
INDIA AND INVESTOR-STATE ARBITRATION IN INTERNATIONAL INVESTMENT DISPUTES

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ABSTRACT

Recently, over the years foreign investment in India has boomed and with that the nation is developing drastically in respect to the framework of regulating and dispute mechanism to solve International Investment Disputes. Arbitration is another blooming dispute resolving mechanism which has made easy and speedy way to resolve disputes, many of the big entities prefer Arbitration over the traditional path of court. In many Investment disputes where a foreign company has invested in India, they choose Arbitration for resolving their disputes. This study has adopted exploratory research methodology, it helps to understand current position of India in dealing International Investment Disputes through Arbitration and the changes observed in approach and attitude of India towards the framework. Further attempt has been made to analyse different treaties and Regulations for the same from a Global Perspective.

Keywords: Investment, Arbitration, Investor–state, ICSID, Bilateral Investment Treaties, India

INTRODUCTION

In Investment treaties and Free trade agreement, Investment arbitration is one of the alternative dispute resolution mechanisms which allows the foreign investors to resolve investment disputes through International Tribunals. As a result of globalisation and Foreign direct Investment, International investments in India have witnessed a drastic growth, with that the need and use International Investment Treaties. Basis of investment arbitration lies in Investment treaties. There exists a criterion which marks a county eligible to opt for this mechanism. The consent for conducting an Investment Arbitration is usually given by the country which hosts. The procedure and provisions are mentioned under the Bilateral Investment Treaties and other regional agreements. International centre for settlement of investment disputes (ICSID) has a major role in regulating the Investment disputes. Approximately around 37 of the developing countries out of 61 governments and 14 in developed countries have experienced investment treaty arbitration¹. This convention was formed mainly for the development and reconstruction by the executive authorities of the International Bank. Gas, telecommunication, oil are the major sectors where Investment arbitration is booming in India. India signed first Bilateral Investment treaty in 1994 with united Kingdoms. BIT aims to protect the investments made by both the countries by rules and regulating the behaviour of the host state where the investment has been made. It helps the Investors by protecting their interests.

CHANGE OVER TIME

New found approach towards economic liberalization in India around 1991 pushed India to participate in investment treaty regimes. In 1990s severe balance of payment crisis made India to interact with global economy resulting in an outward looking approach. India's first model of bilateral investment treaty was made by foreign countries and was much inclined towards protecting the foreign investors than upholding the local regulatory powers of the state. This extra foreign friendly regime remained unchanged for two decades.

In 2011 just one international arbitration was held in India. In 1990s Dabhol Power Company (DPC)² in Maharashtra was a party to it. The company was of a joint venture Eron corporation,

¹ United Nations Conference on Trade and Development. INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW. [https://unctad.org/en/Docs/iteiit20054_en.pdf]

² Nishith Desai Associates. Bilateral Investment Treaty Arbitration and India. https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf

General Electric corporation and Bechtel Enterprise formed with the intention of generating electric power in Maharashtra. DPC had entered into an agreement with the Maharashtra State Electricity Board as the only purchaser of DPC. Later the MSEB backed off from the agreement leaving behind DPC with not a single customer. This impacted the investment badly. Later DPC initiated arbitration proceedings but was denied by the court's interference. As a reaction to this the joint venture companies invoked the India -Mauritius BIT in which they challenged India. Around nine cases related to this project were filed but the issue failed to reach international investment arbitration award and got settled. Even after this scenario after 1990's till almost 2016 India is facing challenges in dealing with international investment disputes.

INTER STATE INVESTMENT ARBITRATION

International Investment arbitration in simple terms is a procedure through which a dispute between a foreign investor and the host country. The result of this procedure is seen in a positive way as in recent years it has led to economic development of many countries and helped in development in private entities. It has proven to pave a depoliticized space for the party to resolving a dispute with that it also promises neutrality and independence to the parties.

Firstly, there is a difference between International commercial arbitration and international Investment arbitration because of two factors namely, parties who are involved in the Arbitration and nature of the claim³. In commercial arbitration the parties involved are private entities whereas the parties to IIA are, one party is a foreign company and the other party is a state. IIA resolves disputes which arise from a multilateral investment treaty or an investment contract. Whereas ICA deals with disputes arising out of an obligation which is commercial in nature. Mainly institutional and ad hoc formats are used to conduct a dispute between the host state and foreign entity. Institutional arbitration is usually administered by ICSID, International court of arbitration of chamber of commerce or Stockholm's Institute's chamber of commerce. The parties are free to choose the arbitration format for themselves. The jurisdictions of the investment tribunals depend upon the host state. the scope of jurisdiction is usually decided in accordance to *Ratione Materiae*, *Ratione Voluntatis*, *Ratione Temporis* and *Ratione personae*⁴.

³Alam Sagar, F., & Pednekar, S. (Year). International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences. Cyril Amarchand Mangaldas Blog. Retrieved from [<https://corporate.cyrilamarchandblogs.com/2019/05/international-investment-arbitrations-international-commercial-arbitrations-guide-differences/>] (May 15, 2019)

⁴ MNLU Mumbai. Handbook on Investment Arbitration in India. Retrieved from <https://mnlumumbai.edu.in/pdf/Handbook%20on%20Investment%20Arbitration%20in%20India.pdf>

Ratione Voluntatis refers to the consent given by the parties for arbitration. The consent is either given directly in the agreement itself or through bilateral treaties. In reference to institutional arbitration an ombudsman can act as an institutional interlocutor in the host country and the investor can approach to redress their issues respectively. One of the alternatives methods to resolve investment disputes is by Dispute Prevention policies⁵, it prevents a dispute from becoming a formal investment dispute by e.g., establishing a inter institutional mechanism which will act as an alert mechanism.

ICSID

International centre for settlement of investment Disputes mainly contains the rules referred to as by IIAs and followed by the parties to the dispute. Chapter six and seven of the convention mentions procedural provisions and chapter 2 contains jurisdictional Rules. The rules in ICSID were adopted back around 1967. The general conduct of ICSID is as follows, first the party requesting files a request for arbitration then screening and registration of the request takes place followed by deciding number of arbitrators and method for the same. Further tribunal gets constituted by appointing tribunal members, the tribunal holds the first session in which written procedures followed by oral procedures and deliberation takes place followed by Award. The recent report of ICSID states that there is continuous growth in membership, currently there 153 member states are there. In the year 2023 ICSID and UNICITRAL completed the work on code of conduct of arbitrators in international investment disputes, according to the report nearly 66 percent of hearings and session were held were held remotely and hybrid and about 13 percent were held in person⁶.

INDIA'S STAND ON ICSID

It has been seen that developing countries including India had denounced ICSID convention as they perceive investor state dispute settlement in a negative way as they fear, the protection given to the foreign investors as this might affect the regulatory power the state in a negative way and would also result in undermining the sovereignty of the state party who is the host. In reference to the decision of White Industries V. India⁷, after the decision ICSID has unfavoured India. The result of this was in favour of the foreign investor, one of the after effect of this was

⁵ United Nations Conference on Trade and Development. World Investment Report 2009: Transnational Corporations, Agricultural Production and Development. Retrieved from https://unctad.org/system/files/official-document/diaeia200911_en.pdf

⁶ International Centre for Settlement of Investment Disputes ICSID Annual Report 2023. Retrieved from https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR2023_ENGLISH_web_spread.pdf

⁷ White Industries v. Republic of India, Final Award, November 30th, 2011.

that after 2011 India only signed one bilateral investment treaty and terminated over 58 treaties till the year 2015⁸. Even though India contributed in the drafting ICSID, is not a signatory to this convention as from India's perception the conventions is more inclined towards supporting and protecting the foreign investor states in India. There is one common criticism is observed that there is no appeal in available on a decision of ISCID as in reference to Article 53⁹ of the convention that, the award is binding to the parties and is not in any case appealable and no other remedy e.g., review can be opted. The convention has made a provision regarding annulment of award under Article 52 of the convention where annulment can be asked for in certain circumstances. Irrespective the powers of the annulment committee are very restrictive as they cannot review on law being misappropriately applied, false fact further the committee is also not in the position to amend the award and take it to the tribunal as a concern. This demerit was observed in the case CMS v. Argentina¹⁰ it was seen that it was rightly pointed out by the annulment committee the tribunal had committed so e error of law but unfortunately the observation of annulment committee was not considered justly due to the limited powers under Article 52 of the convention¹¹. Back in 2017 a proposal made by Canada and EU which proposed to work on a multinational pact on investment at world trade organisation which would have Investor state dispute settlement (ISDS) mechanism in it. This sort of Investment court system would result into many negative effects such as billions of taxes payer's money would be used to compensate foreign company by the state, more lawsuits and fees would be incurred without no justifiable reasons. It would not be possible to remove the privileges given to the investor which would directly result into more power and could surpass the regulatory power of the state with which the private corporation is dealing with. This will also empower the Investors to sue the government over measures to protect the health and safety of the workers and also protection of environment. This can be observed by taking into account what happened in the Union Carbide corporation before the gas tragedy. In recent times ISDS has become one of the most controversial topics in International Investment law. Recently in 2020

⁸ Nishith Desai Associates. (2018). Bilateral Investment Treaty Arbitration and India: With a special focus on Indian Model BIT, 2016. Retrieved from [https://nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf] (last accessed June 25, 2020)

⁹ The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention

¹⁰ CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, 27 Decision on Annulment 135-136 (25 Sep. 2005).

¹¹ International centre for settlement of investment Disputes

in *Vodafone International Holdings BV V. Government of India*¹² the permanent court of arbitration passed an award against the Indian government. The reason which was told by the company to opt arbitration against India was that the articles in bilateral investment treaty between India and Netherlands were violated. The award also mentioned the scope of Legislature's duty in India, the order which was passed by the supreme court which was overruled by an amendment was explicitly considered as a breach in the award. The amendment was passed with the intention to charge capital gain tax from Vodafone company, thereafter by criticising this act of government the international forums passed a financial bill 2012, the PCA found that the amendment made by the Indian Government unjust and unfair. The Tribunal had directed Indian Government to reimburse Rupees 850 million to Vodafone as a legal cost. this case has a good and as well as a bad side, the bad side is the unfair amendment made by the legislature just to increase tax collection and the good part to notice here is hoe the judiciary is Independent and does nor act under the pressure of the state.

CONCLUSION

For developing and as well as developed countries, dealing with International Investment Arbitration and International Investment Treaties is bit challenging as there are still some demerits. For a smooth long run, the authorities should make some changes or partially build a structure which may be followed by the governments for governing the awards resulting out of an international Investment arbitration and which would maintain a balance between the government of the state and the Investor. The rights of a sate in a BIT should also be balanced. On the other hand, it is necessary for a state to understand the that with maintaining and protecting the sovereignty of power on local laws the investor too should have balanced rights as if the investor has enough rights the investor would invest more that in return would help in the development of the state itself. A new BIT model with balanced and proper rules and regulations would ensure that India won't face problems anymore.

¹² PCA Case No. 2016-35 (Dutch BIT Claim). SCC Online Blog. (2022, November 29). Vodafone versus India: A Never-Ending Saga. [<https://www.sconline.com/blog/post/2022/11/29/vodafone-versus-india-a-never-ending-saga/>]

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