INDIA AND INVESTMENT ARBITRATION: POLITICS, PUBLIC INTEREST AND INVESTOR RIGHTS

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ABSTRACT

This article examines India's evolving approach to international investment law through an analysis of seminal arbitral awards in investor-State dispute settlement (ISDS) proceedings. It focuses particularly on disputes concerning sovereign regulatory measures and policy enforcement which albeit in greater public interest, situated India within the rather vague yet tense entanglement between investor protection and host-State sovereignty. The study interrogates the extent to which arbitral tribunals have ascribed due importance to India's obligations towards human rights, socio-economic development, and regulatory governance, as against the duties owed to foreign investors under bilateral investment treaties (BITs). In doing so, it highlights the persistent discord between India's initiative to formulate and adapt public policy in response to domestic requirements and the application of international investment standards such as fair and equitable treatment, denial of justice, etc. which often constrain such State legislative and administrative autonomy. The article further analyses whether tribunals adequately account for the democratic, political, and developmental context of host-States, or whether their reasoning tends to prioritise investor rights and interests in a manner that risks undermining sovereign decision-making. Finally, it proposes a set of recommendations aimed at recalibrating this balance, so as to ensure that the protection of investments does not come at the cost of a State's legitimate and sovereign right to prioritise public welfare and domestic policy objectives.

Keywords: International Investment Arbitration, ISDS Proceedings, White Industries Case, 2015 Model BIT, Human Rights, Sustainable Development.

I. Introduction

A) Introduction

The fastest-growing major economy with an estimated Gross Domestic Product ("**GDP**") growth rate of 6.4% in 2026 alone[1], India has — since first opening its market to foreign trade and investment under the New Economic Policy ("**NEP**") of 1991 — grown exponentially to become the third largest economy in the world. A crucial aspect of this welcome has been Foreign Direct Investment ("**FDI**"): Going beyond the conventional investment of capital, FDI is tantamount to more direct and substantial management and ownership. Within the country, FDI has been a harbinger of technological transfer; stimulating growth of newer businesses which often requires extensive training for a more capable workforce, thus enhancing domestic production capacity.[2] In doing so, FDI also guarantees profit generation within the country receiving the investment.

The many benefits promised by FDI require that the host-States i.e. nations receiving the investment, provide a most efficient legal and regulatory framework for the investors – which could be multinational corporations, individuals, etc. – in order to ensure that the latter's investment within the nation is adequately secured, thereby incentivising future investments by the same or other nations. International investment law is that branch of public international law that regulates this relationship between host-States and the home-State of a foreign investor, and it formalises itself by means of bilateral investment treaties ("**BITs**"), or multilateral investment treaties, select comprehensive free trade agreements ("**FTAs**") or economic and trade agreements ("**ETAs**"), and other similar reciprocal agreements.

BITs offer protection to investments undertaken by foreigners in the territory of another state by way of certain standard clauses such as fair and equitable treatment ("**FET**"), full protection and security, national treatment, denial of justice, most-favoured nation standard, protection from unlawful expropriation, etc.[3] In the circumstance that a dispute regarding any of the foregoing arises, where the investor has reason to believe that the host-State's action may prejudice the former's investment, the dispute-resolution clause within such treaty may be

[1] World Economic Outlook Update, January 2026: Global Economy: Steady amid Divergent Forces, IMF (2026), (last visited Mar 14, 2026).
[2] Martin Feldstein, *Aspects of Global Economic Integration: Outlook for the Future* (2000), https://www.nber.org/system/files/working_papers/w7899/w7899.pdf.
[3] Chirag Balyan, Handbook on Investment Arbitration in India, CAR-MNLUM (2021).

invoked. Investor-state dispute settlement ("**ISDS**") takes the recourse of by far the most utilised dispute resolution mechanism available under investment treaties[4] i.e. investment arbitration.

Through the perusal of recent awards by investment arbitral tribunals in ISDS proceedings, this article explores India's approach to investment agreements, with special focus on ISDS claims involving larger public policy concerns. It analyses the discord between India's consideration for human rights or the greater public benefit of her people – entangled with a consistent demand for state sovereignty – and the duties and obligations owed to investors. In its approach, the article sheds light on the emphasis placed by international arbitral tribunals on the rights of any host-State, particularly India, to continually evolve its public policy to best fit the ever-growing demands of its people, as opposed to perfunctorily favouring the interests of its investors. Finally, the article details certain suggestions that could help stabilise this balance and ensure that it does not tip in favour of the investors' right against any treatment that may prove detrimental to their financial position, while also affirming the host-State's right to prioritise domestic obligations in the public policy space.

B) Statement of Problem

India's booming economy relies heavily on FDI; While bilateral investment treaties are designed to provide a most efficient legal and regulatory framework for investors, the invocation of Investor-State Dispute Settlement (ISDS) mechanisms has increasingly highlighted a friction between investor rights and State sovereignty. This raises concerns with regards to ISDS proceedings, raising questions such as whether a State's regulatory autonomy can be pit against investor rights, risking an imbalance that has, and could hamper India's freedom to regulate her citizens.

C) Literature Review

The following works have proven seminal in providing the research that this article necessitated:

1. Graham Mayeda, Investing in Development: The Role of Democracy and Accountability

[4] Zachary Douglas, *The juridical foundations of investment treaty arbitration*, *in* The International Law of Investment Claims (2012).

in International Investment Law, 46 Alta. L. Rev. 1009 (2009).

In some of the most crucial work for the furtherance of this research, Graham Mayeda, in *Investing in Development*, examines the relationship between international investment law and democratic development and governance. He argues that investment agreements may often constrain democratic expression and thereby hinder sustainable development. He further states that such agreements restrict the policy space of developing host-States and that arbitral tribunals often fail to ascribe significance to domestic democratic decision-making. He therefore, advocates for a recalibration of investment law through a democracy-oriented and accountability-based framework, thus ensuring that investor protection does not undermine public welfare objectives.

2. Catharine Titi, Are Investment Tribunals Adjudicating Political Disputes? Some Reflections on the Repoliticization of Investment Disputes and (New) Forms of Diplomatic Protection, 32 J. Int'l Arb. 261 (2015)

Catharine Titi, in *Are Investment Tribunals Adjudicating Political Disputes?*, challenges the foundations of ISDS as a depoliticised mechanism, arguing that contemporary investment arbitration increasingly involves disputes embedded in political and public policy considerations. By expanding on how tribunals are often required to adjudicate matters arising from sovereign regulatory choices which blurs the distinction between legal and political disputes, she highlights the need for recognising the inherently political nature of disputes adjudicated within the investment arbitration framework.

3. Graham Mayeda, International Investment Agreements Between Developed and Developing Countries: Dancing with the Devil? Case Comment on the Vivendi, Sempra and Enron Awards, 4 McGill Int'l J. Sustainable Dev. L. & Pol'y 223 (2008)

Graham Mayeda, in *International Investment Agreements Between Developed and Developing Countries: Dancing with the Devil?,* critically analyses the implications of investment treaty arbitration for developing States through the Vivendi, Sempra, and Enron awards. He argues that arbitral tribunals have continually interpreted key standards such as fair and equitable treatment and the defence of sovereign rights in a manner that does not provide apt significance to the economic crises and governance challenges faced by developing host-States. To address this, Mayeda advocates for a sustainable development-oriented interpretative framework,

integrating social welfare, economic necessity, and democratic governance into arbitral reasoning.

4. Chirag Balyan, Handbook on Investment Arbitration in India, CAR-MNLUM (2021).

Chirag Balyan's *Handbook on Investment Arbitration in India* serves as a foundational resource for analysing India's evolutionary approach to balancing investor rights with sovereign regulatory rights. The work systematically outlines key substantive standards such as fair and equitable treatment, expropriation, and jurisdictional principles, situating them within the Indian context. It offers a comprehensive account of India's history with international investment law, mapping its treaty practice, arbitral jurisprudence, and the procedural framework that governs ISDS.

D) Research Objective

The objective of this research is to evaluate whether investment arbitral tribunals, in adjudicating ISDS claims against India, have adequately accounted for the State's sovereignty in pursuing legislative and regulatory measures driven by public interest. It does so by analysing the intensity and character of ISDS disputes brought against India and determining whether arbitral tribunals tend to disproportionately favour the financial interests of foreign investors.

E) Research Questions

This study seeks to answer:

1. Do arbitral tribunals within the ISDS framework in disputes involving India adequately balance investor protection with the State's sovereign right to legislate policies and inform regulations in furtherance of the duties owed to the public at large?

2. Whether India's evolving treaty practice (post-2015 BIT Model) reasonably addresses concerns arising from previous arbitral experiences?

F) Research Methodology

This article undertakes a doctrinal research methodology, relying on the analysis of arbitral awards, international treaties, and academic journals. The approach is qualitative and

analytical, focusing on the ever-evolving relationship between investor protection and hostState sovereignty within the framework of international investment law, with special emphasis on India. The study then makes use of ISDS proceedings involving India, further breaking down the reasoning used by arbitral tribunals in deciding disputes where State measures rooted in public policy have been challenged by foreign investors. Findings are culminated in policy suggestions for India that may help strengthen the balance between the two.

II. The ICSID Convention

Post the Second World War, economies around the world, especially those heavily affected by the war or newly independent nations which were previously colonies, required investment of capital. This explains the vast number of BITs signed between 1945 and 1990 (as shown in the figure below), developed countries were supportive of FDI as they were in dire need of the capital raised through it, while developing countries hoped to enhance their domestic capacity, awaiting better employment opportunities and economic growth. Both sides therefore, accepted an international minimum standard to which foreign investment must be held, regardless of how obviously it may favour the rights of the investors and limit any presumably 'restrictive measures' enacted by the host-State.

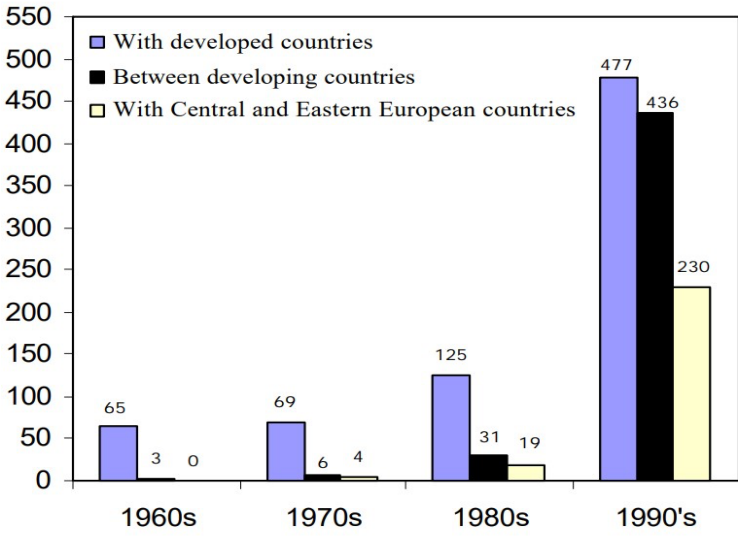

Figure 1. Number of BITs concluded by developing countries by the decade, 1960-1999

Source: UNCTAD database on BITs.

The most defining in this process was the World Bank's step to draft the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[5] in 1965.

Particularly favoured at the time by developed countries, the International Centre for Settlement of Investment Disputes ("**ICSID**") provides an independent forum to conciliate and arbitrate these disputes.[6] This decade saw the evolution of various multilateral treaties and agreements, most of which received blatant opposition from developing countries. Post six decades and exponential globalization around the globe, India's oft-debated stance despite being a major economy[7], to not be a signatory to the ICSID Convention has not changed; A fact that the Indian Council for Arbitration's then Executive Director Mr. G.K. Kwatra ascribes to the Convention's not being fair, and that its rules for arbitration leaned towards the developed countries.[8]

III. India and Investment Arbitration

A) A *Brief* History

As mentioned previously, the Indian economy prior to the introduction of the NEP Policy of 1991, had been closed off to foreign trade and investment. What was then focused more on domestic capacity building and industrial growth, the economy eventually made way in the birth of this new era, are issues such as the Balance of Payments ("**BoP**") crisis, pressure felt from the magnitude of investment flowing into other developing Asian countries at the time, such as China. The then Finance Minister Dr. Manmohan Singh emphasized, during his visit in December 1992 to the United Kingdom ("**UK**"), the need to reform the Indian market in order to benefit from international relations and attract FDI. This was materialised in 1994 when India signed its first BIT with the UK. The model treaty for this BIT was based on the Organisation for Economic Cooperation and Development's ("**OECD**") Draft Convention for Protection of Foreign Property of 1967. A BIT based on the OECD showed India's willingness to accept the same binding legal principles for protection of foreign investment that it had

[5] ICSID CONVENTION, REGULATIONS AND RULES 1 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf.
[6] Introducing ICSID | ICSID, Worldbank.org (2021), https://icsid.worldbank.org/resources/publications/introducing-icsid (last visited Mar 14, 2026).
[7] See *supra* note 1.
[8] The HinduBusinessLine, ICA against India joining global dispute settlement body, BusinessLine (2000), https://www.thehindubusinessline.com/todays-paper/tp-others/article29064097.ece (last visited Mar 14, 2026).

previously opposed in the 1960s and 1970s.[9] Popularly criticised for being the economic version[9] of NATO, the OECD texts were soon visible to the world as inescapable power-grabs for its developed and economically strengthened member-nations.[10] By 2000, India had signed close to forty BITs. With foreign investment soaring, and the country focusing on laws that balance the requirements of such investment with regulatory obligations owed to an evergrowing democracy, it was only a matter of time before India's administrative choices that did not align with investors' interests were challenged. This would infamously happen with the dispute in *White Industries v. India*.[11] Although India's first complication with investment arbitration was undeniably the *Capital India Power Mauritius I v. Maharashtra Power Development Corp. Ltd.* (Dabhol Power Project Case),[12] it was the *White Industries* arbitration that first alarmed lawmakers and pushed them to re-evaluate the magnitude of obligations owed by India at the time under its BITs.

B) The Nascence and Development of a Decisive Discrepancy

Graham Mayeda argues that investments within a country be viewed as a *means* to an end, and not as the end in itself.[13] His 'sustainable development' analysis helps view FDI as an investment in (especially developing) nations' endeavour to legislate on policies and enforce laws that best promote the interests of its citizens.[14] These policies include strengthening human rights and within the ambit of it, ensuring certain essential civil and political rights – such as democratic participation and representation, environmental protection, provision of healthcare facilities, etc. In this manner, he expands, investment becomes an 'enabler' of progressive development within any nation.[15] As highlighted previously, investment could only make such leaps when supported by a healthy political climate,[16] suitable to both 'democracy and development'. A balanced view of these arguments therefore appositely

[9] Prabhash Ranjan, How Manmohan Singh played a key role in India signing its first bilateral investment treaty, ThePrint (2019), https://theprint.in/pageturner/excerpt/how-manmohan-singh-played-a-key-role-in-indiasigning-its-first-bilateral-investment-treaty/279710/ (last visited Mar 19, 2026).
[10] Daniel J. Mitchell, The Case Against The OECD | IFC Review, IFC Review (2025), https://www.ifcreview.com/articles/2025/february/the-case-against-the-oecd/ (last visited Mar 18, 2026).
[11] *White Indus. Austl. Ltd. v. Republic of India*, Final Award, UNCITRAL (Nov. 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.
[12] *Final Award*, ICC Case No. 12913/MS, *Capital India Power Mauritius I & Energy Enters. (Mauritius) Co. v. Maharashtra Power Dev. Corp. Ltd. et al.* (Int'l Ct. Arb. Apr. 27, 2005).
[13] Graham Mayeda, *International Investment Agreements Between Developed and Developing Countries: Dancing with the Devil? Case Comment on the Vivendi, Sempra and Enron Awards*, 4 McGill Int'l J. Sustainable Dev. L. & Pol'y 191, 199 (2008), https://ssrn.com/abstract=2619341.
[14] *Id.* at 200.
[15] *Id.*
[16] See *infra* Part I.A.

pushes the narrative that laws and regulations must be framed in such a manner that international investment is most efficiently utilised (or rewarded in a more realistic sense), while also not jeopardising the simultaneous duty of the state to legislate and enforce other policies to further its interests i.e. those of its citizens. In the words of the World Commission on Environment and Development's 1987 report on World Commission on Environment and Development: *Our Common Future*, such 'equity' would be aided by political systems that can secure effective citizen participation in decision-making and by greater democracy in the realm of international decision making'.[17]

The appeal of investment arbitration lies in its apparent impartiality. Traceable to the same logic as that behind the nascence of ICSID, submitting the resolution of investment disputes between a foreigner and host-State to independent authorities is crucial to ensure that the power to decide the rights of the investor is not contained solely within the domestic institutions belonging to said state. Be that as it may, such arbitration must also provide an assurance to host-States – that the award supporting policies favourable to investors, will not be granted to the detriment of the former's sovereignty; In either of these cases, the arbitral tribunal is bound to intentionally or unintentionally question the policies of the host-State; It is this inquiry that takes away from the 'non-political' nature of ISDS.[18]

Catherine Titi argues that the political nature of these arbitral disputes raises a question as to where exactly the dividing line 'between judging a host-State's policies and judging the consequences of such policies for investors' lies.[19] Such an act would *directly*, in either of the two situations, lead the tribunal to question the lawful administrative choices made (indirectly) by the citizens of a country through formally elected officials. For instance, a general rule of public international law requires new governments fulfil the obligations of, or be subjected to the same standard as the previous one; If a democratic vote results in the upheaval of existing state structure and the coming into power of another one, a new turn in the government's investment governance must not be questioned simply because it does not provide the same advantage to investors – this was central to the dispute in the Dabhol Power Project

[17] World Comm'n on Env't & Dev., *Our Common Future: Report of the World Commission on Environment and Development*, U.N. GAOR, 42d Sess., Supp. No. 25, U.N. Doc. A/42/427 (1987).
[18] Catharine Titi, *Are Investment Tribunals Adjudicating Political Disputes?Some Reflections on the Repoliticization of Investment Disputes and (New) Forms of Diplomatic Protection*, 32 J. Int'l Arb. 261 (2015), https://ssrn.com/abstract=2671189
[19] B. Stern, *Are Some Disputes Too Political to Be Arbitrable?*, 24 ICSID Rev.—Foreign Inv. L.J. 80 (2009), quoted in *id.* at 267.

Case.[20]Moving forward to the landmark *White Industries* ruling, where claims arising out of a contract entered into by White Industries and Coal India were decided by the International Court of Arbitration under the International Chamber of Commerce ("**ICC**") Rules. This 2002 decision in favour of White Industries initiated a chain of claims and counter-claims between the parties that continued for years before it reached the Supreme Court of India ("**Sup. Ct.**"). Finally in 2011, White Industries in adherence to the India-Australia BIT initiated investment treaty arbitration against the country claiming denial of justice and fair and equitable treatment, which was eventually decided in favour of the claimant. It is here that our discussion on sovereign rights finds relevance.

Denial of justice was alleged on grounds that the enforcement of the initial award was delayed by nine years due to the inefficiency of the Indian courts.[21] The claimant argued that it was India's obligation to ensure that the award was enforced and in failing to do so, she has denied fair and equitable treatment to White Industries. What is interesting to make a note of here is that the definition or provision of these 'effective measures' was not originally found in the India-Australia BIT; It was rather sought in conjunction with the BIT ratified between India and Kuwait, claimed as the 'most-favoured nation' ("**MFN**") treatment that all investor states were equally entitled to. The subjectivity of what is defined as 'effective measures' with regards to standards of judicial security or fair procedure, were not given due consideration.

In this context, it is essential to recall the alarming volume of investment disputes brought against Argentina in the wake of its economic meltdown during the late 1990s. Now, the context in which the sovereign measures of the developing nation were adjudged happens to be different – a major economic emergency had resulted in measures that made it difficult for the country to focus on investment protection, thus resulting in violations of various BIT clauses. One such claim brought against the country was the *Vivendi* annulment award of 2007,[22]where in deciding against Argentina, a crucial factor that the arbitral tribunal failed to consider was the unexpected and troubling nature of the problem they faced.

In such situations what becomes more important, Mayeda argues, is to decide whether the

[20] See *supra* note 12.
[21] Parina Muchhala, *India'sTryst with Investment Arbitration*, in *Handbook on Investment Arbitration in India* 82, 88 (Chirag Balyan ed., CAR-MNLUM 2021).
[22] *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, Award, ICSID Case No. ARB/97/3 (Int'l Ctr. For Settlement of Inv. Disputes Aug. 20, 2007), https://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf

government's actions were purely self-interested and the due process of law was denied to the investors, or whether such actions were justified to promote public welfare.[23] At the very least, so[23] long as 'good faith' is not proven to be breached by the host-State, its actions could be measured with some leeway as incapacity to not fulfil the contract. Albeit recognising White Industries' duty to have known the state of the Indian judiciary at the time, the tribunal still decided against India – reasoning that the Sup. Ct. ought to have successfully decided the case within five years;[24] Additionally, Article 4(5) of the Kuwait-India BIT[25] (on which White Industries would later depend) states that the host-State must ensure that the contracting state meaning thus its investors, are provided with 'effective means' to enforce their rights, by ensuring access to the former's courts of justice, tribunals, and agencies, and the right to employ persons of their choice to assert such right; To not have met the most basic standard of impartially interpreting this BIT clause while also utilizing a screwed meaning sheds light on why India's losing in an investment treaty dispute for a mere judicial delay was particularly disappointing, indubitably therefore pushing her to re-evaluate the entire framework of her investment treaties.

The *White Industries* dispute opened a floodgate of claims against India's policies, most of which tackled questions concerning what qualifies as 'valid practise' of her sovereignty. In the immediately following *Deutsche Telekom v. India*[26] arbitral claim – which remedies a dispute arising from a contract entered into by Devas Multimedia (where Deutsche Telekom had purchased a 19.62% share through a Singaporean subsidiary) and India-owned Antrix Corporation Ltd. – the arbitral tribunal failed to ascribe importance to the Indian Cabinet Committee's finding that the contract between the two could prejudice the interests of the country and that the provision of the S-band spectrum to Antrix must be denied for 'vital strategic and societal applications'.[27]

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[23] See Mayeda, *supra* note 13, at 208.
[24] Mukesh Butani, Akshara Rao & Yeesha Shriyan, *Tax Carve Outs Under Bilateral Investment Protection Agreements: A Review* (Vidhi Ctr. for Legal Policy 2023), https://vidhilegalpolicy.in/wp-content/uploads/2023/04/Tax-Carve-Outs-Under-Bilateral-Investment-Protection-Agreements_FINAL.pdf
[25] Agreement for the Promotion and Protection of Investments, India–Kuwait, art. 4(5), quoted in Sumeet Kachwaha, *The White Industries Australia Limited–India BIT Award: A Critical Assessment*, 29 *Arbitration International* 275, 287 (2013).
[26] *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Final Award (UNCITRAL, Geneva, May 27, 2020).
[27] *Republic of India v. Deutsche Telekom AG*, [2023] SGCA(I) 10 (Sing. Ct. App. Dec. 15, 2023), https://www.newyorkconvention.org/media/uploads/pdf/4/6/4628_singapore-18-india-v-deutsche-telekom-15-dec-2023.pdf

I believe policy measures largely for the greater benefit of her citizens or for the development of India's own capacity must not have been subjected to such judgement and if they must, the tribunal could have paid greater attention to the government's policy choice in the context of being made in the interest of state defence. Such exceptions when advanced by states should be interpreted broadly by arbitral tribunals so as to not diminish the importance of democratic decision-making.[28] This also requires that the reasoning advanced by national tribunals or committees be given greater importance, which in the case was not, as they act in an advisory capacity to elected representatives of the citizens. If such mechanisms are absent, Mayeda expounds, international tribunals are unlikely to be impartial and just interpreters of domestic law.[29]

The amendment of Section 9(1)(i) of the Income Tax Act ("**ITA**") of 1961 in 2012 came as a response or is said to have led, to one of the most popular chains of ISDS claims against India. The amendment[30] tried to cover indirect transfers by non-residents within the taxation ambit with retrospective effect.[31] The first of these disputes was *Vodafone Group v. India*,[32] where investment arbitration proceedings were initiated by Vodafone group against India under the India-Netherlands BIT, claiming that the legislature targeted them specifically with the tax reform as a response to the Sup. Ct. decision in favour of the former where the policymakers were not able to justify their claim of capital gains tax with regards to the acquisition of the Indian-based Hutchison Whampoa telecoms business in 2007. The Permanent Court of Arbitration ("**PCA**") unanimously ruled in favour of the claimant and held that India by this practise has breached the FET standards guaranteed in the BIT. Very similar is the case of *Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India*,[33] where following India's decision to scrap the 2012 amendment and an offer to return the USD 1.06 billion refund owed, the ISDS proceedings initiated under the India-UK BIT were settled in the favour of the claimant, Cairn Energy. These stand out as examples of cases where both bad faith and

[28] Graham Mayeda, *Investing in Development: The Role of Democracy and Accountability in International Investment Law*, 46 Alta. L. Rev. 1009 (2009)
[29] See Mayeda, *supra* note 13.
[30] The 2012 retrospective tax amendment, introduced in response to *Vodafone International Holdings BV v. Union of India* and the basis of subsequent investment treaty claims, was nullified by India in 2021.
[31] Tathagata Choudhury, *India's Experience with Investment Treaty Disputes and Related Damages*, Madhyam (Aug. 17, 2023), https://www.madhyam.org.in/indias-experience-with-investment-treaty-disputes-and-relateddamages/
[32] *Vodafone Group Plc v. Republic of India*, PCA Case No. 2016-35, Final Award (Perm. Ct. Arb. Sept. 25, 2020).
[33] *Cairn Energy PLC & Cairn UK Holdings Ltd. v. Republic of India*, PCA Case No. 2016-07, Final Award (Perm. Ct. Arb. Dec. 21, 2020).

a breach of representations made to the foreign investor are evident in a host-State's conduct, however what remains debated is whether arbitral tribunals should concern themselves with the policy that has hampered the rights of the investors, or the legitimacy or democratic nature by which the policy was brought into effect.

The protections allowed to investors under such treaties must at all times be measured against each other to ensure that the balance on which the stability of FDI rests has, what Thomas Franck explains as, the "elasticity needed to accommodate the inevitable tension between the political pull to change and the economic rationale for stability."[34]

India has also had many decisions in her favour, such as those in *Korea Western Power Company Limited v. The Republic of India decision*[35] and *Louis Dreyfus Armateurs SAS v. Republic of India*,[36] etc. where her sovereign right to decide the allocation of public resources, and to prevent the 'internationalisation' of treaty claims against regulatory policies which are well within the government's commercial or taxing discretion.

C) The 2015 Model BIT

It was the volume of these ISDS claims that pushed India to revise its Model BIT[37] in December 2015. Consequently, it has terminated previous BITs with 77 countries, with only six remaining in force. Additionally, only four new treaties have been signed with Belarus (2018), Kyrgyzstan (2019), Brazil (2020), United Arab Emirates ("**UAE**") (2024), Uzbekistan (2024), and most recently with Israel (2025) (which is yet to enter into force).[38] Important modifications include broader regulatory rights given to the host-State i.e. India, lower FET standards and requirements of exhausting local remedies before filing a notice for arbitration.[39] This is most certainly an attempt on the government's part to lower investor protection and prioritise its sovereign rights.

When it comes to the definition of 'investment', the revised text has narrowed the definition by making it 'enterprise-based' thus ensuring that the foreign investor be a 'legally constituted

[34] Thomas M. Franck, *Fairness in International Law and Institutions* 449 (Clarendon Press 1995).
[35] *Korea Western Power Co. Ltd. v. Republic of India*, Award, PCA Case No. (Dec. 30, 2025).
[36] *Louis Dreyfus Armateurs SAS v. Republic of India* , Award, PCA Case No. 2014-26 (Perm. Ct. Arb. Sept. 11, 2018).
[37] Model Text for the Indian Bilateral Investment Treaty, art. 3.1 (India Dec. 28, 2015).
[38] U.N. Conf. on Trade & Dev., *International Investment Agreements Navigator: India*, https://… (listing India'sBITs and treaty status).
[39] See *supra* note 21.

enterprise' in India.[40] This lowers the possibility of treaty-based claims being instituted against the country. Furthermore, the MFN clause which had become subject to many claims e.g. *White Industries*, has been excluded completely to prevent 'treaty shopping'. However efficiently this may strengthen India's sovereignty by not allowing investors to step out of the definitions they chose for themselves, the choice to remove the clause entirely seems rather extreme. What the Model BIT could have rather pursued, are measures similar to Canada-European Union Comprehensive Economic and Trade Agreement ("**CETA**") – as also referred to, and recommended by the Standing Committee on External Affairs in 2021[41] where MFN clauses restrict investors from getting a peak into what other state's investors are promised so long as the host-State has not in its delivery of resources, damages or compensation, actually differentiated between the two in a discriminatory manner.

The revised Model BIT also removes the FET standards which often are the core of BITs, protecting investors from any arbitrary decisions by the host-State which may unnecessarily hamper the investments of the former. The removal of this clause may stem from the fear that this clause can and previously has very easily been used against the interests of the State such as the *Antrix-Devas* debacle. The text however does include a 'Treatment of Investment' clause, which provides investors with protection against denial of justice, fundamental breaches of due process of law, targeted discrimination on unjust grounds, etc. – in a clear attempt to narrow the interpretation of what would otherwise be FET standards.[42]

Earlier, the BITs signed by India did not exclude tax measures from the scope of arbitral jurisdiction and included instead a limited tax exception, enough to allow taxation claims against the nation e.g. *Vodafone* and *Cairn* disputes.[43] As opposed to this, the Model BIT states that the treaty shall exclude from its ambit "any law or measure regarding taxation, including measures taken to enforce taxation obligations."[44] The revised text further clarifies that where the host-State decides that the conduct alleged as breach of its obligations is a subject matter of taxation, such decision of the State, whether before or after the commencement of arbitral proceedings, "shall be non-justiciable and it shall not be open to any arbitration tribunal to

[40] *Infrastructure Projects in India: From Cradle to Grave to Resurrection* (Econ. Laws Prac. 2021), https://elplaw.in/wp-content/uploads/2023/11/ELP-Booklet-Infrastructure.pdf
[41] PRS Legislative Research, *India and Bilateral Investment Treaties* (Oct. 27, 2021), https://prsindia.org/policy/report-summaries/india-and-bilateral-investment-treaties.
[42] Hitesh Nagpal, *Fundamental Concepts of Investment Arbitration*, in *Handbook on Investment Arbitration in India* 18 (Chirag Balyan ed., CAR-MNLUM 2021).
[43] See *supra* note 24.
[44] See *supra* note 36.

review such decision." Many scholars argue that to take away from arbitral tribunals to directly or indirectly define their jurisdiction goes against the doctrine of *Kompetenz-Kompetenz*.

The Model BIT also contains a chapter on 'General Exceptions' specifying the subjects which cannot be claimed before an investment arbitral tribunal; These include protection of public health, of humans, animal or plant life, protection and conservation of the environment, compliance with domestic laws not in consonance with treaty provisions, etc. The provision of these exceptions allows the host-State to balance the duty owed to its citizens and to their greater benefit with the rights of the investors.

In this manner, the 2015 Model BIT represents a decisive shift away from the previous regime that naively favoured investor interests, towards one that strengthens sovereign rights and administrative autonomy. While the revised Model BIT undoubtedly affirms India's position by narrowing investor protections and protecting core sovereign functions, it is simultaneously an alarming reminder that the balance could very easily tilt too far in the opposite direction, potentially affecting investor confidence in India's economy.

IV. Conclusion and Suggestions

Political figures in the United States of America ("**USA**") in 2011 expressing 'concern about US taxpayer dollars' – which provided the funding for the World Bank loans sent to Argentina during its economic crisis – would request a 'suspension of these loans' to 'sovereigns *not* in compliance with ICSID rulings.'[45] In a politicised economic environment like such, India's position as the fastest growing major economy can only be fended for by prioritising its sovereignty over the rights of investors – which do still continue to be favoured and adjudged broadly to corner developing nations.

The challenge therefore, lies not merely in affirming sovereignty, but also with ensuring that the same is accompanied by a comprehensive and credible investment framework – accommodating the political rights of developing economies such as India with the stability that foreign investors seek.

In light of the discussion undertaken in the article, it is suggested that investment arbitral

[45] Letter from Mark Kirk, U.S. Senator, to Timothy Geithner, U.S. Sec'y of the Treasury (June 21, 2011), quoted in Titi, *supra* note 18, at 284.

tribunals adopt a comprehensive approach that ascribes due deference to democratic and policy-making frameworks of the host-State. As highlighted in the works of Graham Mayeda, regulatory measures in furtherance of public welfare, economic stability, or governance objectives must be assessed within the 'socio-political realities' of the State, as opposed to vague international standards. This would ensure that tribunals do not inadvertently undermine the democratic decision-making, so essential to developing economies. In addition to this, arbitral tribunals must be careful with disputes involving vital questions of sovereignty arising from inherently political state discretion which could help the institution avoid intrusive review of sovereign measures unless of course, clear evidence of arbitrariness, bad faith, or discrimination is provided. Lastly, host-States must ensure that BITs employed by them balance the allocation of rights to obligations, thus better incorporating clear (often narrower) standards of protection, and to the same extent, expanding the responsibilities on investors, with regards to compliance with domestic laws legislated for public benefit.