



Opinion | Efficient dispute redressal system a must to boost FDI

With rising political pressure to create more jobs, which in turn require more spending on infrastructure and industry, foreign direct investment (FDI) becomes all the more critical. The government is justified in protecting its interests, but that should not come at the expense of investors feeling shortchanged.

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The Indian economy is in the grip of a slowdown and things are likely to worsen. Rising oil prices and the inability to boost exports puts the balance of payments at risk. That in turn will compel India to do one of two things.

One, find ways to cut the import bill, as discussed earlier. Two, move quickly to woo foreign investments.

The latter is easier said than done because the government has not made investors feel that their investments are safe. Foreign Direct Investments during April- December decreased 7 percent compared to a year ago and is unlikely to pick up anytime soon. The issue of arbitration still rankles foreign investors.

In 2014, the government cancelled all bilateral investment treaties (BITs) India had with 58 countries. The Centre wanted these countries to sign a modified BIT which forbade foreign investors from approaching international arbitration tribunals without first exhausting legal remedies in India. Given the abject rate of dispute resolution in India, no country has signed these amended provisions barring Cambodia and Belarus with whom India has little foreign trade.

As a consequence, a significant part of foreign direct investment flowing into India now is funds from companies which have already invested heavily in India and need to keep their investments profitable and relevant. That could explain investments by entities like Vedanta (and Cairn) and Vodafone making substantial investments even while they have challenged certain decisions of the government before **international arbitration tribunals.**

Typically, international arbitration is the most sought after remedy in BITS, according to a report from Nishith Desai Associates. Half the bilateral treaties in existence offer investors the choice of at least two arbitration fora. The report adds that the number of such fora that treaties offer has only increased over time.

Unfortunately, India has shown little interest in offering this flexibility to foreign investors. Moreover, the passage of existing cases before international tribunals has not been easy, mostly on account of objections and arguments presented by the government of India which is the major disputant in most cases. Indeed, the National Law Commission has described the Indian government as a compulsive litigant, a view ratified by the Supreme Court.

The Nishith Desai report said that India is a respondent in at least 15 cases involving investment treaties, the highest number of suits filed against a host state. Eleven of them are listed in the chart alongside. Some of them have been pending since 2012.

In one case, involving Dewas Multimedia, the government has even gone about filing criminal charges against Indian officials who entered into the agreement with the litigant company.

Clearly, if the government wants to invite more FDI, it will have to create rules quickly to convince investors that their investments are safe. One contentious clause is what constitutes an investment.

According to existing rules, pre-operative investments -- where the project is not complete -- are not regarded as investments. But how does one protect investments involved in building a road, or a bridge or even a steel plant, which will generate profits and go into operation only after the entire work is completed? Is the entire investment to be dismissed as being without protection because it is pre-operative investment? What happens to the investments made when disputes arise even while construction work is midway?

The need to address these issues is extremely urgent. As Nishith Desai points out, "With rising state regulation in diverse areas such as public health, environment, economic reforms and security amongst others, international investment treaty law is striving to balance investor protection with state interests. Further, the diminishing distinction between traditionally capital importing and capital exporting states has called for a re-look at BITs and investment protection standards."

India has been notoriously lax in effective dispute resolution. That is where institutions like Singapore International Arbitration Centre have stepped in as the ideal seat for arbitration, saving litigants cost and time. India even refuses to pass a binding law that decisions by the tribunal -- based in the new arbitration centre just created in Mumbai -- will not be reopened by Indian courts. Just look at the way in which the Ranbaxy case has continued to drag on, with compensation not being paid to Dai-ichi even after clear and unambiguous rulings by the arbitration tribunal in May 2016. Clearly, the government seeks to protect its own interests over that of investors. That is truly unfortunate.

With political pressures rising to create more jobs, which in turn will require more spending on infrastructure and industry, the need for FDI will become more urgent. Expect political pressure to do the trick that common sense was unwilling to accept. That unfortunately has invariably been India's bane. Most legal redressals are based on political pressure, not on long-term planning based on sagacity and discussion.

If India has to gain a place among the best in the world, it has to focus on dispute redressal on a war footing.

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