



On 11<sup>th</sup> October, 2017, the Honourable High Court of Bombay at Goa quashed the notification shifting the jurisdiction for Goa of the National Green Tribunal (NGT) to the Bench in Delhi, thereby retaining the jurisdiction of the Western Zone Bench at Pune. This welcome decision for the citizens of Goa in the trajectory of asserting access to justice, could, however, be shortlived.

There are other issues looming over access to justice. The impending Regional Comprehensive Economic Partnership (RCEP), which is a proposed multilateral investment treaty, has clauses for Investor-State Dispute Settlement (ISDS), according to leaked texts of RCEP available online. By these clauses, only Corporations are permitted to sue Governments, not vice versa. As far as people are concerned, their participation in litigation is not even envisaged. The provisions include exclusive jurisdiction to a special international arbitration tribunal of private lawyers for trying cases, which will be based in a foreign country. This means that in this overseas Tribunal, corporations can bring cases against Governments if they feel that their profit maximization possibilities are reduced by any steps taken by the latter. Never mind if the steps taken are policies that benefit the ordinary citizen.

So if a foreign company invests in India and the RCEP comes into effect, then that foreign company will have the right to not sue in Indian Courts but at the International Arbitral Tribunal of Private Lawyers. The Government which has been and is actually complicit with these investors will pay a team of lawyers (not at Delhi but abroad) to fight these cases. The cost of the litigation itself will only burden the public exchequer while some Government officers, who have to brief the private law firms engaged, will get a paid holiday.

Just like the Government notification about change of jurisdiction for NGT, which came as a *fait accompli* without an *a priori* consult with people, the Investment treaties with the ISDS Clauses also come as a *fait accompli*, where the State negotiates behind closed doors on clauses in the treaty, and the negotiating texts are not made public until they are complete.



Our domestic Courts are designed to be accessible to the public. As per the Legal Services Authority Act, 1987, those who cannot afford a lawyer are entitled to free legal aid. Other people who have a stake in the proceedings, or even the common public, can attend the proceedings, and they do not happen behind closed doors. All this will obviously not be possible with a Court such as this ISDS International Arbitral Tribunal, based far away in a foreign country. The voices of people resisting the violations of their fundamental rights by these corporates will not have a chance to be heard. People will not also have a chance to see how the Government is approaching the litigation.

Let us look at the possible scenarios if the RCEP with these ISDS clauses comes into effect. The State under present legislation has the power to grant clearances for casinos, huge golf courses. The owners of these businesses have high stakes. The corporates with these entrenched stakes are not likely to give up their profit maximization possibilities easily – even if public pressure mounts in such a way that the Government has to yield and repeal the amendment permitting casinos or revoke licences for golf courses.

Elsewhere in the world, the revocation of licences for golf courses has met with huge claims from corporates that they were in compliance of requirements at the time of being granted these licences and that they can therefore only withdraw so long as the Government gives them reasonable compensation in terms of the land fee, shareholders' investment and membership fees. These are exactly the kind of claims that can surface, if the Government bends to pressure from people to ban 18-hole golf courses, on finding them environmentally harmful. Both the prohibitively expensive litigation and the magnitude of the claims for compensation in the International Tribunal can dry up the Government coffers. This, when it is actually the political decision makers and the particular bureaucrats who endorsed the treaties and also provided the licence against set environmental norms and standards.

Similarly, as per the impending RCEP, if a coal factory or a coal hub is given the licences and clearances, it can sue the Government, citing loss of profit, if any such licence is revoked. A decision of the National Green Tribunal even though positive for people, can also be the subject of an ISDS case by the corporate. A characteristic of the ISDS cases is that the complainant investor companies do not have to exhaust domestic remedies.



The ISDS clauses enable corporations to relitigate cases they have already lost in domestic courts. Further, they are able to do so in a private system lacking procedural protections. As more multinational corporations are based outside of India, more such challenges will be brought against the Indian Government. To add to this, it turns out that the ISDS clauses neither have appeal provisions, nor accountability provisions of this set of private lawyers who serve as arbitrators, and who rotate between being arbitrators *and* representing corporations against Governments.

It is imperative to state that Corporations with their financial might have the potential to litigate in courts having jurisdiction over the places where they are operating. We cannot have investment treaties that have the exclusive and exclusion clauses ousting the jurisdiction of domestic courts, in fact even ousting the possibilities of people taking their cases against violating foreign corporations to court.

We cannot throw all the core principles of Access to Justice, so well elucidated in the Judgement on the National Green Tribunal Jurisdiction case, to the winds. We cannot have the ISDS clauses of the proposed RCEP or any bilateral or multilateral investment treaty trampling on the very right to access justice, following violations of our fundamental human rights.

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Access to Justice - ISDS style!