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Act bilateral, think multilateral on investment issues: A proposed strategy for India

How India can make its foreign policy work

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By Anjali Tandon

Globally, countries remain interested in foreign investment as a source of capital for domestic growth and development needs. The host countries facilitate foreign investment through national investment policies. In addition to investment promotion, the host countries also ensure investment protection through treaties, to provide them with a rule-based, predictable and non-discriminatory environment (UNCTAD, 2017). The partner countries – host and home countries – engage with each other by signing a Bilateral Investment Treaty (BIT). The BIT negotiations are designed to address investor concerns, while also striking a balance according to regulatory space with the host country.

Nearly nine of every ten International Investment Agreements (IIAs), signed across the world, are BITs while the remaining ones are Treaties with Investment Provisions (TIPs) which form part of a larger Free Trade Agreement (FTA) covering many other issues such as trade and non-tariff barriers. India's engagement concerning BITs dates back to 1994 while TIPs were initiated after ten years in 2004. Following the global trend with a prevalence of BITs in the IIAs, India too has a counted few TIPs with Singapore, South Korea, Malaysia, Japan and the ASEAN.

India's experience with BITs

In comparison to the TIPs, BITs have the advantage of being independent of other issues. Since BITs entail investment specific rules and regulations, they can be amended or terminated relatively easily. This is in contrast to the need to re-negotiate an entire FTA while addressing investment-related issues only. Thus, countries including India tend to prefer the BIT route for providing and procuring protection for foreign investments. However, the increasing initiation of disputes by a large number of developed countries vis-a-vis the developing partners has raised alarms on the skewed nature of the existing framework of BITs. The number of disputes as well as settlements has increased dramatically in the recent past; from 50 cases in 2000 to as many as 608 in 2014, mostly initiated by investors (UNCTAD).

India alone has faced 22 legal disputes filed by its investment partners. Most cases have been initiated by its developed partners. Even more disturbing is the nature of arbitration which has turned more commercial with most of the earlier disputes being settled through non-pecuniary reliefs; in contrast to the more recent settlements through awarded compensation. Simultaneously, Indian investors abroad have also experienced disputes in relation to the existing BITs. However, the disputes and the order of claims is far more when raised by the foreign investing partners against India, in comparison to when the Indian investor has sued its partner abroad.

Aiming for the driver's seat

In an attempt to cap the increasing number of bilateral disputes and to preserve domestic regulatory policy space, India very recently revised its BIT policy. The effective BIT, through a narrower protection for the investor, certainly makes it clear that India wishes to be the rule-maker rather than rule-taker in rewriting the rules of the global trading architecture. Likewise, many other countries including South Africa, Indonesia, Ecuador, Brazil and the Netherlands have also revisited their investment regimes. This only goes to show that concerns on BIT related arbitration are not unique to India.

However, can bilateralism be exclusively considered as the best approach by a developing country like India which is trying to learn the rules of the game fast? Perhaps, maintaining a distinctly bilateral approach along with participation in the international debate would entail a balanced approach. Engagement with the international community will be preferable.

Skirting multilateral discussion: A good idea?

However, India has taken the exclusive approach. For instance, India made a no-show on the list of 70 proponent countries which recognised the links between investment, trade and development at the 11 Ministerial Conference of the WTO, which culminated on 13 December 2017. The advocates of investment issues at the forum seek future structured discussions for identifying and developing elements of a framework. Maintaining an arm's length from engagement in multilateral investment issues, India has cited pre-mature nature of discussions, inconclusive settlement of the commitments at the past ministerial meetings, and lack of preparedness as the reasons. However, while keeping its foot down for agricultural negotiations at the WTO, India could have made rallied for a deal through its engagement on investment-related issues. India not only has an enormous market on offer but has also demonstrated a strong will to capitalise on committed domestic reforms. India's

jumping ahead by 30 spots within a year on the Ease of Doing business ranking is already being acknowledged as among the top 10 improvements of 2017 (World Bank, 2017).

Engagement at a multilateral level can offer an opportunity to understand the trends and minds on investment thinking across the world. This can be availed to understand and address the concerns of bilateral partners on the polarised position taken by India in the new BIT. The discomfort of the investment partners cannot be ignored entirely if India is to maintain cordial relations. More so, given the increasing investment outflows from India which become eligible for a reciprocating action.