Dispute Resolution in the India-Brazil BIT: Symbolism or Systemic Reform?

Kluwer Arbitration Blog
April 9, 2020

Ashutosh Ray (Assistant Editor for South Asia) (Peter & Kim) and Kabir A.N. Duggal (Columbia Law School)

Please refer to this post as: Ashutosh Ray (Assistant Editor for South Asia) and Kabir A.N. Duggal, 'Dispute Resolution in the India-Brazil BIT: Symbolism or Systemic Reform?', Kluwer Arbitration Blog, April 9 2020, http://arbitrationblog.kluwerarbitration.com/2020/04/09/dispute-resolution-in-the-india-brazil-bit-symbolism-or-systemic-reform/

On 25 January 2020, India and Brazil signed an investment agreement (the "**India-Brazil BIT**"). As an agreement that has been signed at the dawn of the new decade, it is symbolic for a few reasons. First, it is a south-south agreement between two large and growing economies. Second, it abandons investor-state arbitration in favor of state-to-state arbitration with an increased focus on dispute prevention. Third, unlike most investment agreements, it expressly provides that a tribunal cannot award compensation. Instead, it only permits a tribunal to interpret the BIT or order conformity of any noncomplying measure—a move potentially inspired from the WTO dispute settlement mechanism.

The India-Brazil BIT marks a significant shift from the decades-old practice of investor-state arbitration. This BIT instead brings dispute prevention to the center stage with the adversarial form of dispute resolution being a secondary consideration. Further, the adversarial form (by way of an arbitration) is available only between the states party to the treaty, reminiscent of traditional rules of diplomatic protection. This is even reflected in the Preamble, in which India and Brazil note their intention of: "Seeking to maintain a dialogue and foster government initiatives that may contribute to an increase in bilateral

investments." Consequently, the investor has no right under the India-Brazil BIT to directly bring a claim against a state.

The Global Rethink on Investor-State Arbitration

This approach of abandoning or moving away from investor-state arbitration is not anachronistic, even though it may appear so. Rather, it is a sentiment that is currently being shared by both the developing and developed world alike. There is a global rethink on investor-state arbitration today. Since 2017, UNCITRAL Working Group III has been evaluating different options for the reform of investor-state arbitration. In Europe, the European Commission has decided to cancel all intra-EU BITs. More than 168 BITs, including their sunset clauses, will terminate if/when the new multilateral treaty is ratified. There is also a proposal by the European Commission to replace investor-state arbitration with a court structure. Similarly, the EU-Canada CETA and EU's agreements with Singapore, Vietnam, and Mexico adopt an Investment Court System to represent "a new EU approach to investment-related disputes eliminating the risk of abuse and safeguarding the right to regulate in the public interest." Similarly, since 2018, ICSID has published a set of proposed changes to modernize its rules. Likewise, other countries are redrafting their model BITs, with several recent examples from countries such as Ecuador, Colombia, and the Netherlands, among others.

Dispute Resolution in the India-Brazil BIT: More Brazilian than Indian?

India and Brazil (both BRICS countries) have redrafted their model BITs in the recent past after elaborate consultations and discussions. Regarding the dispute resolution model, both countries adopt very different approaches. Where India's Model BIT permits investor-state arbitration, this is only possible after an investor has exhausted local remedies before domestic courts for five years. The Brazil Model BIT abandons investor-state arbitration to create instead a unique scheme to resolve disputes through joint consultations, failing which it provides for state-to-state arbitration. This model is evocative of traditional rules of diplomatic protection in international law. An earlier post on the Blog discusses how the India-Brazil BIT varies from the India Model BIT. The India-Brazil BIT retains features from both the model BITs while also adding new elements. The approach to dispute

prevention and resolution, however, appears to be influenced by the Brazilian Model BIT. Under Art. 18 of the India-Brazil BIT, any state that believes a specific measure constitutes a breach of the BIT can refer the matter to a Joint Committee comprising government representatives of both parties (the "Dispute Prevention Procedure"). Such Joint Committee can recommend findings in relation to the alleged breach of the BIT. The referral can relate to a general measure or can be in relation to a specific investor and, if it is in relation to the latter, representatives of the affected investor "may be invited to appear before the Joint Committee" (Art. 18(3)(b)). If the dispute cannot be resolved through the Dispute Prevention Procedure, the matter may be referred to arbitration between the states if both parties mutually agree to do so (Art. 19).

Prohibition on Compensation in the India-Brazil BIT

The dispute resolution clause of the India-Brazil BIT may appear to be similar to the Brazilian Model BIT, but it is different on one crucial point. It expressly takes away the power of the tribunal to award any compensation. The Brazil Model BIT in Art. 24.13 provides that the states may enter into a specific arbitration agreement and request an arbitration tribunal to examine the existence of damages and establish compensation for such damages through an arbitration award. Art. 24.13(c) further states that if the arbitration award provides monetary compensation, the state receiving such compensation shall either transfer to the holder of rights of the investment or request the arbitral tribunal to order the transfer of compensation directly to the holders of rights. However, the India-Brazil BIT does not stipulate the possibility of any specific agreement by way of which an arbitration tribunal may award any sort of compensation to either of the parties. Rather, the language appears to be prohibitory in nature. The table below contrasts the approach for dispute resolution among the various instruments in relation to the power to award monetary compensation:

India Model BIT	Brazil Model BIT	India-Brazil BIT

"A tribunal can only award monetary compensation for a breach of the obligations under Chapter II of the Treaty. Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided by a Party." (Art. 26.3)	"[T]he Parties may, through a specific arbitration agreement, request the arbitrators to examine the existence of damages caused by the measure in question under the obligations of this Agreement and to establish compensation for such damages through an arbitration award." (Art. 24.13)	"The purpose of the arbitration is to decide on interpretation of this Treaty or the observance by a Party of the terms of this Treaty. For greater certainty, ***the Arbitral Tribunal shall not award compensation***." (Art. 19(2))

The clause in the India-Brazil BIT appears to be inspired by the WTO regime where the Dispute Settlement Body appoints panels that decide whether disputed trade measures break a WTO agreement or an obligation. It recommends measures to conform with the WTO rules and how this could be done. It does not, however, award any compensation to either of the disputing parties. It remains to be seen whether remedies under customary international law such as restitution are available if they could be couched as matters dealing with the "interpretation" or "observance by a party of the terms of this Treaty" under Article 19 of the India-Brazil BIT. What is clear is that this BIT seeks to promote a dialogue between the states to resolve any outstanding issues even after they have been interpreted by the arbitration tribunal.

Evaluating the Dispute Resolution Mechanism

Critics might note that the exclusion of the possibility of investor-state arbitration requires investors to depend on diplomatic avenues between states to resolve their disputes. This they argue may hamper investor sentiment and prevent further

investments. For example, an investor will likely need to have a good relationship with its state machinery to be able to persuade it to initiate a dispute on its behalf. The home state's decision to engage with the host state may also depend on several other factors such as: the relationship with the other state at the time when a dispute has arisen; the political climate within both the states; and other deals which may be in the pipeline between both the states, giving either one of them a better bargaining power.

Others would counter that Brazil is an example of a growing economy that continues to receive substantial investments without ever having ratified a treaty providing for investor-state arbitration. Similarly, after finalizing its revised Model BIT, India sent notices terminating or not renewing BITs that had expired to at least 57 countries. The revised Indian Model BIT was largely a result of a spate of claims against India after it lost the *White Industries* case. The change in India's approach towards investor-state arbitration has not necessarily hindered its image as a lucrative destination for foreign investment. India was among the top ten recipients of foreign investment in 2019. Similarly, it is among the world's top ten improvers in the World Bank's Doing Business report for the third consecutive year, being the only large economy to maintain the streak in the last two reports.

The efficacy of this genre of BITs remains to be established, but as is evident, states appear to be interested in testing new water. Several countries are creating and adopting different models for dispute resolution, including maintaining investor-state arbitration, abandoning investor-state arbitration, or restricting investor-state arbitration. The India-Brazil BIT fits into this narrative and provides another model for consideration to the global community. Ultimately it remains to be seen which model will prevail in this highly polarized debate. As stated by Michael J. Gelb, "Confusion is the welcome mat at the door of creativity."