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Why India's model bilateral investment treaty needs a thorough relook

It is good news that India has not completely abandoned its BIT regime, but not more than one country adopting the 2016 model BIT is sufficient indication of infirmities in the model

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Foreign Direct Investment (FDI) in India has seen eleven-fold growth in the past two decades — from $4 billion to $44.8billion. With abundant drivers of human capital, infrastructure, natural resources, technology and law, we are undoubtedly the fastest-growing economy in the world. FDI plays a key role in accelerating this growth.

However, FDI is a two-way street. Investor protection is critical for ensuring FDI inflows. A stable political and legal environment, assurances against taking away of the investment value through legislative or administrative acts, transparent public policy measures, and speedy access to justice are strong guarantees for foreign investors.

A bilateral investment treaty (BIT) between two countries plays a key role in offering these guarantees on an international plane. India entered the realm of BITs in 1994. In 2003, India released her first Model BIT – an investor-centric prototype used readily to ink BITs with other countries.

However, 2011 witnessed a turbulence in the Indian BIT landscape. India was directed by an international arbitral tribunal to pay an exemplary sum of $3.5 million to White Industries, an Australian investor, for failure to provide "effective means of asserting claims and enforcing rights" – a standard borrowed from the India-Kuwait BIT into the India-Australia BIT through a most-favored nation (MFN) provision. Needless to mention, such awards are borne by the public exchequer.

This case marked a cataclysmic change in India's approach towards BITs. In 2015, India replaced the investor-centric 2003 Model BIT with a State-centric model. To avert further damage, India terminated BITs with 58 countries in 2017.

December 16, 2018, marked the third anniversary of release of the new Model BIT – published on December 16, 2015, and adopted on January 14, 2016. However, in the span of three years, no country barring Cambodia has embraced the 2016 model.

I am often asked whether the 2016 model BIT is manifestly unworkable. As clichéd as it sounds, it depends. Over the past two decades, India's attractiveness as an investment destination has increased considerably, along with its bargaining power. However, the answer also depends on the stakeholders – the host State, the foreign investor, and, unmissably, the outbound Indian investor.

As a host State, the Government of India is heavily guarded by the terms of the current model. For instance, tax measures are exempt from the scope. Also, India can now adopt a range of public policy measures that could adversely impact investor capital. Although the State must prove that the measures were necessary and non-discriminatory, it would be prudent to impose additional limits to check the exercise of regulatory powers. The intent of a measure and the result it seeks to achieve must be weighed against its impact on the investment. Compensation for disproportionate impact would compel the State to adopt least restrictive alternatives.

As a foreign investor, the burden to qualify as an investor under the BIT is onerous. Assets may not be easily covered under the multi-faceted definition of investment. The foreign investment must legally constitute an enterprise according to laws in India. In addition, the investor must prove to have committed capital for a certain duration, assumed risk and assisted in economic development of India. Unfortunately, there is no guidance to measure these factors. It will, therefore, be critical that these criteria are assessed objectively in line with industry standards. A lot will depend on interpretation of the BIT by courts or international arbitral tribunal.

Further, the most-favoured nation (MFN) clause and the catch-all guarantee of 'fair and equitable treatment' is conspicuously absent. Targeted discrimination and fundamental breach of due process by the State is considered prohibitive, although guidance is minimal, and arbitrariness is not covered. The new model is also silent on specific representations made by GoI to foreign investors that create legitimate expectations of investment protection. These are indispensable guarantees and ought to be included.

Last, but most important — access to justice treads a treacherous path. The mandate to first exhaust court remedies for five years, with further nine months to negotiate and initiate arbitration, strikes at the very heart of effective dispute resolution. While we have moved two steps forward through introduction of the Commercial Courts Act and rehaul of the Arbitration & Conciliation Act towards speedy and effective adjudication, a provision of this nature is exceedingly regressive. A constructive via-media would be to provide a 30-day cooling off period followed by a six-month mediation at the outset. The dispute could then be tried before national commercial courts for an oft-accepted timeframe of 18 months. Upon failure thereon, the party could initiate arbitration.

In this mesh of entitlements and obligations, what seems to be sidelined is the outbound investor – the third stakeholder. In 2017-18, outbound investment rose to the tune of $11 billion. Under the present model BIT, as we unassumingly adopt the role of a capital-importing country, the Indian outbound investor will be bound by the same rigorous terms as its counterpart. This must force us to re-think our substantive legal framework on FDI.

The fact that not more than one country has adopted the 2016 model BIT in the past three years is sufficient indication of infirmities in the model. However, the good news is that India has not completely abandoned its BIT regime. It is, therefore, critical to generate innovative ideas to draw an effective legal framework and reinstate an effective model beneficial to all stakeholders.

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