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Navigating India's Investment Landscape: From Historical Shifts to Emerging Trends

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The paper examines the evolution of India's foreign investment policies, starting from tracing the journey from the pre-independence period to the present day. It indulges into the historical shifts, from the colonial period's tight regulations to the post-independence socialist approach, and then finally the economic liberalization in the 1990s. Furthermore, the paper also critically analyses India's attempts to strike a balance between protecting foreign investors and preserving regulatory independence, as has been illustrated by the 2015 Model Bilateral Investment Treaty (BIT). The paper sheds light on key amendments and their impact while subsequently addressing criticisms and challenges. The research methodology employed in this paper includes both doctrinal and secondary doctrinal research. The paper seeks to provide a complete understanding of India's developing foreign investment landscape by examining the historical context, policy shifts, and emerging trends that have helped shape the country's approach to foreign direct investment (FDI) and international investment agreements (IIAs). It also discusses the implications of the policies made by India for a better understanding of the international rule of law and the balance between investor protection and regulatory independence.

Keywords: *foreign investment policies, 2015 model bilateral investment treaty, investor protection, regulatory independence.*

INTRODUCTION

India has undergone significant transformations over the years in its approach to foreign investment which shows the country's progressing economic priorities. As India continues to mark its presence on the global level, there arises a need to navigate through the complex landscape of investment treaties, and foreign direct investment (FDI) policies become important. The paper aims to explore the historical shifts and emerging trends in India's foreign investment policies by addressing the research problem of understanding how India's approach to foreign investment has evolved over the years and what implications these changes have. The research methodology involves a comprehensive review of literature, including scholarly articles, policy documents and legal frameworks to analyze the path of India's investment policies and also to identify its crucial trends and challenges. This analysis dives into the pre-independence era where foreign investment was strictly controlled by British colonial rule, with all the regulations structured to favour the economic interests of the British. After the independence, India had opted for a socialist economic model with limited foreign investment till the economic crises in the late 1980s forcing it to accept liberalization measures in the 1990s. The focus is on the 2015 Model Bilateral Investment Treaty (BIT), which attempted to strike a balance between protecting foreign investors and maintaining India's regulatory independence. The paper further critically examines the provisions related to Fair and Equitable Treatment (FET), expropriation, and Investor-State Dispute Settlement (ISDS) mechanisms under the 2015 Model BIT. It explains how these provisions have the goal of promoting legal certainty while at the same time protecting India's policy space. Additionally, the paper delves into emerging trends such as the 2022 Foreign Exchange Management Directions which aims at liberalizing India's outbound investment framework as well as India's strategic shift towards regional trade arrangements focussing on investment cooperation.

RESEARCH GAP

The paper addresses a notable research gap in the understanding of India's evolving foreign investment policies, specifically in the context of balancing investor protection with regulatory independence. The already existing literature focuses on historical shifts and key policy changes but lacks a comprehensive analysis of the 2015 Model Bilateral Investment Treaty (BIT) and its implications for India. This paper seeks to fill this gap by critiquing India's attempts to strike a balance between protecting foreign investors and preserving regulatory independence by way of using the 2015 Model BIT as a crucial point.

LITERATURE REVIEW

British Colonial Policy and the Economy of India examines how the British colonial policies in India from 1833 to 1930 aimed to extract wealth instead of benefitting India. It emphasized limited foreign investment controlled by the British, especially in sectors such as railways and mining. This historical exploitation created India's economy and investment policies, thus, making it crucial to understand for insights into India's economic landscape and challenges during its independence passage. The paper sheds light on the economic impact of British colonial policies, but it fails to provide a detailed exploration of foreign investment policies during that era. It only briefly covers limited foreign investment and sectoral focus but does not focus on how these policies shaped India's approach to foreign investment. This paper fills this gap by closely analyzing India's strengthening foreign investment policies. It further critiques the 2015 Model Bilateral Investment Treaty (BIT), by examining how historical shifts, like colonial exploitation and limited foreign investment, influenced subsequent policy decisions. With the help of policy amendments, such as the 2022 Foreign Exchange Management Directions, the paper provides an understanding of India's investment terrain.

Foreign Direct Investment (FDI) in India: An Analysis of Growth and Performance explores the landscape of FDI in India to understand its impact on the economy. It further highlights India's consistent FDI growth, especially in sectors like services, manufacturing, and IT. It gives credit to this growth to liberalization measures and policy reforms, despite the persistent challenges such as the bureaucratic hurdles along with infrastructure gaps. The paper does not examine the historical context and policy shifts that have influenced India's approach to FDI. It purely focuses on growth, sectoral distribution, challenges, and recommendations without determining how India's historical economic policies and reforms have shaped its FDI landscape. This creates a research gap in understanding the broader historical and policy contexts behind India's FDI growth. This paper addresses this gap by examining India's historical shifts in foreign investment policies. It evaluates policies from the pre-independence era to the post-liberalization period, including the 2015 Model Bilateral Investment Treaty (BIT).

Through analyzing policy amendments, challenges, and emerging trends like that of the 2022 Foreign Exchange Management Directions, this paper seeks to provide an understanding of India's growing foreign investment landscape.

Protection of Foreign Investment in India and International Rule of Law: Rise or Decline seeks to examine India's foreign investment policies over three periods: post-independence, the 1990s, and the current phase. It explains India's shift from advocating global, national treatment to balancing investor protection and regulatory freedom. The paper puts forth that India's approach signifies a rise in the international rule of law, thus maintaining investor protection with a focus on regulatory balance. The paper does not explore the historical shifts and specific policy amendments that led to India's policy change towards foreign investment. It fails to provide an in-depth examination of the intricacies and specific policies that influenced India's approach to investor protection and regulatory freedom. Henceforth, this leaves a research gap in understanding the detailed evolution of India's foreign investment policies and further its implications for the international rule of law. This paper addresses this gap by providing a comprehensive examination of India's developing foreign investment policies. It inspects specific amendments, challenges, and emerging trends like the 2022 Foreign Exchange Management Directions. This offers a detailed understanding of India's foreign investment terrain. By focusing on the balance between investor protection and regulatory independence, the paper adds to the historical context and policy evolution to the broader discussion on the international rule of law and India's stand on investor protection.

The Indian Model Bilateral Investment Treaty: Continuity and Change examines India's strengthening BIT policy, balancing investment protection, and regulatory sovereignty. It explains the new model BIT's changes, by, aiming for a realistic approach to align with public policy concerns. The challenge in the way forward includes updating existing BITs and integrating trade and investment regimes towards a common goal. The paper discusses India's BIT policy evolution without going into specific historical influences. The paper further lacks an exploration of factors shaping the model BIT's development. This leaves a gap in understanding the historical context of India's BIT policy. This paper analyzes India's foreign investment policies, including the 2015 Model BIT. It further explores historical shifts, evaluates amendments, and offers insights into India's investment terrain. This analysis helps in filling the gap by adding historical context and policy evolution, thus contributing to knowing about India's investment policy changes.

Investors' Protection in India: Regulatory Framework and Investors' Rights, Obligations & Grievances examines investor protection in India's securities market. It focuses on investors' role in market dynamics and growth. It further emphasizes confidence among small investors post-scams. The analysis encompasses regulatory frameworks like SEBI and challenges such as fraud and insider trading, stressing the need to address grievances for market trust. The paper examines investor rights and challenges in the securities market but lacks a detailed analysis of the historical regulatory framework evolution in India. It does not examine the historical context or policy shifts shaping investor protection laws, thus, leaving a notable gap in understanding this evolution. This paper analyzes India's growing foreign investment policies, which include investor protection measures. By evaluating historical shifts and policy amendments it adds to the discussion on investor protection in India. This analysis helps in understanding India's regulatory framework evolution.

Investment Treaties and National Governance in India: Rearrangements, Empowerment, and Discipline finds that IIAs create a complicated terrain of struggle among various actors having different motives. This leads to varied effects on governance. Governance actors strategically use stories about IIAs in political struggles revealing some of the context-dependent impact of these agreements. The paper does not examine the specific impact of IIAs on ISDS mechanisms in India. It fails to explain the challenges and implications of ISDS mechanisms in India's investment treaties. This paper, by examining the 2015 Model BIT's provisions on ISDS, explores how India balances investor protection with regulatory independence. This analysis helps in addressing the gap in understanding how India's policies have shaped its stand on ISDS. This offers certain insights into the challenges and implications of these mechanisms.

Deconstructing India's Evolving Approach Toward International Investment Agreements explains India's evolving stand on IIAs since its first BIT in 1994. It further discusses how India revamped its model BIT, terminating many existing ones. India has been very slow in new BITs, having agreements with only Brazil, Belarus, and Kyrgyzstan, pending enforcement. The paper fails to address the specific factors that influence India's limited progress in negotiating new IIAs post-2015 and all the reasons for the few numbers of BITs, despite India's growing global influence. This paper addresses this gap by examining India's growing foreign investment policies, particularly focusing on the 2015 Model Bilateral Investment Treaty (BIT). By analyzing the specific features of the 2015 Model BIT like Fair and Equitable Treatment (FET), Expropriation, and ISDS, the paper offers insights into how India is steering through challenges in striking a balance between investor protection and regulatory independence. This analysis helps in knowing the complexities influencing India's approach to IIAs.

Liberalizing the Outbound Investment Framework in India - A Step towards Ease of Doing Business examines India's recent changes to its Outbound Investment Framework through the 2022 Foreign Exchange Management Rules. It simplifies and liberalizes regulations for Indian entities investing in equity overseas. It further distinguishes between Overseas Direct Investment (ODI) from Overseas Portfolio Investment (OPI). The article focuses on India's liberalizing outbound investment framework, emphasizing changes introduced by the ODI Framework in 2022. However, it fails to delve into the broader context of how these changes are in line with India's overarching goal of ease of doing business or the specific implications for investors. The paper addresses this gap by analyzing India's evolving foreign investment policies, especially the 2015 Model Bilateral Investment Treaty (BIT). It further examines how these changes contribute to India's ease of doing business initiatives. This provides a better understanding of India's approach to IIAs and their impact on investors.

Foreign Direct Investment in India in the 1990s: Trends and Issues explains FDI trends in the 1990s. When compared to China, India attracted foreign firms with its large market, leading to global brands' presence despite all the competition worries. This period also witnessed a surge in fixed investment. Some of the challenges included concerns about collusion and entry barriers. The paper provides information on FDI trends during the 1990s but does not explore the specific policies and regulatory changes in India influencing these trends. This paper addresses this gap by analyzing India's evolving foreign investment policies, focusing mainly on the 2015 Model Bilateral Investment Treaty (BIT). Through evaluation of provisions such as FET, Expropriation, and ISDS, the paper helps in knowing how India's policies align with the evolving international rule of law, thus, providing a complete understanding of India's approach to foreign investment during the 1990s.

The Significance Of International Investment Arbitration In India's Efforts Toward Instituting A Robust Regulatory Regime discusses the role of investment treaties and regulatory mechanisms in protecting foreign investors. It further focuses on India's BITs, examining shifts in the country's investment policy. It also explores the dispute resolution mechanisms available in India's internal regulatory obligations. The paper does not provide a detailed exploration of the specific provisions within the 2015 Model BIT. It also fails to mention how they address the balance between protecting foreign investors and preserving India's regulatory independence. This paper addresses the gap by analyzing India's actions to strike a balance between protecting foreign investors and preserving regulatory independence by keeping focus on the 2015 Model BIT. Through examination of important provisions such as FET, Expropriation, and ISDS, the paper offers information as to how India's policies are in line with the evolving international rule of law.

EVOLUTION OF INDIA'S FOREIGN INVESTMENT POLICIES

Pre-Independence Era (1757-1947): Foreign investment in India during the colonial period was significantly different from the now-liberalized investment climate. The British rule encompassed both political and economic control. Under colonial rule, the economic policies were structured to favour the interests of the Empire, with a focus on exporting raw materials to Britain and importing finished goods. Resultant, the British administration subjected all foreign investments to strict regulations and control. India's pre-independence economy was agrarian, having limited industrial development and focused more on agriculture. This meant fewer opportunities for foreign investment compared to any other industrialized nation.[1]

[1] Ritu Kang, 'Foreign Direct Investment FDI in India an Analysis of Growth and Performance' (Thesis, Kurukshetra University 2019)

The colonial government's strict control over the economy and their lack of focus on the domestic industries had dissuaded potential foreign investors who were seeking stable and growing markets.[2] Some specific sectors that aligned with the colonial rule interest were targeted by the foreign capital. The British made significant investments in railway infrastructure to facilitate the extraction and transportation of raw materials like cotton and minerals back to Britain. Plantations like tea and coffee, called cash crops and mining, served as profitable ventures for export to Britain.

Post-Independence (1947-1990): After independence in 1947, India was set on a journey of making itself a self-reliant nation along with promoting rapid industrialization. This period saw the adoption of a socialist economic model which was influenced by the then Prime Minister Jawaharlal Nehru's vision.[3] Foreign investment was seen as an evil that could hinder a robust domestic industrial base.[4] India's view on foreign investment matched with its position in the international field, wherein it was the upholder of national treatment of foreign investment and supported the New International Economic Order. This emphasized autonomy and the developing countries' rights over their resources.[5]

This approach was further supported by the Industrial Policy Resolution of 1956.[6] This policy accentuated the state's control over strategic sectors like steel, coal, power, and heavy industries. The policy further looked forward to fostering economic development through centralized planning and resource allocation. Besides the state control, import substitution policies became a foundation of India's industrial strategy during this period. The government implemented tariffs and quotas to discourage imports and increase domestic production.[7] Even though import substitution promoted domestic industries like automobiles, it also led to several inefficiencies.[8]

[2] Irfan Habib, 'The Eighteenth Century In Indian Economic History' (1995) 56 Proceedings of the Indian History Congress <https://www.jstor.org/stable/44158638> accessed 22 March 2024
[3] K. V. Viswanathaiah, 'Jawaharlal Nehru's Concept Of Democratic Socialism' (1965) 26(4) The Indian Journal of Political Science <https://www.jstor.org/stable/41854092> accessed 22 March 2024
[4] Aniruddha Rajput, ' Protection of Foreign Investment in India and International Rule of Law: Rise or Decline?' (2017) 10 Berlin Potsdam Research Group <https://dx.doi.org/10.2139/ssrn.3135261> accessed 22 March 2024
[5] *Ibid*
[6] 'Industrial Policy Resolution' (*Industrial Policy Highlights*, 30 April 1956) <https://dpiit.gov.in/sites/default/files/chap001%20%2013.pdf> accessed 22 March 2024
[7] Jagdish N. Bhagwati, *India: Planning for Industrialization: Industrialization and Trade Policies Since 1951* (Oxford University Press 1970)
[8] *Ibid*

This not only restricted the competition but also stifled technological innovation. The pure focus on domestically produced goods, regardless of being cost-effective, hurt product quality.[9] India had to face a severe economic crisis characterized by both high fiscal deficits and a balance of payment crisis. Such a crisis led to a shift in economic policies. India anchored on various economic reforms known as the Liberalization, Privatization, and Globalisation (LPG), under the leadership of Prime Minister Narasimha Rao in 1991. This change in the policy also facilitated the changes in the international legal landscape, wherein a more liberal approach towards foreign investment was acquiring popularity.

Post-1990s (Liberalization and Beyond): The main reason behind India's FDI Policy shift was a series of economic crises during the 1980s. These crises, including diminishing foreign reserves and an emerging balance of payment crisis, forced the government to abandon its protective and conservative stance.[10] The economic pressure from the crises led to the 'forced embrace' of FDI, thus, marking a crucial changing point in India's economic policy.[11]

An array of economic reforms aimed at attracting FDI was witnessed in the 1990s. These reforms began with reducing the high import tariffs, which increased the competitiveness of foreign goods and promoted a more open trade environment.[12] Additionally, the government raised sectoral FDI caps, allowing foreign investment in significant sectors such as energy. Furthermore, the government permitted 100% FDI.[13] To streamline the FDI approval process and reduce the bureaucratic hurdles for foreign investors, the Foreign Investment Promotion Board (FIPB)[14] was set up.[15] This shift from strict regulation to a more liberalized approach in

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[9] Isher Judge Ahluwalia, *Industrial Growth in India: Stagnation Since the Mid-Sixties* (OUP 1985)
[10] C. Rangarajan, *Two Episodes in the Reform Process' in India's Economy: Performance and Challenges* (Oxford University Press 2010)
[11] Rajput (n 4)
[12] R. Nagraj, 'Foreign Direct Investment in India in the 1990's: Trends and Issues' (2003) 38(17) Economic and Political Weekly <https://www.jstor.org/stable/4413497> accessed 22 March 2024
[13] ibid.
[14] 'About Us' (*Foreign Investment Facilitation Board*) <https://fifp.gov.in/AboutUs.aspx> accessed 22 March 2024
[15] Nagraj (n 12)

managing foreign capital flows was exemplified by the replacement of the Foreign Exchange Regulation Act (FERA)[16] with the Foreign Exchange Management Act (FEMA)[17].[18]

The economic liberalization also opened avenues for major infrastructure projects involving multinational businesses. However, some of these corporations got involved in controversies, highlighting the complex interplay between corporate interests, governance mechanisms, and political dynamics. One such example was the Dabhol power project. Proposed as a $ 3 billion power plant in Maharashtra's Ratnagiri district.[19] The project was a joint venture between the US-based firm, Enron Corporation, General Electric (GE), Bechtel, and the state-owned Maharashtra Power Development Corporation. The project faced resistance from the beginning due to a lack of transparency in the power purchase agreement between Enron and the Maharashtra State Electricity Board (MSEB).[20] It was revealed that the board was paying a high rate of Rs. 7.80 per unit to purchase power from the Enron project even when the retail consumers were charged only Rs. 1.89 per unit.[21] This led to significant losses for the state utility. This power project highlighted the need for strict governance mechanisms, transparency, and accountability as the country steered through the complex landscape of foreign investment and PPPs in crucial sectors.[22]

Besides domestic policy reforms, India sought to attract FDI through other means. In 1992, India joined the Multilateral Investment Guarantee Agency (MIGA), providing both greater security and risk mitigation for foreign investors. On the other hand, India also accompanied Bilateral Investment Treaties (BITs) with several countries, one of them being the United Kingdom in

[16] 'Exchange Control Manual' (*RBI,* 2015) <https://www.rbi.org.in/scripts/ECMUserView.aspx?CatID=12&Id=21> accessed 22 March 2024
[17] Foreign Exchange Management Act 1999
[18] Rangarajan (n 10)
[19] Sundeep Khanna, 'Backstory: The Dabhol Conspiracy and Enron's India Misadventure' *CNBCTV18* (18 April 2022) <https://www.cnbctv18.com/energy/backstory-the-dabhol-conspiracy-and-enrons-india-misadventure-13186432.htm> accessed 01 May 2024
[20] *Ibid*
[21] Khanna (n 19)
[22] 'FACT SHEET Background on Enron's Dabhol Power Project' (*Committee on Government Reform,* 22 February 2002) <https://edbodmer.com/wp-content/uploads/2018/07/Dabhol-Chronology-Cheney-Meeting.pdf> accessed 01 May 2024

1994.[23] These BITs offered foreign investors legal safeguards and recourse mechanisms in case of any dispute.[24] However, it is important to note that these provisions, such as international arbitration, may restrict the government's regulatory space in certain situations.[25] The third phase, which began in 2011, marked a significant shift in India's approach towards foreign investment. This shift was initially prompted by the White Industries case wherein an Australian investor demanded arbitration proceedings against India under the Australia-India BIT. The investor contended a violation because of delays in enforcing a commercial arbitration award within the Indian courts.[26]

The arbitral tribunal while not finding the Indian courts responsible for the denial of justice, however, highlighted India's multiple vulnerabilities:

- The case indicated concerns about the possibility of foreign arbitral tribunals by questioning the actions taken by the Supreme Court of India.[27]
- This case further focused on the potential possibility of broad interpretations of investment treaties, which led to concerns about the restrictions on its sovereignty and India's ability to regulate certain aspects of its economy or developmental goals.
- It also highlighted a shift away from Indian domestic courts for dispute resolution, this is because of possible perceived inefficiencies.

After the White Industries case, India observed a surge in investment claims lodged against the government for various actions.[28] This surge exposed the limitations of the current approach to FDI. The then Indian government in response to this led a critical review of its BIT program

[23] Rishi Vimadalal, 'India and Investment Treaty Arbitrations: A Chequered Past and Uncertain Future' *SCC Times* (29 September 2021) <https://www.scconline.com/blog/post/2021/09/29/india-and-investment-treaty-arbitrations/> accessed 01 May 2024
[24] United Nations, *Trade And Development Report* (1998)
[25] Rajput (n 4)
[26] Aditya P Arora, 'Case Comments on White Industries v. Republic Of India' (*Academike,* 03 February 2015) <https://www.lawctopus.com/academike/case-comments-white-industries-v-republic-india/#> accessed 01 May 2024
[27] *Ibid*
[28] *Centre for Public Interest Litigation v Union of India* (2012) 3 SCC 1

through the Ministry of Commerce. The review ushered India to take several policy initiatives like the termination of existing BITs and the development of a New Model BIT in 2015[29].

India has taken a careful approach towards negotiating and ratifying new BITs after the 2015 Model BIT. India has only signed four BITs with Belarus, Kyrgyzstan, Taiwan, and Brazil since the release of the model text in 2016.[30] At the same time, India is currently engaged in negotiations with 37 countries and blocks to enter new BITs which are in line with its revised investment policy framework.[31] Moreover, India has terminated its former BITs with almost 77 countries and has only retained six agreements that are in force.[32] This step shows India's commitment to modernizing its investment treaty regime while also addressing concerns related to past experiences with the ISDS mechanisms.

BALANCING ACT: INVESTOR PROTECTION VS REGULATORY INDEPENDENCE

India's journey with FDI has been a story of multiple ups and downs, beginning with a policy of import substitution which aimed at promoting domestic production and limited foreign participation in the economy to facing a series of economic crises in the late 1980s, compelling it to embrace a more liberalized approach.[33]

However, there always has been a longstanding challenge in striking a balance between protecting foreign investor interests and upholding the state's regulatory independence in international investment law. In the case of India, achieving this balance became crucial in the wake of high-profile investor-state disputes as well as issues related to the broad interpretations of the investment treaties that affected its independence in the policy space.

The 2015 Model Bilateral Investment Treaty (BIT) serves as a significant navigational point in the ongoing story. It stands out for its attempt to arrive at a fine balance between protecting

[29] 'Annex Model Text for the Indian Bilateral Investment Treaty' (Department of Economic Affairs) <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 01 May 2024
[30] Subhayan Chakraborty, 'What Are India's BITs and How Do They Affect International Arbitration?' (*Money Control*, 25 January 2022) <https://www.moneycontrol.com/news/business/economy/explained-what-are-indias-bits-and-how-do-they-affect-international-arbitration-7981671.html> accessed 01 May 2024
[31] The Standing Committee on External Affairs, *India and Bilateral Investment Treaties* (2021)
[32] *Ibid*
[33] Arvind Panagariya, 'Growth and Reforms During 1980s and 1990s' (2004) 39(25) Economic and Political <https://www.jstor.org/stable/4415173> accessed 20 March 2024

foreign investors and preserving India's right to regulate. It further acknowledges the need for investor protection while at the same time respecting India's right to regulate. This is attained through several important features such as:

Fair and Equitable Treatment (FET): Conventionally, the FET standard in the BITs has been interpreted broadly, by potentially hindering a government's ability to enact legitimate regulations.[34] Further, the Model BIT clarifies that the FET standard does not prevent any legitimate regulatory actions. This helps ensure that certain essential regulations concerning environmental protection, public health, or labour standards can be implemented without prompting investor-state disputes.[35] For example, in case the Indian government enforces strict environmental regulations that may have an impact on the profitability of foreign-owned factories, such strict regulations would not be considered a violation of FET under this Model BIT as long as they are made applicable in a non-discriminatory manner.

Expropriation: There was a fear of arbitrary government actions which potentially led to discouragement of foreign investment. This fear is sourced from the ambiguous concept of expropriation in the BITs. The Model BIT defines expropriation more accurately by excluding the non-discriminatory regulatory measures from its purview.[36] This move protects investors from any such situation where the government seizes their investments without providing them with compensation. At the same time, it safeguards the government's right to make necessary regulations even when those regulations might have an impact on the profitability of an investment.

Investor-State Dispute Settlement (ISDS): ISDS provides mechanisms for foreign investors to bypass the domestic courts and bring their disputes directly against the host government in international tribunals. Even though this mechanism provides a sense of security for the investors, it has also been widely criticized for probably undermining the domestic courts or the

[34] Sankalp Jain, 'Investors' Protection in India: Regulatory Framework and Investors' Rights, Obligations & Grievances' (2014) SSRN < https://dx.doi.org/10.2139/ssrn.2462944>
[35] Rajput (n 4)
[36] Rishi Shroff, 'India's Sweeping Regulatory and Policy Changes: Heralding a New Era in Investor Protection in M&A Transactions?' (2014) 14(!) Oxford University Commonwealth Law Journal <https://ssrn.com/abstract=2821335> accessed 23 March 2024

domestic legal systems and empowering corporations over the host state governments.[37] Article 15 includes conditions precedent that an investor is required to fulfill before submitting a claim to any international arbitration centers.[38] It involves first exhausting all the local remedies for a duration of at least 5 years, providing certain notices, and obeying strict timelines. The Model BIT of 2015 also includes certain preventive measures against the abuse of the ISDS mechanism. These measures can include provisions for frivolous claims or provisions that ensure the disputes are settled within the domestic legal framework before going with international arbitration.

Even when these features highlight efforts to strike a well-maintained balance between investor protection and regulatory independence, the critics argue that the 2015 Model BIT's approach is heavily in favour of regulatory independence and erodes investor confidence.[39] The defendants on the other hand argue that the new provisions offer more legal certainty and provide a suitable and transparent investment environment.[40] Many of the developing countries facing similar challenges may look up to the 2015 Model BIT as an outline for modifying their investment treaty frameworks. On the contrary, capital-extensive states may express concerns over their perceived diminishing investor protection which shall ultimately impact the bilateral investment flows and negotiations.

Promoting Legal Certainty Through Detailed Provisions

India's BITs employ detailed provisions that serve as a crucial mechanism for achieving a balance between investor protection and regulatory autonomy. It also establishes a rule-based system for foreign investment, which promotes legal certainty for both investors as well as the government. A predictable environment is provided within the BITs because of clear and well-defined rights and obligations.[41] This predictable environment can help investors make informed decisions that have a much better understanding of the legal framework governing

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[37] Jain (n 34)
[38] Annex Model Text for the Indian Bilateral Investment Treaty (n 29)
[39] *Ibid*
[40] Mahdev Mohan and Chester Brown, *The 2015 Indian Model BIT* (Cambridge University Press 2021)
[41] K. Rajaraman et. al., 'The Indian Model Bilateral Investment Treaty: Continuity and Change' (2016) SSRN <https://ssrn.com/abstract=2763222> accessed 24 March 2024

their investments.[42] One such example is the detailed definition of 'investment' given under Article 1.4 which describes the specific assets and characteristics that are eligible to be considered as a protected investment.[43] Such provisions minimize any room for conflicting interpretations or confusion between the investors and the host state government.[44] This significantly reduces the risk of disputes that may arise from misunderstandings about what rights investor has and what regulations the can government impose.

India's BIT includes a range of provisions that intensify legal certainty. Article 6 provides comprehensive rules on fund transfers which specify permissible currencies, exchange rates, and grounds for restricting transfers.[45] Furthermore, Article 9 discusses the entry and lodging of personnel who are associated with the investments, by ensuring certainty about the rights and obligations that are involved.[46] Such involvement of granular provisions highlights India's commitment to creating a transparent and predictable legal framework.

The treaties impose certain restrictions on the host state government's power to seize foreign investments. In the event the expropriation becomes necessary, it must be done for a public purpose, carried out in compliance with the law, and be accompanied by prompt, adequate, and effective compensation.[47] The FET provision given under the BITs helps in ensuring that foreign investors receive just and non-arbitrary treatment from the government of the host state.[48] It further includes provision for dispute resolution for settling any disagreements between investors and governments often through international arbitration under Chapter IV.[49]

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[42] Josef Ostřanský and Facundo Pérez-Aznar, 'Investment Treaties and National Governance in India: Rearrangements, Empowerment, and Discipline' (2021) 34(2) Leiden Journal of International Law <https://dx.doi.org/10.2139/ssrn.3721959> accessed 24 March 2024
[43] Annex Model Text for the Indian Bilateral Investment Treaty (n 29)
[44] Rajaraman (n 41)
[45] Annex Model Text for the Indian Bilateral Investment Treaty (n 29)
[46] *Ibid*
[47] Rajaraman (n 41)
[48] Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance Backlash* (Oxford University Press 2019)
[49] Anujay Shrivastava and Kaustubh Kapoor, 'Significance Of International Investment Arbitration In India's Efforts Toward Instituting A Robust Regulatory Regime' (2019) 11 NLSIU Indian Journal of International Economic Law <https://ssrn.com/abstract=3843382> accessed 6 April 2024

The *Cairn Energy v India*[50] was a high-profile international investment dispute case that primarily centered on a retrospective tax demand imposed by the Government of India on Cairn Energy, a UK-based energy company. The dispute began with a corporate reorganization done in 2006, wherein Cairn Energy transferred the shares of its Indian assets to a newly formed company called Cairn India Ltd, as a part of preparations for an initial public offering. After several years in 2014, the Indian tax authorities said that energy firms owed capital acquires tax of around $1.6 billion on the internal restructuring that occurred in 2006.

Cairn's claim had its legal basis from the India-UK Bilateral Investment Treaty signed in 1994. Cairn Energy and its subsidiary Cairn UK Holdings Limited (CUHL) invoked the BIT's investor-state dispute settlement provisions in 2015 and went with international arbitration proceedings against India under the United Nations Commission on International Trade Law (UNCITRAL) rules. The submissions were made in the arbitral tribunal between the period of 2016-2018 and were chaired by Laurent Gouiffès. The tribunal ruled in favour of Cairn in December 2020 and held that India violated the fair and equitable treatment laid down in the India-UK BIT by demanding a retrospective tax. The tribunal ordered India to pay Cairn $1.7 billion (including interest and costs). After lengthened negotiations, India agreed to return $1.06 billion to Cairn in August 2022, thus resolving the long-standing dispute.

The case highlighted the importance of BITs in protecting the rights of foreign investors providing a framework where disputes can be resolved. Overall, the involvement of such detailed provisions showcases India's attempt to promote a rule-based system that provides a predictable environment to all the stakeholders and hence fosters foreign investment.

EMERGING TRENDS IN INTERNATIONAL TRADE AND INVESTMENT LAW

The Reserve Bank of India (RBI) introduced an important regulation that governs the investment of Indian residents in August 2022. The Foreign Exchange Management (Overseas Investment)

[50] *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v Government of India* (2020) PCA Case No 2016-17

Directions, 2022 aims at facilitating outward foreign direct investment (ODI) and promoting India's inclusion in the global economy.[51]

One of the key provisions of these revised regulations is the broadened scope which allowed Indian institutions to engage in a wider range of economic activities abroad. The revised framework besides the traditional investments in joint ventures and wholly owned subsidiaries, now includes provisions for portfolio investments, real estate investments, and other forms of overseas investments.[52] Furthermore, these guidelines have fostered greater foreign direct investment outflows by easing the norms for Overseas Direct Investment (ODI) by Indian entities. The need for prior approval from the RBI in certain cases has been given away by expanding the automatic route for ODI.[53]

The introduction of the concept of 'strategic sectors' is one of the crucial aspects of the revised regulations. They identify certain sectors as of being significant importance to India's economy and are of strategic interest.[54] These sectors include defense, telecommunication, energy, and natural resources. Under these strategic sectors, any investment in foreign entities can be made beyond the prescribed limit of 400% of net worth after seeking approval from the Central Government to safeguard India's national interests and to foster investments in areas that are critical for the development and security of the country.[55]

Defense has been classified as a strategic sector because of its importance to national security. Investments made by Indian institutions in overseas defense companies or even acquisitions of defense-related assets may require both enhanced scrutiny and clearances from concerned authorities.[56] Telecommunications is also assigned as a strategic sector due to it being critical to India's infrastructure and data security.[57]

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[51] Foreign Exchange Management (Overseas Investment) Directions 2022
[52] *Ibid*
[53] 'Revised Overseas Investment Guidelines' (*EY*, 25 August 2022) <https://www.ey.com/en_in/alerts-hub/2022/08/revised-overseas-investment-guidelines> accessed 06 April 2024
[54] *Ibid*
[55] 'Notification of Overseas Investment Rules, Regulations & Master Directions, 2022' (*Dewan P.N Chopra & Co., Chartered Accountants*, 26 August 2022) <https://www.dpncindia.com/blog/notification-of-overseas-investment-rules-regulations-master-directions-2022/> accessed 07 April 2024
[56] Revised Overseas Investment Guidelines (n 53)
[57] *Ibid*

Furthermore, the new directions have given away many approval requirements which helps in smoothening transactions and reducing administrative burdens.[58] The Indian institutions can also defer payment of consideration for any overseas acquisitions without prior approval however, it is subject to specific conditions.[59] Not only this but the institutions that are under investigation for certain offenses can also undertake overseas investments or disinvestments without prior approval.[60] The moderation provided for approval requirements extends to other areas and the Indian institutions can issue corporate guarantees to subsequent level step-down subsidiaries without any prior approval.[61] In addition, they can write off their overseas investments without requiring prior approval in cases of disinvestment.[62] The push given by the Foreign Exchange Management (Overseas Investment) Directions, 2022 for increased outward foreign direct investment (ODI) needs to be carefully balanced with potential challenges related to international investment agreements.

One of the key issues highlighted by the Parliamentary Standing Committee on External Affairs in its 2021 report[63] on India's BITs and Investment Agreements is the sparse number of agreements signed since 2015. This leads to India falling short of its growing global influence. The report further emphasizes the need for more vigorous BITs to protect Indian investments abroad and attract foreign investments in India. However, the ongoing condition of investment treaty negotiations has not indulged in providing crucial progress in terms of finalized agreements.[64] This stagnation may obstruct India's ability to secure strong protections for its outward investments. Further complications arise when the existing interim Free Trade

[58] Foreign Exchange Management (Overseas Investment) Directions 2022
[59] Vaishnavi Vyas, 'Liberalizing the Outbound Investment Framework in India - a Step towards Ease of Doing Business' (*Lexology,* 07 September 2022) <https://www.lexology.com/library/detail.aspx?g=072a6f1c-cf53-45be-ad5e-1543761cf91c> accessed 07 April 2024
[60] Foreign Exchange Management (Overseas Investment) Directions 2022
[61] 'Overseas Investment Rules and Regulations announced – Key highlights' (*Pwc.in,* 24 August 2022) <https://www.pwc.in/assets/pdfs/news-alert/regulatory-insights/2022/pwc_regulatory_insights_24_august_2022_overseas_investment_rules_and_regulations_announced_key_highlights.pdf> accessed 07 April 2024
[62] Foreign Exchange Management (Overseas Investment) Directions 2022
[63] Ministry Of External Affairs, *Fourteenth Report* (2022)
[64] *Ibid*

Agreements (FTAs) lack comprehensive provisions for foreign investment protection. This becomes problematic in safeguarding Indian businesses that are venturing overseas.[65]

There are also concerns about regulatory autonomy wherein India may be hesitant to exercise control over its domestic policies through investment agreements.[66] For instance, India has been hesitant to include agriculture in its BITs fearing that the foreign entities might challenge government policies that primarily aim at protecting domestic farmers and ensuring food security.[67] The experiences with Investor-State Dispute Settlement (ISDS) cases also influence India's cautious pose.[68] In fact, in recent years India has terminated several BITs citing concerns about the wide nature of the ISDS provisions and their ability to restrict the government policies.[69] RBI aims to create a more instrumental and empowering environment for Indian institutions to seek global opportunities, diversify their investments, and enhance their competitiveness in the international market by introducing these investment rules.

One other significant trend is India's strategic shift towards bilateral and regional trade arrangements which emphasizes investment and economic cooperation with certain countries and regions. A crucial example is the India-EFTA Trade and Economic Partnership Agreement (TEPA)[70] which was signed on March 10, 2024. It was signed between India and the European Free Trade Association (EFTA), which comprised Switzerland, Iceland, Norway, and Liechtenstein. This is India's first major free trade agreement with any of the developed nations under the EFTA.[71] The TEPA makes it obligatory for EFTA countries to aim for a whopping USD 100 billion in investments in India. This is to be done within 15 years from its entry into force.[72]

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[65] *Ibid*
[66] S. Steininger, 'Prabhash Ranjan, India and Bilateral Investment Treaties. Refusal, Acceptance, Backlash' (2021) Oxford University Press <https://doi.org/10.1007/8165_2020_62> accessed 07 April 2024
[67] Harshad Pathak and Shantanu Singh, 'Deconstructing India's Evolving Approach Toward International Investment Agreements' *International Treaty News* (1 July 2023) <https://www.iisd.org/itn/en/2023/07/01/deconstructing-indias-evolving-approach-toward-international-investment-agreements/> accessed 07 April 2024
[68] Steininger (n 66)
[69] Pathak (n 67)
[70] Ministry of Commerce & Industry, 'India-EFTA Trade and Economic Partnership Agreement' (*PIB,* 10 March 2024) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2013169> accessed 07 April 2024
[71] 'EFTA Trade and Economic Partnership Agreement: Key Outcomes and Implications' (*Economic Laws Practice*, 11 March 2024) <https://elplaw.in/wp-content/uploads/2024/03/ELP-Update-India-EFTA-Trade-and-Economic-Partnership-Agreement-Key-Outcomes-and-Implications.pdf> accessed 03 May 2024
[72] *Ibid*

In addition to this, facilitated the creation of 1 million jobs in India during the said period.[73] In case these targets are not achieved, India can call upon a consultation procedure and potentially suspend concessions. The TEPA is looked at as an opportunity to access European and other global markets by the Indian exporters. This is in line with India's Atmanirbhar Bharat and Make in India initiatives. Even before TEPA, India had signed agreements with Mauritius (Comprehensive Economic Cooperation and Partnership Agreement, 2021), the United Arab Emirates (India-UAE Comprehensive Economic Partnership Agreement, 2022), and Australia (India-Australia Economic Cooperation and Trade Agreement, 2022).

All these agreements showcase India's strategic focus on bilateral and regional trade arrangements with an intent to enhance trade and foreign investments.[74]

CONCLUSION

This paper has provided a comprehensive overview of India's foreign investment policies, tracing its evolution from the pre-independence era to the present day. The analysis emphasizes the historical shifts, policy frameworks, and key amendments by keeping a specific focus on the 2015 Model Bilateral Investment Treaty (BIT). By discussing the balance between protecting foreign investors and preserving regulatory independence, this paper seeks to contribute to the understanding of India's approach to foreign investment. The research methodology, combining both doctrinal and secondary doctrinal research, has allowed for a thorough exploration of historical contexts, emerging trends, and challenges. On the way forward, policymakers and stakeholders need to consider the intricate aspects of investor protection and regulatory autonomy in the dynamic terrain of India's foreign investment policies.

[73] EFTA Trade and Economic Partnership Agreement: Key Outcomes and Implications (n 72)
[74] *Ibid*