

Sustainable Development and Environmental Protection Under the International Investment Agreements of India – A Critical Review

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ABSTRACT

Introduction: In 2015, India adopted the reformed Model Bilateral Investment Treaty (BIT) and terminated most of its existing agreements. Same year, all members of the United Nations agreed on achieving 17 ambitious Sustainable Development Goals by 2030 (UNSDGs) with majority of the goals further highlighting the need for environmental protection. This paper examines the progress in achieving the SDGs through a review of the post 2015 Indian BITs for compliance with the sustainable development-oriented provisions.

Methodology: A review of the global and national reports and databases is undertaken for evaluating progress and gaps in meeting the UNSDGs at the national and state levels in India along with their SDG scores and foreign investment data and rankings. Post 2015 BITs signed, adopted and currently in force were reviewed and analyzed for their compliance with the sustainable development-oriented provisions.

Findings: India's progress has been slow with further needing about USD 2.64 trillion in investments to meet the UNSDGs by 2030. Even with increased foreign investment there remains a wide gap in international investments and progress in SDG targets for India. Except for a few agreements, even the post reform BITs do not provide adequate safeguards for environmental protection. Both at the national and state level, a higher investment ranking does not naturally reflect a higher SDG score for the respective states e.g. states like Maharashtra and Gujarat together received almost 60% of the total foreign investment but lag in SDG progress in comparison to states that received much less FDI.

Conclusion: Future BITs must be carefully negotiated to make them SDG oriented and implemented with environmental protection and SDGs at their core. Besides mandatory environmental and social impact assessments, a negative or restricted list of areas for foreign investment adversely affecting the environment can be included in all BITs.

Keywords: Environment Protection; International Investment; Sustainable Development; Investment Law; Environmental Law; India

INTRODUCTION

Owing to its rich natural and human resources, India is one of the world's most favoured destinations for international investments and foreign investment has played a major role in its economic development [1] While India, earlier relied on export substitution and debt-financed development [2] it liberalised its economy in the early 1990s and began to rely on Bilateral Investment Treaties (BITs) and International Investment Agreements (IIAs) to stimulate international investments [2] IIAs are widely considered an important source of legal standards for the existing global investment governance regime. While foreign investment aids recipient countries' economic development, it may sometimes cause long-term adverse impacts on environment protection and sustainable development[3] Such impacts may be especially severe in underdeveloped nations that lack a robust legal framework, have weak law enforcement, and a low level of investment governance. It is extremely challenging for countries to harmonise and balance the paradox of investment vis-à-vis environmental protection and sustainable development. While IIAs provide enforceable protections to foreign investors in order to stimulate investment flows and therefore

sustainable development [4] The IIAs, especially those from the old generation, are also responsible for the so-called “pollution havens”, the “regulatory chilling effect” or the lower end of the “environmental Kuznets curve”[5] These are further aggravated by the absence of effective investment governance under IIAs along with weak implementation regimes of other specialized treaties, such as international human rights treaties and international environmental laws, which often fail to address sustainable development concerns associated with IIAs [6]

Given these adverse effects of IIAs, countries have been revising their agreements based on UNCTAD’s IIA Reform Accelerator (2020), the IIA Reform Package (2018) and the Investment Policy Framework for Sustainable Development (2015) [7]. As per Steffen Hindelang, maintaining sustainable development in the country depends upon the host state and can be facilitated by developing and implementing effective policies in this regard [3]

Since liberalisation in the early 1990s, India had entered into more than 80 IIAs until 2015, when it began to relook its investment agreements and terminated most of the old generation agreements. This paper investigates whether these reforms effectively align with Sustainable Development Goals (SDGs) and examines gaps in their implementation. It presents the progress in achieving the SDGs through a review of the post 2015 Indian BITs for compliance with the sustainable development-oriented provisions.

METHODOLOGY

This paper presents a comprehensive review of the IIAs entered by India to assess the extent they are compliant with sustainable development-oriented provisions. In particular, the investment agreements signed, adopted and currently in force in India have been reviewed and analyzed for this purpose (Treaty text were retrieved from the UNCTAD repository available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india>). The Electronic Database of Investment Treaties (EDIT) from the World Trade Institute available at: <https://edit.wti.org/document/investment-treaty/search> was used for comparing different treaty provisions. In addition, an extensive search was undertaken to examine reports and databases that monitor global SDG progress including the UNSDG data available from <https://dashboards.sdindex.org/> and the Niti Ayog dedicated to monitor SDG progress at the national and state levels in India available at <https://sdgindiaindex.niti.gov.in/#/>. The international investment data was retrieved from the World Investment Report published by the UNCTAD and available at <https://unctad.org/publication/world-investment-report-2024> and foreign direct investment data for India was used from the Department for Promotion of Industry and Internal Trade, Government of India available at <https://dpiit.gov.in/publications/fdi-statistics>. IIAs and BITs have been used interchangeably in this paper. Data collection and analysis were done between January 2024 to December 2024.

RESULTS

Pre-2015 BITs of India: Post liberalisation, India signed its first BIT in 1994 with the United Kingdom. Based on its 1993 Model BIT and 2003 Model BIT India signed over 80 IIAs to stimulate foreign investment by providing protection to international investors and their enterprises [8–10]. These early Indian IIAs’ are essentially comparable and follow the overall structure and regulatory pattern of traditional European IIAs [2] It is noted that none of the traditional BITs, except Kuwait BIT, provided for exceptions related to human health as stipulated under Article XX of the GATT, 1994 [11] The IIAs from this period, which will continue to regulate investment disputes over the coming years owing to sunset clauses, include no mention of sustainable development, host state rights, or investor commitments, especially to the health, environment and sustainable development. The lack of guidelines on procedural issues and indemnity for investors within IIAs, raises concerns about the time and cost of arbitral processes for the host country against corporate investors. As a result, it is difficult for India to predict how arbitral tribunals will handle investment disputes involving sustainable development issues under these IIAs, such as whether arbitral tribunals will accept sustainability measures challenged by foreign investors or require India to compensate foreign investors for losses or additional costs incurred as a result of such sustainability measures [12]

Post-2015 Indian IIAs: Most of the pre-2015 treaties have been terminated by unilateral denouncement by either party and India started negotiating and entering into new treaties in the post 2015 UNSDGs era [11]. While the new treaties were negotiated with UNSDGs and its implementation plan already in place, yet the new IIAs did not include sustainable development as part of the key enabling provisions

within the newly drawn IIAs [13]. Only three BITs i.e. the ITA and TECC BIT (2018); India - Belarus BIT (2018); and India - Brazil BIT (2020) have included sustainable development in the preambular text of the respective IIAs (Table-1). Besides having the sustainable development mentioned in the preamble, BITs also have limited mention of the host state's right to regulate public policy interests and the voluntary corporate social responsibility obligation of foreign investors (i.e. ITA and TECC; Belarus; and Kyrgyzstan BITs).

Table 1: Post-2015 BITs of India having environment, sustainable development and CSR exemptions.

Sl#	Name of Country (Year)	Status	Exemption for host country				
			Expropriation	GATT Article XX	SDG	CSR	Environment protection
1	Taipei (2018)	In force	Yes	No	Yes	Yes	Yes
2	Belarus (2018)	In force	Yes	Yes	Yes	Yes	Yes
3	Colombia (2018)	In force	Yes	Yes	No	No	Yes
4	Kyrgyzstan (2019)	Signed	No	Yes	Yes	Yes	Yes
5	Brazil (2020)	Signed	Yes	Yes	Yes	Yes	Yes

While reviewing the model text of the 2015 BIT, the Law Commission of India suggested the addition of text to the effect that protects the right of the Parties to adopt laws in the public interest generally, and specifically, for the protection of the environment, human health and labour standards [14]. However, this was not included in the subsequent IIAs. Even suggestions from the UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) about including good governance are not included in subsequent treaty texts [15], except in the Brazil-India BIT that was entered into in 2020. transfer of technology is not included in any of the above treaties. While all five BITs are exempt from direct expropriation due to 'non-discriminatory regulatory measures applied to protect public health, safety and the environment, they stand differently on some of the key sustainable development measures [16].

Anti-corruption measures:

Article 10 of the Brazil India BIT is dedicated to anti-corruption while BIT with Columbia does not have any mention of the term corruption. The other three BITs mention the same to be addressed under the CSR clause and bar an investor from submitting a claim if his investment was made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms.

Labour and human rights:

All BITs call for respect for labour obligations but do not mention anything about labour rights. Human rights are mentioned in the BIT with Columbia and Brazil, in others it is only mentioned to be addressed under the CSR clause.

Transparency:

Transparency is another essential component of sustainable development, it is included as a separate substantive Article and requires the same in the arbitral proceeding Article under BITs with Belarus, Kyrgyzstan and Taipei, while it is only mentioned as a substantive clause in BIT with Brazil and not mentioned at all in the BIT with Columbia.

Progress in achieving SDGs at the national and regional level

The progress towards SDGs in the country is measured by the Ministry of Statistics and Programme Implementation, Government of India (MoSPI). The 2023 report of the MoSPI monitors the national progress towards SDGs through a National Indicator Framework with 284 indicators and reported progress on each indicator [17,18]. At the global level, however, the progress on the 17 SDGs for India remained relatively slow during the year 2015 to 2024, with a score of 64 it ranked at 109 out of 167 countries in 2024. However, this was about six points higher from its score of 58.45 in 2015. In 2024, countries like Bhutan (61st, the best in South Asian neighbours), the Maldives (67th), Sri Lanka (93rd), Nepal (95th) and Bangladesh (107) have better SDG core and ranking than India [19].

Table – 2: Comparing progress in SDGs in South Asian Countries in 2024

Sl#	Country	Rank	Achieved	On track	Moderately increasing	Stagnating	Decreasing	No Data	FDI 2022*
1	Thailand	45	2/17	3	4	10	0	0	10.03
2	Bhutan	61	0/17	1	9	4	1	2	0.011

3	Maldives	67	1/17	3	7	3	0	4	0.722
4	China	68	2/17	2	6	8	0	1	189.1
5	Indonesia	78	0/17	2	7	8	0	0	21.96
6	Sri Lanka	93	0/17	2	7	6	2	0	0.898
7	Nepal	95	1/17	0	9	6	0	2	0.065
8	Bangladesh	107	0/17	1	6	9	1	0	03.48
9	India	109	0/17	2	8	5	2	0	49.35
10	Myanmar	120	0/17	1	6	6	2	2	1.23
11	Pakistan	137	0/17	0	5	8	3	1	1.33

* Foreign Direct Investment in the year 2022 in USD thousand million.

Source: SDG from The SDGs and the UN Summit of the Future. Sustainable Development Report 2024
FDI for 2022 from UNCTAD, World Investment Report 2023

In terms progress in SDGs, India is on track to achieving two goals (no poverty and quality education) while countries like Thailand and Maldives are on track to achieving three goals. China, Indonesia and Sri Lanka are on track with achieving two goals each. Thailand and China have already achieved two goals while Maldives and Nepal have achieved one each. Although Maldives has achieved one goal and is on track with three goals, there is no data on four goals. Similarly, Bhutan and Nepal ranked higher than India have no data for two goals and China for one goal. It may be noted that the progress that the countries with high FDI do not necessarily have the high SDG scores. Bhutan with the lowest FDI in the 11 South Asian countries is ranked 2nd in SDG scores (Table 2).

Progress at sub-national level

At sub-national level in India the progress towards SDGs also remains uneven and slow over the years and foreign direct investment in various states does not indicate if it is a key factor or contributor to the overall progress in SDG score for the respective states. The table below shows the year-wise SDGs progress of the states [20] and the percentage of FDI [21] Received by each state in the country. Among the top ten best-performing states in SDGs and top 10 FDI recipients in 2019-20, the state with second highest FDI (Maharashtra) is ranked 10th in the SDG score. Among the top 10 FDI recipient states, Tamil Nadu is ranked 3rd in SDG score, Karnataka is ranked 5th and Telangana 9th. While states like Sikkim which has not received any FDI is ranked 8th in SDG scores, Himachal Pradesh with only 0.03% receipt of FDI is ranked 2nd, Goa with 0.1% receipts is ranked 6th and Kerala with 0.35% of FDI receipt is ranked 1st in SDG scores. Other states that are in top FDI receipt are ranked much lower in their SDG scores during this period (Table 3).

Table – 3: SDG progress and FDI receipts by states in India for the years 2019-20

Rank SDG	States	SDG Score 2019-20*	%FDI 2019-20	Rank FDI
1	Kerala	73	0.35	12
2	Himachal Pradesh	72	0.03	17
3	Tamil Nadu	71	3.56	4
4	Andhra Pradesh	70	0.36	11
5	Karnataka	69	14.09	3
6	Goa	69	0.1	15
7	Uttarakhand	68	0.02	18
8	Sikkim	68	0	22
9	Telangana	68	2.04	7
10	Maharashtra	67	27.65	2
11	Gujarat	67	31.92	1
12	Punjab	65	0.19	14
13	Mizoram	62	0	23
14	Haryana	62	2.46	6
15	Manipur	62	0	25
16	Tripura	62	0	24
17	West Bengal	61	0.78	8

18	Madhya Pradesh	60	0.35	13
19	Odisha	60	0.04	16
20	Nagaland	59	0	27
21	Chhattisgarh	59	0	26
22	Rajasthan	59	0.45	10
23	Uttar Pradesh	58	0.74	9
24	Meghalaya	57	0	28
25	Arunachal Pradesh	57	0.01	20
26	Assam	56	0.01	21
27	Jharkhand	55	3.46	5
28	Bihar	51	0.02	19

*Average of SDG score for the year 2019 and 2020 for respective states

Relationship between SDGs and International Investments

It may be noted that, like the global rankings about SDG scores and FDI receipts, states with higher FDI are not necessarily the states with higher SDG scores. Although there is a weak positive correlation, meaning that as SDG scores slightly increase, FDI percentages tend to increase as well. The FDI is not a significant predictor of SDG scores for the states. This also means that FDIs do not significantly improve the state's progress in SDG scores. The above analyses suggest that FDI alone is not a good predictor of SDGs. States like Maharashtra and Gujarat combined received almost 60% of the total FDI but lag in SDG progress in comparison to states that received much less FDI.

While Gujarat is working to create new job opportunities, foster a competitive business environment and attract investments in renewable energy, technology, and biotechnology, creating new business facilitation vehicles and simplifying regulations resulting in increased FDI [22] As per the SDG report of 2020, the state topped in Goal 3 (Health) and Goal 9 (Industry) while for Goal 2 (Hunger) and Goal 5 (Gender), it remained as an aspirant state. It has much to do in the field of environment. A score of five for “life underwater” (Goal 14) of the SDG in comparison to a score of 100 for West Bengal for the same goal tells the whole story [23]. Therefore, merely increasing FDI may not be the best way forward if the states do not link such FDI to sustainable development.

SDGs Orientation of the IIAs

Despite the important role that foreign investment plays in encouraging economic development, not all foreign investment results in long-term development in host countries and can be responsible for major environmental and community damage and even sparking international disputes and conflicts [24,25]. This is especially true in countries with a sensitive environment, volatile political and social situations, a developing economy and weak governance of international investments. The international community recognises that international investments are critical to achieving sustainable development and that there is an urgent need to address the sustainability issues associated with activities supported by such international investments [26] In this regard, it is also suggested that rather than IIAs, issues about sustainable development should be addressed through specialised treaties such as international environmental and human rights treaties [27]. To change the existing global investment governance regime to be more sustainable and development-oriented, the IIA system must be reformatted and recalibrated from its conventional goal of investment protection to address issues of environmental and social sustainability. This is a difficult task. Because, traditionally, IIAs are intended to safeguard foreign investors and their assets against discriminatory and arbitrary behaviour by host states [28].

However, in recent years, several states have begun to place a greater emphasis on sustainable development in IIA negotiations. The US Model BIT of 2012 and the Dutch Model BIT of 2018, demonstrate this. Prominent international organisations have also developed model IIAs to meet the objectives of sustainable development. For example, the International Institute for Sustainable Development (IISD) proposed a Model International Investment Agreement for the Promotion of Sustainable Development in 2004 to serve as a framework for states considering IIAs [29]. The IISD, Indian, Norway and Dutch Model BITs each contain the key sustainable development provisions (Chi, 2018). It stipulates investment that promotes sustainable development in developing countries with the key objective of the international investment to contribute to the development objectives of each state and the region as a whole [30]

The model Article 20 of the Southern African Development Community Model Bilateral Investment Treaty Template (2012) that provides for the Right of States to Regulate reads as under:

“In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.”

The new age IIAs underscore the key need for the member states to prioritize sustainable development. It is important to integrate sustainable development perspectives in all IIAs including in provisions related to the investor-state arbitration. The host country should also be able to protect its regulations on sustainable development from foreign investors' challenge in international arbitration as any “regulatory chill” effects of investor-state arbitration could impede states' efforts in pursuing sustainable development [31]. Regulation of foreign investment in tobacco products is just a point in case.

Tobacco and SDGs

Investments in tobacco products for human consumption in all forms pose a great threat to sustainable development and therefore foreign investment in tobacco trade is prohibited in India [32]. Tobacco cultivation is responsible for deforestation, soil erosion, and depletion of soil nutrients, it is a water-intensive crop. It is also responsible for pollution due to wood burning for ‘flu-curing’, [33,34] tobacco smoke, cigarette butts and plastic packing of tobacco products [35,36] Poorer sections of the society and those with no or little education are more vulnerable to tobacco use [37]. Tobacco use impoverishes roughly 15 million people only in India [38]. Tobacco cultivation is also responsible for ‘Green Tobacco Sickness’, which raises the issue of labour rights, similarly, millions of poor beedi rollers in Southeast Asian countries including India and Bangladesh are exploited and left disabled in old age [39]. Moreover, the 4.2 million hectares of land used for tobacco cultivation can be used for other crops and contribute to meeting the goal of reducing hunger [40] In addition, exposure to second-hand smoke not only infringes on non-smoker's right to health [41], But have trans-generational effects on the risk of disease, thereby threatening the rights of more than one generation [42]. Thus, tobacco use violates the rights enshrined in the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) [43].

Challenges in SDG Orientation of the IIAs

While the governance of IIAs is in line with SDGs, the ‘regulatory chill’ effects of investor-state arbitrations and ineffective and insufficient implementation mechanism of other specialized UN treaties remain key challenges in making the IIAs SDG oriented. International investment beyond BITs are also a major concern. For example, in the year 2023-24, the top 10 foreign investors (86% of the total FDI) were countries with whom India does not have a BIT, except UAE which contributed only 3% of the total FDI [21]. Managing the sector-wise investment towards sustainable development is another challenge. Sectors like the automobile industry, construction (infrastructure) activities, construction development (townships, housing, built-up infrastructure and construction-development projects), drugs and pharmaceuticals, chemicals and power which are among the top 10 sectors for FDI in India. Investment in these sectors needs to be SDG oriented. Other sectors that remain challenging are mining and mineral processing, natural resource processing, agriculture and food processing, High-technology industry, chemical processing, textile and clothing industry, light industry, and heavy machinery industry. While at the top of FDI for India, the service sector also poses challenges for host countries and therefore requires SDG oriented scrutiny, monitoring and evaluation [6]. As indicated by the governments in the region, capacity-building, investor obligation, conform to national law and SDGs as an objective and purpose of IIAs have been identified as the key reform needed when reviewing or entering into new IIAs. In addition, engaging local communities, preserving state regulatory rights, limiting access to ISDS and broadening public participation in IIAs have been suggested to strengthen and meet the SDG objectives [6].

Looking beyond IIAs for funding SDGs

International investments are essential to support development and growth. However, there is a wide gap between the amount of foreign investment received and the funds required to meet the SDGs for a country. According to UNCTAD's investment report 2023, there is a deficit of USD 4 trillion per year for developing countries to meet their SDG targets. It suggests a global compact setting out priority actions, ranging from financing mechanisms to investment policies to help developing countries meet their SDG targets [44]. According to the Standard Chartered SDG Investment map, India needs about

USD 2.64 trillion to meet its SDG targets by 2030 while the overall foreign investment in the first quarter of the year 2024 was only USD 12 billion [21,45]. India called for new mechanisms to fund SDGs during the G20 summit in September 2023 in New Delhi and suggested a USD 500 billion per year Sustainable Development Goals stimulus plan by 2030 [46]. International investments in innovative SDG funds including sustainable funds, green bonds, social bonds, and mixed-sustainability bonds should be monitored to see their contribution to achieving the SDG targets. The global and domestic cooperation and commitment during COVID-19 should be replicated with similar urgency to finance and thereby meet the SDG targets [47]. Drawing lessons from its COVID-19 response, India should also prioritize innovative budgetary and extrabudgetary financing, timely and targeted strategies with a pioneering approach aligned with the Addis Ababa Action Agenda to make significant progress toward meeting its SDGs [48,49]. Corporations may also consider issuing SDG bonds, like the companies in the UK, to access a new pool of capital that is earmarked for sustainable projects. This will not only help the companies to contribute to the sustainable development of the country but also meet global sustainability standards, making them more attractive to both domestic and international investors [50].

CONCLUSION

Although there is significant progress in international investments in India. However, both global and domestic SDG progress monitoring suggests a wide gap in international investments and progress in SDG targets. While there is some progress in achieving SDGs, there is need to keep a track of the progress and maintain the progress for goals we are on track for. Even the post 2015 BITs do not have a clear mandate for meeting SDGs and remain insufficient to guide arbitral tribunals when dealing with actions and outcomes from SDG orientation of IIAs in case of any dispute. Future BITs must be carefully negotiated to make them SDG oriented and implemented with environmental protection and SDGs at their core. In this regard, the following recommendations may be considered by the Government:

1. Mandatory environmental and social impact assessments for all international investments especially to highlight their contributions in achieving SDGs.
2. Draw a negative or restricted list of areas for investment e.g. tobacco, alcohol, mining etc, wherein no international investment should be allowed.
3. A positive list may be created with areas key to SDG targets for which encouragement should be provided to international investors e.g. poverty elimination, gender equity, biodiversity, preventive health, recycling, rewilding, and reforestation etc.
4. Equitably distribute foreign investments across different states and link them to the state's progress in achieving the environmental and SDG targets and indicators identified by the Niti Aayog.
5. Include a comprehensive mechanism under the dispute resolution system that prioritizes actions and efforts for meeting the SDGs.
6. Establish, by law, a dedicated autonomous tribunal that monitors, evaluates and adjudicates international investments for meeting the SDGs.
7. Establish, by law, innovative financial mechanisms and mandates, both for domestic and international investors to bridge the funding deficit in meeting SDGs.

DATA AVAILABILITY STATEMENT:

This study uses publicly available datasets for analysis which are appropriately cited and may be accessed from:

1. Investment agreements: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india?%20type=bits>
2. SDG progress in India: <https://sdgindiaindex.niti.gov.in/#/ranking>
3. Foreign Direct Investment-India: <https://dpiit.gov.in/publications/fdi-statistics>

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