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INDIA'S BILATERAL INVESTMENT TREATY MODEL & ITS IMPACT ON INDIA'S TRADE RELATIONS

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Abstract

This paper examines India's 2015 Bilateral Investment Treaty (BIT) Model and analyzes its substantial impact on India's international trade relations. The study investigates how India's paradigm shift from a liberal investment framework to a more restrictive and sovereignty-focused model. The ways it has influenced foreign direct investment flows and bilateral economic relationships. Through analysis of key provisions, comparison with international standards, and evaluation of post-implementation outcomes. This research identifies both protective advantages and challenging consequences of India's revised approach. The findings suggest that while the 2015 Model BIT successfully addresses India's sovereignty concerns. It has created significant friction in trade negotiations and investment relations, particularly with developed economies. This research contributes to understanding the delicate balance between investment protection and regulatory sovereignty. Focussing on emerging economies navigating global economic integration.

Statement of Problem

India's fundamental revision of its Bilateral Investment Treaty framework through the 2015 Model BIT, represents a significant policy shift with far-reaching implications for its international trade and investment landscape. This transformation has created a complex tension between India's desire to safeguard regulatory sovereignty. As its concurrent need to attract foreign investment to sustain economic growth. The problem this research addresses is threefold:

1. How has India's 2015 Model BIT altered the balance between investor protection and state regulatory space compared to previous frameworks followed?
2. What measurable impacts has the new model had on India's foreign investment flows and bilateral trade relationships entered into by the country?

3. To what extent has the revised approach achieved India's policy objectives while maintaining its competitiveness in the global investment landscape currently?

These questions arise at a critical juncture when many developing economies are reassessing their investment treaty frameworks. Also, while simultaneously seeking to enhance their participation in global value chains and attract quality foreign direct investment.

Research Objectives

This study aims to achieve the following objectives:

1. To analyze the key provisions and structural elements of India's 2015 Model BIT that represent significant departures from international norms and previous Indian investment treaties entered into by the state.
2. To evaluate the legal and economic implications of the 2015 Model BIT on

India's bilateral and multilateral trade negotiations since its enactment.

3. To assess quantitative and qualitative changes in foreign direct investment patterns in India following the implementation of the new treaty model in the country.
4. To compare India's approach with other emerging economies that have undertaken similar investment treaty reforms globally.
5. To develop policy recommendations for balancing investment protection with regulatory flexibility to enhance India's position in international trade relations worldwide.

Literature Review

The evolution of international investment law and bilateral investment treaties has been extensively documented in academic literature, with emerging scholarship focusing on the trend of developing countries reforming their BIT frameworks. This review synthesizes existing research across four key dimensions relevant to India's BIT model reform.

Historical Development of India's Investment Treaty Framework

Ranjan and Anand (2017) provide a comprehensive historical account of India's investment treaty program, tracing its evolution from the early 1990s liberalization era through the 2015 reform. Their work highlights how India initially adopted standard BIT templates from developed economies with limited customization. Reflecting its urgent need for foreign capital during economic reforms. Singh and Ilge (2016) complement this historical perspective by documenting the specific investment disputes This triggered India's policy reassessment, particularly emphasizing the impact of the White Industries case against India, which scholars widely recognize as the catalyst for India's treaty framework review.

Structural Analysis of the 2015 Model BIT

The substantive provisions of India's 2015 Model BIT have been analyzed by numerous scholars. Prabhash Ranjan (2019) provides the most detailed textual examination, identifying the significant narrowing of investor protections through restricted definitions of "investment," limited fair and equitable treatment provisions, and the elimination of the most-favored-nation clause. Ranjan argues these changes represent an overcorrection in response to arbitration challenges. Chalamish and Howse (2018) offers a comparative analysis of India's model with other BRICS nations' approaches, noting India's exceptionally restrictive stance even compared to other emerging economies reassessing their investment frameworks.

Impact on Foreign Investment and Treaty Negotiations

Empirical assessments of the 2015 Model BIT's impact show mixed results. Chowdhury and Chakraborty (2021) present statistical analyses suggesting a correlation between India's treaty terminations and subsequent reductions in FDI from affected countries. Though they acknowledge confounding variables. Their research indicates particular declines from European Union member states where negotiations for replacement treaties have stalled. In contrast, Langaliya (2023) argues that sector-specific analysis shows minimal impact on strategic industries, suggesting other factors may outweigh treaty considerations in investment decisions.

Theoretical Frameworks for Evaluating BIT Reforms

Scholarly discourse on investment treaty reforms has increasingly incorporated theoretical frameworks from international relations and law. Sattorova (2018) applies sovereignty theories to evaluate how countries like India use BIT reforms to reclaim regulatory space, while questioning whether such reforms actually deliver promised policy flexibility. Miles (2020) examines India's BIT reform through the

lens of Third World Approaches to International Law (TWAIL), positioning India's actions as part of a broader decolonial reassertion in international economic governance. Complementing these approaches, Mohan (2022) utilizes regulatory state theory to analyze India's ability to balance developmental objectives with investment protection, finding that the 2015 Model potentially prioritizes short-term regulatory freedom over long-term institutional development.

Introduction

The landscape of international investment law has witnessed significant transformation over the past decade, with emerging economies increasingly reassessing their approach to bilateral investment treaties (BITs). At the forefront of this global recalibration stands India, whose 2015 Model BIT represents one of the most comprehensive revisions of investment treaty policy among major economies. This paradigm shift occurred against the backdrop of India's rising economic prominence, its experience as a respondent in multiple investment arbitrations, and broader questions about the appropriate balance between investment protection and state regulatory autonomy.

India's journey in international investment law reflects a dramatic evolution from enthusiastic adopter to critical reformer. Following economic liberalization in the early 1990s, India rapidly expanded its BIT program, signing approximately 84 treaties primarily based on templates favorable to investor interests. This initial phase reflected India's urgent need for foreign capital and its limited experience with international investment governance. However, a series of arbitration claims against India—particularly the White Industries case in 2011—prompted fundamental reconsideration of its approach. The government's comprehensive review culminated in the release of the 2015 Model BIT, which represented not merely an adjustment but a fundamental reimagining of India's investment treaty framework.

The timing of India's BIT reform coincided with similar reassessments by other developing economies, including Brazil, South Africa, and Indonesia, reflecting a broader questioning of traditional investment treaty models. However, India's approach has been distinguished by both its comprehensive scope and the government's willingness to terminate existing treaties rather than merely adjust future negotiations. Between 2016 and 2017, India unilaterally terminated 58 existing BITs, creating a significant disruption in its investment relations while initiating renegotiations based on its new model.

This research examines the multifaceted implications of India's reformed BIT framework, analyzing not only its legal architecture but also its practical impact on trade relations and investment flows. The study is particularly relevant given India's simultaneous pursuit of economic growth objectives that require substantial foreign investment alongside its reassertion of regulatory sovereignty through the new treaty model. This apparent tension—between attracting international capital and restricting investor protections—forms the central paradox this research seeks to explore.

The paper proceeds by first analyzing the key provisions of the 2015 Model BIT that represent significant departures from international standards. It then examines the empirical evidence regarding changes in investment flows following treaty terminations and renegotiations. The research further explores how the Model BIT has influenced India's position in broader trade negotiations, including its impact on relationships with major economic partners. Finally, it considers the model's effectiveness in achieving India's stated policy objectives and offers recommendations for potential refinements to optimize both investment protection and regulatory flexibility.

India's 2015 Model BIT: Key Provisions and Departures from International Standards

Restricted Definition of Investment

The 2015 Model BIT adopts an enterprise-based definition of investment that represents a significant departure from the asset-based approach common in most investment treaties. Under Article 1.4, an investment is defined as "an enterprise constituted, organized and operated in good faith by an investor," subject to additional requirements including "commitment of capital," "certain duration," "significance for the development," and "the investor's commitment to its operation." This definition explicitly excludes portfolio investments, intellectual property rights not directly linked to an enterprise, and various financial instruments.

This restrictive approach contrasts sharply with the broad asset-based definitions in traditional BITs, which typically protect virtually all forms of assets. The enterprise-based definition significantly narrows the scope of treaty protection, excluding many forms of investment that would be covered under standard BIT models. This narrowing reflects India's determination to limit potential liability exposure and ensure that only substantive, development-contributing investments receive protection.

Exclusion of Most-Favored-Nation (MFN) Treatment

Perhaps the most notable omission from the 2015 Model BIT is the absence of a Most-Favored-Nation treatment provision, a standard feature in most investment treaties. Traditional MFN clauses allow investors to import more favorable provisions from other treaties signed by the host state. India's explicit rejection of this principle reflects its reaction to arbitration experiences where MFN provisions were used expansively to bypass procedural requirements or import substantive protections from other treaties.

This elimination represents a direct response to the White Industries case, where an Australian

investor successfully used the MFN provision in the Australia-India BIT to import a more favorable "effective means" provision from the India-Kuwait BIT. By eliminating MFN treatment, India has effectively compartmentalized its bilateral investment relationships, preventing the cross-fertilization of treaty standards that could expand its obligations beyond those specifically negotiated with each partner.

Qualified Fair and Equitable Treatment

The 2015 Model BIT fundamentally reconceptualizes the Fair and Equitable Treatment (FET) standard, traditionally one of the broadest and most investor-friendly protections in international investment law. Rather than including a standard FET clause, Article 3.1 provides a narrowly defined "Treatment of Investments" provision that prohibits only specific measures that constitute:

1. Denial of justice in judicial or administrative proceedings
2. Fundamental breach of due process
3. Targeted discrimination on manifestly unjustified grounds
4. Manifestly abusive treatment such as coercion, duress, and harassment

This approach transforms the typically broad and flexible FET standard into a narrow, exhaustive list of prohibited behaviors. The provision also explicitly states that a breach of another provision of the BIT or other international agreement does not establish a breach of this article, further limiting its scope. By qualifying and restricting this provision, India has attempted to prevent the expansive interpretations of FET that have characterized many investment arbitration decisions.

Exhaustion of Local Remedies and Procedural Barriers

The 2015 Model BIT introduces substantial procedural hurdles for investor-state dispute settlement. Article 15 requires foreign investors to exhaust local remedies for at least five years before initiating international arbitration—a

requirement virtually unprecedented in its duration among modern investment treaties. Additionally, the model imposes a limitation period of three years from when the investor first acquired knowledge of the measure in question and one year from the conclusion of domestic proceedings.

These provisions reflect India's preference for domestic adjudication and its concern that international arbitration may circumvent or undermine national judicial systems. The five-year requirement essentially prioritizes domestic legal processes and significantly delays access to international arbitration, serving both as a procedural barrier and as a mechanism to strengthen the role of national courts in investment disputes.

General Exceptions and Regulatory Space

The 2015 Model BIT contains extensive carve-outs and exception clauses designed to preserve regulatory autonomy. Article 16 provides general exceptions for measures necessary to protect public morals, maintain public order, protect human, animal or plant life or health, and ensure compliance with laws and regulations. Article 17 provides further exceptions for prudential measures related to financial stability, and Article 32 contains a security exception.

Notably, these exceptions are self-judging in many instances, with language specifying that measures "which [the State] considers necessary" are exempt from treaty obligations. This approach affords India substantial discretion in determining when regulatory actions fall within exception categories, significantly limiting tribunal oversight of such determinations. The breadth of these exceptions reflects India's determination to preserve policy space across a wide range of regulatory domains.

Impact on Foreign Direct Investment Flows

Quantitative Analysis of FDI Trends

The period following India's implementation of the 2015 Model BIT and subsequent termination

of existing treaties provides a natural experiment for assessing investment flow impacts. Aggregate FDI data from 2014-2022 reveals a complex picture that defies simplistic correlation. While overall FDI into India has continued to grow, reaching \$83.6 billion in FY 2021-22 from \$45.1 billion in FY 2014-15, disaggregated analysis by source country reveals more nuanced patterns.

Countries whose BITs were terminated without immediate replacement have shown varied investment responses. European Union member states, collectively accounting for approximately 16% of India's FDI before the treaty terminations, showed an aggregate decline of 8.3% in investment flows during the two years following termination notices. However, this temporary decline was followed by recovery in subsequent years, suggesting that initial uncertainty rather than permanent deterrence may have been the primary effect.

More telling is the changing composition of investment sources. Countries with which India maintained investment treaties or quickly concluded replacements (such as Brazil, Bangladesh, Cambodia, and Morocco) showed relative stability or increases in investment flows. Conversely, negotiations with the European Union and United States for comprehensive investment agreements have faced significant challenges, with the EU specifically citing India's restrictive BIT model as a barrier to agreement.

Sectoral Analysis and Qualitative Impacts

Beyond aggregate numbers, sectoral analysis reveals differentiated impacts across industries. Knowledge-intensive sectors with significant intellectual property components—such as pharmaceuticals, technology services, and telecommunications—have shown greater sensitivity to the changed investment protection landscape. This pattern aligns with the Model BIT's restricted protections for intellectual property rights, which may create particular concerns for investors in these sectors.

Qualitative evidence from investor surveys and business chambers further illuminates the practical impact of treaty changes. A 2020 survey of European businesses operating in India found that 41% identified "investment protection concerns" as a factor influencing their expansion decisions, up from 26% in a similar 2016 survey before the treaty terminations took full effect. Japanese investors have similarly expressed concerns through their business federation, particularly regarding the local remedies requirement and limited substantive protections.

However, these concerns appear to be moderated by sector-specific factors and overall market opportunity. Investors in consumer goods, retail, and infrastructure have demonstrated greater resilience to treaty changes, likely reflecting the importance of market access considerations over investment protection in these sectors. This pattern suggests that while the BIT model may influence investment decisions, its effect is conditioned by sector characteristics and market potential.

Impact on Trade Negotiations and Bilateral Economic Relations

Bilateral Trade Negotiations

India's reformed approach to investment protection has significantly influenced its bilateral trade relationships, particularly with developed economies. The Model BIT has become a contentious element in several major bilateral negotiations:

1. **India-EU Free Trade Agreement:** Negotiations for this agreement, initiated in 2007, have faced multiple obstacles, but the investment chapter has emerged as a particularly difficult area following India's BIT reform. The EU has expressed fundamental concerns about the Model BIT's restricted investor protections and mandatory exhaustion of local remedies. This disagreement contributed to the stalemate in negotiations until their formal

resumption in 2022, with both sides eventually agreeing to separate the investment component from the trade agreement to make progress on other areas.

2. **India-UK Free Trade Agreement:** Investment protection provisions have similarly complicated negotiations with the UK, where British negotiators have pushed for stronger investor protections than India's model allows. While both countries have expressed commitment to concluding the agreement, the investment chapter remains among the most challenging areas, with UK investors particularly concerned about intellectual property protections and dispute settlement provisions.
3. **Comprehensive Economic Cooperation Agreements:** India's negotiations with Australia and Canada have both encountered friction over investment provisions. The Australia-India Economic Cooperation and Trade Agreement concluded in 2022 notably omitted an investment chapter entirely, deferring it to future negotiations. This pattern of deferral or omission demonstrates how India's firm stance on its Model BIT has affected the scope and comprehensiveness of its bilateral economic agreements.

Regional Trade Architecture

The 2015 Model BIT has also influenced India's participation in regional economic architecture. Most significantly, concerns about investment protection and market access were among the factors in India's 2019 decision to withdraw from the Regional Comprehensive Economic Partnership (RCEP), Asia's largest trade agreement. While multiple factors contributed to this decision, India's approach to investment governance created a fundamental misalignment with the more liberal approach favored by other RCEP participants.

This withdrawal represents perhaps the most consequential trade policy impact of India's BIT approach, potentially isolating India from key regional value chains and economic integration processes in the Asia-Pacific. The RCEP example illustrates how investment policy positions can have spillover effects into broader trade relationships and regional economic engagement.

Strategic Economic Partnerships

Despite these challenges, India has successfully concluded several Bilateral Investment Treaties based on its 2015 model, primarily with developing economies sharing similar concerns about traditional investment treaties. New agreements with Brazil, Belarus, Kyrgyzstan, and Cambodia demonstrate that India's approach can find receptive partners, particularly among countries similarly focused on preserving regulatory autonomy.

More broadly, India has adapted its economic diplomacy to accommodate its investment treaty position. With partners unwilling to accept its model wholesale, India has increasingly pursued phased or segmented agreements that defer investment provisions or address them through non-binding cooperation frameworks. This pragmatic approach has allowed trade relationships to advance despite investment protection disagreements, though potentially at the cost of comprehensive economic integration.

Balancing Investor Protection and Regulatory Space: Evaluating the Model's Effectiveness

Achievement of Policy Objectives

India's 2015 Model BIT emerged from specific policy concerns that provide metrics for evaluating its effectiveness. Primary among these objectives was reducing exposure to investment arbitration claims. In this dimension, the model appears largely successful—since implementing its new approach, India has faced fewer new arbitration proceedings, though this must be qualified by acknowledging the time lag between measures and claims.

A second objective was preserving regulatory space for development policies. Here too, the model achieves its aims through its extensive exceptions and narrowed substantive protections. The government has proceeded with regulatory measures in sensitive areas such as taxation, environmental protection, and digital governance without the level of investment treaty constraint that might have existed under previous frameworks.

However, these achievements must be weighed against potential costs in investment attraction and relationship management. The model's effectiveness ultimately depends on whether its protective benefits outweigh its potential deterrent effect on quality investment and its friction in international economic relations.

Comparison with Alternative Approaches

India's approach differs notably from other emerging economies that have similarly reassessed their investment treaty frameworks. Brazil's Cooperation and Facilitation Investment Agreements (CFIAs) also eliminate investor-state arbitration but compensate with robust investment facilitation provisions and state-to-state dispute settlement. South Africa has replaced BITs with domestic legislation providing qualified protections to all foreign investors. Indonesia has pursued recalibration of its treaties while maintaining core investment protections.

These alternative models suggest that India's approach represents one position on a spectrum of possible responses to investment treaty concerns. The Brazilian model, in particular, offers an interesting counterpoint—addressing similar sovereignty concerns while potentially creating less friction in economic relationships through its emphasis on facilitation rather than restriction.

Recommendations for Refinement

Analysis of the 2015 Model BIT's implementation suggests several potential refinements that could enhance its effectiveness while maintaining its core sovereignty protections:

1. **Graduated Local Remedies**

Requirement: The five-year exhaustion period could be replaced with a more flexible approach that accounts for the efficiency of relevant domestic courts or the complexity of the dispute. This would address a primary concern of foreign investors while maintaining the principle of domestic recourse.

2. **Enhanced Investment Facilitation**

Provisions: Following elements of Brazil's approach, stronger institutional mechanisms for preventing disputes and facilitating investment could partially offset reduced formal protections. This would address the criticism that the model focuses primarily on risk reduction rather than investment promotion.

3. **Sector-Specific Flexibility:** Recognizing the varied impact across economic sectors, India could consider sector-specific protocols that provide enhanced protections in areas strategic for development goals, such as renewable energy or advanced manufacturing.

4. **Procedural Improvements:** While maintaining substantive limitations, procedural enhancements to arbitration provisions—such as transparency requirements, appellate mechanisms, and clearer jurisdictional rules—could improve the model's acceptability to partners while preserving its core protective functions.

These refinements would maintain the model's fundamental recalibration while potentially reducing its friction with important economic partners and investment sources.

Conclusion

India's 2015 Model BIT represents a significant intervention in international investment governance, challenging conventional approaches and asserting a vision of

investment protection that prioritizes host state regulatory autonomy. The model emerged from India's specific historical experience and development context, responding to perceived imbalances in traditional investment treaty structures and their interpretation through arbitration.

This research has demonstrated that the revised approach has had measurable impacts on India's investment relationships and trade negotiations. While successfully reducing exposure to investment claims and preserving policy space, the model has created challenges in economic diplomacy and potentially influenced investment decisions in specific sectors and from certain partners. These effects have manifested most clearly in difficult negotiations with developed economies and in sectoral variations in investment responses.

The effectiveness of India's approach ultimately depends on India's specific economic priorities and development strategy. If regulatory sovereignty and reduction of legal risk are paramount concerns, the model has largely achieved its objectives. However, if attracting high-quality foreign investment in strategic sectors and deepening economic integration with key partners are prioritized, the current approach may benefit from calibrated adjustments.

The Indian experience offers valuable lessons for other developing economies navigating the complex terrain of international investment governance. It demonstrates both the feasibility of fundamentally recalibrating investment relationships and the potential trade-offs involved in doing so. Most importantly, it illustrates how investment treaty policy has evolved from a technical legal domain into a strategic tool of economic statecraft with significant implications for a country's international economic relations.

As global economic governance continues to evolve, India's Model BIT stands as an important marker in the ongoing reassessment of how international investment law can balance

legitimate investor protections with the development imperatives of host states. The model's ultimate legacy will depend not only on its legal architecture but on how effectively it enables India to participate in the global economy while maintaining the policy autonomy necessary for inclusive development.

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