

Should India Accept New Plan Of Eu – Investment Court System?

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Abstract

Those already established in the arbitration world must be known with the criticism confronted by the investor state dispute settlement nowadays. Several nations replied to this in their own way; India replied by introducing Indian Model BIT 2016. On other Hand EU presented ICS “Investment Court System”. This paperdescribes the relationship between EU and India and their recommencement of negotiations on the bilateral trade and agreements. It will also focus on whether India should accept their proposal or not.

Introduction

With the discussions between India and European Union concerning BTIA (Broad Based Bilateral Trade and Investment Agreement) to recapitulate soon¹, what should India look forward to from the EU at the transacting table? Since the standoff in the BITA agreement in 2013, debate around the investor state dispute settlement (ISDS) has been contentious every so often². Dealing with critique from the general public and NGOs, ISDS has now obtained the character for being “the most lethal phase in Europe” and has been described as being “terrible for democracy”.

Numerous nations around the world are examining their current policies and laws on international investment; many countries like Ecuador and Venezuela have given up their membership for the ICSID (International Centre for Settlement of Investment Disputes) while on the other hand others are deciding to rectify their current investment structure. Example for the above mentioned statement is India, who has remarkably modernized its current investment structure by revealing its “text for the Indian Bilateral Investment Treaty” (2016). Nonetheless, the EU has gone with some more hostile way and has come up with a suggestion for the ICS (Investment Court System) to reinstate ISDS dead body.

Significantly, the ICS idea sets out a scheme under which a quasi-contract with qualified judges will hear the matters and deliver awards. Individually, these awards can also be addressed to particular grounds and time limitations. It is planned that the last award given by this court can then be imposed either as a judgement or under any acknowledged international law instruments such as the conference on Recognition and enforcement of foreign arbitral awards.

However, India has already without any delay has rejected the proposal to work towards a multilateral investment agreement, given the increasing momentum and propaganda of the ICS, India should believe strongly that the EU will likely introduce the projected ICS to India for admittance when discussions on BTIA resumes. Canada and Vietnam appears to be ready to secure ICS regardless of the ongoing interpretations concerning the ICS, and most importantly,

1. M.K Venu (The wire), Modi and merkel put India –EU free Trade Agreement Back on agenda, 2017
2. ISDS is a system used to settle disputes between investors and host states.

its doubtful future. Now the question stands: should India give entry to the ICS or the ICS is just another case of the ‘Emperor’s New Clothes’?

In order to ascertain if the ICS is appropriate option for India, this manuscript presents a disparity between the essential ways in which the decision-making body vary under the suggested ICS from that under the Indian Model Bit 2016.

India And Eu: Investment And Trade

Lately both India and EU have amended their individual standpoint on ISDS. India has discharged a large group of its BITs with a view to negotiate again them in level with the 2016 Indian Model BIT. The EU have came up with a new ICS to take over the ISDS which at present features in EUVFTA (EU-Vietnam Free Trade Agreement) and CETA (Comprehensive Economic Trade agreement) both of which are in contradicting stages of conclusion³. Though it is tough to ascertain the negotiations between the India and EU will commence but in this section of the manuscript examination will be done regarding the trade and investment accord between the India and the EU, and analyse the previous developments in India’s investment structure.

In 1990 the EU expressed that their commitment with Asia would not be accomplished without an Indian partnership. Similarly, at the end of the cold war India started seeing EU as one of the closely joined with its own altitude of democracy and multiculturalism.

In year 1994 India and EU got into the cooperation agreement which covered the path for a broad political and economic cooperation with a focal point on improving trade and investment. In year 2004 India by the side of countries like China, Japan and South Korea giving a sign of qualitative change in the relationship where India is for the very first time is seen as an equal partner. After the year 2005 ‘Joint action plan’ was accepted. This particular plan incorporated a “High Level Trade Group”, which was assigned with ascertaining ways and methods for additional trade and investment accord between the EU and India.

In year of 2007 as per the advice of the High Level Trade Group, discussions on the BTIA started. Discussion covered several important issues like investment protection intellectual property protection. In 2013 discussion came to a dead end as both EU and India weren’t on the

3. CETA with the exception of ICS came into force on september 2017

same page on several issues. In 2017 annual summit both India and EU agreed to work on the matters in certain time, though resumption of the negotiations concerning BITA didn't happen.

In year 2014 BJP government won the election and Narendra Modi became Prime Minister, a decree he received on the assurance of good administration and development. At the time in Germany PM Modi and Angela Merkel declared a revival commitment to restore the discussions on the BTIA as soon as possible.

Surge in trade between both EU and India has been decreased, with the total trade took place between Eu and India in 2016 was less in comparance to 2015. As per the suggested reports, a succesfull trade between both UK and India will lead to growth in their bilateral trade by 26% per annum. A meaningful reason for the mishap in the primary BTIA negotiations in year 2013 was the UK's emphasis on lower tariffs on its whiskey and other drinks, while opposing India's appeal for liberlization of visa rules and regulations concerning Indian workers. It can be said that Brexit may have a conclusive repercussion on the advancement of the EU-India trade alliance⁴. Not being able to pursue the EU's supremacy on FTAs after Brexit, the UK is also looking to wind up a congruent independent accord with India. Although, given India current modernization of its investment policies, it is expected that these contracts will contain clauses on investment protection and dispute resolution which are considerably separate from the BITs that India signed around 1990s.

The Ics (Investment Court System)

ISDS present image of an important feature of international investment law. The ICS on the other hand trying to regain public assurance and focus on the recognized flaws of established ISDS. Nonetheless, the question remains wether the EU is capable enough to advocate for the ICS?

ISDS has been a crucial fundamental of a system of enticement advised by host states to foreign investors to draw attention of investments to their own territories. These accords begun in year 1960 and from that point till now there consists of over 3,000 international investment agreements which consists investor to state dispute settlement methods .

4. Daniel Boffey, Brexit could help Eu to strike a Trade with India, The Guardian, 2017

Though, nowadays ISDS has sustained a bad reputation. Critics might contend that the regulation of this more urgent appeal to improve ISDS is also in part because ISDS was an arrangement constructed solely to be used by the western investors against the evolving state, but has now started to be continuously used against the exporters of the investments.

Emergence Of The ICS

The ICS is broadly considered as a critter that has been constructed to satisfy the critics of the investment arbitration. In year 2015 Cecilia Malstrom conferred a theoretical manuscript titled “Investment in TTIP and Beyond- The path for reform” to the European Parliament and Council⁵. This idea was proposed to focus on the longstanding dispute surrounding the critics of the ISDS, which was possibly at its topmost during the transatlantic Trade and Investment Partnership (TTIP) discussion of 2014.

This idea was especially to the point and described four basic areas of the transformation. It contended that the TTIP should consist a bilateral appellate method that would serve to amend the errors of law clear the errors in the evaluation of the facts⁶. The idea consisted a remark to the WTO Appellate Body as well.

The EU parliament heartened the EU commission to construct on the theoretical paper, and propose it as along lasting solution for clearing up disputes between the investors and States in relation to the democratic principles and close examination. As per the recommendations from the EU parliament, there were two requisite that were to be evaluate as non-negotiable; the first one was to set up an appellate system, and the second was to assimilate publicly appointed professional judges in the case of ISDS.

In year 2015, EU commission announced its formulated text of the investment chapter of the TTIP, which consisted the clauses for the formation of ICS. On november 12, 2015 the EU commission advanced its official plan for the formation of an Investment court system in the TTIP. As per the plan ISDS will now include a public law approach and would incorporate new and better features like alternative with third party to participate. Most importantly ICS would establish a two tiered tribunal which would deal with conflict between investors and host state.

5. EU Commission Press release database, 2016

6. EU Commission, Investment in TTIP and beyond – the path for reform

Should India Accept ICS?

With ICS possibly to present with idea to India, question comes in mind whether India should welcome the idea of ICS or should rather just follow the 2016 BIT Indian Model.

One of the essential of arbitration is the capability of the party to choose the arbitrators that will hear their conflicts. Though, there are sometimes allegations claim of biasness of arbitral tribunal or members turning out to be state friendly or investor friendly.

The present ICS plan seen in CETA AND EUVFTA describes that all the particular members of the Investment Court are selected by the states parties by way of a “Committee” or a “trade Committee” accordingly. Although, there are several concerns on whether ICS plan assure that a fully independent and unprejudiced adjudicating body has been established. Certainly, the selection process of the available tribunal members as presently conceived in the ICS plan is closed and non-transparent. The committee which selects the members consists of government officials from the EU and other party. It will always be in question whether the appointed members of the ICS who were selected though non - transparent or non- consultative mechanism will indeed be free from the biasness. There is by all means always consist such risk that public positions will be given on the basis of the political recommendations.

Qualification Of The Members

The ICS plan constructed a pecking order adjudication mechanism consisting two stages i.e. the tribunal and the appeal tribunal. It is conceived that mistakes in recognition of facts and the law by the tribunal may be rectified by the appeal tribunal.

Regarding the required qualification of the members, the first and foremost requirement for the member under the ICS plan is that the particular candidate must – “carry the necessary qualifications in their own respective countries regarding the appointment to judicial offices”. Second the candidate “must have expertise in the public international law”

Qualification regarding the Appeal tribunal is alike as for the tribunal except they must “carry the necessary qualifications in their own respective countries regarding the appointment to

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7. Gus Van Harten, Arbitrator Behaviour in Adjudication: An experimental study of Investment accord arbi.

judicial offices.”

Accordingly, as per the Indian Model BIT 2016 requirement to qualify for the arbitral tribunal, candidates must carry “relevant expertise in public international law or international investment law or resolution of the conflicts arising under the International trade”.

Independence Of The Tribunal

It is important to assure the independence of the judicial and quasi-judicial bodies and remain unprejudiced. The ICS plan administer that the “members of the tribunal and appeal tribunal shall not be connected with any type of government”⁸. Though, other clauses of the ICS plan possibly show this futile by providing that “the fact person obtain an income from the government, or was previously employed by the government, or has relative who receives a load of income from the government, does not in itself show that the person unqualified”.

The Indian Model BIT 2016, in comparison, administer that the tribunal “should be independent and not be connected with or take any type guidance from” either party regarding matters like trade and investment. In addition the arbitrators are not allowed to take any kind of “information from any management, government or any party regarding the matter concerns the conflict”.

Diversification Of The Tribunal Members

A proper critique of the ISDS has been stated that it is generally “an old boys club”. The selection of the female arbitrators in the investment arbitration remains unsatisfactory. With the absence of women participation in the investment arbitration, shortage of the geographical diversification in the investment arbitration is also an element of concern. Regardless of the depressing stats, efforts have been made to make sure that practice of international arbitration is more assorted and well defined. Taking the stats into account and different actions, it is not improbable to expect the ICS plan to accommodate remedial clauses so that the sessions are different and well defined. But, neither the ICS plan and nor the Indian model consist any of the above mentioned clauses. This is particularly regrettable for the young female candidates as investment arbitrators who will basically be eradicated out of the arbitration proceedings by the ICS system. Significantly, aim of diversification in arbitration proceedings will have to be erased if all the

8. EUVFTA, Art. 14(1)

investment matters are to be resolved by State appointees.

Administration Of The Awards Under The Ics

There are some important matters regarding the administration of the awards passed along by a tribunal compatible to the present Investment Court plan. The ICS plans try to, may be foolishly, deal with this matter by solely stating that judgements delivered by the Tribunal are to be considered as ICSID awards, or awards compatible to the New York Conference.

Conclusion

The ICS plan is a desiring success project, especially at a time when public view is bending away from multi-lateralization and additionally in the way of nationalization. It is very clear that ICS has come out with this due to the critics faced by the investment arbitration in modern time. The significance of the investment arbitration must not be forgotten. It cures structural difference between investors and host states, while alluring investment and removing politics from the investment matters.

The ICS plan, while had a good intention has not been able to either satisfy the critics of ISDS or maintained the central principals of investment arbitration. It is may be proved ironic that critics describe that the excellent part of the ICS is that it will never achieve its multilateral form. Likewise, investment dispute resolution as per the Indian Model BIT 2016 is also contains a flaw. The necessity to have the dispute heard in local courts for a needed time period fails to take into application the sometimes the immediate remedy needed by small and medium size investors who have already deteriorate losses on their investment.

There's a famous saying that the way to hell is filled with good intentions; both EU and India are admonished against a fast resolution. In any case it is way to early to call the ISDS finished.