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India-Brazil Bit: A Global Rethink of Investor-State Arbitration?

PRAPTI ALLAGH¹

ABSTRACT

When an Investment Corporation treaty with the Brazilian president, Jair Bolsonaro, joined hands with India for corporation in the fields of oil and natural gas, cyber-security, science & technology, health and traditional medicine etc. In addition to this treaty, India opened up its market to allow 100% FDI in coal and Lignite along with offering 100% acquisition of Air India at the World Economic Forum. This treaty had a global recognition because India for the first time officially disregarded the Investor State Arbitration and thus India changed its approach from an investor protective dispute resolution mechanism to a whole different approach of resolving disputes by completely following the Brazil Model BIT. In this article, a comparative analyses has been done between the India Model BIT and the Brazil Model BIT and analyzed as to how there has been a dynamic shift in the Dispute resolution mechanisms all across the globe along with an Indian perspective. This paper has also discussed the provisions of the India-Brazil BIT which act as a paradigm of change in Investment Arbitration such as the constitution of a joint committee, a provision for state-state arbitration, dispute prevention mechanism and the prohibition on the tribunal to pass a compensatory award. Then a comparison has been made between State-State Arbitration and Investor-State Arbitration which is continued by a critical analyses on the whole Dispute prevention mechanism which has been adopted by the India-Brazil BIT. The article has been analyzed from a practical perspective and an alternative framework has also been recommended. It recommends various alternatives in case the Dispute prevention fails to prevent the disputes altogether as there hasn't been an alternative provided in the treaty as even the Arbitral tribunal has been only empowered to pass an award of interpretation of the provision and not a compensatory award which could have a deep impact on the investor.

¹ Author is a student at The University of Petroleum and Energy Studies, Dehradun, India.

I. INTRODUCTION

On the visit of the Brazilian President, Jair Bolsonaro India signed a BIT with Brazil which was a Brazilian model of an Investment Corporation and Facilitation Treaty.² This BIT is considered to be a new template for India along with indicting rethink of the usual investment protection approach. It is a move towards facilitation and corporation from both the countries instead of just protecting the investor. This BIT is based upon the Brazilian Model BIT and not the Indian Model BIT.³ The India Brazil BIT is of paramount importance because of two major reasons: firstly, it is the first south-south agreement between the countries which are a part of BRICKS and this is the first time India has completely disregarded the standard Investor-State Arbitration and it has adopted a State-Sate Arbitration when it comes to dispute resolution.

II. INDIAN MODEL BIT VS. BRAZIL MODEL BIT

The recent changes made by India in its BIT model in 2015 aimed at reducing the protection commonly provided to a foreign investor (fair and equitable treatment, national treatment and full protection and security) and moved towards providing increasing protection to the host state at the same time. It is pertinent to note that the Draft of Revised Model BIT⁴ significantly differs from the Revised Model BIT⁵. For instance, the draft model included “promotion of investments” and not “protection of investments” and the draft model allowed for counterclaims to be filed by the host state which is not an aspect of the revised model. On the other hand, Brazil is also determined on following a similar approach by entering into Agreements on Cooperation and Facilitation of Investments (ACFIs). When India and Brazil entered into this BIT, it was a revolution from being rule takers to rule makers and with this new approach, the usual ICSID model may be up for a re-alignment.

Since the past 5 decades, the bilateral investment treaties are focused on adopting the investor-state approach which is primarily focused on protecting the interest of the investors as opposed to demanding reciprocal responsibilities from the investors as the countries are keen towards attracting more investments which is an unfair and an unbalanced approach. But with major economies such as Brazil and India changing their approach towards corporation and facilitation instead of investor protection, it can be seen that the governments

² Brazil - India Investment Cooperation and Facilitation Treaty (2020)

³ Model Text for the Indian Bilateral Investment Treaty

⁴ Jesse Coleman, Kanika Gupta, India's Revised Model BIT: Two Steps Forward, One Step Back?, 4th October 2017, http://ccsi.columbia.edu/files/2017/10/Investment-Claims_-India%E2%80%99s-Revised-Model-BIT_-Two-Steps-Forward-One-Step-Back_.pdf

⁵ India,s Model Bilateral fnvestment Treaty Text, F. No. 26/St20t3-IC, Government of India Ministry of Finance Department of Economic Affairs (Investment Division)

are keen on attracting investments but not at any cost. The countries are now looking for a fair and balanced approach which can be seen in the India Brazil BIT.

India-Brazil BIT

The preamble of the India-Brazil BIT is quite assertive as it uses the word “will” and it raises high hopes for corporation and facilitation of investments for stimulation of “mutually beneficial business activity, economic corporation, promotion of sustainable development and reduction of poverty”. And the objective of this BIT states to facilitate and encourage bilateral investments by the way of corporation. By the way of this treaty, the two nations joined hands for corporation in the fields of oil and natural gas, cyber-security, science & technology, health and traditional medicine etc. In addition to this treaty, India opened up its market to allow 100% FDI in coal and Lignite along with offering 100% acquisition of Air India at the World Economic Forum.

III. DISPUTE RESOLUTION UNDER THE TREATY

Under Article 13 of the India Brazil BIT⁶, a joint committee is to be constituted comprising of Government representatives of both the state parties in order to oversee the implementation of the agreement. Under Article 18 of the BIT, there exist a Dispute prevention procedure which is a part of the 2015 Brazilian Model BIT. It states that if one of the parties contemplates that the other party has breached the BIT in any manner, a written request is to be submitted to the joint committee which then takes appropriate measures in order to prevent escalation of the dispute within a given period of time.

Article 19 of the India-Brazil BIT explicitly contains a detailed provision on State-state arbitration. It provides for the parties to submit the disputes to an ad-hoc arbitral tribunal or to a permanent arbitration institution. The purpose of arbitration has also been clearly laid to decide only upon the interpretation of the treaty and not to award compensation in any case. The arbitration is only subjected to examine certain matters pertaining to certain provisions and not all the provisions of the treaty. The appointment of arbitrators shall be in such a way that each state has the right to appoint one tribunal and the two appointed members shall in turn appoint a third state national as a chairperson. It also states that the president shall be invited to make the necessary appointments and the decision given by the tribunal is binding on the parties.

⁶ Article 19- Brazil - India Investment Cooperation and Facilitation Treaty (2020)

IV. PROHIBITION ON COMPENSATION

As seen from the provisions of India-Brazil BIT, article 19 prohibits a compensatory award and only provides for the tribunal to rule upon the interpretations. This feature is neither included in the Indian Model BIT nor in the Brazilian Model BIT. This model can be compared with the dispute resolution of the WTO regime as the dispute settlement body under WTO also just decides on whether an agreement was broken and it recommends the measures that could be taken. However, there is no compensatory award in the regime followed by WTO as well. The India-Brazil BIT seems to have followed a similar regime. This regime is favorable in achieving the objective of corporation and facilitation of the BIT but on the other hand it can have adverse effects on the investors as the decisions regarding any disputes could be dependent on the relationship between the two states which could depend on external factors such as politics at the time when the dispute has arisen. This could severely hamper the investments in those states.

V. INVESTOR STATE ARBITRATION VIS-À-VIS STATE-STATE ARBITRATION

There has been seen a paradigm shift from Investor-State arbitrations towards a better model such as Domestic Courts, Obudsmen or State-state arbitration. Developing countries such as Brazil, India and South Africa have significantly rethought their approach towards Investor-State Arbitration. Other countries which are attempting to disengage the traditional bonds of BIT which includes the ICSID regime are Bolivia,⁷ and Venezuela.⁸ The question arises is that why is it that most of the developing countries are disregarding the ICSID regime and are still continuing to receive investments despite having an investor-protection regime. There are multiple factors which have led towards the countries to rethink their approach.

- **Diluted role of the investor:** Firstly, the role of the state of the investor in the dispute resolution process has raised serious concerns about the politicization of these matters. The Investor-state regime was created in order to protect the interest of the investors so that they could bring a direct claim against the states. This objective has been completely diluted by giving the state of the investor the power to decide upon the existence of the dispute and upon when to drop the claim. The investor loses any decision making power at any stage of the process in the ICSID regime.

⁷ Clint Peinhardt, Rachel L. Wellhausen *Withdrawing from Investment Treaties but Protecting Investment*, 20 April 2016, http://www.rwellhausen.com/uploads/6/9/0/0/6900193/peinhardt_wellhausen_bitwithdrawal.pdf

⁸ SERGEY RIPINSKY, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve*, April 13, 2012, <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve>

- **High Costs:** The costs of arbitral proceedings under ICSID are extremely high and both the parties to a proceeding incur high costs in relation to legal fee, monetary awards and other costs. On one hand, some countries struggle to gather resources to incur high costs of arbitration whereas other countries where the matters are relatively small do not even stand a chance to appear in court.
- **Contradictory Awards:** The awards passed by ICSID are not subjected to appeal. However, they can be annulled according to Article 53(1) of the ICSID Convention. The awards passed by ICSID are annulled in a very restrictive manner on the basis of the grounds mentioned in the convention. Where 52% of annulment applications have been registered since 2011, only 3% of the awards have been annulled. The Ad-hoc committee which annuls awards has been given an excessive amount of power which it misuses consistently according to the Global Arbitration Review.⁹ The awards passed by the tribunal of ICSID are subject to corruption and misconduct, serious departure from fundamental rule of procedure, failure to state reasons of the basis of the awards.

There has been an open criticism of the practical applicability of the ICSID regime. Not only the academicians and politicians criticize this regime but it has also welcomed major criticism from the “insiders”¹⁰ of ICSID itself. Even though ICSID has received major criticisms over the past decade, it shall remain a crucial piece in the international trade treaties but the fact that it needs serious reforms in its regime cannot be disregarded.

Now relating to the comparison between the investor-state arbitration regime of ICSID and the State-State regime followed in the India-Brazil BIT, since it is following a state-state arbitration regime via Corporation and facilitation investment agreement, it justifies the disregard and its open criticism towards the ICSID mechanism as the model is designed to avoid disputes altogether. According to Brazil¹¹, excessive litigation arising out of BIT and the constraints on sovereignty has a deep impact on the developing nations.

The Inter-state arbitration precedes the Investor-state regime and it was the only regime until 1969 when the first investor-state dispute arose. This mechanism had taken a backseat and the investor-state regime was the one being adopted and most of the countries were a member

⁹ Claudia Annacker, Laurie Ahtouk-Spivak and Zeineb Bouraoui, ICSID Awards, 04 January 2019, <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/1st-edition/article/icsid-awards>

¹⁰ MICHAEL NOLAN, CHALLENGES TO THE CREDIBILITY OF THE INVESTOR-STATE ARBITRATION SYSTEM, 2016, *American University Business Law Review*, Vol. 5, No. 3, 429, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157420

¹¹ The Cooperation and Facilitation Investment Agreement, Brazil

of ICSID. But due to the rising concerns about the Investor-state mechanism over the past decade, the inter-state dispute resolution has been regaining popularity by the developing countries. The Indian Model BIT which was published in 2015 contained restrictive provisions regarding Investor-State Arbitration but very recently, India has also terminated 58 BITs which followed the ICSID model. Its treaty with Brazil demonstrates the fact that India is also moving towards a different approach.

Where the Inter-state arbitration is now being reconsidered, there are several issues which need to be addressed before adopting this mechanism just because of the concerns arising out of the Investor-state arbitration. Some of the issues which need a proper scrutiny are:

1. The local remedy needs to be exhausted before initiating State-State litigation and the fact that local courts are subjected to bias towards their own state cannot be overlooked.
2. The role of the investors and the impact that they might have due to political changing political climate of the states needs to be addressed.
3. The “Dispute” needs to be clarified in interpreting the dispute relating to interpretation of a treaty.

VI. CONCLUSION

The criticism of the ICSID regime continues and some states have even disregarded this process in its entirety. However, the application of Inter-state mechanism is subjected to the political realities of the states which negotiate and the fact that the foreign investors do not have any added benefits from this mechanism also makes the country adopting less favorable for the investors. It would definitely be too soon to reach a conclusion as the future shall tell if this regime is better suited in today’s era.

We also noticed a whole different approach with respect to the disputes in the India-Brazil BIT and have adopted an alternative to dispute resolution which is Dispute Prevention. This model aims at prevention of disputes altogether so that the formal conflicts could be avoided. The practical application of this model could be perilous as there is no adjudicatory mechanism which has the authority to decide upon a dispute in case the method of dispute prevention fail which could happen with the changing dynamics of a nation such as the political environment as the Arbitration Tribunal only has the jurisdiction to decide upon the interpretations without any power to award any compensation. This could be extremely unfair for an investor as he does not get a say as he did in an Investor-State Arbitration under the

ICSID Model. One possible solution to this potential issue could be to have alternative dispute resolution model in case the Dispute prevention fails to actually prevent a dispute such as either giving the compensatory power to the tribunal or giving the investor the option to resolve the dispute by going to the domestic courts of the host state and establishing special courts for Dispute Resolution of foreign investors for speedy resolutions.

The India-Brazil model has its pros and cons but the impact on the Indian investments and on the countries adopting this mechanism shall decide if the shift is permanent or just a less unwholesome alternative.
