Some advice to India on the IFA negotiations Premium

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India should not be opposed to joining the investment facilitation agreement negotiations for fear of investor-state dispute settlement claims

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‘The possibility of an audacious ISDS tribunal interpreting provisions broadly cannot be a basis to oppose international lawmaking’ | Photo Credit: Getty Images

Although the World Trade Organization (WTO) is in a moribund condition, there is prolific activity taking place in one area of rule-making: investment facilitation agreement (IFA). Backed by more than 100 countries (it does not include India), the proposed IFA is meant to create legally binding provisions aimed at facilitating investment flows. The legal obligations inter alia will require states to augment regulatory transparency and predictability of investment measures. This agreement will be very different from investment protection agreements such as bilateral investment treaties (BITs) that allow foreign investors to bring claims against the host state for alleged treaty breaches. This is known as investor-state dispute settlement (ISDS).

Fear of ISDS

Presumably, one of the reasons India is not a party to IFA negotiations is the apprehension that foreign investors could use a future IFA to bring claims under the existing BITs. Anwar Shaik, India's Counsellor at the WTO, has flagged this concern. Arguably, foreign investors may use the most favoured nation (MFN) provision in BITs to borrow or import stipulations from the IFA perceived to be more advantageous than those given in the underlying BIT.

Likewise, the foreign investor may use the ubiquitous provision of fair and equitable treatment (FET) present in BITs to challenge non-compliance with IFA. Older investment treaties rarely elucidate the meaning of the FET provision, which, in turn, allows ISDS tribunals to supply its normative content. Tribunals have held that the FET provision includes investors' legitimate expectations. Debatably, the foreign investor may argue that the commitments undertaken by a state under the IFA create 'legitimate expectations' of the investor. Another entry point for the provisions of the IFA into the ISDS mechanism can be the so-called 'umbrella clause' — a BIT clause that allows contractual and other commitments owed to a foreign investor to be brought under the treaty's protective umbrella.

However, these are mere presumptions. Even if a foreign investor brings such claims, the ISDS arbitration tribunal is unlikely to agree with the investor for the following reasons. First, as George Bermann and others argue, many BITs exempt an economic integration agreement from the application of MFN. Thus, the possibility of foreign investors successfully importing IFA provisions into the BIT is remote.

Second, it is doubtful that an ISDS tribunal will accept the argument that mere non-compliance with IFA breaches an investor's legitimate expectations. The only exception to this will be if a State has included its IFA commitments as part of the specific assurances to the foreign investor luring her to invest and then goes back on these assurances without a proportionate public policy justification. Thus, a binding IFA, minus other things, cannot be the basis of an investor's legitimate expectations.

Third, most new investment treaties avoid 'umbrella clauses' altogether. This limits the possibility of investors suing states for non-compliance of IFA obligations as a breach of a BIT's 'umbrella clause'.

Moreover, the IFA can be firewalled from BITs by the former unequivocally stating that it cannot be used to interpret or apply any rule for the protection of investment contained in any investment treaty. The IFA can also categorically state that it does not create rights for non-signatory countries and their investors. Indeed, the draft IFA text includes such language aimed at insulating the IFA from BITs and ISDS.

Reforming BITs

Critics argue this will not be enough. The IFA cannot bind an ISDS tribunal, which will hear a claim brought by an investor under a BIT. For the ISDS tribunal, the IFA is just another international law instrument that must be interpreted and applied in accordance with the context of the relevant BIT. Countries can overcome this problem by amending their respective BITs to exclude the IFA from its scope. This is not a mere theoretical possibility. Given the sizeable number of 100-plus countries pushing for the IFA, who wish to insulate it from ISDS, these countries can agree among themselves to reform their BITs to reflect this will. In fact, the BIT reform process is already underway, with older treaties being replaced with newer ones that contain more balanced provisions.

The possibility of an audacious ISDS tribunal interpreting provisions broadly can never be ruled out. But this cannot be a basis to oppose international lawmaking, in the same way that a hypothetical likelihood of a national court interpreting the law wrongly cannot be the reason to cease domestic lawmaking. Thus, India should not be opposed to joining the IFA negotiations at the WTO due to fear of ISDS claims.

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