

View: Balancing state regulation & investor rights

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As we brace for a global economic slowdown and plummeting GDPs, the flow of FDI in India offers a sanguine picture. UNCTAD reports that India is among the top 10 countries for inbound FDI and soon to be among top 20 for outbound FDI. However, India also seems to be the breeding ground for disputes with foreign investors.

In the past 25 years, India has faced 26 international investment arbitration cases from foreign investors such as Vodafone, Cairn, Vedanta, Devas and Nissan under the auspices of Bilateral Investment Treaties (BITs) between India and the investor's country. Claims filed under BITs elevate the government's investment-impacting measures to international treaty violations. Resultantly,

compensation claims run into millions and billions of dollars. The 'loser pays' principle applies with a slight modification. Here, if the government loses, the public exchequer pays.

BITs have therefore come under severe criticism worldwide. Arguably, BITs fetter the government's powers to regulate in public interest, lest these measures would impact foreign investment. They also leave the fate of a State's needs and measures in the hands of a delocalised international arbitration tribunal. In 2017, India aligned with this criticism

and terminated 58 out of 84 BITs. Resultantly, new foreign investors in India, unprotected by BITs, lie uncomfortably in the overburdened scales of the Indian judiciary. While the final outcome might heal investor wounds, the wait in courts could drain out investment value.

However, for a country committed to easing business and raising investment, it is a welcome move to propose enactment of a special legislation to protect foreign investors and resolve investor-State disputes. The Finance Ministry is stated to have recommended mediation and establishment of special fast-track courts for this purpose. Alternatively, it is also stated to consider vesting jurisdiction with the National Company Law Tribunal (NCLT). Will this reinstate investor trust in India? The classic answer is, it depends. An investor-State dispute entails elements of public and private international law, as well as national law of the host State. It is therefore critical for the mediator to hold the requisite expertise and recognition in international investment, national law and regulation. It may not be advisable to create a panel or list of mediators for parties to choose from since this could expose the list to lack of independence and conflict of interest. Party consent for appointment of mediator must therefore be mandatory. In the event of lack of consensus, the baton could be handed over to mediation centres of arbitral institutions to appoint suitable mediators.

For uniformity in each case, special mediation rules modelled on internationally recognised mediation rules may be formulated and appended to the legislation. Failing mediation, special courts dedicated solely to investor-State disputes, and not NCLTs, provide for a better solution. Expert judges with knowledge of international investment and national laws, wielding sound commercial acumen, must be appointed. Considering that these disputes may not be abundant in number, it might be more effective to engage lawyers with requisite knowledge, experience and expertise on a rotation basis or for a fixed time period to take the judicial mantle.

Most importantly, a single level of appeal to the Supreme Court with minimum grounds for appeal could go a long way in speedy disposal of cases. A brief time limit for filing and disposal of appeals, with a framework for expeditious execution, are indispensable. The ultimate goal ought to be to strike the right balance between State regulation and investor rights. We hope that legislative protection of foreign investors through robust and transparent processes in India will promote foreign investment and accentuate its economic benefits – namely growth, employment and sustainability.

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