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India-Brazil Bilateral Investment Treaty – A New Template for India?

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During the recent visit of Brazilian President, Jair Bolsonaro, to India, Brazil and India inked the investment cooperation and facilitation treaty (hereinafter bilateral investment treaty – BIT).

From Brazil's point of view, this BIT is an extension of a novel approach to foreign investment in international law based on investment *facilitation* and *cooperation*, not investment *protection* – something that a typical BIT entails. Brazil embraced this approach in 2015 when it launched its Model BIT. Since 2015, Brazil has signed more than 10 such treaties focusing on investment facilitation and cooperation – the one signed with India being the latest one.

From India's point of view, this is the fourth BIT signed after adopting a new Model BIT in 2016. The previous three have been signed with Belarus, Taiwan and Kyrgyz Republic (the text is not in public domain). India's BIT with Brazil is based on the Brazilian, not Indian model BIT, though a careful reading of the text shows that both sides have compromised to strike this deal.

The purpose of this piece is to demonstrate how the India-Brazil BIT deviates from the Indian Model BIT. I discuss deviations on the following issues: definition of investment, expropriation, and investor-State dispute settlement (ISDS).

Definition of Investment

The India-Brazil BIT, like the Indian Model BIT, adopts an enterprise-based definition of investment where an enterprise is taken together with its assets. The Indian Model BIT further requires that the enterprise must satisfy certain characteristics of investment such as commitment of capital and other resources, duration, the expectation of gain or profit, and the assumption of risk and significance for the development of the country where the investment is made. Article 2.4 of the India-Brazil BIT also provides for these characteristics of investment except for 'significance for the development' of the host State. The requirement that investment should be significant for the development of the host State is a subjective requirement and proving that this requirement has been met could be a challenge for foreign investors.

Expropriation

A very important feature of the India-Brazil BIT is that it only protects against direct expropriation. Article 6.3 of the BIT states: "For greater certainty, this treaty only covers direct expropriation, which occurs when an investment is nationalised or otherwise directly expropriated through a formal transfer of title or outright seizure". Thus, indirect expropriation is outside the scope of the BIT. This provision is consistent with Brazil's Model BIT. Brazilian lawmakers have been critical of provisions in BITs that allow foreign investors to challenge indirect expropriation claims. Brazil believes that rules on indirect expropriation open the gates for abusive claims by foreign investors that limit a State's capacity to adopt regulatory measures to pursue public interests such as the protection of public health and environment.

The absence of rules on indirect expropriation in the India-Brazil BIT is a complete departure from Article 5 of the Indian Model BIT and also India's BITs with Belarus and Taiwan that provide protection to foreign investment from both direct and indirect expropriation. In fact, the Indian Model BIT not only provides protection from indirect expropriation but also provides how to determine that an investment has been expropriated indirectly.

In today's world, direct expropriations of foreign investment have become rare. Foreign investment faces challenges from regulatory conduct of a host State that may have an effect equivalent to direct expropriation without expropriating investment directly. While the possibility of foreign investors abusing the system can never be ruled out, the possibility for host States to abuse their public power to the detriment of foreign investors or impose disproportionate costs on foreign investors for pursuing public interests can also not be ruled out. Thus, leaving indirect expropriation outside the scope of the BIT creates a yawning gap in the protection of foreign investment.

Dispute Settlement

The most important aspect of the India-Brazil BIT, inspired from Brazil's Model BIT and other Brazilian BITs, is that it adopts a very different approach to the settlement of investment disputes. It is well known that Brazil has been a vocal opponent of the ISDS system. Thus, Brazil has developed a novel approach to settlement of investment disputes based on prevention. For this purpose, Article 13 of the India-Brazil BIT provides for the creation of a joint committee comprising officials of both the countries. This joint committee shall, *inter alia*, supervise the implementation and execution of the treaty and resolve disputes concerning investments of investors in an amicable manner.

Article 14 establishes the creation of national focal points or ombudsman in both the countries that would, *inter alia*, endeavour to follow the recommendations of the joint committee, and address differences in investment matters. Article 18 of the India-Brazil BIT provides for a dispute prevention procedure. As per this procedure, any measure of a country that the other country considers amounts to a breach of the BIT, shall be referred to the joint committee for dispute prevention. In case the joint committee is unable to prevent the dispute, then the dispute shall be referred to State to State arbitration pursuant to the procedure in Article 19.

Article 19 of the India-Brazil BIT provides for State-to-State dispute settlement (SSDS). Article 19.2 states that the purpose of SSDS arbitration is to decide on the interpretation of the treaty or observance by a country of the terms of the treaty. It further clarifies that the SSDS arbitration tribunal shall not award compensation. There is no mention of ISDS in the India-Brazil BIT. The absence of ISDS in the BIT is a clear reflection of the Brazilian stand on this issue. Brazil has been sceptical of ISDS for several reasons, including it being discriminatory against domestic investors.

The dispute settlement provisions in the India-Brazil BIT are not consistent with the dispute settlement provisions of the Indian Model BIT. The Indian Model BIT provides for both SSDS and ISDS. The investor's access to international arbitration in the Indian Model BIT is subject to several restrictions such as exhausting local remedies for a period of five years and following a very strict time period requirements. However, not allowing ISDS means that foreign investors shall be completely dependent on the home State. If for any reason the home State does not wish to espouse the cause of the foreign investor, there will be no redress available for the foreign investor under international law. While Brazil's concerns about ISDS are legitimate, the solution to addressing these concerns is not to do away with the system completely. Instead, it would be better to ensure that the systemic concerns that plague the ISDS model such as lack of transparency, bias in the appointment and functioning of arbitrators, etc., are addressed by undertaking the necessary reforms.

Similarities with the Indian Model BIT

Some provisions in the India-Brazil BIT are common to the Indian Model BIT. For instance, like the Indian Model BIT, there is no most favoured nation (MFN) provision in the India-Brazil BIT, although the Brazilian Model BIT provides for a MFN provision.

Like the Indian Model BIT, Article 20.3 of the India-Brazil BIT puts taxation related regulatory measures outside the purview of the BIT. However, there is one subtle difference. Article 2.4(ii) of the Indian Model BIT states that the host state's decision that the impugned regulatory measure is taxation-related shall be final and non-justiciable. The Article 20 language in the India-Brail BIT that gives immunity for taxation related measures does not use the language of non-justiciability. Articles 23 and 24 of the India-Brazil BIT provides for general and security exceptions respectively and resemble the general and security exceptions in the Indian Model BIT.

Conclusion

The India-Brazil BIT reflects a compromise between the Indian and Brazilian approaches to investment treaties. However, the BIT is certainly more titled towards the Brazilian approach. It does not contain ISDS and rules on indirect expropriation, which creates a gaping hole in the protection of foreign investment. The focus of the BIT is more on dispute prevention. While this is admirable, the fact that also needs to be appreciated is that host States may abuse their public power and thus BITs need to reflect a careful balance between a host State's right to regulate and investment protection. As I have argued in my book, subsequent to being sued by several foreign investors, India adopted a Model BIT that gives precedence to the host State's right to regulate over investment protection. The India-Brazil BIT tilts even more towards a host State's right to regulate, thus marking a departure from India's Model BIT. It will be interesting to see whether India, in its future BIT negotiations, would come back to its Model BIT template or be more comfortable with the Brazilian template.

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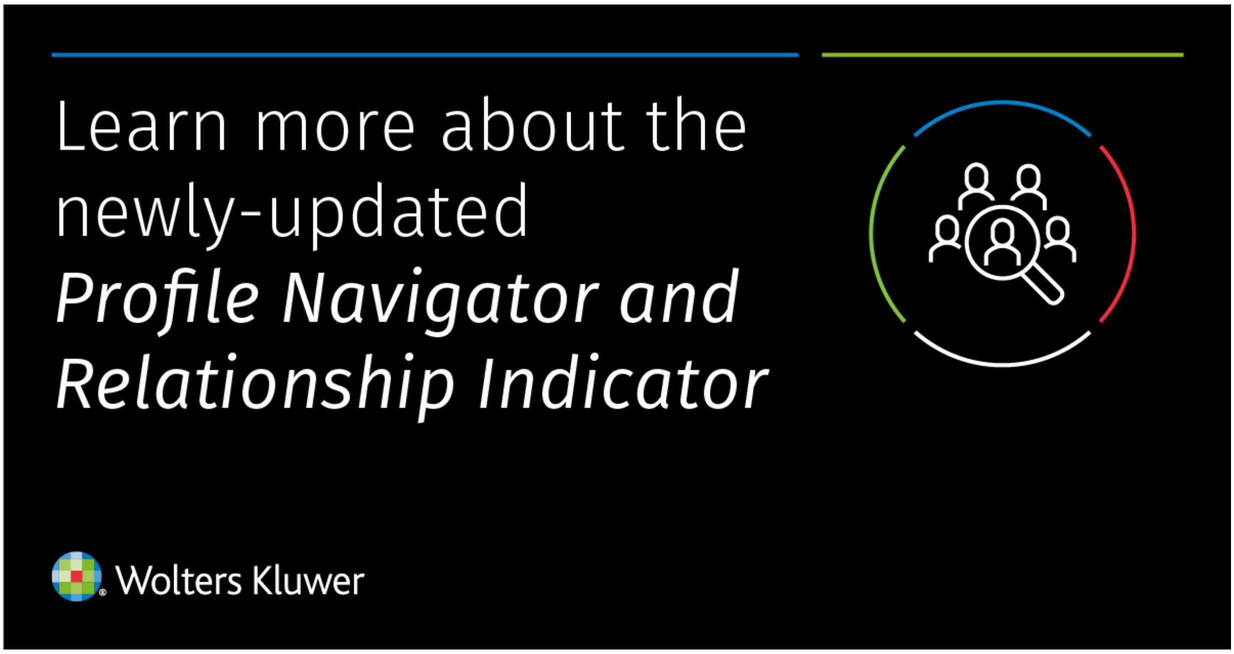

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