

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES
[ISSN 2581-5369]

Volume 9 | Issue 3

2026

© 2026 International Journal of Law Management & Humanities

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for free and open access by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of any suggestions or complaints, kindly contact support@vidhiaagaz.com.

To submit your Manuscript for Publication in the International Journal of Law Management & Humanities, kindly email your Manuscript to submission@ijlmh.com.

Investment Treaty Arbitration and India's Evolving Position: Balancing Regulatory Sovereignty and Investor Protection

SANJANA BHANDARKAR* AND DHRUV DARUKA**

ABSTRACT

India's engagement with international investment law reflects a persistent tension between its ambition to attract foreign direct investment and its determination to preserve regulatory sovereignty over fiscal, environmental and developmental policy. The escalating arbitral proceedings of the second decade of this century, most notably White Industries, Vodafone and Cairn, exposed the structural weaknesses of the first-generation 1993 bilateral investment treaty architecture. This article argues that although the 2015 Indian Model BIT correctly identified those weaknesses, it adopted an over-compensatory defensive posture that prioritises arbitral insulation at the expense of investment credibility, potentially discouraging the very quality and volume of foreign direct investment that a rules-based treaty regime is intended to encourage. Drawing on regulatory sovereignty theory, investment protection theory and the legitimacy critique of investor-State dispute settlement, and on a comparative analysis of the treaty practice of Singapore, the EU-Canada Comprehensive Economic and Trade Agreement and the Canada-United States-Mexico Agreement, the article proposes a third-generation treaty model for India. That model combines a proportionality-reviewed fair and equitable treatment standard, a reformed and tiered local remedies mechanism, environmental, social and governance conditionality, and institutionalised dispute settlement, and it sets out a phased policy roadmap for its adoption.

Keywords: *Investment treaty arbitration, bilateral investment treaties, investor-State dispute settlement, Indian Model BIT, regulatory sovereignty, fair and equitable treatment, ESG conditionality, investment court system.*

I. INTRODUCTION

India's interactions with international investment law have always been complex. As a State that has simultaneously positioned itself as a welcoming destination for foreign direct investment and a firm guardian of its developmental regulatory sovereignty, the investor-State dispute

* Author is a student at Symbiosis Law School, Pune, India.

** Author is a student at Symbiosis Law School, Pune, India.

settlement (ISDS) architecture woven into its bilateral investment treaties (BITs) has been a recurring source of constitutional concern and doctrinal uncertainty. A series of escalating, high-stakes arbitral proceedings in the second decade of this century, most significantly *White Industries Australia Limited v. Republic of India*,¹ crystallised that tension. The disputes in *Vodafone International Holdings BV v. Republic of India*² and *Cairn Energy PLC v. Republic of India*³ sharpened it further, exposing the basic conflict between India's desire to remain an attractive destination for investment and its wish to retain unconstrained powers to regulate fiscal, environmental and developmental policy.

This article contends that the structural flaws of the first-generation 1993 BIT architecture were rightly identified in the wake of these landmark cases, but that the Indian Model BIT 2015 took a defensive stance which over-compensates, sacrificing the credibility of investment protection in order to achieve arbitral insulation. India's longer-term development goals may thereby be compromised, paradoxically, by discouraging the quality and volume of foreign direct investment that a rules-based treaty regime is supposed to encourage. Several of India's largest inflows of foreign direct investment are in sectors, such as extractives, infrastructure and energy, that depend heavily on treaty protection, and it is precisely in those sectors that a credible BIT architecture is crucial.

The principal contribution of this article is to define a third-generation investment treaty model for India that moves beyond the dichotomy between first-generation BIT maximalism and the defensive treaty nationalism of the 2015 Model.⁴ It recommends a calibrated architecture drawing on the Investment Court System of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), on Singapore's investment treaty network and on the Canada-United States-Mexico Agreement (CUSMA) framework, and combining a proportionality-reviewed fair and equitable treatment (FET) standard, reform of the local remedies mechanism, environmental, social and governance (ESG) conditionality, and institutionalised dispute settlement. This is not a compromise but a doctrinal synthesis that only a few advanced treaty negotiators have begun to approximate.

¹ *White Industries Australia Ltd v Republic of India* (Final Award, 30 November 2011) UNCITRAL [hereinafter *White Industries*].

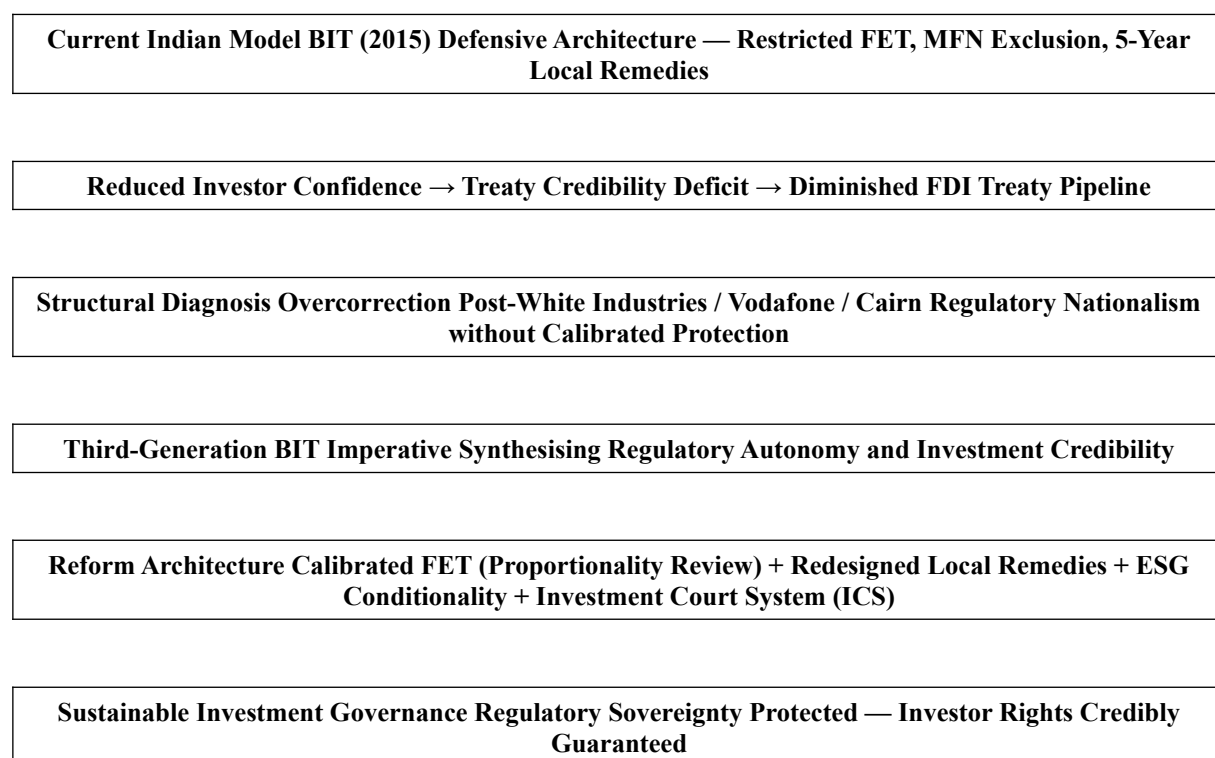
² *Vodafone International Holdings BV v Republic of India* (Final Award, 25 September 2020) PCA Case No 2016-35.

³ *Cairn Energy PLC and Cairn UK Holdings Ltd v Republic of India* (Final Award, 21 December 2020) PCA Case No 2016-7.

⁴ Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 *Northwestern Journal of International Law and Business* 1, 5.

The article proceeds as follows. The second part traces the development of India's investment treaty regime within its political and economic context. The third part develops a theoretical framework that combines regulatory sovereignty, investment protection and the legitimacy critique of ISDS. The fourth part offers a doctrinal review of the principal innovations of the 2015 Model BIT. The fifth part undertakes a comparative treaty analysis across four jurisdictions. The sixth part addresses emerging developments, including ESG obligations and the work of UNCITRAL Working Group III. The seventh part outlines a modernised framework for India's future BITs, and the eighth sets out a policy roadmap.

Figure 1: India's investment treaty reform trajectory.



II. HISTORICAL EVOLUTION OF INDIA'S INVESTMENT TREATY REGIME

A. The 1993 Model BIT

The first Model BIT, drafted in 1993 amid the post-liberalisation reforms, reflected the prevailing orthodoxy of investment treaty practice. Inspired by the Washington Consensus and intended to appeal to Western investors, it sought to guarantee the widest possible investor protections. The 1993 Model contained broad FET clauses, comprehensive most-favoured-nation (MFN) provisions and a commitment to international arbitration subject to minimal procedural requirements. India concluded more than eighty BITs on this or a similar template before the full implications of the architecture became apparent. The combination of a wide

MFN scope, the absence of an exhaustion clause and a broadly drafted FET standard created a pathway by which investment claims could reach arbitral tribunals quickly and on expansive grounds.

B. White Industries and the MFN problem

In 2011 the *White Industries* award was issued. White Industries Australia Limited, a mining-equipment company, had earlier obtained an arbitral award of approximately AUD 4 million against Coal India Limited and had then sought for many years to enforce it before the Indian courts. The enforcement process ran to roughly nine years, which the tribunal characterised as a systemic failure to provide effective means of asserting claims and enforcing rights. The central question was whether India had breached its obligations under the India-Australia BIT. The FET clause of that treaty did not expressly guarantee an effective means of asserting claims. The claimant's ingenuity lay in importing that guarantee through the MFN clause: because the India-Kuwait BIT contained a more favourable 'effective means' standard, the claimant argued that the MFN clause extended that standard to the Australian investor. The tribunal accepted this argument and held that India was in breach.⁵ The doctrinal implications were significant. *White Industries* demonstrated how MFN clauses in first-generation BITs enabled treaty shopping, a mechanism capable of importing substantive and procedural protections from across the entire BIT network and thereby rendering India's carefully calibrated bilateral commitments redundant. Indian negotiators came to appreciate that, through MFN, the least demanding protection afforded to any partner State could become the effective floor for India across its global treaty obligations.

C. Vodafone, Cairn and the regulatory backlash

Where *White Industries* revealed the MFN vulnerability, the *Vodafone*⁶ and *Cairn* disputes exposed the reach of arbitral scrutiny over India's exercise of fiscal power. The *Vodafone* dispute arose from the retrospective amendment to the Income-tax Act 1961 effected by the Finance Act 2012, which sought to tax the indirect transfer of shares in Hutchison Telecommunications International Limited, a structure established offshore for tax neutrality. Vodafone International Holdings BV challenged the resulting tax demand of approximately USD 2.2 billion, contending that the retrospective imposition of liability breached the FET provisions of the India-Netherlands BIT, and commenced arbitration accordingly.

⁵ Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 22-45.

⁶ *Técnicas Medioambientales Tecmed SA v United Mexican States* (Award, 29 May 2003) ICSID Case No ARB(AF)/00/2 [154].

India invoked the tax carve-out in the BIT, but the tribunal rejected that defence in its award of September 2020, holding that the retrospective tax measure breached the FET standard. The implications were far-reaching: a sovereign's power retroactively to determine tax obligations was subjected to a treaty commitment incurred years earlier under a bilateral investment agreement.

This trend was magnified in the *Cairn Energy* award, rendered by a tribunal constituted under the auspices of the Permanent Court of Arbitration in December 2020, which held India liable in the sum of approximately USD 1.2 billion in response to a tax assessment of some USD 1.4 billion arising from an internal corporate restructuring by Cairn.⁷ It became the highest ISDS award against India and led to multi-jurisdictional enforcement action in France, the Netherlands and Canada. India's ultimate response was to withdraw the retrospective taxation provisions and refund the amounts collected under the impugned assessments through the Finance Act 2021, thereby accepting the substance of the tribunals' position.

Taken together, the three disputes illustrated a 'legitimacy crisis' for ISDS from the perspective of host States, since international arbitral tribunals were able to constrain fiscal, regulatory and judicial action that host States regarded as falling within the indispensable core of domestic sovereignty, an outcome that India had neither anticipated nor sought to resist through the treaty negotiation process.

Table 1: Major arbitral decisions shaping India's bilateral investment treaty policy.

Case	Issue	Tribunal Holding	Policy Consequence for India
White Industries v India (2011)	Enforcement delay of ICC award through Indian courts; MFN clause invoked to import effective means provision from India-Kuwait BIT	Tribunal upheld jurisdiction via MFN; India breached effective means obligation through decade-long judicial delay	Triggered wholesale review of BIT program; exposed MFN procedural importation risk; catalysed 2015 Model BIT revision
Vodafone v India (2016)	Retrospective tax legislation imposing capital gains liability on offshore share transfer; breach of FET and legitimate expectations	Permanent Court of Arbitration ruled retrospective taxation breached FET standard under India-Netherlands BIT	India's Finance Act 2012 retroactive amendment challenged; highlighted regulatory overreach risk in tax measures
Cairn Energy v India (2020)	Retrospective tax assessment of USD 1.4 billion on internal restructuring; FET claim under India-UK BIT	PCA tribunal awarded USD 1.2 billion; India's challenge to enforcement across multiple jurisdictions failed in	Largest award against India; forced legislative amendment (Finance Act 2021) repealing retrospective tax;

⁷ Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 152-170; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013) 201.

Case	Issue	Tribunal Holding	Policy Consequence for India
		France and Netherlands	demonstrated enforcement power of ISDS
Philip Morris v Uruguay (2016)	Plain packaging regulations challenged as expropriation and FET breach	ICSID tribunal upheld Uruguay's regulatory authority; proportionality review validated health measures	Confirmed legitimate expectations doctrine requires investor awareness of regulatory environment; endorsed regulatory autonomy for public health
Tecmed v Mexico (2003)	Non-renewal of waste facility permit challenged as FET breach	ICSID awarded damages; introduced highly expansive legitimate expectations doctrine	Expansive FET interpretation criticised by Schill and Sornarajah; influenced India to adopt closed-list FET
Salini v Morocco (2001)	Jurisdiction over road construction contract; definition of investment	Tribunal formulated four-factor Salini test for qualifying investment	India's 2015 Model BIT adopts an enterprise-based definition of investment avoiding Salini expansionism
CMS v Argentina (2005)	Emergency economic measures challenged; FET and non-impairment clauses invoked	Tribunal rejected necessity defence; Argentina liable for USD 133 million	Demonstrated vulnerability of regulatory emergency measures; strengthened India's demand for express carve-outs in BITs
Parkerings v Lithuania (2007)	Regulatory change in historic district; legitimate expectations under FET	Tribunal held investor cannot claim legitimate expectations where host state regulation was in a state of evolution	Supports India's position that regulatory context must inform legitimate expectations; used in defensive pleadings

III. THEORETICAL FRAMEWORK

A. Regulatory sovereignty theory

The theoretical literature on regulatory sovereignty in international investment law has grown substantially alongside the expansion of ISDS jurisprudence. Muthucumaraswamy Sornarajah has advanced the most forceful objection, arguing that the very foundation of investment treaty arbitration, namely the protection of foreign capital from the regulatory interventions of the host State, systematically privileges capital over the legitimate developmental prerogatives of the host State.⁸

⁸ Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 263-265.

This view finds support in the early ISDS jurisprudence. Awards such as *Tecmed v. Mexico*⁹ articulated the principle of a 'stable and predictable' regulatory environment as a quasi-constitutional requirement imposed on host States but not on investors. Sornarajah, Van Harten and Paparinskis have each observed that such formulations were created by investment arbitrators without any standing institutional mandate, on the basis of treaties drafted at a level of generality that could not plausibly have been intended to produce the substantive effects attributed to them.¹⁰

B. Investment protection theory

The investment protection school, to which Stephan Schill's comparative work and the normative analysis of Andrew Newcombe¹¹ belong, contends that the ISDS system performs functions in the international economic order that domestic remedies cannot readily replace.

The Indian Model BIT 2015 adopts the international minimum standard approach to FET in a form drawn even more narrowly than the *Neer* formulation, a position that, as Schill has observed, is more defensive than doctrinally required.

C. The legitimacy crisis of ISDS

The legitimacy critique advanced by Gus Van Harten is threefold. It targets the procedural structure of ad hoc arbitration, in which arbitrators are selected on a case-by-case basis, often by parties with structural interests in the continued expansion of investor protection, and lack institutional accountability; the absence of binding precedent and appellate review; and the insulation of investment arbitration from public scrutiny.

India's response to these concerns in the 2015 Model BIT was largely defensive, limiting access rather than addressing the structural causes of arbitral bias. While analytically coherent, that response is not sufficiently strategic. The constructive alternative is not to retreat from jurisdiction but to reform institutions, as the UNCITRAL Working Group III process seeks to do. India's stance of defensive nationalism is compounded by its limited participation in the leading reform initiatives: it is not a party to CETA, nor has it taken a leading role in the ISDS reform work of Working Group III.

⁹ José E Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law 2011) 56.

¹⁰ *Parkerings-Compagniet AS v Republic of Lithuania* (Award, 11 September 2007) ICSID Case No ARB/05/8 [332].

¹¹ *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (Decision on Jurisdiction, 23 July 2001) ICSID Case No ARB/00/4 [52].

IV. DOCTRINAL ANALYSIS OF THE 2015 INDIAN MODEL BIT

A. Fair and equitable treatment

The reconfiguration of the FET standard is the most significant doctrinal development of the 2015 Model BIT. The conduct listed in Article 3 is exhaustive and closed, departing from the open-ended minimum standard of customary international law. Each enumerated obligation is accompanied by a qualification that preserves the host State's right to regulate.¹²

This architecture is deliberate and reactive to the expansionism associated with the *Tecmed* line of reasoning. At the level of the treaty text, India's negotiators regarded the *Tecmed* tribunal's insistence that a State should not affect the basic expectations taken into account by the investor at the time of the investment as incompatible with a developmental State.

The doctrinal response, however, has its own difficulties. The award in *Parkerings v. Lithuania*,¹³ where the regulatory environment of the host State was in evident flux, illustrates how India might have preserved regulatory control while affording credible investor protection through proportionality analysis rather than categorical exclusion. India has instead adopted a position that its treaty partners have struggled to accept, and the categorical exclusion is one reason why India's BIT pipeline has contracted markedly since 2015, with only a small number of new BITs concluded.

B. Most-favoured-nation clauses

The 2015 Model BIT's exclusion of procedural rights from the scope of the MFN clause is a direct legislative reaction to *White Industries*. Article 4 confines the operation of MFN to substantive treatment standards and expressly excludes dispute-resolution mechanisms and rights found in other international agreements. This drafting closes the specific arbitral route on which *White Industries* relied, though at a systemic price.

The difficulty is that MFN clauses serve valid functions in investment treaty architecture beyond the importation of procedural rights. They guard against competitive discrimination between treaty partners, promote regulatory uniformity and reduce the need for case-by-case national treatment analysis. The 2015 approach may overlook a more proportionate response, such as the targeted carve-outs used in the Singapore-Australia Free Trade Agreement, and may therefore be disproportionate to the problem it seeks to solve.

¹² ASEAN Comprehensive Investment Agreement (adopted 26 February 2009, entered into force 29 March 2012) art 11(4).

¹³ Comprehensive Economic and Trade Agreement (EU-Canada) [2017] OJ L11/23, art 8.27 [hereinafter CETA].

C. Exhaustion of local remedies

Under Article 15 of the Model BIT 2015, an investor must pursue domestic proceedings, including final adjudication before the Supreme Court of India, before initiating international arbitration, and must do so within a period of five years. This provision is unusual among modern treaties. The exhaustion requirement reflects India's emphasis on the primacy of local remedies, consistent with the Calvo doctrine's insistence that local remedies be pursued before international claims are made. The five-year time frame, however, does not reflect the realities of Indian judicial timelines, as the delay in *White Industries* itself demonstrated.

The provision thus poses a structural paradox: a remedial system whose deficiencies were themselves found to constitute a treaty breach must be exhausted before access is available to the international mechanism designed to remedy that breach. As Martins Paparinskis has noted, the 2015 Model offers no guarantee of judicial adequacy within the specified time frame, such as the exhaustion requirement under the minimum standard of international law would demand.¹⁴

D. Definition of investment and investor

The 2015 Model BIT introduces an enterprise-oriented definition of investment under which qualifying investments must display a substantive connection to the host State economy, evidenced by a contribution to development, the creation of employment or the generation of technical knowledge. The enterprise-based definition addresses the use of shell-company structures, a pattern examined in *Salini v. Morocco*¹⁵ and central to the *Vodafone* dispute.

The definition of investor requires that the individual or entity have substantial business operations in the territory of the treaty partner, a requirement directly responsive to the *Vodafone* structure. Although defensible in principle, critics observe that the enterprise definition may generate definitional uncertainty, particularly for holding-company structures that are commercially customary but may not satisfy the substantive connection test on a strict construction.

V. COMPARATIVE TREATY ANALYSIS

A. Singapore's investment treaty architecture

Singapore's investment treaty programme exemplifies calibrated liberalism, retaining substantive protections for investors within a framework that deliberately preserves regulatory

¹⁴ Netherlands Model Bilateral Investment Treaty 2019, art 7 (Corporate Social Responsibility).

¹⁵ Howard Mann and others, *IISD Model International Agreement on Investment for Sustainable Development* (International Institute for Sustainable Development 2005).

flexibility. Singapore's BITs and investment chapters feature FET clauses that protect legitimate expectations while expressly retaining the right to regulate in the public interest. The ASEAN Comprehensive Investment Agreement (ACIA), to which Singapore is a party, illustrates the approach through a savings provision confirming the host State's right to adopt regulatory measures for legitimate public welfare purposes such as health, safety and the environment.¹⁶

Singapore has also developed institutional dispute-settlement facilities, including the Investment Arbitration Rules of the Singapore International Arbitration Centre and, more recently, the Singapore International Commercial Court, both tailored to investor-State disputes and internationally credible. This treaty architecture has helped preserve investment credibility, as evidenced by the substantial stock of foreign direct investment that Singapore has attracted.

B. CETA and the Investment Court System

The CETA Investment Court System (ICS) represents the most significant structural change to investment treaty dispute settlement since the 1965 Washington Convention. The ICS addresses the structural legitimacy concerns identified by Van Harten through a distinctive institutional design: standing appointments of adjudicators to fixed terms, standing procedural rules, a code of conduct and an appellate tribunal.¹⁷

Article 8.10 of CETA also employs a closed-list approach, but one drafted more finely than the Indian Model of 2015. It expressly recognises legitimate expectations arising from specific representations made by a host State, and affirms that the right to regulate is preserved through the general exceptions in Article 28.3. Together, the ICS and the CETA FET standard offer the most advanced bilateral model reconciling investor protection with regulatory autonomy.

C. Canada and the CUSMA framework

The investment chapter of CUSMA represents a different line of development, driven largely by the United States' objective of limiting ISDS exposure rather than reforming it institutionally. As the successor to the North American Free Trade Agreement, CUSMA severely curtails investor-State arbitration between Canada and the United States, confining it to a narrow set of claims. The framework is instructive for India not as a model to be emulated but as a demonstration that major capital exporters have come to tolerate substantial limitations on ISDS in order to sustain treaty relationships with partners that assert significant regulatory prerogatives.

¹⁶ UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Note by the Secretariat' (5 September 2018) UN Doc A/CN.9/WG.III/WP.149.

¹⁷ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (Award, 8 July 2016) ICSID Case No ARB/10/7 [306]-[399].

D. Lessons for India

The comparative analysis yields several doctrinal lessons. First, the closed-list FET approach used in both India and CETA is more widely accepted than its Indian critics allow; it is the rigidity of India's implementation, and its lack of proportionality review, rather than the closed list as such, that sets the Indian model apart. Second, the ICS model shows that institutional reform, rather than jurisdictional exclusion, offers a viable means of addressing legitimacy concerns. Third, Singapore's experience demonstrates that investor protection and regulatory flexibility are compatible within a single framework, provided that the framework remains credible to investors.

Table 2: Comparative investment treaty framework: India, Singapore, CETA and CUSMA.

Criterion	India (2015)	Singapore	CETA (EU-Canada)	CUSMA (Canada)
FET Standard	Closed list; no autonomous FET; linked to customary international law minimum standard	Fair and equitable treatment with legitimate expectations protection; ASEAN-style carve-outs	Exhaustive closed list; explicit prohibition on expansive interpretation; Investment Court System	Closed list aligned with NAFTA Art. 1105; minimum standard of treatment only
MFN Clause	Excluded; no procedural importation through MFN	Included with carve-outs for preferential trade agreements	Included; expressly excludes procedural rights importation	Included with broad exceptions for prudential measures
Local Remedies	Mandatory 5-year exhaustion of domestic remedies before ISDS	Cooling-off period; no mandatory exhaustion requirement	No mandatory exhaustion; fork-in-the-road clause applies	No mandatory exhaustion; mediation encouraged
ISDS Mechanism	Ad hoc arbitration; UNCITRAL Rules; ICSID excluded	SIAC Investment Arbitration; ICSID available	Investment Court System with permanent tribunal and appellate body	CUSMA Chapter 14; investor-state access preserved for legacy NAFTA claims
ESG Provisions	No explicit ESG conditionality; general exceptions for health and environment	Emerging; sustainability chapter in newer FTAs; no investor obligation mechanism	Comprehensive sustainable development chapter; investor obligations discussed	Labour and environment chapters; no mandatory investor ESG compliance

VI. EMERGING DEVELOPMENTS IN INTERNATIONAL INVESTMENT LAW

A. ESG obligations

The embedding of environmental, social and governance requirements into investment treaty law is the most notable doctrinal shift in international investment law since the advent of ISDS

in the 1990s. The European Union's new-generation free trade agreements and the Netherlands Model BIT 2019 contain affirmative obligations directed at investors, such as requirements to respect human rights, to exercise environmental due diligence and to comply with anti-corruption standards, that condition treaty protection. The Netherlands Model BIT is particularly notable in making access to ISDS dependent on the investor's adherence to the UN Guiding Principles on Business and Human Rights.¹⁸

The Indian Model BIT 2015 provides general exceptions for measures taken to protect human health or safety and the environment, but it lacks affirmative ESG conditionality within its investment protection regime. This is a significant omission, both because ESG conditionality would add political legitimacy to India's treaty commitments in domestic public discourse and because its absence leaves India outside the emerging global norm that will shape the next generation of investment agreements.

B. Sustainable investment treaties

Developed by the United Nations Conference on Trade and Development, the International Institute for Sustainable Development and a number of academic institutions, the sustainable investment treaty movement proposes that sustainability objectives be embodied as binding treaty obligations rather than as aspirational preambular statements. India's engagement with these instruments has been limited and largely peripheral, focused on investor obligations rather than investor rights and placing sustainable development obligations principally on the investor.¹⁹

C. UNCITRAL Working Group III reforms

Since 2017 UNCITRAL Working Group III has worked systematically to reform ISDS in response to concerns about the structural legitimacy of arbitration, its consistency and predictability and its cost.²⁰ India has attended the sessions of Working Group III but has not been a leading force in the reform process. Given its extensive experience as a respondent State, it would be desirable, from both the national interest and the systemic reform perspectives, for India to engage more actively, including through advocacy for mandatory proportionality review and ESG conditionality.

¹⁸ Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 3-15.

¹⁹ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic* (Award, 8 December 2016) ICSID Case No ARB/07/26 [1143]-[1221].

²⁰ Sornarajah (n 5) 289-295.

VII. A MODERNISED FRAMEWORK FOR INDIA'S NEXT-GENERATION BITS

A. Reconstructing FET

The first pillar of the third-generation framework is a redefined FET standard that preserves regulatory sovereignty by adopting proportionality review in place of categorical exclusion. The proposed formulation would resemble the 2015 Model in retaining a closed list of FET obligations but would add an explicit proportionality assessment. That assessment would test whether a measure pursues a legitimate objective, whether it is rationally connected to that objective, whether it is the least investment-restrictive means reasonably available, and whether the ratio of public benefit to investor harm is proportionate. This approach is consistent with the reasoning of the *Philip Morris v. Uruguay* tribunal²¹ and with the scholarship of Schill²² and Paparinskis on proportionality in investment law.

B. Reforming local remedies

The five-year exhaustion requirement should be replaced with a tiered mechanism comprising three stages: a mandatory six-month period of direct negotiation between the investor and the responsible State authority; a twelve-month domestic mediation or alternative dispute resolution stage conducted through an administrative process subject to binding time limits; and a final twelve-month stage of domestic judicial review of administrative decisions amenable to public law review. If these stages were mandatory, the pre-arbitration process would occupy no more than thirty months, sufficient to allow genuine domestic resolution while avoiding the prolonged delay seen in *White Industries*. Express exceptions would apply in cases of manifest futility and denial of justice.

C. Integrating ESG conditionality

India's next-generation BITS should incorporate ESG conditionality at two stages. At the level of investor qualification, qualifying investors should be required to demonstrate adherence to the core labour standards of the International Labour Organization, to the environmental due diligence obligations reflected in the OECD Guidelines for Multinational Enterprises, and to anti-corruption commitments under the United Nations Convention against Corruption. At the level of treaty protection, an investor's ESG failures should be capable of being raised as a counterclaim or as a defence, rather than triggering automatic denial of protection, in line with

²¹ *White Industries* (n 1).

²² *Vodafone* (n 2).

awards such as *Urbaser v. Argentina*.²³ This graduated approach preserves the structure of investment protection while providing genuine accountability for investor conduct.

D. Investment court model

The structural legitimacy of investor-State dispute settlement in India's next-generation treaties requires institutional reform that transcends ad hoc arbitration. The proposed India-Specific Investment Tribunal (ISIT) would be a permanent tribunal established within each major bilateral treaty, composed of members appointed by the treaty parties to fixed, non-renewable terms. The ISIT would operate under procedures modelled on the CETA ICS, adapted to reflect India's preference for UNCITRAL-based procedures. Consistency across India's treaty network would be secured through an appellate mechanism, which could in due course be linked to the proposed UNCITRAL multilateral investment court.

E. India's relationship with ICSID

India's non-membership of the International Centre for Settlement of Investment Disputes (ICSID), resulting from its non-ratification of the Washington Convention, is a significant institutional lacuna. In India's absence from ICSID, treaty partners have had to rely on UNCITRAL rules and ad hoc arbitration for investment disputes. Sornarajah and others have criticised ICSID as an institution aligned with the Washington Consensus,²⁴ and this criticism informs Indian scepticism; nonetheless, accession to the ICSID Additional Facility Rules, which are available to non-contracting States, could serve as an interim step towards fuller engagement.

VIII. POLICY ROADMAP

A. Short-term reforms

In the short term, India should revise the local remedies exhaustion requirement of the 2015 Model BIT within a period of twenty-four months, adopting the tiered thirty-month mechanism proposed above. At the same time, India should issue official interpretive guidance on the closed-list FET provisions, following the model of the interpretive notes of the NAFTA parties, in order to clarify the treaty text and signal its credibility to prospective partners. India should also move from observer to active participant in UNCITRAL Working Group III, advancing its own reform proposals.

²³ *Cairn Energy* (n 3).

²⁴ Schill (n 18).

B. Medium-term reforms

In the medium term, and within a horizon of three to five years, India should negotiate next-generation BITs, beginning with strategically important partners such as the European Union, the United Kingdom and the United States, incorporating the complete third-generation framework: a reconstructed FET standard with proportionality review, tiered local remedies, ESG conditionality and the India-Specific Investment Tribunal model. India should also accede to the ICSID Additional Facility Rules in order to widen the institutional choices available to treaty partners. A formal mechanism for the review and possible renegotiation of existing BITs on third-generation terms should be established under the joint administration of the Ministry of Finance and the Ministry of Commerce.

C. Long-term institutional reforms

In the long term, over a horizon of roughly ten years, India should aim to consolidate its treaty network, where feasible, into regional investment agreements on the model of the ASEAN-India investment agreement, and to promote the development of a multilateral investment court under UNCITRAL auspices. India should take a leading role in advancing the third-generation model within the G20 framework, pressing a reform agenda that balances the legitimate interests of capital-exporting and capital-importing States. A systematic review of the interaction between India's domestic investment law, including the Foreign Exchange Management Act and the sectoral FDI regulations, and its treaty obligations is needed to ensure coherence.

IX. CONCLUSION

India's investment treaty experience over the past three decades is a laboratory of investment law in microcosm, displaying the full range of structural tensions between sovereign regulatory authority, investor protection and the institutional frameworks of international dispute resolution. The 2015 Model BIT is a genuine, sophisticated and coordinated response to the crises generated by *White Industries*, *Vodafone* and *Cairn*, but one focused foremost on averting liability rather than on improving investment governance.

The central thesis of this article is that both the first-generation BIT maximalism that produced the vulnerabilities the 2015 Model sought to close, and the defensive treaty nationalism of the present regime, are counterproductive to India's strategic interests. The path forward calls for a third-generation treaty that reconciles regulatory sovereignty with investor protection through proportionality review, institutionalised dispute settlement and ESG conditionality. This is not a utopian proposal: elements of it are already being implemented in CETA, are maturing within

Singapore's treaty network, and are being developed through the UNCITRAL reform programme in Working Group III.

India's next generation of investment agreements, including the prospective India-EU BIT and the investment chapter of a UK-India free trade agreement, will shape both its domestic investment environment and its role in the development of international investment law. A third-generation model that reflects India's commitment to protecting investors while embodying genuine regulatory autonomy would serve the national interest, advance the development agenda and contribute to resolving the unresolved crisis of legitimacy in ISDS reform. India should not miss the opportunity to lead this reform rather than merely to resist the system in its current form.
