Overview of India's Bilateral Investment Treaty

What is the issue?

- The economic condition of the country at present is less encouraging.
- Given this, Indian bilateral investment treaties (BITs) need to strike a balance between foreign investor interests and those of the state.

What is the country's present economic scenario?

- The GDP growth rate is at a five-year low.
- Domestic consumption is sinking, and the business confidence index has plunged.
- India has recorded its highest unemployment rate in the last 45 years.
- Foreign direct investment (FDI) equity inflows to India in 2018-19 contracted by 1%.
- After an increase of 22% and 35% in 2014-15 and 2015-16, respectively, FDI equity inflows began tapering off since 2016-17.
- The growth rate in this indicator has fallen to 9% and then to 3% in 2017-18.
- To add to these is the claim made by Arvind Subramanian, India's former Chief Economic Adviser, that India's GDP has been overestimated.

What are the shortfalls in India's approach?

- **China factor** - The global supply chains are shifting base as a result of the ongoing trade war between the U.S. and China.
- Many of these supply chains have relocated to Vietnam, Taiwan, Malaysia and Indonesia.
- At this time, India has failed to attract firms exiting China.
- India is clearly not the natural/first option for these firms for a host of reasons.
- These may include poor infrastructure, rigid land and labour laws.
- A deepening crisis in the banking sector and a lack of structural economic reforms are other reasons.
- **BIT** - The well-advertised improvement in India's ease of doing business rankings has not significantly contributed to any rise in FDI.
- Notably, this coincided with India's decision, in 2016, to unilaterally terminate bilateral investment treaties (BITs) with more than 60 countries.
- This is around 50% of the total unilateral termination of BITs globally from

2010 to 2018.

- Unilateral termination of BITs on such a mass scale projects India as a country that does not respect international law.
- India also adopted a new inward-looking Model BIT in 2016 that prioritises state interests over protection to foreign investment.
- It came as a reaction to India being sued by several foreign investors before international arbitration tribunals.
- The government concluded that these claims were an outcome of India's badly designed BITs signed in the 1990s and 2000s.

What were the drawbacks in India's BITs?

- India's BITs gave extensive protection to foreign investment with little regard for state's interests.
- This design flaw could have been corrected by India negotiating new balanced treaties.
- It could have then replaced the existing ones with the new ones.
- But now, the termination of BITs unilaterally has created a vacuum.
- Importantly, even the design flaw was not the real reason for the increasing number of BIT claims.
- A large number of claims arose as the judiciary could not get its act together; there were inordinate delays in deciding on the enforceability of arbitration awards.
- Also, the judiciary ruled in certain cases without examining India's BIT obligations.
- E.g. the en masse cancellation of the second generation telecom licences in 2012
- Likewise, the executive (Manmohan Singh government) got the income tax laws retrospectively amended in 2012.
- This was to overrule the Supreme Court's judgment in favour of Vodafone.
- It then cancelled Devas Multimedia's spectrum licences in 2011 without following due process, thus adversely impacting Mauritian and German investors.
- All these cases indicate the less rationale state regulation.
- They also reveal an absence of full knowledge of India's obligations under BITs by different state entities.
- In the process to correct the pro-investor imbalance in India's BITs, India went to the other extreme and created a pro-state imbalance.

What lies ahead?

- It is still unclear if termination of BITs and adoption of a state-friendly Model BIT adversely impacted FDI inflows.

- But certainly, BITs positively impacted foreign investment inflows to India.
- So an examination of the link between the two should be a high priority for the Ministry of Finance and Corporate Affairs (nodal body dealing with BITs).
- The Ministry of Finance and Corporate Affairs should invest extensively in developing state capacity.
- This will ensure that the Indian state starts internalising BITs and is not caught on the wrong foot before an international tribunal.
- In this context, 'progressive capitalism' (channelling the power of the market to serve society) proves to be the right option.
- Indian BITs should strike a balance between interests of foreign investors and those of the state.
- Clarity, continuity and transparency in domestic regulations are essential.
- A commitment to a balanced BIT framework would help India project itself as a nation committed to the rule of law and thus boost investor confidence.
- Also, since India is fast becoming a leading outward investor, balanced BITs would also help in protecting Indian investment abroad.

Source: The Hindu

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