

Reviving the Indo-US BIT dialogue

There is very little meeting ground between the two countries on core issues of a BIT. It is imperative that India articulates a clear stand

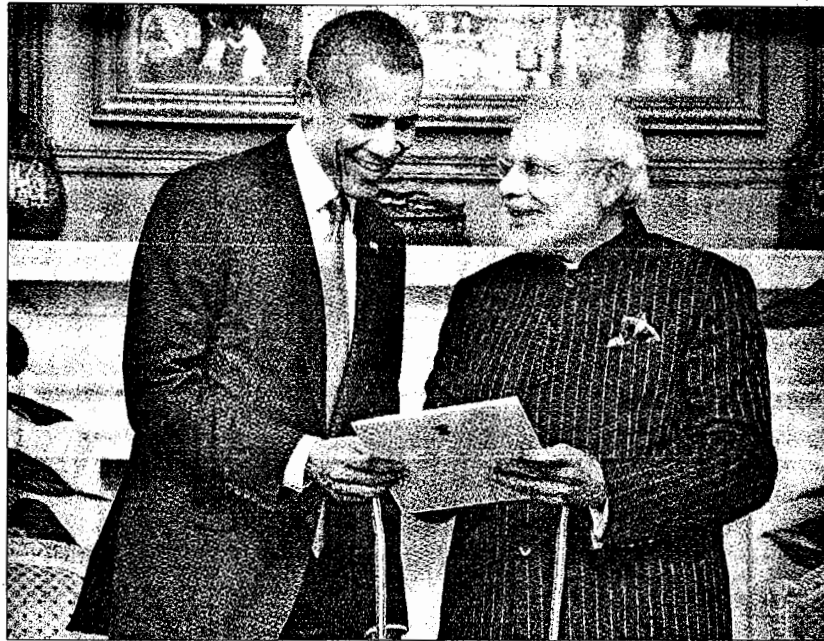


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The visit of US president Barack Obama to India is being described as a 'seminal moment' in the bilateral ties between the two countries. One of the issues that figures very high on Obama's agenda is to make a heavy-duty pitch for reviving the stalled negotiations for a bilateral investment treaty (BIT) between the two countries. American companies are very keen on the BIT, as that will ensure protection of their investment under international law. From India's perspective, it is argued that this might boost US investment flows to India, which is critical for the success of Make-in-India. India and the US started negotiating a BIT in 2008-09. However, these negotiations were interrupted when India decided to launch a review of its BITs and adopt a new model.

The major speed-breaker in US-India BIT negotiations is the lack of clarity on India's stand on BITs. India discovered in 2011, more than 15 years after having signed the first BIT in 1994, that these treaties could be used by foreign investors to challenge sovereign regulatory measures of Indian state at international arbitral forums. This 'late learning' happened after India lost a BIT dispute in 2011 to White Industries, an Australian company; and after being sued by major foreign corporations like Vodafone, Nokia, Telenor, Deutsche Telekom under various Indian BITs. Academics working in the area, including this author, have been arguing for review of BITs given India's susceptibility to such BIT claims much before India was sued by these foreign corporations. However, wisdom dawned on the Indian government only after it was sued!

Unfortunately, the review of India's BITs and the work towards developing a new model BIT has been kept away from public glare and is shrouded in bureaucratic opaqueness. Supposedly, India has developed a new model BIT, which will serve as a template for India's future BIT negotiations. However, apart from media reports and analyses by individual academics and experts based on media reports, mighty little information is publicly available about the new model. Why has the draft text of the new model BIT not been publicly shared to solicit comments from public at large? Also, reportedly, there is divergence within Indian government on BITs with some favouring their abrogation, while some in favour of retaining BITs after overhauling the current model.



The US model BIT covers IPR under the definition of investment. This means that foreign investors can use BIT to protect their IPRs. Given India's sensitivity with regard to IPR protection and reports that India wishes to have a truncated definition of investment in its future BITs, will India agree to such a provision, especially extended to pharmaceutical corporations, to use BIT to enforce IPR protection?

Consequently, while the US position on BITs is well-known from its model BIT of 2012, India's position on BITs is uncertain. This raises many questions, which have to be answered for any meaningful negotiation to take place between the two countries on signing a BIT. First, the 2012 model US BIT contains elaborate provisions for investor-state arbitration. This provision empowers private investors to directly bring claims against sovereign action of host states as treaty breaches at international arbitral forums. India's position on this issue is not clear. In view of the fact that many foreign corporations have served BIT arbitration notices to India, some in the Indian government, reportedly, want the abolition of the investor-state arbitration provision in BITs whereas some favour retaining it though with modifications. The modification could be in the form of introducing a strict fork-in-the-road clause in investor-state arbitration so that the investor is compelled to choose between domestic courts and international arbitration to pursue its claims against host state. Will the US accept a BIT with India without the investor-state arbitration provision or with a severely curtailed investor-

state arbitration provision?

Second, in addition to the typical provisions contained in most BITs, the US model BIT contains provisions on investment and environment, investment and labour, etc. This is at variance with India's existing model BIT and treaty practice. Will India be comfortable linking investment with labour and environment given its traditional opposition to linking trade and investment issues with non-economic matters?

Third, if media reports are to be believed, India might prefer a very restrictive most favoured nation (MFN) clause in its BITs to ensure that foreign companies including American corporations do not circumvent BIT provisions by treaty shopping. There is also speculation that India might prefer not to have MFN provision in BITs at all. India losing the BIT dispute to White Industries due to the interpretation of the MFN provision is hugely responsible for this. Will the US sign a BIT with India without a MFN provision?

Fourth, the US model BIT recognises pre-entry national treatment protection. This means that foreign investors and investments

enjoy the right not to be treated less favourably in comparison to domestic investors and investments even before the investment has actually entered the country. Will India accept this given its existing FDI policy that screens investment at borders in many sectors?

Fifth, the US model BIT covers intellectual property rights (IPR) under the definition of investment. This means that foreign investors can use BIT to protect their IPRs in host states. Given India's sensitivity with regard to IPR protection and reports that India wishes to have a truncated definition of investment in its future BITs, will India agree to a provision that allows US companies, especially pharmaceutical corporations, to use BIT to enforce IPR protection?

Currently, there is very little meeting ground between the two countries on core issues of a BIT. For any positive movement forward, it is imperative that India articulates its clear stand on BITs putting an end to all speculative analysis.

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