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TABLE OF CONTENTS

S. No.	Title of the Paper / Author	Page No.
1.	Sextortion: Addressing the Impact and Law in India *Dr. Smita Sarmah & Dr. Kasturi Gakul*	1
2.	Cyber Operations Against Space Assets: A Legal Reassessment under the Law of Armed Conflict and International Telecommunication Regulation *Raghavendra S Kollurkar*	17
3.	The Basic Structure Doctrine as a Thin Line of Distinction Between Constitutional Amendment & Constitutional Dismemberment: An Analysis *Raajdwip Vardhan & Susmit Isfaq*	28
4.	Faith and Law at Crossroads: Unravelling the Complexities of Cult Crimes in India's Socio-Legal Framework *Saumya Tripathi*	46
5.	Navigating The Extent of Judicial Intervention in Pre-Arbitral Proceedings vis-a-vis Contemporary Judicial Trends in India *Meher Malik*	58
6.	Bridging Arbitration and Mediation: Evaluating the Arb-Med-Arb Hybrid in India's Investor-State Disputes *Jagyansh Kumar*	76
7.	Navigating Conflicts between IBC and PMLA: Prioritizing Insolvency Resolution over Asset Attachment *Shraddha Tiwari*	93
8.	Unearthing the Vices in Presumed Consent Law In Light of Recent Amendments To Transplantation of Human Organs and Tissues Act *Rishi Khemnani & Hardik Jain*	105
9.	Clickwrap Agreement: Validity, Enforceability And Challenges *Akarsh Raj*	115

10. Ethics v. Governance: A Critical Study of Misleading Advertisements And Consumer Rights in India
Palak Sharma 126

11. Post-Decisional Hearing In Administrative Law: Balancing Procedural Fairness And Administrative Efficiency
Garima Bansal 146

12. Balancing Corporate Tax Incentives and Revenue Collection: A Framework for Promoting Sustainable Business Practices in India
Shrey Bhatnagar & Mahi Singh 165

13. Electoral Disqualification Due To Criminal Antecedents: A Comparative Study
Diya Dhall & Suhani Anand 179

14. From Boardrooms to Ecosystems: A Study of Directors' Duty under Section 166(2) and Environmental Concerns With Reference To UK And Indian Laws
Prabhav Tripathi & Gargi Bindal 200

15. The Enforcement Dilemma of Interim Measures in Foreign Seated Arbitration: Emergency Arbitrator's Award in India
Divyam Desai & Shravin Relan 216

LEGISLATIVE COMMENT

16. Legislative Comment on the WAKF (AMENDMENT) BILL, 2025: Quoting the Contemporary Analysis of the Bill
Taarini Bhardwaj 226

Submission Guidelines 234

BRIDGING ARBITRATION AND MEDIATION: EVALUATING THE ARB-MED-ARB HYBRID IN INDIA'S INVESTOR-STATE DISPUTES

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ABSTRACT

The Arbitration-Mediation-Arbitration model ('Arb-Med-Arb'/AMA) as a form of alternate dispute resolution has emerged as a modern, innovative approach for resolving the ever-growing issue of investor-state disputes. However, its adoption and efficacy remain underexplored in the Indian context, where the evolving investment landscape and regulatory framework present unique challenges and opportunities. This research article aims to examine the Arb-Med-Arb model as a dispute resolution mechanism for investor-state conflicts, focusing on its potential application and implication for India. The research article analyses the legal, procedural, and practical dimensions of the framework along with drawing comparisons from international frameworks such as ICSID and UNCITRAL rules. The research article evaluates the efficacy of the model in the Indian context as to whether it achieves the objectives of timely resolution, cost-effectiveness, enforceable resolutions, etc. Additionally, it addresses concerns related to neutrality, enforceability of mediated agreements, and confidentiality. The research article takes into account India's withdrawal from ICSID and examines its implications along with bilateral investment treaties and the Arbitration and Conciliation Act, 1996. By analysing these aspects, the researcher then suggests policy reforms needed to integrate hybrid mechanisms into India's investment dispute framework effectively.

Keywords: *Arbitration, Investor-State Disputes, ICSID, Hybrid Mechanisms, Dispute Resolution*

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1. INTRODUCTION

Investor-state disputes *("ISDs")* have become increasingly common in the present time, with such cases doubling as compared to the past decade.[1] An increase in the proliferation of bilateral investment treaties *("BITs")* is one possible explanation. Other reasons that can be attributed to this surge include increased foreign direct investment *("FDI"),* economic protectionism, criticism of host-driven sovereignty and investor pushback, and global economic volatility.[2] Such disputes evolved significantly from state-to-state dispute resolution to direct investor claims, primarily through the development of BITs and other mechanisms like free trade agreements *("FTAs").*[3] Initially, 'diplomatic protection' was a way to resolve such state-to-state disputes, in which the state acted on behalf of the injured entity intending to locally resolve the issue without escalating it to international forums.[4] A perfect example of this approach can be seen in the case of the Freedom, Commerce, and Navigation *("FCN")* treaties of the mid-20th century, for instance, the treaty signed between the United States of America and Japan post-World War II.[5] Later on, there was a paradigm shift with the advent of BITs, brought mainly by the European Union and the United States, as during the 1970s-80s, European nations, including France, the Netherlands, Denmark, and Norway, initiated BIT programs, primarily with developing countries. Such treaties allowed investors to directly pursue claims against host states without exhausting domestic remedies.[6] With the formation of the International Centre for Settlement of Investment Disputes *("ICSID"),* such disputes became formally recognised and a regulatory framework came into existence.

In India, the ISDs became prevalent after the market reforms of 1991, which facilitated initial BITs. These treaties mainly favoured foreign investors by allowing them to access international arbitration without exhausting their local remedies.[7] An eye-opening stance

1 United Nations Conference on Trade and Development, *Facts and Figures on Investor-State Dispute Settlement Cases*, Investment Policy Hub (Nov. 2024) https://investmentpolicy.unctad.org/publications/1302/facts-and-figures-on-investor-state-dispute-settlement.

2 *Id*.

3 Won-Mog Choi, *The Present and Future of the Investor-State Dispute Settlement Paradigm*, 10 Journal of International Economic Law 725 (2007).

4 International Law Commission, Draft Articles on Diplomatic Protection, with Commentaries 2006, art 1.

5 Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic (signed 2 February 1948, entered into force 26 July 1949) 79 UNTS 171.

6 *Id*.

7 *Evolution, Challenges, and Reforms in India's Investor-State Dispute Settlement Mechanisms*, Via Mediation Centre, https://viamediationcentre.org/readnews/MTQ4NA==/Evolution-Challenges-and-Reforms-in-Indias-Investor-State-Dispute-Settlement-Mechanisms.

was introduced by the *White Industries* case,[8] which prompted a re-evaluation of the existing ISDS framework to fix the vulnerabilities. Consequently, India released a model BIT which mandated the exhaustion of local remedies before initiating Investor-State Dispute Settlement *("ISDS")* under Article 15, restricted the Most Favoured Nation *("MFN")* clause to prevent treaty shopping, and included clearer definitions of key terms like 'investment' and 'investor' under Article 1.6 and 1.1 respectively. The shift marked India's stance towards having a balanced approach considering ISDs. Subsequently, alternative dispute resolution *("ADR")* mechanisms became junctions for ISDS.

Currently, ISDS has diversified beyond traditional ICSID arbitration into multiple models, including UNCITRAL arbitration, standalone mediation and conciliation under the UNCITRAL Model Law, expedited and small-claims procedures, and proposals for a permanent Multilateral Investment Court *("MIC"),* each designed to address different policy objectives and procedural efficiencies. The ICSID Convention, adopted in 1965, remains the sole self-contained regime offering automatic enforceability of awards but is now complemented by UNCITRAL Arbitration Rules (2013), which grant parties greater flexibility in tribunal composition and procedural innovation, such as fast-track rules for smaller claims under USD 2 million.[9] In response to concerns about consistency and appellate review, UNCITRAL is also developing a MIC proposal to replace ad hoc tribunals with a standing court offering permanent judges and a two-tier structure.[10] These innovations reflect a broader shift toward tailoring ISDS processes to case value, complexity, and the policy preference of host states, options that India, in light of its 2017 ICSID withdrawal and reliance on UNCITRAL arbitration under its 2015 Model BIT, may now consider integrating to refine its hybrid Arb-Med-Arb offerings. This paper critically examines the efficacy of the Arb-Med-Arb model within the Indian ISDS landscape. It begins by exploring the various investment arbitration models and their relevance to India. Subsequently, it delves into India's historical and contemporary experiences with ISDS, analysing the implications of the 2015 Model BIT. The paper then assesses the potential of the Arb-Med-Arb model to address existing challenges, considering its advantages and limitations. Finally, it offers recommendations for integrating such hybrid mechanisms into India's investment dispute resolution framework. Therefore, a brief discussion on the core part of the paper, i.e., the AMA model is necessary, which is discussed in the next heading.

8 White Industries Australia Ltd v. India, Final Award, IIC 529 (2011).

9 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature 18 March 1965, entered into force 14 October 1966, 575 UNTS 159.

10 European Parliament, *Multilateral Investment Court*, Briefing (Jan. 2020) https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf.

2. DEMYSTIFYING THE ARB-MED-ARB MODEL

The Arb-Med-Arb model became popular in the previous decade when disputes were being settled amicably between the parties even before the arbitral award was issued.[11] In 2021, the Herbert Smith Freehills Survey revealed that mediation during arbitration has a higher likelihood of succeeding.[12] This conclusion was drawn from data indicating that a significant proportion of mediators reported high settlement rates when mediation was integrated into ongoing arbitration processes. Specifically, the survey found that nearly half of the mediators experienced success rates exceeding 70% in such scenarios. The model operates sequentially, meaning it firstly follows the formal structure and enforceability mechanism of arbitration, followed by the collaborative and inclusive nature of mediation.[13] Firstly, arbitration, a legally binding process, is adjudicated by a neutral arbitrator appointed by the parties or otherwise.[14] Thereafter, the model embeds a mediation phase where a neutral mediator helps the disputing parties reach a mutually amicable settlement. Therefore, the Arb-Med-Arb model uniquely integrates the strengths of both arbitration and mediation, offering parties the dual benefits of enforceability and the opportunity for mutually beneficial outcomes. If mediation is successful, the settlement can be recorded as a consent award, making it enforceable under the New York Convention across more than 160 countries. This structure not only offers the assurance of enforceability but also encourages parties to explore amicable solutions, balancing the adjudicative nature of arbitration with the voluntary, consensus-driven approach of mediation. The model's design thus facilitates efficient dispute resolution while preserving the parties' autonomy and fostering mutually agreeable outcomes. The various steps involved in the process are discussed in the following subheadings.

2.1 Initiation of Arbitration

The process begins with the formal initiation of arbitration. This involves filing a Notice of Arbitration, where parties outline their disputes and nominate arbitrators in accordance with

11 Peter Pettibone, John S Siffert and Angela Zhu, *An Examination of Institutional Arb-Med-Arb Protocols and Practices* 13 NYU Journal of Law and Business 329 (2017).

12 London Chamber of Arbitration and Mediation and Herbert Smith Freehills, *Mediation in Arbitration Survey Insights* (on file with authors). See also *Mediation in Arbitration: Insights from the London Chamber of Arbitration and Mediation / Herbert Smith Freehills Survey* (Herbert Smith Freehills) https://hsfnotes.com/arbitration/2021/02/02/mediation-in-arbitration-insights-from-the-london-chamber-of-arbitration-and-mediation-herbert-smithfreehills-survey/.

13 Peter Pettibone, *supra* note 11.

14 Catherine A Rogers, *Reconceptualizing the Party-Appointed Arbitrator and the Meaning of Impartiality*, 64(1) Harvard International Law Journal 137 (2023).

the procedural rules of the chosen arbitral institution.[15] This step establishes an enforceable framework which is then followed by mediation if decided. The next is the mediation phase.

2.2 Mediation Phase

The mediation phase is conducted by a neutral mediator, who may or may not be the same individual as the arbitrator, depending on the protocol agreed upon by the parties. The mediator facilitates open dialogue, encourages compromise, and helps the parties explore creative solutions that could resolve the dispute without the need for a formal arbitral award.[16] If the parties reach a settlement during mediation, the terms of the agreement are documented and submitted to the arbitrator. The arbitrator then reconvenes the arbitration solely to formalize the settlement as a consent award. A concrete illustration comes from the SIAC-SIMC Arb-Med-Arb Protocol: after the Singapore International Mediation Centre (SIMC) mediates a settlement, the parties refer the agreement back to the Singapore International Arbitration Centre (SIAC) tribunal.[17] Clause 7 of the AMA Protocol expressly empowers the tribunal to transform the settlement into a consent award, choosing which provisions to include and which to remain contractual.[18] Between 2014 and 2017, over 50 SIAC-SIMC Arb-Med-Arb cases relied on this mechanism, with an 85 percent settlement rate and nearly all settlements formalized as consent awards.[19] This step is critical as it transforms the mediated settlement into an arbitral award, rendering it enforceable under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[20] The consent award provides legal finality and ensures that the settlement is recognized across jurisdictions that are signatories to the Convention. Thereafter, arbitration can be resumed, if need arises.

2.3 Resumption of Arbitration

In a situation where no settlement is made during the mediation process, the parties can again resume the arbitration procedure. The arbitrator then considers the unresolved issues from the mediation phase and then renders the arbitral award to conclude the matter. This

15 Wheaton Webb, *Mind the Gap: Proposing a Tool for Identifying Gaps in Institutional Arbitration Rules*, 13 Florida A&M University Law Review 125 (2017).

16 Stephen P Anway, *Mediation in Copyright Disputes: From Compromise Created Incentives to Incentive Created Compromises*, 18(2) Ohio State Journal on Dispute Resolution 439 (2003).

17 Singapore International Mediation Centre, SIAC-SIMC Arb-Med-Arb Protocol, cl. 7.

18 Christopher Boog, *The New SIAC/SIMC AMA Protocol,* Asian Dispute Review 91, 95 (2015).

19 Singapore International Mediation Centre, Annual Case Statistics 2014–2017 https://simc.com.sg/case-statistics/.

20 Brette L Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention*, 54(5) UCLA Law Review 1385 (2007).

ensures that the dispute is settled even if mediation fails.

India's positive outlook towards ADR mechanisms makes a fertile ground for the Arb-Med-Arb model to become popular. To support such mechanisms, institutional arbitration centres, such as the Mumbai Centre for International Arbitration *("MCIA")* and the Delhi International Arbitration Centre *("DIAC")* provide adequate infrastructure for the resolution of issues, particularly ISDs, similar to their international counterpart like the Singapore International Arbitration Centre *("SIAC")* and Singapore International Mediation Centre *("SIMC"),* which launched their Arb-Med-Arb Protocol back in 2014.[21] The traditional ISDS framework is filled with criticism such as being adversarial, costly, lack of flexibility, and time-intensive.[22] Adopting the model formally will also address a key problem: cross-border disputes. For example, mediators reported success rates exceeding 70% in many cases, with even higher rates in cases involving disputes of over £10 million.[23] The next heading delves into the integration of these in the existing Indian framework with possible implications.

3. INDIA'S CURRENT INVESTOR-STATE DISPUTE FRAMEWORK

Internationally, ICSID provides a platform for settlement between the disputing parties, which makes it a suitable place to resolve ISDs. However, India is not a signatory to this Convention for numerous reasons.[24] As recommended by the Indian Council for Arbitration, the framework is more aligned towards developed countries.[25] ICSID proscribes member states from challenging awards in their domestic courts, therefore, there is an absence of judicial review by Indian courts if the arbitral award violates India's public policy.[26] Judicial ambiguity also persists in interpreting the term 'investment' by the arbitral tribunals as per the ICSID Convention.[27] Additionally, India fears a regulatory chill, a situation

21 SIAC-SIMC AMA Protocol http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf; Arb-Med-Arb Protocol, VIAC https://www.viac.vn/en/arb-med-arb-protocol.

22 Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), The Oxford Handbook of International Investment Law 1048–1050 (OUP 2008).

23 Mediation in Arbitration Survey Insights (n 12).

24 Mahnaz Malik, *The ICSID Club: List of Members and Non-Members* (BIICL Investment Treaty Forum, 20 June 2007) 3.

25 *Id*.

26 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature 18 March 1965, entered into force 14 October 1966, 575 UNTS 159, arts. 52–54.

27 Christoph H. Schreuer, The ICSID Convention: A Commentary (2nd edn, Cambridge University Press 2009) 114–118; Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award (15 April 2009).

where governments may hesitate to introduce public welfare regulations due to the risk of adverse investment arbitration awards. In India's context, this concern crystallised after disputes in the telecom and taxation sectors (e.g., *Vodafone v India* and *White Industries v India*), where retrospective tax measures and licensing reforms were challenged, exposing the state to multi-million-dollar liabilities.[28] Such experiences can deter policymakers from enacting progressive legislation, say, on pollution control or public health, if they believe that foreign investors could claim breaches of "fair and equitable treatment" or legitimate expectations.[29] Empirical studies by UNCTAD have shown that over half of the surveyed governments cite ISDS threats as a factor in regulatory decision-making.[30] For India, regulatory chill thus represents a real trade-off between safeguarding sovereignty to regulate in the public interest and maintaining an attractive investment climate. Between 2011 and 2015, India faced multiple investment treaty claims due to regulatory changes, particularly in the telecom and taxation sectors, such as the retrospective amendment to the Income Tax Act, 1961. These claims exposed India to significant financial risks and fuelled concerns about the inflexibility of ISDS mechanisms like ICSID arbitration.[31] Despite these challenges, there appears to be a shift from these concerns, and there's a growing call from academia for India to formally recognise the convention.[32] To address the issues with ISDS mechanisms, India formulated a restrictive BIT model that excluded MFN clauses and taxation measures and mandated the exhaustion of local remedies before initiating international arbitration.[33] Following this, India unilaterally terminated its earlier 58 BITs to renegotiate according to the model BIT, which ensured a balance between investor rights and state sovereignty.[34] It has been felt that enhanced protection under ICSID arbitration could benefit Indian investors operating in member states, such as the Netherlands, Singapore, and the USA.[35]

28 White Industries (n 8); Vodafone International Holdings BV v. Union of India 1 SCR 573.

29 Gus van Harten, Investment Treaty Arbitration and Public Law (OUP 2007) 127–132.

30 UNCTAD, World Investment Report 2022: International Tax Reforms and Sustainable Investment (United Nations 2022) 152–153.

31 Gordon Blanke, *India's Revised Model BIT: Every Bit Worth It!,* Kluwer Arbitration Blog (Mar. 20, 2016) https://arbitrationblog.kluwerarbitration.com/2016/03/20/indias-revised-model-bit-every-bit-worth-it/.

32 Abhisar Vidyarthi, *Revisiting India's Position to not Join the ICSID Convention*, Kluwer Arbitration Blog (Aug. 2, 2020) https://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/.

33 Model Text for the Indian Bilateral Investment Treaty, art 15.1 (2015) https://dea.gov.in/sites/default/files/ModelBIT_Annex.pdf.

34 Ministry of Finance, Annual Report 2016–17, Department of Economic Affairs (2017) 96–97.

35 Abhisar Vidyarthi, *supra* note 32.

Domestically, India relies on the Arbitration and Conciliation Act, 1996 *("A&C Act"),* for arbitration and enforcement of foreign awards. However, investment awards face challenges under the New York Convention due to India's commercial reservation under Article 1(3), which restricts enforcement to disputes considered 'commercial' under Indian law, creating uncertainty.[36] This creates a significant ambiguity for ISDS awards, as investment treaty disputes often involve broader public policy considerations and may not fit neatly into the definition of 'commercial' disputes. Consequently, the enforcement of such awards in India remains uncertain, with varying interpretations by Indian courts. The act fails to address critical issues such as state sovereignty, regulatory autonomy, or investor obligations.

Looking at the provisions of India's 2015 Model BIT reveals important provisions related to dispute resolution for ISDs and fixes some shortcomings discussed previously. Article 15.1 mandates that an investor must exhaust all available local judicial and administrative remedies for at least five years before initiating arbitration.[37] This provision reduces the risk of international tribunals interfering in matters that could be resolved by India's legal framework itself. Moreover, it aligns with the prerequisite mentioned in Article 26 of the ICSID Convention.[38] The deliberate omission of the Most Favoured Nation (MFN) clause from the Model BIT is another significant development. Under earlier BITs, investors could invoke MFN clauses to import more favourable procedural provisions, such as arbitration clauses, from other treaties (a practice known as "treaty shopping"). This led to uncertainty and broader-than-intended access to arbitration, as seen in cases like *Maffezini v Spain*.[39] By excluding MFN clauses, India ensured that each treaty operates within its negotiated terms, thereby preserving the specific balance of rights and obligations it seeks to establish with each treaty partner. These structural changes reflect a shift in India's ISDS policy, from broad investor privileges toward a more calibrated approach that safeguards regulatory autonomy while still providing a framework for investor protection.

Additionally, the treaty does not recognise the protection of investor's legitimate expectations, which has been a basis for expansive claims in ISDS cases. Along with these provisions, the treaty mandates a six-month consultation period to encourage amicable settlement before

36 Sahil Tagotra and Ishita Mishra, *Recent Developments in the Enforcement of New York Convention Awards in India*, Kluwer Arbitration Blog (Jul. 6, 2020) https://arbitrationblog.kluwerarbitration.com/2020/07/06/recent-developments-in-the-enforcement-of-new-york-convention-awards-in-india/.

37 Model Text for the Indian Bilateral Investment Treaty, art 15.1 (2015) https://dea.gov.in/sites/default/files/ModelBIT_Annex.pdf.

38 Gordon Blanke, *supra* note 15.

39 Maffezini v. Spain, ICSID Case No. ARB/97/7.

initiating arbitration.[40] The treaty provides United Nations Commission on International Trade Law *("UNCITRAL")* Arbitration rules as the forum for dispute resolution instead of ICSID Convention. Article 2.4 excludes disputes related to taxation, subsidies, compulsory licenses, public health, and other regulatory measures.[41] Article 11 obligates investors to comply with host state laws, regulations, and administrative guidelines, and non-compliance with the same leads to rejection of the arbitration claim.[42] By introducing these control mechanisms, the Model BIT addresses many of the apprehensions that previously dissuaded India from participating in the ICSID framework. These changes indicate a potential shift in India's approach.

Beside these frameworks, India has also considered alternative ISDS reform mechanisms being discussed internationally, such as the Multilateral Investment Court *("MIC")* proposed by UNCITRAL and other forums. The MIC proposal aims to establish a treaty-based adjudicative body to resolve ISDs.[43] Proponents of this mechanism, like the EU, argue that disputes involving sovereign states should be treated as a public law matter, necessitating a standing court instead of ad hoc tribunals. However, critics, including Russia and China, warn of potential politicisation and bias, paralleling concerns raised about existing international courts like the ICJ.[44] However, India's stance on accepting this framework is unclear. For example, India is negotiating a trade and investment agreement with the EU that may adopt the European model,[45] which replaces ISA with a bilateral standing court and envisions transitioning to a multilateral MIC. While this step showcases India's approach to accepting alternate frameworks, it also underscores the need for a decided strategy for the shift. Having discussed the basis of the framework as well the status quo of India's regulatory framework for ISDS, the author argues for integrating the model in their framework in the upcoming heading.

40 *Id.*

41 Model Text for the Indian Bilateral Investment Treaty, art 2.4 (2015) https://dea.gov.in/sites/default/files/ModelBIT_Annex.pdf.

42 Model Text for the Indian Bilateral Investment Treaty, art 11 (2015) https://dea.gov.in/sites/default/files/ModelBIT_Annex.pdf.

43 Fahira Brodlija, *The Multilateral Investment Court: Necessary ISDS Reform or Self-Fulfilling Prophecy?* 15 Arbitration Law Review 1 (2024).

44 *The Elephant in the Room: India's Place in the International Investment Regime*, Mondaq (Sept. 21, 2022) https://www.mondaq.com/india/inward-foreign-investment/1231930/the-elephant-in-the-room-indias-place-in-the-international-investment-regime.

45 Fahira, *supra* note 43.

4. INTEGRATING THE ARB-MED-ARB MODEL IN INDIA'S ISDS FRAMEWORK

Moving ahead from our above specific discussion on each topic, the following sub-headings will deal with themes related to the integration of the Arb-Med-Arb model into India's ISDS framework. These themes will cover how Arb-Med-Arb aligns with India's Model BIT, fits within its legislative framework, and contributes to its broader economic goals, while addressing challenges and drawing on international best practices.

4.1 Advantages of the AMA Model in the ISDS Framework

Mediation has showcased substantial effectiveness in resolving disputes in India, as evidenced by empirical data from various mediation centres. For instance, the Delhi High Court Mediation and Conciliation Centre achieved a 56% settlement rate during the same period.[46] Since the model integrates mediation as an intermediary process, it can potentially reduce animosity and facilitate the preservation of business relationships which are at risk in case of litigation or arbitration. Parties opt for the Arb-Med-Arb model because it uniquely combines the certainty of arbitration with the flexibility and relationship-preserving benefits of mediation. In Arb-Med-Arb, an initial arbitration phase provides the parties with a clear understanding of risks and likely outcomes, which in turn incentivizes genuine bargaining in the subsequent mediation phase. Should mediation produce a settlement, that agreement is converted into a consent award enforceable under the New York Convention, thus marrying mediation's amicable resolution with arbitration's enforceability. Moreover, parties value the model's procedural flexibility: they retain control over mediator/arbitrator appointments, procedural timetables, and the choice to resume arbitration seamlessly if mediation stalls. Confidentiality is better preserved than in standalone arbitration because mediation sessions occur in private, encouraging more candid disclosures and creative problem-solving. Conversely, the knowledge that unresolved issues will still be adjudicated provides a *"backup"* that sustains settlement momentum, addressing the mediators' dilemma of *"empty chairs"* in pure mediation when one side disengages. Finally, by blending party autonomy with institutional safeguards, Arb-Med-Arb appeals to a broad spectrum of stakeholders, corporate counsel, in-house lawyers, and sovereign states seeking efficient, enforceable, and relationship-preserving dispute resolution As per research by Broches and Levin, mediation can lead to quicker resolutions, often within 4-6 months, compared to the

46 Sana Shakil, *Mediation centres gain ground, over 1L cases solved in 10 years*, Times of India (Oct. 11, 2015) https://timesofindia.indiatimes.com/city/delhi/mediation-centres-gain-ground-over-1l-cases-solved-in-10-yrs/articleshow/49306101.cms.

protracted timelines of arbitration proceedings.[47] India's Model BIT does not recognise the doctrine of legitimate expectations as a substantive protection, thereby reducing the potential for expansive claims.[48] This exclusion safeguards India's ability to introduce regulatory changes for public welfare, such as environmental protections or economic reforms. It is possible that such exclusion was inspired by Brazil's approach encapsulated in its Cooperation and Investment Facilitation Agreements *("CIFAs"),* which prioritises state sovereignty and avoids traditional ISDS mechanisms.[49] Moreover, from a fiscal perspective, resolving ISDs with the Arb-Med-Arb model significantly reduces costs incurred for pursuing litigation or arbitration alone. Although inserting a mediation phase may appear to add costs, especially if parties ultimately resume arbitration, empirical studies demonstrate net savings even when mediation does not produce a full settlement. An ICC ADR Task Force found that mediation sessions conducted mid-arbitration reduced document production by 40% and cut overall case budgets by 15%, as fewer witnesses and expert reports were needed.[50] In practice, the upfront cost of mediation is thus more than offset by streamlined tribunal procedures, fewer procedural skirmishes, and accelerated timetables yielding lower total expenditure even when a consent award is not reached at mediation.[51] By resolving disputes during the mediation phase, parties can avoid these substantial costs. It is advantageous for India as this model mitigates the risk of large financial liabilities arising from arbitral awards, such as those seen in the *White Industries* case, where India incurred huge costs and faced criticism over its failure to meet its obligations under a BIT. The next sub-heading deals with the legislative framework surrounding arbitration in India.

4.2 Legislative and Institutional Framework

The A&C Act, the governing framework of arbitration in India, is pivotal in accommodating new ADR options such as Arb-Med-Arb. For instance, arbitrations brought under UNCITRAL rules (as specified in India's Model BIT), the A&C Act's procedural provisions, including Section 30 empowering arbitrators to facilitate settlement and "*conduct the proceedings in such manner as…will secure the fair, expeditious and economical conduct of the proceedings*" and Sections 23–28 on interim measures apply in full.[52] These provisions can support an

47 Broches and Levin, *Mediation in Investor-State Dispute Settlement,* 17 ICSID Review 146 (2002).

48 Prabhash Ranjan Et. Al, *India's Model Bilateral Investment Treaty: Is India Too Risk Averse?,* Brookings India Impact Series (August 2018).

49 Geraldo Vidigal & Beatriz Stevens, *Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?,* 19(3) Journal of World Investment & Trade 475-512 (2018).

50 ICC ADR Task Force, Benefits of Integrating Mediation into Arbitration, 7–8 (2019).

51 Nadja Alexander et al., *Cost-Efficiency in Arb-Med-Arb: Empirical Insights* 12(1), Journal of International Dispute Settlement 45, 52 (2021).

52 Arbitration and Conciliation Act, 1996, § 2(1)(e), 23–28, 30, No. 16, Acts of Parliament, 1996 (India).

Arb-Med-Arb process by authorizing tribunals to pause for mediation, order interim relief, and record settlement-derived consent awards.[53] However, an amendment in the Act or a notification recognising the process and providing the procedural safeguards will be more beneficial. Under the New York Convention, only *"arbitral awards"* as defined in Article I(1) are enforceable, and whether a mediated settlement recorded as a consent award fall within that scope has been the subject of debate.[54] Although the Convention's text does not explicitly mention mediation settlements, an expansive interpretation of *"arbitral award"* reinforced by UNCITRAL Working Group II proposals could permit their enforcement, yet this theory remains largely untested in practice. To resolve this uncertainty, the A&C Act should be amended to expand the statutory definition of *"arbitral award"* in Section 2(1)(d) to expressly include mediated settlements recorded under Section 30(2) and introduce a provision analogous to Section 14 of the Mediation Act, 2023, which mandates recognition and enforcement of domestic mediation agreements, while also incorporating the Singapore Convention's cross-border enforcement mechanisms into Part II. Additionally, the role of institutions such as the MCIA is also important. Although they are well-positioned to handle complex arbitration cases yet they have to develop a robust framework for hybrid mechanisms like Arb-Med-Arb. Leveraging institutional rules and developing specialised panels of mediators and arbitrators could enhance the MCIA's ability to facilitate this process. Moreover, adopting best practices from institutions like the SIAC, which have successfully implemented Arb-Med-Arb protocols, could help India adapt these models to its unique legal and economic context. The next subsection discusses best practices from across the globe for India to take cues for formulating their own framework.

4.3 International Precedents and Best Practices

Taking a look at international practices and analysing the impact can help India successfully implement the same as per its own norms. For example, in Singapore, the SIAC and the SIMC have established a well-structured Arb-Med-Arb Protocol. The key to their success lies in the seamless transition between arbitration and mediation, facilitated by clear procedural rules and efficient administration.[55] Another example is Hong Kong. Hong Kong's experience with the Arb-Med-Arb model under the Hong Kong International Arbitration Centre *("HKIAC")* further highlights its effectiveness. The enforcement of mediated settlements, especially under the Singapore Convention on Mediation, has made this model

53 Alan Redfern & Martin Hunter, Law And Practice Of International Commercial Arbitration (5th edn, Sweet & Maxwell 2009) ch 11.

54 Sussman ADR, The New York Convention Through A Mediation Prism (ABA Dispute Resolution Publications 2008) 12–15.

55 SIMC, *supra* note 21.

more reliable and attractive for ISDs.[56] This enforceability reduces uncertainty and fosters confidence among investors and states alike. These protocols benefit from clear institutional rules, trained panels of mediators and arbitrators, and built-in timelines that prevent undue delays but they also rely on statutory recognition of consent awards and on mediation-friendly court support. India could emulate their procedural rigor by incorporating an AMA clause into its Model BITs or into the A&C Act, explicitly empowering tribunals to stay for mediation and to issue consent awards; tasking MCIA/DIAC with developing dedicated AMA rules and rosters; and enhancing judicial guidelines to enforce mediated consent awards without re-litigation. However, shortcomings include India's non-ratification of the Singapore Convention, limiting cross-border enforceability, and a current lack of mediation culture and trained practitioners at scale. A detailed discussion on the extent of challenges marring the ISDS framework is done in the next heading.

5. CHALLENGES ASSOCIATED WITH THIS INTEGRATION

With the efficacy discussed in the previous heading, it is time to divert our attention towards the challenges associated with the positives of integrating the model with India's ISDS framework. The model presents a duality, where an individual may serve as both mediator and arbitrator that can undermine the fairness and neutrality of dispute resolution process. This issue stems primarily from the dual role's inherent conflict of interest.[57] In the mediation phase, parties are encouraged to disclose sensitive information to facilitate settlement. However, if the same individual transitions into the arbitration phase, they might subconsciously or consciously rely on the confidential disclosures made during mediation, even if such information is inadmissible in arbitration. Additionally, the A&C Act creates a legislative gap for proper integration of this model. For example, the Act does not explicitly mandate the separation of roles between mediator and arbitrator in hybrid processes, nor does it outline mechanisms to ensure that the arbitrator disregards confidential information obtained during mediation. Although the Mediation Act, 2023 addresses these concerns, what the A&C Act still lacks, however, is any express provision to *"stay"* arbitration mandatorily for mediation or to reconvene for the sole purpose of signing off a mediated consent award. This gap creates two implications: first, it discourages investors from opting for Arb-Med-Arb mechanisms due to the fear of biased arbitration outcomes. Second, it limits the willingness of states, including India, to embrace the model as a legitimate alternative to traditional ISDS methods.

56 *Id*.

57 Mukti Rijal, *Double Hatting in Dispute Resolution*, MEDIATE (Nov. 5, 2021) https://mediate.com/double-hatting-in-dispute-resolution/.

Another aspect that poses a challenge to this integration is the enforceability of mediated settlements. Unlike arbitral awards, which are enforceable under the well-established framework of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, mediated agreements often lack comparable international guarantees. Enforceability is a cornerstone of trust in any dispute resolution mechanism.[58] Without robust mechanisms to enforce mediated settlements, parties may be reluctant to invest time and resources in mediation as part of the AMA process. This issue is particularly critical in the context of ISDS, where the stakes involve not only substantial monetary compensation but also sensitive issues of state sovereignty and regulatory autonomy. The United Nations Convention on International Settlement Agreements Resulting from Mediation *("Singapore Convention"),* provides a legal framework for the direct enforcement of mediated agreements across its signatory states. By not ratifying this convention, India limits its ability to offer international investors the assurance that mediated agreements resulting from AMA processes will be upheld in foreign jurisdictions. This is a significant deterrent for investors who prioritise predictability and reliability in ADR mechanisms. Comparatively, countries that have ratified the Singapore Convention, such as Singapore and Hong Kong, offer a competitive advantage by providing investors with greater certainty regarding the enforceability of mediated settlements.[59] These jurisdictions have integrated the Singapore Convention into their legal frameworks, ensuring that mediated agreements are treated with the same level of enforceability as arbitral awards under the New York Convention. This alignment has bolstered investor confidence and positioned these jurisdictions as leaders. For India, the non-ratification of the Singapore Convention reflects broader systemic challenges in embracing mediation as a core component of its dispute resolution framework. While India's A&C Act includes provisions for conciliation, it does not explicitly address the cross-border enforceability of mediated settlements. This omission leaves parties uncertain about the legal status of such agreements, particularly in disputes involving international investors and foreign jurisdictions.

Lastly, the absence of standardised protocols for the integration of the Arb-Med-Arb (AMA) model within India's ISDS framework creates significant barriers to its effective implementation. India's Model BIT is predominantly arbitration-centric, neglecting

58 *Enforcement of Mediated Settlement Agreements*, Norton Rose Fulbright https://www.nortonrosefulbright.com/en/knowledge/publications/511d2b89/enforcement-of-mediated-settlement-agreements.

59 *Singapore Convention on Mediation Handbook*, Singapore Management University School of Law https://www.singaporeconvention.org/sites/singaporeconvention.org/files/SMU%20SOL%20Singapore%20Convention%20Mediation%20Handbook.pdf.

mechanisms for alternative or hybrid approaches like Arb-Med-Arb.[60] This focus on arbitration alone limits the adaptability of India's dispute resolution framework to contemporary needs, especially in industries such as renewable energy and high-tech sectors, where disputes often require flexible, relationship-preserving solutions. For instance, renewable energy projects often involve long-term commitments between investors and the state, making mediation a valuable tool for addressing disputes without disrupting ongoing partnerships. Arbitration alone, with its adversarial nature, may result in outcomes that undermine the trust and cooperation necessary for the success of such projects. Similarly, technology-related disputes often involve rapidly evolving markets and require innovative, time-sensitive solutions that mediation can better accommodate. In India, capacity-building initiatives specific to Arb-Meb-Arb are scarce. Most professionals in the legal and business sectors are well-versed in arbitration but lack exposure to mediation and hybrid processes, leading to hesitation and scepticism about the viability of Arb-Med-Arb. To solve these extensive challenges, the next heading proposes some policy suggestions to be incorporated to successfully integrate the AMA model in the ISDS framework.

6. POLICY SUGGESTIONS AND WAY FORWARD

To integrate the Arb-Med-Arb model effectively into India's ISDS framework, India should consider several targeted policy suggestions along with their implementation measures and expected outcomes. The legislative framework governing ADR in India, particularly the A&C Act must be amended to explicitly recognise the Arb-Med-Arb model.

The A&C Act should require mediators to disclose any past or present relationship with the parties or counsel, observe a 'cooling-off' period of at least six months before serving as an arbitrator in any matter they have mediated, and submit annual conflict-check certifications to the appointing institution. These measures mirror best practices in institutional Arb-Med-Arb protocols such as SIAC-SIMC's requirement of separate appointment panels and HKIAC's six-month separation rule designed to eliminate any appearance of bias. On enforceability, the amendment should expressly incorporate the United Nations Convention on International Settlement Agreements Resulting from Mediation *("Singapore Convention on Mediation")* by defining a *"mediated settlement agreement"* as an *"arbitral award"* for purposes of Section 47, and providing that, when executed in the prescribed form, such agreements are directly enforceable in India and in all other signatory states under

60 Rishabh Gandhi, *The Arb-Med-Arb Model: Shaping the Future of ADR in India*, Bar & Bench (Oct. 24, 2024) https://www.barandbench.com/law-firms/view-point/arb-med-arb-model-shaping-future-of-adr-india.

Chapter V of the New York Convention. Under Article 5 of the Singapore Convention, enforcement may be refused only on narrow public-policy grounds or where the settlement is not *"in writing"* or *"resulting from mediation,"* thereby offering investors the same certainty enjoyed in Singapore and Hong Kong.

Second, India must ratify the Singapore Convention on Mediation to enhance the cross-border enforceability of mediated settlements. Ratification would provide legal certainty and make mediated agreements directly enforceable in signatory states, thereby addressing investor concerns about reliability. The Ministry of Law and Justice, in collaboration with the Ministry of External Affairs, can expedite the review process to assess compatibility with existing domestic laws and initiate ratification proceedings. This step will align India with global ADR leaders like Singapore and Hong Kong, making it a more attractive destination for foreign investment.

Third, institutional reforms are crucial for implementing the Arb-Med-Arb model. Institutions like the MCIA and the DIAC should establish detailed protocols and guidelines for hybrid dispute resolution mechanisms. These protocols should include training programs to build capacity among arbitrators and mediators in handling Arb-Med-Arb cases. The government can incentivize such initiatives by offering grants or tax benefits to arbitration institutions developing such frameworks. This will ensure that Indian institutions are equipped to manage the complexities of hybrid processes, thus enhancing their global competitiveness.

Fourth, confidentiality safeguards need to be strengthened to ensure the integrity of the mediation process. The amended A&C Act and institutional rules must include strict confidentiality protocols, with penalties for breaches. Institutions can enforce these norms by requiring mediators and arbitrators to sign binding confidentiality agreements. Public awareness campaigns highlighting these safeguards can further reassure parties about the process. Enhanced confidentiality will encourage open dialogue during mediation, increasing the likelihood of mutually beneficial settlements.

Lastly, to promote wider adoption of the Arb-Med-Arb model, India should integrate its use into its Model BIT. Provisions mandating mediation before arbitration and recognizing Arb-Med-Arb as a preferred mechanism for dispute resolution can be included. An Optional Arb-Med-Arb Protocol can be introduced that parties can append to their current treaties by simple exchange of notes rather than reopening entire agreements. New BITs could incorporate a model AMA clause as standard practice, while existing treaties could adopt supplementary agreements or side letters establishing mediation interludes. The Ministry of Commerce might also issue non-binding guidelines and convene a stakeholder steering

committee including representatives from MCIA, DIAC and industry to promote voluntary uptake of hybrid rules. Over time, this incremental approach, leveraging protocols and guidance instead of wholesale treaty amendment can harmonize India's ISDS framework with its policy goals without derailing the ratification process.

By addressing legislative gaps, strengthening institutional capabilities, and aligning with global standards, India can position itself as a preferred destination for dispute resolution. This strategic shift not only enhances investor confidence but also aligns with India's broader economic goals of attracting sustainable foreign investments while maintaining regulatory autonomy.