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More than a BIT of protectionism

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The Narendra Modi government's stand on foreign investment is bewildering. On the one hand, it rolls out the red carpet to foreign capital under 'Make in India'. On the other, it reduces legal protection for foreign investors. The reported expiration of India's bilateral investment treaty (BIT) with the Netherlands on November 30, due to India unilaterally terminating the treaty, is a classic example. India has also issued notices to around 50 countries to terminate BITs, which includes about 20 European Union (EU) member countries. These will come into

force soon. These treaties play a critical role in protecting foreign investment by holding host states accountable for the exercise of their regulatory power through an independent international arbitration mechanism, thus furthering international rule of law. BITs involve a certain degree of trade-off between protecting foreign investment and preserving the host state's regulatory power.

The narrative on BITs in India has oscillated from one extreme to the other. From 1994 to 2011, India signed 70-odd BITs tilted heavily in favour of investment protection against the host state's regulatory power. Instead of correcting this laissez-faire narrative by balancing investment protection and the state's regulatory power, the pendulum has now swung to the other extreme. The recently adopted Indian model BIT tilts the balance towards the host state's regulatory power by severely limiting the substantive and procedural protection to foreign investment. India's BIT loss to White Industries, an Australian investor, in 2011 and a slew of BIT cases slapped by many foreign corporations triggered this protectionist narrative. The recent loss in the Devas multimedia case under the India-Mauritius BIT, which arose on account of the cancellation of the Antrix-Devas deal, has strengthened this narrative. This is problematic in terms of protection of investment in India and Indian investment abroad.

Protection of foreign investment in India

Termination of BITs by India will not impact existing foreign investment in India because most Indian BITs contain survival clauses ensuring availability of treaty protection for existing investment even after the expiration of the treaty for the next 10 to 15 years. Termination of BITs will also not impact any of the 15-odd ongoing BIT disputes against India including Vodafone's challenge of retrospective taxation under the India-Netherlands BIT.

Nevertheless, termination of BITs means that new foreign investment, such as any new Dutch investment in India made after November 30 shall not enjoy treaty protection. This shows India's reluctance to be held accountable for its regulation under international law, thus forcing foreign investors to rely entirely on domestic laws and domestic courts to safeguard their interest. This may not be an attractive proposition for foreign investors for two reasons. First, if domestic laws are changed suddenly to the detriment of foreign investors, like it happened in the case of Vodafone where Parliament retrospectively amended the Income Tax Act to overrule the Supreme Court's decision in favour of Vodafone, it would leave the foreign investor without any remedy. Second, the overstretched Indian judicial system does not inspire much confidence in foreign investors as a forum for speedy resolution of disputes.

Subsequent to termination, India plans to launch new BIT negotiations with these 50-odd countries based on its 2015 model BIT. For example, with respect to EU countries, India hopes to replace the cluster of European BITs with the India-EU Bilateral Trade and Investment

Agreement (BTIA), However, international treaty negotiations take time. The India-EU BTIA, despite 16 rounds of negotiations since 2007, has not been signed due to major differences. Unilateral termination of BITs by India has not gone down well with the EU, which means even further delay in BTIA obligations. Brexit has complicated things even more. The legal vacuum created would surely dampen investor sentiment, especially because there is far too much state interference in businesses in India that make the country a difficult place to do business. India's rank in World Bank's ease of doing business is abysmal at 130 out of 190 nations. When it comes to specific factors that are critical for foreign investors, such as enforcing contracts, India's rank is even worse at 172. Moreover, major countries that export capital to India are unhappy with the protectionist template of India's new model BIT as the basis to negotiate the new treaty.

Protection of Indian investment abroad

Today, India is not just an importer but also an exporter of capital. India's overseas FDI has increased from less than \$1 billion in 2000-01 to more than \$21 billion in 2015-16. Given the reciprocal nature of BITs, their termination followed by replacement with a protectionist treaty will also reduce the protection available to Indian companies abroad. The significance of BITs for Indian companies can be gauged from three recent instances. First, a few months back, an Indian investor, Flemingo Dutyfree Shop Private Limited (FDF) successfully sued Poland under the India-Poland BIT, winning damages of €17.9 million. The tribunal found that Poland, by illegally terminating a series of lease agreements enjoyed by FDF's indirect Polish subsidiary, had expropriated FDF's investment and denied fair and equitable treatment to it under the India-Poland BIT. Second, an Indian mining company, Indian Metals & Ferro Alloys Ltd. (IMFA), has sued Indonesia under the India-Indonesia BIT at the Permanent Court of Arbitration, The Hague, claiming \$599 million in damages, for regulatory problems pertaining to the claimant's coal mining permits. Third, in a newly surfaced challenge, an Indian investor has sued Macedonia under the India-Macedonia BIT for the alleged expropriation of mining concessions awarded to the Indian investor.

Indian BITs should reconcile investment protection with the host state's regulatory power and shun laissez-faire and protectionist narratives. For this, India needs to do three things: amend the protectionist 2015 model BIT so as to strike a balance between interests of investors and that of the host state, negotiate with existing BIT partners based on this balanced model, and withdraw the termination notices till the newly negotiated text is finalised for replacing the existing BIT. This would help India resurrect its image globally of a market economy based on rule of law, not arbitrariness and cronyism.

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