THE INDIA-BRAZIL BIT: ONE STEP FORWARD, TWO STEPS BACK

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ABSTRACT

The Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India is a landmark international investment agreement for several reasons. Both countries are one of the largest economies in the world and have denounced the forum of investor-state arbitration in the past. Both countries have, in recent years, demonstrated their displeasure with the constraints on the right to regulate that the investor-state dispute settlement mechanism embodies. Thus, this bilateral treaty is apotentially ground-breaking treaty. This article critically analyses important provisions of the treaty. The article first gives an overview of the approach taken by the two countries with respect to investment agreements. It then analyses important provisions under the treaty. The last part of the article discusses the dispute settlement mechanism proposed under the treaty and critically analyses the decision to exclude the mechanism of investor-state arbitration. The overall objective of the article is to review the substantive and procedural provisions of the treaty to show how this type of agreement strikes a new balance between the protection of investors and the right to regulate.

1. INTRODUCTION

India's approach to foreign investment has seen several phases in the past few decades. India's recent outlook towards investment agreements is a product of India's loss in the *White Industries* case, wherein the tribunal found that the delayed justice in India violated the effective means standard of asserting claims.[1] Post the *White industries* case, India further witnessed several bilateral treaty claims being filed against it. This led to India issuing

1. White Industries Australia Limited v. The Republic of India UNCITRAL, Final Award (30 November 2011).

a model bilateral treaty in 2015,[2] which was the basis for all future treaties with India.

There has been a similar movement in Brazil's outlook on investment agreements. The new generation treaties negotiated by Brazil showcase Brazil's new approach to investment agreements - tailor-made agreements in tangent with Brazil's requirements. These agreements are known as Agreements on Cooperation and Facilitation of Investments ('ACFIs'). The new generation ACFIs signed by Brazil are tailored towards balancing the rights of investors and the State's right to regulate.[3] The agreements envisage 'cooperation' and 'facilitation', not investment 'protection'.[4] ACFIs proposed by Brazil also, interestingly, provide for State-to-State arbitration and not investor-state arbitration.[5]

The India-Brazil BIT is said to be an amalgamation of the two approaches of the countries. It was signed by the parties on 25 January 2020. Notably, just like the ACFIs signed by Brazil, the India-Brazil BIT has no provisions for investor-state arbitration.

2. IMPORTANT PROVISIONS

A. Objective

The characterization of the India-Brazil BIT is set in the objective clause, which states "*to promote cooperation between the Parties in order to facilitate and encourage bilateral investments*".[6] As mentioned earlier in the context of Brazil's signed ACFIs, this objective showcases the emphasis

2. Revised Model Indian Bilateral Investment Treaty, (2015) https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf accessed 8 February 2023.
3. Robert Volterra and Giorgio Francesco Mandelli, 'India and Brazil: Recent Steps Towards Host State Control in the Investment Treaty Dispute Resolution Paradigm' (2017) VI Indian Journal of Arbitration Law, 91.
4. Prabhash Ranjan, 'India-Brazil Bilateral Investment Treaty – A New Template for India?' Kluwer Arbitration Blog (19 March 2020) http://arbitrationblog.kluwerarbitration.com/2020/03/19/india-brazil-bilateral-investment-treaty-a-new-template-for-india/ accessed 18 September 2022.
5. See Brazil-Angola Cooperation and Facilitation Agreement (signed on 1 April 2015, entered into force on 28 July 2017) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4720/download.
6. The Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and The Republic of India (signed on 25 January 2020) (hereinafter 'India-Brazil BIT') art. 1.

on the *facilitation* and *encouragement* of investments by the countries, rather than the *protection* of investors.

B. The Definition Clause

Article 2.4 of the India-Brazil BIT defines investment as – "*an enterprise, including a participation therein, in the territory of a Party, that an investor of the other Party owns or controls, directly or indirectly, or over which it exerts a significant degree of influence that has the characteristics of an investment, including the commitment of capital, the objective of establishing a lasting interest, the expectation of gain or profit and the assumption of risk.*"[7]

The definition is an enterprise-based definition of investment. This is similar to the definition in India's model bilateral treaty.[8] This form of definition is in contrast to the asset-based definition. In the former, the investment is associated with an enterprise. In the latter, *'any asset'* can be covered under the definition. This essentially limits the investments covered under the treaty to investments by entities that have an actual presence in the host State.

The question of what constitutes an investment for the purpose of a bilateral treaty is a heavily discussed issue in investor-state arbitration cases. Understandably so, as whether an investor's activities fall within the purview of investment or not is a deciding factor for an arbitral tribunal's jurisdiction.

First-generation treaties often provided a broad definition of investment. These treaties mainly covered established businesses that invested capital in the host State.[9] The scope of investment was usually kept broad to provide a larger scope of investments with the necessary protection. However, in recent years, treaties have been drafted with a more restricted definition.[10]

7. India-Brazil BIT, signed 25 January 1996, art. 2.4.
8. See n 2.
9. Noah Rubins, 'The Notion of 'Investment' in International Investment Arbitration', in Norbert Horn and Stefan M. Kröll (eds), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, *Studies in Transnational Economic Law* (Kluwer Law International 2004) 283-324.
10. Wenhua Shan and Lu Wang, 'The Definition of "Investment": Recent Developments and Lingering Issues', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration, ICCA Congress Series* (Kluwer Law International 2019) 169 - 197.

Duration of investment, element of risk, regularity of profit and return and a substantial commitment and significance to the host State's development are considered the general characteristics of a protected investment.[11] These characteristics elucidated by Schreuer[12] were first followed by a tribunal in Fedax v. Venezuela.[13] These characteristics were later refined in Salini v. Morocco[14], which stated:

> *'The doctrine generally considers that investment infers: contributions, certain duration of performance of the contract and a participation in the risks of the transactions. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.'*

The *Salini criteria* have been implemented by some tribunals and have been rejected by others.[15] However, the abovementioned characteristics have, in some form, or the other the basis for adjudging whether an investment has been made by an investor or not.

The India-Brazil BIT implements much of the *Salini criteria* but excludes 'significance for the development' of the host State as this characteristic is generally not easy to prove for investors. In essence, the BIT tightens the scope of protected investments. This can also be seen by the fact that the article enlists not just what falls within the definition but also what does not constitute an investment.[16]

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11. Prabhash Ranjan, 'Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion' (2016) 26 Journal of International Arbitration 217.
12. C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001).
13. Fedax NV v. Republic of Venezuela ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) para 63.
14. Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco [I] ICSID Case No. ARB/00/4, Decision on Jurisdiction (31 July 2001) para 52.
15. Noah Rubins, 'The Notion of 'Investment' in International Investment Arbitration', in Norbert Horn and Stefan M. Kröll (eds), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies in Transnational Economic Law (Kluwer Law International 2004) 283 -324.
16. India-Brazil BIT, signed 25 January 1996, art. 4.1.

C. Substantive Protections

1. *Fair and Equitable Treatment*

One of the key unique features of the India-Brazil BIT is the forfeiture of the 'fair and equitable' ('FET') clause. The FET clause essentially states that foreign investors should be accorded 'even-handed', 'unbiased' 'just' and 'legitimate' treatment in host States.[17] The language instead enlists certain prohibited measures. These enlisted measures include 'denial of justice', 'breach of due process' and 'discriminatory behaviour'.[18] The terms used in the language of the BIT are the standard terms used to advocate for a case of breach of fair and equitable treatment. However, by choosing to replace the term FET with more constrained language, the countries have chosen to restrict the scope of the protection and safeguard their right to regulate. The provision also does not use the term 'Full Protection and Security'. Instead, it mentions discrimination in the protection of physical security *only;* clearly demonstrating the policy of tightening the scope of protection.[19]

This move by the countries is due to the vague nature of the FET clause, which has led to several arbitration claims. It has been previously stated that the scope of the FET provision can only be assessed based on specific case scenarios.[20] A classic example of this is the quandary faced in the case of *Philip Morris* v. *Uruguay.*[21] The *Philip Morris* case caused much debate as it demonstrated that the investor-state arbitration system could be used to question the public policy measures of a State. In the case, Philip Morris filed a claim against Uruguay's plain packaging law. Philip Morris contended that the FET clause was violated as the regulations breached their legitimate expectations as investors because the measures were not based on sufficient scientific research. This argument, however, was eventually dismissed. Due to the ambiguity of the contours of the FET standard, any measure of the State could be subject to a claim. Thus, the objective of the

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17. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile ICSID Case No. ARB/01/7, Award, (May 25, 2004) para 113.
18. India-Brazil BIT, signed 25 January 1996, art. 2.4.
19. India-Brazil BIT, signed 25 January 1996, art 4.1(*v*).
20. Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) para. 118; Chemtura Corporation v. Government of Canada, (formerly Crompton Corporation v. Government of Canada) UNCITRAL, Award (2 August 2009) p. 123.
21. Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016).

countries is to streamline the possible measures that violate the rights of the investor.

The clause also states that only international law as recognised under the laws of the States is applicable.[22] For illustration, India follows the 'doctrine of dualism' which provides that international law is not automatically incorporated into the domestic legal order and that for an international convention or a treaty to be *'embodied'* in Indian law, it has to be enacted by the Indian parliament.[23] Thus, under this BIT, parties will first have to demonstrate that there has been a breach of the 'denial of justice' standard or the 'breach of due process' standard *as incorporated* under Indian law. It has been argued that the wording of this provision effectively leads to the exclusion of the FET standard.[24] The author disagrees. While the ramifications of this restriction are yet to be seen, the author believes the provision upholds the essence of an FET standard. In the author's opinion, the *actual* difference or ramifications of the change in wording is unlikely to be enormous. Both India and Brazil are nations with advanced and well-structured laws that recognize principles of international law. Thus, the standards under Indian or Brazilian law are in tangent with internationally recognized standards. The restriction is unlikely to lead to the exclusion of fair and equitable treatment to the investors. A better characterisation of the clause would be that the contours of the FET standard are set *within the scope* envisaged under the national laws of the two States; ensuring that obligations or standards not incorporated under Indian law or Brazilian law are not imported under the garb of customary international law.

2. *Expropriation*

Article 6.3 of the India-Brazil BIT explicitly states *'that this Treaty only covers direct expropriation'*. Indirect expropriations are thus not covered by the BIT. This is consistent with Brazil's stance on expropriation in recent times.[25] Indirect expropriation, also known as, creeping expropriation occurs when a measure or a series of measures by a host state leads to near total deprivation of the investor's investment. Whether a host states

22. India-Brazil BIT, signed 25 January 1996, art. 4.1.
23. Constitution of India, Art. 253; Union of India v Azadi Bachao Andolan (2004) 10 SCC 1; Maganbhai Ishwarbhai Patel v. Union of India (1970) 3 SCC 400 : (1969) 3 SCR 254.
24. Henrique Choer Moraes and Pedro Mendonc¸ 'Cavalcante, The Brazil-India Investment Cooperation and Facilitation Treaty: Giving Concrete Meaning to the "Right to Regulate" in Investment Treaty Making' (2021) 36 ICSID Review 304, 313.
25. See n 5.

measure constitutes as indirect expropriation or not requires a 'a case-by-case, fact-based inquiry".[26]

Indirect expropriation again has a broad and vague scope. Consistent with the approach in the previous provisions, the intention of the India-Brazil BIT is to streamline the scope of protection.

3. *Most Favoured Nation ('MFN') Clause*

An example of an MFN clause can be seen below:[27]

> *"Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and associated activities by the investors of any third State."*

Essentially, through an MFN clause, claimants can import more favourable clauses from other investment treaties signed by the host State. There is considerable variance in case law on whether MFN clauses are applicable to dispute resolution clauses. In *Maffezini* v. *Spain,*[28] the Spain-Argentina BIT had an exhaustion of local remedies clause. However, Maffezini successfully argued that the Spain-Chile BIT does not contain an exhaustion of local remedies clause and hence the jurisdiction of tribunal should be upheld in the case. There have also been multiple cases where the importation of dispute resolution clauses has been rejected by the tribunal.

The India-Brazil BIT does not contain an MFN clause. This is consistent with India's stance on MFN clauses. India's model bilateral treaty does not contain an MFN clause, as well.[29] In the *White Industries* case[30], the applicable BIT was the India-Australia BIT. The claimant imported the 'effective means' provision from the India- Kuwait BIT. An 'effective means' clause states that a host State must provide to an investor effective

26. 2012 U.S. Model Bilateral Investment Treaty, para 4 of annex. B https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf accessed 7 February 2012.
27. Agreement between the Government of the Republic of Benin and the Government of the People's Republic of China concerning Promotion and Reciprocal Protection of Investments (signed 18 February 2004) art. 3.2.
28. Emilio Agustín. Maffezini v. Kingdom of Spain ICSID Case No. ARB/97/7, Award (November 13, 2000).
29. See n 2.
30. See n 1.

legislative means to assert its rights. The award rendered found India liable to pay heavy costs for the breach of this imported 'effective means' clause.[31] Naturally, India has since not been an advocate of the MFN clause.

The author believes that the MFN clause is an important clause to ensure equality of protection for foreign investors. Thus, the complete deletion of the clause in the India-Brazil BIT is overly restrictive. However, it is also understandable why the countries took the step. The India-Brazil BIT's language and clauses vary from the other treaties signed by the countries. Hence, the addition of the MFN clause will defeat the objective of the unique drafting of the India-Brazil BIT.

4. *Corporate Social Responsibility ('CSR')*

Including a CSR clause in bilateral treaties is a very recent trend in investment agreements. CSR refers to certain principles or practices that companies and multinational corporations follow to reduce any negative impact or increase their positive impact on the lives of the people living in the host State. These clauses generally obligate investors to contribute to sustainable development in the host State and to voluntarily comply with principles of 'responsible business conduct'.[32]

The author believes a CSR clause goes a long way in balancing the rights and obligations of a foreign investor. Investment agreements usually only include obligations of the State. Although a foreign investor has to comply with the national laws of the host State while making an investment, having a CSR clause helps elevate these obligations to an international obligation. Thus, this provision may encourage foreign investors to participate in social causes in the host State and make a positive impact.

5. *Public Policy Exceptions*

The India-Brazil BIT also includes a public policy exception clause in Article 23. A public policy exception clause essentially states that measures undertaken by host States for the protection of certain public policies are exempted from scrutiny. The wording of the clause under the BIT is similar to the wording given in Article XX of the General Agreement on Tariffs and Trade ('GATT').[33] The clause is *parimateria* to Article 32.1

31. See n 1 at para 16.1.1.
32. India-Brazil BIT, signed 25 January 1996, art. 12.
33. General Agreement on Tariffs and Trade, (concluded on 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, annex 1-A.

of India's model bilateral treaty. The provision essentially states that the parties to the BIT are not prevented from executing non-discriminatory measures relating to pertinent areas of State regulation like public health, environmental protection and maintenance of public order.

The aforesaid provision is also to be read with Article 22 of the BIT, which states that each party may adopt or enforce any measure that would ensure that the investment activity within its territory is undertaken in compliance with the "*labour, environmental and health law"*[34] of the state.

The main difference between the provisions given above is that while Article 23 is a general public policy exception clause, Article 22 is specific to investment activity in the territory of the host State.

It is not uncommon in international law for State to provide similar exceptions. For example, under the European Court of Human Rights ('ECtHR') **jurisprudence** there is a doctrine known as the margin of appreciation doctrine. Under the doctrine, States are permitted space to manoeuvre their obligations under the ECtHR to meet necessary collective goals.

Under Article XX of GATT, the test to ascertain whether a measure comes under the exception is two-tiered.[35] The first tier is to ascertain whether the measure in question has an objective. The second tier would be to ascertain whether the measure in question has the requisite nexus to the objective. It can be inferred that a similar test will be used for disputes arising out of the India-Brazil BIT.

3. DISPUTE RESOLUTION MECHANISM

The most unique and noteworthy aspect of the India-Brazil BIT is the absence of a provision providing for investor-state arbitration. This aligns with the objective of the BIT.

The focus of the approach by both countries is on dispute prevention through diplomatic means. Although the provisions combine the approach of both countries, it can be stated to be more of a Brazilian model of dispute resolution.

34. India-Brazil BIT, signed 25 January 1996, art. 22.1.
35. *The Public Order Exception under WTO Law*, in Zena Prodromou, *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes*, 56 (Kluwer Law International) 21.

Under the BIT, the parties are to establish a Joint Committee. This Joint Committee will comprise government officials from both countries and will have its own rules of procedure.[36] Article 18 states that any party that believes there has been a breach of the provisions under the treaty should refer the issue to the Joint Committee.[37]

To refer to an issue, either party will have to make a written request to the other party. The Joint Committee will then, within 120 days, evaluate any such submission made and prepare a report.[38] The measure in question may be a general measure or a measure affecting a particular investor. If it is a measure particularly affecting an investor, then the 'representatives *of the affected investor may be invited to appear before the Joint Committee'*.[39]

Only in the event that the dispute cannot be resolved through this procedure, shall the dispute be referred to arbitration between the States, provided each party consents.[40] Interestingly, the provisions also provide for amicus curiae briefs.[41] Another interesting feature of the arbitration procedure under the BIT is that the arbitral tribunal cannot award compensation.[42]

4. DISPUTE RESOLUTION MECHANISM- AN ADEQUATE REMEDY?

With increasing transnational trade and investment post World War II, the need was seen for a forum that would protect foreign investors' rights in a host State. However, over the years, concerns have arisen about a system *that allows big corporations to sue countries.*[43] The criticisms against the system are manifold. Below, the author highlights some of the main criticisms against the system.

Firstly, investor-state arbitration has been criticised for infringing a State's 'right to regulate'. The notion is that a tribunal of three private persons with only a commercial background should not be allowed to question a

36. India-Brazil BIT, signed 25 January 1996, art. 13.
37. India-Brazil BIT, signed 25 January 1996, art. 18.1.
38. India-Brazil BIT, signed 25 January 1996, art. 18.2.
39. India-Brazil BIT, signed 25 January 1996, art. 18.3.
40. India-Brazil BIT, signed 25 January 1996, art. 19.1.
41. India-Brazil BIT, signed 25 January 1996, art. 18.4.
42. India-Brazil BIT, signed 25 January 1996, art. 19.2.
43. Claire Provost and Matt Kennard, 'The obscure legal system that lets corporations sue countries', *The Guardian* (10 June 2015) https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid accessed 19 September 2022.

law or a regulation passed by a State. This infringes on the most basic function of a State- law-making.[44] Moreover, when a domestic court questions a law legislated by the State, it is held to certain standards of judicial accountability.[45] However, non-public actors (arbitrators) are not subjected to the same accountability. Arbitrators have been criticized for being *'elite private judges'* with no understanding of public law.[46] The fact that arbitration proceedings are usually confidential further corroborates the lack of accountability argument.

Second, and probably the most prominent criticism that the *Philip Morris case*[47] validated, is that foreign investors utilise the forum to *arm-twist* the host States. Investors can challenge laws relating to the public interest if they are not profitable to them via the means of investor-state arbitration. Such challenges not only dissuade the host state from enforcing certain laws but also dissuade other States that are deliberating on implementing similar laws. This is known as a 'regulatory chill'.

Thirdly, it has been contented that investor-state arbitration is a pro-investor forum. This is because only investors can file a claim through a BIT. Moreover, when a treaty is signed, only a state acquiesces to compulsory arbitration.[48] Another contention on the same lines has been that since only investors can bring a claim against States, arbitrators have a financial incentive in rendering pro-investor decisions.[49]

There are procedural criticisms against the forum as well. The main criticisms are regarding the exorbitant costs, lack of transparency, lack of predictability and no appellate review mechanism in investor-state arbitration. The exorbitant damages that may be awarded and the general

44. Diana Marie Wick, 'Legal & Business Article: The Counter-Productivity of ICSID Denunciation And Proposals For Change' (2012) 11 J. Int'l Bus. & L. 239, 247.
45. Gus Van Harten, *Investment Treaty Arbitration and Public Law* 4 (Oxford Scholarship Online, 2007).
46. Pia Eberhardt & Cecilia Olivet, 'Profiting from Injustice, How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom' (Corporate Europe Observatory 2013).
47. See n 21.
48. Robert W. Schwieder, 'TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication' (2016) 55 Colum. J. Transnat'l L. 178, 185.
49. Eduardo Zuleta, 'The Challenges of Creating a Standing International Investment Court', in Jean E. Kalicki and Anna Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System* 409 (2015); Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion.' (2010) 2.1 Trade, Law and Development 19, 36.

expenses involved in the procedure are a substantial financial burden on the States. For example, the average claim for damages in investor-state arbitration is about $492 million.[50] Moreover, according to the Organization for Economic Cooperation and Development (OECD), the average cost of an investor-state arbitration proceeding is about $8 million.[51]

With these criticisms and the experiences that both countries have had with paying exorbitant compensation to investors through the mechanism, the exclusion of the investor-state dispute settlement ('ISDS') mechanism from the India- Brazil BIT does not come as a surprise. The World Trade Organization ('WTO') dispute settlement mechanism is closest to investor-state arbitration. The concerns around investor-state arbitration are not found to be against the WTO dispute settlement mechanism. What makes the two systems different? The biggest difference in the mechanisms is that the WTO mechanism is State-to-State arbitration. Moreover, exorbitant amounts in compensation is one of the main issues that States have with the ISDS. However, as a decision under the WTO dispute settlement mechanism doesn't significantly affect the coffers of the State, there is less opposition to the mechanism.[52] Thus, the author believes that the fact that damages are not imposed on the losing State in the WTO mechanism plays a role in its survival.

Keeping these observations in mind, the India-Brazil BIT seems to be implementing the WTO model for dispute resolution. However, a copy-paste implementation of these characteristics is unsuitable. The WTO mechanism does not cater to the needs of individual investors or private citizens. It settles disputes that are inherently matters between States. The reason why the mechanism does not impose compensation is due to the presumption of equality. It is accepted that every State is a sovereign and the measures of the State are only to be questioned to the extent that it is inconsistent with the WTO agreements. However, the context of investor-state arbitration is slightly different. Investors and States are not on an equal footing. One party, the State, holds much more power and can reduce an investor's financial power to nil. The focal point in investment protection

50. Diana Rosert, 'The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration', (International Institute for Sustainable Development, July 2014).
51. David Gaukrodger & Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', (OECD Publishing 2012) http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf accessed 19 September 2022.
52. Rochelle Dreyfuss, 'The EU's Romance with Specialized Adjudication', (2016) 47 Int'l Rev. of Intellectual Property and Comp. L. 887, 889.

is not on the measure but on the economic *effect* of the measure on an investment. Thus, a tribunal's power to award compensation is crucial in investor-state disputes. If the tribunal cannot award compensation, and the investor has made exorbitant losses because of the host State's measures, will the mechanism be able to truly protect the interests of the investor?

State-to-State arbitration and the dispute prevention mechanism under the India-Brazil BIT are mechanisms that can probably safeguard the interests of investors. However, it is to be noted that the birth of investor-state arbitration in itself signifies that diplomacy as a means to protect investors has failed in the past.[53] Would a State be able to protect and advocate for the interests of its investors sufficiently? Is there a possibility that the protection of diplomatic relations between the countries may, in the future, supersede the interests of an investor? This system could also lead to further politicisation of investor disputes. This may lead to either of two possibilities; added political pressure on a host State or an investor's interests being diminished to further the political interests of the States. Either possibility would limit the objectives of investment protection. Moreover, this mechanism will also lead to further red-tapism. Investors will have to first deal with the government officials in their State and patiently push their agenda forth. Investors will then have to wait for a response from the host State. Bureaucracy across the world is often criticised for being slow and cumbersome. By adding another layer of bureaucracy, the procedure may further add to the woes of an investor.

The BIT states that the Joint Committee will be comprised of government representatives.[54] Some investor-state disputes involve very complex facts and legal issues. A question arises as to whether the members of the Joint Committee would have the necessary knowledge to understand and evaluate the issues presented to it.

Notably, the BIT also states that if the measure in question involves a specific investor, then *"a Party may deny submission to the dispute prevention procedure matters pertaining to a specific investor which have been previously submitted by that investor to other dispute settlement mechanisms, unless those proceedings are withdrawn from other dispute settlement mechanisms."*[55]

53. Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2.1 Trade, Law and Development 19, 33.
54. India-Brazil BIT, signed 25 January 1996, art. 13.2.
55. India-Brazil BIT, signed 25 January 1996, art. 18.3(*c*).

This clause, the author believes, is concerning. This clause essentially says that a party may 'deny' the submission of an investor. The rights given to government officials herein are sweeping. Moreover, the clause also restricts the investor from bringing any other form of claim against the host State. This excessively restricts the rights of the investor. In this scenario, the investor may have to forfeit any claims it has brought against the host State in national courts. If the investor does not receive adequate protection from the mechanism laid down in the BIT, then the investor would be left without a remedy. This situation is likely to arise because a tribunal under the BIT cannot award compensation.

5. CONCLUSION

The author believes there are concerning elements to the dispute resolution mechanism under the India-Brazil BIT. While the restriction of the scope of some of the provisions balances the State's right to regulate and the safeguards accorded to investors, the dispute resolution mechanism under the BIT is excessively restrictive. The author believes that a more balanced approach would have been to have the first step of dispute prevention and then the possibility of investor-state arbitration. This would have adequately balanced the rights of both stakeholders. An overly restrictive dispute resolution clause will lead to more forum shopping. Investors will find ways to ensure that their dispute is heard under the provisions of a different treaty with more favourable provisions. The only companies that will not be able to find a way out of a restrictive BIT are smaller non-multinational companies. The brunt of a cumbersome and inadequate dispute settlement mechanism will ultimately be borne by companies with limited capital. This will defeat the purpose of the BIT and the objective of the two States.

On a concluding note, the India-Brazil BIT is a welcome upgradation of investment agreements. However, it remains to be seen whether the dispute resolution mechanism under the BIT will adequately protect the rights of investors or not.