Reviews the Bilateral investment treaties

(Mains GS 3 : Effects of Liberalization on the Economy, Changes in Industrial Policy and their Effects on Industrial Growth.)

Context:

- Last month in parliament, the Standing Committee on External Affairs presented a report on 'India and bilateral investment treaties (BITs).
- This report is momentous as it comes a decade after India lost the first investment treaty claim in 2011 *(White Industries v. India)*

Core elements:

- The broader context in which the Committee took up the task of reviewing India's approach towards BITs has three core elements.
- First, 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).
- Second, India adopted a new Model BIT in 2016, which marked a significant departure from its previous treaty practice.
- Third, 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.

Vital recommendations:

- The loss in *White Industries v. India* case was perceived as an ominous sign as it became a watershed moment for India and transformed the trajectory of India's BIT landscape triggering sweeping changes.
- The Standing Committee on External Affairs examined the overall context and made vital recommendations for the government to consider.

Expedite negotiations:

- Committee articulated its discontentment at the fact that India has signed very few investment treaties after the adoption of the Model BIT.
- It recommends that India expedite the existing negotiations and conclude the agreements at the earliest because a delay might adversely impact foreign investment.

Influenced FDI inflows:

- **C**ontrary to the position of policymakers, the committee recognises the potential of BITs in luring foreign direct investment (FDI).
- This aligns with the findings of several empirical studies that show that while individual BITs do not impact investment inflows, the cumulative effect of all BITs signed by India positively influenced FDI inflows.
- In this regard the committee recommends that India should sign more BITs in core or priority sectors to attract FDI which is a novel pathway in investment treaty-making.
- 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-tune Model BIT:

- The committee recommends that India's Model BIT will be fine-tuned because the Model BIT gives precedence to the state's regulatory interests over the rights of foreign investors.
- However, the Model BIT should be recalibrated keeping two factors in mind: tightening the language of the existing provisions to circumscribe the discretion of ISDS arbitral tribunals that offer broad interpretations, and striking a balance between the goals of investment protection and the state's right to adopt bonafide regulatory measures for public welfare.
- However, if the Model BIT is tweaked with the sole motive to reduce arbitral discretion, it might result in further skewing the balance towards the host state's right to regulate.
- This would make it arduous for India to convince its potential treaty partners like the EU which already have misgivings about the Model BIT.

Bolstering the capacity

- The committee recommends bolstering the capacity of government officials in the area of investment treaty arbitration.
- While the government has taken some steps in this direction through a few training workshops, more needs to be done.
- What is needed is 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.

Improve governance:

- A very large proportion of ISDS claims against India is due to poor governance which includes changing laws retroactively, annulling agreement in the wake of imagined scam , and the judiciary's fragility in getting its act together.
- The Committee could have emphasised on greater regulatory coherence, policy stability, and robust governance structures to avoid ISDS claims.

Conclusion:

The government should promptly assemble an expert team to review the Model BIT which involves critical voices because plural viewpoints can coalesce into an efficacious policy.