DAILY EDITORIAL ANALYSIS

TOPIC

REVISION OF INDIA'S MODEL BILATERAL INVESTMENT TREATY (BIT)

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Context

- The revision of **India's model Bilateral Investment Treaty (BIT)** text, as announced in the **Union Budget 2025,** aims to make the treaty more investor-friendly while aligning it with current global economic realities.

BITs: Historical Background

- The concept of BITs **emerged in the mid-20th century,** primarily to protect foreign investments in developing countries.
- Early treaties were shaped by decolonization and economic nationalism, focusing on safeguarding private property abroad.
- Over time, BITs have evolved to address the changing dynamics of global trade and investment.

About the Bilateral Investment Treaty (BIT)

- **BIT**, also known as **International Investment Agreements (IIAs),** is a **legal framework**, under the United Nations Conference on Trade and Development **(UNCTAD)**, designed to protect foreign investments.
- It is a **reciprocal agreement** between two countries to promote and protect foreign private investments in each other's territories.
- It establishes 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 & Equitable Treatment**: In accordance with international law; and,
  - **Protection From Expropriation**: Limiting each country's ability to take over foreign investments in its territory.
- BIT typically includes mechanisms like **investor-state dispute settlement (ISDS)** and **state-to-state dispute settlement (SSDS)** to address conflicts.

BIT & India

- India introduced its **first Model Bilateral Investment Treaty (BIT) in 1993,** but after facing multiple investor-state disputes, it **revised** its **Model BIT text in 2015.**
  - India signed its first BIT in 1994 with the UK and recently signed BITs with UAE and Uzbekistan in 2024.
  - India is currently negotiating BITs with the UK, Saudi Arabia, Qatar, and the European Union.
- **Provisions of Model BIT, 2015:** The **Standing Committee on External Affairs** noted that there is **still scope for fine-tuning some of its provisions,** like investor-state dispute settlement mechanism.

Why is a New Revision Needed?

- **Narrow Definition of Investment:** Model BIT (2015) limited the definition of investment to enterprises with substantial business operations in India, excluding indirect investments and portfolio investments.
- **Overly Protectionist & Discouraging FDI**: Several foreign investors view India's BIT framework as unfavorable, prompting a rethink to balance investor protection with national interests.
- **Geopolitical Shifts & Trade Agreements:** With India negotiating trade agreements with the EU, UK, and Canada, a more balanced BIT is essential for fostering economic cooperation.
- **Investor-State Dispute Settlement (ISDS) Concerns:** Model BIT (2015) made it difficult for investors to seek international arbitration, which is a major deterrent for foreign businesses.

India's Approach in Current Scenario

- Chief Economic Adviser V. Anantha Nageswaran announced that India's new model Bilateral Investment Treaty (BIT) will be updated to **align with the evolving global investment environmen**t, while safeguarding India's sovereign rights and regulatory space.
- Finance Minister Nirmala Sitharaman also highlighted that the BIT model will be **revamped to encourage sustained foreign investment** and make it more investor-friendly.

Expected Changes in the Revised Model BIT

- **More Balanced Investor Protections:** India may introduce a limited MFN clause and expand the scope of investment protections while maintaining regulatory autonomy.
  - It aims to attract more investors while preventing treaty shopping.
- **Redefining Exhaustion of Local Remedies Clause:** The rigid five-year requirement to exhaust local remedies may be relaxed to make international arbitration more accessible.
  - A 'fork-in-the-road' mechanism could be introduced, allowing investors to choose either domestic courts or arbitration.
- **Stronger Dispute Resolution Mechanisms:** India is likely to reconsider its approach to ISDS.
  - A reformed arbitration mechanism — possibly with a standing appellate body or mediation framework — may be introduced to make dispute resolution more predictable.
- **Incentives for Sustainable & Digital Investments:** The revised BIT may introduce clauses favoring sustainable investments, digital trade, and green energy projects, in line with India's climate goals.
- **Sector-Specific Provisions:** India may introduce sector-specific regulations, particularly for industries like pharmaceuticals, technology, and infrastructure, ensuring national security while attracting high-value investments.

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.

Conclusion and Way Forward

- A well-crafted Bilateral Investment Treaty (BIT) can play a transformative role in India's economic growth by boosting investor confidence, attracting foreign investments, and aligning with global standards.
- By providing a stable and predictable business environment, a revised BIT can reassure foreign investors, encouraging them to invest in India.
- Increased foreign investments, in turn, drive economic development, create jobs, and enhance India's global trade standing.
- Moreover, updating the BIT ensures that India's investment policies remain competitive and in line with international best practices.
- BITs should capture India's national interest, particularly regarding regulatory powers, and that BITs should be negotiated independently rather than as part of Free Trade Agreements (FTAs).

Source: IE

Mains Practice Question

[Q] Discuss the significance of revising the Bilateral Investment Treaty (BIT) model in India. How can such reforms create opportunities for economic growth while maintaining a balance between investor rights and state sovereignty?