Nissan Dispute - Need for BIT revision

Why in news?

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The Japanese automaker Nissan has initiated international arbitration proceedings against India.

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How did the controversy evolve?

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- In 2010, Nissan and its partner Renault, a French carmaker, set up a manufacturing plant in Oragadam, Chennai and invested a huge sum.
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- To further promote the investment, the state government of Tamil Nadu assured several fiscal incentives.
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- This was in the form of investment promotion subsidy (IPS) and value-added tax (VAT) refunds.
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- It is learnt that the state government had paid the IPS dues.
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- But the dispute arose over VAT refund amounting to Rs 2,900 crore along with Rs 2,100 crore in damages, interest and other costs.
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- Nissan is thus seeking a compensation of around Rs 5,000 crore.
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- Having failed on several rounds of negotiations with the State and Union governments, Nissan has initiated international arbitration proceedings against the Indian government.
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- The claim is initiated under the investment chapter of the India-Japan Comprehensive Economic Partnership Agreement (CEPA).
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How did the TN government respond?

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- **Double benefits** - The TN government asserts that the car manufacturer could claim 14.5% VAT refund only for car sales within Tamil Nadu.
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- Thus, TN government has rejected Nissan’s claim on the ground that the company was seeking VAT benefits for ‘exported’ cars as well.
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- It has called this an attempt of claiming 'double benefits'.
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- **Period** - Under the MoU signed between Renault-Nissan and TN government in February 2008, tax incentives are to be paid over a period of 21 years.
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- But Nissan is trying to extract the subsidy in an accelerated fashion in less than 4 to 5 years.
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- TN government raises concern that this could disrupt the government’s financial reserves.
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What are the challenges in resolution?

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- **Tribunals** - The regulation of tax in international investment law is a highly contested issue.
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- This is because various tribunals have adopted different interpretative approaches to fix the liability of a host state.
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- **Anti-Arbitration** - With the rise of international arbitration, anti-arbitration injunctions are increasingly resorted to.
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- These injunctions are sought to restrain the initiation or continuation of arbitration proceedings.
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- In the Nissan case, the government of Tamil Nadu has approached the Madras High Court to restrain the CEPA arbitration.
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- However, similar cases reveal that international arbitral tribunal exercised its jurisdiction irrespective of domestic courts' order.
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- **Jurisdiction –** The claim relies on protections provided under an

international agreement, the CEPA, and not on any domestic law.
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- Moreover, it is the TN government which is a party to the anti-arbitration injunction proceeding and not the government of India.
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What are the gaps in the existing policy?

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- In 2015, the Model Bilateral Investment Treaty (BIT) was promulgated in response to various investment claims initiated against India.
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- However, most developed countries are hesitant to comply with new standards.
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- This is because
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i. the revised Model BIT discourages investors
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ii. specifies more regulatory risk by removing ‘most favoured nation’ clause
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iii. imposes a mandatory requirement of ‘exhaustion of local remedies’ for five years before resorting to an international forum for dispute resolution
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- There were a series of investor-state disputes initiated under different investment protection agreements by various foreign investors in the recent period.
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- Responding to this, India unilaterally terminated most BITs to which it was a Contracting Party.
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- However, it is evidently becoming difficult for the country to avoid new disputes.
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What is desired?

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- International investment protection agreements play a key role in attracting foreign capital.
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- Terminating BITs and the resultant absence of legal protections affects investor confidence in the Indian market.
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- This would run contrary to government efforts on making India a manufacturing hub and addressing issues like unemployment.
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- So a systematic revision of the Model BIT would be a practical solution.
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- The government may also consider establishing a central repository for all relevant data and documents related to investments for better transparency and accountability.
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Source: Financial Express

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