The Future of Investment Protection: Assessing the Fallout of BIT Renegotiations and Terminations in India and Sri Lanka

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Abstract:

This paper examines the changing paradigm of international investment governance in South Asia through the lens of the legal, economic and geopolitical consequences of the Bilateral Investment Treaty (BIT) terminations and renegotiations in India and Sri Lanka. Both countries have taken a sharp turn away from traditional investor-centric treaty frameworks to reclaim their domestic regulatory sovereignty, catalysed by an unprecedented wave of high-stakes Investor-State Dispute Settlement (ISDS) claims, including the retrospective tax disputes in India and the unilateral cancellation of the Colombo East Container Terminal (CECT) agreement in Sri Lanka.

This paper examines the systemic reform initiated by India's mass treaty cancellations in 2016 and the adoption of its highly defensive 2016 Model BIT, and considers the structural effects of shifting from asset-based to enterprise-based definitions of investment, removing the Most-Favoured-Nation (MFN) clause, and introducing strict Exhaustion of Local Remedies (ELR) requirements. It also explores how such postures intersect with Sri Lanka's ongoing economic restructuring and sovereign debt management. A critical legal analysis of the 15 year "sunset" or "survival" clause in the terminated 1997 India-The Sri Lanka BIT exposes the fractured investment landscape where legacy investments are protected for long periods while modern inflows in the crisis period are exposed to municipal law. Finally, the paper suggests policy recommendations for a balanced BIT architectural design. It argues that emerging economies can effectively protect foreign risk capital, without sacrificing their essential public policy flexibilities, by incorporating refined substantive standards, limiting arbitral discretion, and limiting survival clauses to five years. This research paper is part of the author's Ph.D. research work

Keywords:

Foreign Direct Investment, FDI Policies, ISDS, India, Sri Lanka, BITS.