DAILY EDITORIAL ANALYSIS

TOPIC

A BILATERAL INVESTMENT TREATY WITH A 'BIT' OF CHANGE

A BILATERAL INVESTMENT TREATY WITH A 'BIT' OF CHANGE

Context

- The recent **Bilateral Investment Treaty (BIT)** between **India and the United Arab Emirates (UAE)** marks a significant shift in India's approach to investment treaties which **replaces the 2014 India-UAE investment treaty**, reflecting India's evolving stance on balancing investment protection with the state's sovereign right to regulate.

> **Do You Know?**
> - UAE is the 7th largest with a share of 3% in the total FDI received in India, with cumulative investment of approximately $19 Billion from April 2000- June 2024.
> - India makes 5% of its total Overseas Direct Investments in UAE to the tune of $15.26 Billion from April 2000 - August 2024.

About the Bilateral Investment Treaty (BIT)

- It is an **agreement between two countries** that sets the terms and conditions for private investment by nationals and companies of one state in another.
- It is a part of the **International Investment Agreements (IIAs)** under the United Nations Conference on Trade and Development **(UNCTAD)**.
- It is expected to improve investor confidence, increase foreign investments and overseas direct investment opportunities, and have a positive impact on employment generation.

India and BIT

- India has been actively negotiating BITs with various countries to boost foreign direct investment (FDI). The **recent Interim Budget** highlighted that India is negotiating BITs with trade partners to boost FDI inflow.
  - It emphasised that these negotiations are being conducted from a position of strength.
- **India's Model BIT:** India's Model BIT, adopted in 2015, has been the foundation for its investment treaties. The **objective** is to provide appropriate protection to foreign investors in India and Indian investors in the foreign country, while maintaining a balance between the investor's rights and the Government obligations.

Significances of BITs

- **Investor Confidence:** BITs can boost the confidence of investors by providing a level playing field and non-discrimination in all matters.
  - They provide an independent forum for dispute settlement by arbitration.
- **Foreign Direct Investment (FDI):** BITs can help increase the inflow of FDI.
  - For example, India is negotiating BITs with trade partners to improve its ease of enforcing contracts, which is currently a hurdle for FDI inflows.
    - The FDI inflow during 2014-23 was $596 billion.
- **Economic Growth:** By attracting foreign investment, BITs can contribute to economic growth and **employment generation** in the host country.
- **Legal Protection:** BITs offer legal protection to investors, which can be particularly important for investments in countries where the domestic legal framework is unpredictable or unstable.
  - BITs impose obligations under international law on host states to protect foreign investment from the other state.

Key Changes in India-UAE Bilateral Investment Treaty (BIT)

- **Exhaustion of Local Remedies:** The India-UAE BIT reduces the waiting period for foreign investors to exhaust local remedies before bringing an Investor-State Dispute Settlement (ISDS) claim to three years, as opposed to the five years in the Model BIT.
  - This aims to give investors quicker access to ISDS, balancing investment protection with India's regulatory needs.

- **Investment Definition**: The India-UAE BIT simplifies the definition of "investment" by removing the requirement that an investment must be significant for the host state's development, which was part of the Model BIT.
  - This reduces arbitral discretion and offers greater clarity.
- **Treatment of Investments:** The treaty specifies violations of investment protection, such as denial of justice and breaches of due process. Unlike the Model BIT, it removes reference to customary international law (CIL), thus reducing arbitral discretion and offering clearer guidelines for states and investors.
- **Continuity with India's Treaty Practice:** Despite the departures, the India-UAE BIT maintains key features of India's approach, such as excluding the Most Favoured Nation (MFN) clause and restricting challenges to tax measures. The treaty also bars ISDS tribunals from reviewing the merits of domestic court decisions, preventing them from acting as courts of appeal.
- **Additional Provisions**: The treaty specifically disallows third-party funding in ISDS cases and denies ISDS access in cases where an investor faces allegations of fraud or corruption.

Challenges Associated with the BITs

- **Unequal Distribution of Rights and Obligations:** BITs often create an unequal distribution of rights and obligations between developed countries, which are the source of most foreign direct investment, and developing countries, which are mainly recipients.
- **Risk of Litigation:** BITs lead to an increased risk of litigation. Some developing countries have been sentenced by international arbitral tribunals to pay millions of dollars as a result of alleged violations to these treaties.
- **Ambiguous Legal Standards:** Most of these awards are based on expansive interpretations of ambiguous legal standards and concepts such as **'fair and equitable treatment' and 'indirect expropriation'.**
- **Limitations in Addressing Issues:** BITs can't address every problem that companies face abroad.
  - For example, American companies in China face challenges in protecting and enforcing their intellectual property rights (IPR).
- **Loss of Policy Space**: BITs can lead to a loss of policy space for the host country, limiting its ability to regulate in the public interest.
- **Treaty Shopping:** Investors might take advantage of the most favourable nation clause in BITs to sue a host country under a treaty to which it is not a party.

Implications for Future Treaties

- The India-UAE BIT is expected to influence **India's ongoing negotiations** with other countries, including the United Kingdom and the European Union.
- By addressing key concerns of foreign investors and providing a more streamlined process for dispute resolution, India aims to attract more foreign investment while safeguarding its regulatory autonomy.
- It represents a pragmatic approach to investment protection, reflecting India's commitment to creating a favourable investment climate without compromising its sovereign rights.
- As India continues to refine its investment treaty practices, the lessons learned from the India-UAE BIT will likely shape future agreements, ensuring a balanced and equitable framework for international investments.

Future Outlook: Towards Sustainable Development

- Looking ahead, India's BIT strategy is likely to continue evolving in response to global trends and domestic priorities. There is a growing recognition of the need to align investment treaties with sustainable development goals (SDGs) and climate change commitments.
- Future BITs may incorporate provisions that explicitly reference SDGs, require environmental and social impact assessments, and reform dispute resolution mechanisms to include considerations of environmental and social factors.

Source: TH

Mains Practice Question
How might a revised Bilateral Investment Treaty (BIT) strike a balance between protecting foreign investments and safeguarding domestic policy space, particularly in the context of sustainable development and climate change?