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Rethinking India's Bilateral Investment Treaties: Balancing Investor Protection with Policy Space

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Abstract: India's approach to international investment agreements has undergone a significant transformation, particularly with the introduction of its Model Bilateral Investment Treaty in 2016. This paper undertakes a clause-by-clause evaluation of the treaty text, examining the strengths, limitations, and omissions in key provisions related to investor protection and state regulatory autonomy. By comparing India's model treaty with contemporary international agreements such as its economic cooperation arrangements with the United Arab Emirates and Australia, as well as its investment cooperation agreement with Brazil, the analysis in the paper highlights areas where India's treaty practice diverges from evolving global standards. The study also draws on foreign direct investment data to explore the implications of India's withdrawal from earlier investment treaties. In doing so, it identifies specific legal and procedural elements that may affect investor sentiment. The paper concludes by offering targeted recommendations aimed at supporting a balanced investment treaty framework that encourages inward investment while preserving the host country's ability to pursue public interest objectives.

1. Introduction

Foreign Direct Investment (FDI) has long been a catalyst for economic growth, contributing to employment, technological advancement, and infrastructure development in host countries [Balasubramanyam et al., 1999; Aerni, 2017]. To attract and protect such capital flows, countries sign Bilateral Investment Treaties (BITs), which offer legal assurances such as Fair and Equitable Treatment (FET), Most-Favoured-Nation (MFN) status, and access to Investor-State Dispute Settlement (ISDS) mechanism [OECD, 2008; UNCTAD, 2015].

India signed over 80 BITs between 1994 and 2011 [UNCTAD, 2023]. While the proliferation of BITs during this period was expected to enhance investor confidence, the actual design of these treaties may have limited their effectiveness in signalling legal stability. India's early BITs adopted boilerplate templates that often lacked clarity in key definitions, particularly regarding "investment" and the scope of "fair and equitable treatment" (FET). The absence of explicit references to regulatory objectives of sustainable development in the preambles, as seen in more modern treaties like the Japan-Switzerland BIT, further weakened their developmental coherence and may have constrained their appeal to long-term investors. India's early BITs did not reflect a strategic understanding of the evolving investment landscape. By importing legal language without adapting it to India's policy needs, these treaties may have unintentionally exposed the country to expansive arbitral interpretations while failing to attract the quality and scale of FDI originally envisioned. There is a need for India's BIT framework to move beyond symbolic alignment with international standards and toward a more deliberate design that aligns treaty commitments with national development objectives (Ramesh, 2015).

But growing concerns over investor claims especially in the Vodafone and White Industries cases led to the adoption of a new Model BIT in 2016 that emphasized policy space over investor rights [Ranjan & Anand, 2017]. This shift was accompanied by the termination of several BITs and a move toward excluding substantive investment provision in recent FTAs such as the UAE CEPA and Australia ECTA [Ranjan, 2022]. Although intended to reduce legal exposure, these developments have raised questions about India's ability to maintain investor confidence and attract long-term capital, especially as evidence shows that BIT terminations have negatively impacted FDI inflows [Hartmann & Spruk, 2022]. This paper explores how India can redesign its model BIT to better protect investors while preserving regulatory autonomy and reviving treaty relationships. This study is based on secondary research using scholarly articles, empirical studies, government reports, and data on foreign direct investment. A provision-wise analytical approach has been adopted to assess the structure and implications of India's 2016 model bilateral investment treaty, followed by recommendations focused on balancing investor protection and host state regulatory objectives. Section 2 presents a comprehensive literature review on the global and

India-specific links between FDI and BITs. Section 3 outlines India's investment policy framework and examines the implications of its policy changes. Section 4 critically analyses the provisions of India's 2016 Model BIT in comparison to newer treaty models. Section 5 proposes policy recommendations to modernize India's BIT strategy for a globally competitive investment climate.

2. Literature Review

2.1 Global and National Foundations of FDI

Foreign Direct Investment (FDI) serves as a critical driver of global economic development by facilitating capital inflows, advancing technology transfer, and creating employment opportunities. Beyond financial contributions, FDI enables the diffusion of managerial expertise and innovation, especially in developing and emerging economies. However, the extent of these benefits is contingent upon host country conditions. In particular, the presence of large domestic markets and a skilled labour force significantly enhances the developmental impact of FDI by reinforcing human capital and enterprise competitiveness (Balasubramanyam, Salisu, & Sapsford, 1999).

Recent geopolitical disruptions and macroeconomic volatility have significantly reshaped global FDI patterns, influencing sectoral distribution and regional allocations (UNCTAD, 2023; UNCTAD, 2024). In response, several countries have undertaken reforms to streamline investment procedures, strengthen institutional capacities, and modernize regulatory frameworks aimed at attracting foreign capital (UNCTAD, 2024). Nigeria, for instance, demonstrates the potential of FDI in alleviating capital and technology deficits, although its efficacy is closely tied to the presence of supportive legal and policy environments (Aliyu, 2015). Similarly, the concept of principal embeddedness highlights how multinational enterprises can foster long-term, trust-based relationships with local suppliers, thereby enhancing knowledge spill overs and integrating domestic firms into global value chains (Aerni, 2017).

India offers an illustrative case of aligning investment policy with national development objectives. Since the 1990s, economic liberalization, coupled with targeted structural reforms, has resulted in robust FDI inflows that have supported industrial growth and employment generation. More recent initiatives aimed at boosting competitiveness and human capital have further augmented India's ability to channel FDI toward long-term developmental goals (UNCTAD, 2023).

In addition to domestic reforms, international legal instruments play a vital role in mitigating investment-related risks. BITs function as legal guarantees that reduce uncertainty by offering protections such as fair and equitable treatment (FET) and access to investor–state dispute settlement (ISDS) mechanisms (OECD, 2008). These provisions are particularly salient in jurisdictions where domestic institutions are perceived as weak, thereby serving as external commitments to a stable and transparent investment climate.

Nonetheless, empirical evidence regarding the effectiveness of BITs remains mixed. While BITs appear to complement existing institutional quality in countries with credible legal systems, their impact is less evident in weaker governance contexts (Hallward-Driemeier, 2003). Furthermore, mechanisms such as investment contracts and political risk insurance may offer comparable protection in certain environments (Yackee, 2010). Well-designed BITs may also exert a signalling effect, attracting investment even from outside treaty partners by conveying a stable regulatory environment (Kerner, 2009). These findings underscore that the effectiveness of BITs is mediated by treaty design, institutional quality, and sector-specific dynamics, positioning them within a broader framework of investment governance (Kerner, 2009; Hallward-Driemeier, 2003; Yackee, 2010).

Among complementary risk mitigation instruments, political risk insurance plays a critical role in high-risk environments. The Multilateral Investment Guarantee Agency (MIGA) provides coverage against non-commercial risks such as expropriation, political violence, and currency inconvertibility, thereby reducing the perceived risk of investment in politically volatile contexts (MIGA, 2024). This instrument is particularly relevant for long-term investments in sectors such as infrastructure and renewable energy, where high capital intensity and exposure to regulatory shifts can deter investors.

In fiscal year 2024, MIGA issued US$ 8.2 billion in guarantees across 40 projects, with the majority directed toward low-income and fragile states (MIGA, 2024). These guarantees were instrumental in facilitating investment flows that might otherwise have been withheld. In developing countries, political risk insurance has supported nearly 30 percent of total FDI inflows, compared to a global average of just 3 percent (Gordon, 2009). Despite its utility, MIGA's operations are constrained by conservative underwriting practices, country exposure ceilings, and a preference for large-scale, commercially viable projects. These limitations reduce its accessibility for small and medium-sized enterprises and early-stage ventures in fragile markets (Gordon, 2009; MIGA, 2024). In such contexts, political risk insurance constitutes a foundational, rather than supplementary, component of the investment promotion architecture.

Global FDI flows have been significantly impacted by recent external shocks. The COVID-19 pandemic precipitated a sharp contraction in FDI in 2020 due to widespread lockdowns and investor uncertainty. Notably, Asia, particularly China, have demonstrated relative resilience during this period (UNCTAD, 2023). Although a partial recovery occurred in 2021, the outbreak of the war in Ukraine in early 2022 led to renewed volatility, with global FDI declining by 12 percent in 2022 to US$ 1.3 trillion (UNCTAD, 2023). Cross-border mergers and acquisitions, as well as international project finance, were particularly affected due to rising financial uncertainty and geopolitical instability.

Despite these disruptions, the FDI landscape has exhibited signs of selective resilience and structural transformation. Developing countries attracted a record 70 percent of global FDI, although the growth was concentrated in a limited number of large emerging markets. In contrast, least developed countries experienced a 16 percent decline in FDI inflows, reinforcing structural disparities in investment distribution (UNCTAD, 2023). Greenfield project announcements rose by 15 percent, reflecting cautious investor optimism, particularly in sectors such as infrastructure and semiconductors, while flows into digital and fossil fuel sectors plateaued.

Sustainability-oriented finance has gained momentum in recent years. Environmental, Social, and Governance (ESG) funds and green bonds now represent trillions of dollars in global assets. However, the distribution of these flows remains uneven, with limited penetration in the Global South. The investment gap for achieving the Sustainable Development Goals (SDGs) now exceeds US$ 4 trillion annually, underscoring the urgent need for targeted investment policy reforms, enhanced de-risking mechanisms, and greater international coordination to mobilize private capital for sustainable development (UNCTAD, 2023).

In this evolving environment, global investment priorities have shifted. Cost efficiency has been replaced by a focus on resilience, diversification, and sustainability (Leshchenko, Voronkova, & Tsaturyan, 2023). The experiences of the pandemic and the Ukraine conflict have sharpened investor sensitivity to geopolitical and supply chain risks. In response, countries are increasingly emphasizing regulatory transparency, infrastructure readiness, and climate-aligned policies to attract high-quality, long-term investment. The future trajectory of FDI will depend on how effectively nations adapt to these shifting priorities, balancing investor protections with developmental objectives through comprehensive and forward-looking policy frameworks (Leshchenko, Voronkova, & Tsaturyan, 2023).

While literature underscores the developmental potential of FDI, it also highlights unresolved tensions. First, not all forms of FDI contribute equally to growth. Resource-seeking and speculative inflows may generate limited spill overs compared to greenfield or technology-intensive investments, raising questions about the quality as well as the volume of FDI. Second, the relationship between BITs and FDI remains inconclusive. Several studies find only weak or context-specific links, suggesting that BITs may act more as credibility signalling devices than as decisive determinants of capital flows. This raises the issue whether domestic reforms such as regulatory transparency, infrastructure development, and market liberalization play a more central role than treaty commitments in shaping investor sentiment. Finally, the uneven distribution of FDI, with large emerging economies capturing most inflows while least developed countries continue to lag behind, underscores a broader challenge: BITs and global investment regimes may reinforce, rather than resolve, structural disparities. These debates are critical for India, where the policy question is whether strengthening treaties or improving domestic institutions is the more effective pathway to sustained inflows.

2.2 Global Reforms in Bilateral Investment Treaties

Countries such as Vietnam, Indonesia, and South Africa have undertaken significant reforms of their BITs to better align investment policies with national development objectives and to safeguard regulatory autonomy (UNCTAD, 2015). For example, Vietnam has transitioned from traditional BITs to more comprehensive investment chapters embedded in modern trade agreements like the EU-Vietnam Free Trade Agreement. These agreements clarify FET, narrow the scope of indirect expropriation, and establish transparency and ethical standards for arbitration, while adopting a "negative list" approach that specifies sectors open to foreign investment and incorporating environmental and labour provisions to support sustainable development (OECD, 2018). Indonesia on the other hand, responding to controversial ISDS cases and concerns over excessive regulatory constraints, terminated many of its treaties and introduced a new model BIT emphasizing the state's right to regulate in areas such as public health, labour, and environment, while limiting clauses like MFN and increasing procedural transparency in dispute settlement (OECD, 2020). South Africa took a transformative approach by replacing several BITs with the Protection of Investment Act of 2015, preserving investor protections but eliminating ISDS in favour of domestic court jurisdiction, thus anchoring investment protection within the country's constitutional framework and emphasizing regulatory sovereignty to promote inclusive growth (UNCTAD, 2015). Collectively, these reforms illustrate a global trend toward balancing investor protection with domestic policy space and sustainable development (UNCTAD, 2015).

In addition to these national level reforms, modern BITs have increasingly incorporated explicit provisions safeguarding the host state's "right to regulate" in public interest (Ranjan, 2016). Historically, BITs emphasized strong investor protections such as FET, protection against expropriation, and ISDS, often at the expense of states' regulatory autonomy. This imbalance raised concerns over "regulatory chill," where governments hesitated to enact public health, environmental, or social regulations due to fears of costly arbitration (Ranjan, 2016). To address these issues, recent BITs embed clear clauses protecting states' rights to pursue legitimate public policy objectives. For example, India's 2016 Model BIT explicitly affirms that treaty provisions shall not prevent measures necessary to protect public health, safety, environment, labour rights, and national security, while narrowing FET definitions and indirect expropriation to protect state sovereignty (Ranjan, 2016). Similarly, the 2016 Morocco–Nigeria BIT integrates sustainable development and human rights, requiring investors to uphold labour and environmental standards and explicitly allowing states to regulate without triggering treaty violations (Zugliani, 2019). These developments reflect a broader shift towards treaties that balance investor protections with public policy priorities, particularly in developing country contexts (Zugliani, 2019; Ranjan, 2016).

Recent policy frameworks increasingly advocate for reforming international investment agreements to align with sustainable development objectives by integrating investment provisions into national development strategies (UNCTAD, 2023). These reforms emphasize the importance of balancing investor protections with the host state's sovereign right to regulate in areas such as public health, environmental protection, and labour rights (UNCTAD, 2023). Strengthening domestic legal systems to protect both foreign and domestic investments, while promoting responsible business conduct, is a key priority. Reforming ISDS mechanisms is also central to this agenda, with growing support for alternative approaches that prioritize dispute prevention and investment facilitation (UNCTAD, 2023).

These national experiences are part of a broader evolution in international investment law, where treaty design increasingly reflects sustainable development imperatives and the recalibration of investor–state relations. Rather than offering unrestricted protections, modern BITs are being tailored to reinforce regulatory sovereignty while enhancing legal clarity and predictability for investors. This trend is further supported by a growing policy consensus that investment treaties should complement domestic development strategies and institutional priorities rather than override them (UNCTAD, 2023).

In this context, treaty reforms now commonly feature narrowed interpretations of FET, the removal or redefinition of MFN clauses, and procedural innovations that reduce reliance on adversarial ISDS mechanisms. Notably, BITs such as the Morocco–Nigeria 2016 agreement and India's Model BIT 2016 embed provisions upholding public interest regulations and investor responsibilities, marking a paradigmatic shift in treaty drafting from earlier, investor-dominated approaches (Ranjan, 2016; Zugliani, 2019).

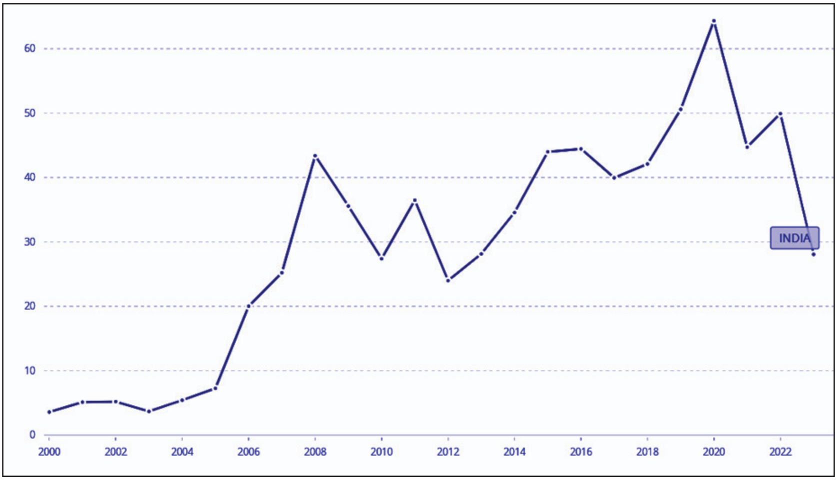
Moreover, international advocacy has increasingly emphasized the need for accessible dispute resolution frameworks that prioritize prevention and early-stage dialogue over litigation. These developments reflect a growing recognition that investment governance must strike a balance between attracting capital and preserving national policy space, particularly for countries pursuing inclusive and sustainable development trajectories (UNCTAD, 2023).

A closer look at global treaty reforms reveals three persistent dilemmas. First, the balance between investor protection and regulatory sovereignty remains contested. Overbroad protections can generate "regulatory chill," yet excessive restrictions may deter investment altogether, creating a credibility gap. Second, the ISDS system is at the centre of a legitimacy crisis: inconsistent arbitral outcomes, high litigation costs, and perceptions of bias have pushed countries to explore alternatives ranging from South Africa's domestic-court model to Brazil's cooperation-based framework and the EU's proposal for a multilateral investment court. This fragmentation highlights the absence of a unified reform pathway. Third, while modern treaties increasingly include environmental, labour, and sustainability clauses, doubts remain about their enforceability and their actual impact on investor behaviour whether they function as binding obligations or symbolic add-ons. For India, these global trends pose a dual challenge: aligning with international reform momentum to preserve credibility, while avoiding a treaty model so restrictive that it isolates the country from key investment partners.

2.3 India's FDI Performance and Treaty Practice

India's trajectory as a recipient of Foreign Direct Investment (FDI) has experienced fluctuations over the past decades, with periods of growth interspersed with declines, reflecting the dynamic nature of global capital flows and domestic economic factors. This rise has been facilitated by liberalized investment policies, macroeconomic stability, and targeted government campaigns such as ease of doing business, Production Linked Incentive Scheme and Make in India programme aimed at boosting manufacturing and fostering a conducive environment for investors. Between April 2000 and December 2024, cumulative FDI inflows crossed US$ 1.05 trillion (₹89.85 lakh crore), reflecting a nearly 20-fold increase in annual inflows compared to FY2001. Notably, in the first nine months of FY 2024–25 alone, FDI equity inflows grew by 13% year-on-year, reaching US$ 50.01 billion (₹4.22 lakh crore), with significant contributions from sectors such as services and computer software and hardware sectors [IBEF, 2025].

Figure 1: FDI Inflows (2000–2023) in US$ Billion



Source: World Bank

The sectoral distribution of FDI inflows underscores India's dual strength in digital innovation and industrial growth (IBEF, 2025). Services accounted for 16.2% of total FDI, followed by computer software and hardware (15%), trading (6.4%), telecommunications (5.5%), and automobiles (5.2%), highlighting the attractiveness of both high-tech and traditional sectors (IBEF, 2025). On the source side, Mauritius, Singapore, and the United States emerged as leading contributors, with Mauritius alone accounting for 24% of total inflows largely due to favourable tax treaty with India under the Double Taxation Avoidance Agreement (DTAA), but also to its status as a low-tax jurisdiction commonly used for investment routing and treaty-based tax planning strategies (IBEF, 2025). Despite the global downturn in investment flows during 2020–2021, India was among the few major economies to record growth in FDI, driven particularly by the digital economy, including fintech and e-commerce platforms (UNCTAD, 2023).

India's improving business environment has contributed significantly to attracting FDI inflows (World Bank, 2020). India climbed from 142nd place in 2014 to 63rd in 2020 in the Ease of Doing Business rankings (World Bank, 2020). This improvement reflects reforms in areas such as business registration, construction permits, insolvency processes, and digitization of regulations, which have collectively enhanced investor confidence (World Bank, 2020).

India's investment treaty policies, particularly the unilateral termination of 44 Bilateral Investment Treaties (BITs) between 2013 and 2019, have had a notable impact on FDI inflows (Hartmann & Spruk, 2022). These terminations aimed to strengthen regulatory sovereignty and limit exposure to investor-state dispute settlement (ISDS) claims (Hartmann & Spruk, 2022). However, a quasi-experimental study shows that FDI inflows from affected countries dropped by over 30% compared to those from countries with active BITs or no treaties with India (Hartmann & Spruk, 2022).

India's investment treaty policies particularly the large-scale unilateral terminations of its BITs between 2013 and 2019 have had a measurable and negative impact on FDI inflows. During this period, India terminated 44 BITs as part of efforts to assert regulatory sovereignty and reduce exposure to investor-state dispute settlement (ISDS) claims. A quasi-experimental study using difference-in-differences methodology with quarterly bilateral data from 138 foreign investor home countries found that these terminations caused a reduction of over 30% in FDI inflows from affected countries compared to those whose BITs remained in force or who never had BITs with India [Hartmann & Spruk, 2022].

The study further indicates that this decline was not due to a general withdrawal of investment from India but rather a rerouting of FDI flows through jurisdictions maintaining BITs with India, such as Singapore, underscoring the role of BITs as legal protection and a signal of investment security. Additionally, the decline was more pronounced in mergers and acquisitions and other sensitive deal types, while greenfield investments remained relatively unaffected. In response to growing ISDS claims, India introduced a new model BIT in 2015, curtailing investor protections, narrowing definitions of investment and investor eligibility, and requiring exhaustion of local remedies before arbitration. While these reforms aimed to reclaim regulatory space and align policy with development goals, the short-term effect was a significant contraction in FDI flows from treaty-affected countries. This experience highlights the critical need to balance legal certainty for investors with sovereign policy autonomy in treaty design [Hartmann & Spruk, 2022].

India's investment climate presents a mixture of strong potential and persistent institutional challenges. The country's large and youthful population, expanding digital infrastructure, and ongoing economic reforms have fostered an attractive environment for foreign direct investment (FDI). Progress in digitizing public services, improving logistics, expanding electricity access, and implementing structural reforms like tax rationalization and labour market adjustments have significantly enhanced India's global competitiveness.

Initiatives such as Make in India, Start-up India, and liberalized FDI caps across key sectors have reinforced India's image as an emerging investment hub, particularly in technology, infrastructure, and renewable energy. Combined with India's market size and growing middle class, these reforms position the country as a high-opportunity destination for long-term investors. However, foreign investors continue to express concerns over regulatory unpredictability, bureaucratic complexity, and institutional inefficiencies. Issues such as inconsistent policy enforcement between central and state governments, difficulties in contract enforcement, and limited judicial efficiency remain key obstacles.

Overall, while India offers immense potential for foreign investment, realizing its full appeal depends on consistent policy execution, institutional strengthening, and improved governance transparency [World Economic Forum, 2020]

2.4 Positioning India in the Global BIT-FDI Discourse

The literature reviewed highlights that FDI plays a crucial role in fostering economic growth, technology transfer, and employment generation, especially in developing economies like India. Globally, while BITs are not standalone drivers of FDI, they contribute significantly by enhancing legal predictability and reducing political risk. Recent reforms in countries such as Vietnam, Indonesia, and South Africa demonstrate a clear trend toward rebalancing BITs embedding the right to regulate, restricting investor protections, and aligning treaties with sustainable development objectives. These shifts reflect UNCTAD's broader recommendations for designing investment agreements that support both investor interests and host state policy space.

India's experience reinforces these global patterns but also exposes critical challenges. Despite impressive FDI growth driven by domestic reforms and structural advantages, the unilateral termination of 44 BITs between 2013 and 2019 led to a measurable decline in FDI from treaty-partner countries. Empirical evidence suggests that the absence of treaty-based legal protections prompted investors to reroute capital through countries with existing BITs. While India's 2016 Model BIT reasserts regulatory sovereignty, its narrow definitions and procedural barriers such as the mandatory five-year exhaustion of local remedies before accessing international arbitration, the exclusion of pre-establishment rights, and the omission of umbrella clauses have raised concerns over investor confidence. The literature thus underscores the need for India to strike a more balanced approach complementing domestic policy space with externally credible and investor-sensitive treaty frameworks to sustain long-term FDI inflows.

3. India's Investment Policy and Treaty Evolution

3.1 Liberalization of India's Investment Framework

India has progressively liberalized its Foreign Direct Investment (FDI) policy framework over the past two decades, particularly since 2014, with the aim of enhancing investor confidence, simplifying procedures, and increasing capital inflows. A central feature of this liberalization has been the expansion of the automatic route, which permits foreign investors to invest in many sectors without prior government approval. As of recent policy reforms, up to 100% FDI is allowed under the automatic route in a wide range of sectors including electronics manufacturing, telecom services, insurance intermediaries, and single-brand retail (Economic Survey, 2022–23).

Reforms have also extended to sensitive sectors such as defence, civil aviation, and media, where higher FDI limits are permitted under the government approval route. The abolition of the Foreign Investment Promotion Board (FIPB) and the digitization of compliance mechanisms have improved efficiency and transparency in the investment process (Economic Survey, 2022–23). Notably, the opening of strategic sectors such as mining and space to private and foreign participation has been accompanied by the elimination of over 39,000 compliance requirements and the decriminalization of more than 3,500 provisions. These reforms, supported by complementary initiatives like the Production-Linked Incentive (PLI) schemes and the National Logistics Policy, have contributed to a visible structural shift in FDI inflows and positioned India as a preferred global destination in manufacturing, digital services, and infrastructure (Economic Survey, 2022–23).

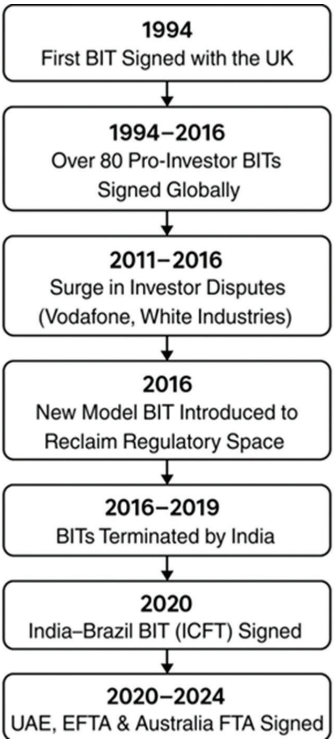
Government-led initiatives such as *Make in India*, the Production-Linked Incentive (PLI) schemes, and *Gati Shakti* have played a pivotal role in reshaping India's investment environment. Launched in 2014, *Make in India* was designed to transform India into a global manufacturing hub by encouraging both domestic and foreign investment in key sectors. The PLI schemes, covering sectors such as electronics, pharmaceuticals, textiles, and electric vehicles, offer direct fiscal incentives to firms based on production and investment targets, thereby linking industrial performance with policy support (Economic Survey, 2022–23). In parallel, the *Gati Shakti* National Master Plan aims to address infrastructure bottlenecks by integrating multi-modal transport networks and reducing logistics costs through data-driven planning and coordination across ministries (Economic Survey, 2022–23). These initiatives have not only supported capital formation but also reinforced India's positioning as a competitive and infrastructure-ready economy in the global investment landscape (Economic Survey, 2022–23). These reforms not only enhanced India's attractiveness to foreign investors but also laid the groundwork for a more nuanced approach in negotiating BITs, signalling the government's willingness to balance investor facilitation with regulatory control.

3.2 Evolution of India's BIT Strategy

India's engagement with BITs began in 1994, following the post-liberalization push to attract greater volumes of foreign investment (Srinivasan, 2019). The first BIT was signed with the United Kingdom, and by the late 2000s, India had concluded treaties with over 80 countries (UNCTAD, 2015). These agreements followed a standard template that emphasized investor protections such as FET, protection against expropriation, and access to ISDS mechanisms while offering limited safeguards for the host state's regulatory autonomy (Ranjan, 2015). Initially, BITs were viewed as strategic tools to reduce political and legal risk for investors and to signal India's openness to global capital flows (UNCTAD, 2015).

However, the proliferation of ISDS claims against India in the late 2000s and early 2010s most notably in cases such as White Industries, Vodafone, Cairn Energy, Nokia, and Nissan exposed vulnerabilities in India's treaty framework, which was grounded in a laissez-faire liberalism model from the 1990s (Ranjan & Anand, 2017). Many of these early BITs lacked precise definitions and regulatory carve-outs, allowing broad interpretations that challenged domestic policy decisions (Ranjan, 2015). The resulting backlash from government bodies, civil society, and parliament prompted a comprehensive policy reassessment aimed at regaining regulatory control and reducing legal exposure (Hartmann & Spruk, 2022).

Between 2013 and 2019, India unilaterally terminated 44 BITs, and in 2016, introduced a new Model BIT reflecting a clear shift away from investor-centric treaty design. The revised model narrowed the definition of investment to an enterprise-based approach, imposed stricter investor eligibility criteria, excluded clauses such as Most Favoured Nation (MFN) treatment and umbrella clauses, and limited the scope of the FET standard to a closed list of egregious violations (Ranjan, 2015; Ranjan & Anand, 2017). It also required investors to exhaust domestic legal remedies for five years before initiating international arbitration, and included an explicit affirmation of the state's right to regulate in areas such as public health, environment, labour, and financial stability (Hartmann & Spruk, 2022). While these reforms enhanced legal clarity and reaffirmed regulatory sovereignty, critics argue that the balance now tilts too heavily toward the host state, potentially undermining investor confidence (Ranjan & Anand, 2017). While the Model BIT was designed to reduce arbitral discretion and protect policy space, its rigid procedural thresholds and exclusion of key protections have made negotiations with new partners more difficult, slowing down India's ability to conclude new agreements (Ranjan, 2015).



As of 2024, India maintains a limited number of active BITs, including those with Singapore, Bangladesh, and Sri Lanka, though most are based on pre-2016 templates and remain pending renegotiation (UNCTAD, 2024). In recent years, India has also opted to exclude binding investment protection provisions from several of its comprehensive trade agreements. For instance, the India–UAE Comprehensive Economic Partnership Agreement (CEPA) and the Australia–India Economic Cooperation and Trade Agreement (ECTA) do not include investor-state dispute settlement (ISDS) mechanisms or enforceable investment protections such as FET or MFN (Ranjan, 2024). This evolution suggests a deliberate policy choice by India to prioritize domestic regulatory sovereignty, even if it comes at the cost of temporarily reduced investor confidence, highlighting the tension between maintaining policy space and attracting foreign investment.

3.3 Impacts of Treaty and Policy Reforms

India's decision to terminate a large number of BITs and adopt the 2016 Model BIT has had measurable consequences for its investment landscape. Empirical evidence shows that countries whose BITs were terminated experienced a significant reduction in FDI flows to India over 30% on average compared to countries with active or no prior treaties (Hartmann & Spruk, 2022). This decline was especially marked in capital-intensive and high-risk sectors, where investors typically rely on treaty-based legal protections such as investor-state dispute settlement (ISDS) mechanisms (Hartmann & Spruk, 2022).

The restrictive provisions introduced in the 2016 Model BIT, while intended to protect regulatory sovereignty, have contributed to India's limited success in concluding new investment agreements. The model's removal of broad protections such as Most Favoured Nation (MFN) clauses, its narrow definitions of investment and investor, and the requirement to exhaust domestic remedies before accessing arbitration have been viewed by several negotiating partners as overly rigid and investor-unfriendly (Ranjan, 2015). As a result, treaty negotiations with countries such as the United States and members of the European Union have either stalled or made limited progress, reflecting hesitancy on the part of foreign governments and investors to engage under such restrictive terms (Ranjan, 2015).

While the revised approach was intended to reduce India's exposure to investor claims and ensure policy space for domestic priorities, it has also introduced a new layer of uncertainty. The lack of updated BITs with major investment partners and the prolonged negotiation timelines have raised concerns about the legal risk environment in India, especially for long-term, high-value investments. Although India continues to attract FDI through its internal market potential and domestic reforms, the absence of comprehensive and balanced investment treaties may limit the country's ability to fully leverage global capital flows in an increasingly competitive investment landscape (Hartmann & Spruk, 2022).

As of 2024, India maintains a limited number of active BITs. More broadly, India has shifted toward a decoupled approach that favours investment facilitation and regulatory cooperation over binding legal protections, a strategy increasingly reflected in its recent comprehensive trade negotiations. This evolving treaty practice underscores India's continued emphasis on safeguarding regulatory autonomy while remaining engaged in global investment frameworks (Ranjan, 2024). While this strategic shift has limited immediate FDI growth from traditional treaty partners, it reflects a broader attempt to recalibrate India's investment framework toward sustainable and policy-aligned inflows, which could influence the design of future BITs.

4. Evaluation of India's BIT Framework

4.1 Traditional vs. Modern BIT Structures

India's BIT framework has undergone a gradual but significant transformation over the past three decades. It evolved through three main phases: the 1993 model, influenced by OECD-style agreements; a 2003 revision, which retained most pro-investor features with only minor refinements in drafting; and the 2016 Model BIT, which marked a deliberate policy shift toward protecting regulatory sovereignty and limiting legal exposure to investor-state dispute settlement (Ranjan & Anand, 2017).

Traditional Indian BITs were characterized by several core features that prioritized investor protection, often at the expense of the host state's policy space. These BITs typically included broad and inclusive definitions of "investment," designed to cover a wide range of assets and economic interests. Another hallmark was the inclusion of the FET standard, which obligates the host state to provide a minimum level of treatment to foreign investors, often interpreted expansively by arbitral tribunals. MFN treatment was also standard, ensuring that investors from one contracting party received treatment no less favourable than that accorded to any third country. Additionally, the Full Protection and Security (FPS) clause required the host state to provide a certain level of physical and legal security to foreign investments. These provisions were often vaguely worded, granting broad interpretive discretion to tribunals and exposing India to challenges when regulating in the public interest particularly in areas such as health, taxation, and the environment (Ranjan & Anand, 2017).

The introduction of India's 2016 Model BIT marked a fundamental shift in treaty design. It narrowed key definitions, particularly through the adoption of an enterprise-based definition of investment, and introduced more precise legal standards. The intent was to align treaty provisions with India's policy objective of safeguarding its sovereign right to regulate while maintaining a predictable investment environment (Ranjan & Anand, 2017).

Although the Model BIT represents an important step toward rebalancing treaty obligations, some of its provisions still lack clarity. This imprecision could permit broad arbitral discretion, thereby undermining the legal certainty that the reforms were designed to achieve (Ranjan & Anand, 2017).

A central feature of the revised BIT regime is the deliberate preservation of regulatory space. The Model BIT includes explicit carve-outs for policy areas such as public health, environmental protection, and national security. These exceptions are intended to protect legitimate, non-discriminatory state action from being challenged under ISDS. However, the operational language of these carve-outs remains vague, which may allow tribunals to interpret such provisions inconsistently, thereby weakening the protection they are meant to offer to sovereign regulation (Ranjan & Anand, 2017).

Changes to the dispute resolution process further underscore India's evolving approach. The Model BIT requires investors to exhaust local remedies for a period of five years before approaching international arbitration. This provision seeks to prioritize domestic judicial systems and reduce frivolous claims. However, the absence of exceptions for cases involving futility or unreasonable delay has been noted as a key limitation. Without such safeguards, the clause risks becoming a procedural barrier rather than a genuine opportunity for domestic resolution. This structural rigidity could deter investors, especially in jurisdictions with known inefficiencies in judicial enforcement (Ranjan & Anand, 2017).

India's transition from its traditional BITs to the 2016 model reflects a clear attempt to restore balance between investor rights and state sovereignty. These efforts are grounded in India's experience with international arbitration and are consistent with broader global reforms. Nonetheless, academic evaluations reveal that persistent ambiguities and procedural inflexibility may limit the effectiveness of these reforms in fostering legal predictability and enhancing investor trust (Ranjan & Anand, 2017).

4.2 Analysis of the 2016 Model BIT

(i) Provisions that Recalibrate Investor Protection and Safeguard Policy Space

India's Model BIT incorporates several provisions that effectively safeguard public policy space while recalibrating the balance between investor protection and regulatory autonomy. A significant feature is the exclusion of the traditionally broad FET clause, which is replaced by a narrowly defined "Treatment of Investments" provision. This provision limits investor protections to denial of justice, fundamental breach of due process, manifestly abusive treatment, and targeted discrimination, all grounded in customary international law standards. Such limitation reduces arbitral discretion and enhances legal predictability (Brookings Institution, 2018, p. 24). However, the narrower scope may reduce investor confidence, as some investors could perceive the protections as insufficient compared to more broadly defined FET clauses in other treaties. The omission of the MFN clause further strengthens India's regulatory autonomy by preventing treaty shopping and limiting exposure to expansive or unpredictable arbitral interpretations (Ranjan & Anand, 2017, p. 15).

The Model BIT also narrows the definition of "investment" to enterprise-based assets constituted, organized, and operated in accordance with host state laws, thereby excluding portfolio investments and other volatile financial flows that do not contribute to sustainable development (Chowdhury, 2018, p. 4). On the downside, excluding portfolio or innovative financial investments may limit access to some forms of capital that could complement long-term enterprise investments.

Procedural provisions require investors to exhaust local remedies for a minimum of five years prior to initiating international arbitration. This stipulation strengthens domestic legal primacy and acts as a deterrent against premature ISDS claims (Ranjan & Anand, 2017, p. 20). However, the requirement to exhaust domestic remedies may delay dispute resolution, which could deter investors seeking quicker legal recourse. Furthermore, the treaty explicitly carves out regulatory areas such as taxation, health, environment, and safety from the scope of ISDS. This carve-out protects essential policy domains from external scrutiny and preserves India's sovereign regulatory autonomy (Chowdhury, 2018, p. 6). Nevertheless, investors may view these carve-outs as overly state-favourable, creating uncertainty about the enforceability of certain investment protections.

Addressing indirect expropriation, the Model BIT clarifies that non-discriminatory measures taken for legitimate public welfare objectives including public health, safety, environmental protection, and public morals do not constitute indirect expropriation, even if such measures negatively impact investments. This "public interest" exemption safeguards the state's ability to regulate in the public interest, provided these measures are enacted in good faith and follow due process (Brookings Institution, 2018, p. 27). While it protects policy space, some investors might perceive ambiguity around what qualifies as 'public interest,' potentially leading to cautious investment behaviour.

Additionally, the treaty contains a taxation carve-out that excludes most tax measures from treaty obligations, thereby protecting India's sovereign right to implement tax policy without undue interference from investor claims. The inclusion of a corporate social responsibility (CSR) clause, though non-binding, encourages investors to voluntarily integrate environmental, labour, and anti-corruption standards into their operations, signalling India's commitment to responsible business conduct and sustainable development (Brookings Institution, 2018, pp. 28–30). The non-binding nature of the CSR clause may limit its real-world impact, and the taxation carve-out, while safeguarding fiscal policy, might deter certain tax-sensitive investors.

These provisions reflect India's deliberate choice to prioritize policy sovereignty over broad investor protections, signalling a shift toward a state-centric investment framework. While this approach strengthens domestic regulatory authority, it also underscores the challenges of balancing investor confidence with sovereign policy space, a tension that will shape India's BIT negotiations and its attractiveness to global investors in the years ahead.

(ii) Provisions that Introduce Substantive and Procedural Constraints

India's Model BIT has drawn criticism for several provisions that may undermine its effectiveness in attracting foreign investment. A primary concern lies in the treaty's narrow and rigid definition of "investment." Departing from broader, asset-based definitions common in earlier BITs, the Model BIT adopts an enterprise-based approach, limiting coverage to investments made in the form of an enterprise established or acquired under the host state's laws (Brookings India, 2018). This excludes other prevalent forms of investment, including portfolio investments, minority shareholdings, intellectual property rights, debt instruments, and indirect ownership structures unless directly tied to the enterprise (Brookings India, 2018). While a growing number of jurisdictions have adopted enterprise-based definitions of investment to enhance legal certainty and curb opportunistic treaty claims, the restrictive formulation in India's Model BIT may still fail to accommodate contemporary investment modalities prevalent in technology and service sectors. This exclusionary scope could disincentivize investors who seek comprehensive and adaptable treaty protections (Brookings India, 2018).

Moreover, the Model BIT imposes dual criteria for qualifying as an investment, requiring not only enterprise status but also satisfaction of objective characteristics such as capital commitment, profit expectation, investment duration, and risk assumption (Brookings India, 2018). This compounded restriction can create uncertainty for investors using layered ownership models or IP-heavy structures, further narrowing the treaty's applicability (Brookings India, 2018). The exclusion of pre-establishment rights, which denies protections during the entry phase of investments, reflects a policy orientation that prioritizes regulatory sovereignty over using treaties as proactive instruments of investment promotion. This may align with India's broader stance that its large consumer market and domestic reform agenda are sufficient to attract investment, thereby diminishing the functional role of BITs as promotional tools (Brookings India, 2018). Collectively, these elements contribute to perceptions of the Model BIT as overly cautious and potentially unattractive to a wide spectrum of investors (Brookings India, 2018).

Another contentious provision is the mandatory exhaustion of local remedies clause, which requires investors to pursue claims through domestic courts for a minimum of five years before initiating international arbitration (Brookings India, 2018). This provision, lacking exceptions for futility or undue delay, has been viewed as excessively rigid (Hanessian

& Duggal, 2017). Given well-documented inefficiencies in the Indian judicial system including significant case backlogs and enforcement delays this requirement may deter investors who question the accessibility and impartiality of domestic legal recourse. Unlike many international treaties that allow bypassing local remedies under certain conditions, India's Model BIT is perceived to prioritize sovereign control at the expense of meaningful investment protection, undermining the treaty's credibility as a commitment to legal recourse (Brookings India, 2018). While intended to reinforce domestic institutions and reduce frivolous claims, the clause's inflexibility risks discouraging bona fide investors and limiting India's appeal as an investment destination (Hanessian & Duggal, 2017).

(iii) Provisions that Limit Traditional Investment Protections

One of the major concerns is weakening of the FET standard. The Model BIT omits FET as a broad, flexible safeguard and instead limits it to a closed list of serious procedural violations, such as denial of justice and breaches of due process. This narrowing of scope substantially restricts the grounds on which investors can seek protection and redress. Investors are left more vulnerable in cases of regulatory unpredictability, shifting policies, or inconsistent administrative practices, which may not qualify under the treaty's restricted definitions (Ranjan & Anand, 2017, pp. 25–31). By grounding FET protections strictly in customary international law, the Model BIT raises the evidentiary burden for investors and potentially deters legitimate claims. While this approach aims to limit arbitral discretion and uphold state sovereignty, it may simultaneously reduce the treaty's credibility and overall investor confidence (Ranjan & Anand, 2017, pp. 25–31).

In addition, the omission of umbrella clauses and binding pre-establishment rights further weakens the protective framework of the Model BIT. Umbrella clauses typically elevate contractual breaches by the host state to treaty violations, allowing investors to pursue international arbitration in such cases. Their absence means that investors must rely on domestic courts for resolving contractual disputes, limiting international recourse and weakening enforcement mechanisms (Ranjan & Anand, 2017). Similarly, by excluding pre-establishment rights, the treaty fails to protect investors during the crucial entry phase, such as when securing licenses or permits. These omissions reflect India's intent to reclaim regulatory autonomy and restrict exposure to international liability. However, they also create uncertainty and reduce the perceived reliability of India's BITs as instruments for promoting and protecting foreign investment (Ranjan & Anand, 2017).

4.3 Comparative Analysis with Modern Agreements

India's recent treaty engagements with countries such as the UAE, Australia, EFTA members, and Brazil reflect a strategic departure from the investment protection mechanisms embedded in the 2016 Model BIT. While the agreements with the UAE, Australia, and EFTA are comprehensive trade pacts that include investment facilitation chapters without enforceable protections, the Brazil–India agreement is a standalone investment cooperation and facilitation treaty. For instance, the investment chapter in the UAE-India CEPA omits critical protections such as FET, FPS, and ISDS. Ranjan (2024) describes this shift as a deliberate move towards "decoupling" investment protection from trade agreements, signalling India's intent to regain regulatory control and reduce exposure to international arbitration claims. While the 2016 Model BIT, though restrictive, still codifies legal protections within a formal structure, these newer agreements, particularly CEPA represent a further policy evolution toward removing enforceable investor obligations altogether (Ranjan, 2024).

The investment chapter in the Australia-India Economic Cooperation and Trade Agreement (ECTA) further reinforces the country's recent policy of excluding traditional investment protection from trade deals. The ECTA omits key investor safeguards such as FET, FPS, and ISDS. This reflects a continuation of India's decoupling strategy, aimed at avoiding enforceable commitments that could lead to international arbitration. While the Model BIT still retained these concepts though narrowly defined and procedurally limited, the ECTA takes a firmer stance by removing them altogether. This approach grants India greater regulatory flexibility but may reduce the legal assurance foreign investors often seek, signalling a shift in treaty practice from defensive legalism to policy autonomy (Ranjan, 2022).

The India-EFTA Trade and Economic Partnership Agreement (TEPA) also mirrors this shift by excluding binding investment protection provisions entirely. The TEPA avoids including FET, expropriation clauses, and ISDS, focusing instead on non-binding investment facilitation and promotion. While the agreement contains a political commitment to enhance FDI flows, it offers no legal remedies or enforceable guarantees to foreign investors. This represents a clear departure from both India's earlier FTAs and the Model BIT, which despite its defensive posture still offered limited legal protection. Moreover, India has not renewed its terminated BITs with Switzerland and Iceland, meaning investors from these EFTA countries currently lack any form of treaty-based protection. The TEPA thus exemplifies India's broader strategy of prioritizing regulatory space and reducing international legal exposure (Ranjan, 2022, pp. 16–19).

Table 1: Comparative Analysis of India's Modern Investment Agreements vs 2016 Model BIT

Provision	**India–UAE CEPA**	**Australia-India ECTA**	**India-EFTA TEPA**	**India's Model BIT (2016)**
Investment Protection Rules	Omits FET, FPS, expropriation clauses; no investment chapter	Omits FET, FPS, ISDS; no binding investor protection	No enforceable protections; focuses on facilitation	Includes FET, FPS, expropriation; narrowly defined

Continued...

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MFN Clause	Not included	Not included	Not included	Omitted to strengthen regulatory autonomy; prevents treaty shopping
ISDS Mechanism	Not included; excludes access to arbitration	Not included; no investor recourse	Absent; no international arbitration	Permitted only after 5-year exhaustion of local remedies
Regulatory Autonomy	High; investment fully decoupled from trade	High; full autonomy preserved	High; avoids legal commitments	Preserved through carve-outs and narrow definitions
Policy Intent	Prioritizes domestic flexibility and regulatory space	Minimizes exposure to arbitration risk	Reinforces decoupling from traditional investor protections	Defensive legalism balancing sovereignty and minimal investor protection
Treaty Type	Trade agreement with investment facilitation	Trade agreement with omitted investment protections	Trade agreement with political commitment but no legal obligations	Formal investment treaty model (BIT)

The India-Brazil BIT, formally titled the Investment Cooperation and Facilitation Treaty (ICFT) and signed in 2020, marks a notable departure from the structure and legal philosophy of India's 2016 Model BIT. While the Model BIT adopts a defensive stance, with narrowly defined investor rights, exclusion of MFN clauses, and a mandatory five-year exhaustion of local remedies before access to arbitration, the India-Brazil

BIT emphasizes cooperation over adjudication. It omits conventional investor protections such as FET, MFN treatment, and ISDS, opting instead for a framework rooted in regulatory dialogue, transparency, and dispute prevention. Institutional mechanisms such as Joint Committees and designated focal points are established to facilitate early state-to-state consultations and resolve disagreements before they escalate. Drawing from Brazil's cooperation-based BIT model, the treaty reflects a shared commitment to mutual accountability and sustainable development, aiming to create a predictable investment climate without compromising regulatory sovereignty. This BIT exemplifies India's evolving treaty strategy moving away from rigid legalism toward flexible governance that rebalances investor protection with state autonomy (D'Souza, 2021).

Provision	**India–Brazil BIT (ICFT, 2020)**	**India's Model BIT (2016)**
Investment Protection Rules	No FET, MFN, expropriation; focuses on cooperation and facilitation	Includes narrowly defined FET, FPS, expropriation clauses
ISDS Mechanism	Absent; replaced with state-to-state dispute resolution	Permitted only after 5-year exhaustion of local remedies
Regulatory Autonomy	Strong emphasis on policy space and institutional dialogue	Preserved via carve-outs and procedural filters
Institutional Mechanisms	Joint committees, focal points for early dispute prevention	None beyond traditional BIT structures
Policy Intent	Promote sustainable development via cooperation, not adjudication	Minimize arbitration risk while retaining legal formality
Treaty Type	Cooperation-based BIT (Brazilian model)	Defensive legal BIT model (Indian revisionist approach)

India's recent investment chapters in trade agreements such as the UAE Comprehensive Economic Partnership Agreement (CEPA), Australia-India Economic Cooperation and Trade Agreement (ECTA), and India-European Free Trade Association (EFTA) Trade and Economic Partnership Agreement (TEPA) mark a significant shift from the investor protections found in the Model BIT. Unlike the Model BIT, which includes core protections such as FET, FPS, and ISDS mechanisms though narrowly defined and with strict conditions, these newer agreements deliberately exclude such protections. The UAE CEPA and Australia ECTA omit FET, FPS, and ISDS entirely, reflecting India's strategic move to "decouple" investment protections from trade agreements to enhance regulatory sovereignty and reduce exposure to international arbitration claims (Ranjan, 2022, 2024). Similarly, the India-EFTA TEPA excludes traditional investor protections and focuses solely on investment promotion and facilitation without binding legal guarantees, representing a further evolution of this decoupling strategy. Moreover, India has terminated BITs with EFTA members such as Switzerland and Iceland, removing treaty-based protection in that region (Ranjan, 2024). In contrast, the India-Brazil BIT adopts a cooperation-based approach that excludes ISDS, FET, and MFN clauses. Instead of relying on enforceable investor rights, it emphasizes regulatory dialogue, transparency, and early dispute prevention through institutional mechanisms such as joint committees and focal points (D'Souza, 2021).

While India's recent treaties reflect a clear preference for non-binding investment facilitation and state-centric dispute resolution, its reform strategy also diverges from global trends in terms of institutional depth and reputational signalling. Recent agreements like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and European Union (EU)-model BITs have coupled investor protection reform with procedural transparency, robust enforcement mechanisms, and stronger adjudicatory frameworks often including independent appellate mechanisms or proposals for a multilateral investment court (UNCTAD, 2023). In contrast, India's newer treaties rely on state-to-state cooperation mechanisms without equivalent institutional commitments or dispute resolution architecture. This signals a preference for regulatory control over legal predictability, which, while aligned with domestic sovereignty objectives, may limit India's appeal to institutional investors prioritizing enforceability and governance benchmarks (Schill et al., 2018).

Globally, recent treaties such as CPTPP and EU-style BITs (e.g., CETA, EU-Vietnam, EU-Singapore) continue to include core provisions like FET, MFN clauses, and ISDS, albeit in revised and more circumscribed forms. The FET standard is limited to a closed list of violations to reduce arbitral discretion, MFN clauses are explicitly restricted to prevent the importation of broader substantive or procedural rights, and ISDS is complemented by procedural reforms including mandatory transparency, codes of conduct for arbitrators, and proposals for a permanent multilateral investment court. These developments indicate a shift toward preserving investor protection while concurrently accommodating host state regulatory interests, in line with broader trends in contemporary investment treaty practice (Ranjan, pp. 3–8).

5. Policy Recommendations - Designing India's Next-Generation BIT

5.1 Rationale for Reform

India's current BIT framework requires comprehensive reform to address the structural imbalances that have emerged from its defensive approach to investment treaty design. The empirical evidence presented in Section 3 demonstrates that the termination of 44 BITs between 2013 and 2019 resulted in a measurable decline in FDI inflows from affected countries, with investors increasingly routing capital through jurisdictions that maintained active treaties with India. This pattern underscores the critical role that investment treaties play in shaping investor confidence and capital allocation decisions.

The analysis in Section 4 reveals that while India's Model BIT successfully preserved regulatory sovereignty, it introduced excessive rigidity that has hindered treaty negotiations and potentially deterred legitimate investors. The mandatory five-year exhaustion of local remedies, the exclusion of Most Favoured Nation treatment, and the narrow definition of investment have created procedural barriers that may be disproportionate to the risks they seek to address. These provisions, while well-intentioned, have positioned India as an outlier in the global investment treaty landscape at a time when the country seeks to attract significant foreign capital to support its development objectives.

Furthermore, India's recent practice of excluding investment protection provisions entirely from comprehensive trade agreements such as the UAE CEPA and Australia ECTA represents an overcorrection that may undermine long-term investment relationships. While this approach provides maximum regulatory flexibility, it fails to offer the legal predictability that institutional investors increasingly demand in an uncertain global environment.

The global trend toward reformed rather than abandoned investment treaties as evidenced by the CPTPP, EU-model BITs, and recent agreements by Vietnam and Indonesia suggests that complete withdrawal from investment protection is neither necessary nor strategically optimal. Instead, what is required is a recalibrated approach that balances India's legitimate sovereignty concerns with the need to maintain investor confidence and competitive positioning in the global investment landscape.

5.2 Guiding Principles for the New BIT Model

India's next-generation BIT model should be anchored on four core principles that reflect both contemporary international best practices and India's specific development priorities:

Balanced Protection and Regulation: The new model should provide meaningful investor protections while preserving adequate policy space for legitimate regulatory measures. This balance should be achieved through precise drafting rather than blanket exclusions, ensuring that both investors and the state have clear expectations regarding their respective rights and obligations.

Procedural Transparency and Efficiency: Investment dispute resolution mechanisms should prioritize transparency, efficiency, and early resolution. Rather than creating insurmountable procedural barriers, the new framework should establish clear pathways for legitimate dispute resolution while discouraging frivolous claims through well-designed filtering mechanisms.

Sustainable Development Integration: The treaty framework should explicitly align investment protection with India's sustainable development objectives, incorporating environmental, social, and governance considerations into both substantive provisions and procedural requirements. This integration should extend beyond mere corporate social responsibility clauses to encompass binding obligations that support India's climate and development commitments.

Institutional Flexibility and Adaptation: The new model should incorporate mechanisms for regular review and adaptation to evolving economic conditions and international best practices. This includes provisions for institutional dialogue, periodic assessment of treaty effectiveness, and structured processes for updating treaty terms in response to changing circumstances.

5.3 Provision-wise Recommendations

Based on the preceding analysis of India's Model BIT and subsequent trade agreements, the following provision-wise recommendations aim to balance regulatory autonomy with investor confidence, ensuring both sustainable investment inflows and policy space.

5.3.1 Preamble & Objectives

The preamble should explicitly acknowledge the dual objectives of investment protection and sustainable development, establishing a clear interpretive framework for the entire treaty. Drawing from recent EU and CPTPP models, the preamble should affirm that investment protection and trade liberalization should support rather than undermine environmental protection, labour rights, and inclusive economic growth.

The preamble should also recognize the importance of regulatory space for achieving public policy objectives, while simultaneously affirming the value of legal certainty for investors. This balanced approach would provide arbitral tribunals with clear guidance on how to interpret potentially conflicting provisions, reducing the risk of expansive interpretations that could undermine India's regulatory autonomy.

5.3.2 Definition of Investment & Investor

India should adopt a refined definition of investment that maintains the enterprise-based approach while providing greater flexibility for contemporary investment structures. The definition should explicitly include technology transfers, management contracts, and intellectual property arrangements that contribute to productive capacity, while continuing to exclude purely speculative financial instruments.

For investor definitions, India should introduce a "substantive business activities" test similar to those found in recent EU agreements. This would require investors to demonstrate genuine economic activity in their home state, preventing shell companies and treaty shopping while accommodating legitimate corporate structures. The definition should also include provisions for denial of benefits to prevent abuse by investors who lack substantial business activities in their claimed home state.

5.3.3 Fair and Equitable Treatment (FET)

Rather than abandoning FET entirely, India should adopt a closed-list approach that provides greater certainty while maintaining meaningful protection. The FET standard should be limited to denial of justice in criminal, civil, or administrative proceedings; fundamental breach of due process; manifestly abusive treatment; and targeted discrimination based on gender, race, or religion.

This approach, successfully implemented in several recent agreements, provides investors with clear expectations while preventing the expansive interpretations that characterized earlier arbitral awards.

The standard should be explicitly grounded in customary international law and include illustrative examples to guide both investors and tribunals in its application.

5.3.4 Most Favoured Nation (MFN)

India should reintroduce MFN treatment in a calibrated manner that preserves competitive neutrality without exposing India to procedural exploitation. Specifically, the MFN clause should be structured as a qualified, substantive-only provision deliberately excluding procedural entitlements like ISDS access, arbitration modalities, or timelines. This approach, reflected in India's pre-2016 BITs and certain recent agreements, ensures investors receive no less favourable substantive treatment but cannot import dispute resolution frameworks from third-party treaties. Moreover, the clause should include explicit carve-outs for agreements with developing-country partners that incorporate special exceptions such as enhanced development or regulatory flexibility to avoid unintentionally overriding those benefits.

To implement this practically, India's future BITs could declare: "The MFN obligation applies only to substantive treatment standards, such as FET, expropriation, or full protection and security, and excludes procedural rights, including dispute resolution mechanisms and ISDS procedures." Such specificity would prevent tribunals from extending MFN to procedural or ISDS-related assets while ensuring substantive investor protection remains competitive. An accompanying footnote or annex could clarify that this does not permit 'treaty-shopping' for more expansive procedural rights from other treaties. This limited MFN design would restore competitive parity for foreign investors while avoiding the interpretive overreach that led India to exclude MFN entirely in its Model BIT.

5.3.5 Expropriation

The expropriation provision should maintain strong protection against direct expropriation while providing greater clarity regarding indirect expropriation. Following international best practices, the provision should include a detailed annex that clarifies that non-discriminatory regulatory measures designed to protect legitimate public welfare objectives do not constitute indirect expropriation.

The provision should establish a clear analytical framework for determining indirect expropriation, focusing on the economic impact of the measure, its purpose and context, and whether it interferes with distinct, reasonable investment-backed expectations. This approach, adopted in agreements such as CPTPP and EU-Singapore, provides clarity for both investors and regulators while preserving policy space for legitimate regulatory measures.

5.3.6 Investor Obligations & CSR

India should transform its non-binding CSR provision into enforceable investor obligations that align with international standards. These obligations should require investors to comply with applicable domestic laws, respect internationally recognized labour rights, implement adequate environmental management systems, and engage in meaningful consultation with affected communities.

The obligations should be linked to treaty protections, with serious violations affecting the availability of treaty benefits. This approach, pioneered in agreements such as the Morocco-Nigeria BIT, creates positive incentives for responsible investment while providing India with mechanisms to address investor conduct that may conflict with development objectives.

5.3.7 ISDS Mechanism

India should replace the rigid five-year requirement with a flexible fast-track system for treaty-based investor–state disputes. Specifically, the government could utilize the Fast-Track Arbitration mechanism under Section 29B of the Arbitration & Conciliation Act, 2015, which mandates a sole arbitrator and resolution within six months based on written submissions. To localize its effectiveness, India could set up special investment dispute benches within select High Courts or even extend jurisdiction to the National Company Law Tribunal (NCLT) with built-in timelines (e.g., 12–18 months) for exhausting domestic remedies.

Investors would invoke this fast-track system by demonstrating that domestic avenues are unavailable, ineffective, or excessively delayed. This ensures a balance between judicial sovereignty and timely recourse. It avoids the rigidity of fixed-exhaustion deadlines while signalling India's commitment to efficiently resolving treaty disputes.

Moreover, incorporating enhanced procedural transparency such as public hearings, full disclosure of pleadings/documents, and allowance for third-party (amicus) submissions would align India with global best practices. Additionally, India should explore participation in bilateral appellate mechanisms or pilot the UNCITRAL-proposed Multilateral Investment Court framework, positioning itself as a leader in ISDS procedural reform without abandoning arbitration entirely.

5.4 Need for Reviving Terminated BITs

India should develop a systematic approach to renegotiating terminated BITs using the reformed model as a template. Priority should be given to agreements with major investment partners where FDI flows have demonstrably declined following termination, particularly those with developed countries that possess strong institutional frameworks for reciprocal investment protection.

The renegotiation strategy should emphasize India's commitment to providing a stable and predictable investment environment while clearly communicating the reforms that address earlier concerns about regulatory space. India should also consider transitional arrangements that provide grandfathering protection for existing investments while applying new standards to future investments, thereby maintaining continuity while implementing reforms.

5.5 Integrating Investment Protection in Future CEPAs/ FTAs

Rather than completely excluding investment protection from trade agreements, India should develop a modular approach that allows for different levels of investment protection based on the development level and institutional capacity of treaty partners. For agreements with developed countries, India should include comprehensive investment chapters based on the reformed BIT model, while agreements with developing countries might focus on investment facilitation and cooperation.

This differentiated approach would allow India to maintain policy flexibility while providing appropriate protections for different categories of investment relationships. Investment chapters in trade agreements should also include explicit linkages between trade and investment liberalization and sustainable development objectives, ensuring that economic integration supports rather than undermines India's broader development agenda.

5.6 Conclusion

The reform of India's Model BIT represents both a strategic necessity and an opportunity to position the country as a leader in the evolution of international investment law. The current framework, while successful in preserving regulatory sovereignty, has created unnecessary barriers to foreign investment at a critical juncture in India's development trajectory. The evidence presented throughout this analysis demonstrates that complete withdrawal from investment protection is neither economically optimal nor strategically necessary.

The recommendations outlined above provide a pathway for India to maintain its commitment to regulatory autonomy while offering the legal certainty that modern investors require. By adopting a balanced approach that incorporates international best practices while reflecting India's specific development priorities, the country can restore its competitive position in the global investment landscape without compromising its policy space.

The timing for such reform is particularly opportune, as the global investment treaty system is undergoing significant evolution toward more balanced and sustainable frameworks. By leading this reform process rather than remaining on its periphery, India can influence the development of international investment law in ways that serve both its national interests and the broader objective of creating an investment system that supports sustainable and inclusive development.

Implementation of these reforms should be accompanied by enhanced domestic institutional capacity for treaty negotiation and investment promotion, ensuring that India's reformed approach is supported by the administrative and legal infrastructure necessary for effective implementation. This comprehensive approach to investment policy reform will position India to capture the significant economic benefits of foreign investment while maintaining the regulatory flexibility essential for achieving its long-term development objectives.

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