

## BITs and pieces of trade with Israel

Many pundits in India continue to gaze at the India-Israel relationship through the lens of Palestine. However, some argue that it is critical to de-hyphenate India's relations with Israel and Palestine, a process that began in 1992 when New Delhi established diplomatic relations with Tel Aviv and which has gathered steam since then. [Prime Minister Narendra Modi's visit to Israel](#) earlier this month made this de-hyphenation blatant and conspicuous.

Growing trade and investment relations are a strong reason to study India-Israel relations on their own merit. Bilateral merchandise trade increased from \$200 million in 1992 to around \$4 billion in 2016, an increase of 2,000% in 25 years. Cumulative foreign direct investment (FDI) inflows from Israel, from April 2000 to March 2017, stood at \$122 million. While these are low, constituting only 0.04% of total FDI inflows to India, there is enormous potential for Israeli investment in fields such as renewable energy and water management (drip irrigation and desalination). Defence production, which is at the heart of the 'Make in India' campaign, is another area with significant potential for Israeli investment, a move that will help India save billions of dollars it currently spends on importing weapons from Israel. Israel is the third largest supplier of arms to India after Russia and the U.S. Investment in defence production will also give a fillip to domestic manufacturing, reduce dependence on bureaucratic state-owned ordnance factories and bring in new technology — an example being the recently set up plant in Madhya Pradesh, between India's Punj Lloyd and Israel Weapon Industries, to manufacture small arms.

Boosting trade and investment ties found explicit mention in the India-Israel joint statement during Mr. Modi's visit. To encourage bilateral investments, Mr. Modi and his Israeli counterpart, Benjamin Netanyahu, also agreed to conduct negotiations on a bilateral investment treaty (BIT).

Is an India-Israel BIT possible? In 1996, India and Israel signed a BIT. However, this was reportedly terminated by India when it unilaterally discontinued 58 BITs recently. For a new BIT to be negotiated, both sides will have to start afresh. However, there are challenges given the many fundamental differences Israel and India have on BITs, as outlined in their Model BITs of 2003 and 2016, respectively. The first is on the investor-state dispute settlement (ISDS) provision that allows foreign investors to bring claims against a host state for alleged treaty breaches at international arbitral forums. Foreign investors prefer international arbitration — which is faster and independent — over litigating in domestic courts. The Israeli model gives an investor the choice to submit any investment dispute with a state to international arbitration if not resolved within six months through negotiations. The Indian model imposes many procedural and jurisdictional restrictions on an investor's right to bring an ISDS claim. These include a foreign investor having to litigate in domestic courts for five years before pursuing a claim under international law. These requirements make it very difficult for a foreign investor to make efficient use of the ISDS provision.

### Bit of a bumpy ride

Second, Israel's model provides a broad asset-based definition of foreign investment that covers both FDI and portfolio investment. The Indian model of 2016 defines investment narrowly as an enterprise (with its assets) that has to possess certain characteristics of investment including the investment having 'significance for the development' — words not defined in the BIT — of the host country. Third, the Israeli model contains a broad most favoured nation (MFN) provision — a cornerstone of non-discrimination in international economic relations — which is missing in the Indian model. The absence of MFN, from Israel's perspective, would mean that its businesses would have no remedy under international law if India were to discriminate against it, say, by offering greater incentives to another defence manufacturer over an Israeli one.

Fourth, the Indian model excludes taxation altogether from the purview of the BIT. Thus, the foreign investor cannot bring an ISDS claim even if taxes imposed are confiscatory, discriminatory or unfair. However, in the Israeli model, taxation-related measures are recognised as an exception only to MFN and national treatment provisions. Foreign investors can still challenge taxation-related measures for violating other BIT provisions such as the fair and equitable treatment or expropriation. India's recent record in administering its taxation laws has made foreign investors jittery. The World Investment Report 2017 issued by the United Nations Conference on Trade and Development also points out that tax-related concerns are a deterrent for some foreign investors to invest in India. Thus, Israeli investors will not be comfortable if taxation is completely outside BIT's purview.

In sum, the Indian position on BITs is very pro-state, offering limited rights and protection to foreign investors. The Israeli position is the opposite. An India-Israel BIT looks difficult till both sides move away from their stated positions. Both sides should work towards having a BIT that reconciles investment protection with a state's right to regulate.

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