A BIT to Review

Why in news?

The Standing Committee on External Affairs submitted its report on the subject 'India and Bilateral Investment Treaties' on September 10, 2021.

What are BITs?

- Bilateral Investment Treaties (BITs) are reciprocal agreements between two countries to promote and protect foreign private investments in each other's territories.
- BITs encourage foreign investors to invest in a State and there by contributing towards overall developments and advancements of the economy.
- The following are the essential clauses covered under BITs.
    1. Applicability
    2. Fair and Equitable Treatment and Full Protection & Security
    3. National treatment and Most-favored-nation treatment
    4. Expropriation
    5. Dispute settlement mechanisms - between States and between an investor and a State

What about India's experiments with BITs?

- India's tryst with BITs started in **1994** when it signed its first with the **United Kingdom**.
- It subsequently went on to sign BITs with more than 80 countries.
- ***White Industries v. India***- India's love for BITs ended in heartbreak in 2011, when an international tribunal ordered India to pay 4.10 million Australian dollars (plus interest and costs) to White Industries under the 1999 Indo-Australia BIT.
- India had started receiving notices under various BITs in relation to the retrospective tax amendments and cancellation of 2G licenses.
- In this background, in 2015, India started drafting a new model BIT to replace the existing **model Bilateral Investment Promotion Agreement** (2003).
- The **model BIT** was finalized and released in public domain in **2016**.

What is the 2016 model BIT about?

- **Definition of investment-** The Model has adopted an 'enterprise-based' definition of investment under which investment is treated as the one made by an enterprise incorporated in the host state.
- Under the earlier 'asset based definition' of investment, intellectual property and other assets were included.
- **Exclusion of MFN treatment-** The foreign investors sued India arguing that they have to get the same beneficial treatment given to companies from other countries.
- In the case of White Industries, the Australian firm has highlighted the MFN status provided under the India-Kuwait BIT to claim compensation from the government.
- **Full Protection and Security (FPS) -** FPS means obligations only relating to physical

security of investors and to investments.
- **State government as stake holders-** Actions of the state Governments are included under the Model BIT.
- **Fair and equitable treatment (FET)-** The Model BIT links Fair and Equitable Treatment to international laws to counter a broad interpretation and risk misuse.
- **Expropriation-** Expropriation means nationalization of assets of foreign companies.
- The Model BIT provides that the State cannot expropriate or take measures equivalent to expropriation, except “for reasons of public purpose” in accordance with the procedure established by law and on payment of adequate compensation.
- **Non-Discriminatory treatment-** Investors can avail non-discriminatory compensation in circumstances like armed conflict, natural disasters and in the state of national emergency.
- **Transparency-** The Model BIT requires the Parties to ensure that all the laws, regulations, procedures and administrative rulings covered in the BIT are published or are available for interested persons.
- **Corporate Social Responsibility (CSR)-** The Model BIT mandates foreign investors to voluntarily adopt internationally recognized standards of CSR.
- **International arbitration-** The aggrieved investor should use all local remedies as well as negotiations and consultations initiating arbitrations against the host State.
- Investor can use outside remedies **only five years after** resorting to all domestic arrangements.
- **Excludes matters relating to taxation-** The model BIT approved by the cabinet excludes matters relating to taxation.

What is wrong with the model BIT?

- **Limited liability**- The sole focus on the entire model BIT is to limit the liability for the host state and raise the bar required to bring a claim under the BIT.
- **Definition of investment-** It narrows down the definition of “investment” and removes much of the protections that investors largely rely upon.
- The enterprise based definition is riddled with vague qualifications such as “certain duration”.
- **Fair and equitable treatment**- It has been replaced with protections that require steep thresholds to be invoked.
- **MFN-** The well recognized doctrine of Most-Favoured Nation is also absent.
- **Exclusion of matters relating to taxation-** The Vodafone tax experience is reflected in the model BIT where taxation measures have been exempted from the protections offered under the BIT.
- **International arbitration-** The biggest disappointment of the model BIT is the insistence on exhausting the domestic remedies for at least 5 years before commencing arbitration under the BIT.
- **Issues for Indian companies-** Indian companies investing abroad will also have similar limitations on protections and be subject to the local judicial bottlenecks.

What is the context of reviewing India’s approach towards BITs?

- **Frequent sueing**- Since the White Industries case, foreign investors have sued India around 20 times for alleged BIT breaches.
- This made India the 10th most frequent respondent-state globally in terms of investor-state dispute settlement (ISDS) claims from 1987 to 2019 (UNCTAD).
- **2016 Model BIT-** India adopted a new Model BIT in 2016, which marked a significant

departure from its previous treaty practice.
- **Future BITs**- India is in the process of negotiating new investment deals (separately or as part of free trade agreements) with important countries such as Australia and the U.K.

What are the recommendations of the Standing Committee?

- **Expedition of existing negotiations**- The Committee noted that India has signed very few investment treaties (with only 4 countries) after the adoption of the Model BIT.
- It recommends fastening the existing negotiations and concluding the agreements at the earliest because a delay might adversely impact foreign investment.
- **FDI-** The committee recognises the potential of BITs in attracting foreign direct investment (FDI).
- The committee recommends that India should sign more BITs in core or priority sectors to attract FDI.
- It will require an overhauling of India's extant treaty practice that focuses on safeguarding certain kinds of regulatory measures from ISDS claims rather than limiting BITs to specific sectors.
- **Fine-tuning Model BIT**- The Model BIT gives precedence to the state's regulatory interests over the rights of foreign investors.
- The Model BIT should be recalibrated by tightening the language of the existing provisions to limit the discretion of ISDS arbitral tribunals and striking a balance between investment protection and the state's right to adopt bonafide regulatory measures for public welfare.
- **Capacity building**- The committee recommends bolstering the capacity of government officials in the area of investment treaty arbitration.
- There is a need for an institutionalised mechanism for capacity-building through the involvement of public and private universities that have competence in this field.
- The government should also consider establishing chairs in universities to foster research and teaching activities in international investment law.

What does this call for?

- Changing laws retroactively (Vodafone and Cairn suing India), annulling agreement in the wake of imagined scam (taking away S-band satellite spectrum from Devas), and the judiciary's weakness in getting its act together (the White Industries case), etc. reflects India's poor governance.
- Greater regulatory coherence, policy stability, and robust governance structures to avoid ISDS claims is the need of the hour.
- The government should assemble an expert team to review the Model BIT.

References

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