

# Kluwer Arbitration Blog

## Will India do away with investor state arbitration?

Rohit Bhat · Wednesday, August 23rd, 2017

On 29<sup>th</sup> December 2016, the Government of India constituted a High-Level Committee under the Chairmanship of Mr. Justice B N Srikrishna, Retired Judge, Supreme Court of India. The Committee was constituted pursuant to the Government's commitment to speedy resolution of commercial disputes and to make India an international hub of arbitration. The terms of reference of the Committee required it to examine the effectiveness of existing arbitration mechanisms, studying the functioning and performance of arbitral institutions in India and identifying gaps regarding manpower, skills, infrastructure, and funding in such institutions.

On 3<sup>rd</sup> August 2017, the Committee forwarded its [143-page report](#) to the Law Minister and if implemented, it will bring about much-needed changes to India's international arbitration regime. However, its recommendations concerning investor-state arbitration have far reaching consequences. The Committee has advocated a move away from investor state arbitration and has recommended various measures such as state to state arbitration, compulsory negotiation and mediation and also toyed with the idea of a multilateral investment court.

Since the decision in *White Industries v. The Republic of India* India has faced a barrage of investor state claims. 21 cases have been filed against it, 11 of which are still pending. These cases prompted India to re-draft its 2003 Model BIT, and in 2015, India adopted a new [protectionist BIT](#) (available [here](#)) which brought about [significant changes](#) to the BIT regime. As stated in this [news report](#), India is looking to renegotiate all its existing BIT's to bring it in tune with its 2015 Model BIT. India has, thus far, served termination notices to 57 countries, which includes capital exporting states of the EU. The use of the 2015 Model BIT has been subject to criticism and as pointed out by [Prabhash Ranjan](#) a BIT that protects investors may contribute to rising FDI inflows. The lack of investor state arbitration, on the other hand, may render foreign investment more vulnerable to regulatory abuse. The present recommendations, if adopted, will play an important role in India's ongoing BIT re-negotiations.

### Moving away from investor state arbitration:

The critical recommendation of the Committee is made at Page 108 of the report where the Committee advocates a move away from the present system of investor-state dispute resolution. In supporting its recommendation, the committee has made specific reference to the recently concluded India-Brazil BIT. This BIT does not provide for investor-state arbitration. Instead, it provides for an ombudsman and state-state arbitration. The Committee has, in approving such a mechanism, emphasised that *'state-state arbitration gives states greater control over the arbitral proceedings as compared to investor-state arbitration and that the involvement of both the states directly can allow some room for reciprocity, prevent unnecessary arbitration claims and otherwise provide for greater involvement of states in the dispute resolution process.'*

### In the alternative - appellate mechanisms in the existing BIT's

If India chooses not to do away with investor state mechanisms, the Committee has recommended making a further change to its BITs and incorporating an appellate mechanism. Such a mechanism, according to the Committee, will deal with the criticism that *'arbitral tribunals often rule in favour of the investor, leaving states without recourse to appeal.'* Further problems of 'inconsistency and unpredictability' have also been referred to, and it is suggested that an appellate mechanism may resolve these problems. In making its recommendation, the Committee has referred to the appellate mechanisms included by the United States in its free trade agreements with Singapore, Chile, and Morocco.

### Multilateral investment courts

The anti-investor-state arbitration theme of the Committee is apparent from its suggestion that the Government explores the option of multilateral investment courts, such as the one that the EU has been working on since 2015.

### Compulsory Negotiation, Conciliation, Ombudspersons and Mediation

The Committee has made strong recommendations in favor of systems that 'potentially

could minimize investor-state dispute, or once they have arisen, channelise them to processes and platforms which focus and highlight communication and the shaping of consensual solutions.’ To achieve this objective, the Committee suggests the inclusion of provisions for mandatory negotiation, conciliation, ombudspersons, and mediation. The Committee has specifically emphasized mediation, which has the advantage of being cost effective, preserving confidentiality, ‘strengthening of the relationship between the parties’ and ‘preserving long term relationships.’ The Committee has recommended that Government attempt to incorporate a mandatory mediation clause in any new BIT signed pursuant to the ongoing renegotiation process.

### Approval of the 2015 Model BIT

The Committee has given its approval to changes made to the dispute resolution clauses in the 2015 Model BIT. These changes include the multi-tiered dispute resolution procedure that provides for exhaustion of local remedies before investor state arbitration can be invoked. Under Article 15 of the 2015 Model BIT, an investor is required to exhaust all local remedies for a period of at least 5 years from the date on which he first acquired knowledge of the breach. After that, a claim may be submitted, and parties are then obligated to use best-efforts to resolve the dispute amicably for a period of 6 months. It is only on the failure of such best efforts that an investor can submit a claim for arbitration. This procedure has been approved by the Committee. The Committee has refrained from making any observations on other areas such as the changes brought about by the expropriation clause and the absence of a fair and equitable treatment clause.

### Mechanisms to deal with existing and future disputes

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Apart from suggesting a policy shift, the Committee has also dealt with dispute management under the BITs and has outlined the five pillars of a proper mechanism for dispute management – procedures, authority, coordination, counsel, and funds. Recommendations under these heads include (a) designating a body that would be responsible for dispute management and claims of investors; (b) creation of a body that would be responsible for coordinating the state’s defence at all stages of the arbitration; (c) creation of an inter-ministerial group to coordinate with the dispute management agency in order to ensure that the state’s views are adequately represented before the tribunal; (d) close monitoring of disputes brought by Indian investors against other contracting states so as to ensure that treaty interpretations by Indian investors do not run contrary to the position adopted by the Indian Government; (e) Appointing qualified and reputed counsel without any conflict of interest; (f) ensuring that the team of counsel consists of solicitor *and lead counsel* and lastly; and (g) the creation of a fund for defence of investor state proceedings so as to ensure that unavailability of funds does not delay investor state arbitration

proceedings.

## Conclusion

The High-Level Committee report in the first instance recognizes that it was necessary for the Government to have (previously) initiated an extensive BIT program to attract foreign investment. Its recommendations, however, is perhaps an indicator of the fact that India no longer needs solely rely on investor state protection to attract such investment. The recently concluded India-Brazil BIT that contained no investor state arbitration shows India's skepticism of this mechanism. India now seeks to renegotiate 57 BIT's, including with capital exporting countries such as the Netherlands (India's third largest source of foreign direct investment), which unlike Brazil, would most likely favor strong investor protection provisions. Implementing the recommendations of the High-Level Committee will result in a policy shift in India's approach to investor state arbitration, which may have an important impact on India's upcoming treaty negotiations.

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