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DEMYSTIFYING INVESTMENT TREATY ARBITRATION: CONSENT WITHOUT PRIVACY, INDIA'S EXPERIENCE UNDER BILATERAL INVESTMENT TREATIES AND THE CASE FOR BILATERAL ARBITRATION TREATIES

~ *Bhoomika Sarang & Chinmaya Kalyankar*

Abstract

Investment treaty arbitration, built on the device of a standing offer to arbitrate contained in bilateral investment treaties (BITs), has become the principal means of resolving disputes between foreign investors and host States. This paper examines how that mechanism operates, why it was preferred to the available alternatives, and where its design now strains, particularly in relation to jurisdictional and temporal gateways, legitimacy, consistency, cost and delay. It then turns to India, whose experience of investor–State arbitration, from *White Industries* to *Cairn* and *Vodafone*, prompted the termination of a large part of its treaty network, the adoption of a restrictive 2015 Model BIT and, more recently, a cautious recalibration in the India–UAE and India–Uzbekistan treaties of 2024.

Against that background, the paper critically evaluates Gary Born's proposal for bilateral arbitration treaties (BATs), and its multilateral extension, as a default dispute resolution architecture. It argues that the BIT was an efficacious and innovative device whose reliance on defined categories of 'investor', 'investment' and consenting State leaves a growing class of disputes outside its reach; that a BAT-type default mechanism could widen the forum available to cross-border parties; but that, as Born formulated it, a BAT is a procedural device for private commercial disputes and cannot replace the substantive protections that a BIT supplies. The paper concludes that BATs are best conceived as a complement to, rather than a substitute for, reformed investment treaties, and it identifies the safeguards that any investor–State adaptation of the proposal would require.

Keywords: *Investment treaty arbitration; bilateral investment treaties; investor–State dispute settlement; bilateral arbitration treaties; consent to arbitration; India*

1. Introduction

Few developments in international economic law have been as consequential, or as contested, as the rise of investment treaty arbitration. Where a foreign investor once depended on the diplomatic protection of its home State, or on the courts of the very State of which it complained, a network of bilateral investment treaties (BITs) now allows that investor to bring a claim directly against the host State before an international tribunal. By the end of 2025, UNCTAD had recorded 1,463 publicly known treaty-based investor–State arbitrations.¹ That is more than double the fewer than 600 cases recorded at the end of 2013.² The treaty network that underpins those claims is vast. At the time of writing, UNCTAD’s navigator lists some 2,860 BITs concluded, of which roughly 2,235 are in force, together with some 520 treaties with investment provisions (TIPs), such as free trade agreements containing investment chapters.³

India sits at the centre of this debate. It concluded its first BIT, with the United Kingdom, in 1994 and had signed 83 BITs by 2015.⁴ In 2011 it suffered its first adverse award, in *White Industries*;⁵ it was later held liable in the retrospective-taxation disputes brought by Cairn and Vodafone;^{6,7} and it responded by terminating a large part of its treaty network and adopting a restrictive Model BIT in 2015.⁸ Yet India has since returned to the negotiating table, concluding

¹UNCTAD, ‘Update on investor–State arbitrations: 400 cases filed under investment treaties since 2020’ (UNCTAD Investment Policy Hub, April 2026) <<https://investmentpolicy.unctad.org/news/hub/1793/20260401-update-on-investor-state-arbitrations-400-cases-filed-under-investment-treaties-since-2020>> accessed 7 October 2026. The figure is cumulative to 31 December 2025 and, because some arbitrations are confidential, is a minimum.

²UNCTAD, *Facts and Figures on Investor–State Dispute Settlement Cases* (IIA Issues Note, November 2024) <https://unctad.org/system/files/official-document/diaepcbinf2024d5_en.pdf> accessed 7 October 2026.

³UNCTAD, ‘International Investment Agreements Navigator’ <<https://investmentpolicy.unctad.org/international-investment-agreements>> accessed 7 October 2026. The navigator’s counts are revised periodically; the figures given are those displayed on the date of access.

⁴‘Investment Treaty Arbitration: India’ (*Global Arbitration Review*, Know-How report, current to 31 August 2024) <<https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/india>> accessed 7 October 2026.

⁵*White Industries Australia Ltd v Republic of India* (Final Award) UNCITRAL (30 November 2011).

⁶*Cairn Energy PLC and Cairn UK Holdings Ltd v Republic of India* (Final Award) PCA Case No 2016-7 (21 December 2020).

⁷*Vodafone International Holdings BV v Republic of India* (Award) PCA Case No 2016-35 (25 September 2020).

⁸Government of India, Ministry of Finance (Department of Economic Affairs), *Model Text for the Indian Bilateral Investment Treaty* (2015).†

new BITs with the United Arab Emirates and Uzbekistan in 2024.⁹ Its experience therefore offers a revealing lens through which to examine both the achievements and the deficiencies of the BIT model.

The problem this paper addresses is twofold. First, the BIT mechanism was designed around defined categories: a protected ‘investor’, a protected ‘investment’, a consenting State and a closed list of treaty standards. Disputes falling outside those categories, or outside the temporal limits of the treaty, are left to other fora, and the contest over where the line falls has itself become a major source of jurisdictional litigation. Second, the legitimacy, consistency, cost and duration of investor–State arbitration have attracted sustained criticism, to which many States, India among them, have responded by retreating from the system rather than reforming it. Against this background, Gary Born has proposed a different architecture: bilateral arbitration treaties (BATs), under which two States would agree that international commercial disputes between their nationals are, by default, to be resolved by arbitration.¹⁰ Whether, and in what form, such a mechanism can serve as an alternative to the BIT is the central question explored here.

Section 2 explains the historical and conceptual foundations of investment treaty arbitration. Section 3 examines how the mechanism operates, focusing on consent, the jurisdictional and temporal gateways, and enforcement. Section 4 identifies the principal deficiencies of the contemporary system. Section 5 analyses India’s treaty practice and arbitral experience. Section 6 evaluates the BAT proposal and sets out design principles for any adaptation to the investor–State context. Section 7 concludes.

2. Foundations of Investment Treaty Arbitration

2.1 The Gap in Customary International Law

Customary international law has long protected the property of aliens, but it did so in a way that left the individual investor without standing. Protection depended on diplomatic protection: the investor’s State of nationality could espouse the claim, but was under no duty

⁹Government of India, Ministry of Commerce and Industry (Department of Commerce), ‘Bilateral Investment Treaties’ (Lok Sabha Unstarred Question No 5056, answered 1 April 2025) <<https://www.commerce.gov.in/wp-content/uploads/2025/04/LS-USQ-No.5056-dated.-01.04.2025.pdf>> accessed 7 October 2026.

¹⁰Gary Born, ‘BITs, BATs and Buts: Reflections on International Dispute Resolution’ (2014) *Young Arbitration Review* (March 2014 edition). The essay reproduces an after-dinner speech delivered at the Kiev Arbitration Days in November 2012.† See also ‘Gary Born’s BITs, BATs and Buts in the News’ (*WilmerHale*) <<https://www.wilmerhale.com/en/insights/news/gary-borns-bits-bats-and-buts-in-the-news>> accessed 7 October 2026.

to do so, and once it did, the claim became the State's own.¹¹ Substantive protections against expropriation and denial of justice existed, but international law supplied no general forum in which a private investor could invoke them against a host State.¹² Multilateral solutions were repeatedly proposed but never adopted.¹³ The alternative of litigating in the host State's own courts was unattractive to investors, who doubted the independence of those courts in disputes with the executive, and host States, for their part, were historically reluctant to submit to any external forum.¹⁴

2.2 The Emergence of the Bilateral Investment Treaty

The response that emerged was bilateral. Germany and Pakistan concluded the first BIT in 1959,¹⁵ and the model spread rapidly, each treaty setting out substantive guarantees, such as protection against expropriation without compensation and a promise of fair and equitable treatment, and, increasingly, a mechanism for resolving disputes. The institutional machinery was supplied by the ICSID Convention of 1965,¹⁶ which established a specialised centre for investor–State arbitration but depended, under article 25, on the written consent of both parties.¹⁷ The BIT supplied the missing consent. In *Asian Agricultural Products Ltd v Sri Lanka*, decided in 1990, an ICSID tribunal accepted jurisdiction on the basis of consent contained in a BIT rather than in a contract between investor and State.¹⁸

Although arbitration is today a routine feature of cross-border dispute resolution, the idea that a State would agree in advance to arbitrate disputes with private foreign parties on the international plane was, in the era of the early BITs, a highly innovative approach.¹⁹ The innovation was not merely procedural. It converted what had been a matter of inter-State diplomacy into a legal entitlement that the investor itself could enforce.

¹¹*Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3.

¹²Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995) 58.†

¹³Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 31–64;† Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 55.†

¹⁴Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) ch 1.

¹⁵Treaty for the Promotion and Protection of Investments (Germany–Pakistan) (signed 25 November 1959, entered into force 28 April 1962) 457 UNTS 23.†

¹⁶Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).

¹⁷ICSID Convention (n 17) art 25(1).

¹⁸*Asian Agricultural Products Ltd v Republic of Sri Lanka* (Final Award) ICSID Case No ARB/87/3 (27 June 1990).

¹⁹Dolzer and Schreuer (n 15) ch 1.

2.3 Alternatives Considered and Not Pursued

Other mechanisms for resolving international investment disputes could have been adopted. They ranged from submission of disputes to the courts of the host State, to the creation of a permanent international investment court, to the referral of all investment disputes to an existing international arbitral institution. None was pursued.²⁰ Because States tended to conclude individually tailored BITs rather than join a single multilateral instrument, each treaty defined for itself which disputes were arbitrable and which were not.²¹

Several reasons explain why arbitration prevailed. It offered a neutral forum, decision-makers with appropriate expertise, a degree of procedural flexibility and, through the New York Convention and the ICSID Convention, a realistic prospect of enforcement.²² Those qualities had been proved in international commercial arbitration, and investment treaty arbitration borrowed from that model the efficiency, neutrality and expertise that made it, in the eyes of its designers, the best available mechanism for delivering effective and time-bound results.²³ The borrowing is significant for the argument developed in Section 6: if investment arbitration drew its legitimacy and technique from commercial arbitration, it is at least coherent to ask whether the traffic can run in the opposite direction.

2.4 Growth and Concentration of Disputes

The growth of the system has been striking. The number of known treaty-based cases rose from fewer than 600 at the end of 2013 to 1,332 by the end of 2023, and to 1,463 by the end of 2025.²⁴ Developing countries have faced the majority of claims, often brought by claimants from developed countries, and about one third of all cases involve the energy supply and extractive industries.²⁵ Two features of this pattern matter for what follows. The first is that the disputes that reach arbitration are disproportionately those in which regulatory or contractual decisions of the host State affect high-value, long-term investments, so that investor–State arbitration frequently requires tribunals to review the exercise of public power. The second is that the burden of that review falls unevenly across States, which helps to explain why the

²⁰R Doak Bishop, James Crawford and W Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law International 2005) 10.†

²¹Schill (n 14); Newcombe and Paradell (n 14).

²²Neil Kaplan, ‘Investment Arbitration’s Influence on Practice and Procedure in Commercial Arbitration’ (2013) *Asian Dispute Review* 122.†

²³*Ibid.*

²⁴UNCTAD, *Facts and Figures* (n 2); UNCTAD, ‘Update on investor–State arbitrations’ (n 1).

²⁵UNCTAD, *Facts and Figures* (n 2).

response of some capital-importing countries, India included, has been to reconsider the system altogether.

3. How Arbitration under a BIT Operates

3.1 Arbitration without Privity

The modus operandi of arbitration under a BIT departs from the orthodox model of arbitration. In commercial arbitration, the parties conclude an agreement to arbitrate, usually in a contract, before or after a dispute arises. In investment treaty arbitration, there is typically no such agreement between the investor and the State. Instead, the host State, in the BIT, makes a standing offer to arbitrate disputes with investors of the other contracting State; the investor accepts that offer by commencing arbitration, and the arbitration agreement is perfected at that moment. Jan Paulsson aptly described this phenomenon as ‘arbitration without privity’: the State and the investor have no prior contractual relationship, yet they are bound to arbitrate.²⁶ The consent of the State is a form of constructive consent derived from the text of the treaty, rather than from a negotiated bargain.²⁷

Three consequences follow. First, the scope of the State’s consent is exactly as wide as the treaty makes it. Whether the offer extends to ‘any dispute’ relating to an investment or only to disputes about alleged breaches of the treaty is a question of treaty interpretation, to be resolved under the general rule in article 31 of the Vienna Convention on the Law of Treaties.²⁸ Secondly, because the investor’s acceptance is unilateral, the State cannot, once the BIT is in force, decide which disputes it will arbitrate. Thirdly, the same feature that makes the mechanism so effective for investors makes it politically sensitive for States, which may find themselves before an international tribunal in respect of measures adopted in the exercise of ordinary regulatory powers.

3.2 Jurisdictional Gateways and Temporal Issues

An investor wishing to invoke the treaty must pass through a series of gateways, each of which is defined by the treaty and each of which can be contested. Three are of particular importance to this paper.

²⁶Jan Paulsson, ‘Arbitration Without Privity’ (1995) 10 *ICSID Review—Foreign Investment Law Journal* 232.

²⁷Bishop, Crawford and Reisman (n 21) 10.

²⁸Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31.

Who is an ‘investor’? The treaty protects only investors of the other contracting State. Questions of nationality, corporate structure and, increasingly, the substance of an investor’s links to its State of incorporation determine whether the offer to arbitrate extends to a given claimant. This issue is particularly acute in the Indian context and is considered in Section 5.4.

What is an ‘investment’? BITs conventionally define ‘investment’ by means of a broad, asset-based formula, but tribunals have sometimes imposed additional, implied requirements. In *Salini Costruttori SpA v Morocco*, the tribunal derived criteria from the ICSID Convention, including a contribution, a certain duration and an element of risk.²⁹ Subsequent tribunals have disagreed about whether such criteria are jurisdictional requirements or merely indicia, with the result that the boundary of the protected class of disputes is uncertain. India’s 2015 Model BIT moved away from an asset-based definition to an enterprise-based one, a change that also narrows the scope for definitional disputes of this kind.³⁰

When did the dispute arise, and has the procedure been followed? The temporal dimension of jurisdiction is the most often overlooked, yet it generates a substantial share of preliminary objections. It has at least four facets.

- *Ratione temporis.* A treaty does not, absent a contrary intention, bind a State in relation to acts or facts that took place, or situations that ceased to exist, before its entry into force.³¹ Whether a dispute that crystallised before the treaty’s entry into force, or a continuing course of conduct that straddles it, falls within the offer to arbitrate is a recurrent question in the case law.
- *Survival after termination.* Many BITs contain ‘sunset’ or survival clauses that continue to protect investments made before termination for a stated period, often of ten to twenty years.³² For a State that has terminated a large part of its treaty network, as India has, the practical consequence is that exposure to claims does not end on the date of termination (see Section 5.3).

²⁹*Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (Decision on Jurisdiction) ICSID Case No ARB/00/4 (23 July 2001).

³⁰‘India–UAE BIT 2024: A Measured Approach’ (*HSF Kramer Arbitration Notes*, 2024) <https://www.hsfkramer.com/zh_HK/notes/arbitration/2024-posts/India-UAE-BIT-2024-A-Measured-Approach> accessed 7 October 2026.

³¹VCLT (n 29) art 28.

³²Dolzer and Schreuer (n 15).†

- *Waiting periods and local-remedies requirements.* Many BITs require the parties to attempt amicable settlement for a stated period, or require the investor to litigate in local courts for a period, before resorting to arbitration. Tribunals have differed on whether non-compliance with such a requirement deprives them of jurisdiction or merely renders the claim premature.³³ India's Model BIT takes the strongest position, requiring the exhaustion of local remedies for a minimum period before a claim may be submitted to arbitration (see Section 5.3).
- *Importing more favourable procedures.* Where a treaty contains a most-favoured-nation clause, investors have sought to use it to bypass procedural preconditions by importing more favourable dispute settlement provisions from other treaties. The tribunal in *Maffezini v Spain* accepted that approach,³⁴ whereas the tribunal in *Plama v Bulgaria* rejected it in the absence of clear evidence of the contracting parties' intention.³⁵

The significance of these gateways for this paper is practical and conceptual. Practically, litigation about whether the claimant is an investor, whether it has an investment, and whether the dispute is ripe consumes time and expense before the merits are reached. Conceptually, each gateway reflects the fact that the BIT's offer to arbitrate is a limited one. The original appeal of the BIT, namely that it allowed States to define the precise class of disputes they were prepared to arbitrate, is also the source of its principal limitation: disputes that fall outside the defined categories have no treaty forum.

3.3 Institutional Frameworks and Enforcement

BITs ordinarily give the investor a choice among institutional frameworks, commonly ICSID arbitration, arbitration under the UNCITRAL Arbitration Rules (frequently administered by the Permanent Court of Arbitration) or, less commonly, other institutional rules. The choice matters for enforcement. An ICSID award is binding, is not subject to review by national courts, and must be recognised by every contracting State as if it were a final judgment of its own courts, subject to a limited internal annulment procedure.³⁶ An award rendered under non-

³³*Ethyl Corporation v Government of Canada* (Award on Jurisdiction) UNCITRAL (24 June 1998).†

³⁴*Emilio Agustín Maffezini v Kingdom of Spain* (Decision on Objections to Jurisdiction) ICSID Case No ARB/97/7 (25 January 2000).

³⁵*Plama Consortium Ltd v Republic of Bulgaria* (Decision on Jurisdiction) ICSID Case No ARB/03/24 (8 February 2005).

³⁶ICSID Convention (n 17) arts 52–54.

ICSID rules is a conventional arbitral award: it is subject to set-aside proceedings at the seat of the arbitration and is enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).³⁷

This distinction is of particular importance to India, which has not signed or ratified the ICSID Convention.³⁸ Investor–State arbitrations against India have therefore proceeded under the UNCITRAL Rules, as in *White Industries*,³⁹ *Cairn* and *Vodafone*, and the resulting awards are enforceable through the New York Convention and open to challenge before the courts of the seat.⁴⁰ The seat chosen thereby becomes decisive: India’s challenge to the *Vodafone* award was brought before the courts of Singapore, and its challenge to the *Cairn* award before the Dutch courts.⁴¹

4. Deficiencies in the Contemporary Mechanism

The BIT mechanism was designed in an era when it was both new and, by comparison with the alternatives, attractive. Its subsequent expansion has exposed deficiencies that fall into four groups. The review that follows is necessarily summary, but it is important because each deficiency bears on the question whether a different architecture, such as the BAT, could address it.

4.1 Legitimacy and Regulatory Autonomy

The most fundamental criticism is that investment treaty arbitration entrusts to ad hoc tribunals of private individuals the review of the exercise of sovereign power, without the safeguards (tenure, accountability, public reasoning and appeal) associated with public law adjudication.⁴² The concern is sharpest where the measure under review is a public health, environmental or fiscal measure of general application. States fear that the prospect of a claim, however it might ultimately be decided, deters or distorts regulation, and some scholars have documented a wider

³⁷Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention).

³⁸ICSID, ‘List of Contracting States and Other Signatories of the Convention’ (ICSID).† The current list should be checked on the ICSID website before submission.

³⁹*White Industries* (n 5).

⁴⁰*Cairn* (n 6); *Vodafone* (n 7).

⁴¹‘India moves to resolve tax disputes’ (*Bloomberg Tax*, 2021) <<https://news.bloombergtax.com/daily-tax-report-international/india-moves-to-resolve-tax-disputes>> accessed 7 October 2026.†

⁴²Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007).

‘backlash’ against the system.⁴³ The claim brought by Philip Morris Asia against Australia’s plain-packaging legislation illustrates the anxiety, although the claim itself failed on jurisdictional and admissibility grounds.⁴⁴

The defence of the system should be stated fairly. Brower and Schill have argued that arbitration can strengthen, rather than threaten, the legitimacy of international investment law, because it provides a depoliticised mechanism for the enforcement of investors’ rights and because it can be reformed from within by attention to procedural fairness and transparency.⁴⁵ The disagreement is, in substance, between those who regard the legitimacy deficit as inherent in the design and those who regard it as correctable. As will be seen, India’s own response has been to correct the design through narrower treaty language rather than abandon investor protection altogether.

4.2 Consistency and Predictability

Because tribunals are constituted ad hoc and are not bound by precedent, similar treaty language has produced divergent outcomes. The divergence between *Maffezini* and *Plama* on the reach of most-favoured-nation clauses, and the debate over the *Salini* criteria, discussed above, are paradigm examples.⁴⁶ There is no general appellate body; ICSID annulment is confined to specified procedural grounds, and the review of non-ICSID awards at the seat is similarly limited. A further source of uncertainty has been the interaction of investment treaties with regional legal orders. The Court of Justice of the European Union held in *Achmea* that an arbitration clause in an intra-EU BIT is incompatible with EU law,⁴⁷ and applied similar reasoning to the Energy Charter Treaty in *Komstroy*.⁴⁸ These decisions are of limited direct relevance to India, but they show that the legal validity of a treaty’s arbitration clause is itself capable of being challenged on constitutional grounds, a point relevant to the BAT proposal (Section 6.4).

⁴³M Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017); † Michael Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010). †

⁴⁴*Philip Morris Asia Ltd v The Commonwealth of Australia* (Award on Jurisdiction and Admissibility) PCA Case No 2012-12 (17 December 2015).

⁴⁵Charles N Brower and Stephan W Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2009) 9 *Chicago Journal of International Law* 471.

⁴⁶*Maffezini* (n 35); *Plama* (n 36); *Salini* (n 30).

⁴⁷Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2018:158.

⁴⁸Case C-741/19 *Republic of Moldova v Komstroy LLC* EU:C:2021:655.

4.3 Cost, Delay and the Independence of Arbitrators

Investment arbitrations are expensive and slow, and preliminary jurisdictional objections of the kind described in Section 3.2 add to both. The temporal dimension is not confined to jurisdiction: the duration of proceedings, and of the set-aside and enforcement proceedings that follow an award, can run for years. A related concern is the integrity of the tribunal. Because arbitrators are appointed by the parties and many also act as counsel in other cases, commentators have called for clearer ethical standards and greater transparency in appointments.⁴⁹ These concerns were among those that led UNCITRAL in 2017 to entrust Working Group III with a mandate to identify and address ISDS concerns, including cost, duration, consistency and the independence of decision-makers.⁵⁰

4.4 Transparency

Commercial arbitration is traditionally confidential. That default is poorly suited to disputes in which the public interest is directly engaged, and the international community has responded with the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention).⁵¹ The existence of these instruments demonstrates two things. The first is that the investment arbitration system is capable of reform. The second is that any attempt to transpose a commercial-arbitration default, such as the BAT, to disputes involving States must confront the same transparency question.

4.5 The Reform Response and India's Position

Reform has proceeded on several tracks. UNCITRAL Working Group III has pursued structural reform, including proposals for a standing mechanism and an appellate body, and in 2023 UNCITRAL adopted codes of conduct for arbitrators and judges in international investment disputes and guidelines on mediation.⁵² Individual States have revised their treaty

⁴⁹R Doak Bishop and Margrete Stevens, 'Advocacy and Ethics in International Arbitration: The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy' (2010) 15 *ICCA Congress Series* 391.†

⁵⁰UNCITRAL, *Report of the United Nations Commission on International Trade Law, Fiftieth Session (3–21 July 2017)* UN Doc A/72/17.†

⁵¹United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017), annexed to UNGA Res 69/116 (10 December 2014) UN Doc A/RES/69/116; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective 1 April 2014).†

⁵²'ISDS policy trend round-up for 2023' (HSF Kramer, January 2024) <<https://www.hsfkramer.com/th/notes/publicinternationallaw/2024-01/isds-policy-trend-round-up-for-2023>> accessed 7 October 2026.

templates. India has taken the most radical unilateral course, terminating many of its BITs and adopting a restrictive model. Whether that course is the most effective means of securing the benefits of foreign investment while protecting regulatory space is examined in the next section.

5. India's Treaty Practice and Arbitral Experience

5.1 Evolution of India's Treaty Programme

India's engagement with investment treaties followed its post-1991 economic liberalisation.⁵³ The first BIT, concluded with the United Kingdom in 1994, was followed by a rapid programme of treaty-making; by 2015 India had signed 83 BITs, of which 74 were in force.⁵⁴ For two decades the treaties attracted little controversy, in part because India was rarely a respondent. That changed in the early 2010s, and the cases that followed drove the later reappraisal of the programme.

5.2 The Cases that Shaped India's Policy

White Industries (2011). The first adverse award against India arose from an Australian investor's attempt to enforce an ICC arbitral award against an Indian State-owned enterprise. The claimant complained of prolonged delay in the Indian courts. The tribunal accepted that the delay breached an obligation to provide 'effective means' of asserting claims and enforcing rights, which it imported, through the most-favoured-nation clause in the Australia–India BIT, from the India–Kuwait BIT.⁵⁵ The case is significant for the present paper for two reasons. It shows that the temporal efficiency of a State's own courts can itself engage international responsibility, and it demonstrates the practical power of an MFN clause to expand the substantive and procedural content of a treaty beyond what the contracting States may have anticipated.

The Antrix–Devas disputes. Claims brought by CC/Devas (Mauritius) Ltd and associated investors, and by Deutsche Telekom AG, arose from the annulment of a satellite-spectrum contract between Antrix, a State-owned company, and Devas Multimedia. They required tribunals to consider the scope of the 'essential security' exception in the relevant treaties and

⁵³LS USQ No 5056 (n 9).

⁵⁴GAR (n 4).

⁵⁵*White Industries* (n 5).

the extent to which a State may rely on it to justify the cancellation of a commercial arrangement.⁵⁶

Cairn and Vodafone (2020). The most consequential disputes concerned the retrospective taxation of indirect transfers of Indian assets. In 2012 the Indian Supreme Court held that the Indian tax authorities lacked jurisdiction to tax Vodafone's offshore acquisition of an interest in an Indian telecommunications business.⁵⁷ Parliament responded by amending the Income Tax Act 1961 with retrospective effect through the Finance Act 2012.⁵⁸ Two tribunals subsequently held that the resulting assessments breached India's obligation to accord fair and equitable treatment, Cairn under the India–UK BIT and Vodafone under the India–Netherlands BIT.⁵⁹ India challenged both awards before the courts of the respective seats.

The sequel is instructive. In August 2021 Parliament enacted the Taxation Laws (Amendment) Act 2021, which withdrew demands raised on the strength of the 2012 retrospective amendment for indirect transfers undertaken before 28 May 2012 and provided for refunds, on condition that claimants withdrew proceedings and gave undertakings.⁶⁰ The episode demonstrates both the strengths and the limits of the system: the awards exerted real pressure on India's fiscal policy, yet the final resolution was achieved by domestic legislation and negotiation rather than by judicial enforcement.

5.3 The Termination Wave and the 2015 Model BIT

The government's official explanation is that, following the adoption of the revised Model BIT in 2015, it decided to terminate existing treaties with countries whose initial validity period had expired and to renegotiate them on the basis of the new model.⁶¹ Reported figures for the number of BITs terminated vary considerably, from 58 in earlier accounts to 77 by 2024 in a

⁵⁶*CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Ltd and Telcom Devas Mauritius Ltd v Republic of India* (Award on Jurisdiction and Merits) PCA Case No 2013-09 (25 July 2016);[†] *Deutsche Telekom AG v Republic of India* (Interim Award) PCA Case No 2014-10 (13 December 2017).[†]

⁵⁷*Vodafone International Holdings BV v Union of India* (2012) 6 SCC 613.

⁵⁸Finance Act 2012 (India).

⁵⁹*Cairn* (n 6); *Vodafone* (n 7); 'India moves to resolve tax disputes' (n 42).

⁶⁰Taxation Laws (Amendment) Act 2021 (India); 'India and the Cairn Energy Conundrum: It's a Wrap' (*Mondaq*) <<https://webiis05.mondaq.com/india/energy-law/1147698/india-and-the-cairn-energy-conundrum-its-a-wrap>> accessed 7 October 2026.[†]

⁶¹LS USQ No 5056 (n 9).

recent practitioner survey.⁶² As noted in Section 3.2, termination does not eliminate exposure: survival clauses preserve protection for existing investments for a stated period.

The 2015 Model BIT represents a deliberate recalibration of the balance between investor protection and regulatory autonomy. Four features are central. First, it replaces the asset-based definition of investment with an enterprise-based definition.⁶³ Secondly, it requires an investor to exhaust local remedies for a minimum period, which the Model sets at five years, before submitting a claim to arbitration.⁶⁴ Thirdly, it omits an MFN clause, so removing the mechanism that gave rise to the outcome in *White Industries*.⁶⁵ Fourthly, it replaces the open-ended fair and equitable treatment standard with narrower, more specific obligations and contains broad exceptions for matters such as taxation.⁶⁶

Assessments of the Model have been divided. Critics have argued that India has become too risk-averse and that the Model is unlikely to attract treaty partners or investors;⁶⁷ the government itself has since acknowledged that, after almost ten years, certain clauses required review to strike an overall balance.⁶⁸ The weight of the evidence is that the Model has secured regulatory autonomy at the expense of treaty-making momentum.

5.4 The Definition of ‘Investor’ in Indian Treaties

The definition of the protected investor determines who may invoke the State’s standing offer to arbitrate and is, accordingly, a primary jurisdictional gateway. Indian BITs have traditionally defined ‘investor’ expansively to include any national or juridical person of the other contracting party.⁶⁹ For juridical persons, the treaties generally require that the entity be incorporated or duly organised under the laws of the contracting party in which it claims to be an investor; they do not require the entity to maintain a permanent place of business in that State.⁷⁰ The consequence is that a company incorporated in a treaty partner may qualify even

⁶²GAR (n 4). The sources consulted do not reconcile these figures; the official list of terminated treaties should be consulted before submission.†

⁶³HSF Kramer, ‘India–UAE BIT 2024’ (n 31).

⁶⁴Model BIT (n 8).†

⁶⁵Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, and Backlash* (OUP 2019).†

⁶⁶Law Commission of India, *Analysis of the 2015 Model Indian Bilateral Investment Treaty* (Report No 260, 2015).†

⁶⁷Prabhash Ranjan, Harsha Vardhana Singh, Kevin James and Ramandeep Singh, ‘India’s Model Bilateral Investment Treaty: Is India Too Risk Averse?’ (Brookings India Impact Series No 082018-01, August 2018).†

⁶⁸LS USQ No 5056 (n 9).

⁶⁹Ranjan and others (n 68).

⁷⁰Ranjan and others (n 68).

where its real economic links with that State are slight, which creates opportunities for treaty shopping and raises the question whether denial-of-benefits clauses are an adequate response.

Most Indian BITs neither include nor exclude the government as an investor. Brookings' 2018 study identified the United Arab Emirates treaty as an exception that expressly included the government of a contracting party within the definition of investor, and found that the India–Japan CEPA, the ASEAN–India arrangements and the India–Singapore CECA allow government-owned companies and entities to qualify.⁷¹ The 2024 India–UAE BIT retains this feature and extends it to government entities and to trusts owned and controlled by the government.⁷² The inclusion of State-owned entities is a significant policy choice. It enlarges the class of persons who can invoke investor protections, but it also raises the conceptual difficulty of a State, acting through an entity, claiming against another State, and it blurs the line between commercial and sovereign activity which investment protection was designed to maintain. This issue is of direct relevance to the proposed extension of BATs to government agencies, to which Section 6 returns.

5.5 Recalibration after 2024

India's most recent treaty practice suggests a cautious return to investor–State arbitration on revised terms. The India–UAE BIT, signed on 13 February 2024 and in force from 31 August 2024, retains investor–State arbitration, covers portfolio investment and reduces the period for exhaustion of local remedies to three years.⁷³ India and Uzbekistan signed a BIT on 27 September 2024,⁷⁴ reported to have entered into force in 2025 and to follow the 2015 Model more closely than the UAE treaty does.⁷⁵ The pattern is of a State that has not abandoned the BIT but has narrowed it, and that is prepared to move selectively towards investor-friendlier terms with strategically important partners.

⁷¹Ranjan and others (n 68).

⁷²GAR (n 4).

⁷³HSF Kramer, 'India–UAE BIT 2024' (n 31).

⁷⁴Samir Malik, M Shahan Ulla and Aryan Mehta, 'Counterclaims and Beyond: A Comparative Analysis of the India-Uzbekistan Bilateral Investment Treaty and India's Treaty Practice' (*Legal 500*) <<https://www.legal500.com/developments/thought-leadership/counterclaims-and-beyond-a-comparative-analysis-of-the-india-uzbekistan-bilateral-investment-treaty-and-indias-treaty-practice/>> accessed 7 October 2026.

⁷⁵'India's investment treaty landscape in 2026' (*Freshfields Risk & Compliance*) <<https://riskandcompliance.freshfields.com/post/102mmwp/indias-investment-treaty-landscape-in-2026>> accessed 7 October 2026.

5.6 Enforcement and the Domestic Legal Framework

Because India is outside the ICSID system, a treaty award in favour of an investor in India would, if India declined to comply, have to be enforced through the New York Convention. In India, the enforcement of foreign awards is governed by Part II of the Arbitration and Conciliation Act 1996, whose application depends on the award being made in a territory notified by the Central Government as a reciprocating State and in respect of differences arising out of legal relationships considered commercial under Indian law.⁷⁶ Part I of the Act does not, following *BALCO*, apply to arbitrations seated outside India.⁷⁷ Whether an award rendered under an investment treaty arises from a legal relationship ‘considered as commercial’ is not a question on which settled authority has been identified.⁷⁸ The point matters for any proposal, including the BAT, that would depend on the Convention for enforcement against or in favour of Indian parties, and it is flagged as an area for further research.

The Indian experience yields three lessons for the analysis that follows. First, jurisdictional and definitional questions (who is an investor, what is an investment, and when must local remedies be exhausted) are the principal instruments through which India has tried to regain control of the system. Secondly, the most damaging disputes were not about commercial contracts at all but about the State’s own regulatory conduct, which is precisely the category that any dispute resolution mechanism extended to States must treat with caution. Thirdly, the practical outcome of the largest disputes was shaped by seat, enforcement and domestic legislation as much as by the content of the awards.

6. Bilateral Arbitration Treaties as an Alternative: A Critical Evaluation

6.1 Born’s Proposal

The proposal for the Bilateral Arbitration Treaty originates in Gary Born’s 2012 Kiev Arbitration Days speech, ‘BITs, BATs and Buts’.⁷⁹ Born’s starting point was that BITs had established a workable model of standing consent: a State offers, in a treaty, to arbitrate certain disputes with a defined class of persons, and the offer is accepted by the act of commencing arbitration. His suggestion was that the same technique could be applied to ordinary international commercial disputes. On the formulation reported by his firm, the BATs would

⁷⁶ Arbitration and Conciliation Act 1996 (India) ss 44–49.

⁷⁷ *Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc* (2012) 9 SCC 552.

⁷⁸ No decision of the Supreme Court of India squarely resolving this question was located in the research for this paper; Indian case law should be searched (for example on SCC Online) before submission.†

⁷⁹ Born (n 10).

leave parties free to contract out, including by agreeing to forum selection clauses or other arbitration provisions, but absent such agreement they would provide for resolution of international commercial disputes between nationals of contracting States by binding arbitration, producing a binding award, with the UNCITRAL Rules proposed as the default.⁸⁰ Born also considered the possible extension of the concept to multilateral arbitration treaties (MATs), under which many States would adopt the same default.⁸¹

A fundamental point must be made at the outset. As formulated by Born, the BAT is a default *procedural* mechanism for disputes between private commercial parties who are nationals of the contracting States. It is not, in its original form, a mechanism for investor–State disputes, and it does not create any substantive standard of treatment. The BAT is sometimes presented as an ‘alternative’ to the BIT. That description is defensible only if the BAT is understood as an alternative *forum* architecture, adapted to include disputes between investors and States, rather than as a replacement for the substantive protections of a BIT. The remainder of this section proceeds on that footing.

6.2 Structure and Claimed Procedural Benefits

Three procedural features are commonly identified as the strengths of the BAT. First, a BAT could extend not only to the contracting States but also to their government agencies, so bringing within the default regime disputes in which State entities are parties. The extension to government agencies is not, on the sources consulted, part of Born’s core formulation, which is addressed to nationals of the contracting States;⁸² it is better understood as a design choice that States could adopt when drafting. Secondly, any dispute between an investor and a contracting State that falls outside the treaty definition of ‘investment’ could be arbitrable under a BAT, thereby removing the definitional gateway that has been so productive of litigation under BITs (Section 3.2). Thirdly, a BAT would serve as a ‘catch-all’ default for all disputes not specifically excluded by its terms, and so reverse the BIT’s logic: whereas a BIT lists what is arbitrable, a BAT would list what is not.

Under a BAT, the courts of the contracting States would decline to entertain disputes within its scope and would refer them to an international commercial tribunal, and would recognise the

⁸⁰Gary Born’s BITs, BATs and Buts in the News’ (n 10).

⁸¹Bruno Guandalini, ‘Bilateral Arbitration Treaties and Efficiency: A New Proposal on and an Old Challenge to International Commercial Arbitration’ (2013) 10(38) *Revista Brasileira de Arbitragem*.†

⁸²The extension to government agencies could not be verified against the text of Born’s published essay and should be checked against the primary source.†

resulting award as final and binding. The multilateral variant, a MAT, would be concluded between multiple States, each agreeing that commercial disputes between their respective nationals would be resolved by international commercial arbitration. As in a BAT, recourse to arbitration would be a default subject to an opt-out.

6.3 The Case for a Wider Arena

The argument in favour of the BAT draws on several of the weaknesses of the BIT mechanism identified above. It can be put in four propositions.

- *Scope.* By defining arbitrability negatively rather than positively, a BAT would reduce disputes over whether a particular claimant or transaction falls within the offer to arbitrate. The ‘investor’ and ‘investment’ gateways would be replaced by a simpler test of nationality and commercial character.
- *Certainty.* Commentators have noted that a BAT could address typical pathologies of arbitration clauses, because the treaty could prescribe the form of arbitration (institutional or *ad hoc*), the institution and the rules, and could remove doubt about the tribunal’s competence where a dispute falls within the treaty definition.⁸³
- *Enforcement.* A BAT could also address the recognition and enforcement of awards, giving contracting States a common framework within, or in addition to, the New York Convention.⁸⁴
- *Convergence.* The proposal embodies the exchange of experience between investment and commercial arbitration. If investment arbitration borrowed efficiency, neutrality and expertise from commercial arbitration (Section 2.3), then it is coherent for commercial arbitration to borrow the BIT’s device of standing consent.

6.4 The ‘Buts’: Objections and Limits

Born himself identified the objections to his proposal, and subsequent commentary has developed them. Five are decisive for the question this paper asks.

First, a BAT supplies no substantive protection. This is the most important limitation in the context of India’s experience. The claims in *Cairn* and *Vodafone* succeeded because the BITs

⁸³‘Bilateral Arbitration Treaties: A Few “Bits” More and No “Buts” Within the Portuguese Jurisdiction’ (*Kluwer Arbitration Blog*) <<https://legalblogs.wolterskluwer.com/arbitration-blog/bilateral-arbitration-treaties-a-few-bits-more-and-no-buts-within-the-portuguese-jurisdiction/>> accessed 7 October 2026.†

⁸⁴*Ibid.*

contained a standard of fair and equitable treatment that a tribunal could apply to a retrospective tax measure that was valid under Indian domestic law.⁸⁵ Under a BAT, a dispute of that kind would be arbitrable, but the tribunal would have to decide it under the applicable law, which in a dispute with the State over its legislative acts would be that State's own law. A retrospective tax validly enacted by Parliament would then be lawful, and the investor would have no remedy. The BAT therefore widens the *forum* but not the *entitlements*. It cannot replace the BIT; it can at most operate alongside a treaty that supplies the substantive standards.

Secondly, consent and legal validity are uncertain. A BAT would operate without the express agreement of the particular parties, so it would have to be given effect through domestic legislation, and in several jurisdictions that legislation could be vulnerable to constitutional challenge.⁸⁶ The requirement in article II(1) of the New York Convention that an agreement to arbitrate be in writing, and the equivalent requirement in India's Arbitration and Conciliation Act 1996, raise the question whether a treaty-based default would qualify as an 'agreement' for the purposes of referral and enforcement.⁸⁷ The BIT analogy helps only partly: under a BIT the consent of the State is express, in the treaty itself, and the investor's consent is given by its act of commencing proceedings, whereas under a BAT both private parties would be bound by an arrangement to which they have not individually consented.

Thirdly, a catch-all default would enlarge State exposure. If the BAT were adapted to investor-State disputes, a State would be exposed to arbitration not only of disputes about treaty breaches but of all contractual and regulatory disputes not excluded by the treaty. That is the opposite of the direction of India's policy since 2015, which has been to confine, not widen, the circumstances in which the State can be called to account before international tribunals (Section 5.3). A BAT acceptable to India would therefore need extensive carve-outs for taxation, public health, national security and similar matters. Each carve-out narrows the 'wider arena' that is the proposal's chief attraction.

Fourthly, the BAT would reproduce the legitimacy concerns of ISDS. Disputes involving government agencies raise the same transparency, independence and public-interest questions as BIT arbitration (Section 4). The default confidentiality of commercial arbitration would be

⁸⁵Cairn (n 6); Vodafone (n 7).

⁸⁶Tania Singla, 'The Bilateral Arbitration Treaty Regime: Some "BUTs" for Thought' (*RMLNLU Law Review Blog*, 30 September 2015) <<https://rmlnlulawreview.com/2015/09/30/the-bilateral-arbitration-treaty-regime-some-buts-for-thought/>> accessed 7 October 2026.

⁸⁷New York Convention (n 38) art II(1); Arbitration and Conciliation Act 1996 (India) s 7.†

inappropriate for such disputes, and the UNCITRAL transparency instruments and codes of conduct would need to be incorporated.

Fifthly, there has been no adoption. No State has concluded a BAT. The proposal was still being discussed some five years after Born's speech, including at UNCITRAL's fiftieth anniversary conference,⁸⁸ but it has not been adopted. Critics have argued that the analogy with the BIT is overstated: BITs arose from a necessity, namely the absence of any forum for investor claims, that does not compel a network of BATs, because commercial parties already have access to arbitration through the New York Convention.⁸⁹ Guandalini's analysis similarly accepts efficiency as a legitimate motivation for BATs while identifying additional 'Buts' that reduce their advantage over the existing system.⁹⁰

6.5 A Comparative Summary

Table 1 summarises the principal differences between BIT-based arbitration and the BAT as proposed by Born.

Table 1: BIT-based arbitration and the BAT compared

Feature	BIT-based investor-State arbitration	BAT (as proposed by Born)
Source of consent	Standing offer by the host State in the treaty, accepted by the investor commencing arbitration	Standing offer by the contracting States, operating as a default subject to opt-out by the parties
Typical parties	Investor of one State against the host State	Private commercial parties who are nationals of the contracting States (State entities only if the treaty so provides)
Scope of disputes	Disputes concerning protected 'investments' of protected 'investors', as defined in the treaty	International commercial disputes not excluded by the treaty
Substantive standards	Fair and equitable treatment, protection against expropriation, national treatment and others, as the treaty provides	None; the applicable law is that chosen by the parties or determined by conflict-of-laws rules

⁸⁸Do Born's BATs still have wings?' (*Global Arbitration Review*)

<<https://globalarbitrationreview.com/article/do-borns-bats-still-have-wings>> accessed 7 October 2026.†

⁸⁹'Bilateral Arbitration Treaties: Are BATs Blind to Existing International Structures and Realities?' (*Mapping ADR*, Jindal Global University, 12 April 2024) <<https://jgu.edu.in/mappingADR/bilateral-arbitration-treaties-are-bats-blind-to-existing-international-structures-and-realities/>> accessed 7 October 2026.

⁹⁰Guandalini (n 82).

Feature	BIT-based investor-State arbitration	BAT (as proposed by Born)
Public-interest safeguards	Treaty exceptions and carve-outs; transparency instruments	Not addressed in the original proposal; would be required for any State-party disputes
Enforcement	ICSID Convention or New York Convention	New York Convention, with any treaty-specific provisions
Status	Approximately 2,860 BITs concluded; 1,463 known treaty-based cases to end-2025	Proposed; not adopted by any State

Source: author's synthesis from Sections 3 and 6.1, drawing on the UNCTAD data cited in Section 1.1.

6.6 Positioning the BAT among Reform Options and Design Principles

The BAT should be evaluated against the other reform options currently in play. Working Group III's work on a standing mechanism, an appellate body and codes of conduct addresses directly the legitimacy and consistency deficits of ISDS.⁹¹ The BAT addresses none of these directly; its contribution is to provide a default forum for disputes that the BIT does not reach. The reform options are therefore complementary rather than competing, and the proper question is not whether to choose between the BAT and BIT reform but whether the BAT can add value alongside it.

If India or any other State were to pursue an investor-State adaptation of the BAT, the analysis above suggests six design principles.

- (1) **Complement, not substitute.** The BAT should operate alongside a reformed BIT that supplies the substantive standards. It should supply a forum for disputes outside the BIT's scope, such as those involving enterprises that do not satisfy the definition of investor or investment.
- (2) **Limit the State-party extension.** Where State entities are included, the BAT should apply only to disputes arising from commercial activity (*acta jure gestionis*) and should exclude the exercise of sovereign regulatory power.
- (3) **Protect regulatory autonomy by express carve-outs.** Taxation, public health, environmental protection, national security and similar fields should be excluded, following the approach of India's Model BIT and its essential-security practice.

⁹¹'ISDS policy trend round-up for 2023' (n 53).

- (4) **Ensure legal certainty of consent.** The BAT should be supported by implementing legislation, satisfy the formal requirements of the New York Convention and domestic arbitration law, and apply only prospectively to disputes arising after its entry into force, with a clear survival clause.
- (5) **Build in time-bound and transparent procedure.** The BAT should specify procedural deadlines to address delay, adopt the UNCITRAL transparency instruments for any dispute in which a State is a party, require compliance with a code of conduct for arbitrators, and encourage mediation at an early stage.
- (6) **Proceed incrementally.** Given that no BAT has been adopted, any initiative should begin as a pilot with a small number of partners with well-developed arbitration frameworks and should be subject to periodic review.

7. Conclusion

The BIT was, at its inception, an efficacious and innovative method of dispute resolution. By transforming a diplomatic entitlement into a legal one and by supplying a neutral, enforceable forum, it filled a genuine gap in international law. With the passage of time, however, the variety of disputes arising from cross-border business has outgrown the categories of dispute that a BIT is designed to cover. The jurisdictional and temporal gateways of investor, investment, time and procedure have become sources of litigation in their own right, and wider concerns about legitimacy, consistency, cost and duration have eroded confidence in the system.

The Indian experience illustrates each of these points. The disputes in *White Industries*, *Devas*, *Cairn* and *Vodafone* exposed the fiscal and regulatory implications of broadly drafted treaties, and India's response, in the form of mass termination, a restrictive Model BIT and selective renegotiation, has been to narrow rather than abandon the BIT. The answers to the four research questions may be stated briefly. Consent in BIT arbitration is constructive, derived from treaty text, and bounded by gateways that generate substantial preliminary litigation (RQ1). The principal deficiencies are legitimacy, consistency, cost and delay, and India's cases show each of them at work (RQ2). India's treaty practice has evolved from expansive protection to restriction and, since 2024, to calibrated moderation, with the definition of 'investor' remaining a central point of tension, especially as regards government-owned investors (RQ3).

On the final question (RQ4), the paper's conclusion is qualified. The BAT, informed by the expertise of both investment treaty arbitration and international commercial arbitration, could provide a wider arena for dispute resolution than the BIT. It would reduce definitional litigation, promote certainty about the forum and align enforcement with the New York Convention. But it is a procedural mechanism designed for private commercial disputes. It supplies no substantive standard of treatment, it raises unresolved questions about consent, validity and sovereign exposure, and it has not been adopted by any State. It should therefore be understood as a complement to, and not a replacement for, a reformed BIT regime, and, if adapted to investor-State disputes, only with the safeguards identified in Section 6.6.

Three areas deserve further research: the treatment of investment treaty awards under Part II of India's Arbitration and Conciliation Act 1996; an empirical study of the duration and cost of proceedings against India; and a drafting study of how a BAT's scope, carve-outs and transparency provisions might work in practice for an investor-State adaptation.