The Investment Chapter of the EU-India FTA: Implications for Health

Background

- EU-India FTA negotiations began in 2007, and are scheduled to end in 2011.
- Lisbon Treaty transferred to the EU exclusive competence over Foreign Direct Investment issues;
- January 2011: European Commission (EC) requested expansion of its investment negotiating mandate for the EU-India FTA in order to negotiate investor protections on behalf of the EU. The mandate remains under consideration in European Council.
- On 6 April 2011, the European Parliament adopted a resolution on a future European international investment policy wherein the European Parliament insisted that investment chapter "*provisions should avoid negatively impacting the production of generic medicines and must respect the TRIPS exceptions for public health*". An additional EP resolution regarding the EU-India FTA, adopted on 11 May 2011, also called on the Commission "*to ensure that provisions on investment protection do not lessen the parties' ability to issue compulsory licenses or undermine other public health policies.*"
- EU Member States have Bilateral Investment Treaties (BITs) with very high levels of investor protection. These protections are provided at the expense of governments' abilities to legislate in the public interest. This mistake should be rectified in the new EU investment policy.

Significance of the Investment Chapter for Public Health

- The EU-India investment talks are a unique opportunity to repair the serious shortcomings of the BITs between India and some European countries, by ensuring the new agreement does not risk regulation in the public interest being attacked by foreign investors. However, based on the current EU negotiating stance, this opportunity is likely to be missed.
- Together with the EU-Canada and the EU-Singapore FTA (under negotiation), the EU-India FTA is the first EU FTA that will include extensive investment protections. These agreements will set the precedent for future investment chapters in FTAs.
- The investment chapter as foreseen by the proposed mandate will undermine both the European and Indian governments' ability to issue regulations to protect public health, promote access to medicines, or to protect the social determinants of health such as a clean environment or access to water. Foreign companies would have the right under this agreement to challenge any government regulation in secret arbitration proceedings, whenever they claim such regulation has affected enjoyment of their investments. The draft FTA defines "investment" to include intellectual property rights; this means that any foreign IP holder that alleges the value of its IPR to be affected by government regulation could challenge that government in arbitration.
- Because India provides 80% of the generic medicines used in developing countries, application of the investor protections in India could seriously undermine access to generic medicines in the developing world.

Provisions that Threaten Public Health

In order to understand the challenges that this chapter poses to regulating in the public interest, three issues should be taken into account: First, what "investments" receive protection under the agreement; second, what specific standard of protection must a government accord to foreign investors; and, third, how can investors enforce their interests under the agreement? Each of these elements is reviewed below.

1. Expansive definition of "investment"

"Intellectual property rights, goodwill, technical processes and know-how as conferred by law" would be considered as investments, and, as such, must be protected according to the standards established in the agreement, backed by investor-to-state arbitration.

2. Standards of protection for foreign investors

- Prohibition of indirect expropriation

This provision forbids governments from directly "taking" foreign investments, but also from taking regulatory actions that may interfere with the enjoyment of an investment, including expected profits. Often, regulatory and other government

actions are considered by foreign investors to undermine the value of their investment and therefore be tantamount to outright expropriation. The promotion of TRIPS flexibilities could be treated this way.

"Fair and equitable treatment"

This standard aims to provide a minimum level of protection under which, regardless of the treatment given to a State's domestic investors, the treatment of investors from the other signatory State must not fall. While this concept appears reasonable on its face, the standard is typically undefined in agreements and has been interpreted very broadly by arbitration panels. This vague minimum standard of treatment means that a wide range of government activities that affect foreign investors, including actions in the public interest, could potentially be challenged as 'unfair' or 'inequitable'.

- Restrictions on performance requirements

This provision would limit the possibility for the host government to place conditions on foreign investors, such as requiring that they transfer technology or use local inputs including personnel.

3. Private enforcement mechanism: investor-state arbitration

This is the most problematic feature of the investment chapter of the draft FTA, as it gives foreign investors the right to sue governments for compensation if laws, policies, court decisions or other actions interfere with the enjoyment of their investments – even if the government actions are in the public interest. This arbitration mechanism gives foreign investors, including foreign IPR holders, the right to circumvent normal legal processes and bring a case directly to a secret arbitral tribunal. This means that investors can bypass domestic courts that would balance investor rights with constitutional and human rights. It is impossible to predict how arbitrators will apply certain treaty provisions, notably the undefined standards described above. In some cases the public interest underlying the challenged regulation has not adequately been taken into account by tribunals. In addition, the cost of defending a measure in international arbitration is significant, even when a case is dismissed.

In April 2011 the Australian government announced that it would no longer include any investor-to-state dispute settlement mechanisms in its FTAs, as this constrains the abilities of governments to enact laws in support of social, environmental, and economic objectives.

Use by foreign investors of investor-to-state arbitration to challenge regulations in the public interest[1]

- In 2010, Philip Morris filed a case against Uruguay on the basis of the investment-state dispute mechanism in the Switzerland-Uruguay BIT, because Uruguay decided to require bigger tobacco warning labels on cigarette packets. Philip Morris claims this was an expropriation of its trademarks. In 2002, the company threatened Canada to challenge the government before an arbitral tribunal when the latter expressed an intention to ban terms such as "light" and "mild" from cigarette labels. Philip Morris said that such action would be unfair and inequitable.
- In 2007, Merck called the issuance of a compulsory license by the Brazilian government for Efavirenz, an antiretroviral medicine, an "expropriation" of its intellectual property.
- In 2010, an arbitral tribunal ruled that Argentina must compensate Aguas Argentinas S.A. (a consortium of local and foreign investors providing water and sewage treatment services) because of its decision to freeze water prices charged to consumers in the midst of the economic crisis in the country. The goal of this government action was to ensure continued access to water during the crisis, particularly given the fact that Aguas had increased water prices by 88,2% between 1993 and 2002. The price freezing was deemed unfair and inequitable by the arbitrators. It is as of yet unclear exactly how much Argentina will be required to pay in compensation.
- In 1998, Canada was forced to pay $19 million to Ethyl Corporation in compensation (for loss of profits and costs) and to remove a regulation banning the inter-provincial transport and international import of the fuel additive MMT which it had enacted due to public health and environmental concerns.

[1] For additional information: Oxfam (2011) : Sleeping Lions : International investment treaties, state-investor disputes and access to food, land and water.

Recommendations

In order to ensure that the EU-India FTA will not undermine the abilities of the EU or India to regulate in the public interest, including in support of health and access to medicines, the threat posed by the investment chapter must be addressed. Therefore, the Parties should:

- Remove "intellectual property rights (IPR), including goodwill, technical processes and know-how as conferred by law" from the definition of "investment" in the investment chapter of the proposed EU-India FTA;
- Remove the "investor-to-state" arbitration mechanism from the investment chapter;
- Define "Indirect expropriation" and "fair and equitable treatment" precisely and narrowly to protect legitimate government regulations in support of public health, access to medicines and other public interests from challenge by foreign investors;
- Immediately review and reform all existing BITs between European countries and India to effect the same changes recommended above.