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The Investment Chapter in the India-European Free Trade Association Free Trade Agreement: Much Ado about "Something"

Prabhash Ranjan (Jindal Global Law School) · Thursday, June 13th, 2024

It took 16 years of negotiations for India and the European Free Trade Association ("EFTA")—comprising Switzerland, Norway, Iceland, and Liechtenstein—to clinch a free trade agreement ("FTA"). The newly minted FTA is expected to boost the extant levels of trade between the two countries. The formal name of the signed agreement is the Trade and Economic Partnership Agreement ("TEPA"). However, in this piece, I refer to it as an FTA for two reasons. First, the TEPA contains all the usual traits that one typically associates with an FTA such as liberalizing trade in goods and services and having provisions on intellectual property and government procurement. Second, the term FTA is a familiar acronym used in international economic law literature to describe such trade agreements. This piece focuses on two salient features of chapter 7 on "Investment Promotion and Cooperation"—EFTA's obligation to invest in India; and India's right to rebalance concessions in case investment from EFTA countries does not fructify.

But before we look at these salient features, it is pertinent to observe three key facts. First, this is the first FTA India has signed in the last few years that contains a somewhat detailed separate chapter on investment. India's recent FTAs with countries like the United Arab Emirates, Mauritius, and Australia do not contain detailed provisions on investment. India has been consciously following a practice of decoupling international investment law from international trade law in its FTAs. This approach differs from India's FTA practice in the 2000s when it signed trade agreements that included a detailed chapter on investment protection with an investor-State dispute settlement ("ISDS") mechanism. Second, the investment chapter in the India-EFTA FTA deals only with investment promotion and facilitation. It does not contain investment protection features and ISDS. Third, the investment chapter is not subject to dispute settlement given in chapter 12.

Obligation to Invest

A noteworthy aspect of the investment chapter that has generated immense buzz is the commitment made by the EFTA countries that they will make foreign direct investments ("FDI") worth US$100 billion to India in the next 15 years (Article 7.1(3)(a)). As a result, this FTA is being called a US$100 billion deal. Furthermore, there is also excitement due to Article 7.1(3)(b), which says that one million direct jobs will be generated in India within 15 years of the FTA coming into force as a result of the FDI flowing from EFTA countries. Typically, investment treaties or FTA investment chapters do not quantify the amount of FDI flowing from one country to another or the number of jobs such a flow will generate. So, from that standpoint, these provisions are pathbreaking and unprecedented.

However, this does not mean that the EFTA countries are under an obligation to invest US$100 billion in India in 15 years. Specifically, Article 7.1(3)(a) provides as follows:

“the EFTA States shall aim to increase foreign direct investment from investors of the EFTA States into India by 50 billion (US dollars) within 10 years from the entry into force of this Agreement and an additional 50 billion (US dollars) in the succeeding 5 years….”

In other words, the obligation of the EFTA countries in Article 7.1(3)(a) is to “aim to” increase FDI to US$50 billion within 10 years of the FTA coming into force followed by another US$50 billion in the succeeding 5 years. Moreover, footnote 7 to Article 7.1(3)(a) States that, for such a high level of FDI to materialize, India should be able to sustain a nominal Gross Domestic Product (“GDP”) growth rate of 9.5 percent for the next 15 years. Likewise, Article 7.1(3)(b) provides that the EFTA States shall “aim to” facilitate the generation of one million jobs in India.

Both these provisions codify what is known as an obligation of conduct—an obligation to make an honest endeavour towards achieving a goal, notwithstanding the result. This differs from an obligation of result, which would require achieving a specified outcome. The EFTA countries are only under a legal obligation to make an honest effort to invest US$100 billion and generate one million jobs in India. They are not required to realize these outcomes.

Rebalancing of Concessions

The other riveting aspect of the investment chapter is that India can withdraw the tariff concessions given in the FTA to the EFTA countries if the promise of US$100 billion of investment and one million jobs does not materialize. While Article 7.8 recognizes such rebalancing of concessions, it is not as straightforward as it may appear.

The FTA provides a mechanism to review whether the obligations of conduct mentioned in Article 7.1 are being complied with. This review will not be done by any judicial body but by an investment sub-committee (“ISC”) comprising government representatives of India and the EFTA countries. The ISC shall undertake the review in three stages—no later than 5, 10, and 15 years after the FTA comes into force (Article 7.7(3)). If, after 15 years, as provided in Article 7.7(6), “India considers” that “the EFTA States have not fulfilled the obligations to promote investments,” the former may request consultations with the latter.

The word “considers” in Article 7.7(6) gives India the right to determine whether the agreement’s objectives have been satisfied unilaterally. However, in making this determination, India must answer whether EFTA States have made an honest endeavour to invest in India, not whether they have actually invested the said amount. The difficulty in determining whether a country has violated its obligation of conduct, as against an obligation of result, is the non-availability of benchmarking. It will be arduous to make a case that the EFTA countries have not sufficiently tried to invest in India. Moreover, India will fail to make a case against the EFTA countries if it fails to maintain the required nominal GDP growth rate of 9.5 percent.

Assuming India makes a unilateral determination that the EFTA States have not sufficiently tried to invest in India, withdrawing tariff concessions is not automatic. India and the EFTA States must enter into consultations to resolve the differences through different graded mechanisms. As per the time periods provided for these consultations in Articles 7.7(6) to 7.7(12), it may take around 5 years. Only if these consultations fail, India has the right to take "temporary" and "proportionate" remedial measures in the form of withdrawal of tariff concessions given to the EFTA States as provided in Article 7.8(1). In short, any rebalancing of concessions can occur only 15 years after the FTA comes into force plus around 5 years spent diplomatically settling differences.

Missing Investment Protection

As pointed out, the India-EFTA FTA does not contain investment protection features. So, there are no provisions granting fair and equitable treatment, national treatment, most favored nation treatment, protection against unlawful expropriation, etc. There is also no ISDS mechanism. The India-EFTA FTA contains a State-State dispute settlement, but this mechanism does not apply to the investment chapter. This is not surprising given India's recent approach and treaty practice over investment protection and ISDS. As a consequence of being sued by numerous foreign investors, India, a few years ago, unilaterally terminated most of its bilateral investment treaties ("BITs") that contained ISDS provisions. The unilateral termination of BITs has adversely impacted foreign investment inflows to India.

India adopted a new Model BIT in early 2016, which contains several pro-State features and subjects the ISDS mechanism to a requirement to exhaust local remedies for 5 years. This requirement renders it practically unworkable for foreign investors. As already pointed out, India has stopped including investment protection and ISDS provisions in its FTAs. So, the India-EFTA FTA not including investment protection is part of this broader trend of India's investment treaty practice.

The lack of investment protection and ISDS in the India-EFTA FTA investment chapter assumes significance because India's BITs guaranteeing such protection to investors of countries like Switzerland and Iceland stand unilaterally terminated, as part of India's repudiation of most of its BITs. If India expects EFTA States's investors to make such high levels of investment, it must include investment protection provisions either as part of the India-EFTA FTA or as part of a separate India-EFTA investment treaty. Given the concerns of regulatory abuse evident from several foreign investors suing India before ISDS tribunals in the last decade, EFTA investors would prefer investment treaty protection while investing in India.

Conclusion

The investment chapter in the India-EFTA FTA has created much enthusiasm due to its novel feature of quantifying the actual FDI and jobs that it may generate for the developing country in the deal, India. However, the devil always lies in the details. The fine print of the text shows that whether such high levels of investment will flow from EFTA members to India is not as straightforward as it may appear. Likewise, India has the right to unilaterally determine whether the EFTA members comply with their investment obligation and take temporary and proportionate measures to rebalance trade concessions. This, too, is not as straight as it appears and is continent to a long and bureaucratic process. Nonetheless, the investment chapter is a step forward in not just deepening but also legalizing international investment relations between the two parties. This needs to be augmented by encompassing investment protection and an ISDS mechanism.

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This entry was posted on Thursday, June 13th, 2024 at 8:30 am and is filed under foreign direct investment, Foreign Investment, Free Trade Agreements, India, Investment, Investment agreements, Investment Arbitration, Investment law, Investment protection, Investment Treaties, Investor, Investor duties, Investor-State arbitration, ISDS, Protection, State-State Dispute Settlement, State-to-state arbitration
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