ICSID: NEXT STEP FOR INDIAN ARBITRATION?

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Introduction

In 1965 an international arbitration institution was established under the name of The International Centre for Settlement of Investment Disputes (“ICSID”) to deal with legal dispute resolution and conciliation between international investors and Member States. This institute is an autonomous, multilateral specialized institution to encourage international flow of investment and mitigate non-commercial risks by a treaty drafted by the International Bank for Reconstruction and Development's executive directors and signed by member countries. Headquartered in Washington, DC in the United States of America, the ICSID is part of and funded by the World Bank Group. As of May 2016, 153 contracting member states agreed to enforce and uphold arbitral awards in accordance with the ICSID Convention.

The ICSID is governed by its Administrative Council which meets annually and elects the center's Secretary-General and Deputy Secretary-General, approves rules and regulations, conducts the center's case proceedings, and approves the center's budget and annual report. The council consists of one representative from each of the center's contracting member states and is chaired by the President of the World Bank Group, although the president may not vote. The ICSID's normal operations are carried out by its Secretariat which comprises 40 employees and is led by the Secretary-General of the ICSID.

Creation of ICSID

Aron Broches, the general counsel of IBRD in 1961, developed the idea, after consultation with leading experts in the field of arbitration around the world, for a multilateral agreement on a process for resolving individual investment disputes on a case by case basis as opposed to imposing outcomes based on standards. The board of directors approved the final draft of the agreement, titled Convention on the Settlement of Investment Disputes between States and

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Nationals of Other States, and the Bank president disseminated the convention to its member states for signature on 18 March 1965.

As of 14 May 2016, 362 of 574 (62%) registered arbitration cases were concluded by the forum.

**Need for ICSID**

With the legal world progressing towards alternate forms of dispute resolutions, arbitration has increasingly become popular due to its many advantages. A united framework such as ICSID, has its merits in terms of the enforcement of the award, the way to challenge it, even the costs. Moreover the ICSID is the only one which comes with its proper international legal framework giving it an international platform unlike the other frameworks adopted by India.

**Drawbacks of ICSID**

Although the ICSID provides an international framework and a platform for international collaboration for investor related disputes, it still faces some drawbacks such as:

- Due to delays and long procedures for choosing of an arbitrator from the Panel and picking a chairman for the same leads to the ICSID arbitrations taking longer amounts of time than other forms of frameworks. An average ICSID case usually takes about 3 years.

- Any award given by a non-ICSID arbitration is open to be set aside under the discretion of the laws of the country where that award was made. However, in the case of ICSID the award granted is final and not open to be set aside by any local court. Instead, ICSID has a self-contained system for annulment within the ICSID Convention by an ad-hoc Committee of three arbitrators, independent from the parties and from national courts.

- Many Latin American countries have received a large number of negative investment awards, some of them grossly unfair and biased against the State and in favor of investors from developed countries. This has led to a perception among the emerging economies that the framework is biased procedurally, as well as substantively, as it fails to respect their needs of regulatory and economic freedom.

- A functional challenge to ICSID arbitration is the sheer cost and complexity of ICSID proceedings. In addition, arbitration proceedings are also perceived to be dilatory,
difficult to manage, disruptive, unpredictable, and not subject to appeal. Coupled with these challenges is the observation that low-income countries lack the resources to bear the legal fees and related costs of defending against well-resourced transnational corporations.²

- Although the Secretary General of the ICSID has the authority to appoint arbitrators to resolve investment disputes and has a duty to appoint only those who are unbiased and do not have any personal interest in the matter, given the limited number of qualified candidates, the balance of the appointment process allegedly favors developed countries.³ Moreover upon appointment of the arbitrator, ICSID hearings are often held in expensive cities like Washington, London, and Paris; these locations are convenient for and affordable to wealthy investors, but not the more distant and poorer developing states, their investors, and civic groups in their countries.⁴

- A further criticism leveled against investor-state arbitration is that substantive defenses invoked by developed states in foreign-investor claims have grown exponentially. This is typified in the NAFTA case, Methanex v. United States of America,⁵ the U.S. and Canadian Model Treaties,⁶ and the India-Singapore Economic Cooperation Agreement.⁷ In particular, each treaty includes defenses to investor claims on such grounds as health, public morality, social welfare, and sustainable development.⁸ ICSID tribunals have accommodated these defenses.⁹ They have also rejected investor claims that such defenses deny foreign investors “fair and equitable treatment” or that a signatory state has exceeded the limits of the “margin of appreciation” doctrine in protecting its public interests over the investment interests of foreign investors.¹⁰ These objections are directed at more than treaty exceptions to standards of treatment accorded to investors from wealthy countries.¹¹ More accurately, the objection is that wealthy countries are able to impose their model codes and treaties on developing states, along with self-serving substantive intellectual property and other laws.¹² The further objection is that investment arbitrators, in construing those treaties literally, are likely to perpetuate an unequal playing field for investors from poor and lower middle-income states. The result is the protection of the “legitimate expectations” of investors from wealthy states at the expense of the even more legitimate needs of developing states and their subjects.¹³
India and ICSID

With a well-known reputation of local court interference with international arbitrations in the past, India has reversed this trend in two recent landmark decisions of the Indian Supreme Court leading to which experts have often raised the pros and cons of the ICSID enforcement system in connection with India.

In collaboration with its neighboring nations, India set up the BRICS Arbitration Centre (BRICS Centre) to address and reinforce international arbitrations with foreign investors. While limited to BRICS countries in its initial phase, it will be available to all the developing countries in the future. While the idea may seem new to some, India has been toying with this idea since the last two years. The views of three member states, namely India, Brazil and South Africa as developing nations, is clear—they will prefer an arbitration framework that is receptive and which respects the regulatory freedom that developing and emerging nations need.

At the conference on ‘International Arbitration in BRICS’, the then Indian Finance Minister Arun Jaitley was unequivocal in pitching for a separate arbitration framework for the BRICS countries or the emerging economies. He was clear that India, like other developing economies, has been a victim of the inherent structural bias that prevails in the traditional frameworks of international arbitration. Contrary to the perception, this stand of Jaitley’s is neither new nor isolated. In fact, it is even consistent with India’s stand since 2012, when the then Finance Minister of India indicated that India will renegotiate all its Bilateral Investment Treaties (BIT) from scratch.

However, if the nation were to adopt the ICSID a few points are to be kept in mind in order to protect its own interests:

- India should consider excluding certain territories (for example territories where there is strife in India such as Jammu & Kashmir) from arbitration under ICSID, as is allowed under Art. 70 of the ICSID Convention;
- Moreover, we should also consider excluding certain classes of disputes and even certain designated projects from arbitration under ICSID, as is allowed under art. 25 (4) of the ICSID Convention.
Conclusion

India has been a leader fighting for the developing countries in multilateral trade negotiations. It is hoped that India will also take a strong stance in its bilateral negotiations with the EU. The nation has realized that there are major problems with the old-style investment treaties and the related investor-state dispute settlement system. India would not be the first country to depart from the traditional old-style investment treaty model and choosing ICSID as a framework would work against the interests of the nation.

But even if India takes a strong stance in its investment negotiations, this will not solve its problems with its existing investment treaties. India has signed a large number of old-style treaties that leave it vulnerable to challenge. These too must be fixed.
ENDNOTES


3 Co-arbitrators in Mining Dispute Rule that ICSID Acted Within its Authority When It Nominated an Arbitrator After Gambia Failed to Do So Within Prescribed Time Limit, INVESTMENT ARB. REP. (May 20, 2011), http://www.iareporter.com/articles/20110520_1; see also Effort to Disqualify Arbitrator in Venezuelan Oil Case Unsuccessful; Adjudicators Acknowledge that Multiple Arbitral Appointments Can Be a Concern, INVESTMENT ARB. REP. (May 20, 2011), http://www.iareporter.com/articles/20110520.


14 Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc; and Shri Lal Mahal Ltd. v. Progetto Grano Spa.