

Standing Committee Report Summary

India and Bilateral Investment Treaties

- The Standing Committee on External Affairs (Chair: Mr. P.P. Chaudhary) submitted its report on the subject ‘India and Bilateral Investment Treaties’ on September 10, 2021. Bilateral Investment Treaties (BITs) are reciprocal agreements between two countries to promote and protect foreign private investments in each other’s territories. BITs establish minimum guarantees between the two countries regarding the treatment of foreign investments, such as national treatment (treating foreign investors at par with domestic companies), fair and equitable treatment (in accordance with international law), and protection from expropriation (limiting each country’s ability to take over foreign investments in its territory). Key observations and recommendations made by the Committee include:
- **Status of BITs:** The Committee noted that till 2015, India had signed BITs with 83 countries (of which 74 were in force). These BITs were negotiated based on the Indian Model BIT of 1993. India revised its Model BIT text in 2015. The Committee observed that since then, India has: (i) signed new BITs/Investment Agreements with only four countries and is negotiating with 37 countries/blocks, and (ii) terminated its older BITs with 77 countries (i.e., older BITs with only six countries are in force).
- The Committee observed that the number of BITs/Investment Agreements signed by India after 2015 and the number under negotiation are inadequate. It noted that BITs have the potential to attract foreign direct investment (FDI) by providing prospective investors with a higher degree of confidence in their investments. In this light, the Committee recommended: (i) signing new BITs with countries with which India had such treaties in the past, (ii) signing BITs selectively in identified priority sectors, and (iii) early completion of treaty negotiations by the Ministry of External Affairs in coordination with other Ministries/Departments.
- **Arbitration under BITs:** BITs generally provide a mechanism for settling disputes between investors and the country of investment. The most preferred mode of settling such disputes is arbitration, where parties agree to have their dispute decided by a neutral person (the arbitrator) instead of going to court. The Committee noted that so far, there have been 37 notices of dispute or letters intending to raise a dispute against India under various BITs. Although only one case resulted in India paying an arbitral award, the said award resulted in a significant cost to the exchequer. To avoid such losses in the future, the Committee recommended timely settlement of investment disputes through pre-arbitration consultation or negotiations.
- On the basis of rules and procedure, arbitration may be institutional (administered by an arbitral institution as per its rules) or ad hoc (mutually arranged by the parties). The Committee noted that the Ministry of External Affairs has signed an agreement with the Permanent Court of Arbitration (PCA), under which an arbitration administered by PCA can be conducted in India. PCA is the oldest institution for international dispute resolution. The Committee recommended the Ministry to ensure early implementation of the agreement so as to make India a hub for international arbitration.
- **Provisions of Model BIT, 2015:** The Committee noted that while the Model BIT, 2015 is an improvement over the older BITs, there is still scope for fine-tuning some of its provisions (such as those regarding the investor-state dispute settlement mechanism). It recommended that the Model BIT should: (i) be suitably amended in light of new experience gained in disputes arising out of BITs, (ii) be reviewed continuously to ensure that it is balanced and comprehensive, and (iii) incorporate best practices and provisions from BITs adopted by advanced countries after studying in detail the implementation and outcome of such treaties.
- **Drafting of BITs:** The Committee recommended that BITs should be drafted without any ambiguity, so as to avoid: (i) overbroad interpretation by arbitrators and tribunals, (ii) investment disputes or claims against India, and (iii) the abuse of certain provisions by investors.
- **Developing local expertise:** The Committee noted that since India does not have sufficient number of lawyers/judges with the requisite expertise and experience, huge fees are paid to foreign lawyers and law firms engaged to represent India in investment arbitration. It recommended developing panels of domestic lawyers (and law firms) with: (i) the requisite expertise in investment arbitration to represent India, and (ii) experience in investment treaty law to ensure good drafting of BITs. It also recommended training government officials in the field of investment treaties, and promoting the New Delhi International Arbitration Centre as a world-class arbitration centre.

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