Cambridge Compendium of International Commercial and Investment Arbitration*, 1st ed., ed. Stefan Kröll, Andrea Bjorklund, and Franco Ferrari (Cambridge University Press, 2023), 441–67, https://doi.org/10.1017/9781108304467.017.
[47] Ranjan, *India and Bilateral Investment Treaties*.
[48] Dilini Pathirana and Mark McLaughlin, "Non-Precluded Measures Clauses: Regime, Trends, and Practice," in *Handbook of International Investment Law and Policy*, ed. Julien Chaisse, Leïla Choukroune, and Sufian Jusoh (Singapore: Springer Singapore, 2019), 1–23, https://doi.org/10.1007/978-981-13-5744-2_6-1.
[49] Güneş Ünüvar, "State as a Sovereign and a (Respondent) Party in Investment Treaty Disputes," in *The Transformation of International Investment Law and Its Principles*, vol. 44, by Güneş Ünüvar, European Yearbook of International Economic Law (Cham: Springer Nature Switzerland, 2025), 69–101, https://doi.org/10.1007/978-3-032-01110-7_3.

clauses offer essential regulatory flexibility for host countries, Indian investors venturing abroad must understand their implications.

The Impact of the 2016 Model BIT on Investor-State Arbitration

India's restrictive Model BIT 2016 has its most significant impact on ISDS. Here, India has not eliminated international arbitration; instead, it has made such recourse subject to substantive, jurisdictional, and procedural conditions, with international adjudication taking a more subsidiary role.[50]

1) Jurisdiction of the Arbitral Tribunal

Model BIT takes a restrictive approach to the jurisdiction of any arbitral claims. Jurisdiction is not only reserved for investment disputes but also depends upon whether the claimant is a protected investor, the disputed asset a protected investment, and all procedural requirements of the treaty are met. Nationality and the structure of the investment may become the crucial factor determining a claimant's access to treaty protection.[51] These requirements for Indian outward investors' connecting factors make their nationality, incorporation, ownership or control, and the structure in which the investment is made relevant. Such determinations, based on the investor's form and features, may determine an arbitral tribunal's overall jurisdiction to hear the case.

The Model BIT also excludes certain disputes from arbitral jurisdiction. Article 13.5 of the Model BIT provides that a tribunal shall not have jurisdiction to review on the merits any decision made by a judicial authority of the Parties. Thus, arbitration would not function merely as an appellate forum of domestic judicial decisions and would strengthen the role of the host State's domestic legal system.

2) Applicable Law and the Interaction between Domestic and International Law

Through the creation of the Model BIT between international investment and domestic law, interaction is bound to arise as far as the legal stance of the outward

[50] Grant Hanessian and Kabir Duggal, "The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?," *ICSID Review* 32, no. 1 (February 2017): 216–26, https://doi.org/10.1093/icsidreview/siw020.

[51] Ursula Kriebaum, Christoph Schreuer, and Rudolf Dolzer, *Principles of International Investment Law*, 3rd ed. (Oxford University Press, 2022), https://doi.org/10.1093/law/9780192857804.001.0001.

investment of an Indian outbound investor is concerned; this may be impacted by the law of the host state, the law governing the existence of the investor's company and the structure of the company, the investment treaty governing the investment, together with the arbitral proceedings governing the dispute. This may raise questions about the significance or validity of domestic law in investment-treaty arbitration.[52]

Private international law is relevant here for identifying a connecting factor between the investor, the investment, the host State, and an applicable legal order; it does not automatically determine how the investment treaty is interpreted. Meanwhile, the arbitral tribunal must consider how domestic law functions within the investment treaty's international law environment. Further information: Private international law in investment arbitration; connecting factors and relevant legal framework.[53]

Thus, for an Indian Outward Investor, the interaction between domestic and international law affects the practical certainty of treaty protections, especially where the breach is alleged to arise from an administrative or judicial measure taken under the host state's domestic law.

3) Exhaustion of Local Remedies and Access to Arbitration

A unique feature is that the Model BIT requires an investor to resort to domestic remedies before filing a claim in international arbitration. Article 15 requires the investor to submit the claim to the relevant domestic courts or administrative bodies and pursue local remedies for five years, subject to an exception where no available domestic legal remedy can reasonably provide relief**.** This provision makes international arbitration the subsidiary mechanism, placing the national courts and administrative bodies at the center of the dispute-resolution process. Hanessian and Duggal consider the five-year exhaustion requirement as a considerable departure from the one found in investment treaties.[54]

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[52] Martin Jarrett, "The International Validity of Domestic Law in Investment-Treaty Arbitration," *Arbitration International* 39, no. 1 (April 2023): 1–18, https://doi.org/10.1093/arbint/aiad001.
[53] Jarrett.
[54] Hanessian and Duggal, "The Final 2015 Indian Model BIT."

The consequence for outward Indian investors is one that they cannot afford to take lightly. One cannot assess access to international arbitration independently of the efficacy and availability of remedies in the host State. Therefore, the investor cannot assess not only whether relevant conduct could be said to violate the applicable BIT, but also whether any remedy provided by the domestic legal system of such a nature as to satisfy pre-arbitration requirements of the treaty.

Thus, the effectiveness of ISDS may be drastically curtailed as Mandatory domestic proceedings (Article 15) read with the restriction on reviewing the merits of decisions (Article 13.5). Article 13.5 allows the tribunal to review only decisions taken by a judicial authority, and Article 15 requires the investor to seek recourse first from domestic courts**.**

Thus, the Model BIT does not transplant an issue from national courts to international arbitration, but provides a hierarchy when disputes do arise. This connection between local remedies, choice of law, and recourse to arbitration is an important aspect of legal certainty and the effectiveness of treaty protection for prospective Indian outward investors.

Conclusion

By introducing the 2016 Model BIT, India appears to have changed how it regulates investments, shifting from an investor-protective approach to one that prioritizes host-state regulatory autonomy and reduces the risk of investment claims. That was understandable for India, given its experience with investment arbitration, where international investment treaty standards have been interpreted broadly.

However, the analysis yields four main findings. First, such an exclusion, in the form of traditional Fair and Equitable Treatment & Most-Favoured-Nation clauses, reduces substantive and procedural protections for investors. Second, the restrictive definitions of investor & investment, and reliance on the denial-of-benefits clause, mean eligibility may be uncertain, especially for investors using subsidiaries and incorporation in different jurisdictions to invest. Third, from a Private International Law perspective, nationality, corporate structure, choice of

law, and exclusive jurisdiction clauses become more important factors in determining whether an Indian investor can claim treaty protection. Fourth, requiring domestic remedies as a prerequisite to international arbitration means ISDS may lose some of its benefits, since the investor must wait a while to seek remedies from an overburdened Court system in the host State before resorting to international arbitration. Also, if the domestic legal mechanism is slow or less effective, then ISDS would be weakened.

India could usefully calibrate its revision of the Model BIT; the time has come to reconsider current investor-protection practice, rather than retreating completely. It is important to remove the substantive content requirement (to use a more precise formulation of the standard-of-treatment than 'fair-and-equitable-treatment'), introduce a narrowly crafted and MFN provision that prevents abuse of treaty shopping or still allow the legitimate advantages of it, add clarity on the legal definition of corporate nationality and substantial business activity (the 'principal place of business requirement' for nationality of legal persons in India is problematic) and lastly revise the domestic-remedy requirement than completely disregard it, adding an 'exhaustion of local remedy as a condition for proceeding' when its use actually proves to be futile. The ISDS should establish clearer and more predictable jurisdiction rules, as it is the most crucial segment in any BIT. Doing so does not infringe India's room to regulate. This will add certainty and make the system efficient for inbound and Indian outward investment.

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