

INDIAN INVESTMENTS AND BITS

Relevant for: International Relations | Topic: India - Sri Lanka

A general view of the Chinese-managed terminal of the Colombo port is seen from the Galle Face promenade in Colombo. | Photo Credit: [AFP](#)

Sri Lanka's decision to renege on a 2019 agreement with India and Japan that aimed to jointly develop the strategic East Container Terminal (ECT) at the Colombo port comes as a rude shock to New Delhi. While international relations experts are busy assessing the diplomatic fallout of this problematic decision for India-Sri Lanka ties, the issue also needs to be looked at through the prism of the India-Sri Lanka bilateral investment treaty (BIT), which forms the bedrock of international law governing foreign investment between the two countries.

In 1997, India and Sri Lanka signed a BIT to promote and protect foreign investment in each other's territories. The defining characteristic of this BIT, as is the case with all BITs, is that it empowers individual foreign investors to directly sue the host state before an international tribunal if the investor believes that the host state has breached its treaty obligations. This is known as investor-state dispute settlement (ISDS).

An important protection provided for foreign investment in the India-Sri Lanka BIT is the fair and equitable treatment (FET) provision given in Article 3(2). This Article provides that investments and returns of investors of each country shall, at all times, be accorded FET in the other country's territory. FET is a ubiquitous provision contained in almost all BITs. The normative content of the FET provision has been fleshed out by scores of ISDS tribunals in the last two decades. The tribunals have persistently held that an important component of the FET provision is that the host state should protect the legitimate expectations of foreign investors. In a case known as *International Thunderbird Gaming Corporation v Mexico*, it was held that the concept of legitimate expectations relates to a situation where the host state's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure to honour those expectations could cause the investor (or investment) to suffer damages.

Sri Lanka, by signing the agreement to jointly develop the ECT at the Colombo port, created such expectations on the part of Indian investors. Defaulting on this agreement, without specific and reasonable justification, potentially violates the Indian investor's legitimate expectations, and thus, the FET provision of the BIT.

However, the twist in the tale is that India unilaterally terminated the India-Sri Lanka BIT on March 22, 2017. This termination was part of the mass repudiation of BITs that India undertook in 2017 as a result of several ISDS claims being brought against it. In cases of such unilateral termination, survival clauses in BITs assume significance because they ensure that foreign investment continues to receive protection during the survival period. Article 15(2) of the India-Sri Lanka BIT contains a survival clause, according to which, in case of a unilateral termination of the treaty, the treaty shall continue to be effective for a further period of 15 years from the date of its termination in respect of investments made or acquired before the date of termination.

Thus, the Indian investment in Sri Lanka and vice-versa made or acquired before March 22, 2017, will continue to enjoy treaty protection. But, in the case of the investment in developing the ECT at the Colombo port, this survival clause will be inconsequential, since the agreement was signed in 2019, i.e., after India unilaterally terminated the BIT. Hence, the Indian investor will not be able to sue Sri Lanka before an ISDS tribunal, notwithstanding the merits of the case.

This sordid episode has important lessons for India's overall approach to BITs. As a consequence of the onslaught of ISDS claims in the last few years, India has developed a protectionist approach towards BITs. The motivation appears to be to eliminate or at least minimise future ISDS cases against India. However, an important attribute that perhaps has not received much attention is that BITs are reciprocal. Thus, BITs do not empower merely foreign investors to sue India, but also authorise Indian investors to make use of BITs to safeguard their investment in turbulent foreign markets.

In the post-COVID-19 world, regulatory risks will further exacerbate, subjecting foreign investment to arbitrary and whimsical behaviour of countries. Accordingly, given India's emergence as an exporter, and not just an importer of capital, the government should revisit its stand on BITs.

India needs to adopt a balanced approach towards BITs with an effective ISDS provision. This will facilitate Indian investors in defending their investment under international law should a country, like Sri Lanka, renege on an agreement.

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