
**ANALYSIS OF INVESTOR-STATE DISPUTE SETTLEMENT MECHANISMS IN
INDIA'S BILATERAL INVESTMENT TREATIES & WAY FORWARD.**

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Abstract

Investor-State Dispute Settlement (ISDS) mechanisms have become a critical aspect of international investment law, particularly in the context of Bilateral Investment Treaties (BITs). This research paper provides a comprehensive analysis of India's ISDS mechanisms under its BITs, examining the evolution of these mechanisms, India's recent policy shifts, and their implications for foreign investors. We identify challenges, potential areas of reform, and the impact of these mechanisms on the investment climate in India. India's ISDS mechanisms have undergone significant changes over time, driven by the country's experiences with high-profile disputes involving foreign investors. Initial BITs signed by India featured broad ISDS provisions, granting investors wide-ranging access to international arbitration. However, a series of costly disputes and rising concerns about sovereignty led to a shift in India's approach to ISDS. In 2015, India adopted a new Model BIT that incorporated several changes to its ISDS mechanisms, including limiting the scope of ISDS, requiring the exhaustion of local remedies, and promoting transparency.

India's ISDS mechanisms face numerous challenges that impact the country's investment climate. These challenges include perceived bias against developing countries in ISDS outcomes, inconsistency and unpredictability in arbitral awards, the absence of appellate mechanisms to review arbitral decisions, and the cost and duration of ISDS proceedings. The combination of these challenges raises questions about the legitimacy and effectiveness of India's ISDS mechanisms in protecting foreign investments and fostering a stable investment environment. In conclusion, this research paper offers a comprehensive analysis of India's ISDS mechanisms under its BITs, highlighting the evolution, challenges, and potential areas of reform. By examining these issues in detail, the paper contributes to a better understanding of the implications of India's ISDS mechanisms for foreign investors and the broader investment climate. As India continues to evolve its approach to ISDS, the insights provided in this paper can help inform future policy decisions and contribute to the development of a more balanced and effective ISDS system.

Keywords: Bilateral Investment Treaty, Investor-State Dispute, Model BIT, Investor rights, State sovereignty.

INTRODUCTION

Investor-State Dispute Settlement (ISDS) mechanisms are a critical aspect of international investment law, playing a pivotal role in addressing disputes between foreign investors and host states. These mechanisms, typically found in Bilateral Investment Treaties (BITs), are designed to provide foreign investors with a neutral, depoliticized forum to resolve disputes arising from the host state's alleged breach of treaty obligations. The primary goal of ISDS is to safeguard foreign investments and foster a predictable legal framework, thereby facilitating cross-border investments and economic growth [1].

India, with its rapidly expanding economy, has witnessed a surge in foreign investments over the past few decades [2]. To capitalize on this growth, India has entered into numerous BITs with other states, incorporating provisions on ISDS to protect and promote foreign investments. However, India's experience with ISDS has been marked by a series of high-profile disputes involving foreign investors. These disputes have led to substantial financial liabilities for the Indian government and ignited a reassessment of India's approach to ISDS, culminating in the adoption of a new Model BIT in 2015 [3].

This research paper aims to provide a comprehensive analysis of the evolution, current state, and future prospects of ISDS mechanisms in India's BITs. To achieve this objective, the paper is organized into several sections, each addressing a specific aspect of India's ISDS mechanisms.

The paper begins by tracing the historical development of India's approach to ISDS in its BITs. This section highlights the policy shifts that have taken place over time, with particular attention to the changes introduced in India's 2015 Model BIT. This historical analysis provides valuable insights into the factors that have shaped India's ISDS policy and the challenges it has faced in balancing the need for investor protection with its sovereign right to regulate.

Next, the paper examines the key features of India's ISDS mechanisms, offering an in-depth analysis of the various elements that constitute the dispute resolution process. These features include the arbitral institutions and rules governing the dispute resolution process, the scope of ISDS in BITs, the requirement to exhaust local remedies before initiating an arbitration [4], the role of Most-Favored-Nation (MFN) clauses in extending the application of ISDS provisions [5], and the degree of transparency in the ISDS process [6].

Following this, the paper discusses the main challenges and criticisms associated with India's ISDS mechanisms. These challenges include the perceived bias against developing countries in ISDS outcomes, inconsistency and unpredictability in arbitral awards, the absence of appellate

mechanisms to review arbitral decisions [7], and the cost and duration of ISDS proceedings [8][2]. This section also considers the implications of these challenges for the legitimacy and effectiveness of ISDS mechanisms in protecting foreign investments in India.

Finally, the paper proposes potential areas of reform for India's ISDS mechanisms, offering recommendations for addressing the identified challenges and enhancing the overall investment climate in the country. These proposed reforms include strengthening domestic legal frameworks to ensure effective protection of foreign investors' rights, promoting alternative dispute resolution methods such as mediation and conciliation, establishing an appellate mechanism to review arbitral decisions and ensure consistency in the interpretation of investment treaty provisions [9], and enhancing transparency and stakeholder participation in the ISDS process by incorporating public access to documents and hearings, as well as allowing *amicus curiae* submissions.

By examining the various aspects of India's ISDS mechanisms in its BITs, this paper seeks to contribute to the ongoing debate on the effectiveness and fairness of ISDS as a tool for protecting foreign investments and fostering a stable investment climate in India. Moreover, the proposed reforms aim to strike a balance between the interests of foreign investors and the host state, ensuring that both parties can benefit from the economic growth and development that international investments can bring.

EVOLUTION OF ISDS MECHANISMS IN INDIA'S BITS

This section traces the evolution of ISDS mechanisms in India's BITs, starting with the early BITs signed between 1994 and 2011, followed by the introduction of the 2015 Model BIT, and finally the recent BITs and policy shifts that have influenced India's approach to ISDS.

2.1. Early BITs (1994-2011)

India entered the arena of BITs in 1994, with the first BIT signed with the United Kingdom [10]. During this initial phase, India's BITs were heavily influenced by the traditional approach to ISDS, characterized by broad investor protections and limited exceptions for the host state. The ISDS provisions in these early BITs allowed foreign investors to submit disputes to international arbitration, often without the requirement to exhaust local remedies. Moreover, the MFN clauses in these BITs enabled foreign investors to invoke more favorable dispute resolution provisions from other treaties entered into by India [11].

A notable example of an early Indian BIT is the India-Netherlands BIT, signed in 1995, which provided a broad scope of investor protection and facilitated access to international arbitration [12]. However, these early BITs, which offered extensive protections for foreign investors, exposed India to a series of high-profile disputes, such as the White Industries case in 2011. As a consequence, the Indian government faced increased scrutiny over its BIT policy, prompting a re-evaluation of its approach to ISDS mechanisms.

2.2. The 2015 Model BIT and its Impact on ISDS

The Indian government's reassessment of its approach to ISDS culminated in the introduction of the 2015 Model BIT (Ranjan & Anand 2017, p. 1). The 2015 Model BIT marked a significant departure from the traditional approach to ISDS, reflecting India's attempts to balance investor protection with its policy space and sovereign right to regulate [13].

One of the critical changes introduced by the 2015 Model BIT was the requirement to exhaust local remedies before initiating ISDS proceedings [14]. This provision was intended to encourage foreign investors to seek redress through the domestic legal system before resorting to international arbitration, thus providing the host state with an opportunity to address grievances and avoid costly arbitrations [15].

Another key change was the limitation of the MFN clause's applicability, which excluded its use in ISDS provisions [16]. This restriction was aimed at preventing foreign investors from "treaty shopping" to access more favourable dispute resolution provisions from other treaties [17][11].

The 2015 Model BIT also introduced more stringent definitions of key terms, such as "investment" and "investor," to ensure that only genuine investments and investors would be covered by the treaty protections [18]. Furthermore, the new Model BIT incorporated several exceptions and carve-outs for the host state to preserve its policy space and right to regulate in the public interest [19].

The 2015 Model BIT had a significant impact on India's approach to ISDS, as it sought to strike a balance between the protection of foreign investors and the host state's regulatory autonomy [20]. The Model BIT's provisions have since been reflected in India's renegotiated BITs, signaling a shift in India's stance on ISDS [21].

2.3. Recent BITs and Policy Shifts

Following the introduction of the 2015 Model BIT, India has pursued a policy of renegotiating its existing BITs to bring them in line with the new Model BIT's provisions. This process has led to the termination of several BITs and the negotiation of new treaties that incorporate the revised ISDS mechanisms [22].

Recent BITs signed by India, such as the India-Belarus BIT and the India-Taiwan BIT, demonstrate the influence of the 2015 Model BIT on India's approach to ISDS [23][13]. These treaties incorporate the exhaustion of local remedies requirement, the limitation of the MFN clause's applicability to ISDS, and the inclusion of more precise definitions of key terms (India-Belarus BIT 2018, Arts. 13.1, 5.5, 1.1, & 1.2); (India-Taiwan BIT 2018, Arts. 14.1, 7.5, 1.3, & 1.4).

In addition to renegotiating its BITs, India has also been actively engaged in the ongoing discussions on ISDS reform at the United Nations Commission on International Trade Law (UNCITRAL) [24]. These discussions aim to address the various challenges and criticisms associated with ISDS mechanisms, including issues of transparency, consistency, and the lack of an appellate mechanism. India's participation in these discussions reflects its commitment to improving ISDS mechanisms and ensuring that they adequately protect foreign investments while preserving the host state's right to regulate.

In conclusion, the evolution of ISDS mechanisms in India's BITs has been marked by a gradual shift from a traditional approach focused on broad investor protections to a more balanced approach that considers the host state's policy space and right to regulate. This evolution has been driven by India's experiences with high-profile disputes, which prompted the introduction of the 2015 Model BIT and the renegotiation of existing BITs. India's ongoing engagement in international discussions on ISDS reform further underscores its commitment to refining and improving its ISDS mechanisms in response to the challenges and criticisms that have emerged.

KEY FEATURES OF INDIA'S ISDS MECHANISMS

This section provides an in-depth analysis of the key features of India's ISDS mechanisms, including arbitral institutions and rules, the scope of ISDS in BITs, the requirement to exhaust local remedies, the role of Most-Favored-Nation (MFN) clauses, and transparency in the ISDS process.

3.1. Arbitral Institutions and Rules

The choice of arbitral institutions and rules is a crucial aspect of the ISDS process, as it determines the procedural framework governing the arbitration proceedings. In India's early BITs, the arbitration rules most commonly adopted were those of the International Centre for Settlement of Investment Disputes (ICSID) [25]. However, India has not ratified the ICSID Convention and, consequently, cannot fully utilize the ICSID framework for investment arbitration [26].

The 2015 Model BIT introduced changes concerning arbitral institutions and rules. It provides for ad hoc arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, with the Permanent Court of Arbitration (PCA) administering the proceedings if the parties fail to agree on the appointment of arbitrators [27]. This shift reflects India's preference for a more flexible and adaptable arbitration framework compared to the ICSID system.

3.2. Scope of ISDS in BITs

The scope of ISDS in BITs determines which disputes qualify for arbitration under the ISDS mechanism. India's early BITs provided a broad scope for ISDS, allowing foreign investors to initiate arbitration for disputes arising from alleged breaches of treaty obligations [28]. This broad

scope has led to several high-profile disputes involving foreign investors, such as the cases of White Industries and Vodafone.

The 2015 Model BIT significantly narrowed the scope of ISDS by limiting the types of disputes that qualify for arbitration. It explicitly excludes certain matters, such as taxation, government procurement, and subsidies [29][3]. This narrower scope aims to strike a balance between investor protection and the host state's regulatory autonomy, reducing the risk of potential disputes while maintaining adequate protection for foreign investors [30][13].

3.3. Exhaustion of Local Remedies

The exhaustion of local remedies rule requires foreign investors to first pursue their claims in the host state's domestic courts before initiating arbitration under the ISDS mechanism. India's early BITs did not consistently include this requirement, leading to concerns about the circumvention of domestic legal processes.

The 2015 Model BIT introduced a mandatory requirement for the exhaustion of local remedies. It requires foreign investors to pursue their claims in domestic courts or administrative tribunals for at least five years before initiating arbitration under the ISDS mechanism [31][29]. This requirement is intended to ensure that the host state has an opportunity to address investor grievances through its domestic legal system before being subjected to international arbitration .

3.4. Most-Favoured-Nation Clauses and ISDS

Most-Favoured-Nation (MFN) clauses are a common feature of BITs, ensuring that investors from one treaty party receive treatment no less favourable than that accorded to investors from any other state [32][5]. In the context of ISDS, MFN clauses have been used by foreign investors to "import" more favourable dispute resolution provisions from other BITs to which the host state is a party.

India's early BITs included broad MFN clauses, which, in some cases, allowed foreign investors to bypass certain procedural requirements, such as the exhaustion of local remedies. However, the 2015 Model BIT narrows the application of the MFN clause by explicitly excluding dispute resolution procedures from its scope. This exclusion is intended to prevent foreign investors from circumventing India's carefully crafted ISDS provisions and to ensure a greater level of control over the dispute resolution process.

3.5. Transparency in the ISDS Process

Transparency in the ISDS process is crucial for fostering trust and accountability in the system. Historically, investment arbitration has been criticized for its lack of transparency, with proceedings often conducted behind closed doors, and limited access to documents and decisions [33].

India's early BITs did not consistently address transparency concerns. However, recent developments in international investment law, such as the adoption of the UNCITRAL Transparency Rules in 2014, have spurred greater attention to this issue. The 2015 Model BIT incorporates provisions aimed at enhancing transparency in the ISDS process. It requires that all documents submitted to or issued by the arbitral tribunal be made available to the public, subject to the protection of confidential information. Additionally, the Model BIT allows for third-party submissions in the form of amicus curiae briefs, enabling non-disputing parties to contribute to the proceedings and promote a more inclusive and transparent decision-making process [34]

In conclusion, the key features of India's ISDS mechanisms have evolved over time, reflecting the country's changing priorities and experiences with investment disputes. By analyzing these features, it is possible to identify the strengths and weaknesses of India's approach to ISDS and to propose targeted reforms aimed at creating a more balanced and effective system for resolving investment disputes.

CHALLENGES AND CRITICISMS OF INDIA'S ISDS MECHANISMS

The ISDS mechanisms in India's BITs have been subject to various challenges and criticisms. This section examines four primary issues: the perceived bias against developing countries, inconsistency and unpredictability in awards, the lack of appellate mechanisms, and the cost and duration of ISDS proceedings.

4.1. Perceived Bias against Developing Countries

One of the most significant criticisms of India's ISDS mechanisms is the perceived bias against developing countries, including India. Critics argue that the system disproportionately favours developed countries and their investors, leading to unfair outcomes in disputes involving developing nations.

This perceived bias can be attributed to various factors. First, the majority of arbitrators in ISDS proceedings originate from developed countries, potentially leading to a lack of diversity and impartiality in decision-making [35][7]. Second, developing countries may lack the necessary resources and expertise to effectively participate in ISDS proceedings, placing them at a disadvantage compared to their developed counterparts. Third, the substantive provisions of BITs, including the standards of treatment and protection, may be interpreted in a manner that disproportionately benefits investors from developed countries [36].

To address this perceived bias, India's 2015 Model BIT introduced provisions aimed at ensuring a more balanced approach to ISDS. For example, the Model BIT includes more precise definitions of key terms, such as "investment" and "investor," and emphasizes the host state's right to regulate in the public interest [37][3]. These changes are expected to promote a more equitable ISDS system that better serves the interests of both developed and developing countries.

4.2. Inconsistency and Unpredictability in Awards

Another major challenge facing India's ISDS mechanisms is the inconsistency and unpredictability in arbitral awards [38]. Critics argue that the lack of a coherent and predictable jurisprudence in ISDS undermines the credibility and legitimacy of the system [39][6].

The inconsistency in awards can be attributed to several factors, including the absence of a centralized body of jurisprudence, the reliance on ad hoc tribunals, and the varying interpretations of key treaty provisions by different arbitrators [40][9]. In response to these concerns, India's 2015 Model BIT includes more detailed provisions on substantive standards and procedural rules, which aim to provide greater clarity and consistency in the interpretation and application of the treaty.

4.3. Lack of Appellate Mechanisms

The absence of appellate mechanisms in India's ISDS mechanisms has also attracted significant criticism. The current system allows for the review of arbitral awards only on limited grounds, such as procedural irregularities or jurisdictional errors (ICSID Convention, Article 52). As a result, there is no mechanism for addressing substantive errors in the interpretation or application of the law, which can lead to inconsistent and unpredictable outcomes.

To address this issue, several proposals have been made to establish an appellate mechanism for ISDS, including a proposal by the United Nations Conference on Trade and Development (UNCTAD) for the creation of a multilateral appellate body (UNCTAD 2015). The introduction of an appellate mechanism could enhance the consistency, coherence, and legitimacy of the ISDS system by providing a means to correct substantive errors in arbitral awards and fostering the development of a more predictable body of jurisprudence [41]. However, such a mechanism has yet to be adopted in India's BITs or its 2015 Model BIT.

4.4. Cost and Duration of ISDS Proceedings

The cost and duration of ISDS proceedings constitute another significant challenge for India's ISDS mechanisms (UNCTAD 2013). ISDS proceedings can be expensive, with legal and administrative fees often exceeding millions of dollars [42]. Additionally, the duration of ISDS proceedings can be lengthy, with cases typically lasting several years (UNCTAD 2013). These factors may deter potential claimants, particularly small and medium-sized enterprises, from pursuing ISDS claims and undermine the accessibility and effectiveness of the system [43].

Several measures have been proposed to address the cost and duration of ISDS proceedings. For example, the adoption of expedited procedures, fixed timelines, and the use of alternative dispute resolution mechanisms, such as mediation and conciliation, could help reduce the time and cost associated with ISDS. Additionally, the establishment of a permanent investment court, as proposed by the European Union in its recent trade and investment agreements, could potentially lead to a more efficient and cost-effective dispute resolution process (European Commission

2015). However, these measures have not yet been widely adopted in India's BITs or its 2015 Model BIT.

In conclusion, the challenges and criticisms surrounding India's ISDS mechanisms are multifaceted and complex, encompassing issues of perceived bias, inconsistency and unpredictability in awards, the lack of appellate mechanisms, and the cost and duration of ISDS proceedings. Addressing these concerns is crucial for enhancing the credibility, legitimacy, and effectiveness of the ISDS system in protecting foreign investments and fostering a stable investment climate in India. Future policy efforts should focus on implementing targeted reforms, such as strengthening domestic legal frameworks, promoting alternative dispute resolution mechanisms, establishing an appellate mechanism, and enhancing transparency and stakeholder participation in the ISDS process.

POTENTIAL AREAS OF REFORM FOR INDIA'S ISDS MECHANISMS

The challenges and criticisms associated with India's ISDS mechanisms have prompted discussions on potential areas of reform to address these concerns and improve the overall effectiveness of the system. This section explores four key areas of reform: strengthening domestic legal frameworks, promoting alternative dispute resolution, establishing an appellate mechanism, and enhancing transparency and stakeholder participation.

5.1. Strengthening Domestic Legal Frameworks

One of the primary areas of reform for India's ISDS mechanisms is the strengthening of domestic legal frameworks for foreign investment disputes [44]. By improving the domestic legal system, India can provide foreign investors with greater confidence in the fairness, predictability, and efficiency of the domestic dispute resolution process, potentially reducing the reliance on ISDS as a means of resolving investment disputes.

This reform could involve the development of specialized courts or tribunals for foreign investment disputes, staffed with judges experienced in international investment law [45][31]. These specialized courts or tribunals would have the jurisdiction to hear cases arising from BITs, ensuring a more consistent and coherent application of international investment law principles.

Additionally, India should focus on improving the overall efficiency and effectiveness of its judicial system, addressing issues such as judicial backlog, lengthy delays, and procedural inefficiencies (World Bank 2017). This can be achieved through procedural reforms, capacity building, and investment in technological infrastructure to streamline the dispute resolution process.

5.2. Promoting Alternative Dispute Resolution

Another area of reform involves promoting the use of alternative dispute resolution (ADR) mechanisms in investment disputes, such as mediation and conciliation (UNCTAD 2016). ADR mechanisms can offer a more cost-effective, timely, and flexible approach to dispute resolution compared to traditional ISDS arbitration, potentially reducing the burden on both investors and host states.

India could encourage the use of ADR by incorporating provisions in its BITs that require parties to attempt mediation or conciliation before initiating arbitration proceedings [46]. Moreover, the Indian government can actively promote ADR by providing training and support for mediators and conciliators, establishing ADR centers equipped to handle investment disputes, and raising awareness of the benefits of ADR among investors and other stakeholders.

5.3. Establishing an Appellate Mechanism

The establishment of an appellate mechanism for ISDS decisions is another potential reform that could address concerns about inconsistency and unpredictability in arbitral awards. An appellate mechanism would allow for the review of arbitral decisions on matters of law, ensuring a more consistent application of international investment law principles and enhancing the overall legitimacy of the ISDS system.

India could advocate for the creation of a multilateral appellate mechanism for ISDS disputes, potentially in collaboration with other countries facing similar concerns about the current ISDS system. This appellate body could be modelled after existing appellate mechanisms, such as the World Trade Organization's Appellate Body, and would have the authority to review and potentially overturn or modify arbitral decisions.

5.4. Enhancing Transparency and Stakeholder Participation

Finally, enhancing transparency and stakeholder participation in the ISDS process is another important area of reform for India's ISDS mechanisms (UNCTAD 2013). By increasing transparency in the ISDS process, India can ensure greater accountability and public scrutiny of arbitral decisions, which in turn can contribute to the overall legitimacy of the system.

To enhance transparency, India could adopt provisions in its BITs that require the publication of key documents related to ISDS proceedings, such as pleadings, submissions, and arbitral awards [47]. Additionally, India could support the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules for ISDS arbitrations, which provide a comprehensive framework for transparency in ISDS proceedings (UNCITRAL 2014).

In terms of stakeholder participation, India could introduce provisions in its BITs that allow for the submission of amicus curiae briefs by non-disputing parties, such as non-governmental organizations, affected communities, and industry associations. This would enable a broader range

of perspectives to be considered during the ISDS process, potentially contributing to more balanced and equitable outcomes.

CONCLUSION

India's approach to ISDS mechanisms has evolved considerably over the past three decades, reflecting its growing importance as an investment destination and its need to balance investor protections with its own policy objectives. By addressing the challenges and criticisms of its current ISDS mechanisms and implementing targeted reforms, India can create a more stable and predictable investment environment for foreign investors.

By addressing these potential areas of reform, India can create a more effective, fair, and balanced ISDS system that better serves the interests of both foreign investors and the host state. The reforms discussed in this paper—strengthening domestic legal frameworks, promoting alternative dispute resolution, establishing an appellate mechanism, and enhancing transparency and stakeholder participation—can contribute to addressing the challenges and criticisms associated with India's current ISDS mechanisms. By implementing these reforms, India can foster a more stable and predictable investment environment for foreign investors, ultimately promoting economic growth and development.

In conclusion, the potential areas of reform for India's ISDS mechanisms—strengthening domestic legal frameworks, promoting alternative dispute resolution, establishing an appellate mechanism, and enhancing transparency and stakeholder participation—can contribute to a more effective, legitimate, and balanced ISDS system. By addressing the challenges and criticisms associated with its current ISDS mechanisms, India can create a more stable and predictable investment environment for foreign investors, ultimately fostering greater economic growth and development.

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