General Studies – 2 *Topic: Bilateral, regional and global groupings and agreements involving India and/or affecting India's interests*

Bilateral Investment Treaty (BIT)

1) What is BIT

- A bilateral investment treaty (BIT) is an agreement establishing the terms and conditions for private investment by nationals and companies of one country in another country.
- Most BITs include fair and equitable treatment, protection from expropriation, free transfer of means and full protection and security.
- The distinctive feature of many BITs is that 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
- This is through ICSID (International Centre for the Settlement of Investment Disputes), rather than suing the host State in its own courts.
- This process is called investor-state dispute settlement.

2) Background

- The first BIT was signed by India on March 14, 1994. Since then the Government of India has signed BITs with 83 countries.
- These BITs were largely negotiated on the basis of the Indian Model BIT of 1993.
- The Union Cabinet had given its approval for the revised Model Text for the Indian Bilateral Investment Treaty in December 2015.
- The revised model BIT will be used for re-negotiation of existing BITs and negotiation of future BITs

3) Importance of BIT

- A BIT increases the comfort level and boosts the confidence of investors by assuring a level playing field and non-discrimination in all matters
- It provides for an independent forum for dispute settlement by arbitration.
- It is broadly akin to the right of equality and protection against arbitrary state action.
- The Treaty seeks to promote and protect investments in either country with the objective of increasing bilateral investment flows.
- It also seeks to encourage each country to create favourable conditions (climate) for investors of the other country to make investments in its territory

4) Criticism

- NGOs have spoken against the use of BITs, stating that they are mostly designed to protect the foreign investors.
- They do not take into account obligations and standards to protect the environment, labour rights, social provisions or natural resources.
- Investors are driven by important factors like market size, availability of skilled labour, infrastructure and quality of domestic governance institutions, and not so much by the existence of a BIT.
- The costs of BITs are becoming harder. An increasing number of disputes have been brought against states laws such as anti-tobacco legislation, regulation on nuclear power, environmental regulations etc which are measures taken in the public interest
- Leading economists have similarly raised concerns about the potential impact of traditional BITs on governments' ability to regulate in the public interest.

- BITs are often detrimental for developing countries, as they provide extensive protection for foreign investors through the investor-state dispute settlement (ISDS) arbitration procedures.
- Investors who believe they are affected by policy changes can claim billions from the state.
- This gives businesses an undesirable power position

5) **Terminating BIT**

- Recently, India has terminated its bilateral investment treaties (BIT) with 57 countries, including the Netherlands.
- This means Dutch companies in India, and Indian companies in the Netherlands, can no longer make use of the controversial arbitration procedures called ISDS.
- India has also issued notices to around 50 countries to terminate BITs, which includes about 20 European Union (EU) member countries.

6) **Impacts due to termination of BIT**

- Erosion of investors' confidence, who are doing business under BIT to be terminated.
- New Investors being prevented to come to India from respective country whose BIT expired or terminated.
- Termination followed by replacement with a protectionist treaty will also reduce the protection available to Indian companies abroad.
- This shows India's reluctance to be held accountable for its regulation under international law, thus forcing foreign investors to rely entirely on domestic laws and domestic courts to safeguard their interest.
- Indian judicial system does not inspire much confidence in foreign investors as a forum for speedy resolution of disputes.
- It may affect India's ease of doing business

7) **New model BIT**

- The country's new model BIT provides the framework for new negotiations with trading partners
- The new model clarifies that it only covers investments that have a physical presence and substantial business activities in the territory of the host state.
- The investors get the significant benefit of ISDS — but not before pursuing prior remedies before domestic courts
- India's new model BIT makes clear that its goal is to accomplish more than mere investor protection.
- **Criticism**
  a) New model BIT tilts the balance towards the host state's regulatory power by severely limiting the substantive and procedural protection to foreign investment.
  b) This is problematic in terms of protection of investment in India and Indian investment abroad.
  c) It has failed to balance the protection of foreign investment with India's right to regulate
  d) The model BIT, does not have the most favoured nation (MFN) provision — a cornerstone of non-discrimination in international economic relations.

8) **Way Forward**

- The 2015 model BIT should be amended to strike a balance between interests of investors and that of the host country
- Withdraw the termination notices till the newly negotiated text is finalised for replacing the existing BIT.

- This would help India revive its image globally of a market economy based on rule of law, not arbitrariness and cronyism.
- A balanced BIT that protects foreign investment without unduly compromising the host state's right to regulate will benefit both the countries