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The Year 2016 for India – Of New Beginnings and Not-So-Happy Endings?

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Much Ado About India's Protectionist Model BIT

The last week of November 2016 was an eventful and rather paradoxical week for India. While India and Brazil successfully concluded negotiations for a new Bilateral Investment Treaty ("BIT"), the India-Netherlands BIT expired.

India has spent the past year refurbishing its investment agreements. According to UNCTAD, India is one of the most frequent respondent states in investor-state disputes, with approximately 20 disputes filed against it since 2003, three of which were initiated in 2016. In an attempt to armour itself against fresh attacks by investors, the Indian government notified 57 countries with which its BITs have expired, or are soon to expire, that it intends to negotiate new treaties upon their expiry. These negotiations will be based on India's Model BIT (the "Model BIT"), which India circulated in December 2015.

The Model BIT has raised more than just a few eyebrows, as it does away with significant protections that investors conventionally rely on. For example, it does not contain a most favoured nation ("MFN") clause; it does away with the fair and equitable treatment ("FET") standard; it insists on the exhaustion of local remedies (both judicial and administrative) during a period of at least five years (unless the investor can demonstrate that there are no available domestic legal remedies capable of providing any relief), and provides for a further cooling-off period of six months, before initiating arbitration proceedings.

Nevertheless, the Sun Rises on the India-Brazil BIT…

While sceptics have wondered just how much success India will have in negotiations based on this rather protectionist Model BIT, India seems to have found a friend in its main trading partner in Latin America, and BRICS counterpart – Brazil.

As reported by *IAReporter*, India and Brazil have recently successfully agreed on a BIT. While the text of the India-Brazil BIT will be published only later this year, according to *IAReporter*:

• Investors will not have the option of initiating arbitration proceedings against India or Brazil. The BIT replaces investor-state arbitration with other alternative dispute resolution mechanisms, such as an ombudsman, state-to-state arbitration and "dispute prevention procedures".
• The BIT does not provide for the blanket protection of the FET standard. Instead, it contains

specific protections derived from customary international law, such as protection against denial of justice.
• The MFN clause has been omitted entirely from the BIT.
• The BIT also contains investor obligations and a number of exceptions relating to taxation, labour, health, security, human, animal and plant life, and "national archaeological treasures".

The unconventional nature of the India-Brazil BIT, and the exclusion of investor-state arbitration in particular, does not come as a surprise. Brazil, which is the fifth largest beneficiary of foreign direct investment ("FDI") in the world, and the largest in Latin America, has called into question the belief that more BIT protection entails more FDI. Unlike other countries, Brazil has refused to entangle itself in a web of BITs, by signing but not ratifying 14 BITs in the 1990s. Since 2015, however, Brazil has signed new BITs with Angola, Chile, Colombia, Malawi, Mexico, and Mozambique. It is worth noting that none of these new BITs are presently in force, and that its BITs with Angola and Mozambique exclude investor-state arbitration as a means of dispute resolution.

Prospective investors and practitioners will naturally wonder whether the exclusion of investor-state arbitration could render the India-Brazil BIT toothless. That said, as discussed below, could it also toll the death knell for *intra* BRICS arbitration?

The finalisation of the India-Brazil BIT comes on the heels of the Conference on International Arbitration in BRICS organised by the Indian government on 27 August 2016, ahead of the 8th BRICS Summit hosted by India on 15-16 October 2016. The aim of the conference was to debate the need to develop an effective international arbitration system for the resolution of *intra* BRICS commercial and investment disputes. Mr Arun Jaitley, the Indian Finance Minister, recommended that a task force comprising representatives from the BRICS member states be set up to suggest institutional reforms in international arbitration and develop arbitration as an alternative dispute resolution mechanism for *intra* BRICS investment and commercial disputes.

Three months down the line, now that two major BRICS countries, India and Brazil, have chosen to opt out of investor-state arbitration, India's enthusiasm for arbitration of *intra* BRICS investment disputes is dubious. Moreover, their fellow BRICS, South Africa's dislike for international arbitration is no secret. South Africa was the first African country to terminate its BITs and replace them with domestic law, the Protection of Investment Act 22 of 2015, which denies investors direct access to investor-state arbitration. This law requires investors to resort to local remedies to resolve investment related disputes, and provides for state-to-state arbitration, subject to the consent of the government and the exhaustion of local remedies.

Against this background, although India can talk the talk about arbitration to resolve BRICS-centric investor-state disputes, it seems rather unlikely from the India-Brazil BIT that India (or its BRICS counter-parts) will be ready to walk the walk.

… But Sets on the India-Netherlands BIT

The Model BIT has had little success so far with the capital exporting states of the European Union ("EU").

India and the EU have been negotiating an India-EU Broad-based Trade and Investment Agreement ("BTIA"), to replace the India-Netherlands BIT which expired on 30 November 2016,

as well as India's BITs with 23 other EU states which will expire by the end of 2017.

India and the EU are nowhere close to reaching an agreement with respect to the BTIA. This is largely due to India's inward-looking Model BIT, notably its provision which requires investors to exhaust local remedies during a period of five years before initiating arbitration proceedings.

India and the EU's inability to reach an agreement with respect to the BTIA has been particularly worrisome, as the expiry of the India-Netherlands BIT has created a gaping legal hole in the two countries' bilateral investment environment. While the India-Netherlands BIT contains a "sunset clause" which will protect existing investments for a period of fifteen years following termination, it will not protect new investments made after its termination on 30 November 2016.

Jyrki Katainen, Vice-President of the European Commission, cautions that in the absence of protection, European investors might not be eager to bring fresh investment into India, and the cost of capital will rise significantly. India must not take Mr Katainen's concerns lightly. When Dutch Prime Minister Mark Rutte visited Prime Minister Modi in June 2015, he affirmed that the Netherlands has a lot to offer India, particularly in the areas of water management, health care, mobility, agriculture and horticulture, and urban planning. As reported on the Indian Ministry of External Affairs website, the Netherlands is India's fourth largest trading partner in the EU, and the value of mutual trade has risen to more than six billion Euros in recent years. The Netherlands is also one of India's top five investors, with the presence of 115 Dutch companies in India. In addition to possibly scaring away Dutch investors, the absence of a BIT/BTIA could worry potential Indian investors as well, as most of the out-bound FDI from India is directed to the Netherlands. If India does not play its cards right, the Netherlands may no longer have a lot to offer India, contrary to its Prime Minister's promises.

Will India Woo Investors Despite Sending Them Mixed Signals?

Prime Minister Modi has been very vocal about facilitating "*a vibrant ecosystem for alternate dispute resolution, including arbitration" to "provide additional comfort to investors and businesses*". Yet the Model BIT betrays his reluctance for arbitration.

He has acknowledged that "*if a dispute arises, corporates want to resolve them quickly through arbitration, without going to courts.*" However, in addition to India's Model BIT, which compels disputing parties to first go to Indian courts, Section 29A of India's new Arbitration and Conciliation Amendment Act, 2015, also forces parties to go to court to extend the period for completion of the arbitration beyond 18 months from the constitution of the tribunal (see here for a detailed discussion).

He has recognised that "*Businesses seek assurance of the prevalence of rule of law in the Indian market. They need to be assured that the rules of the game will not change overnight, in an arbitrary fashion.*" Nevertheless, his sudden (and controversial) decision to "demonetize" Indian Rupee ("INR") 500 and INR 1000 banknotes overnight has raised alarm bells for investors as regards the stability and predictability of India's legal environment.

So while India has been actively reshaping its arbitration laws and investment climate, the jury is still out on whether these measures will actually help create a more secure legal environment for investors, or if these mixed signals from India will drive investors away.

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