

A court to fix all investor-state rows?

Embroiled in 22 arbitration proceedings against it in disputes with prominent global investors, including Vodafone and Cairn Energy, India has cautiously welcomed a proposal to establish a 'World Investment Court' (WIC).

The World Court, a plan pushed mainly by the European Union (EU), is to be a "permanent, independent, legitimate, accountable, consistent and effective" global body framework with a mechanism for appeal as well, to resolve the current and future investor-State disputes including the ones that India is/could be involved in.

The matter is coming up for discussion next month at the United Nations Commission on International Trade Law (Uncitral), of which India is a member along with 59 other nations representing 'various geographic regions and the principal economic and legal systems of the world'. The Uncitral works on the 'modernisation and harmonisation' of international business rules.

Responding to a questionnaire sent by an Uncitral Working Group mandated to look into issues including the proposed WIC, India said it "welcomes the move to have discussions and deliberations on the proposal, and further comments could be provided in due course."

However, it said, "The legal and practical challenges to establishing a WIC should not be underestimated." It added, "one of the most critical areas in designing a permanent investment court relates to its composition, structure and certainty."

Currently, such disputes are being dealt with by the Investor-State Dispute Settlement (ISDS) regime, but with varying provisions in more than 3,300 International Investment Agreements (IIA) — including Bilateral Investment Treaties (BIT) and Treaties with Investment Provisions (TIPs). India had inked 83 BITs, and is a party to 13 TIPs.

As per the Uncitral, the ISDS regime was created to enhance confidence in the stability of the investment environment. The regime is used to solve investor-State disputes in a neutral and flexible manner. Uncitral said the ISDS provisions in investment treaties vary, with some providing for ISDS in any dispute arising from the investment concerned, and others restricting ISDS to claims arising from breach of certain treaty provisions, or to claims relating to 'expropriations' (or measures including nationalisation).

'Inconsistent awards'

Global think-tank OECD said, "Such variation...is likely to both motivate and complicate possible harmonisation of international investment law. It may also affect the apparent consistency of arbitral awards, and increase arbitration costs..." India, in its reply to the Uncitral questionnaire, had also said, "One of the drawbacks of the current landscape of BIT arbitrations is the number of inconsistent or even contradictory awards..."

The WIC — alternatively called 'International Tribunal for Investments' or 'Multilateral Investment Court' — is proposed to "replace or supplement" this ISDS arbitration regime in investment treaties.

According to the EU Trade Commissioner Cecilia Malmström, "This system [ISDS] has operated for more than forty years: and the main beneficiaries are EU investors, who bring over half of the world's ISDS cases. But ISDS is old-fashioned and it is far from perfect."

'ISDS criticised'

Ms. Malmström further said, in a speech in February, that the WIC is an idea the EU has begun to present in the international community including “at the World Trade Organisation (WTO)... to discuss the issue and get their support.” The ISDS regime has been criticised due to its “absence of or limited legitimacy, consistency and transparency, the lack of a review mechanism, as well as ad hoc constitution of tribunals, lengthy duration and high costs.”

As per the UNCTAD, the United Nations agency on trade, investment and development, as on July 31, globally there were 817 ‘known treaty-based investor-State arbitrations’.

This includes 26 such matters that India is involved in. In 22 of the 26 cases, India is or was the ‘respondent State’ (with proceedings initiated against it), while in four other matters, India is or was the ‘Home State’ of the investor that sued another country. The report of the High Level Committee — ‘to review the institutionalisation of arbitration mechanism in India’ — had said that in the early years, India saw few claims (from investors), and even settled the dispute regarding the Dabhol power project. However, it said, the award in the ‘White Industries’ case against India (the tribunal awarded a compensation of \$4.1 million to White Industries) not only resulted in many fresh notices against India, but also caused much consternation — as the primary grounds for the award was based on delays of the Indian judiciary.

It added, “The award in White Industries triggered a spate of investment treaty claims being raised against India... The most prominent among these claims was the one raised by Vodafone... [which] invoked the India-Netherlands BIT and issued a notice of arbitration to the Government for its failure to protect investor rights.”

In 2015, India released a ‘revised’ Model BIT Text, in the backdrop of many arbitration proceedings against it, where investors cited provisions in its bilateral investment treaties to seek huge compensation for ‘economic harms suffered due to reasons including policy changes’. India said the ‘revised’ Text was necessitated as extant treaties were signed with partner nations after negotiations on the basis of the Model BIT Text adopted in 1993 (amended in 2003), that had provisions “susceptible to broad and ambiguous interpretations by arbitral tribunals”.

The ‘revised’ Text will be used to re-negotiate India’s existing treaties, as well as negotiate future treaties and investment chapters in its ‘Treaties with Investment Provisions’. However, India has become wary of ISDS. It is learnt that the recently ‘finalized’ India-Brazil BIT has no ISDS. In the light of the ISDS problems and efforts to harmonise the related norms globally to resolve such issues, the European Commission will next month hold a stakeholder meeting on the proposed World Court by pitching it as a solution.

'Not in India's interest'

On the proposed Court, the earlier-mentioned High Level Committee suggested that, “The efficacy of such an investment court may be assessed based on experiences of other countries and a position adopted on the usage of such investment court mechanisms.” Abhijit Das, head and professor, Centre For WTO Studies, Indian Institute of Foreign Trade, however, said, “It (the World Court) may not be in India’s interest as many of the shortcomings of the ISDS, including the expansive interpretation of certain investment treaty terms that has been a bone of contention in many cases, are likely to continue in the WIC.”

“Besides, many developing nations including India, Indonesia and South Africa are either moving away from BITs or are making fundamental changes to their BITs. In these circumstances, perhaps it is not in India’s interest to support the WIC.”

'Resistance exists'

Mukhisa Kituyi, Secretary-General, UNCTAD, said, "... there are some countries which are still very resistant to it (the World Court).... you are not going to be able make any international mechanism without their express consent... in many ways, they would like to internationalise their domestic jurisprudence on such disputes."

He added that the UNCTAD, along with the EU, is helping in developing a rules-based investor dispute resolution mechanism that goes beyond the traditional dispute mechanism.

"But we are putting greater emphasis on investment facilitation, and on a rules-based framework for a new regime of investment agreements that are more sustainable, and that balances rights and obligations that do not erode or abuse social and ecological considerations in a way we see in the old stock of investment agreements, particularly in the BITs."

Andreas Esche, director, Program Shaping Sustainable Economies, Bertelsmann Stiftung, a German-headquartered private operating foundation, said "it (the World Court) is a reliable proposal as it is not following any national interests."

In a veiled reference to many Indian firms investing abroad including in Africa and Latin America, he said considering the World Court is important especially if "you are interested in protecting your investments in countries with a legal system that is not so well-established."

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