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# CORPORATE GROUP LIABILITY IN ISDS CLAIMS: EXPLORING INDIAN PARENT–SUBSIDIARY STRUCTURES AND ATTRIBUTION OF INVESTOR ACTIONS

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## Abstract

This article investigates the complex landscape of corporate group liability in Investor–State Dispute Settlement (ISDS) claims, focusing on the attribution of investor actions within Indian parent–subsidiary structures. As India continues to modernise its Bilateral Investment Treaty (BIT) framework and navigates an increasingly globalised investment environment, the traditional principle of corporate separateness poses unique challenges. The doctrine of attribution, derived from international law and domestic legal principles, has evolved to encompass corporate group structures, often testing the boundaries of separate legal personality. This paper critically analyses key ISDS cases that have challenged or reinforced these boundaries, evaluates India's legislative and judicial approach to corporate liability, and explores how corporate structuring may be used strategically—sometimes abusively—by investors. The study concludes by offering recommendations for India's treaty practices and domestic policy alignment to ensure a fair balance between investor protection and state sovereignty.

## 1. Introduction

Global investment is often facilitated through complex corporate structures involving parent companies and their subsidiaries. These structures, while serving strategic business purposes, have raised critical issues in international investment law, particularly in the context of Investor–State Dispute Settlement (ISDS). The traditional principle of separate legal personality makes it challenging to attribute liability or benefits across entities within a corporate group. This problem is magnified in ISDS proceedings, where investors may seek to leverage the corporate veil to gain access to treaty protections or avoid liability. This article seeks to unpack the challenges and legal responses to attribution of investor actions in ISDS, with a particular focus on the Indian context. It analyses key case law, India's model BIT framework, and judicial approaches to piercing the corporate veil, ultimately providing

recommendations to balance regulatory sovereignty with investor accountability.

## 2. Conceptual Framework: Corporate Group Liability and ISDS

The foundational principle of corporate law is that each company possesses a distinct legal identity, irrespective of ownership or control by another company. In practice, this allows multinational enterprises to operate through subsidiaries without exposing the parent to direct liability. However, in ISDS contexts, claimants often attempt to assert rights under BITs through complex corporate webs, making attribution a central issue. Attribution can arise in three principal forms: (i) where a parent company brings a claim for injuries suffered by its subsidiary, (ii) where a subsidiary invokes treaty protection due to its foreign parentage, and (iii) where states seek to deny jurisdiction by challenging the real nationality of the investor. The tension between corporate

separateness and economic unity continues to evolve, particularly through doctrines such as effective control, beneficial ownership, and abuse of rights.

### 3. Jurisprudential Development in ISDS

ISDS jurisprudence reflects a lack of consensus on corporate group liability. In *Tokios Tokelés v. Ukraine*, the tribunal permitted a claim by a Lithuanian company that was 99% owned by Ukrainian nationals, prioritising formal incorporation over actual control. This raised concerns over treaty shopping and the use of nominal foreign incorporation to access BIT protections. On the other hand, in *Saluka v. Czech Republic*, the tribunal reinforced corporate separateness but acknowledged that veil piercing may be warranted in cases of fraud or abuse. Similarly, in *Phoenix Action v. Czech Republic*, the tribunal denied jurisdiction to an Israeli company that had acquired a Czech entity post-facto, solely to bring an ISDS claim. These cases demonstrate that while tribunals generally respect corporate form, they are willing to scrutinise investor conduct when treaty protections are misused.

### 4. Indian Context: BIT Regime and Policy Shifts

India's BIT landscape has undergone a significant transformation in recent years. Following adverse ISDS rulings, notably the *Vodafone* and *Cairn Energy* cases, India adopted a new Model BIT in 2016 that introduced restrictive definitions of 'investor' and 'investment', required exhaustion of local remedies, and excluded taxation measures from BIT protection. A critical feature of the 2016 Model BIT is its emphasis on substantial business operations in the home state, limiting treaty access for shell or conduit companies. This shift aims to curb abusive practices while preserving India's regulatory space. However, the interplay between domestic corporate structures and BIT protections remains a grey area, especially where Indian subsidiaries of foreign companies are concerned.

### 5. Parent–Subsidiary Attribution in Indian Law

Indian corporate jurisprudence adheres strictly to the doctrine of separate legal personality. The Supreme Court in *State of UP v. Renusagar Power Co.* held that even a wholly owned subsidiary is an independent legal entity. In *Balwant Rai Saluja v. Air India Ltd.*, the Court reiterated that piercing the corporate veil is permissible only where fraud, sham, or improper conduct is evident. However, Indian courts have shown willingness to pierce the veil in tax, competition, and environmental matters. Notably, the Competition Commission of India has held parent entities liable where control and benefit can be demonstrated. Yet, in the BIT context, Indian law does not provide a framework for attributing actions of subsidiaries to parent companies or vice versa. This gap creates a legal vacuum that ISDS tribunals are increasingly required to fill.

### 6. Attribution in International Investment Law

Attribution in ISDS cases often invokes the ILC Articles on State Responsibility, particularly Articles 5 and 8, which address entities acting under state control or direction. For corporate groups, tribunals also consider the 'effective control' standard. In *Tza Yap Shum v. Peru*, the tribunal held that control by a foreign national was sufficient to confer standing under the China–Peru BIT, even though the investment was structured through a local entity. Another important development is the emergence of the abuse of rights doctrine. Where investors restructure to manufacture jurisdiction or evade domestic law, tribunals may deny protection. This doctrine gained prominence in *Pac Rim Cayman v. El Salvador*, where the tribunal declined jurisdiction due to strategic restructuring aimed at accessing ISDS. These developments signal a cautious but evolving willingness among tribunals to look beyond formal corporate separateness when fairness and legitimacy are at stake.

## 7. India's Dilemma: Sovereignty vs. Investment Protection

India finds itself in a policy dilemma. On one hand, it seeks to attract foreign direct investment (FDI) to fuel economic growth. On the other, it must safeguard its sovereignty from abusive ISDS claims. The strategic use of Indian subsidiaries by foreign investors raises critical attribution questions. For instance, if a foreign parent controls an Indian subsidiary, can the parent bring a claim under a BIT in case of regulatory interference? Or conversely, can India deny jurisdiction by arguing that the real investor is Indian? The 2016 Model BIT attempts to address this by requiring proof of substantial business activities. However, without clear rules on attribution within corporate groups, India remains vulnerable to litigation and legal uncertainty.

## 8. Socio-Legal Implications

The attribution problem is not merely a legal technicality but one with profound socio-legal consequences. A permissive approach to corporate form allows treaty shopping and may enable investors to circumvent host state regulations on labour, environment, or taxation. Meanwhile, communities adversely affected by such investments often lack access to equivalent remedies. As a result, ISDS can reinforce power imbalances, favouring corporations over states and citizens. This undermines democratic accountability and the rule of law. Hence, there is a compelling need to reform ISDS mechanisms and national policies to address these asymmetries.

## 9. Recommendations

India should adopt a multi-pronged approach to address corporate group liability in ISDS. First, its future BITs must include explicit provisions on attribution and control, allowing tribunals to look beyond incorporation and examine ownership, benefit, and economic reality. Second, India should introduce statutory provisions enabling regulatory authorities to impose liability across corporate groups where control and profit-

sharing are evident. Third, Indian regulators should coordinate with international partners to develop a shared framework on attribution, possibly through UNCITRAL or ICSID reforms. Finally, India must ensure that its domestic courts and arbitration mechanisms are robust, transparent, and accessible, reducing dependence on external ISDS forums.

## 10. Conclusion

Corporate group liability in ISDS cases raises complex legal and policy questions, particularly in jurisdictions like India with evolving BIT regimes and entrenched corporate formalism. While the principle of separate legal personality serves important business functions, it should not become a shield for evasion of responsibility or manipulation of treaty protections. ISDS tribunals, and India's policymakers, must adopt a principled and pragmatic approach to attribution, balancing the needs of foreign investors with the imperatives of justice, sovereignty, and public interest. A coherent framework for parent-subsidary attribution will be critical as India engages with the global investment order in the years ahead.

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