

BITs shouldn't bite: Let's rethink our bilateral investment treaties

Such a revamp of India's model BIT should focus on regulatory certainty and dispute prevention



**R.V. ANURADHA
& PIYUSH JOSHI**

are partners at Clarus Law Associates, New Delhi.

India's budget for 2025-26 lays out a two-pronged approach to enhancing foreign investments: revamping India's model Bilateral Investment Treaty (BIT) to "encourage sustained foreign investment" and undertaking necessary "regulatory reforms" to ensure a light-touch regulatory framework based on principles and trust to "unleash productivity and employment." Both must go hand in hand.

The "model BIT" referred to is the one released by the government in 2016 to overhaul India's approach to BITs. While India had signed over 80 BITs between 1994 to 2011, it terminated 68 of them in 2016-17. Other countries did likewise, as the 1990s model followed globally was widely seen as outdated. India's reworked model BIT, however, did not find many takers. This is why the budget has proposed a relook.

A BIT is an agreement between two countries for the promotion of mutual investments that assures protection from arbitrary governmental action, compensation in the event of expropriation (or damage), guarantees of smooth fund transfers and dispute settlement mechanisms to resolve disputes between the governments of both countries, as well as between a country and a foreign investor.

This ability of a foreign investor to initiate disputes, called investor-state dispute settlement (ISDS), has been one

of the most controversial aspects of BITs. Its chief architect was the US, but the US itself, under both the Trump and Biden presidencies, has disavowed it. This mechanism provides foreign companies a higher level of protection and exclusive access to special supra-national tribunals for arbitration. In the absence of multilateral checks and balances, ISDS has led to fragmented jurisprudence and extensive trials without meaningful scope for appeal. A renowned practitioner has called it the "wild wild west of international law." The sectors most prone to ISDS litigation worldwide, such as energy, defence, mining, telecom, financial services, water and sanitation, transport and construction, are precisely the ones where India is seeking greater private investment. These are also sectors where laws are constantly evolving to keep pace with emerging technologies and public policy changes.

India has had a spate of investor-state disputes. Retrospective taxes levied on Vodafone's and Cairn Energy's investments in India were challenged, for example, and both cases were settled after prolonged litigation. As a reaction, India's model BIT of 2015 excluded tax related disputes and expanded the mandate for investors to exhaust all domestically available remedies for five years before initiating ISDS arbitration abroad. These aspects, among others, have not been accepted in any new BIT. India has wasted must energy on their defence, but the bigger question is whether ISDS is necessary for a BIT.

A study by the World Bank in 2003 concluded that ISDS results in superior rights for foreign investors than what domestic investors have. More importantly, it exposes the state to potentially large liabilities and also poses hurdles for policy reforms.

Strong investor protection commitments in BITs can exist without the ISDS mechanism. Brazil has remained an attractive investment destination without it by focusing its bilateral pacts

on investment facilitation and conflict prevention. The Brazil-India Investment Cooperation and Facilitation Treaty, for instance, provides for a three-step alternative to ISDS: (a) national-level ombudsmen dedicated to supporting each other's investors through a collaborative approach to dispute prevention, (b) matters that get escalated can be referred to a joint committee with representatives of both countries; and (c) arbitration for disputes that still persist.

Dispute pre-emption can be achieved by having ombudsmen, with processes for conciliation and mediation, as part of the reforms that the finance minister spoke about. Equally important is the 'dispute-proofing' of sensitive sectors through institutionalized risk assessments of legislative and executive proposals. This would help India design laws and take executive action in ways that are consistent with BIT obligations and achieve policy objectives in a manner that is compatible with the same.

This would be invaluable to India's growth story, especially if coupled with other proposals, from overhauling regulations, certifications, licences and permissions to the development of an Investment Friendliness Index of States, trade facilitation through voluntary compliance devices, streamlining of cargo screening, creation of warehousing facilities, establishment of a national framework for global capability centres and the setting up of Bharat-TradeNet, a unified platform for trade documentation and finance solutions.

India's range of bilateral as well as multilateral trade and investment agreements has been expanding, with important signals being sent out to assure investors and traders of a predictable and investor-friendly regulatory regime in the country. No law, however, is static, and we need policy space for achieving legitimate goals. BITs need to be revised in a manner that is mindful of what serves India best.

These are the authors' personal views