Proposed EU-India investment agreement: what of the ISDS clause?

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Abstract:

In the past two decades, there has been a marked departure by States from globalisation and liberalisation of economies towards its antithesis – protectionism. The geopolitical significance of this shift is reflected in the changing attitudes of States – from both the Global North and the Global South – towards investment treaties. The mechanism of investor-state dispute settlement, or ISDS, as it is popularly known, has come a long way from being a much-needed pragmatic solution to offset the political risks faced by investors pouring their capital into an economy, to a toxic ecosystem that is perceived to benefit large multinational corporations at the expense of the public exchequer. Unlike commercial arbitration, which takes place between two notionally equal parties, investment arbitration is inherently skewed, being that one of the parties is a State, always as a respondent and usually concerning its obligations under an investment treaty.

In such a scenario, the very virtues of investment arbitration – confidentiality, neutrality, and finality – are seen today as its biggest vices – lack of transparency, supra-constitutionality, and the absence of a review process. Owing to the proliferation of a large number of bilateral investment treaties (BITs) containing ISDS clauses, and the consequent multiplicity of investment treaty disputes, States are revisiting their investment treaties signed from decades before and are considering an overhaul of the entire mechanism in light of public opinion against ISDS and its perceived beneficiaries. In this context, the negotiations between India – a growing economy and an importer of capital – and the European Union – a traditional exporter of capital – for a free trade agreement and an investment agreement, deserve to be examined. While both sides have had diametrically opposing views on the value of ISDS in the past, this has changed significantly in recent years due to a shift in favour of achieving a 'balance' between the competing rights of investors in international law against the State's sovereign right to regulate for public interest. Which begs the question – what of the ISDS clause? While there is no way of knowing which way the wind is blowing on this issue, the author hopes to understand the possible outcomes of negotiations between the two parties based on their current positions on ISDS and in context of today's geopolitical realities.

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1. Introduction

After a nine-year hiatus, India and the European Union have revived talks for a free trade agreement (FTA). In addition to the FTA, the negotiating parties are also looking to sign a geographical indicators (GI) agreement and an investment protection agreement.[1] Although at this point it is pure speculation about what EU-India investment agreement might look like, it is possible to identify the stumbling blocks from the respective negotiating positions of both sides, based on publicly available information. The most crucial stumbling block in the proposed agreement, which forms the focus of this paper, is the investor-state dispute settlement (ISDS) clause, which is typically included in most bilateral investment treaties (BITs) and provides foreign investors with direct access to dispute resolution through international arbitration before a panel of 3 arbitrators. ISDS is a unique hybrid mechanism which designates private foreign individuals and corporations as beneficiaries of rights under international law, such as the right to fair and equitable treatment by a host State, or the right against expropriation of their investments by the host State. These rights may be enforced through the mechanism of direct access to arbitration under the treaty, bypassing domestic dispute resolution processes before domestic courts.

ISDS in recent years has come in for some heavy criticism on several fronts, the most vocal of which are: the constitution of arbitral tribunals outside the framework of domestic legal systems; the private adjudication of issues that have public interest considerations; the routine appointment of a handful of individuals as arbitrators; the phenomenon of "double hatting" where individuals appointed as arbitrators in some cases serve as counsel in others; the general lack of transparency and democratic accountability in relation to the proceedings; the awarding of large sums in compensation to investors that are paid out of the public exchequer of the Respondent State; the absence of a review or appellate process against arbitral awards; and the perception that public policy considerations are eschewed in favour of foreign corporate interests.

This paper seeks to analyse the positions of India and the European Union, who are attempting to revive negotiations for a Free Trade Agreement and an investment protection agreement, in context of the current global hostility towards ISDS.

Chapter II will address the backlash to ISDS in the European Union and in India in recent years, in context of the proliferation of BIT claims against EU Member States and India. Chapter III will look at the evolving

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1 Sujaya Sanjay and Arkoprabho Hazra, 'Working through the unworkable: Reviving the India-EU FTA', Financial Express (20 May 2022), available at <https://www.financialexpress.com/defence/working-through-the-unworkable-reviving-the-india-eu-fta/2532664/> accessed August 20, 2022.