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INVESTMENT ARBITRATION: A COMPARATIVE STUDY OF CHALLENGES AND PROSPECTS WITH SPECIAL REFERENCE TO INDIA

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Abstract

As a main approach for solving disputes between foreign investors and host states, investment arbitration is now prominent under Bilateral Investment Treaties (BITS) and International Investment Agreements (IIAs). Although the system has benefits including impartial status, the enforcement of arbitral decisions and protection for foreign investors, it is now being looked at closely for not being clear, expensive for many, full of delays and inconsistent in certain rulings. Changes in how states and their regulators act have resulted in international changes.

The way India has developed in investment arbitration deserves notice, with many significant disputes and a significant change in approach shown by its Model BIT from 2016. This piece evaluates and compares investment dispute resolution rules in the EU, the US and Latin America, in comparison with ongoing developments in India. The study discusses the issues generated by ISDS, what India did to address them by terminating BITs and seeking new agreements and what this means for its investment climate.

As a result, the paper offers ideas for future actions and proposes steps to align investor support with the country's needs such as creating strong bilateral treaties, building domestic capacity and increasing transparency.

Keywords: Investment Arbitration, Investor- State Dispute Settlement, Bilateral

Investment Treaty, Free Trade Agreement, European Union, Cooperation and Facilitation Investment Agreement, Multilateral Investment Court

Introduction

In countries around the world today, FDI helps greatly with the development of emerging economies. Many countries have negotiated these agreements which usually contain Investor-State Dispute Settlement (ISDS) provisions, to attract and secure foreign investment. Claims made by investors using investment arbitration can be handled in a structural, impartial and enforceable way when a host country breaches the treaty. Still, many people are questioning investment arbitration since it can be costly, lacks transparency, gives inconsistent decisions, suffers from biases on the part of arbiters and appears to threaten the authority of national governments, mainly when their regulatory measures are disputed. Investment arbitration has had a major and transformative impact on India's economy. After its liberalization in the 1990s and 2000s, India adopted numerous BITs that gave investors wide rights, creating high security and expense risks, especially in White Industries v. The stocks are India, Vodafone and Cairn Energy. Because of this, India created a 2016 Model BIT which

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caused it to limit how much investment is covered, aim for exhausting local solutions and maintain the state's authority to govern for the public good. Together with ending several BITs, this policy change signals that India is looking to find a better balance between supporting investors and keep its own autonomy. On the other hand, steps like the EU's call for an investment court, Brazil's new approach to collaboration and the many recent reform efforts from UNCITRAL demonstrate that investment arbitration is developing. As the background for this discussion, the article compares investment arbitration frameworks in main jurisdictions and analyzes India's situation and opportunities in this fast-changing field. It

wants to know if India's new approach in making treaties is consistent with world standards and if it suits both the needs of investors and the public well.

Historical and Conceptual Foundations of Investment Arbitration

Investment arbitration started to be used after World War II, when more countries joined in international economic activities and exchange of capital. The rise of new sovereign countries after the fall of colonial rule encouraged investment in economic progress by way of foreign direct investment (FDI). Yet, because of old grievances and fears that companies could be expropriated without receiving fair payment, countries wanted better ways to assure that investor interests were protected when doing business abroad. Originally, problems between foreign investors and host nations were handled through nations raising the issue on behalf of their citizens. The way the method was carried out meant it was both politicized and inefficient. In 1966, the idea of a neutral forum to settle disputes was backed by the International Centre for Settlement of Investment Disputes (ICSID), created by the World Bank. Thanks to ICSID, investors are allowed to take cases to international arbitrators to settle violations when a host state breaches a treaty. Over time, investment arbitration was included in thousands of Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) which typically provide promises of protection against expropriation, fair and equitable treatment (FET), full safety and security and equal rights. Basically, investment arbitration involves a melding of public and private international aspects. It acknowledges that investors and states are not equal and serves to provide a fair space for resolving disagreements while awards are enforceable in several locations. Yet, the way it has grown has not always been clear or easy. There are those who point out that under the ISDS process, investors have the top priority over the public and that there is no clear legal guidance in the system. Resistance to ISDS in the Global South has encouraged new discussions on who should decide the priorities of a country, the value of state sovereignty and the whether international adjudication is acceptable. For this reason, nations have introduced solutions like the EU's plan for a multilateral court and Brazil's priority on finding solutions through state cooperation and decentralized mediation. Because investment arbitration affects both capital movement and the importance of regulation and social justice, it plays a necessary and challenging role in international economic law.

Comparative Framework: Key Jurisdictions

A review of how top jurisdictions address investment protection, dispute settlement and regulation of matters under their control makes it clear that there are major differences among countries. In the United States, ISDS mechanisms have been implemented in trade and investment deals like NAFTA (now USMCA) and many BITs. Most U.S. agreements have wide investment definitions, award broad rights to investors and let parties go straight to arbitration. Yet, the U.S. has also tried to promote clear rules and has made reforms in the USMCA so that challenges cannot be submitted to ISDS in most disputes with Canada. Alternatively, the EU has attempted to replace the traditional system of ISDS. With the view from the Achmea judgment that it is

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against EU law to have intraEU investment agreements and after being accused of bias and a lack of accountability within ISDS, the EU has put its support behind the Multilateral Investment Court (MIC). A model for this court would be standing judges, appellate review and greater transparency in procedures, all designed to make investment decisions similar to those in public law. At the same time, Brazil has decided to go against ISDS and reject it altogether. While not a party to the ICSID Convention, China has chosen to focus on putting in place Cooperation and Facilitation Investment Agreements (CFIAs) which rely on collaboration between investors and the state to prevent disputes. This model focuses on forming relationships and sharing responsibility instead of using adjudication.

In contrast, India's system for investment arbitration has changed a lot. In the past, BITs signed by India gave investors broad support and access to international arbitration with few limitations. Even so, after the White Industries, Vodafone and Cairn Energy cases, India adopted the Model BIT in 2016 which introduced major measures to protect its independence in determining regulations. According to the new model, investment is narrowly defined, domestic remedies must be tried for five years before international arbitration and the state can regulate in sectors such as health, environment and public order. India has let some BITs expire and refused to renew others because it wants to negotiate them with fairer terms.

It demonstrates that some countries such as the U.S., prioritize investors, the EU opts for public law, Brazil uses preventive diplomacy and India now centers on sovereign regulatory autonomy. The structure of each reflects a unique trade-off between encouraging foreign investment and preserving state power, showing that all countries do not use the same model.

Major Challenges in Investment Arbitration

Even though investment arbitration has become a main way to settle international economic law disputes, it encounters multiple structural and functional problems that doubt its legitimacy, effectiveness and fairness. A major problem is that arbitral decisions can vary widely in their outcomes. Since there is no permanent appellate body, various tribunals may rule differently on identical provisions of treaties which results in conflicting decisions and leaves both investors and countries unsure about the legal outcome. Many believe that arbitral tribunals do not act impartially and may be biased. Often, arbitrators are chosen one time for a certain case, but many end up getting repeated appointments, making some wonder if they're impartial. Things are even more problematic when certain people serve as arbitrators in one case and lawyers in another which erodes trust in the overall system.

The cost and complexity of the process in investment arbitration add to the problem. Spendings for arbitration, including for tribunal usage, lawyers and administration, can be huge which is often a serious problem for developing countries and smaller investors. On top of that, going through arbitration may require years and this leads to increased costs. Notable challenges include a lack of clear information, most of all during arbitrations under ICSID or UNCITRAL rules that can stay confidential. Lack of openness lessens the trust people place in public institutions and prevents others from reviewing actions connected to the environment, health and taxing.

Investment arbitration now appears to states as a limitation on their independence in choosing rules, especially as they are challenged for using broad words such as "fair and equitable treatment" or "legitimate expectations" in their laws. This means some academics refer to a "chilling effect" where governments hold back on enacting useful reforms in case they are later taken to arbitration. Asymmetry in the system—allowing investors rights while letting countries take on equivalent duties—created demands for regulators to introduce obligations for investors in the fields of human rights, protecting the environment and fighting corruption.

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Like other developing countries, India has dealt with these issues on an open and direct basis. The results of previous arbitrations and continuing conflicts have demonstrated issues in the design of treaties and their resolution processes. The government of India is following broader trends of countries that want to regain control of their rules and strengthen safeguards for investment.

India's Experience and Policy Evolution

The country's history with investment arbitration combines economic reforms, obligations set by its treaties and the use of sovereign rights. Between the 1990s and early 2000s, India established over 80 BITs with other countries so it could draw in foreign investment and participate better in the world economy. Early BITs had unclear language that gave investors great protection and few barriers to presenting claims. Even so, the liberal tack led to many prominent investment disagreements that illustrated possible issues in such agreements. For example, White Industries v. Because of a delay in India's courts which was viewed as a breach of the India-UK friendship treaty, along with the cases against Vodafone and Cairn Energy involving retrospective taxation, the arbitral process drew fire for intruding on India's authority in regulating its economy. Because of these experiences, India decided to rethink its policy on investment treaties.

After identifying the need for a better balanced system, India produced a Model BIT in 2016 which will now be used for all Indian treaty talks. The approach introduced in this model goes against what was done before by giving priority to state authority and setting its own rules. Notable changes are a reduced definition of investing, a five-year hold-up rule for international arbitration and an officially preserved right by countries to regulate in the interest of health, the environment and the public. The model also includes stricter requirements for investors, enforce more rules and boost corporate social responsibility which makes investment more balanced. Therefore, India on its own ended 50 BITs and began negotiations to update them according to this new framework.

Apart from updating its treaties, India has taken action to enhance procedures for settling disputes at home. Creating commercial courts and special high court benches is meant to sort out investor grievances more effectively across India. At the same time, India has chosen to act cautiously and be involved in global reform efforts directed by UNCITRAL and ICSID to guide the future of investment arbitration. Even today, India does not participate in ICSID because it still prefers to hold onto jurisdiction in such cases. So, it pushes for avoiding disputes and achieving settlement through friendly talks and local arrangements.

Overall, India's policy evolution reflects a broader shift among emerging economies seeking to recalibrate the investment regime in favor of fairness, sustainability, and developmental priorities. While the reforms have been lauded for protecting sovereign interests, critics argue that the stringent provisions in the Model BIT could deter foreign investors due to reduced legal certainty and limited recourse. Therefore, India faces the ongoing challenge of striking an optimal balance between being an attractive investment destination and safeguarding its policy space. Going forward, India's ability to negotiate balanced treaties, develop credible domestic legal infrastructure, and participate in multilateral reform efforts will be crucial in shaping a stable and equitable investment arbitration environment.

Comparative Insights: Lessons for India

India's changing policies in investment arbitration can be learned from and usefully compared with similar reforms by other countries. Based on what we have learned from the EU, building transparent, accountable and appeal-based systems into investment dispute resolution is crucial. The EU wants a Multilateral Investment Court (MIC) to improve situations under ad hoc arbitration by giving judges and

the court a permanent structure with appeal which can bring more uniformity and justice. It would be valuable for India to take a more active role in multilateral reform talks, since this helps align its plans with current global standards and might also attract even more investment.

Looking at the United States, India can find out how best to support investors while ensuring its own regulators have leeway. Until the USMCA, the U.S. generally supported pre-emptive ISDS clauses in trade agreements that were open to abuse. In the USMCA, American negotiators put in provisions that decreased what investors could do and modernized the system for better organization. It proves that it is feasible to write complete and balanced language in investment treaties without ruining their chances of attracting investors. The Indian Model has inserted features such as local remedy requirements and exceptions for government actions, even so, improving terms and procedures for preventing disputes could advance its position.

CFIAs from Brazil differ from ISDS, as they encourage early problem-solving, mutual responsibility and making sure relations between investors and states continue to improve. Working this way allows India to support what is best for the public without leading to aggressive lawsuits and mistrust with investors. Putting more focus on mediation, ombudspersons and joint committees in India's treaty system could add additional, more flexible ways to settle disputes.

India's own story proves that strong domestic legal institutions and renewed court processes help reduce the country's need for international arbitration. Making commercial courts more capable, ensuring judges are not influenced and working towards a faster resolution of disputes in the nation can both guard sovereignty and reassure investors with strong alternatives. Drawing from the achievements and challenges of other countries, India stands in a good place to introduce a model that protects investors as well as important state interests, helps India develop sustainably and gives meaningful input into efforts to improve investment arbitration worldwide.

Future Prospects and Policy Recommendations

Both globally and in India, the future of investment arbitration depends on making sure that changes regarding fairness, transparency and sovereignty happen successfully. It will continue to be important for India to achieve both increasing foreign investment and securing its right to make laws for the country. India can play a major role in shaping international investment rules and unions that reflect its own needs by participating in multilateral reform projects such as the UNCITRAL Working Group III on ISDS reform and the Multilateral Investment Court. Taking part in these platforms will allow India to share its knowledge and encourage ways to ensure procedures are fair, consistent and focused on the public's interest.

As a first step, India should work on making it easier for business groups to use local courts and arbitration institutions than rely on international arbitration. Investment disputes can often be handled more quickly and at a lower cost by opting for mediation, conciliation and various ADR mechanisms instead of going to arbitration. It is important to keep changing investment treaties to explain terms such as 'investment' and 'expropriation' more clearly, so the rules are easier to implement. It is important to maintain and refine the Model BIT's rules on local remedies and allow for exceptions in the public interest because they help keep policy space from being taken over.

India has the opportunity to try Brazil's Cooperation and Facilitation Investment Agreements as an alternative, as they put more stress on resolving problems through cooperation instead of litigation. As a result, the bonds between investors and states may strengthen and reduce the chance of litigation. In addition, making investors follow

environmental, human rights and anti-corruption regulations will encourage responsible behavior and fit with worldwide sustainability plans.

Good reporting and enabling the public to join treaty talks and disputes will help make the process accountable and sure. To improve transparency, India must release awards and facilitate the submission of amicus curiae which increases the trust of the public. Carrying out these recommendations will help India lead in reforming investment arbitration, so the rules defend investors and preserve the rights of countries and promote sustainable development.

Conclusion

While resolving disputes between states and foreign investors, investment arbitration promises security for investment, but also raises the challenge of how much regulation states can exercise without affecting trade investments. India's pattern of opening up to economic integration highlights the problems faced by developing countries in trying to secure both their wealth and their public policies. Now, the country is opting for Model BITs that are more skeptical of foreign investments and favor regulations to achieve a better and fairer approach to protecting investments. Communities such as the European Union, the United States and Brazil have special experiences that India can use to guide its reforms, writing of balanced treaties and efforts towards avoiding disputes.

To move ahead, India playing a role in reforms worldwide and making its methods for settling disputes within the country more effective will significantly shape a more equal investment arbitration regime. If India works on transparency, adds responsibility for investors and supports alternative dispute resolution, it can attract investment and still match general development and sustainability goals. Ensuring that investment arbitration in India and abroad gets widespread support will require developing a system that is legitimate and fair for every concern.

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