Investment Arbitration and India: A Love-Hate Relationship

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Introduction

As one of the biggest and fastest-growing major economies, and a potent market, India has been an obvious investment destination for decades. The Government's relationship with investors, however, has been less than straightforward. From its protectionist past to political squabbles over Foreign Direct Investment, the journey of foreign investment in the country has seen its ups and downs.

This paper seeks to first examine the tenuous origins of Investor-State Dispute Settlement ("ISDS") in India and how they continue to bleed into the current framework. This is followed by an acknowledgement of the turn in India's relationship with investment arbitration in a liberalised economic regime between 1991 and 2015. Lastly, the paper analyses the point of inflexion in 2015 to a more cautious approach and a noted increase in statism as a means of resolving investment disputes.

Origins of ISDS: A Relationship Born in Crisis

As the political leadership birthed the new nation of India into existence, they were looking for a focal point for the foreign policy of the fledgling nation. They soon found it in the form of decolonisation and anti-imperialism. As a result, India remained staunchly protectionist with global trade and investment.[1] Western capital was seen as a threat to Indian wealth creation and carried with it the possibility of colonialist economic models repeating themselves. This was coupled with a reluctance to undermine the status of the State, wherein recourse to courts was preferred over the development of a private justice system. All in all, India preferred to indigenise the creation of its industry, wealth, and justice. That is, until the 1991 Balance of Payments Crisis when India had to liberalise its economy.

[1] Arvind Panagariya, 'International Trade' (2003) 139 Foreign Policy <https://doi.org/10.2307/3183727> accessed 22 March 2024.

While the first IMF loans were initiated by Prime Minister Chandra Shekhar, it was his successor, Prime Minister P.V. Narasimha Rao who took them forward. By 1994, India had embraced liberalisation and signed its first Bilateral Investment Treaty ("BIT") with the United Kingdom.[2] Over the next 20 years, it went on to sign BITs with 82 more jurisdictions.[3]

ISDS and the Elephant in the Room

The elephant in the room, when discussing investor protection in India, has always been its refusal to sign the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), which set up the International Centre for Settlement of Investment Disputes ("ICSID").

As articulated in a meeting of the Indian Council for Arbitration in 2000, the scepticism towards ICSID has been rooted in two issues: the monopoly of the Chairman of the World Bank Group in the appointment of arbitrators and the inability of the Indian courts to play any role in the process.[4] Both together create a strong bias in favour of Western investors, particularly as the ownership of the World Bank Group is dominated by Western countries, with the United States as the largest stakeholder.[5]

India is not alone in this criticism – the former President of Bolivia, President Evo Morales, once famously said, *"Governments in Latin America and I think all over the world never win the cases. The transnationals always win."*[6] This has resulted in leading academics using sharp phrases such as, *"Indeed, the work of reconstituting empire was done by stellar international lawyers... and it still is being done now."*[7] As such, the Indian Government's longstanding opposition to the Convention has largely been vindicated in today's academia and India is unlikely to consider joining the framework.

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[2] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, London, 14 March 1994.
[3] Simon Hartmann and Rok Spruk, 'The Impact of Unilateral BIT Terminations on FDI: Quasi-experimental Evidence from India' (2023) 18 The Review of International Organizations 259-296.
[4] AP, 'ICA against India joining global dispute settlement body,' *The Hindu*, (Delhi, June 11, 2000).
[5] International Bank for Reconstruction and Development Subscriptions and Voting Power of Member Countries, found at https://thedocs.worldbank.org/en/doc/a16374a6cee037e274c5e932bf9f88c6-0330032021/original/IBRDCountryVotingTable.pdf.
[6] AP, 'Venezuela to sell off US refineries' *Taipei Times* (Taiwan, 1 May 2007) 10.
[7] Cait Storr, 'The War Rages On: Expanding Concepts of Decolonization in International Law' (2021) 31(4) European Journal of International Law 1–14.

Indian Investment Arbitration and its Evolution Post 1991

India has come up with its own alternatives to the ICSID, best represented through the Indo-UK 1994 BIT itself. While the first approach the BIT puts forward to resolve investor disputes is some form of a negotiated settlement, the last resort it proposes is indeed arbitration. The appointment of the panel, critically, has a balanced and common design, with both parties appointing one arbitrator each, and the two arbitrators appoint the third by mutual consent. If the appointment cannot be agreed upon in time, then the opinion of the President of the International Court of Justice ("ICJ") is sought, with the ICJ being viewed as a more democratically run institution than the ICSID. Particularly, the ICJ has seen its credibility rise considerably in India in recent years, in both diplomatic and political circles, as noted by former Indian Permanent Representative to the UN Syed Akbaruddin.[8] This has been supplemented by strong arbitration reform, particularly with the Arbitration and Conciliation Act 1996, which made arbitral awards directly enforceable (without a Court decree).

Yet, the accelerating liberalisation of foreign investment and arbitration faced a reality check in 2011 with the *White Industries* case.[9] The India-Australia BIT allowed both nations "most-favoured-nation" (MFN) status. The investors, in the case, relied on a guarantee for effective local remedies found in an India-Kuwait treaty, which was also granted the MFN status, arguing that the MFN status meant that the same protections should be given under the India-Australia BIT. As such, the delays they faced in litigating against their Joint-Venture partner, Coal India, had violated that guarantee of effective local remedies. In accepting this argument, the Arbitral Panel effectively held that it was acceptable to use the MFN status to import clauses from treaties signed with third countries, and for investors to get the same protection that was promised to individuals from that third country.

Needless to say, this decision has been the subject of a lot of controversy and is widely considered to be a turning point in India's approach to BITs. In 2017, India terminated 58 BITs

[8] Syed Akbaruddin, *India vs UK: The Story of an Unprecedented Diplomatic Win* (Harper Collins India 2021).
[9] *White Industries Australia Ltd v Republic of India*, Final award, IIC 529 (2011).

and has since terminated even more, with a request to renegotiate them along the lines of a model BIT formulated in 2015. [10]

The model BIT constituted a much more comprehensive framework for the resolution of disputes. [11] In particular, it added several conditions precedent to arbitration, as well as a comprehensive conflict-of-interest check for all arbitrators. Among other checks, one could no longer appoint arbitrators belonging to any firm with a history with the disputed parties nor could they have any fixed opinions on the issues being decided during the dispute. These provisions were included due to the perceived threat that investors would pick from an insular network of the "mafia of arbitrators," who are bound to be pro-corporate and anti-State.

This new wave of pushback was not restricted to arbitrators. Originally, in 2014, the Calcutta High Court case of *Board of Trustees of the Port of Kolkata v Louis Dreyfus Armatures SAS* held investment arbitration to be within the purview of commercial arbitration for the purposes of the Arbitration and Conciliation Act 1996. [12] However, in 2017, the Delhi High Court issued an opposing ruling in *Union of India v Vodafone Group Plc United Kingdom*[13] and reiterated it in 2019 in *Union of India v Khaitan Holdings (Mauritius) Limited & Ors.,*[14] thereby excluding investment arbitration from the purview of the Arbitration and Conciliation Act 1996, indicating that such awards were no longer enforceable in India.

While the exact position on this is yet to be confirmed by the Indian Supreme Court, the author finds it likely that India will follow China's example - and preclude investment arbitration from the mandate of the Arbitration and Conciliation Act 1996. [15]

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[10] Herbert Smith Freehills, 'Mixed messages to investors as India quietly terminates bilateral investment treaties with 58 countries (HSF Arbitration Notes, 16 March 2017) <https://www.herbertsmithfreehills.com/notes/arbitration/2017-03/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries> accessed 22 March 2024.
[11] Ministry of Finance, India, 'Annex Model Text for the Indian Bilateral Investment Treaty, 2015 (Department of Economic Affairs) <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 22 March 2024.
[12] (2014) SCC OnLine Cal 17695.
[13] (2018) AIROnline Del 1656.
[14] CS (OS) 46/2019, I.As. 1235/2019 & 1238/2019.
[15] Notice of the Supreme People's Court Regarding the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China [1987] *Fa Jing Fa* No. 5.

The Road Ahead – Increased Statism as an Alternative to Arbitration?

Since these judgments, there appears to be a marked change in India's approach to international economic partnerships with the institutionalisation of diplomatic channels for resolving investment disputes being used as an alternative to investment arbitration. This is best illustrated by the Comprehensive Economic Partnership Agreement ("CEPA") signed with the United Arab Emirates.[16]

The CEPA agreement seems intended to reduce the excessive empowerment of private agents in international economic agreements. Rather than adopting a *Van Gend en Loos* approach, which allows businesses to oversee state policies, CEPA prioritises broader economic trends over the rights of individual investors. This is done by shifting disputes from between a private business and a state, which go to arbitration, to an inter-state level, which is resolved via diplomatic channels. It symbolises the renaissance of state power that has been characteristic of the last decade as the Global South realises the folly of relying on Western legal and economic institutions for development.

While the author is supportive of this renaissance, it is important to be cautious. Such a mechanism reserves justice for those select few deemed fit by the State and is therefore vulnerable to advantaging private agents who have governmental ties at either the diplomatic or political level. Corruption and nepotism both become very likely, particularly as India seeks to shift its manufacturing sector from an oligopoly of conglomerates to a much more broad-based infrastructural setup dominated by Tier-II and Tier-III cities and semi-urban networks. Therefore, while it is a positive step on the international plane, it is important to institutionalise dialogue frameworks between diplomats and industries through trade bodies to allow for complete representation of industry concerns and priorities. Only then will the diplomatic channels be fully effective in promoting Indian industry.

[16] Ministry of Commerce and Industry, Government of India, 'Comprehensive Economic Partnership Agreement (CEPA) between the Government of the Republic of India and the Government of the United Arab Emirates (UAE),' (International Trade) <https://commerce.gov.in/international-trade/trade-agreements/comprehensive-economic-partnership-agreement-between-the-government-of-the-republic-of-india-and-the-government-of-the-united-arab-emirates-uae/> accessed 22 March 2024.

Conclusion

India's journey with investment arbitration has transitioned from protectionism to liberalisation and now to cautious statism. Initially, India's reluctance to engage with frameworks like ICSID was due to concerns over sovereignty and bias towards Western investors. This stance softened in the 1990s with the signing of multiple BITs, reflecting a more open approach to foreign investment and arbitration.

However, key cases like *White Industries* prompted a reassessment. The implications of MFN clauses led India to terminate many BITs and develop a stringent model BIT in 2015, emphasising conditions precedent to arbitration and rigorous conflict-of-interest checks for arbitrators. Recent judicial decisions have added complexity, with courts taking mixed stances on the enforceability of investment arbitration awards. The Delhi High Court's rulings suggest a potential move towards excluding investment arbitration from the Arbitration and Conciliation Act 1996.

India's preference for diplomatic channels over private arbitration is evident in agreements like the CEPA with the UAE, aiming to balance state sovereignty with economic interests. However, this strategy risks corruption and nepotism, especially as India diversifies its manufacturing sector. To mitigate these risks and ensure effective dispute resolution, it is crucial to establish dialogue frameworks between diplomats and industry representatives. This would facilitate a comprehensive representation of industry concerns and enhance the effectiveness of diplomatic channels in promoting Indian industry.

In conclusion, while India's cautious approach to investment arbitration aims to protect national interests and sovereignty, it must be balanced with mechanisms that ensure fairness, transparency, and broad-based economic development.

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