

India's Investment Treaties – Will the Government Reject a Core Standard of Investment Protection?

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Almost all of the more than 3,000 bilateral *investment treaties (BITs)* in existence offer foreign investors the protection of “fair and equitable treatment” under international law. *India’s* new [draft model BIT](#) does not. In place of the well-established standard of protection, which has been interpreted and applied in hundreds of prior investment arbitrations, the model BIT offers limited protection only against “denial[s] of justice,” “un-remedied and egregious violations of due process,” and “manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment.”

India’s omission of the fair and equitable treatment standard of protection is just one of a number of reasons for concern with India’s model BIT, several of which — including the exclusion of protection against arbitrary taxation and severe limitations on the protection of intellectual property — [we anticipated](#) and discussed in a prior post. The exclusion of fair and equitable treatment may be more nuanced, but it is of no less importance to foreign investors in India — as well as companies based in India that are expanding abroad.

India’s proposed substitute standard is narrow and confusing — taken literally, “continuous” and “unjustified . . . coercion or harassment” would not be actionable, unless it was also “outrageous.” The substitution of the fair and equitable treatment standard with this impractical test would have real world consequences. The fair and equitable treatment standard operates as a key safeguard against host government conduct that is arbitrary or discriminatory.

Case after case demonstrates that the risk of such conduct is very real, and that it can take many forms. In one [well-known example](#), a Dutch investor in the Czech Republic was punished for closing a factory by having its export quotas slashed. In [another](#), a company operating the water system in an Argentinian city faced a political campaign where residents were urged not to pay their water bills, and where the company was prevented from enforcing its debts in local courts. These are not the sorts of actions that a country aiming to be “open for business” should seek to protect.

India’s draft model BIT is not law. It is merely a statement of policy generated by an office within

India's Finance Ministry and it is yet to be formally endorsed by the Cabinet. India's finance minister recently [commented](#) in the Financial Times that, in part because of the actions of a bureaucracy resistant to reforms, India has "not been entirely successful in convincing investors of the fairness of [its] tax system." He pledged that his government would not let India's tax administration "lag behind." The cabinet must also stand up to bureaucratic resistance here, including by rejecting the draft model BIT as the basis for [planned negotiations](#) of a BIT with the United States.

Doing so will no doubt be politically fraught. But it is short-sighted to table a text that significantly scales back internationally-accepted investment protections. While other countries, particularly the United States, have sought to provide guidance on the contours of the fair and equitable treatment standard — the U.S. Model BIT does this in an annex — such guidance should not give way to a narrowing of the standard in a way that diminishes substantive protections.

The India draft as it now stands sends a signal that India is not serious about deepening its trade and investment relationship with the United States through the conclusion of a planned India-U.S. BIT. The failure to include important investment protections in India's BITs harms not just foreign investors in India, but also Indian companies investing abroad. Indian outbound investment stood at [\\$30 billion](#) last year, and Indian companies and investors are increasingly taking an interest in capital-intensive projects that are susceptible to long-term political and regulatory risks. As India's Export-Import bank pointed out just last year, a "good investment treaty programme for an emerging economy like India should not only be designed for attracting inward FDI [Foreign Direct Investment] but should also account for outward FDI from that economy."

India should propose a model BIT for the long-term that provides both Indian outbound investors and inbound investors of strategic partners with core investment protections that foster growth.

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