
THE DEVELOPMENT AND CURRENT STRUCTURE OF INDIAN INVESTMENT LAW: BALANCING THE NEEDS OF THE NATION AND INVESTOR PROTECTION

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ABSTRACT

The Indian investment framework governs both domestic and foreign deals, which get approved, monitored, and protected. The system has undergone significant changes. Starting from strict rules after independence, the country then shifted toward more liberal policies in the 1990s. The current structure strikes a balance between attracting foreign investment and adhering to national policy regulations. This Paper examines how bilateral Investment treaties (BITs) between countries function alongside investor-state dispute systems (ISDS). It identifies issues focusing on dispute resolution practices, retrospective taxation and political & economic instability.

Key cases, such as White Industries' fight against India or Vodafone's tax battle, identify major problems. These cases reveal the central problem in India's legal framework. The need to provide a secure and stable environment for investors, while also allowing the government to adjust rules and regulations as required, based on policy documents, court rulings, and other relevant factors. It's not just about framing laws merely on paper; it's about highlighting the challenges in a legal system while balancing the complex needs of the financial and investor sectors in the real world.

Keywords: Indian Investment Law, Foreign Investment, Bilateral Investment Treaties (BITs), Investor-State Dispute Settlement (ISDS), Investor Protection, Sovereign Space, Retrospective Taxation

INTRODUCTION

Investment law encompasses all aspects of managing money entering India, including regulations and court decisions. That includes foreign direct investments, portfolio management, and domestic funds flows.¹ Since they opened in 1991, India has become a top destination for foreign investment, attracting \$71 billion in investment in the 2023-24 Fiscal Year through FDI.² Despite the success, Legal challenges persist. However, Treaty changes and sudden policy shifts can sometimes concern investors, making the environment unpredictable even when economic conditions are stable.

HISTORICAL BACKGROUND

I. PRE-LIBERALISATION PERIOD (1947-1991)

After independence, India's economy was shaped by strict controls and government-led strategies. The Foreign Exchange Regulation Act, 1973,³ This was a significant aspect; they erected protectionist barriers and maintained industries under strict state supervision. State-run companies dominated major sectors, holding monopolies in key areas. Private players, especially foreign ones, faced operational obstacles. Stock ownership was capped, making foreign investment more challenging. Sector restrictions created hurdles. Foreign investors were faced with stringent rules and regulations. This entire setup aimed to boost the local industry but ultimately hindered global financial flows. The system prioritised self-reliance over openness, which worked for some goals but limited growth avenues in the long run.

II. LIBERALISATION ERA (1991 ONWARDS)

The 1991 financial crisis had a significant impact on the economy. One major shift came through industrial policy reforms. They reduced licensing red tape and opened most sectors to foreign capital.⁴ Before that, everything was locked down tight under FERA rules. However, FEMA came in 1999, which was significantly more flexible.⁵ Instead of clamping down hard on forex activities, it focused more on managing them

¹ Reserve Bank of India, Notification No. 20209, under the Foreign Management Act, No. 42 of 1999 (INDIA)

² Reserve Bank of India, Handbook of Statistics on the Indian Economy, 2023-24 (September 2024) (INDIA)

³ Foreign Exchange Regulation Act, 1973 No. 46 of 1973 (INDIA)

⁴ Government of India, Ministry of Industry, Statement on Industrial Policy (24 July 1991) (INDIA)

⁵ Vinod Kothari Consultants, Giving of Guarantee under FEMA (FEB. 2024) (INDIA)

than just restricting them. Made doing business internationally less problematic for companies. A significant shift occurred from strict control to more innovative regulatory frameworks that aimed to facilitate the flow of economic activity. It marked a fundamental change after decades of an outdated system and framework.

III. TREATY ENGAGEMENT AND ISDS EXPOSURE

India actively signed many Bilateral Investment Treaties (BITs) in the 90s and early 2000s⁶. Those deals protected foreign investors, allowing them to take disputes to international courts for fair and equitable treatment (FET).

However, these changes created hurdles for India when ISDS disputes began to emerge. In **White Industries v India**⁷, for example. The company pursued them through arbitration and won, arguing that India did not provide a fair process. The situation demonstrated how these treaties could go wrong, even when countries attempt to play by the rules for investors.

The government probably didn't expect that while signing agreements. It's a traditional case study that people often cite when discussing the balance between investor rights and national interests.

CURRENT LEGAL FRAMEWORK

STATUTES

- **Foreign Exchange Management Act, 1999 (FEMA)**⁸: Oversees cross-border transactions and capital flow.
- **Companies Act, 2013**⁹: Oversees corporate governance, issuance of securities, and compliance.
- **Securities and Exchange Board of India Act, 1992 (SEBI)**¹⁰: Regulates the securities

⁶ Ministry of External Affairs, Indian Treaties Database (Legal & Treaties Division) (INDIA)

⁷ 2 INDIAN J. ARB. L. 3 (June 2013)

⁸ Foreign Exchange Management Act, No. 42 of 1999 (INDIA)

⁹ Institute of Companies Secretaries of India, The Companies Act, 2013 (13 August 2014)

¹⁰ Securities and Exchange Board of India Act, 1992, No.15 of 1992 (INDIA)

market and foreign portfolio investment.

- **Insolvency and Bankruptcy Code, 2016 (IBC)¹¹:** Responsible for providing efficient mechanisms for investors.

POLICY INSTRUMENTS

India's FDI framework, as outlined by the DPIIT, determines the working of foreign investment in the country. Sector limits are mostly automatic approvals, whereas others require government approval and are restricted sectors.¹² Take renewables, you know, through the automatic path; they let in full 100% foreign money, no questions asked, straight in. However, multi-brand retail is trickier through the approval route; they cap it at 51%, which essentially means a lack of proper control. The policies strike a balance between open sectors and those requiring oversight, as well as matters of national interest or local businesses they're protecting.

The document outlines which industries receive expedited access versus those that undergo more stringent checks. Rules vary by sector, and goals may change in response to market factors, conditions, and political influences. Investors need to check which category their industry falls under before proceeding with investments.

Renewables' wide-open retail is a different concept. It depends on the motive and intention for the investment. It goes through paperwork, timelines, and everything tied to these routes. It makes sense when considering policy priorities over time, across different sectors, and various needs. In the end, specific industries keep others entirely off limits, including defence and critical infrastructure areas, where foreign ownership could be sensitive.

REGULATORY AUTHORITIES

- **Reserve Bank of India (RBI)¹³:** Responsible for administering FEMA Provisions and Foreign policy investments.
- **Securities and Exchange Board of India¹⁴:** Responsible for managing portfolio

¹¹ The Insolvency and Bankruptcy Code, 2016, Act No. 31 of 2016 (INDIA)

¹² PwC India, Foreign Direct Investment Norms for Space Sector Liberalised (6 March 2024) (INDIA)

¹³ Reserve Bank of India, Master Direction on Foreign Investments in India (20 January 2025) (INDIA)

¹⁴ Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019 (INDIA)

investments and maintaining market integrity.

- **Department for Promotion of Industry and Internal Trade (DPIIT)¹⁵:** Responsible for managing Foreign Direct Investments (FDI) and promoting ease of business in India.

BILATERAL INVESTMENT TREATIES

India's old BIT setup used to provide investors with solid protection. However, everything shifted after a rise in significant ISDS cases, with White Industries and Vodafone being prime examples. The 2016 Model BIT changed everything.¹⁶ It scrapped the whole fair treatment standard and replaced it with a new standard, which states that now you must spend five full years fighting through local courts before arbitration becomes an option for tax disputes. Entirely out of bounds now.

The government framed it as a balancing act between investor interests and national policy space. The problem is that the changes went too far, according to industry watchers. By stripping back key safeguards so drastically, there's genuine concern that it might deter foreign investment.

LANDMARK CASES

- **WHITE INDUSTRIES AUSTRALIA LIMITED VS. REPUBLIC OF INDIA (2011)¹⁷**

An Australian investor recently invoked the India-Australia investment treaty after claiming local courts had left them hanging for far too long. Arbitration officials ruled in their favour. They received compensation and highlighted some fundamental structural issues in how disputes are resolved here. The panel highlighted systemic bottlenecks that hindered progress.

¹⁵ Saurav Kumar, Swathi Sreenath & Ritvika Thakur, Assessing the Regulatory Landscape for Trading in India (Aug. 14, 2023) (INDUSLAW)

¹⁶ Ministry of Finance, Government of India, Model Text for the Indian Bilateral Investment Treaty (14 January 2016) (INDIA)

¹⁷ White Industries Australia Limited v. Republic of India, Final Award, 30 November 2011, ICSID Case No. ARB/10/17 (UNCITRAL Rules)

- **VODAFONE INTERNATIONAL HOLDINGS B.V. VS. THE UNION OF INDIA & ANR (2012)¹⁸**

In 2012, an amendment was made to the 1961 Income Tax Act. It applied it retroactively for arbitration cases under the India-Netherlands investment treaty.¹⁹ The Permanent Court of Arbitration, a major court, essentially ruled that India's tax rules violated the FET standard it was required to follow. Vodafone ultimately won the entire dispute.

CHALLENGES IN INVESTMENT LAW

- I. **Retrospective Taxation²⁰**: Although it was eliminated in 2021, its history continues to impact investors' confidence.
- II. **Policy Instability²¹**: Constant changes in sector policies, such as those related to e-commerce and data localisation, create uncertainty.
- III. **ISDS Restrictions²²**: The 2016 BIT Model may limit India's potential for foreign investors.
- IV. **Judicial Delays²³**: Slow dispute resolution affects everything.

EMERGING TRENDS

- I. **Green Investments²⁴**: National Green Hydrogen Mission, an initiative by the government of India, aims to attract sustainable FDI.
- II. **Digital Economy²⁵**: Emerging FDI in sectors such as fintech and digital platforms

¹⁸Vodafone International Holdings B.V. v. Union of India (UOI) & Anr., (2012) 6 SCC 613 (India).

¹⁹Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of Investments, 6 November 1995, 2242 U.N.T.S. 101.

²⁰Institute of Cost Accountants of India, Taxation Laws, Indirect Transfer of Assets in India (2021) (INDIA)

²¹Department of Industrial Policy and Promotion (now DPIIT), Press Note No.2 (2018 Series), Consolidated FDI Policy on E-Commerce (26 December 2018) (ARGUS PARTNERS)

²²Nisith Desai Associates, Bilateral Investment Treaty Arbitration and India: With Special Focus on India Model BIT. 2016 (April 2019) (INDIA)

²³Department of Justice, Government of India, National Judicial Data Grid (NJDG), judicial data portal under the e-courts projects (13 March 2025)

²⁴Government of India, Ministry of New & Renewable Energy, National Green Hydrogen Mission (January 2023) (INDIA)

²⁵The Digital Personal Data Protection Act, 2023, No. 22 of 2023 (INDIA)

promotes the development of cybersecurity and data security regulations.

III. ESG Compliance²⁶: India's corporate sector is transforming due to increasing demands from foreign investors for environmental, sustainable, and governance standards.

CONCLUSION AND RECOMMENDATIONS

India's investment framework currently strikes a balance between maintaining control and effectively welcoming foreign investment. The key is striking a balance between stronger treaty protections and flexibility. Setting up special courts specifically for investment disputes could help resolve conflicts more efficiently when they inevitably arise. Sector-specific help desks might cut through red tape more efficiently, allowing projects to move forward instead of getting stuck in the approval procedure.

Mutually meaningful discussions with all parties involved, from businesses to local communities, help prevent future policy clashes, ensuring that all parties communicate effectively with one another. Stable regulations allow, but transparency in decision-making is as crucial as protecting investors to feel secure in the long term. India's chances of becoming a top global investment destination depend on whether the rules and regulations are transparent and disputes are resolved efficiently without unnecessary bureaucracy hindering progress.

Therefore, the requirement is for absolute consistency, with no sudden policy changes that leave companies in problematic situations such as bureaucratic hurdles and political instability. It must have a blend of transparency and stability, where foreign Multinational Corporations are aware of the country's economic environment and the potential benefits.

²⁶ Adani Green Energy Limited, Policy on Business Responsibility and Sustainability Reporting (BRSR) (INDIA)