

Investment Protection in India's Free Trade Agreements: The Past, Present, and the Future

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Abstract

After signing FTAs in the first decade of the new millennium with gusto, India hit a pause button by walking out of the RCEP negotiations in the last hour. However, India's approach toward FTAs changed as the Covid-19 pandemic hit the world creating uncertainties about global supply chains. In the last year or so, India has signed new FTAs with important economies like Australia and is negotiating FTAs with countries like the United Kingdom and the European Union. However, a defining characteristic of India's new FTAs is that they no longer contain a chapter on investment protection. Ever since India lost investment treaty claims to foreign investors, India has adopted an inward-looking and defensive approach toward the issue of investment protection under international law. However, India needs to revisit this approach since countries like the UK and the EU are quite keen on including investment protection provisions as part of their ongoing FTA talks with India. India also needs to recalibrate this approach because investment and trade go hand in hand. An FTA without an investment protection chapter will not enable India to reap the full benefits of trade agreements.

Keywords: India, FTAs, investment, investment protection, investment treaties, BITs, bilateral investment treaties.

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I Introduction: A See-Saw kind of approach to FTAs

India seems to be on a free trade agreement (FTA) signing and negotiating spree. In the last couple of years, India has signed FTAs with Mauritius, United Arab Emirates (UAE), and Australia. India is also negotiating FTAs with the United Kingdom (UK), European Union (EU), Canada, Israel, Bangladesh, the Eurasian Economic Union (an economic bloc comprising Russia, Belarus, Kazakhstan, Kyrgyzstan, and Armenia), South African Customs Union (a customs union comprising of Botswana, Eswatini, Lesotho, Namibia, and South Africa).

India's FTA journey started in the early 2000s with the euphoria over multilateralism subsiding due to the delay in the trade negotiations at the World Trade Organization (WTO).² Since then, till 2014, India signed several FTAs with important countries like Singapore, Japan, Korea, Malaysia, and the Association of South East Asian Nations (ASEAN). From the perspective of trade balance, India benefitted from these FTAs.³ India's FTAs with ASEAN, Japan, Singapore, Afghanistan, etc benefitted exports of India's manufactured products.⁴

Notwithstanding these gains, post-2014, India hit a pause button on FTAs. Voices critiquing trade liberalisation and FTAs started to emerge from within the Indian government. The FTAs signed during the 2000s were criticized for resulting in deindustrialisation in some sectors.⁵ The National Institution for Transforming India (NITI) Aayog, the Indian government's apex public policy think tank, came out with a paper arguing that India's existing FTAs widened India's trade deficit.⁶ This anti-trade rhetoric was not fully backed by empirical facts and contradicted India's gains under these FTAs. An impact of this anti-FTA rhetoric was that India

²Debashis Chakraborty and Dipankar Sengupta, "Learning Through Trading? India's Decade Long Experience at WTO" (2005) 12 South Asian Survey 223; Debashis Chakraborty, Julien Chaisse, Xu Qian, Is It Finally Time for India's Free Trade Agreements? The ASEAN "Present" and the RCEP "Future" (2019), 9 Asian Journal of International Law, 359-391.

³ Ministry of Finance, Economic Survey, 2019-20, <https://www.indiabudget.gov.in/budget2020-21/economicsurvey/doc/echapter.pdf>; Sanjiv Shankaran, Foreign minister Jaishankar's views on FTAs and trade openness are not supported by facts, Times of India, November 20, 2020 <https://timesofindia.indiatimes.com/blogs/cash-flow/foreign-minister-jaishankars-views-on-ftas-and-trade-openness-are-not-supported-by-facts/>

⁴Ministry of Finance, Economic Survey, 2019-20, <https://www.indiabudget.gov.in/budget2020-21/economicsurvey/doc/echapter.pdf>

⁵ The Hindu, "A day after RCEP, Jaishankar slams trade pacts, globalisation," 16 November 2020, <https://www.thehindu.com/business/a-day-after-rcep-jaishankar-slams-trade-pacts-globalisation/article33110309.ece>

⁶ Saraswat, V. K., Prachi Priya, and Aniruddha Ghosh. 2019. A Note on Free Trade Agreements and their Costs. Delhi: NITI Aayog, http://www.niti.gov.in/writereaddata/files/document_publication/FTA-NITI-FINAL.pdf

walked out of the Regional Comprehensive Economic Partnership (RCEP) agreement negotiations just before the deal was to be signed with the remaining 15 countries going ahead.⁷ India also declared its intent to review its FTAs with Japan, South Korea, and ASEAN.⁸ In other words, there was a palpable difference between India's approach towards FTAs from the start of the millennia till 2014, when it was negotiating and signing FTAs with aplomb, and post-2014 when India developed a sceptical attitude towards them.

However, as Biswajit Dhar, India's leading trade economist, argues, when the Indian economy started emerging from Covid-19-induced pain, India's circumvention towards FTAs began to melt away.⁹ India got back to being enthusiastic about FTAs and declared its intent to enter into new trade treaties. Economists argue that the following factors triggered a change of heart regarding FTAs. First, the Indian policy establishment started realising that the lack of deep economic relations with countries like the UK, EU, Canada, etc will come in way of India becoming part of new supply chain arrangements that aim to reduce dependence on China.¹⁰ Second, it also dawned on the policy establishment that India is not a party to mega FTAs – RCEP and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Agreement (CPTPP) – which might encumber India's ability to access bigger markets.¹¹ Overall, it can be said that India's see-saw approach towards FTAs swung from enthusiasm to disillusionment to back to enthusiasm.

These FTAs cover a wide variety of issues such as tariff reduction, trade in services, intellectual property, competition policy, and protection of foreign investment. This paper aims to look closely at the protection of foreign investment in India's FTAs. There are several facets of investment being part of a broader economic agreement like an FTA. Protection of foreign investment is one of them. Other dimensions of investment are liberalization which regulates issues like the entry of foreign investment. Likewise, an FTA may also cover issues related to

⁷ For more on this see Rajat Deb, Is RCEP a Panacea for India? (2020) 68(4) The Indian Economic Journal, 659-666; Amrita Narlikar, India's Foreign Economic Policy under Modi: Negotiations and Narratives in the WTO and Beyond (2022), 58 International Politics, 148-166, at 152.

⁸ Biswajit Dhar, India's renewed embrace of free trade agreements, 21 February 2022, <https://www.eastasiaforum.org/2022/02/21/indias-renewed-embrace-of-free-trade-agreements/>

⁹ See Dhar (2022); Amitendu Palit, India's New and Robust FTA Engagements, 5 October 2021, <https://www.isas.nus.edu.sg/papers/indias-new-and-robust-fta-engagements/>

¹⁰ Surendar Singh, Suvajit Banerjee, Is There Any Dichotomy between India's New FTA Strategy and Its Trade Policy? (2022) Volume 57, Issue 24(11) Economic and Political Weekly, 25-28.

¹¹ Ibid. Some commentators are sceptical of India's approach towards FTAs given the rising protectionism in India. See Singh and Banerjee (2022),

investment facilitation such as regulatory transparency and predictability of investment measures, administrative procedures, and, information sharing, and exchange of best practices to bolster foreign investment inflows.

for the following reasons. First, increasingly more and more FTAs contain investment protection chapters. This is the case with mega FTAs like RCEP, CPTPP, and European Union-Canada Comprehensive Economic and Trade Agreement (CETA), the Common Market for Eastern and Southern Africa (COMESA), the ASEAN Comprehensive Investment Agreement (ACIA), and also with other key bilateral FTAs like UK-Australia, UK-New Zealand. The investment protection chapters in these trade agreements provide minimum legal guarantees to foreign corporations under international law that they would not be discriminated against, their investment will not be subject to expropriation ('taking' of privately owned property by the government, directly or indirectly, unless certain conditions like paying due compensation are met), and that they would receive treatment that is fair and equitable.¹² Second, trade and investment have strong interlinkages and they overlap.¹³ Transnational corporations look for ideal production sites to optimise market access possibilities for their products.¹⁴ This is an important reason why FTAs include investment chapters. Third, India has unilaterally terminated more than 60 bilateral investment treaties (BITs) out of close to 80 that it signed from 1994 to 2010. BITs are standalone investment agreements that protect foreign investments, like the FTA investment chapters, by imposing certain restrictions on the regulatory behaviour of the host state and, thus, preventing undue interference with the foreign investor's rights. These treaties allow foreign investors to bring claims against the State for alleged treaty breaches before international arbitration tribunals. This is known as the investor-State dispute settlement (ISDS) mechanism.

These agreements have been the mainstay of India's investment treaty programme and constitute its first leg. However, investment chapters in FTAs signed by India are not part of this unilateral termination because countries cannot get rid of a part of a treaty. This change can only be brought by an amendment that all treaty-signing countries must agree on.

¹² See Julien Chaisse and Sufian Jusoh, *The ASEAN Comprehensive Investment Agreement* (Edward Elgar: 2016), 7.

¹³ Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law* (Hart Publishing: 2012).

¹⁴ *Ibid.*

To discuss the issue of investment protection in India's FTAs, this paper is divided into the following parts. In part II (the past), the paper discusses the investment chapters in India's FTAs that were signed during the period from the early 2000s to 2014. Next, in part III (the present), the paper turns its attention to the recent FTAs and their focus on investment protection. The paper will show that while India has actively re-started signing FTAs, it is not enthusiastic about including investment protection features in these economic treaties. Part IV (the future) of the paper considers the FTA negotiating objectives of the UK and EU and whether their approach aligns with India's on investment protection as part of the FTA talks. Part V concludes.

II The Past (the 2000s to 2014)

As enunciated, India signed several trade agreements during this period (see Table 1). Not all of these agreements were full-fledged FTAs i.e. trade agreements that comprehensively cover trade in goods and services. Some of these treaties are 'partial scope agreements' i.e. they cover limited or select products.¹⁵ India signed seven full-fledged FTAs, including five bilateral trade treaties with Sri Lanka, Singapore, Korea, Malaysia, and Japan and two regional or multilateral agreements, i.e. the South Asian Free Trade Area (SAFTA)¹⁶ Agreement and the India-ASEAN (Association of South East Asian Nations) FTA. Four of these seven FTAs (India-Singapore, India-Korea, India-Malaysia, and India-Japan) contain an investment protection chapter. The India-ASEAN FTA does not contain an investment protection chapter but both sides have signed a separate investment agreement.

The investment chapters in India's FTAs with Singapore, Korea, Malaysia, and Japan constitute the second leg of India's investment treaty programme. These investment chapters protect these countries' foreign investments in India and vice-versa. We discuss here some of the key characteristics of these investment chapters.

¹⁵ WTO, Regional Trade Agreements Information System, https://rtais.wto.org/UserGuide/RTAIS_USER_GUIDE_EN.html

¹⁶ SAFTA is a free trade agreement signed between the eight nations of the South Asian Association for Regional Cooperation (SAARC) comprising Afghanistan, Bangladesh, Bhutan, Nepal, India, Maldives, Pakistan, and Sri Lanka.

First, investment chapters of India's FTAs define foreign investment as every kind of asset owned or controlled by the investor.¹⁷ Additionally, India's FTAs, unlike India's stand-alone BITs, provide economic characteristics of investment like the commitment of capital or other resources, the expectation of gains or profits, and the assumption of risk as the criteria to define investment.¹⁸ In other words, if an asset, owned and controlled by a foreign investor, does not satisfy these economic characteristics, it will not be an investment, no matter the asset's form.¹⁹

Second, the investment chapters (barring the investment chapter in the India-Singapore FTA) impose an obligation on the host State to accord fair and equitable treatment (FET) to foreign investment. The content of the FET provision is often not mentioned in the investment treaties, and this is true for India's FTA investment chapters as well. However, ISDS tribunals have given a broad meaning to the FET provision and held that it includes within its fold things like investors' legitimate expectations, the requirement of the State to follow due process in dealing with foreign investors, the obligation of the host State to act in good faith, etc.²⁰

The FET provision in India's FTAs is linked to the minimum standard of treatment of aliens under customary international law (MST). For example, Article 10.4(1) of the investment chapter of the India-Korea FTA states:

Each Party shall accord to an investment of an investor of the other Party in its territory 'fair and equitable treatment' and 'full protection and security.' The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

A similar kind of provision linking FET to the MST exists in Article 10.5 of the India-Malaysia FTA's investment chapter and Article 87 of the India-Japan FTA. The purpose to link the FET provision to the MST is to limit the content of the FET provision only to very egregious actions

¹⁷See India Japan FTA art 3(i); India-Malaysia FTA art 10.2(d); India-Korea FTA art 10.1; India-Singapore FTA art 6.1 (1).

¹⁸See India Malaysia FTA art 10.2 (d); India-Korea FTA art 10.1.

¹⁹India-Japan FTA, art 3(i) Note 2

²⁰Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (OUP: 2021), 205-228.

of the host State such as situations when the host State acts in bad faith or when there is wilful neglect of duty on the part of the State.²¹ Arguably, if the FET provision is linked to MST, it will not be interpreted autonomously and given a broad meaning. However, this objective hasn't been accomplished because several ISDS tribunals, despite the linking of the FET provision with MST, have interpreted the FET provision independently and broadly.²²

Third, these FTA investment chapters, like the standalone BITs, impose an obligation on the host State not to directly or indirectly expropriate foreign investment unless it is for a public purpose, following due process, and against due compensation. Direct expropriations i.e. legally taking over the ownership of foreign investors' investment through nationalisation has become rare. The common form of expropriation today is indirect which might take place through the myriad of State regulations aimed at governing different spheres of life that may indirectly interfere with the investor's property rights. However, determining indirect expropriation is very difficult. In other words, it is not easy to ascertain when a State regulation crosses the line and becomes a case of indirect expropriation of foreign investment. Most BITs, including the ones signed by India, are also silent on this issue thus conferring huge discretion to arbitration tribunals to make such determination.

However, India's FTA investment chapters provide a detailed criterion for determining indirect expropriation. For instance, Annex 3(1)(d) of the India-Singapore FTA investment chapter provides as follows:

the determination of whether a measure or series of measures of a Party in a specific factual situation, constitute measures as referred to in paragraph (b) above requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the measure or series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment,

²¹ The MST content is often derived from a 1926 case called the Neer case. See *LFH Neer and PE Neer v. United Mexican States* (Docket No 136), General Claims Commission – United States and Mexico, 4 UNRIAA 60 (15 October 1926).

²² See *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, para 491; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 218; *Crystallex v Venezuela*, Award, 4 April 2016, paras 530-538.

standing alone, does not establish that measures having effect equivalent to nationalization or expropriation, has occurred;

(ii) the extent to which the measure or series of measure interfere with distinct, reasonable, investment-backed expectations;

(iii) character of the measure or series of measures, including inter alia, their intent, objectives, purpose, and degree of nexus between the measures and outcome or effects that forms the basis of the expropriation claim

Thus, the ISDS arbitration tribunal will have to take into account not just the gravity of the economic impact of the regulatory measure on foreign investment but also the character of the measure i.e. the purpose behind adopting the impugned regulatory measure also needs to be examined.²³

India's FTA investment chapters also contain another indicator for determining indirect expropriation. For instance, Annex 10 on the expropriation of India Japan FTA provides:

except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied for legitimate public welfare objectives such as health, safety and the environment, do not constitute measures having effect equivalent to nationalization or expropriation.

Barring exceptional circumstances, State regulatory measures that are non-discriminatory and that are designed and applied for legitimate public welfare objectives do not constitute expropriation. The phrase 'except in rare circumstances' is not defined in any of the treaties except for the India-Korea FTA. Annex 10 A 3 (b) of the India-Korea FTA states that 'except in rare circumstances' implies 'when measures are extremely severe or disproportionate in light of its purpose and effect'. In other words, if a State regulatory measure is too severe or disproportionate when compared with the regulatory measure's purpose and effect, it will be an act of expropriation. The rationale behind excluding disproportionate measures from the ambit of bonafide State regulatory action is that excessively high costs of achieving public

²³ See also India-Malaysia FTA (Annex 10-1); India-Korea FTA (Annex 10-A)].

welfare objectives cannot be passed on to foreign investors. Thus, only if the State’s regulatory measures are proportionate to the public interest objective they seek to achieve, it will not be a case of indirect expropriation irrespective of the economic impact on foreign investment.

Fourth, barring the India-Japan FTA investment chapter, the other three FTA investment chapters do not contain a most favoured nation or an MFN provision. The MFN provision in investment treaties seeks to create a level-playing field for all foreign investors by forbidding the host state from discriminating against investors from various countries. For instance, the MFN provision in Article 87 of the India-Japan FTA provides as follows:

Each Party shall accord to investors of the other Party and to their investments treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party and to their investments with respect to the management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments in its Area.

Foreign investors have often used the MFN provision of the primary BIT (i.e. the investment treaty under which the dispute between investor and State arises) to borrow favourable substantive or procedural provisions granted by the host state under a secondary BIT (i.e. an investment treaty signed by the host State with a third country).²⁴ For instance, in a case known as *White Industries v India*,²⁵ an Australian investor relied upon the MFN provision of the India-Australia BIT (the primary BIT) to borrow a favorable substantive provision related to ‘*effective means of asserting claims and enforcing rights*’ from the India-Kuwait BIT (secondary BIT) into the India-Australia BIT.

Table 1: India’s FTAs, 2000 to 2014

Country	Type of trade agreement	Whether investment protection is part of it?
Sri Lanka (2000)	FTA	No. But India-Sri Lanka had a BIT
Afghanistan (2003)	Partial Scope Agreement	No

²⁴See *Micula v Romania (II)*, ICSID Case No. ARB/14/29, Award, 5 March 2020 paras 440-446. The tribunal in this case held that the foreign investor can use the MFN provision in the primary BIT to borrow the full protection and security provision from the secondary BIT.

²⁵*White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, Nov. 30, 2011 (hereinafter *White Industries v India*).

Thailand (2003)	Partial Scope Agreement	No
MERCOSUR ²⁶ (2004)	Partial Scope Agreement	No
Singapore (2005)	FTA	Yes
Chile (2006)	Partial Scope Agreement	No
Bhutan (2006)	Partial Scope Agreement	No
South Asian Free Trade Area (SAFTA) agreement (2004)	FTA	No. But a separate SAARC Investment Treaty aimed at investment protection has been under negotiation for a very long time.
ASEAN (2009)	FTA	Yes, but as a separate India-ASEAN Investment Agreement
Korea (2009)	FTA	Yes
Nepal (2009)	Partial Scope Agreement	No
Japan (2011)	FTA	Yes
Malaysia (2011)	FTA	Yes

Source: Author's compilation from WTO, Regional Trade Agreements Database

III Present (2014 onward)

As pointed out, India's approach towards FTAs underwent a change post-2014. While India kept on negotiating FTAs like the RCEP, it did not sign any FTA until 2021 with Mauritius. India famously walked out of the RCEP agreement just before it was finally signed by the remaining members. In the meanwhile, India's approach toward investment treaties also went through a complete transformation because of several foreign corporations like White Industries,²⁷ Vodafone,²⁸ Cairn Energy,²⁹ Deutsche Telekom,³⁰ Nissan,³¹ etc. suing India under

²⁶ MERCOSUR or the Southern Common Market has the following countries as its members: Argentina, Brazil, Paraguay, and Uruguay.

²⁷ White Industries v India.

²⁸ *Vodafone International Holdings BV v. Government of India [I] PCA Case No. 2016-35*

²⁹ *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India PCA Case No. 2016-7, Award, 21 December 2020.*

³⁰ *Deutsche Telekom AG v The Republic of India, PCA Case No 2014-10, Interim Award, 13 December 2017*

³¹ *Nissan Motor Co. Ltd v. The Republic of India, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019.*

different treaties. While most claims were brought for breach of different BITs, Nissan sued India under the investment chapter of the India-Japan FTA.

As part of India's new approach toward investment protection, India adopted a new Model BIT in early 2016.³² The 2016 Model BIT represents a new kind of investment protection treaty practice. It prioritises the State's regulatory power over the protection of foreign investment. Several key provisions for the protection of foreign investment such as the MFN and the FET clauses are missing. The 2016 Model BIT makes taxation-related regulatory measures non-justiciable. Importantly, in the 2016 Model BIT, the foreign investor can bring a claim against the host State before an ISDS tribunal only after exhausting local remedies at least for five years and after satisfying several other procedural requirements. India's 2016 Model BIT hasn't found many takers barring a few countries like Belarus,³³ Kyrgyzstan,³⁴ and Taiwan.³⁵ India also signed a BIT with Brazil in 2020.³⁶ However, the treaty with Brazil is closer to the Brazilian Model BIT.³⁷

India's new investment treaty practice has thrown a spanner in the works of FTA negotiations on investment issues. India's FTAs with Mauritius, United Arab Emirates, and Australia, signed in the last few years, do not contain an investment protection chapter (see Table 2). The investment provisions in these FTAs are limited to issues such as promotion and facilitation. For example, one of the objectives of the India-Australia FTA, listed in Article 1.2(d), is to expand trade and investment between the two countries. The absence of an investment protection chapter in these FTAs, coupled with the fact that India has unilaterally terminated its BITs with Australia and Mauritius, means that foreign investment from these countries into India and vice-versa, that entered after the treaty termination, are not protected under international law (See Table 2).

³²The Model Text for the Indian Bilateral Investment Treaty https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf (hereinafter 2016 Indian Model BIT).

³³Treaty between The Republic of Belarus and The Republic of India on Investments (signed 24 September 2018).

³⁴Bilateral Investment Treaty between The Government of The Kyrgyz Republic and The Government of The Republic of India (signed 14 June 2019).

³⁵Bilateral Investment Agreement between India Taipei Association in Taipei and the Taipei Economic and Cultural Center in India (24 October 2018).

³⁶Investment Cooperation and Facilitation Treaty between The Federative Republic of Brazil and The Republic of India (signed 25 January 2020).

³⁷See Henrique Choer Moraes and Pedro Mendonça Cavalcante, 'The Brazil-India Investment Co-operation and Facilitation Treaty: Giving Concrete Meaning to the 'Right to Regulate' in Investment Treaty Making' (2021) 36(2) ICSID Review - Foreign Investment Law Journal 304.

Table 2: India’s Recent FTAs

Year	The country with whom India has signed the FTA	Whether the FTA contains a full-fledged investment protection chapter?	Whether India has signed a standalone BIT with this country?
2022	Australia	No	Yes (1999), but India unilaterally terminated it in 2017.
2022	United Arab Emirates	No	Yes (2013)
2021	Mauritius	No	Yes (1998), but India unilaterally terminated it in 2017.

Source: Author’s compilation

The BIT that India signed with the UAE in 2013, and which came into force on September 13, 2014,³⁸ hasn’t been terminated. There are two reasons for the same. First, Article 18 of the India-UAE BIT provides that the treaty shall remain “in force for a period of 10 years”. Thus, the initial period of the validity of the treaty hasn’t expired. Second, Article 18 also contains an interesting provision that imposes an obligation on countries to commence negotiations, no later than January 1, 2016, to finalise a new agreement and replace the existing treaty with a new one. However, this deadline has been missed.

³⁸ Agreement between The Government of The Republic of India and The Government of The United Arab Emirates on the Promotion and Protection of Investments (signed 12 December 2013)

Although the India-UAE FTA does not contain a full-fledged investment protection chapter, it provides a fresh deadline to finalise a new BIT that would replace the 2013 agreement. Article 12.1 of the India-UAE FTA provides:

The Parties note the existence of the Agreement Between the Government of the United Arab Emirates and the Government of the Republic of India on the Promotion and Protection of Investments, signed at New Delhi, India on 12 December 2013 (UAE-India Bilateral Investment Agreement). Further, the Parties renew their commitment to the ongoing negotiations between the Parties to replace the UAE-India Bilateral Investment Agreement, and agree to finalise a new agreement by June 2022.

Thus, the new deadline was June 2022. But this deadline has also been missed. India and UAE haven't completed their negotiations on a new investment treaty. The 2013 BIT continues to operate. The fact that the two sides are keen to replace the existing BIT with a new one also means that the India-UAE FTA will not contain an investment chapter even in the future. The two sides wish to keep investment protection outside the scope of the FTA.

The pattern that seems to be emerging is that India is not too keen to include an investment protection chapter in FTAs. Seemingly India wishes to have a standalone investment agreement outside the ambit of the FTA. The advantage of having a separate investment treaty could be that it is easy to terminate it unilaterally after the expiry of the initial period for which the treaty is signed, as India did with most of its BITs. If investment protection provisions are part of an FTA as a separate chapter, it is not possible to terminate just one chapter while retaining the remaining treaty without the consent of the treaty partner/s, as discussed earlier. At the same time, the fact that a country can unilaterally terminate the investment treaty poses grave risks for foreign investors. This reduces the certainty and predictability that foreign investors always crave while investing in an alien land.

Moreover, India's approach of not including investment protection within the ambit of FTAs is mystifying for several reasons. First, India's rationale for wanting to sign FTAs with several countries, as mentioned before, is to be part of the global value chains. Both, trade and foreign

investment are central to creating these global value and supply chains.³⁹ Therefore, decoupling trade from investment in these FTAs defies economic sagacity. Second, if investment protection is made a part of these FTAs, India will have a better bargaining position to negotiate balanced investment chapters in comparison to a standalone investment treaty. When several related issues are part of the same deal, there is a superior likelihood of ‘give and take’ and reaching a win-win compromise.

IV The Future

Given the break from the past when India included investment protection chapters in FTAs, the question arises what’s going to be India’s stand on this issue in the future? This is an important question since India is negotiating FTAs with several important countries like the UK, EU, Canada, Israel, etc (see Table 3). India’s investment relations have deepened with many of these countries over the years. For instance, the India-UK investment relationship has grown manifold in the last few decades. Today, the UK is India's sixth largest exporter of foreign capital.⁴⁰ The India-UK investment relationship is no more a one-way street. In 2020, the stock of FDI from India in the UK was £10.6 billion as against £14.9 billion from the UK in India.⁴¹ Given this deep economic investment association, the UK is keen on having an investment chapter in the FTA, thus legalising the investment relationship. The UK’s Department for International Trade (DFIT) lists the protection of British investment in India as a key objective of the investment chapter in the proposed FTA.⁴² Specifically, the investment chapter is supposed to “*provide sufficient protections to UK investors and guarantee that they receive fair and non-discriminatory treatment, ensuring access to adequate remedies in the event that these obligations are breached*”.⁴³ This is a clear reference to having investment protection provisions in the FTA such as protection from illegal expropriation, assuring FET, and non-discrimination.

³⁹Christine Zhenwei Qiang, Yan Liu, and Victor Steenbergen, *An Investment Perspective on Global Value Chains*. (World Bank 2021)

⁴⁰ Quarterly Fact Sheet on Foreign Direct Investment Inflow, Department for Promotion of Industry and Internal Trade, India https://dpiit.gov.in/sites/default/files/FDI_Factsheet_September_2022_0.pdf 17 November 2022.

⁴¹ Trade and Investment Factsheet, Department for International Trade, UK https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1104498/india-trade-and-investment-factsheet-2022-09-20.pdf

⁴² Ibid.

⁴³ Ibid.

Likewise, the EU is an important investor in India. The EU's share in foreign investment stock in India has increased from €63.7 billion in 2017 to €87.3 billion in 2020, making the EU a leading foreign investor in India.⁴⁴ The EU, along with talks for an FTA, has simultaneously launched negotiations for an investment protection agreement, to cement India-EU ties. The EU believes that an investment protection agreement with India will “*significantly increase the level of confidence among investors on both sides, thereby leading to further increases in foreign direct investment in both directions*”.⁴⁵ The EU's textual proposal on investment submitted to India for negotiations contains several investment protection provisions like MFN, FET, and protection from expropriation.⁴⁶ The EU's investment proposal to India talks of creating a two-tier court-like system with an appellate mechanism and tenured judges to resolve treaty disputes between investors and the State.⁴⁷

The EU proposal on investment protection is very different from that of India's stand as reflected in the 2016 Model BIT. For instance, the 2016 Model BIT does not contain MFN and the FET provision. Likewise, India's stand on an investment court to settle disputes between the foreign investor and the State is not known. India hasn't publicly articulated its stand on most of these issues. The two sides will have to resolve these differences as they negotiate for an investment protection agreement. Unlike the UK and the EU who transparently communicate their negotiating objectives and the desired outcomes, India does not follow these best practices. Consequently, one struggles to find out what India's position on most of these issues is.

⁴⁴ European Commission, EU and India kick-start ambitious trade agenda, 17 June 2022 https://policy.trade.ec.europa.eu/news/eu-and-india-kick-start-ambitious-trade-agenda-2022-06-17_en

⁴⁵ Ibid

⁴⁶ EU Textual Proposal – EU–India IPA Negotiation - <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/13cb61e4-79d4-42e0-942e-28156a3cd815/details>

⁴⁷ ibid

Table 3: India's FTA negotiations

Country	Whether investment protection is part of it?
United Kingdom	Yes
European Union	Yes. As an Investment Promotion Agreement, part of the FTA talks
Canada	No. Investment would be negotiated as a separate treaty known as Foreign Investment Promotion Agreement
Israel	Not known (India-Israel BIT unilaterally terminated).
Gulf Cooperation Council	Not known
Bangladesh	Not known (there exists an India-Bangladesh BIT)

Source: *Author's compilation*

V Conclusion

In the past India signed several comprehensive FTAs that covered all important economic issues including investment protection. Over the years, this practice has changed. While India is, once again, reposing faith in FTAs, its stand on including investment protection in these treaties remains ambivalent. As a result of being sued by multiple foreign corporations, India has adopted a defensive approach toward investment treaties. It is this defensive approach that led to the adoption of the 2016 Model Indian BIT. While India's quest to safeguard its sovereign right to regulate while accepting binding investment protection provisions is fully appreciated, India's investment treaty practice has gone to the other end. The pendulum has swung in favour of the host State's right to regulate with scant protection for foreign investors. India is not too willing to accept obligations under international law on the protection of foreign investment. This explains why India's recent FTAs with Australia, UAE, and Mauritius do not cover investment protection. Seemingly India wants to keep the issue of investment protection

outside the ambit of the FTA and negotiate for it separately. Arguably, keeping the issue of investment protection outside the ambit of the FTA gives India greater control over the treaty.

However, it will be difficult for India to follow this approach as it negotiates FTAs with the UK and the EU. Both UK and the EU are very keen on having binding investment protection with India. Thus, India needs to revisit its approach and thinking on investment protection. A good starting point here would be to set up a team of experts to review the 2016 Model BIT. Moreover, it is not that the UK and the EU are not keen to safeguard their sovereign right to regulate while accepting binding investment protection obligations. Thus, there is a convergence on this issue between India and its negotiating partners. The difference only lies in where to draw the line. This is not an insurmountable problem and can be resolved through negotiations. India would do well to remember that its objective of becoming part of the global supply and value chains cannot be accomplished till it is able to attract foreign investment and emerge as a manufacturing base.