

INDIA'S FOREIGN INVESTMENT STRATEGY: LATEST DEVELOPMENTS

INTRODUCTION

India recently entered into three Bilateral Investment Treaties (BITs), with Kyrgyzstan (on 5 June 2025), Uzbekistan (on 15 May 2025) and the United Arab Emirates (on 31 August 2024). These new treaties reflect India's broader foreign investment shift towards safeguarding sovereign rights while promoting economic growth.

Between 2016 and 2021, following several high-profile investment treaty claims against India, the country terminated its BITs with more than 70 countries and has since sought to negotiate new ones which align with its strategy based on a more state-centric approach.

The new BITs with Kyrgyzstan, Uzbekistan and the UAE embody this approach, offering more limited protections to investors than previous treaties while ensuring the state's ability to regulate.

While each BIT has certain unique features, the overall provisions are broadly consistent, with the key takeaways being as follows.

WHO AND WHAT IS COVERED?

Investments and investors

The BITs include restrictive definitions of "*investor*" and "*investment*".

Investments must be made in good faith and comply with the Host State's laws. The BITs also incorporate the Salini criteria, which require investments to exhibit characteristics such as a "*commitment of capital or other resources*," "*certain duration*," "*expectation of gain or profit*," "*assumption of risk*," and "*significance for the development*" of the Host State.

There are also stricter requirements for an "*investor*", including compliance with the laws of the Host State. For juridical persons, there is also a requirement that the entity must conduct "*substantial business activities*" in the Host State, with the India-UAE BIT providing specific criteria for determining this, such as physical presence, central administration, employment of staff, generation of turnover and payment of taxes in the Host State.

Scope and exclusion of certain claims

The scope of India's recent BITs is limited, excluding several areas of potential claims. For example, the BITs do not cover measures adopted by local governments or pre-investment activities. Taxation laws or measures are also excluded, reflecting India's response to previous treaty claims brought by

KEY TAKEAWAYS

- The BITs provide more limited protection to investors and investments by including restrictive definitions, excluding certain state measures from their scope, and emphasising the host state's right to regulate.
- While the BITs include traditional protections in relation to expropriation and national treatment, they limit broader obligations such as fair and equitable treatment.
- The absence of a most-favoured nation clause prevents investors from invoking more favourable protections from other treaties.
- Importantly, investors are required to exhaust local remedies for a period of three or five years, depending on the BIT, before pursuing international arbitration.
- The India-Uzbekistan BIT allows the respondent state to bring counterclaims against investors for treaty violations, reflecting a shift towards balancing investor rights with state interests.
- The BITs with the UAE and Uzbekistan prohibit third-party funding, which could also affect funding from parent companies or shareholders, as the term remains undefined.
- The BITs have a ten-year term and will expire unless both parties agree in writing to renew them for a further ten years. They may be terminated at any time with 12 months' written notice. A sunset clause provides that investments made prior to termination will remain protected for five years following the date of termination.

Vodafone, Vedanta and Cairn Energy against India involving retrospective tax measures. These limitations align with India's 2015 Model BIT, which excludes taxation measures and deems the Host State's decision on taxation matters as "*non-justiciable*." In addition, the BITs exclude from their scope the issuance of compulsory licences related to intellectual property rights, as well as decisions related to subsidies or grants, maintaining regulatory autonomy in these areas.

WHAT PROTECTIONS ARE AVAILABLE?

The BITs include the following key protections for covered investors and investments. Overall, the protections are more limited than those in the previous treaties and underscore the Host State's regulatory autonomy.

Expropriation

The BITs cover both direct and indirect expropriation, including measures equivalent to expropriation, and provide guidance on compensation. For expropriation to be for "*public purpose*" when it concerns land in India, the BITs require that the "*public purpose*" and compensation "*be determined in accordance with the procedure specified in*" India's "*Law relating to land acquisition*". Additionally, the BITs exclude certain state measures from being classified as expropriatory, such as those taken by the Host State in its commercial capacity and non-discriminatory regulatory measures or judicial awards aimed at protecting legitimate public interests or objectives, including public health, safety, and the environment.

National treatment

The national treatment clause in the BITs requires the Host State to provide treatment "*not less favourable than it accords, in like circumstances, to its own investors or to investments*." To prevent broad or divergent interpretations by tribunals, a clarification is provided on the definition of "*in like circumstances*", which is contingent upon whether the treatment is based on legitimate regulatory objectives.

Fair and equitable treatment

The BITs do not explicitly mention "*fair and equitable treatment*" (FET) but instead provide an exhaustive list of four limited obligations that qualify under the classic FET standard: (i) denial of justice, (ii) fundamental breach of due process, (iii) targeted discrimination, and (iv) manifestly abusive treatment. The India-UAE BIT specifically excludes the investor's legitimate expectations from the FET standard of protection, stating that "*the mere fact that a Party regulates in a manner which negatively affects an Investment or interferes with an Investor's expectations, including its expectation of profits, is not a breach of an obligation under this Treaty*."

Full protection and security

The full protection and security (FPS) standard in the BITs is limited to the "*physical security of investors and to investments*" under the Host State's laws, explicitly excluding "*any other obligation whatsoever*."

Absence of most-favoured nations clause

The recent BITs notably exclude a most-favoured nation (MFN) treatment clause. Typically, the MFN clause is used by investors to invoke more favourable protections from treaties between the Host State and third

countries. This exclusion is a direct response to the *White Industries v India* arbitration, where the tribunal used the MFN clause in the Australia-India BIT to grant the investor more favourable protections from the Kuwait-India BIT. Similarly, in *CC/Devas v. India*, the tribunal used the MFN clause in the India-Mauritius BIT to import the FPS clause from the Serbia-India BIT.

RESOLUTION OF DISPUTES BETWEEN THE HOST STATE AND INVESTORS

The good news from the investor perspective is the BITs still provide for international arbitration, a neutral forum for the resolution of disputes between investors and the Host State.

The BITs provide for arbitration under ICSID or the UNCITRAL rules, though India is not an ICSID member and relies on the New York Convention for enforcement, with specific reservations. The BITs ensure that arbitration claims are considered commercial for New York Convention purposes. They also allow tribunals to dismiss frivolous claims. In addition, punitive or moral damages cannot be awarded, and monetary damages must consider factors such as environmental impact and public interest, ensuring a balance between investor interests and public welfare.

The bad news is, there are considerable limitations. First, access to arbitration is restricted by requirements to pursue local remedies before initiating arbitration proceedings: the India-Uzbekistan and India-Kyrgyzstan BITs require a five-year exhaustion of local remedies, while the India-UAE BIT requires three years. In addition, the BITs with the UAE and Uzbekistan expressly prohibit third-party funding. This term is undefined, potentially including funding from parent companies or shareholders.

The new treaties demonstrate a more sophisticated and cautious approach by India towards investment protection mechanisms in its BITs. While investors now face significant hurdles in bringing claims under these treaties, India nonetheless acknowledges the importance of participating in the global investment protection framework.

FURTHER INFORMATION

Clifford Chance offers extensive guidance on investment treaty structuring and resolving disputes with foreign governments. This note provides an overview and does not constitute legal advice. For more detailed information on the protections available under India's BITs with the United Arab Emirates, Uzbekistan, and Kyrgyzstan, or to learn more about using investment treaties to safeguard your international investments, please contact the individuals listed below.

Content relating to India is based on our experience as international counsel representing clients in their business activities in India. We are not permitted to advise on the laws of India, and should such advice be required we would work alongside a domestic law firm.

CONTACTS



Nish Shetty
Partner

T +65 81287412
E nish.shetty
@cliffordchance.com



Kate Apostolova
International Partner

T +61 475383118
E kate.apostolova
@cliffordchance.com



Sanjna Pramod
Senior Associate

T +61 401235321
E sanjna.pramod
@cliffordchance.com



Bronte Hannah
Senior Associate

T +61 422386828
E bronte.hannah
@cliffordchance.com



Rose Cuenin
Associate

T +61 412027686
E rose.cuenin
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, Level 24, 10 Carrington Street,

Sydney, NSW 2000, Australia

© Clifford Chance 2025

Liability limited by a scheme approved under professional standards legislation

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest** • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague** • Riyadh* • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

**Clifford Chance has entered into association agreements with Clifford Chance Prague Association SRO in Prague and Clifford Chance Badea SPRL in Bucharest.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.