"DEFINING PARTNERSHIP OF THE 21ST CENTURY": E VISA POSSIBILITY FOR INDIAN CITIZENS?

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U.S. immigration laws specifically authorize the issuance of E visas to nationals of a country that has qualifying treaty[i] of commerce and navigation with the United States. Such qualifying treaties may include treaties of Friendship, Commerce and Navigation (FCNs) and Bilateral Investment Treaties (BITs).

A BIT is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in another state. This type of investment is called foreign direct investment (FDI). BITs acts as a tool in protecting the FDI in a volatile market. Especially, they protect foreign investments in light of the risks that foreign investors face in many parts of the world, including cancellation of concessions, leases, or licences; expropriation of shares; windfall, royalty, and other taxes; exchange rate risks; prohibition on the repatriation of profits; political or court interference; environmental regulation and remediation responsibility; land rights issues; riots; and protests, to name but a few. Faced with such risks, and given the likelihood that local courts and laws may not provide a speedy, effective and unbiased means of resolving investment disputes, BITs provide foreign investors with an additional level of protection under international law.

There are two types of E visas: Treaty Trader visa (E-1) and Treaty Investor Visa (E-2). The E-1 visa is applicable to a treaty national entering the U.S. solely to carry on substantial trade, which is international in scope and principally between the U.S. and the foreign state. For E-1 visa, the treaty national must be an essential employee, employed in a supervisory or executive capacity, or possess highly specialized skills essential to the efficient operation of the firm. Ordinary skilled or unskilled workers do not qualify. The E-2 visa applies to a treaty national [or an entity owned by the treaty national(s)] to develop and direct the operations of an enterprise in which he or she has invested or is actively in the process of investing a substantial amount of capital. For E-2 visa, if the applicant is not the principal investor, s/he must be considered an essential employee, employed in a supervisory, executive, or highly specialized skill capacity.

There is no bright line test of what would constitute a "substantial" amount of capital. The U.S. State Department acknowledges that the costs of investing in a business can vary dramatically, depending on the nature of the business: many millions to buy an automobile factory; and only a relatively small sum to set up a consulting firm. Further, the general rule requires that over 50% of the total volume of the international trade[ii] conducted by the treaty trader regardless of location must be between the United States and the treaty country of the alien's nationality.

For a business to qualify for Treaty Investor visa, apart from being a national of the treaty country, at least 50 percent of the business must be owned by person(s) with the treaty country's nationality.

Additionally, besides the requirement of investment being substantial, the investment must be a real operating enterprise, an active commercial or entrepreneurial undertaking. A paper organization, speculative or idle investment does not qualify. Uncommitted funds in a bank account or similar security are not considered an investment.

E visas have certain advantages over other nonimmigrant visas. Unlike the L-1 visa, the E visa categories do not require the setting up of a branch, subsidiary or parent in the U.S. of a foreign entity. The E visa category also has less government regulations compared to the H-1B visa category. There is no prevailing wage requirement, labor certification attestation, and posting and public access file requirements. Neither there is a cap on the initial grant of E visas nor cap on E visa extensions. Both E-1 and E-2 visa holders are initially granted stay of two years with the possibility of unlimited extensions. All E nonimmigrants, however, must maintain an intention to depart the United States when their status expires or is terminated. Further, Treaty traders/investors and employees may be accompanied or followed by spouses and unmarried children who are under 21 years of age and can get work authorization. More so, their nationalities need not be the same as the treaty investor or employee. Note that since E visas are not dual intent visas, an alien cannot pursue permanent residency (green card) application while on E nonimmigrant status.

Although United States has entered into treaties with some of the India's neighboring states (Pakistan, Sri Lanka[iii] and Bangladesh[iv]), at present, India does not have an FCN treaty, BIT or equivalent treaty with the U.S. In past, India and the United States have engaged in BIT negotiations to enhance trade relations and investment flows. This treaty under negotiation, which has been languishing since 2008, aims to protect and promote investments and guarantee international minimum standards in the treatment of foreign investments.

While on the one hand an investment treaty between India and the U.S. would provide important protections to U.S. investors from arbitrary, discriminatory or confiscatory measures, and would be enforceable by independent international arbitration. On the other hand, such a treaty could also help facilitate additional investment in infrastructure and other priorities in India where investment is badly needed.

Both Washington and New Delhi want to embrace the idea of BIT but so far they have not been able to reach a common ground and gather political support. The enthusiasm of the United States in entering a BIT with India can be sensed through a letter sent by the members Senate India Caucus, U.S. Senate, urging the President Barack Obama to expedite the ongoing discussions about the treaty between the U.S. and India. The letter, in pertinent part, states that: *"Many countries have already recognized and acted upon the incredible economic opportunities India presents. India has completed investment agreements with 80 countries including all major European nations, ASEAN, Japan and South Korea. In order to overcome the competitive disadvantage already facing American companies in the Indian marketplace, it is imperative that the United States move forward quickly to negotiate and conclude this treaty…"*

While bilateral trade and investment between the United States and India has quadrupled since 2006—now at approximately $100 billion, with U.S. investment in India at $28 billion—the Obama administration and U.S. businesses argue that the trade partnership has not reached its potential and that India's trade policies are, in fact, sometimes discriminatory to U.S. companies. Washington has urged the Indian government to break down business barriers by changing its intellectual property laws, especially as they relate to pharmaceuticals; address inconsistent tax treatment; requirements that companies buy local content, such as in the telecommunications industry and renewable energy sector; and limitations on foreign direct investments. While the Indian government has already undertaken a number of policy changes to begin addressing the trade and investment partnership with the U.S., New Delhi is reluctant to the idea of investor-state arbitration[v] and has been pressing Washington to give its local courts the jurisdiction over the cases that may arise.

The reason for India's reluctance to the Investor-State arbitration emanates from its past experience. India has signed 82 BITs, of which 72 are in force. Among the countries with which India has concluded BITs are Australia, Belgium, Cyprus, France, Germany, Indonesia, Korea, Kuwait, Malaysia, Mauritius, Netherlands, Qatar, Russia, Switzerland, and the United Kingdom. India has recently seen a surge of investment arbitration cases brought against it because of the investor-state arbitration clause in the existing BITs. Even though India appears to have been a party to few unreported investment arbitration cases, India did not experience its first publicized loss in an investor–state arbitration until *White Industries Australia Ltd. v. India* in November 2011. The arbitration tribunal in *White Industries* held in favor of an Australian mining company and awarded it US$5 million in damages as the company had suffered long delays in the Indian courts enforcing a commercial arbitral award against an Indian state-owned company. Additionally, the invalidation of 2G license auctions that were conducted in 2008 by the Indian Supreme Court in 2012 led to additional claims against the Indian government under the already existing BITs. As a result, the Indian government has expressed strong dissatisfaction with the investor-state dispute resolution provisions of its BITs, and India's Finance Minister approved the creation of a permanent body to advise on the renegotiation of India's existing BITs, with the apparent purpose of either weakening or removing investor-state dispute resolution provisions from India's BITs.

There are differences between the United States and India in the initial bargaining positions regarding BIT, but few show any philosophical difference that cannot be overcome. For what President Obama calls one of the "defining partnerships of the 21st century," letting the economic side of things drift is unacceptable. Political leaders on both sides will need to push for an expansive vision of the possible cooperation between the two countries. By midcentury, the United States and India are forecast to be the second- and third-largest economies in the world. Now is the time for these two economic giants to prioritize their bilateral economic relationship in order to rise to the occasion. While no doubt such a treaty would provide protection to the investments and open new avenues of investment for both countries, it would bestow immigration benefits (such as E visa) to its nationals, which in turn will further benefit the economy of both countries.

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[i] A treaty is an agreement under international law entered into by actors in international law, namely sovereign states and international organizations. A treaty may also be known as an (international) agreement, protocol, covenant, convention, pact, or exchange of letters, among other terms. Regardless of terminology, all of these forms of agreements are, under international law, equally considered treaties and the rules are the same.

[ii] There must be an actual exchange, in a meaningful sense, of qualifying commodities such as goods, moneys, or services to create transactions considered trade.

[iii] Only Treaty Investor (E-2) classification

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[v] Countries concluding investment treaties almost always negotiate a dispute settlement provision. This generally includes conditional or unconditional consent to international arbitration, usually at the International Centre for Settlement of Investment Disputes (ICSID).