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A BIT of reform, a lot of opportunities

Revised model Bilateral Investment Treaty text is an opportunity to tailor it to the current global economic realities

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An announcement on the revision of the model Bilateral Investment Treaty (BIT) text was made in the Union Budget 2025 to make it more investor-friendly. The last revision was in 2015, which was aimed at balancing investors' rights and obligations. As the government considers a new version, it is imperative that the legalese of the text reflects the current economic realities.

BITs, also referred to as International Investment Agreements (IIAs), are a tool for providing assurance to foreign investors against "measures" that may adversely impact their investments. These treaties are legally enforceable. They provide rights to investors (through the investor-state dispute settlement) or to home states (through state-state dispute settlement) to bring a claim against a host state (receiving foreign investment).

It is noteworthy that these treaties do not contain any written guarantee from foreign investors to invest. An assurance towards the protection of investments is postulated to encourage foreigners to invest in an alien territory. It is thus a means of promoting foreign investment in a country. As per UNCTAD data, as many as 3,291 IIAs (including 2,831 BITs) have been inked so far and many more are still being negotiated.

A "model" text in investment treaty negotiations is a standard base position of a country on its investment treaties. The final agreement is an outcome of a negotiated position between the partner countries. While it is not binding to have one for negotiating a treaty, it generally helps to have one as a guiding document for the negotiators. Countries generally revise their model text at regular intervals. For instance, the US developed a Model BIT text in 1994, which was replaced in 1998, followed by newer versions in 2004 and 2012.

As the historical context of BITs has evolved, BITs have evolved too.

BITs find their genesis in the mid-20th century. Most of the early BITs were signed between a developed capital-exporting country and a developing capital-importing country. Scholars have ascribed this to two fundamental systemic factors. One, decolonisation and the rising trend of economic nationalism. This made BITs an instrument to protect the private property that foreign investors owned abroad. Two, most of the FDI in the 1950s and 1960s was either resource-seeking or focused on manufacturing through import substitution industrialisation policies and thus the need for certain "minimum standards of protection" of investments.

Over time, BITs have been crafted to suit the changing needs of the times. The first-ever investment treaty did not contain the investor-state dispute settlement (ISDS) which is now held as its quintessential aspect.

In the early 1990s, with the NAFTA agreement, pre-establishment commitments were introduced in investment treaties. The traditional commitments were on the host state to provide "protection" for foreign investments and investors. NAFTA introduced the "liberalisation" of the foreign investment regime in the "establishment and operation" of investments. This then became the norm for several investment treaties that followed, which innovated on a mix of protection and/or liberalisation elements.

In March 2024, India signed a Free Trade Agreement (FTA) with a grouping of four European countries-EFTA. This agreement's investment chapter weaved-in a quantifiable commitment on investment and direct employment by EFTA in India. This was unprecedented. The investment chapter also innovated on dispute settlement from arbitration to a G-to-G consultation mechanism.

The foregoing discussion points out that BITs need not be strait-jacketed by precedence. There is scope to think out of the box. A perspective to consider is: Should there be a single model text?

India may be a capital-importing country vis-à-vis developed partner countries, whom it looks up to, for the best technology and to integrate itself into global value chains. However, in several other cases, India positions itself as a capital-exporting country. As per UNCTAD's latest World Investment Report, the stock of inward direct investment (FDI) to India grew from $16 billion in 2000 to $537 billion in 2023. For the same period, outward direct investment (ODI) from India grew from $1.7 billion to $236 billion. India thus needs to strategise its BITs to secure the needs of its own investors too. The practice of having a singular text could then be relooked.

Another aspect that could be given a rethink is how to deal with the Most Favoured Nations (MFN) clause?

The MFN clause was developed in the context of multilateral agreements. Simply put, an automatic MFN implies that the additional commitments offered to others in future, automatically apply to the existing trade partners. This concept was borrowed into BITs as well. Inclusion of MFN in BITs ensures that similar "treatment" (in terms of laws, rules, regulations, orders, inactions etc) is given to investments and investors of all treaty partners.

The Model BIT of 2015 did not include MFN. While there is a history of how this clause has been misused in the context of investment agreements, there is a more basic issue here. It has the potential to disrupt the balance that governments achieve bilaterally. After all, a carefully negotiated treaty must strike a balance between what partner countries offer to each other. There are several alternate formulations of MFN — including consultative MFN, forward-looking provisions, and checks to prevent treaty-shopping — which may then be looked at.

The decision to revise the Model BIT text after about a decade is a welcome step. As India enters Amrit Kaal and positions itself as a decisive economic player, there is both a possibility and an opportunity to think differently about BITs.

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