Bilateral Investment Treaties

September 28, 2020

Bilateral investment treaties (BITs) are international agreements establishing the **terms and conditions for private investment** by nationals and companies of one state in another state. The BITs give investors better access to foreign markets and on fairer terms. When countries enter into a BIT, both countries agree to **provide protections for the other country's foreign investments that they would not otherwise have.**

Objectives of BITs

- to protect investment abroad in countries where investor rights are not already protected through existing agreements (such as free trade agreements)
- to encourage the adoption of market-oriented domestic policies that **treat private investment in an open, transparent, and non-discriminatory way**
- to support the **development of international law standards** consistent with these objectives
- ensure that foreign governments will treat the investors the same as domestic companies; this right is known as **national treatment.**
- BITs also guarantee that the investors are given the same types of preferences that other foreign investors are given in a market, also called **most-favored nation treatment.**
- BITs also protect investors in several other ways. For example, BITs **limit foreign governments' ability to take over the investments** in their country. If such an expropriation does happen, BITs ensure governments compensate investors in a fair and timely manner.
- They allow for an **alternative dispute resolution mechanism**, whereby an investor whose rights under the BIT have been violated could have recourse to

International arbitration, often under the auspices of the ICSID (International Center for the Settlement of Investment Disputes), rather than suing the host State in its own courts.

India’s Model Bilateral Investment Treaty

- After foreign investors sued India under different BITs, India realised that **broad and vague investment protection standards** can be interpreted in manners that give precedence to investment protection over the host state’s right to regulate.
- 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. Intellectual property assets are not considered.
- It **dropped the Most Favoured Nation (MFN)** status which was previously included.
- It **links ‘Fair and Equitable Treatment’ to international laws**, aimed at countering a broad interpretation and risk misuse. Any potential violation listed in the provisions of denial of justice and breach of due process requires a violation of customary international law for a claim to be justified.
- It provides that the State cannot nationalize or expropriate (nationalization of assets of foreign companies) an investment or take measures equivalent to expropriation, except for reasons of public purpose. However any measure by a judicial body aiming to protect public interest will be outside the purview of expropriation.
- It stipulates that the aggrieved investor should use all local remedies as well as negotiations and consultations initiating **arbitration** against the host State.