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India, Brazil Ink Novel Investment Treaty: Is Dispute Prevention the Way Forward?

Ishaan Madaan · Saturday, March 21st, 2020 · Young ICCA

On 25 January 2020, India and Brazil signed an Investment Cooperation and Facilitation Treaty, in the presence of the Brazilian president Jair Messias Bolsonaro. Arguably the most prominent of the 3 BITs that India has signed since adopting the model BIT in December 2015. The new treaty articulates several provisions (briefly discussed below) in departure from the model version. The two nations also committed to step-up cooperation in the field of oil and natural gas, cybersecurity, science and technology, health and traditional medicine, etc. This comes in the backdrop of India opening up its market to allow 100% FDI in Coal and Lignite mining as well as in some digital media sectors. India also offered for a 100% acquisition its debt-ridden national carrier Air India at the World Economic Forum at Davos earlier this January.

The treaty incidentally also comes at a time when Venezuela – which holds the maximum oil reserves in the world (roughly 18%) – faces sanctions from the United States thereby hindering commercial dealings by other nations and businesses with the oil dependent Latin American country.

As a backgrounder, for Brazil, this is the 27th BIT it has signed, yet there is only one which has seen light of the day. Surprisingly though, both Brazil and India are not signatories to the ICSID Convention. While Brazil has remained firm in its views that investor-state arbitration limits a state's rights to regulate benefits to foreign investors, it may perhaps have been on the same footing as India – which has revoked 58 of its BITs in the recent past. India currently has only 14 BITs in force, with 5 in the post-signing incubation phase, including the most recent with Brazil.

A departure from the Model BIT

The new Investment Treaty, in terms of disputes and resolution, has departed considerably from the **Model BIT** of 2015. Her largely protective Model BIT provides for a new Investor State Dispute Settlement mechanism that requires foreign investors to exhaust local remedies for 5 years before going for international arbitration. Perhaps learning its lessons from the White Industries crises where the investor may not have anticipated that enforcing the award would take substantially longer time than procuring one from a tribunal. For the largest democracy in the world – with the fastest growing population – which has its higher judiciary clogged with close to half a million pending cases; it would make sense to prevent being accused for breach of the Fair &

Equitable Treatment Standard owing to delayed adjudication. However, the instant treaty between India and Brazil completely shifts the focus from dispute resolution to dispute prevention, with no provision for investor-state arbitration, lest through their country.

Here's a brief look at some of the key provisions

Investment has been defined narrowly to include shares, stocks, licenses, authorizations, loans to enterprises, intellectual property, and movable and immovable property. There is a categorical exclusion of several items like debt securities, portfolio investments, claims to monies arising out of commercial transactions, goodwill.

Article 4 – Treatment of Investments

The standards of protection are provided for in Article 4, depart from the traditional Fair & Equitable Standard, preclude either nation from taking measures that constitute denial of justice, breach of due process, discrimination and abusive treatment against investments. Though in consonance with the model BIT's Article 3, there is no most-favored nation (MFN) clause in the treaty.

Article 10 – Investment Measures and Combating Corruption and Illegality

The Article casts a duty upon both nations to adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism financing with regard to covered matters. Moreover, the treaty takes a step further in precluding any protection to investments made with capital or assets from 'illicit' sources. This provision rather cements the debate, at least for the purpose of this treaty, on whether corrupt investments are entitled to protection. The investment, to be recognized as such, has to be in accordance with the provisions of the treaty and in compliance with the laws of the host state, with an onus on the investors to share any information that the host state may desire, including those of corporate history and practices of the investor.

Article 13 – Joint Committee for the Administration of the Treaty

A Joint Committee envisaged under this provision would administer the treaty. The functions and responsibilities include supervising the implementation and execution of the treaty, and also consulting with investors and stakeholders on issues related to the work of the committee. But going beyond, the largely autonomous committee would, *inter alia,* be empowered to mediate for amicable disputes concerning investments and also, supplement rules for arbitral dispute settlement between the parties.

Article 14 – Ombudsman

Both nations shall designate an ombudsman who shall be responsible to support investors from the other party in its territory, and amongst other responsibilities, shall be tasked to address differences in investment matters with a view to help in prevention of disputes.

Article 18 – Dispute Prevention Procedure

The most striking feature of the treaty translates not to dispute resolution but dispute prevention.

Grievance regarding a specific measure adopted by either nation can only be raised by the other nation, not by investors, before the Joint Committee. An investor, though, may raise objections through its representative nation, unless already raised before another dispute settlement forum (not envisaged in the treaty).

Article 19 – Dispute resolution between Parties

The dispute resolution clause does not envisage resolving disputes between investors and parties, but only between parties, *i.e.*, the nations. The choice between an *ad hoc* Arbitral Tribunal or a permanent arbitration institution rests with the parties, however, there are 2 important conditions:

i. 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. The Arbitral Tribunal, however, shall be precluded from awarding compensation.

ii. The Tribunal shall be empowered to examine matters related to the following:

a. the objective, definitions, scope and general provisions.

b. treatment of investments, expropriation, compensation for losses attributable to war or other armed conflict, revolution, state of emergency, civil strife, etc., and transfer of funds.

c. treatment of protected information.

d. parties' right to take prudential measures in relation to protection of investors, maintenance of financial institutions and financial systems.

e. amendments to the treaty, relationship with other treaties, and issues relating to the duration of the instant treaty.

iii. The parties would bear their own costs, although the tribunal may in its discretion direct any party to bear all or a substantial portion of the costs.

The treaty further lays down the criteria for the appointment of arbitrators as well as a code of conduct to be followed by the arbitrators. As it appears, an aggrieved party may ultimately seek refuge under its government to raise issues of treaty violation in arbitration, and vicariously seek enforcement of any arbitral directions regarding observance of treaty provisions.

Dispute Prevention

The treaty envisages cooperation, in pursuit of which are incorporated binding general and security exceptions; while giving due regard to each other's sovereign prerogatives and regulatory powers. The minimization of the potential areas of disputes certainly exhibits promise in avoidance of conflicts that may escalate to the level of formal disputes. The level of governmental intervention in crystallizing those disputes may effectively mean resolution through diplomatic discussions, rather than invoking the provisions of this treaty. The promise to offer ombuds services, to act as a focal point for the other party's investors, appears ideal. In theory, dispute prevention provisions can promote transparency, better informed investments, cooperation between investors and states, reduce blindsiding measures, save costs, prevent hostilities and eventually promote the objectives of the treaty.

Reportedly, India has been taken to investment arbitration on 24 occasions, and suffice it to say, India is wizening-up with its approach towards investments. India is currently defending 11 investment disputes, unlike its Brazilian counterpart, which has no reported ones. Indian investors on the other hand have notably resorted to Investment Arbitration on only 7 instances, of which just 3 remain pending. Though one of the largest developing economies, and one of the fastest growing, too, India still ranks 63rd on the Ease of doing business index and a startling 163 in resolving contracts. India's new-found approach, under which any of the 3 new treaties are yet to come in force, is yet to manifest results *vis-à-vis* dispute resolution. How the new dispute prevention mechanism fares is a question for tomorrow, but it surely would highlight the impact of not resorting to traditional investor-state dispute resolution in an age when investment arbitration is often being questioned.

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