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"Developed and Developing: Antrix-Devas Deal, a Revelation into Biased BITs?"

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The cases of domestic abuse have seen an unprecedented rise in a developing country, Xenia in South America. Various studies conducted by the national authorities of Xenia showed that instances of domestic abuse are inextricably linked with alcohol consumption. After nation-wide protests from its citizens the Republic of Xenia has decided to ban alcohol from its country. This key public policy decision has faced a lot of backlash from t he international community, leading to various ARBITRATION SUITS filed against the country by international investors with stakes in the Xenian alcohol companies.

Such cases of clashes between governments and international investors have become very common and are solved through Investor-State dispute settlement (ISDS) mechanisms. ISDS is a tool through which individual investors can sue countries alleging discriminatory practices. The ISDS regimes are enforced through bilateral treaties between countries and have been constituted to boost investment in the countries by managing the uncertain nature of investment. Since ISDS is enforced through Bilateral Investment treaties (BITs) it leaves a room for negotiation between the countries. This paper argues that ISDS regimes are used as tool of exploitation by the multi national corporations and do not help in improving the economic status of developing countries.

History

India has been one of the most sued countries under ISDS in the year 2015. [1] A typical ISDS agreement is between a developed investor country and a developing country.[2] The number of ISDS cases between developed countries like old European Union countries and United States have been negligible but these cases have been rising between developed and developing countries. [3] Investment Disputes are a fairly new occurrence starting with the time richer countries built factories and started companies in poorer countries and were made subject to a completely different legal

[1] Patnaik, P. (2017). Deconstructing India's Model Bilateral Investment Treaty. [online] The Wire. Available at: https://thewire.in/66558/deconstructing-indias-model-bilateral-investment-treaty/ [Accessed 8 Oct. 2017].
[2] Abbott, R. and Erixon, F. (2014). Demystifying Investor-State Dispute Settlement. ECIPE Occasional Paper.
[3] *Ibid*

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system. In order to get past this roadblock a mechanism to protect investors was constructed to what we now know as ISDS. [4]

In the 1960s, the first multilateral instrument for investor protection and state-investor dispute resolution came in the form of International Center for Settlement of Investment Disputes. Now various Bilateral and Multi-lateral treaties have ISDS clauses such as NAFTA or the Energy Charter.[5]

This treaty was established by the members of the World Bank in 1965, with the primary purpose of providing conciliation and arbitration facilities to resolve international investment disputes.[6] The connection with World Back is an important one and will help us understand the way international relations between countries influence the role of investors in a country.

The Antrix-Devas Deal

A deal was signed between Antrix, the commercial wing of Indian Space Research Organisation and Bengaluru based company, Devas Multimedia wherein Antrix was to provide Devas with the 70 MHz of the coveted S-Band space segment to Devas for its digital multimedia services. Devas in its turn had to provide Antrix with 300 million dollars in a course of 12 years. This project was undertaken with the aim of providing wireless network in remote parts of India, which it can be argued was in line with the public purpose of development of infrastructure.

In 2011 in the background of the infamous 2G-spectrum scam, the government of India became conscious of its every move. When reports of irregularities in the Antrix-Devas deal surfaced in the media it found it best to cancel the agreement keeping in line with the political scenario of the time.
Devas Multimedia was accused of receiving foreign aid amounting to Rs. 578.54 crore between May 2006 and June 2010 whose subscription agreements had clauses barred by the Foreign Investment Promotion Board's guidelines. There were other allegations meted out to Devas's foreign investors for contravening FEMA[7] and other domestic checks and balances put in for foreign investment.

In 2013, Devas and its foreign investors initiated two international arbitration proceedings against India on the undue termination of the contract. First was an

[4] European Commission (2013) Investment Protection and Investor-to-State Dispute Settlement in EU Agreements. November 2013.
[5] UNCTAD (2013), World Investment Report: Global Value Chains – Investment and Trade for Development. Geneva: UNCTAD
[6] Abbott, R. and Erixon, F. (2014). Demystifying Investor-State Dispute Settlement. ECIPE Occasional Paper.
[7] Foreign Exchange Management Act (FEMA), 1999

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international commercial arbitration against Antrix, with an International Chamber of Commerce (ICC) tribunal based in Paris which resulted in a penalty of USD 672 million for India. Second was based on an BIT constituted between India and Mauritius under the United Nations Commission on International Trade Law arbitration rules. A Tribunal seated in Hague found India liable of contravening the expropriation clause in BIT agreement with Mauritius and ordered it to pay Devas a whopping sum of 1 billion dollars.

Expropriation

Expropriation clauses deal with nationalizing investment territories and promote non-discriminatory regulatory actions taken by parties to promote public purpose. This must be looked with proportionality and reasonableness keeping in mine the 'sole effects' doctrine wherein the tribunal's analysis revolves around the effect of state action on the investment.[8]

India's Public Purpose

In the Antrix-Devas arbitration India took the defence of public purpose. But ISDS clauses heavily favour the investors, and India failed to show a clear cause for public purpose. Indian courts have always take a wide view of what public purpose constitutes. Even in cases of fundamental rights which are the soul of its Constitution, public purpose has been used to narrow down its ambit. In the Singur Land Acquisition case Supreme Court of India labeled public purpose as any project which would secure economic benefits to the state and the public at large or bring employment opportunities. [9] In India public necessity is greater than private necessity.[10] In the case of Green v Frazier the Court stated that the objective of public purpose should be to promote "public health, safety, morals, general welfare, security, prosperity, and contentment" of all the citizens.[11] Right to property guaranteed under Article 31 of the Indian Constitution ceased to be a fundamental right in the year 1978 clearly demonstrating the state's inclination to limit personal gains and dilute the right to private property in the larger interests of the country.

Definitely this widened meaning of public purpose in India as a socialist-aspiring state[12] may be in contrast to the other countries it deals with. BITs and ISDS clauses end up resulting in encroaching state sovereignty.

[8] Foulatier, A. (2016). Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century , written by Jean E. Kalicki & Anna Joubin-Bret. The Law & Practice of International Courts and Tribunals, 15(2), pp.397-400.

[9] Kedar Nath Yadav vs State Of West Bengal & Ors AIR 8438 SC 2016

[10] V.N. Shukla's 'Constitutional Law of India', (Mahendra P. Singh, rev'd. Eastern Book Company,12th ed. 2008) pp 298-99.

[11] Daulat Singh Surana v First Land Acquisition Collector & Others, AIR 6754 SC 2006

[12] Preamble, Constitution of India

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Role of State Institutions in dealing with ISDS Disputes

Developed countries usually have highly advanced institutions for dealing with trade, commerce and investment in contrast to welfare-centric developing countries. While taking public policy decisions, concerns relating to investors does not take centre-stage and there is no intensive mechanism to deal with such disputes. Developing countries don't only have a disadvantage on the negotiating table of BITs but also on the power to handle disputes which have already arisen. Due diligence is not observed by the legislature and executive in scrutinizing the contracts before terminating them and there is a need of specialized organs to deal with such contracts.

World Bank and the bias of International Organisations

Three billionaires in the North today hold assets more than the combined GNP of all the least developed countries and its 600 million people.[13] The ISDS System was adopted by countries who were a part of World Bank to boost investment, but World Bank itself has been accused of playing a part in increasing the debt problem of the developing world. While the World Bank provides loans to countries for their development, it also comes at a high cost of setting up various institutions and changing laws of the said country in order to get the financial assistance. Forcing countries to change their own laws without fully understanding its implications locally only creates more problems than it solves.

In 2015 Ghana was at high risk of being unable to pay its debts as announced by IMF[14] and World Bank but only 7 months later the World Bank guaranteed 400 million dollars of repayments on a 1 billion pounds bond sold to private investors. In such a scenario even if Ghana fails to pay its debts, the real winners will be investors.

Such cases only prove the clear bias international institutions have towards investors from developing countries who benefit at the cost of developing countries and their welfare policies. ISDS regimes are only one other such example wherein investors are compensated at the cost of nations. A one billion dollar fine imposed on a developing country like India is an impossible burden to bear.

Conclusion and the Road Ahead

In May 2016, almost after a year the 1 billion dollar arbitral award was given to Devas, Central Bureau of Investigation of India has been given sanction to try G Madhavan Nair, the then chairman of ISRO for criminal conspiracy with an intent to cause undue gains to themselves in the Antrix-Devas deal. It is yet to be seen whether

[13] UNDP, Human Development Report (1999).
[14] International Monetary Fund (IMF)

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the international arbitration regimes with focus on investor welfare will take into account the unfair practices undertaken by the domestic players in developing countries.

Meanwhile India has come up with a new model BIT with more stringent clauses for its protection which accord narrower meanings to investments. But whether this model will result in any practical benefits will only depend on India's negotiating power. It may transform its BITs with the BRICs nation but may not have the same power in dealing with commerce giants like United States of America.

The enforcement under ISDS is usually very strict and cannot be at par with inter-state disputes. India cannot disregard the arbitral tribunal's award like China in the South China Sea dispute. Some ISDS clauses even have waivers from sovereign immunity.[15] All states must be accorded with power to decide against such clauses and a healthy balance must be found between sovereignty of states and investor rights.

[15] Abbott, R. and Erixon, F. (2014). Demystifying Investor-State Dispute Settlement. ECIPE Occasional Paper.