Towards a Repository of Policy Options for IIA Reform

Research Project
India's Bilateral Investment Promotion and Protection Agreements[1]

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In recent years, India has been involved in several disputes with foreign investors in which the latter have invoked the provisions of the Investor State Dispute Settlement (ISDS) mechanism included in Bilateral Investment Promotion and Protection Agreements, or BIPPAs, to bring the host country before international arbitration panels. At the end of 2013, there were 14 disputes against India, the 10th-largest among the countries facing investment disputes.

But it wasn't until end-2011 that the government, having BIPPAs with 82 countries, faced the challenges posed by these agreements. This was the result of a ruling made against the government in 2011 by a Singapore-based tribunal established under the rules of the United Nations Commission on International Trade Law (UNCITRAL) that adjudicated the dispute between the state-owned Coal India Ltd and an Australian firm, White Industries Ltd., after the foreign firm had invoked the ISDS provisions of the India-Australia BIPPA.

Since the Coal India arbitration, a number of foreign investors have either served notices for arbitration or are preparing to invoke the provisions of the ISDS for enforcing the rights in India. These disputes have arisen in two broad domains: the first concerns allocation of the airwaves for telecommunication services and the second, tax disputes involving a number of major foreign investors.

The government has responded by initiating a review of the BIPPA model. The review is ostensibly to avoid disputes with the foreign investors. In our view, this re-look at the BIPPAs must take consider three contentious areas. These are: **(i) definition and treatment of foreign investment**, **(ii) expropriation and (iii) investor-state dispute settlement provisions**. This note discusses the specific issues arising in the aforementioned areas and suggests a possible way forward.

Areas of the BIPPAs Needing Re-think and Suggestions for Moving Forward

(i) Definition of investment

The definition of investment that the government has agreed to in BIPPAs is unusually broad. According to the Model BIPPA, "investment means every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made ..." Further, the Model BIPPA clarifies that this definition is non-exclusive, although several forms of investments are listed out, which can be divided into three categories, namely assets, different forms of financial participation and non-financial forms like contracts and other business concessions.

[1] The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

The financial forms included are “shares in and stock and debentures of a company and *any other similar forms of participation in a company*”, which, in other words implies that the government has committed itself to protect any form of financial contribution by a foreign entity in an enterprise operating in India, irrespective of their level of risk-taking. Thus, **foreign investors making a long-term financial commitment in India are treated no differently from those that engage in mere speculation**. Such a situation can give rise to perverse incentives, and could explain the reasons for India’s inability to attract foreign investors that can add to the country’s capital formation.

The non-financial forms of “investment” include “rights to money or to any performance under contract having a financial value” and “business concessions conferred by law or under contract”. The inclusion of these forms have meant that every foreign entity participating in an enterprise operating in India, irrespective of the manner its participation, qualifies for protection under a BIPPA, if India has signed one of these agreements with its home country. In fact, the first ISDS that India had to face was initiated by an Australian equipment supplier.

The broad definition of investment adopted in India raises at least two sets of issues. The first is that Indian government is protecting every form of foreign participation in India without making a distinction between the ones whose participation is really important for its development needs and others. As we have alluded to above, this raises the critical issue of perverse incentives, which needs serious consideration as the Model BIPPA is being reviewed. The second issue is that by including such a broad definition, India is effectively promising to treat foreign entities “more favourably” than their Indian counterparts, in violation of the “National Treatment” provisions.

(ii) Expropriation

This discrimination against the owners of assets and other forms of participation in enterprises that are of Indian origin becomes most evident in light of the provisions relating to “expropriation” and ISDS. Assets belonging to Indian nationals, especially “movable and immovable property”, can be expropriated by the government for development needs of the country. These “investors” do not have recourse to ISDS mechanism, which the foreign investors can use to seek remedy against expropriation by the Government of India. It may also be mentioned here that “indirect expropriation” can be a potential area of conflict between the foreign investor and the Indian government. **Domestic regulations in larger public interest can be tantamount to “regulatory takings”, unless the revised model BIPPA provides effective an effective firewall denying the use of ISDS provisions under such circumstances**. Needless to say, the circumstances under which the government action would be justified should be spelt out in a transparent way.

(iii) Investor-state dispute settlement provisions

Finally, the ISDS provisions need serious review. The first steps that can be taken in this regard would be to ensure that this mechanism is less arbitrary are the following. One, ISDS provisions can be invoked in circumstances other than the ones that do not seriously affect public interest. Two, ISDS can only be initiated if the event of a dispute, the **foreign investor has exhausted all local remedies**. And, three, there must be a **possibilities of reviewing rulings by the tribunals in the courts of the host countries of foreign investors**.