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Revisiting India's Position to Not Join the ICSID Convention

Abhisar Vidyarthi · Sunday, August 2nd, 2020

The relationship between developing countries and the International Centre for Settlement of Investment Disputes (ICSID) has not been smooth, to say the least. Several developing countries such as Bolivia, Venezuela and Ecuador have [pulled out](#) from the ICSID Convention. India is one of the prominent developing countries that has refrained from joining the ICSID Convention, since its inception. While India has not stated the specific reasons for its absence from the ICSID Convention, in 2000, the Indian Council for Arbitration [recommended](#) to the Indian Ministry of Finance that India refrain from becoming a signatory to the ICSID Convention on the following grounds: (1) the Convention's rules for arbitration leaned towards the developed countries and (2) there is no scope for a review of the award by an Indian court even if it violates India's public policy. Despite these [criticisms](#), ICSID remains the foremost institution for investor-state disputes. This post revisits India's absence from ICSID and argues that India's reservations against membership of ICSID have been mitigated or taken care of by the restrictive [India Model BIT text 2015](#) (Model BIT). As a result of rearranging the structure and content of its current and future investment treaties to align with the Model BIT, India should now reconsider joining the ICSID regime. The purpose being to enhance its overall reputation as an investment-friendly country.

Changed attitude of India

During the last decade, India has shown a general lack of trust in ISDS and has, as a result, unilaterally [terminated](#) 58 of its existing Bilateral Investment Treaties (BITs). In response, as has been discussed on this [blog](#), India has taken a highly restrictive approach to 'investor protection' and ISDS in the Model BIT. At present, India has successfully [negotiated](#) 6 BITs subsequent to the adoption of its Model BIT, with an additional 13 BITs still under discussion. These BITs mirror several provisions of the Model BIT. For example, the [Belarus BIT](#) (2018) included most provisions as stipulated in the Model BIT.

These recent [developments](#) provide reasons to revisit India's absence from the ICSID Convention. This is because negotiations on the basis of the Model BIT and subsequent incorporation of its provisions are sufficient to safeguard India's political concerns and policy objectives with respect to investor protection and ISDS. The skepticism towards ICSID arbitration is, thus, no longer justified. Moreover, the substantial rise in outbound investments from India in the recent years, both in terms of magnitude and geographical spread, indicates there may be some advantages for India to become a party to the ICSID Convention. Foreign investments of Indian companies grew

with 18 per cent in 2019. Indian investors have invested in several countries that are members to the ICSID Convention, e.g. the Netherlands, Singapore, Mauritius, USA, and the UK. The trajectory shows that Indian companies will increase making foreign investments, including in Africa and Latin America. Therefore, joining the ICSID Convention would provide enhanced rights and protection to Indian investors and their investments abroad.

Tackling the “regulatory chill” and apprehension of investor-bias

In between 2011 and 2015, India was subjected to a plethora of investment treaty claims. Most of these claims were a direct result of the regulatory changes undertaken by India in the telecom and taxation frameworks. As a result, concern relating to a risk of “regulatory chill,” that is the hesitance to regulate for public welfare due to fear of unfavourable investment awards, began to surface. In the context of becoming a member of ICSID, this concern was heightened due to India’s apprehension that the system is maligned by an investor-bias which might result in expansive interpretations of treaty provisions in favour of investors.

However, as mentioned, the Model BIT is indicative of the fact that India has mitigated these concerns/apprehensions by the introduction of several control mechanisms.

Firstly, the Model BIT readdresses the risk of “regulatory chill,” drawing a fine balance between ISDS and state regulation, by incorporating several reservations/exclusions with respect to the applicability of the treaty itself. Article 2.4 of the Model BIT explicitly provides for the exclusion of the treaty in disputes arising out of taxation related issues, measures by a local government, subsidies or grants provided by a Party, issuance of compulsory licenses, government procurements by a Party, services supplied in the exercise of governmental authority by the relevant body or authority of a Party, among others. These exclusion(s) are present in the BITs negotiated by India with Brazil (2020), Belarus (2018), Taipei (2018) and Bangladesh (2017).

Secondly, the Model BIT has taken care of the lack of investor accountability. This has been done through the incorporation of a broad ‘compliance with law’ provision. Article 11 of the Model BIT requires the investors and their investments to comply with all laws, regulations, administrative guidelines and policies of the State. Similarly, various other “investor obligations” have been included in the Model BIT to ensure investor accountability. These obligation(s) have been replicated in the BITs negotiated by India with Brazil (2020), Belarus (2018) and Taipei (2018). Such provisions are interpreted strictly by ICSID tribunals to be jurisdictional prerequisites for investors. Therefore, it will provide an additional safeguard to India in ICSID arbitrations.

Thirdly, India’s apprehension against the supposed investor-bias in ICSID is also mitigated by the Model BIT. This apprehension was strengthened post *White Industries v India* (2010). *White Industries* was the first unfavourable investment award rendered against India. As a response to this case, India has made fundamental changes to its Model BIT. In order to restrict the potential investor-bias or contradictory interpretations to creep in, the Model BIT has done away with several substantive provisions. For instance, the Model BIT does not incorporate: the MFN clause (in an attempt to avoid treaty shopping by investors); the ‘Fair and Equitable Treatment’ (FET) clause; nor the ‘Full Protection and Security’ (FPS) clause as traditionally understood, it is now limited to mere physical protection. Additionally, while Article 3 of the Model BIT provides certain substantive obligations of the host state (qualified by customary international law

threshold), it evidently excludes the protection of the ‘legitimate expectations’ of the investors. Moreover, even in BITs negotiated by India where an FET clause has been included, such as the BIT with [Colombia](#) (2018), the scope of the clause has been limited to ‘minimum standards of treatment’ under customary international law.

It is likely that the narrowing of the substantive protections, in conjunction with enhanced regulatory powers for states and the imposition of investor obligations, will likely mitigate the current skepticism manifested as a regulatory-chill, lack of investor accountability, and the supposed investor-bias.

Predictable enforcement regime

The current enforcement regime for investment awards in India lacks certainty. Investment awards are expected to be enforced under the [New York Convention](#). However, India has availed of the [commercial reservation](#) provided in Article 1(3) of the New York Convention, restricting its applicability to foreign awards arising out of legal relationships ‘*considered as commercial under Indian law*’. Therefore, whether the Indian Arbitration Act 1996 (which implements the Convention) applies to ISDS is highly uncertain. Different High Courts have reached contrasting decisions, as discussed on this [blog](#). Conclusively, the New York Convention is not a predictable regime for enforcement of investment awards in India.

The ICSID Convention provides a more predictable regime for enforcement of its awards. All ICSID awards are final, binding, and directly enforceable. The ICSID enforcement regime has been a subject of [concern](#) for India as it does not provide for a ‘public policy review’ of awards by the national courts. However, as previously discussed, with several control mechanisms (in the form of regulatory freedoms, investor obligations and narrowed substantive protections) in place, the Model BIT ensures more level regime between states and investors, and therefore, the concern regarding the lack of a ‘public policy review’ is diluted. With abundant front-end safeguards available to India, there will be less need for national courts to safeguard at the back-end of the procedure.

Exhaustion of local remedies: safety net prior to ICSID arbitration

One of the foremost developments in the Model BIT is the inclusion of a mandatory ‘exhaustion of local remedies’ clause. Article 15.1 of the Model BIT mandates that the investor must seek remedy for the particular dispute before the relevant domestic courts or administrative bodies of the host state as a precondition to filing a claim before the tribunal. Moreover, Article 15.2 clarifies that the investor must exhaust all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years prior to arbitration. The provision has been replicated in the [Belarus BIT](#) and [Taipei BIT](#) (2018). The incorporation of this provision is in consonance with Article 26 of ICSID Convention, which permits Contracting States to require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration. Therefore, Article 15 of the Model BIT would act as a safety net for India as it would allow the domestic judicial bodies to resolve disputes prior to ICSID arbitration, thereby restricting ICSID arbitration to only unresolved disputes.

Conclusion

The Indian economy benefits significantly from incoming investments. As ICSID provides a transparent, reliable, and predictable legal framework for investor/investment protection, its membership will naturally enhance investor confidence and promote incoming investments. Therefore, the membership of ICSID will significantly add to India's vast and emerging market and relatively cheap labour as factors attracting foreign investors to India. Incidentally, the benefits of membership of ICSID will also be reaped by Indian investors abroad as it will allow them to avail of the enhanced protection and [special features](#) of ICSID. Lastly, as India emerges as a political and economic superpower, it would be well-advised to re-consider its stance with regard to the ICSID regime. If India is able to renegotiate its investment treaties in line with the Model BIT, it will dilute the factors usually cited as reasons for India to refrain from joining ICSID Convention, thereby making its membership a viable option.


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