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## Delhi Arbitration Weekend 2024: India and the Evolving Nature of Investor State Dispute Settlement

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The Delhi Arbitration Weekend (“DAW”) 2024 that took place from 6 to 10 March 2024 witnessed two back-to-back panels on Investor-State Dispute Settlement (“ISDS”). These sessions deliberated on the past, present and future of ISDS from an Indian and global perspective. This post captures the discussions from the two ISDS panels at the DAW titled, “Investor State Dispute Settlement (ISDS) in 2024” (“First ISDS Panel”) and “Where do We Stand: Revisiting the Investor State Dispute Settlement (ISDS) Mechanism in the Light of Today’s Economic Challenges” (“Second ISDS Panel”).

The First ISDS Panel, chaired by [Justice V. Subramanian](#), looked at the state of ISDS in 2024. [Ashwita Ambast](#) (Legal Counsel, Permanent Court of Arbitration) and [Amit Sibal](#) (Senior Advocate, Supreme Court of India) presented the state’s perspective on ISDS and how the mechanism could be reimaged. Meanwhile, [Kenneth Beale](#) (Partner, Jenner & Block) and [Sapna Jhangiani, KC](#) (International Legal Counsel, Singapore Attorney General’s Chambers), discussed some of the current global challenges in ISDS.

The Second ISDS Panel, chaired by [Justice Vikram Nath](#) (Judge, Supreme Court of India) focused on current economic challenges. The panel consisted of [Justice M. Ramachandra Rao](#) (Judge in the High Court of Himachal Pradesh), [C.A. Sundaram](#) (Senior Advocate), [J. W. Rowley, KC](#) (Twenty Essex Chambers) and [Melanie van Leeuwan](#) (Partner, Derains & Gharavi).

### ISDS in 2024

#### The Current State of ISDS: A State’s Perspective

Justice V. Subramanian formally opened the session by quoting a statement from the Miami Arbitration Week 2023 that “the arbitration community is losing the fight to ensure the survival of ISDS”. He noted that ISDS, as a mechanism, had lost its battle of legitimacy in the eyes of public. His remarks reflected the rising concerns against ISDS being used as a tool to target the sovereign rights of states to usher in reforms across various sectors such as energy, environment, etc..

Justice V. Subramanian also highlighted the award that was issued against Honduras, the quantum of which was nearly equal to 2/3 of its economy, and the [P&ID arbitration](#) where the UK

Commercial Court had overturned an award on the grounds of severe abuse of process and multiple counts of bribery. Honduras' case is one of many instances of exemplary awards that have been issued against Latin American countries, which have contributed to a backlash against the use of ISDS. Instances such as these have prompted states across that region to reconsider their positions vis-à-vis investment treaties.

Echoing Justice V. Subramanian's remarks, Amit Sibal referred to states' disenchantment with bilateral investment treaties ("BITs") and ISDS. He supported this position by referring to India's termination of 76 of 87 of its BITs in 2016. He further mentioned that India was not alone and that countries such as South Africa, Ecuador and Brazil had also withdrawn from what he termed the "older order of the ISDS system." The shift in India's position has become more visible after the [White Industries award](#) and subsequent cases. Ever since then, the Indian government has taken a more cautious approach with the [2016 India Model BIT](#) ("India Model BIT"). Among other changes, the India Model BIT has reduced investor protection and introduced the exhaustion of local remedies, thereby making the road to ISDS a lengthy process for disgruntled investors.

[Ashwita Ambast](#), focused on reimagining ISDS and discussed developments related to the [Code of Conduct for Arbitrators in International Investment Disputes](#) ("Code"). She emphasised the significance of addressing concerns regarding the independence and impartiality of arbitrators hearing treaty claims. She highlighted the importance of establishing clear obligations, noting that the Code sets out a non-exhaustive list of "risks of behaviour" which might suggest a lack of independence or impartiality. As bias may be perceived over repeated patterns of behaviours, the non-exhaustive list seems to be one of the major breakthroughs of the Code and the UNCITRAL Working Group III ("WG III").

Ashwita Ambast also highlighted other remarkable features of the Code, such as the regulation of double-hatting and tackling the use of tribunal assistants in investment arbitrations. The Code is a remarkable development and demonstrates that the efforts of WG III are coming to fruition. With several other draft provisions on appellate mechanism, advisory centre and cross-cutting issues being deliberated, it can be said that the WG III may pave the way for much needed reforms for ISDS.

### Current Challenges in ISDS

Kenneth Beale addressed the developments around sustainability, climate change and the Energy Charter Treaty with respect to ISDS. He observed that a lot has changed since the [Conference of Parties 21](#) in 2015, and noted the increased criticism of ISDS as a mechanism used to direct claims against environmental reforms. Further, instances such as the [Eco Oro award](#) demonstrate that ISDS tribunals may ignore environmental carve outs, and push states towards regulatory chill.

Discussing other instances of dissatisfaction among states, Sapna Jhangiani, KC noted that there were two streams of thoughts in this regard: one aiming to redefine ISDS and their involvement, and the other contemplating to change the entire system. She noted that regardless of which newer form ISDS may take, there will always be room for mediation. However, she flagged several issues inhibiting mediation's widespread adoption such as (a) accountability; (b) premature invocation of mediation; and (c) socio-economic impact of mediation, as some of the reasons why mediation was not yet a serious contender. Nonetheless, the prospects of investor state mediation cannot be ruled

out as about 35% of ISDS claims have [ended in settlements](#). However, settlements in relation to treaty claims, may invite public outrage as the terms of settlement may be confidential. In this regard, states and stakeholders would have to work on finding a more balanced approach which takes into account public participation, transparency and steps to make it more legitimate in the eyes of public.

## **Where do We Stand? Mechanisms in Light of Today's Economic Challenges**

### Balancing Interests

Justice Vikram Nath opened the second ISDS panel by projecting ISDS as a pivotal link between investors' interests and sovereignty of a state. He observed that for India to pursue its goal of stable economic development, it was important to instil confidence amongst investors. While investors' confidence in India remained high, India's restrictive approach towards BITs may benefit from some serious reconsiderations, as detailed below.

### Apprehensions Against ISDS

Justice M. Ramachandra Rao noted that ISDS had to be perceived differently, asserting that it should not be allowed to remain as an "open ended sovereign acceptance" of an arbitrator's authority by the state. He observed that this opened the doors for upfront arbitrations, possibility of awards ordering high damages etc. which caused "regulatory chill." He gave instances from the [Phillip Morris](#) arbitration, where a proposed legislation for regulating the use of tobacco was challenged for indirect expropriation, which forced New Zealand to stall a similar legislation being contemplated by them. From an Indian perspective, the India Model BIT aims to address some of these issues by granting broad regulatory powers to the government and reducing investor protection. Additionally, reduced investor protection should not be viewed negatively, as Indian investors abroad would be subject to reduced protection as well.

### The Way Forward

Melanie Van Leeuwen began by discussing India's approach to ISDS, highlighting key policy changes such as (a) the India Model BIT; (b) the termination of several BITs; and (c) the issuance of joint interpretative statements. She noted that under the India Model BIT, the route to ISDS is protracted with the intention to avoid it to the best of abilities.

Further, she remarked that Artificial Intelligence ("AI") and energy transition posed significant threats to India's growth, as the Indian economy at present relied on human capital and non-renewable energy sources. Hence, foreign direct investment would be needed for these sectors. AI and energy transition are expected to play a significant role in the global economy. In this regard, the Indian government has taken some positive steps by expressly recognising environment protection under [Article 8 of the Comprehensive Economic Partnership Agreement](#) between India and Japan and [Article 5.5 of the India EFTA Trade and Economic Partnership \("TEP"\)](#). Considering the ongoing negotiations of other investment and trade instruments globally, these

instances can provide a roadmap to other economies looking to attract investments.

W. Rowley, KC observed that treaties have to be negotiated like contracts. However, if BITs were to offer no protection at all, investors would not accept it. However, this observation may not reflect the reality as [Chapter 12 of India EFTA FTA](#) retains arbitration as a dispute settlement mechanism. At the same time, the said provision requires the tribunal to apply customary rules of public international law. Though unrelated, the dispute settlement provision of the India EFTA TEP addresses C.A. Sundaram's concerns that the present ISDS mechanism is not suited to the present economic climate domestically as well as globally.

## **Concluding Remarks**

The two ISDS panels that took place during the DAW demonstrate India's commitment towards reforming the current ISDS mechanism and adopting a more stable and sustainable alternative. With the backlash against ISDS gaining momentum, a balanced alternative adopted by India in its investment and trade instruments may guide other economies who are currently trying to deal with ISDS.

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This entry was posted on Monday, May 6th, 2024 at 8:47 am and is filed under [Delhi Arbitration Week, India](#)

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