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Going to Bat for the BIT

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In late September, the United States and India will have another quick burst of high-level government engagements, headlined by an expected bilateral meeting between President Barack Obama and Prime Minister Narendra Modi in New York and preceded by the newly recast U.S. India Strategic and Commercial Dialogue (S&CD). While we are seeing solid progress in many areas, Bilateral Investment Treaty (BIT) negotiations stand out as indicative of the often-slow pace of progress in achieving tangible milestones. We are now running the risk of concluding an eight-year Obama administration without substantial progress on the BIT. Yet, if anything has a chance of re-enthusing American negotiators, it would be the Indian Law Commission’s recent report highlighting key weaknesses of India’s draft model BIT—if its recommendations are taken seriously by the Finance Ministry.

Ahead of the September 2014 visit to Washington, D.C., by Prime Minister Modi, [we highlighted](#) the commercial significance of signing a high-standard BIT with India. A BIT is the most important trade agreement that appears to be within the grasp of our governments to negotiate within a reasonable period of time. While the governments did not use the September 2014 visit by Modi to recommit themselves to negotiating a BIT, they did make such a commitment a few months later when President Obama made his return to New Delhi in January 2015. The primary reason that talks have not progressed during the Obama administration is that both governments separately decided to review their model texts, and while unrelated, these reviews happened consecutively.

Months after President Obama’s visit to New Delhi, the Ministry of Finance finally revealed the draft version of its new [model BIT text](#). The new model breaks from the Organization for Economic Cooperation and Development (OECD) template that had previously been the basis for India’s negotiating text. Reflecting concerns about a number of arbitration cases employing the BITs already in force, India’s new draft BIT removes the applicability of “Most-Favored Nation” status, increases obstacles to taking a case to arbitration, excludes some types of passive investments, and adds a number of ambiguous exclusions to the BIT’s arbitration provisions. The Ministry of Finance requested comments on the draft and was expected to issue the final model BIT sometime in the fall.

Then comes a strong, supportive interjection from an unexpected place—the Law Commission of India. In late August, the Law Commission offered an [unsolicited response](#) to the draft model BIT. At a high level, the Law Commission points out that the new model would not serve the Modi government’s larger purpose of facilitating investment. Among the key points raised by the Law Commission:

- **Most-Favored Nation (MFN):** Makes the case for reintroducing MFN, even if limiting its applicability somewhat.

KEY DATA

+9.1%



Increase in U.S.-India goods trade, 12-month rolling average, per U.S. Census.

+27.0%



Increase in FDI, 12-month rolling average, per DIPP.

-34.8%



Increase in FII, 12-month rolling average, per NSDL.

- **Investors should strive to meet host country development objectives:** The Law Commission notes that including such a general provision is too vague, and its exact intent should be spelled out with greater detail.
- **Launch/use of Investor-State Dispute Settlement (ISDS):** The Law Commission raises concerns about the process for moving forward with ISDS, such as the need to use local legal remedies first and the one-year waiting period before an investor can trigger dispute settlement.
- **Exclusions:** The Law Commission raises the concern about the general nature of some exclusions, allowing for the Indian government to self-judge which measures run afoul of BIT provisions.
- **Amendments:** The Commission wants to curb India's ability to amend the BITs and other limits such as retroactive applicability of amendments.
- **Renewal:** The draft model calls for signatories to proactively renew investment treaties after 10 years. The Law Commission calls for auto-renewal.

The Law Commission's recommendations are not binding. But it is helpful to see such an important body weigh in on a critical issue and remind policymakers that the purpose of trade agreements is to facilitate economic ties, not to scare investors. Thinking ahead 18 months, we will have a new U.S. president and senior economic team. If the next U.S. administration looks back and cannot see progress on our BIT talks during an entire two-term administration—and in fact the models have drifted further apart—negotiating a BIT will start out quite low on the list of priorities for the new U.S. trade team. There is still time to generate momentum, but the most important move in this regard must be taken by the Finance Ministry as it prepares to issue its final model text.

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