

## Bilateral Courts: Wooing Europe with Investor-friendly Free Trade Deal

India has suddenly become active in hammering out free trade agreements (“**FTA**”), wooing high-profile partners such as post-Brexit UK, Canada, the Gulf Cooperation Council, Israel, and the EU, as well as done-deals involving Australia (ratified by Parliament Down Under on November 22) and the UAE (in force since May).

This is particularly significant in terms of dispute resolution under such FTAs, given India’s current protectionist policies to expand domestic manufacturing under its ‘make in India’ initiative, and the related increase in customs duties and price controls.

### EU-INDIA FTA

At the time of writing, the EU and India are engaged in the third round of talks on a proposed FTA. The EU is among India’s top three trading partners, accounting for more than a tenth of the latter’s trade. Relunched in June this year, after a gap of almost a decade, the talks also include a separate agreement on investment protection (“**IPA**”).

The IPA negotiations aim to provide a more predictable investment environment, including reciprocal commitments on non-discrimination and fair treatment — even while preserving a sovereign right to regulate. Importantly, such discussions also seek to establish a dispute settlement mechanism different from the extant model involving investor-state arbitration (“**ISA**”). The previous talks in October, for instance, focused on the EU’s proposal for an ‘investment court system’ (“**ICS**”) that is already embodied in its FTAs with Canada, Vietnam, and Singapore.

### ISA VS ICS

What ISA entails — granting a private individual or company the right to sue a sovereign nation over an investment dispute before a party-appointed tribunal — is a revolutionary

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innovation under international law. The trade regime, for example, has no equivalent. In fact, no other category of juristic persons has as expansive rights as foreign investors do under such treaties.

Nevertheless, ISA has a history of ‘depoliticizing’ disputes (that is, preventing them from snowballing into inter-state conflict — including trade wars) by giving foreign investors access to judicial remedy without involving their home state. Further, ISA provides enough regulatory space for developing countries to nurture local industries even while receiving funds from foreign investors, bringing net gains to host states and investors alike.

However, negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US ended in 2016-17 mainly because of ISA, with the reasons including public protests.

Prolonged criticism of ISA has finally led to calls for a world investment court. The EU, in particular, has championed this idea. The EU has not only signed treaties that replace ad hoc arbitration with a system of ‘standing’ bilateral courts, but also contemplates a multilateral permanent court in the future. As India prepares to engage with this template during its IPA negotiations, it needs to check whether it wants to say ‘yes’ to the European proposal.

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