Policy Brief

India-UAE BIPA: Why Such Desperate Haste?

On December 12, 2013, India and the United Arab Emirates (UAE) signed a bilateral investment promotion and protection agreement (BIPA) in New Delhi. The agreement was signed by Namo Narain Meena, India's Minister of State for Finance and Obaid Humaid Al Tayer, UAE's Minister of State for Financial Affairs. With the signing of this BIPA, the total number of India's bilateral investment protection agreements now stands at 84.

As per the official release, the text of the BIPA was finalized during October 30-31, 2013 at Abu Dhabi. After finalization, the agreement was signed by both countries in just a matter of six weeks. However, for some inexplicable reasons, the text of the signed agreement has not yet been made available at the official website of Ministry of Finance.

Seeking Capital Inflows from UAE

India ostensibly signed the BIPA with the UAE in order to tap capital inflows from the UAE to finance large infrastructure projects. The Indian authorities are expecting that this agreement will facilitate over $2 billion investments by the Abu Dhabi Investment Authority (the world's second-largest sovereign wealth fund with assets worth $600 billion) and the Abu Dhabi National Energy Company in the infrastructure and energy sectors. Some analysts believe that this agreement was primarily signed to facilitate the investments by UAE's Etihad Airways in the Jet Airways.

Nevertheless, the fact remains that even before signing this investment agreement, UAE was one of the top 10 investors in India. The UAE is also India's largest trading partner with bilateral trade worth $75 billion in 2012-13. The Indian government expects that this BIPA will pave way to conclude negotiations on the free trade agreement between India and the Gulf Cooperation Council.

A Premature Move

This sudden move by the Indian government has raised many questions about the timing and the rationale of signing the BIPA with the UAE. On March 22, 2013, Mr. Meena had announced in the Parliament that India is reviewing all its existing BIPAs and put all ongoing BIPA negotiations on hold till the review process is complete. That is why, Prime Minister's visit to UAE, scheduled for late March, had to be postponed as the UAE was insisting on India signing the BIPA during the visit.

Since India is currently reviewing all its investment protection agreements, the government has not explained why it has worked out an exception with the UAE. Why the government has shown undue haste to sign this agreement when the new model BIPA text is expected to be finalized by January 2014? Till now, No explanation has been given by the authorities for this hasty decision.

This premature move by Ministry of Finance not only undermines the stated official position but also makes a mockery of its ongoing review process. What if the new model investment agreement text suggests that India should not include provisions such as most favoured nation (MFN), fair and equitable treatment (FET), and investor-to-state dispute mechanisms?

A Mix of Old and New Model Text?

At the time of writing, the text of India-UAE BIPA is not publicly available and therefore one cannot comment on its contents. According to media reports, India's BIPA with UAE is largely based on the old model text which includes MFN, FET and national treatment provisions. The media reports suggest that India has built a safeguard in the agreement by allowing only executive decisions (not judicial pronouncements or laws progumulated by the Parliament) to be challenged within the stipulated period.

Further, the investors from UAE and India will be allowed to use only one legal option (domestic law or international arbitration) in an event of a dispute. In other words, if an investment dispute is referred to and decided by an Indian court, the same cannot be referred to international arbitration.

Some Misconceptions about SWFs

This episode also shows that our policy makers have very little understanding about the rationale and investments made by sovereign wealth funds (SWFs) such as ADIA. Countries like UAE have set up SWFs not to invest in infrastructure or energy projects abroad, as perceived by New Delhi. Such funds are established to manage excessive foreign exchange reserves, commodity exports, the proceeds of privatisations and fiscal surpluses. The SWFs help in diversifying and improving the return on a country's foreign exchange reserves or commodity revenues.

Unlike TNCs and other private companies, the overwhelming majority of sovereign funds (including ADIA) are passive investors. The FDI component of the total investments made by SWFs is very minimal. In rare cases where SWFs undertake direct investments, they do not seek controlling interests or active roles in the management of invested companies. Nor do they possess superior technology and necessary expertise required for infrastructure or energy projects.

The Broader Context

This hurried and unjustified move should not be viewed in isolation, but, rather, within the broader context of India facing a spate of legal notices threatening international arbitration and seeking compensation worth billions of dollars under various BIPAs signed by it in the past. In 2012, India lost a case against White Industries of Australia under the India-Australia BIT and paid a monetary compensation of Rs.258 million in its first ever investment agreement dispute. These developments ultimately forced India to review the earlier model agreement text.

For any foreign investor, there are other key determinants (such as tax policy and labor laws) which influence the investment decision rather than an investment protection agreement between the home and host countries. Hence, it is highly debatable whether this BIPA will actually accelerate fresh capital from Abu Dhabi Investment Authority and other investors from the UAE. Throughout the world, there is no ample evidence to prove that investment protection agreements lead to increased foreign investment or boost the prospects of obtaining investment in future.

While the new model BIPA text is eagerly awaited, the Ministry of Finance should, at least, post the text of India-UAE BIPA on its official website.

— Kavaljit Singh

This Policy Brief is published by Madhyam (New Delhi) in close collaboration with SOMO (Amsterdam).