THE EMPEROR'S NEW CLOTHES: SHOULD INDIA MARVEL AT THE EU'S NEW PROPOSED INVESTMENT COURT SYSTEM?

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Abstract

Those in the arbitration world will no doubt be familiar with the criticism faced by investor state dispute settlement in recent times. Around the world, many nations have responded to this criticism by revisiting the way in which they resolve investment disputes. India, for instance, has released a 2016 Indian Model BIT. The EU, on the other hand, has taken a radical departure from the classical approach and has proposed an 'Investment Court'. Given that India and the EU are soon to recommence negotiations on their Broad-based Bilateral Trade and Investment Agreement, this paper begins by reviewing the trade relationship between the two global powerhouses. The authors provide a comparison of how both India and the EU have sought to deal with the criticism levied against ISDS and assess which approach remains truer to the inherent nature of arbitration, while responding to the critique of ISDS. The analysis focuses on the key features and characteristics of the decision-making bodies under the Investment Court System proposal and the 2016 Indian Model BIT.

I. Introduction

With negotiations between India and the European Union ["**EU**"] on the Broad-based Bilateral Trade and Investment Agreement ["**BTIA**"] to resume soon,[1] what should India expect from the EU at the negotiating table? Since the deadlock in BTIA negotiations in 2013, discussions

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The views presented in this paper are the authors' personal views and not those of the entities they represent.

[1] M. K. Venu, *Modi and Merkel Put India-EU Free Trade Agreement Back on the Agenda*, THE WIRE (May 31, 2017), *available at* https://thewire.in/141841/modi-merkel-berlin-india-eu-germany/.

around investor state dispute settlement ["**ISDS**"] have been controversial at times. [2] Facing criticism from the general public and Non-Governmental Organisations, ISDS has now gained a reputation for being "*the most toxic acronym in Europe*",[3] and has been characterized as being "*dangerous for democracy*".[4]

Many nations around the world are reviewing their policies and laws on international investment; countries such as Bolivia, Ecuador, and Venezuela have relinquished their membership of the International Centre for Settlement of Investment Disputes ["**ICSID**"],[5] while others are choosing to reform their prevailing investment regimes. An example of the latter is India, who has significantly overhauled its existing investment regime by releasing its "Model Text for the Indian Bilateral Investment Treaty" ["**2016 Indian Model BIT**"].[6] However, the EU has taken a more aggressive approach and has developed a proposal for an Investment Court System ["**ICS**"] to replace ISDS' '*dead*' body.[7]

In essence, the ICS proposal sets out a plan under which a quasi-court with tenured judges will hear disputes and render awards.[8] Uniquely, these awards can also be appealed subject to specific grounds and time limitations.[9] It is intended that a final award handed down by this "court" can then be enforced either as a judgment, or under recognised international law instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ["**New York Convention**"] or the ICSID Convention.[10]

Although India has already summarily rejected a suggestion to work towards a multilateral investment agreement,[11] given the growing momentum and publicity of the ICS, India should expect that the EU will likely present the proposed ICS to India for inclusion when negotiations on BTIA recommence. Vietnam and Canada seem ready to accept the ICS despite the ongoing

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2 ISDS is a mechanism used to settle disputes between investors and host States, and is commonly included in international investment agreements. This is discussed further in **Part III.A.** below.

3 Paul Ames, *ISDS: The most toxic acronym in Europe*, POLITICO (Sept. 17, 2015), *available at* http://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe.

4 *Id.*; *See also* Sudeep Chakravarty, *Corporate rights and the backlash against globalization*, LIVEMINT (June 29, 2017), *available at* http://www.livemint.com/Opinion/IehaXBxKeV5RiTJd5X1tdO/Corporate-rights-and-the-backlash-against-globalization.html; For critics on ISDS, *see also Still not loving ISDS: 10 reasons to oppose investors' super-rights in EU trade deals*, CORP. EUR. OBSERVATORY (Apr. 16, 2014), *available at* https://corporateeurope.org/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade.

5 Nicolas Boeglin, *ICSID and Latin America: Criticisms, withdrawals and regional alternatives,* BILATERALS.ORG (June 25, 2013), *available at* http://www.bilaterals.org/?icsid-and-latin-america-criticisms.

6 Model Text for the Indian Bilateral Investment Treaty 2016, *available at* http://finmin.nic.in/sites/default/files/ModelTextIndia_BIT%20%281%29.pdf?download=1, [*hereinafter* "2016 Indian Model BIT"]; *See* Prabhash Ranjan & Pushkar Anand, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. (forthcoming) 1, 42 (2018); Grant Hanessian & Kabir Duggal, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?*, 32(1) ICSID REV. - FOR. INV. L. J. 216 (2017).

7 Douglas Thomson, *EU says "ISDS is dead" ahead of Japan trade deal*, GLOBAL ARB. REV. (July 6, 2017), *available at* http://globalarbitrationreview.com/article/1144114/eu-says-%E2%80%9Cisds-is-dead%E2%80%9D-ahead-of-japan-trade-deal.

8 In this paper, we deal with the ICS model as found in the EUVFTA. EUVFTA, art. 12(5), section 3, ch. II, ch. 8.

9 EUVFTA, art. 28(1), section 3, ch. II, ch. 8.

10 *Id.* art. 31(2), section 3, ch. II, ch. 8.

11 Prabhash Ranjan, *India Should Reconsider Its Stand on Investment at the WTO*, THE WIRE (Feb. 13, 2017), *available at* https://thewire.in/107960/india-investment-agreement-wto/.

criticism subjected towards the ICS, and most importantly, its uncertain future.[12] The question remains: Should India welcome the ICS with open arms, or is the ICS just a case of 'the Emperor's New Clothes'?

The authors commence this discussion with a quick overview of the bilateral trade and investment relationship between the EU and India (**II.A.**), particularly in light of recent developments (**II.B.**). An account of India's overhaul of its regime on investment protection is also presented (**II.C.**).

The article then previews this issue by an introductory look into the original purpose of ISDS (**III.A.**), and presents the reasons behind the EU's transition to the ICS (**III.B.**). The prevailing question of whether or not the EU even has the competency to present such a scheme is explored in light of a recent ruling of the Court of Justice of the European Union ["**CJEU**"], which found that the EU cannot enter into international agreements with mechanisms such as the ISDS or ICS with third countries on its own[13] (**III.C.**).

In order to determine whether the ICS is a suitable option for India, this article presents a contrast between the key ways in which the decision-making body differs under the proposed ICS from that under the 2016 Indian Model BIT (**IV.**).

The authors conclude with the main takeaways from the analysis and find that despite clear room for improvement in the Indian Model BIT, in light of the currently unsettled status of the EU's ability to offer the ICS, and the ICS' failure to preserve tenets of arbitration, India should exercise caution in readily accepting the ICS (**V.**).

II. India and the EU: Trade and Investment

In recent times, both India and the EU have revised their individual stances on ISDS. India has terminated a host of its BITs with a view to renegotiate them in line with the 2016 Indian Model BIT.[14] The EU has developed a new ICS to replace the ISDS, which currently features in the EU-Vietnam Free Trade Agreement ["**EUVFTA**"][15] and the Comprehensive Economic and

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12 This is discussed further in **Part III.C.** below; *See also* Erin Biel & Mattie Wheeler, *The Uncertain Future of the European Investment Court System,* YALE J. INT'L. L. F. (Dec. 1, 2016), *available at* http://www.yjil.yale.edu/the-uncertain-future-of-the-european-investment-court-system/; August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? - The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 J. INT'L ECON. L. 761 (2016) (discussing, *inter alia,* issues pertaining to enforcement).

13 Opinion 2/15 (EU Singapore Free Trade Agreement) of May 16, 2017, ECLI:EU:C:2017:376; For the latest developments with respect to this issue, *see* Hans von der Burchard, *Juncker proposes fast-tracking EU trade deals*, POLITICO (Aug. 31, 2017), *available at* http://www.politico.eu/article/juncker-proposes-fast-tracking-eu-trade-deals/.

14 Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion (Answer to unstarred question No. 1290 on Bilateral Investment Treaties, July 25, 2016), *available at* http://dipp.nic.in/sites/default/files/lu1290.pdf; Ranjan & Anand, *supra* note 6, at 14.

15 *See* EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, Chapter 8, Chapter II (Investment), Section 3 (Resolution of Investment Disputes), which contains the ICS as envisaged in the EUVFTA, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437. EUVFTA is currently undergoing 'legal scrubbing' and is expected to be presented to the European Parliament for consent before the end of 2017. For more information about the status of the EUVFTA, *see* European Parliament*, EU-Vietnam Free Trade Agreement (EVFTA)*, LEGISLATIVE TRAIN SCHEDULE, *available at* http://www.europarl.europa.eu/legislative-train/theme-international-trade/file-eu-vietnam-fta (last accessed on Sept. 21, 2017).

Trade Agreement ["**CETA**"][16], both of which are in differing stages of finalisation.[17] While it is difficult to predict how negotiations between the EU and India will unfold, in this section the authors will explore the trade and investment relationship between the EU and India, and review the recent developments in India's investment regime.

A. EU-India BTIA Negotiations: A Brief Background

In the early 1990s, the EU considered that their engagement with Asia would not be complete without an Indian partnership.[18] Likewise, following the end of the cold war, India was beginning to see the EU as being more closely aligned with its own values of democracy and multiculturalism.[19]

In 1994, the EU (then European Community) and India signed the 1994 Cooperation Agreement,[20] which paved the way for a broad political, economic, and sectoral cooperation with a focus on enhancing trade and investment.[21]

In 2004, India became one of the EU's few '*strategic partners*'[22] alongside China, Japan, and South Korea, signalling a qualitative shift in the relationship whereby India was seen as an equal partner for the first time. Soon after, the 2005 'Joint Action Plan' (revised in 2008) was adopted.[23] This plan established a "High Level Trade Group",[24] which was tasked with determining ways and means to further the trade and investment relationship between the EU and India, and in particular to examine the possibility of launching negotiations on "*a broad-based trade and investment agreement*".[25]

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16 *See* Comprehensive Economic and Trade Agreement between Canada, on the one hand, and the European Union and its Member States, on the other hand, art. 8.18-8.45, section F, ch. 8, *available at* http://www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement. CETA obtained European Parliament's consent on Feb. 15, 2017 and is now pending ratification by Canada and individual EU Member States. For more information on the status of CETA, *see* European Parliament, *EU-Canada Comprehensive Economic and Trade Agreement (CETA)*, LEGISLATIVE TRAIN SCHEDULE, *available at* http://www.europarl.europa.eu/legislative-train/theme-international-trade/file-ceta (last accessed on Sept. 21, 2017).

17 CETA, with the exception of the ICS, entered into force on September 21, 2017. EUVFTA is undergoing legal review and is expected to come into force by the end of 2018.

18 Gulshan Sachdeva, *Evaluation of the EU-India Strategic Partnership and the potential for its revitalisation*, 11, 12 (European Parliament, Directorate-General for External Policies, Study, June 18, 2015), *available at* http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534987/EXPO_STU(2015)534987_EN.pdf.

19 *Id.*

20 Formally known as Cooperation Agreement between the European Community and the Republic of India on partnership and development - Declaration of the Community concerning tariff adjustments - Declarations of the Community and India, EU-India, Aug. 27, 1994.

21 Sachdeva, *supra* note 18, at 11.

22 Press Release, Council of the European Union, The India-EU Strategic Partnership: Joint Action Plan, 11984/05 Presse 223 (Sept. 7, 2005), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/er/86130.pdf.

23 Press and information team of the Delegation to India and Bhutan, *Highlights of trade and economic cooperation between the EU and India,* DELEGATION OF THE EUROPEAN UNION TO INDIA AND BHUTAN (Oct. 17, 2016), *available at* https://eeas.europa.eu/delegations/india_en/12126/Highlights%20of%20trade%20and%20economic%20cooperation%20between%20the%20EU%20and%20India.

24 Press Release, Council of the European Union, The India-EU Strategic Partnership: Joint Action Plan, 11984/05 Presse 223 (Sept. 7, 2005), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/er/86130.pdf.

25 *Id.*

In 2007, based on the recommendations of the High Level Trade Group, negotiations on the BTIA began. The subject matter of negotiations covered access to markets (goods, services and public procurement contracts), investment protection, intellectual property protection and standards on sustainable development (with nexus to environment, social and labour rights).[26] In November 2013, after 16 rounds of negotiations had been concluded, the negotiations came to a standstill because the EU and India failed to see eye-to-eye on several issues.[27] In the 2017 annual summit, India and the EU resolved to work on these issues in a time bound manner, however, recommencement of negotiations on the BTIA did not occur.[28]

B. Recent Revival of BTIA Negotiations and Mitigating Circumstances

In 2014, Narendra Modi replaced Manmohan Singh as India's prime minister, a mandate he received on the promise of good governance and development.[29]

During his visit to Germany earlier this year, Narendra Modi and Angela Merkel announced a renewed commitment to reinstate talks on the BTIA "*as soon as possible*".[30]

Growth in trade between the EU and India has been slow, with the total trade between the two amounting to EUR 77,021 million in 2016, compared to EUR 77,589 million in 2015 and EUR 76,123 million in 2012.[31] According to estimates, a comprehensive trade deal between the EU and India will potentially achieve a doubling of trade between the two partners.[32] Additionally, according to another study, a trade deal between India and the UK will increase their bilateral trade by 26% per annum.[33]

A significant reason for the breakdown in the initial BTIA negotiations in 2013 was the UK's insistence on lower tariffs on its whiskey and other spirits, while resisting India's demand for liberalization of visa rules for Indian workers.[34] It can be argued that Brexit may have a positive

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26 Lakshmikumaran & Sridharan, *India-EU free trade agreement: State of play and way forward*, LEXOLOGY (June 20, 2017), *available at* https://www.lexology.com/library/detail.aspx?g=afb818fa-cfce-4fdf-aecf-503d633ed5fd.

27 Arun S., *India to seek greater market access in U.K. for IT, healthcare*, THE HINDU, Nov. 8, 2016, *available at* http://www.thehindu.com/business/India-to-seek-greater-market-access-in-U.K.-for-IT-healthcare/article16228677.ece; Mike Palmedo, *Negotiating Text of IPR Chapter of India-EU Free Trade Agreement Leaked*, INFOJUSTICE.ORG (Jan. 12, 2011), *available at* http://infojustice.org/archives/800.

28 Press Trust of India, *India, EU hold discussions on proposed free trade agreement*, THE INDIAN EXPRESS, Nov. 22, 2017, *available at* http://indianexpress.com/article/business/india-eu-hold-discussions-on-proposed-free-trade-agreement-4939148/.

29 Jason Burke, *Narendra Modi's landslide victory shatters Congress's grip on India,* THE GUARDIAN, May 16, 2014, *available at* https://www.theguardian.com/world/2014/may/16/narendra-modi-victory-congress-india-election; *See also* Sachdeva, *supra* note 18, at 7.

30 Venu, *supra* note 1.

31 European Commission, *European Union, Trade in goods with India*, DIRECTORATE-GENERAL FOR TRADE STATISTICS, 2, 3 (May 3, 2017), *available at* http://ec.europa.eu/trade/policy/countries-and-regions/countries/india/.

32 Janosch Delcker, *Germany pushes for post-Brexit EU trade deal with India*, POLITICO (May 30, 2017), *available at* http://www.politico.eu/article/eu-india-trade-germany-pushes-for-post-brexit-deal/(estimates doubling EU exports to India); Gabriel Felbermayr et al., *Europe and India: Relaunching a Troubled Trade Relationship* 16 (Ifo Institute Study, 2017), *available at* http://www.cesifo-group.de/ifoHome/infoservice/News/2017/05/news-20170530-fober-80.html (projects doubling of trade between EU and India in the long run).

33 Arun S., *supra* note 27.

34 *Id.*

impact on the EU-India trade relations going forward.[35] Not being bound to follow the EU's lead on FTAs after Brexit, the UK is also looking to conclude a similar independent treaty with India.[36] However, given India's recent overhaul of its investment policy, it is likely that these agreements (if they materialise) will include provisions on investment protection and dispute resolution which are significantly different from the BITs that India signed in the 1990s.

C. India's Overhaul of its Investment Regime

In order to fully contextualize the recommencement of BTIA talks, the history and the reasons for the overhaul of India's investment regime must be understood.

India signed its first BIT with the UK in 1994,[37] which served as a template for its future BITs.[38] As of today, India has signed BITs with 83 partner countries.[39] India has surviving BITs with the Belgium-Luxembourg Economic Union, People's Republic of China, Russian Federation, Saudi Arabia, and several developing countries such as Bangladesh, Myanmar, Mexico, and Mongolia. Notably, India has no investment agreement with the US thus far. Despite a considerable number of signed BITs, India's involvement with ISDS was minimal until recently, when numerous ISDS proceedings against India were instituted.[40] These cases involved investors from the UK, Mauritius, United Arab Emirates, France, Netherlands, Germany, Switzerland, Austria, the Russian Federation, Cyprus and Australia.[41] In 2016, India became one of the most frequently named respondent States in BIT proceedings.[42] However, of particular significance was the 2011 arbitral award in *White Industries* v. *India*[43] which held that India had failed to meet its fair and equitable treatment ["**FET**"] obligation under the India-Australia BIT, because the Indian judiciary had failed to deal with White Industries' jurisdictional claim for 9 years, and awarded AUD 4,085,180,[44] with interest to White Industries.[45] Following this award, widespread

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35 Daniel Boffey, *Brexit could help EU strike free trade deal with India, MEPs believe*, THE GUARDIAN, Feb. 23, 2017, *available at* https://www.theguardian.com/politics/2017/feb/23/brexit-could-help-eu-strike-free-trade-deal-india-meps; Delcker, *supra* note 32.

36 Steven Swinford, *Post-Brexit trade deal with India 'worth extra £2 billion to British economy'*, THE TELEGRAPH, Apr. 9, 2017, *available at* http://www.telegraph.co.uk/news/2017/04/09/post-brexit-trade-deal-india-worth-extra-2-billion-british-economy/.

37 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, ITS No. 27/1994 (Ir.), *available at* http://dea.gov.in/sites/default/files/United%20Kingdom.pdf.

38 Ranjan & Anand, *supra* note 6, at 9.

39 UNCTAD, *International Investment Agreements Navigator*, India, INV. POL'Y HUB, *available at* http://investmentpolicyhub.unctad.org/IIA/CountryBits/96 (last accessed on Sept. 26, 2017). Out of the 83 BITs that India has signed, 60 are in force, 8 are not in force, and 15 were terminated.

40 Ranjan & Anand, *supra* note 6, at 10.

41 UNCTAD, *International Investment Agreements Navigator*, India, INV. POL'Y HUB, *available at* http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2 (last accessed on Sept. 28, 2017).

42 Nicholas Peacock & Nihal Joseph, *Mixed messages to investors as India quietly terminates bilateral investment treaties with 58 countries*, HERBERT SMITH FREEHILLS ARB. NOTES (Mar. 16, 2017), *available at* http://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/.

43 White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award (Nov. 30, 2011), *available at* https://www.italaw.com/cases/documents/1170.

44 *Id.* ¶ 16.1.1(b); AUD 4,085,180 is equivalent to INR 212,436,000 and EUR 3,053,060 according to the exchange rates prevailing on the date of the award *i.e.* Nov. 30, 2011 (pursuant to https://www.oanda.com/currency/converter/).

45 Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program,* INV. TREATY NEWS (Apr. 13, 2012), *available at* https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-

debates about the future of investment arbitration in India ensued, and these arguably formed the reason for an overhaul of India's investment policy.[46]

Following a consultation process, India released the text of the 2016 Indian Model BIT which was based on the 2015 Draft Model Indian Bilateral Investment Treaty. Through the 2016 Indian Model BIT, the Indian government aims to balance investment protection with the host State's right to regulate and clarify treaty provisions so as to minimise arbitral discretion.[47] Despite this attempt, the 2016 Indian Model BIT heavily tilts in favour of the host State,[48] with its most significant feature being the requirement of exhaustion of domestic remedies for five years before recourse to ISDS.[49]

Soon after the finalisation of the 2016 Indian Model BIT, India sent notices to 58 countries (including 22 EU Member States), terminating the BITs with them, and proposed renegotiations based on the 2016 Indian Model BIT with March 31, 2017 as its deadline.[50] India also circulated a proposed "Joint Interpretative Statement" to the remaining 25 counterparties with which BITs are still in their initial term, seeking to align the ongoing treaties with the 2016 Indian Model BIT.[51] Reportedly, the notices to the EU Member States were teamed with a proposal for an '*early harvest*' of the pending BTIA which would avoid a legal lacuna following the expiry of these BITs.[52] Without an EU-India agreement, the alternative would be for the EU Member States to renegotiate these agreements individually.

In or around April 2017, however, the EU proposed to India the opportunity to negotiate a new stand-alone bilateral investment treaty through a '*high-level economic and trade dialogue*' to solve contentious investment issues.[53] The EU also requested a six-month extension of the deadline of March 31, 2017 in order for it to make alternative arrangements (in particular to negotiate another investment treaty). India, however, was not interested in another BIT with the EU and was only keen on signing a "*[…] toned-down version of BTIA which would include an investment chapter*

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indias-investment-treaty-program/ (discussing the White Industries Award and consequent trigger of the reform of India's investment policy).

46 The number of BITs terminated has sometimes been incorrectly reported as 57 instead of 58; *See* authorised source: Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion (Answer to unstarred question No. 1290 on Bilateral Investment Treaties, July 25, 2016), *available at* http://dipp.nic.in/sites/default/files/lu1290.pdf); Asit Ranjan Mishra, *India to trade partners: Sign new bilateral investment treaties by 31 March*, LIVEMINT (Jan. 11, 2017), *available at* http://www.livemint.com/Politics/8IRq2uiGhDAxjyiO2lEJ3K/India-asks-trade-partners-to-sign-new-BIT-pact.html; Prabhash Ranjan, *As India's New Bilateral Investment Strategy Sputters out, the Secrecy and Opaqueness Must Go*, THE WIRE (May 1, 2017), *available at* https://thewire.in/130524/bits-investment-strategy-failure/(in particular dealing with how the termination of BITs was done in a non-transparent manner); Peacock & Joseph, *supra* note 42.

47 *Id.* at 1.

48 *Id.*

49 *Id.* at 41.

50 *See* Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, *supra note* 46; Mishra, *supra* note 46; Ranjan, *supra* note 45*;* Peacock & Joseph, *supra* note 42.

51 Peacock & Joseph, *supra* note 42.

52 Asit Ranjan Mishra, *India tells EU it's ready for early harvest scheme of trade, investment pact*, LIVEMINT (Sept. 19, 2016), *available at* http://www.livemint.com/Politics/YBJDmZdHIXkPorSAYBxzAM/India-tells-EU-its-ready-for-early-harvest-scheme-of-trade.html.

53 Asit Ranjan Mishra, *India reluctant on EU bid for high-level dialogue on contentious issues,* LIVEMINT (May 15, 2017), *available at* http://www.livemint.com/Politics/GJn2AGAFYZxb7lFmRQVpvK/India-cool-to-EU-bid-for-highlevel-dialogue-on-contentious.html.

and leave aside contentious issues for the time being".[54] Due to the lack of progress, as of April 1, 2017 several of these BITs with EU Member States have expired.

III. The Investment Court System: The New Spectacle

ISDS represents an important aspect of international investment law, and was brought about to allow investors protection against misbehaving nations (**III.A.**). The ICS, on the other hand, can be seen as an attempt to restore public confidence and address the perceived shortfalls of traditional ISDS (**III.B.**). Nevertheless, the key question as to whether or not the EU even has the competence to advocate for the ICS remains (**III.C.**).

A. The Classical ISDS

ISDS has been a major component of a system of incentives offered by host States to foreign investors in order to attract investments to their territories.[55] These agreements started emerging around the 1960s and there are now over 3,000 international investment agreements which contain investor-to-State dispute resolution mechanisms, with the EU Member States accounting for 1,400 of these agreements.[56] Recently, however, ISDS has gained a bad reputation and has even attained a coveted mention in a recent speech by President Trump in which he used the term "*unaccountable international tribunals*".[57]

Sceptics might argue that the timing of this more urgent desire to reform ISDS is also in part because ISDS was a system designed solely to be used by Western investors against developing States, but has now begun to be progressively used against exporters of investments.[58]

However, as one commentator put it "*[n]o attempt has been made to assess if and to what extent the ISDS system has failed*".[59]

B. The Emergence of the ICS

The ICS is widely regarded as a creature that has been designed to appease the critics of investment arbitration. It was born on May 5, 2015, when Cecilia Malström presented a concept paper titled "*Investment in TTIP and Beyond - The Path for Reform*" to the European Parliament and to the Council.[60] This proposal was aimed at addressing the longstanding controversy surrounding the criticism of ISDS, which was perhaps at its highest during the Transatlantic

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54 Asit Ranjan Mishra, *India on collision course with EU over trade treaty*, LIVEMINT (Feb. 21, 2017), *available at* http://www.livemint.com/Politics/UKLWUwDn33uBuwRrmBRE5M/India-on-collision-course-with-EU-over-trade-treaty.html.

55 Piero Bernardini, *Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests*, 32(1) ICSID REV. - FOR. INV. L. J. 38, 44 (2017).

56 European Commission, *Investor-to-State Dispute Settlement (ISDS) Some facts and figures*, 3 (Mar. 12, 2015), *available at* http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf.

57 Donald J. Trump, President of the United States of America, Remarks by President Trump to the 72nd Session of the United Nations General Assembly (Sept. 19, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/09/19/remarks-president-trump-72nd-session-united-nations-general-assembly.

58 Bernardini, *supra* note 55, at 45; *See, e.g.*, Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, *in* EFILA, *Task Force paper Regarding the Proposed Investment Court System (ICS)*, 10 (Feb. 1, 2016), *available at* http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf.

59 Bernardini, *supra* note 55, at 44.

60 Press release, EU Commission Press Release database, A future multilateral investment court, MEMO/16/4350 (Dec. 13, 2016), *available at* http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm.

Trade and Investment Partnership ["**TTIP**"] negotiations of 2014. This proposal to reform the current ISDS was mounted on the perceived need to reclaim "*fairness and independency*".[61]

This proposal was notably succinct and identified four main areas of reform. In part, it proposed that the TTIP should contain a bilateral appellate mechanism that would serve to rectify errors of law and manifest errors in the assessment of facts.[62] The proposal contained a reference to the WTO Appellate Body as well.

The EU Parliament encouraged the EU Commission to build on the concept paper, and propose it as a permanent solution for resolving disputes between investors and States on the basis of democratic principles and scrutiny.[63] Within the recommendations of the EU Parliament, there were two requirements that were to be treated as non-negotiable; the first was to establish an appellate system, and the second was to incorporate publicly appointed professional judges in the process of ISDS.[64]

On September 16, 2015, the EU Commission released its draft text of the investment chapter of the TTIP, which contained the provisions for the creation of the ICS.[65] This proposal was a direct evolution of the earlier concept paper of May 2015, and was in line with the instructions of the EU Parliament.

On November 12, 2015, the EU Commission submitted its Official Proposal for the establishment of an investment court system in the TTIP.[66] According to the proposal, ISDS would now involve a 'public law approach' and would include new and improved features such as increased transparency, the option for third parties to participate, and a clearer emphasis on a State's right to regulate.[67] Most noticeably, the ICS would constitute a two-tiered Tribunal which would hear disputes between investors and the host State. The first tier would be a Tribunal, with the second tier comprising an Appeal Tribunal (currently formulated bilaterally with a view to later establish a multilateral court). Given the extensive grounds of appeal, this two-tiered approach has been pinned as a way to address the perceived inconsistency in outcomes and the lack of predictability in international investment law.[68]

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61 Filippo Fontanelli et al., *Lights and Shadows of the WTO-Inspired International Court System of Investor-State Dispute Settlement*, 1 EUR. INV. L. & ARB. REV. 194 (2016); Press release, EU Commission Press Release database, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations, IP/15/5651 (Sept. 16, 2015), *available at* http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

62 EU Commission, *Investment in TTIP and beyond – the path for reform* (Concept Paper, May 5, 2015), *available at* http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm.

63 Fontanelli et al., *supra* note 61, at 196.

64 *Id.* at 197.

65 Press release, EU Commission Press Release database, EU finalises proposal for investment protection and Court System for TTIP, IP/15/6059 (Nov. 12, 2015), *available at* http://europa.eu/rapid/press-release_IP-15-6059_en.htm.

66 Stephan W. Schill, *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, ASIL INSIGHTS (Apr. 22, 2016), *available at* https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping#_edn4; A version of this proposal is also found in EU's trade agreement with Vietnam which was agreed on December 2, 2015.

67 *Id.*

68 *Id.*

However, as commentators have noted, "*[t]he ICS proposal to restructure the ISDS system by creation of an ICS appears to be the result of a political decision rather than of an in-depth analysis of the existing system, its effectiveness and shortcomings as a method of investment dispute settlement*".[69]

C. The EU's Competency to Offer ICS under its Trade and Investment Agreements

The division of legislative powers under the Seventh Schedule of the Constitution of India is done by way of the Union List, State List and Concurrent List (under which both Union and State governments are competent to legislate, with the former prevailing in cases of conflicts). Similar to a certain extent, legislative competences between the EU and its Member States have also been divided. As such, the EU enjoys exclusive competence in areas such as monetary policy for Euro area countries and common commercial policy.[70]

The Treaty of Lisbon, which came into force in 2009, expanded the EU's exclusive competence to include foreign direct investment ["**FDI**"].[71] Therefore, the EU Commission is now able to conclude international agreements with third parties on FDI, independent of any input from the individual Member States.

However, on May 16, 2017, the CJEU clarified that in relation to non-direct investment and ISDS, the EU does, in fact, share competence with the Member States, since such a mechanism "*removes disputes from the jurisdiction of the courts of the Member States*".[72] This means that a reformed ISDS such as the ICS proposal currently featured in the EUVFTA and CETA would require ratification by the individual EU Member States and regional parliaments.

Now that approval by Member States and regional parliaments is required, the EU Commission's strategy appears to be to split such future agreements into two categories: one which does not require Member States ratification, and the other pertaining to the investment portions that require approval of all Member States and regional parliaments.[73]

In any event, obtaining approvals from Member States and regional parliaments, if completed at all, will be a lengthy and cumbersome process (with possible unpleasant surprises). For instance, Wallonia (a region of Belgium) was in the news recently when it threatened to block Belgium's consent to CETA, and was only placated with a promise to seek the CJEU's opinion on the ICS.[74] In this regard, Romania and Bulgaria have also used their consent to CETA as leverage to demand the lifting of visa requirements for their nationals.[75]

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69 Bernardini, *supra* note 55, at 44.

70 Treaty on the Functioning of the European Union (TFEU), art. 207.

71 *Id.* art. 207(4).

72 Opinion 2/15 (EU Singapore Free Trade Agreement) of May 16, 2017, ECLI:EU:C:2017:376, ¶ 292.

73 von der Burchard, *supra* note 13.

74 *Wallonia is adamantly blocking the EU's trade deal with Canada*, THE ECONOMIST, Oct. 22, 2016, *available at* https://www.economist.com/news/europe/21709060-tiny-region-belgium-opposes-trade-reasons-are-hard-understand-wallonia; *Belgium Walloons block key EU Ceta trade deal with Canada*, BBC NEWS, Oct. 24, 2016*, available at* http://www.bbc.com/news/world-europe-37749236; Jennifer Rankin, *EU-Canada free trade deal at risk after Belgian regional parliament vote*, THE GUARDIAN, Oct. 14, 2016, *available at* https://www.theguardian.com/business/2016/oct/14/eu-canada-free-trade-deal-ceta-in-jeopardy-belgium-wallonia-parliament-vote. Meanwhile, Belgium submitted a request for an opinion on CETA's compatibility with EU law to the CJEU on September 6, 2017. For more information, *see* Douglas Thomson, *ECJ to rule on CETA*

Therefore, given that the ICS proposal might never see the light of day, the EU Commission is perhaps better advised to refrain from prematurely declaring that the "*ISDS is dead*".[76]

IV. Should India Accept the EU's Proposal on the Investment Court System?

With the ICS likely to be proposed to India, the question to be answered is whether India should accept the ICS proposal or stick to the 2016 Indian Model BIT. In this section, the authors evaluate key features of the decision-making body under the ICS and compare it to the 2016 Indian Model BIT.[77]

A. Appointment of Tribunal Members

One of the cornerstones of arbitration generally is the ability of the parties to select the arbitrators that will hear their dispute. However, there are often allegations of arbitral tribunal bias or reputations of certain arbitral tribunal members being 'State-friendly' or 'investor-friendly'.[78]

The current ICS proposals seen in CETA and EUVFTA states that all of the members of the Investment Court are appointed by the States parties through a "Committee" or a "Trade Committee" respectively.[79]

However, there are significant concerns as to whether the ICS proposal ensures that an independent and impartial adjudicating body is constituted. Indeed, the appointment process to this pool of available tribunal members as currently envisaged in the ICS proposal is closed and non-transparent. The members of the Tribunal are appointed by the Trade Committee which comprises government officials from the EU and the other contracting party.[80] There are no provisions that require the meetings of the Trade Committee to be held in public or through a consultative process.[81] It is questionable whether members of the ICS Tribunal, appointed through a non-transparent and non-consultative process, will, in fact, be free from real and

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investment court, GLOBAL ARB. REV. (Sept. 6, 2017), *available at* http://globalarbitrationreview.com/article/1147140/ecj-to-rule-on-ceta-investment-court.

75 Georgi Gotev, *CETA collapse scuppers Bulgaria and Romania visa deal*, EURACTIV (Oct. 21, 2016), *available at* https://www.euractiv.com/section/justice-home-affairs/news/ceta-collapse-scuppers-bulgaria-and-romania-visa-deal/; *See also Bulgaria, Romania Endorse CETA in Exchange for Visa-Free Regime With Canada*, SPUTNIK INT'L, Oct. 21, 2016, *available at* https://sputniknews.com/business/201610211046592964-bulgaria-romania-ceta-canada-visa/.

76 Douglas Thomson, *supra* note 7.

77 The comparison undertaken compares the version of the ICS found in Chapter 8, EUVFTA with Chapter IV of the 2016 Indian Model BIT.

78 Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50(1) OSGOODE HALL L. J. 211 (2012) (a study testing the hypothesis of systemic bias in behaviour or arbitrators in investment treaty arbitration).

79 American Bar Association, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal*, 23 (Oct. 14, 2016), *available at* https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjCzIXQos3YAhXKEywKHZ22AN8QFggwMAE&url=http%3A%2F%2Fapps.americanbar.org%2Fdch%2Fthedl.cfm%3Ffilename%3D%2FIC730000%2Fnewsletterpubs%2FDiscussionPaper101416.pdf&usg=AOvVaw3zY_P0iplvU7FXShDP7SQS [*hereinafter* "Report on the ICS"].

80 *See* EUVFTA, art. X.1(3), ch. 17 according to which "*The Trade Committee shall be co-chaired by the Minister for Trade and Industry of Viet Nam and the Member of the European Commission responsible for Trade, or their respective delegates*".

81 Report on the ICS, *supra* note 79, at 23.

perceived bias.[82] Even perceived bias has the potential to erode the faith of investors in the ICS system.[83] Particularly, this may be the case where nepotism and an 'old boys' network' have a role in the selection of judges who will be guaranteed full-time employment with remuneration. There is of course always such a risk that public positions will be awarded based on political considerations. With the appointment process lacking in transparency, this is of particular concern.

Under the 2016 Indian Model BIT, the traditional way of appointing tribunal members is preserved. That is, procedural party autonomy in the appointment of arbitrators is maintained, since each party appoints one arbitrator. The third "Presiding Arbitrator" is appointed by "*agreement of co-arbitrators and the disputing parties*".[84]

B. Qualification of Tribunal Members

ISDS is often criticised for the practice of repeatedly appointing members of a restricted 'club' of practitioners; however, perhaps inadvertently it results in the appointment of arbitrators who have experience, expertise and legal acumen.[85]

The ICS proposal arguably creates a hierarchical adjudication process comprising two levels, *i.e.,* the Tribunal and the Appeal Tribunal. It is envisaged that errors in appreciation of facts and law by the Tribunal may be corrected by the Appeal Tribunal. However, as discussed below, the delineation of qualifications required for these two levels is unclear.

With regards to the qualification required by Tribunal members, the first requirement under the ICS proposal is that in order to be appointed as a member to this Tribunal a candidate must "*possess the qualifications required in their respective countries for appointment to judicial offices*", or be "*jurists of recognised competence*".[86] Secondly, the candidates "*shall have demonstrated expertise in public international law*".[87] It is also "*desirable*" for candidates to have expertise in "*international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements*".[88]

The qualification requirements for the Appeal Tribunal are the same as for the Tribunal, except that they must "*possess the qualifications required in their respective countries for appointment to the highest judicial offices*" or "*be jurists of recognised competence*".[89]

Although there appears to be a slight distinction between the requirements applicable at the two levels at the first glance (in that the candidates for Appeal Tribunal must qualify for the 'highest'

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82 For concerns on bias within the TTIP, *see* Alison Ross, *Schwebel criticises EU act of "appeasement"*, GLOBAL ARB. REV. (May 24, 2016), *available at* http://globalarbitrationreview.com/article/1036358/schwebel-criticises-eu-act-of-appeasement; *See also* Report on the ICS, *supra* note 79, at 24.

83 EFILA, *supra* note 58, at 15.

84 2016 Indian Model BIT, art. 18.2. In case the Tribunal is not constituted within 120 days from the date of submission of Claim, the default consequences are provided under Article 18.3 & 18.4 of the 2016 Indian Model BIT.

85 EFILA, *supra* note 58, at 53.

86 EUVFTA, art. 12(4), section 3, ch. II, ch. 8.

87 *Id.*

88 *Id.*; Further conditions on appointment and function of members of the Tribunal are provided under EUVFTA, art. 12(5-18), section 3, ch. II, ch. 8.

89 EUVFTA, art. 13(7), section 3, ch. II, ch. 8.

judicial offices, which often makes no difference in practice[90]), the alternative requirement of being a "*jurist of recognised competence*" applies to both levels. This common requirement dilutes any meaningful differentiation between the two levels.[91]

Further, the ICS proposal fails to take into account the required qualifications for appointment to judicial offices, as it varies greatly across jurisdictions. In some Member States, freshly graduated lawyers automatically qualify for judicial offices, whereas in others, additional training and qualifications are required.[92] In any event, the most significant question remains, from where will States source such a high number of high-quality judges?[93]

Correspondingly, under the 2016 Indian Model BIT, in order to qualify to be appointed on the Arbitral Tribunal, candidates must have "*relevant expertise or experience in public international law, international trade and international investment law, or the resolution of disputes arising under international trade or international investment agreements*".[94] Noticeably, candidates are not required to qualify for judicial office,[95] which in practice will not make a big difference because in many jurisdictions a member of the bar is also qualified for judicial office. The ISDS effectively regulates the quality of justice delivery by weeding out bad arbitrators, as incompetent arbitrators will fail to secure future appointments.

C. Impartiality and Independence of the Tribunal

It is essential that judicial and quasi-judicial bodies remain independent and impartial. The ICS proposal provides that the "*Members of the Tribunal and of the Appeal Tribunal shall not be affiliated with any government*".[96] However, other provisions of the ICS proposal perhaps render this meaningless by providing that "*the fact that a person receives an income from the government, or was formerly employed by the government, or has family relationship with a person who receives an income from the government, does not in itself render that person ineligible*".[97] It is not realistic to expect officials paid by

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90 Notably, in many legal regimes, judges may be promoted to the higher judiciary based on subjective criteria without clearing an objective formal set of qualifications. In India for example, according to the prevailing 'collegium system', a body of the Chief Justice and four of the most senior judges of the Supreme Court recommend appointees. Critics have expressed concerns as to the transparency of the selection procedure. An attempt to reform this system by appointing an independent constitutional body was rejected by the Supreme Court of India as unconstitutional. Since then, the Collegium has agreed upon a 'memorandum of procedure' with the Indian Central Government. For more information, *see* Dhananjay Mahapatra, *Supreme Court collegium ends 1-year impasse by finalising judicial appointment procedure*, THE TIMES OF INDIA, Mar. 15, 2017, *available at* http://timesofindia.indiatimes.com/india/supreme-court-collegium-ends-1-year-impasse-by-finalising-judicial-appointment-procedure/articleshow/57639152.cms.

91 EFILA, *supra* note 58, at 15, 54.

92 *Id.* at 15.

93 V. V. Veeder, *What Matters - about Arbitration*, CIARB (Nov. 26, 2015), *available at* http://www.ciarb.org/docs/default-source/ciarbdocuments/events/flagship-events/alexander-lecture/alexander-lecture-2015_what-matters---about-arbitration.pdf (discussing issues pertaining to *inter alia* costs, choosing suitable judges, and the seat). *See also* Michael Wood, *Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases*, 32(1) ICSID REV. - FOR. INV. L. J. 1, 14 (2017).

94 2016 Indian Model BIT, art. 18.1.

95 Kian Ganz, *Hard Court Battle – litigation and arbitration*, LEGALLY INDIA, (June 8, 2009), *available at* http://www.legallyindia.com/analysis/hard-court-battle-litigation-and-arbitration-20090608-040 (discussing the preference for retired judges to be appointed as arbitrators in India).

96 EUVFTA, art. 14(1), section 3, ch. II, ch. 8.

97 *Id.* n. 27, art. 14(1), section 3, ch. II, ch. 8.

the government who are appointed on a full-time (and potentially attractive) position to the Tribunal to shed all loyalty to their governments.[98]

The 2016 Indian Model BIT, in contrast, provides that the Tribunal "*shall be independent of, and not be affiliated with or take instructions from*" either party "*with regard to trade and investment matters*".[99] Further, the arbitrators are obligated to "*not take instructions from any organisation, government or disputing party with regard to matters related to the dispute*".[100] The requirement under the 2016 Indian Model BIT is in line with the unambiguous corresponding requirement that the WTO Appellate Body members shall be "*unaffiliated with any government*".[101]

D. Diversity of Tribunal Members

A rightful criticism of the ISDS has been that it is primarily an 'old boys' club'.[102] The appointment of female arbitrators in investment arbitration remains disappointing; in the year 2016, only 19% of the appointees were women.[103] In a 2016 arbitration survey, 84% of the respondents stated that there were too many male arbitrators, while 80% found tribunals to include too many white arbitrators, and 64% thought that too many arbitrators came from Western Europe or North America.[104]

Alongside the ever-growing comment on the palpable absence of women, the lack of geographical diversity in investment arbitration is also a cause of concern.[105] Out of all the cases registered under the ICSID Convention and the ICSID Additional Facility Rules, up until December 31, 2016, 68% appointments to tribunals and *ad hoc* committees were of individuals from Western Europe and North America.[106] At the same time, only a total of 12% cases involved a State party from Western Europe and North America.[107]

Despite the dismal statistics, attempts are being made to ensure that international arbitration practice is more diverse and well represented.[108] In light of these statistics and initiatives, it is not

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98 EFILA, *supra* note 58, at 16.

99 2016 Indian Model BIT, art. 18.1.

100 *Id.*

101 Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17(3), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization (DSU), Annex 2.

102 *International Arbitration Trends That Will Move Forward in 2017*, CIARB (Jan. 16, 2017), *available at* http://www.ciarb.org/news/ciarb-news/news-detail/features/2017/01/16/gender-equality-design-international-arbitration-trends-that-will-move-forward-in-2017.

103 *See* ICSID, *Valuing Women in International Adjudication* (2017), *available at* https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/2017-Issue2/Valuing-Women-in-International-Adjudication.aspx# (last accessed on Sept. 21, 2017).

104 *International Arbitration Survey: Diversity on Arbitral Tribunal – Are we getting there?*, BERWIN LEIGHTON PAISNER 7 (2016).

105 Kabir Duggal, *Understanding Racial Representation in International Investment Arbitration*, 72(2) DISP. RESOL. J. 19, 33 (2017).

106 ICSID, *The ICSID Caseload – Statistics*, 19 (Issue 2017-1), *available at* https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf.

107 *Id.* at 11.

108 *See, e.g.*, the launch of the Equal Representation in Arbitration Pledge *reported in* Mirèze Philippe, *Equal Representation in Arbitration (ERA) Pledge: A Turning Point in the Arbitration History for Gender Equality*, KLUWER ARB. BLOG (June 2, 2016), *available at* http://kluwerarbitrationblog.com/2016/06/02/equal-representation-in-arbitration-era-pledge-a-turning-point-in-the-arbitration-history-for-gender-equality/; *See also* the 'GQUAL Campaign', *available at* http://www.gqualcampaign.org/home/(last accessed on Sept. 25, 2017).

farfetched to expect the ICS proposal to contain remedial provisions so that the appointments are diverse and representative. Disappointingly, neither the ICS proposal nor the 2016 Indian Model BIT contain any and are, therefore, **missed opportunities**.[109] This is especially unfortunate for young (and female) aspiring investment arbitrators who will practically be wiped out of arbitration practice by the ICS system. In essence, goals of diversity in arbitration practice will have to be forgotten if all investment cases are to be decided by state appointees or better put, the '*chosen ones*'.

E. Remedying Inconsistency in Interpretation of Treaty Provisions

One of the key criticisms levied against ISDS is the inconsistency in outcomes that it promotes.[110] The ICS' attempt to cure this fault is seen in the form of creating a 'one stop shop' where all the disputes arising out of the instrument are heard by the same body (an investment court), and by a panel of pre-selected tribunal members.[111] It also establishes an appeal system in an attempt to ensure uniform and consistent interpretation.[112]

Of course, in theory, it may seem that matters appearing before the same body may result in some level of consistency between the awards rendered, but practically, this is likely to seldom be the case. Disputes which arise under the same instrument can still be heard by different tribunal members, and as there is no law of precedence binding one tribunal to a finding made by another, the awards would only achieve consistency by a matter of pure coincidence.

Arguably, the only real way that this inconsistency could be overcome would be through an establishment of a centralized multilateral investment system where disputes under any instrument containing an ICS would be serviced by the same body.[113] Even in that scenario, however, the composition of a three member ICS bench will differ. One cannot expect a permanent three-member bench to hear all the investment cases. If that were to be the case, an inordinate delay will inevitably become inherent to such a multilateral system. But even if all investment cases would be heard by the same bench (which is neither possible nor desirable), such a permanent three member bench would need to differentiate its positions in accordance with different BIT wordings in judging different factual scenarios.

It is also worth considering that the (perceived) inconsistency in interpretation is best dealt with by tighter drafting of provisions, which enumerate the scope of protections such as 'fair and equitable treatment' ["**FET**"], 'full protection and security' ["**FPS**"] or 'most favoured-nation treatment' ["**MFN**"].[114] This has already been done in the new generation FTAs such as CETA

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109 EFILA, *supra* note 58, at 16, 17 (on the ICS proposal).

110 Pieter Jan Kuijper et al., *Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements*, 40 (European Parliament, Directorate-General for External Policies, Study, Sept. 2014), *available at* http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Hindelang.pdf.

111 *See* Muthucumaraswamy Sornarajah, *An International Investment Court: panacea or purgatory?*, COLUM. FDI PERSPECTIVES NO. 180 1, 2 (Aug. 15, 2016) ("*To date, there is no doctrine of precedent in investment arbitration. This will not be so when there is a permanent judicial body.*").

112 Bernardini, *supra* note 55, at 53, 54 (discussing that such a two-tier body may help address concerns of inconsistency, but will only be effective to a limited extent in the absence of multilateralization).

113 *Id.*

114 *Id.* at 53; *See* 2016 Indian Model BIT, art. 3, which affords a substantially limited scope of protections with its narrow definition of FPS. The 2016 Indian Model BIT also omits the classical 'FET' and 'MFN' protections.

and EUVFTA.[115] As such, insistence on an appellate system may be perceived as an overreaction.[116]

In any event, in order to ensure that the Appeal Tribunal is able to address any incorrect factual and legal assertions that may be present at first instance, the Appeal Tribunal should arguably be more qualified and have more expertise and experience. Instead, as discussed above, there is no real distinction between the qualifications required at the two levels of Tribunals as envisaged in the ICS proposal. Therefore, investors will incur substantial costs in having their claims adjudicated by essentially two similarly characterised tribunals with no real appellate consideration.[117] This would also cause additional delay and defer the finality of any award.[118]

The 2016 Indian Model BIT does not contain an appeals mechanism, but it does allow the parties to establish one by way of an agreement.[119] Accordingly, the Parties may agree to the establishment of "*an institutional mechanism to develop an appellate body or similar mechanism to review awards*" which have been "*rendered by tribunals*" under Chapter IV of the 2016 Indian Model BIT.[120] The 2016 Indian Model BIT also provides for the possibility of an appeal/review mechanism under a separate multilateral agreement in the future.[121] Interestingly, this is contradictory to India's summary rejection of the prospect of establishing a multilateral court.[122]

F. Enforcement of Awards under the Proposed ICS

There are considerable issues around the enforcement of awards handed down by a Tribunal pursuant to the current Investment Court proposal.[123] The ICS proposal attempts to, perhaps naively, deal with this issue by merely stating that judgments handed down by the Tribunal are to be treated as ICSID awards,[124] or awards pursuant to the New York Convention.[125]

A critical aspect in the context of the present analysis is to question whether this is, in fact, sufficient.[126] This consideration is crucial for the purposes of availing the advantages of enforcement under the New York Convention and the ICSID Convention. Indeed, designating such a decision as an 'award' as is done in the ICS proposal may be regarded as an *inter se* modification of the ICSID Convention.[127] However, it will not ensure that those ICSID Contracting States who are not parties to an instrument containing the ICS proposal will have to

115 EFILA, *supra* note 58, at 22.
116 *Id.*
117 Report on the ICS, *supra* note 79, at 22.
118 Wood, *supra* note 93, at 13.
119 2016 Indian Model BIT, art. 29.
120 *Id.*
121 *Id.* The provision states: "*The Parties may by agreement or after the completion of the respective procedures regarding the enforcement of this Treaty may establish an institutional mechanism to develop an appellate body or similar mechanism to review awards rendered by tribunals under this chapter. Such appellate body or similar mechanism may be designed to provide coherence to the interpretation of provisions in this Treaty*…" A footnote to this Article 29 explicitly states: "*This may include an appellate mechanism for reviewing investor-state disputes established under a separate multilateral agreement in future*.".
122 *But see* Ranjan, *supra* note 11 (arguing that India's decision to reject the EU's proposal to work towards a multilateral investment court should be reconsidered).
123 *See, e.g.*, Richard Happ & Sebastian Wuschka, *From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma*, 6(1) INDIAN J. ARB. L. 113 (2017).
124 EUVFTA, art. 31(8), section 3, ch. II, ch. 8.
125 *Id.* art. 31(7), section 3, ch. II, ch. 8.
126 Bernardini, *supra* note 55, at 48.
127 Reinisch, *supra* note 12.

recognize and enforce such decisions as ICSID awards.[128] Further, as the EU is not a party to the New York Convention, and cannot be a party, enforceability of awards under the New York Convention must also be questioned; arguably, merely stating that they are to be characterised in such a manner is insufficient. This has also been pointed out by John Gaffney, who argues that "*a more intellectually honest approach*" would require "*not dress[ing] up the resulting judgments as New York Convention arbitral awards*".[129]

In essence, under the 2016 Indian Model BIT, an award rendered by the Tribunal follows the typical rules of ISDS and is only binding between the disputing parties.[130] Further, a disputing party shall abide by the award without any delay.[131] In addition, enforcement of an award may not be sought until, in case of a final award made under the ICSID Convention, 120 days have passed since the award was rendered and no request for revision or annulment has been made, or such proceedings have been completed.[132] In case the final award has been made under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules, this period is 90 days or until such proceedings have been dismissed or have been pursued to finality.[133] Furthermore, each Party must accordingly provide for enforcement of an award in its territory in accordance with its law.[134] In addition, it is provided that a claim submitted under the 2016 Indian Model BIT would be considered to arise out of a commercial relationship or transaction for the purposes of the New York Convention.[135]

V. Conclusion

The ICS proposal is an ambitious project, particularly at a time when public opinion is swaying away from multi-lateralization and further in the direction of protectionism (perhaps even nationalization). It is clear that the ICS has come about due to the criticisms that investment arbitration has faced in recent times. Seemingly, the idea for the ICS has come up like a rabbit eager to win the race, with little regard for thoroughly going through all the necessary steps in sequence. It is noteworthy that UNCITRAL has also explored, during the consultation process relating to reforms of ISDS, the creation of an international investment court and has described this as a "*more radical option for reform*".[136]

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128 *Id.*; Bernardini, *supra* note 55, at 48, 49.

129 John Gaffney, *The EU proposal for an Investment Court System: what lessons can be learned from the Arab Investment Court*, COLUM. FDI PERSPECTIVES NO. 181 1, 2 (Aug. 29, 2016).

130 2016 Indian Model BIT, art. 27.1.

131 *Id.* art. 27.2.

132 *Id.* art. 27.3(a).

133 *Id.* art. 27.3(b).

134 *Id.* art. 27.4.

135 *Id.* art. 27.5.

136 *See* UNCITRAL, 50th Session, Vienna, July 3-21, 2017, Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS), Note by the Secretariat, at 8, ¶ 29, U.N. Doc. A/CN.9/917 (April 20, 2017); S*ee also* Nikos Lavranos, *The first steps towards a Multilateral Investment Court*, CIARB NEWS (July 13, 2017), *available at* http://www.ciarb.org/news/ciarb-news/news-detail/news/2017/07/13/the-first-steps-towards-a-multilateral-investment-court-(mic); Lacey Yong, *EU to begin negotiations for multilateral investment court,* GLOBAL ARB. REV. (Sept. 23, 2017), *available at* http://globalarbitrationreview.com/article/1147314/eu-to-begin-negotiations-for-multilateral-investment-court?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=8676002_GAR%20Headlines%2014%2F09%2F2017&dm_i=1KSF,55YG2,QJNWD5,JUET4,1.

The importance of investment arbitration must not be forgotten. It remedies structural inequalities between investors and host States,[137] while attracting investment and depoliticizing investment disputes.[138] It also serves as a self-regulated system of dispute resolution, while weeding out inappropriate arbitrators. While the current system is not without faults, it is in fact flexible to reform.[139]

There is perhaps some truth in the notion that the perceived disadvantages of the ISDS could be better dealt with by reforming the current system. This could, for example, be achieved by way of clearer drafting of treaty provisions and through the further use of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ["**Mauritius Convention**"].[140]

The ICS proposal, while well intentioned, has not been able to either appease the critics of ISDS[141] or retain the fundamental tenets of investment arbitration. As set out above, it is perhaps misconceived to advertise the ICS as a system of impartial judges, when they are solely appointed by the States. Further, the appointment process lacks any systemic guidelines on diversity or the selection process. In an attempt to appease the public, the EU has undertaken a "*political decision*" before undertaking "*an in-depth analysis of the existing system*".[142]

It is perhaps ironic that critics say that the best thing about the ICS is that it will never attain its multilateral or even bilateral form (especially with authoritarian states).[143] Even if one puts aside concerns regarding lack of EU competence, permanent international courts are difficult to establish and may have the potential to "*[…] arrogate powers and create regimes through precedents in the area in which it operates*".[144] Further, concerns about such permanent courts *"growing ever more independent in the absence of effective government control*" have reverberated.[145] Critics have cautioned, saying even: "*[…] as with international organizations, so with permanent courts, the 'Frankenstein effect' may come into play; having created permanent courts, States may lose control over them*".[146]

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137 Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9(2) CHI. J. INT'L L. 471, 478 (2009).

138 Lise Johnson, *The Outsized Costs of Investor–State Dispute Settlement*, 16(1) INSIGHTS 10 (2016).

139 *See* Carolyn B. Lamm & Karthik Nagarajan, *The Continuing Evolution of Investor-State Arbitration as a Dynamic and Resilient Form of Dispute Settlement*, 5(2) INDIAN J. ARB. L. 93, 112 (2017).

140 The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ('Mauritius Convention') was adopted on December 10, 2014, and is scheduled to enter into force on October 18, 2017, *available at* http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html. On the Mauritius Convention serving as a model for reform of the ISDS, *see* Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism* (CIDS-Geneva Centre for International Dispute Settlement, 2016), *available at* http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.

141 Alex Lawson, *As TTIP Talks Open, Skeptics Attack ISDS Replacement*, LAW360 (Feb. 22, 2016), *available at* https://www.law360.com/articles/761792/as-ttip-talks-open-skeptics-attack-isds-replacement; *See also* Sornarajah, *supra* note 111, at 1, 2. ("*[T]he proposal to set up an Investment Court will enhance the worst features of the existing ISDS system.*", while arguing that domestic courts are best placed to decide investment disputes).

142 Bernardini, *supra* note 55, at 44.

143 Biel & Wheeler, *supra* note 12.

144 Sornarajah, *supra* note 111, at 1, 2.

145 Sonja Heppner, *A Critical Appraisal of the Investment Court System Proposed by the European Commission*, 72(2) DISP. RESOL. J. 93, 110 (2017).

146 Wood, *supra* note 93, at 5.

Similarly, investment dispute resolution under the 2016 Indian Model BIT is also not without fault. The requirement to have the matter heard in local courts for a requisite time period fails to take into consideration the sometimes urgent relief required by small and medium size investors who have already suffered (potentially significant) losses on their investment. As is the case with the ICS proposal, the 2016 Indian Model BIT does not contain any diversity benchmarks or goals, and remains silent on even encouraging diversity in arbitration. Perhaps more noticeably, the 2016 Indian Model BIT for instance, completely does away with the classical FET provision, and the MFN provision. This is particularly concerning as balancing investor protection with State's regulatory objectives was an area earmarked for reform.[147]

As it is often said, the way to hell is plastered with good intentions; the EU and India are cautioned against a quick fix, and against throwing the baby away with the bathwater. In any event, it is too early to call the ISDS dead; as Mark Twain allegedly once said "*reports of my death have been greatly exaggerated*".

[147] *See generally* Ranjan & Anand, *supra* note 6.