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Emerging Trends in International Trade and Investment Law: A Critical Analysis of India's New Overseas Investments Regime and its Position in the International Investment Landscape

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ABSTRACT

This research paper focuses on emerging trends in international trade and investment law, with a specific emphasis on recent changes in India's overseas investment regulations. It comprises four parts, each addressing critical aspects of the evolving global investment landscape.

Part 1 gives an overview of current trends in international trade and investment law, analyzing the impact of rapid globalization on cross-border investments and the complexity of legal frameworks governing foreign investments. It also examines the rise of bilateral and regional investment agreements and the role of investor-state dispute settlement mechanisms.

Part 2 critically examines India's recent overhaul of overseas investment rules. It delves into key amendments and policy shifts aimed at attracting foreign investments and fostering economic growth. A comparative analysis of old and revamped regulations highlights the motivations behind these changes and their potential implications for India's investment climate.

Part 3 provides an in-depth analysis of India's new overseas investments regime, exploring legal, economic, and political considerations that shaped the policy framework. It evaluates potential challenges and opportunities arising from the new rules, including their impact on ease of doing business in India and facilitation of outbound investments.

Part 4 assesses India's position in the international investment regime. It considers the country's historical investment treaty practices, engagement with international investment agreements, and participation in investor-state dispute resolution mechanisms. The paper seeks to provide insights into India's stance on foreign investments and its potential influence in shaping international investment law.

Keywords: *Investment, Trends, Foreign Trade Agreements.*

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I. INTRODUCTION

While historically most FTAs were formed between comparable countries, the number of FTAs between countries with different cultures has increased.[3] 76% of all RTAs that are notified, in effect, and 93% of those that are signed and in negotiation are bilateral agreements.[4] 82% of all RTAs that are notified, in effect, and 93% of those that have been signed but are still being negotiated are FTAs. North-south RTAs make up the majority of RTA clusters, making up 37% of all notified and in effect RTAs and 56% of signed and pending RTAs. While bilateral FTAs between unrelated nations make up the majority of overlapping FTAs, FTAs between developed nations were often established sooner.[5] These observed characteristics of recent RTAs raise concerns about whether the creation of a bilateral FTA between nations that are not identical to one that already exists between nations that are. Only when the initial FTA is formed between two larger countries, and the bilateral FTA cannot be expanded by the addition of a new member, does the FTA act as a building block for MFT through overlapping FTAs. When one of the members of the existing FTA forms another FTA with a non-member country, then a hub-and-spoke system develops. FTAs between comparable countries were typically established earlier than FTAs between dissimilar countries, and these FTAs frequently overlap. We confirm the requirement of establishing a bilateral FTA before examining whether an overlapping FTA and FTA extension result in MFT in order to take these characteristics of recent RTAs into consideration.

Asia's trade policies and current position as the "Global factory" are being impacted by the proliferation of new Free Trade Agreements inside the continent. The utilization of Asian Free Trade Agreements, their breadth, and their effects on economic growth and regionalization tendencies in Asia are the subject of this study's policy recommendations. The main deterrent for not using FTAs is cited as a lack of knowledge about them.[6] The additional reasons given for not using FTAs included low margins of preference, administrative costs and delays related to rules of origin and other export documents, as well as economies based on non-tariff measures. Studies show that the scope of Asian FTAs varies greatly (for instance, whether or not subjects outside the WTO framework are included). Review of the criteria pertaining to the

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[3] The data exclude FTAs involving Indonesia-Pakistan and Chile-Vietnam for which texts were not available.

[4] Rice (a key sensitive sector), however, was excluded from the South Korea-US FTA agreement.

[5] Lao PDR excludes 5 items, Vietnam 7, Malaysia 16, Philippines 17, Indonesia 24, and Cambodia and Myanmar 36 each. In contrast, Brunei Darussalam and Singapore eliminated tariffs on all agricultural products.

[6] Positive and negative list approaches facilitate the identification of products/services for inclusion in FTAs and the extent of their coverage. A negative list approach liberalizes all sectors/products (in a phased manner) unless otherwise specified. A positive list approach is the stipulation of a specific number of products/sectors for preferential treatment with details of the extent of liberalization given to each item.

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four "Singapore issues" (competition, intellectual property, investment, and public procurement) reveals that, of the 69 FTAs examined, 23 percent had comprehensive "WTO-plus" coverage, another 54 percent had partial WTO-plus coverage, and 23 percent were goods-and-services agreements only.

"Challenges Posed by Asian Free Trade Agreements" examines six significant difficulties brought on by these FTAs:

Increasing the use of FTA preferences, addressing the issue of Asian noodle bowls, promoting comprehensive coverage of agricultural trade, facilitating the liberalization of services trade, including new issues (like competition) that go beyond the WTO framework, and creating a regional FTA are just a few of the recommendations made. These issues are examined using fresh data from the analysis of FTAs, enterprise-level surveys, and computable general equilibrium (CGE) models.

Up to the 1990s, FTAs were practically non-existent in Asia. The region's first such pact was the Asia-Pacific Trade pact (APTA),4 which went into effect in 1976. It was followed by the ASEAN Free Trade Agreement (AFTA) in 1991 and the Thailand-Lao PDR Preferential Trade Agreement (PTA) in 1992.

The current expansion of FTA initiatives in Asia can be attributed to four primary factors:

1. the current stagnation in the WTO Doha Round trade negotiations,

2. the increasing market-driven economic integration of Asia,

3. the 1997–1998 Asian financial crisis,

4. the growing economic integration of Europe and North America.

A growing number of policymakers in Asia believe that FTAs, if given a broad scope, can promote increased FDI and trade activity by further eliminating cross-border barriers and doing other similar harmonization initiatives. FTAs are therefore seen as components of a supporting policy framework for strengthening the supply chains and global MNCs' networks of production.

The success of the North American Free Trade Agreement (NAFTA), the monetary union in the Eurozone, the expansion of the European Union (EU) into central and eastern Europe, and the beginnings of the Free Trade Area of the Americas (FTAA) all encouraged Asian economies to sign FTAs. Despite a rise in FTAs since 2000 in Asia, the continent still has fewer FTAs per GDP than other regions. Compared to the global average of 13 FTAs, to which each WTO member is a party, Asia has an average of nine FTAs per economy. Singapore (20), India (13),

Japan (13), China (12), Malaysia (12), and Thailand (12) are among the Asian economies with the most finalized FTAs. There are currently discussions about more FTAs. The EU, with 31 signed FTAs, leads the globe in this regard, while the United States has 20. After passing free trade agreements with China, Japan, and South Korea, ASEAN has now finished doing the same with India, Australia, and New Zealand. FTAs with the EU have also been discussed by the organization.

Different levels of FTA activity in different Asian economies can be attributed to a number of elements, such as economic geography, economic size, per-capita income, levels of protection, and MNCs' production network methods. In terms of the quantity and range of FTAs, Singapore is by far the most active Asian economy. Singapore serves as the regional headquarters for a number of top MNCs and regional organizations thanks to its advantageous location, first-rate infrastructure and logistics, and one of the region's most open economies. China, India, Japan, South Korea, and other Asian economies, as well as those outside the area including Australia and the United States. The US-Singapore FTA, which has been in effect since 2004, is regarded as a model deal in terms of scope and was the first of its kind made by the US in Asia (Koh and Lin 2004). Strangely, the US strategy for FTAs with ASEAN nations under the "Enterprise for ASEAN Initiative" specifically cited the FTA between the US and Singapore as an example.

Middle-income nations like Malaysia and Thailand have established themselves as major regional production centers for the automotive and electronics sectors, respectively. Malaysia has separate agreements with Chile, Japan, New Zealand, and Pakistan in addition to participating in ASEAN's FTAs. Thailand, one of the founding nations of ASEAN, has signed bilateral pacts with New Zealand, Australia, China, India, and Japan. In 2011, it also reached an FTA with Peru.[7]

Despite having fewer FTAs than other major economies in the region, South Korea has strategically secured FTAs with both ASEAN and the two largest trading blocs in the world (Europe and the United States). South Korea specifically has agreements with ASEAN, APTA, and Singapore members within Asia. South Korea has agreements with Chile, Peru, the EU, and the European Free Trade Area (EFTA) economies outside of Asia. The South Korea-US Free Trade Agreement was ratified on March 15, 2012, and it was signed in June 2007. The EU-South Korea Free Trade Agreement was ratified in July 2011 after being signed in October 2010.

[7] Future research can extend Fink and Molinuevo's (2008) more detailed review of key architectural choices in East Asian FTAs with a services component (e.g., dispute settlement, movement of natural persons, scheduling commitments, and treatment of investments) to analyzing the 69 Asian FTAs.

With a few exceptions, the lower-income economies in the area—Cambodia, Indonesia, Lao PDR, Philippines, and Vietnam—have tended to rely on ASEAN to reach FTAs with the bigger economies in the region. This can be due to a dearth of human and technical resources, a lack of negotiating power, or a lack of institutional readiness for FTA discussions. These economies have been able to pool their limited resources and capacity thanks to the ASEAN framework.

An average of two free trade agreements (FTAs) between the economies of the two areas have been signed per year since the first one did so in 2004. There were 20 such contracts active as of 2012 (Wignaraja, Ramizo, and Burmeister 2012). By 2020, it is anticipated that this number will reach 30. The two regions' largest trading economies have driven this development in cross-regional FTAs. Important agreements include the FTAs between China and Costa Rica, Japan and Mexico, South Korea and Chile, and India and Chile. As well as not having taken part in numerous cross-regional FTAs, ASEAN and other South Asian economies do not trade with Latin American economies very frequently.

It's rather simple to keep track of how many Asian FTAs were signed over a specific period of time. The econo-my cological significance of FTAs to economic activity or trade, however, cannot be determined solely by the figures.

It would be useful to determine how much of the international trade of an Asian economy is covered by FTA provisions, even though this is challenging to evaluate due to the numerous exceptions and exclusions incorporated in many agreements.[8] There are no published data on the direction of services trade, and it is difficult to get official figures on the rates at which Asian FTA preferences are used.

The only way to acquire generally suggestive numbers is to make the bold assumption that all currently active Asian commerce in products is covered by signed FTAs.8 Based on this supposition, Figure 4 and Appendix Table 1 make an effort to depict, for the years 2000 and 2010, the proportion of a country's bilateral commerce with its FTA partners in relation to its

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[8] Six FTAs involved Singapore, which typically covers the five key services in its FTAs. A similar approach was followed in the Taiwan-Panama FTA, the Japan-Mexico FTA, and the Thailand-Australia FTA. The ASEAN Framework Agreement on Services (AFAS) was signed in 1995/6 and the protocol to amend AFAS was launched in 2003. Thereafter, several rounds of negotiations have aimed at deepening AFAS.

1. An early review of 11 Asian agreements concluded that "modern FTAs in Asia, some of which are the most sophisticated in the world, have tended to be more comprehensive in terms of coverage and of the building bloc rather than the stumbling bloc type, though there are some (minor) exceptions in terms of certain components" (Plummer 2007, 1795). The study suggested a set of best practices to guide future FTAs.
2. The members are Brunei Darussalam, Chile, New Zealand, and Singapore.
3. ECOTECH is the APEC schedule of programs designed to build capacity and skills in APEC member economies to enable them to participate more fully in the regional economy and the liberalization process. See http://www.apec.org for more information.

overall world trade. Additionally, statistics for the EU and the US are provided.

Two conclusions could be drawn:

First, relative to ASEAN member states, the region's larger economies have smaller shares in 2010, emphasizing the latter's increased reliance on FTAs (particularly AFTA). The shares for the bigger economies are as follows: South Korea (42%), China (27%), India (23%), and Japan (11%), in that order. The economies of ASEAN members are remarkably diverse, with shares exceeding 80% in Brunei Darussalam, Lao PDR, and Myanmar and over 65% in Indonesia and Singapore. The other ASEAN nations' economies range from 62% to 51%.[9] At 15%, Taiwan has the lowest stated percentage of its international trade covered by FTAs.

Second, all noteworthy Asian economies saw a marked increase in their reliance on FTAs between 2000 and 2010, showing the spread of FTAs throughout the region. Over this time, the proportion of trade covered by FTAs to total world commerce has at least quadrupled for the four largest economies in Asia: China, India, Japan, and South Korea. The majority of ASEAN economies are also showing notable growth.

The present trade coverage of FTAs in the biggest economies in Asia is interesting to compare to that of the EU (34%)[10] and the US (26%). The trade coverage of the South Korean economy is greater than that of the EU and the US, while that of the Chinese economy is more than that of the US.

The economies of Japan and India have less trade coverage than the economies of the EU and the US.

II. Asian Free Trade Agreements' Challenges[11]

Concerns about FTAs have grown as they proliferated across Asia (Baldwin 2006, Tamborello 2007, World Bank 2007, Bhagwati 2008, Drysdale and Armstrong 2010, Hoekman and Mattoo 2011). There are many obstacles to regional integration, according to a brief study of the expanding number of conference reports, media stories, policy research, and political discussions about Asian FTAs.

The numerous economic, legal, and political challenges that arise from growing Asian trade integration are not the focus of this study.

[9] Interestingly, South Korean farmers do not seem overly threatened by the South Korea-US FTA but express concerns over agriculture with regard to a South Korea-China FTA.

[10] Changing APEC's mandate into a prospective FTA organization would, however, likely encounter strong opposition from China and many middle-income ASEAN economies.

[11] Manupatra, A. V. R. (n.d.). Manupatra. *Articles*. Manupatra. Retrieved July 30, 2023, from <https://articles.manupatra.com/article-details/International-Trade-and-Investment-Law-Emerging-Trends>

In order to provide policy recommendations, this study pragmatistically analyzes trends and difficulties in Asian FTAs. Particularly, six major issues relating to Asian FTAs warrant additional study:

1) expanding the use of FTAs at the enterprise level;
2) addressing the issue of Asian noodle bowls;
3) encouraging complete coverage of agricultural trade;
4) aiding services-trade liberalization;
5) expanding WTO-plus aspects; and
6) creating a regional FTA.

The examination of new data from enterprise-level surveys, agreement analysis, and CGE models may be helpful in identifying solutions to some of these problems.

III. A PROBABLE SITUATION : CONSOLIDATION OF FTAS IN ORDER

ASEAN-centric RCEP and TPP may serve as a model for FTA consolidation in Asia. A likely possibility could be the consolidation sequence shown below:

1. The creation of a China-Japan-South Korea FTA, either directly through a trilateral agreement between the three economies or through bilateral agreements among them;
2. The acceleration of an ASEAN Economic Community (AEC) to be established by 2015;
3. The formation of the Regional Comprehensive Economic Partnership (RCEP) among the ASEAN+6 economies through mechanisms connecting the current ASEAN+1 FTAs, a new China-Japan-South Korea FTA, and other bilateral FTAs among the "plus six" countries by:

a) The creation of the TPP and the growth of its membership in the Asia-Pacific area;
b) The integration of the RCEP with the TPP to form the FTAAP and the FTAAE with the EU.

With each step providing motivation and momentum for the subsequent one, the dynamics of this "likely scenario" would change over time. Consolidating FTAs in Asia depends on the successful completion of an AEC. As a result, ASEAN would be better able to act as the region's central point for integration. ASEAN would consolidate when the AEC is implemented, thus increasing ASEAN economic unity. Building on this advantage, ASEAN FTAs should see a significant improvement in quality. It would probably be challenging to transition from ASEAN

FTAs to a comprehensive customs union since it would require all members to agree to a single external tariff, yet members now have quite diverse external tariffs (Appendix Table 1).While other economies, like Cambodia and Thailand, may be obliged to lower such barriers, some, like Singapore, may be required to boost import taxes. After the establishment of an AEC, ASEAN would still like to go in the direction of a complete customs union.

It would be impossible to formally integrate the economies of the ASEAN+3 without the establishment of an FTA between China, Japan, and South Korea. The necessary cornerstone agreement would be a political decision by China, Japan, and South Korea to create a bilateral (or trilateral) FTA.

These two major economies (as well as South Korea) may be persuaded to sign a Northeast Asian Free Trade Agreement with the help of ASEAN. Once an FTA between China, Japan, and South Korea (or at the at least, a bilateral FTA/EPA between China and Japan) is established, it may be connected to other FTAs within ASEAN+1 through a variety of methods, combining, harmonizing, and simplifying the ROO.

Separate from the sequencing of the RCEP and TPP outlined above, it would be simpler to connect all of Asia with the US and the EU if they have signed FTAs with a number of significant Asian economies (perhaps through FTAAP and FTAAE).

Both Asia's intraregional economic integration and its transregional economic integration with Europe and North America might potentially advance more quickly with such sequenced techniques.

So, to sum up,the difficulties, opportunities, and patterns related to the expansion of Asian FTAs have been covered in this first section of Research Paper. Through the examination of such agreements, CGE findings, and enterprise-level surveys, as well as taking into account political-economic difficulties and numerous competing approaches, it has provided new information about how Asian FTAs are used.

Evidence suggests that Asian trade policy has changed after 2000. FTAs are becoming increasingly important as vehicles of Asian commercial strategy, with 71 agreements already signed. The three major economies in the region, including Singapore, are considered essential to the expanding Asian FTA activity, and ASEAN as a whole is emerging as a focal point for such initiatives. Strong cross-regional orientations have been retained in Asian FTAs, their trade coverage has expanded, and they have tackled concerns beyond only trade liberalization, such as competition, intellectual property, investment, labor standards, mobility, and public procurement.

The prosperity of the entire world, including Asia, would benefit greatly from the successful conclusion of the Doha Round trade negotiations (for more recent reiterations of this argument, see Hoekman, Martin, and Mattoo 2009; Bhagwati and Sutherland 2011). The outcome of the stalled international trade negotiations is still up in the air, and it's possible that it will lead to much fewer negotiations overall.

A lot of FTAs have been signed, are being negotiated, or have been proposed, therefore Asian FTAs are here to stay. It would be very practical to maximize the advantages of these Asian FTAs while limiting their drawbacks. According to this study's findings, important components of practical reactions to Asian FTAs might include:[12]

1. Increasing the use of FTAs through increased institutional support, improved institutional awareness, and a regional database on FTA use, especially for SMEs;

2. addressing the Asian noodle bowl by improving ROO administration to best-practice levels and further rationalizing ROO;

3. advocating gradual advances in the liberalization of agricultural-trade regulations and pushing for increasing inclusion of agricultural products in Asian FTAs;

4. promoting the gradual liberalization of services-trade policies by focusing on important GATS sectors;

5. incorporating WTO-plus provisions, particularly the four Singapore issues; and

6. promoting the development of an East Asian region-wide agreement, particularly RCEP, with appropriate sub-sequencing and support for member-state development gaps.

Although CGE analysis amply demonstrates the economic justification for a regional accord like RCEP, political-economic considerations will continue to have a significant impact on any decision. A feasible consolidation sequence of discrete steps inside Asia would involve enhancing ASEAN economic integration, creating a China-Japan-South Korea FTA, and combining ASEAN+1 FTAs with a China-Japan-South Korea FTA. Key ASEAN+1 FTAs are already in place. Following these procedures, the RCEP would be formed, and Asia would then be connected to Europe and North America.

IV. Overseas investment rules revised: a essential insight

The Government of India, in cooperation with the Reserve Bank of India ("RBI"), among others, has been gradually reworking and liberalizing the foreign exchange regime in India with the

[12] Manupatra, A. V. R. (n.d.). Manupatra. *Articles*. Manupatra. Retrieved July 30, 2023, from <https://articles.manupatra.com/article-details/International-Trade-and-Investment-Law-Emerging-Trends>

purpose of enhancing the "ease of doing business" and simplifying/liberalizing the investment environment. In light of the aforementioned, the RBI issued the Foreign Exchange Management (Overseas Investment) Regulations, 2022 ("OI Regulations") and the Foreign Exchange Management (Overseas Investment) Directions, 2022 ("OI Directions"; collectively with the OI Rules and OI Regulations, the "OI Regime"). The Government of India also issued the Foreign Exchange Management (Overseas Investment) Rules, 2022 ("OI Rules") via Notification No. G.S. G.S.R 646(E).

Similar to how the Central Government and RBI changed the rules governing foreign direct investment, they did so by notifying the debt investment framework through OI Regulations and the non-debt investment framework through OI Rules, respectively. The OI Directions give clarification on the pertinent operational frameworks as well as a summary of the key changes brought about by the OI Rules and OI Regulations.

Some significant modifications brought about by the OI Regime are listed below:[13]

1. Definition of Foreign Entity: The term "foreign entity," which refers to any entity formed, registered, or incorporated outside of India, including an International Financial Services Center ("IFSC") with limited liability, has replaced the concept of JV/WoS under the former overseas direct investment ("ODI") regime. A foreign entity that focuses on strategic industries including oil, gas, coal, mineral ores, submarine cable systems, start-ups, or any other industry the Central Government deems necessary is exempt from the limited liability rule. The OI Regime has specifically added the criteria of "limited liability" to guarantee that the obligation of the Indian party is clear, identifiable, and limited, even though the notion is identical to the previous definitions of JV/WoS.

2. Overseas Direct Investment and Overseas Portfolio Investment: The addition of a clear and unique definition of overseas portfolio investment ("OPI") has long-standing uncertainty between a portfolio investment and an ODI by an Indian party resolved. OPI refers to any foreign investment that is not an ODI, except investments in unlisted debt instruments and securities issued by Indian residents who are not located in an IFSC. Only listed businesses were allowed to make portfolio investments under the previous ODI Regime. Unlisted Indian enterprises, resident individuals (RIs), mutual funds (MFs), alternative investment funds (AIFs), and venture capital funds (VCFs) are now

[13] Ketan Mukhija, & Gaurav Priyadarshi. (2022). Manupatra. *Articles*. Manupatra. Retrieved July 30, 2023, from <https://articles.manupatra.com/article-details/REVAMPED-OVERSEAS-INVESTMENT-RULES-A-CRITICAL-INSIGHT>

included in the investor universe.

3. Control: The OI Regime has defined the term "control" to refer to the right to appoint a majority of the directors or control the management or policy decisions exercisable by a person or persons acting alone or in concert, directly or indirectly, including by virtue of their shareholding or management rights, shareholders' agreements or voting agreements that entitle them to ten percent or more of the voting rights, or in any other manner in which they are entitled to a majority of the voting rights. Although just 10% of voting rights will be regarded as "control" under the OI Regime, the definition of "control" is consistent with the definition of the term that is widely accepted. It's probable that the 10% criterion was introduced with the goal of maintaining a distinct line between ODI and OPI.
4. Pricing Guidelines: Under the previous ODI framework, valuation was required in some circumstances, including share transfers, share swaps, and partial or complete divestitures. The idea of price standards, as it applied to foreign direct investment, did not, however, expressly apply to international investments. The OI Regime has now introduced the idea of pricing guidelines, according to which all equity capital issues or transfers of shares of foreign entities from persons residing outside of India, from persons residing inside India to persons residing inside India who are eligible to make such investments, or from persons residing inside India to persons residing outside of India, must be priced on an arm's length basis. This concept is subject to some exceptions. The duty to ensure adherence to arm's length pricing has been put on the Authorized Dealer ("AD") bank, while also taking into account the valuation in accordance with any commonly accepted worldwide pricing methodology for valuation. To establish "arm's length pricing," it is advised that RBI specify the pertinent guiding principles. This will allow AD Banks to apply a deliberate and restrained discretion in this area and prevent uncertainty.
5. Recognition of flip-structures: This is one of the OI Regime's most well-received modifications. The flip structures were forbidden by way of "FAQs" published by the RBI, even though the previous ODI system did not officially forbid them. As long as there are no more than two layers of subsidiaries in the overall structure, the OI Regime now explicitly allows an Indian firm to invest in a foreign company that has or (intends to) establish a subsidiary in India.
6. Investment in the Financial Sector: Under the previous ODI framework, only firms that

provided financial services were allowed to make investments in the financial sectors outside of India. All Indian entities are now allowed to participate in international financial sector companies (apart from those involved in insurance and banking) under the OI regime, provided that they have reported net earnings during the previous three fiscal years.

7. ODI in Start-Ups: ODI in start-ups has been particularly segregated from other foreign investment opportunities since the OI Regime allows resident individuals and Indian entities to engage in start-ups abroad with their own personal funds. This investment may be made in "startups" that are recognized as such by the host country's or host jurisdiction's legal system, according to the OI Regime. There aren't many countries that have a clear definition of what a "start-up" is, therefore the phrase loses its significance in any country without one. The RBI may need to be more explicit about its stance on this.
8. Investment by Resident Individual: The former ODI Regime did allow RIs to purchase shares in foreign companies through channels like LRS, ESOPs, gifts, etc., but it was obvious that there was a lack of a clear system and set of guidelines in this area. The OI Regime, which clearly specifies and spells out the procedures and rules connected to overseas investment by RIs, has addressed this. The RI is now allowed to acquire shares through the following methods: (a) OPI; (b) ODI in an operational firm with no subsidiary if the RI has control over such foreign organization; (c) through inheritance; (d) through ESOPs; (e) through the purchase of sweat equity shares; and (f) through gift. The requirements of the liberalized remittance plan will not apply, and the RI must only invest in accordance with the OI Regime.
9. Gifting of Foreign Securities: Under the former ODI regime, the gifting of foreign securities was generally permitted, which caused some market confusion regarding the compliance requirements for the gifting of securities by non-residents to resident Indian entities or individuals, particularly in situations where the non-resident was not a relative of the resident Indian. The Foreign Contribution (Regulation) Act of 2010 must be complied with when a gift of foreign securities is made from a person residing outside of India. The OI Regime now permits a RI to acquire shares through inheritance from a person resident in India or through gift from relatives who are residents of India. This places a heavy burden on RIs because the FCRA's compliance requirements are not currently well defined or understood. We might have to wait and see if the government makes any changes to the FCRA or rules that are associated with it in order to close this

gap.

10. Loans and Guarantees: According to the OI Regime, any loans, investments in debt securities, or other non-fund based commitments made to a foreign entity must first be made by an Indian entity that has control over that foreign entity. Additionally, there are no limitations on the commitments that the Indian business may guarantee on behalf of a step-down subsidiary.
11. Transfer or Write-Off: The former ODI regime imposed a number of conditions and limits on the transfer or write-off of the Indian entity's foreign investments. The OI Regime has now streamlined the process and eliminated particular restrictions on write-offs. The Indian corporation must now adhere to the same write-off requirements that apply to a typical transfer of overseas interests.
12. Pledge of shares and formation of security: Under the OI Regime, it is now possible to create a pledge over the shares and assets of foreign entities, including step-down subsidiaries, in favor of a debenture trustee who has registered with SEBI for the fund-basis facilities used by the Indian business. Furthermore, the OI Regime now permits the creation of a charge over the assets of a foreign entity, including step-down subsidiaries, in favor of a public financial institution for the use of fund- or non-fund-based facilities by either an Indian entity or a foreign entity, including step-down subsidiaries.
13. The OI Regime has brought clarity to some issues that were previously unclear, such as the calculation of financial commitment, the definition of net worth, the distinction between debt and non-debt instruments, the introduction of a late submission charge, the idea of "strategic sector," etc.

While it is commendable that the laws governing foreign investment have been updated, it should be highlighted that, according to the OI Directions, AD Banks have a lot of discretion about how to comply with these rules. The scope of start-ups, the two-layer rule's applicability to other structures, the KYC requirements for "round-tripping" structures, and the FCRA's applicability to share gifting should all be explained as quickly as possible. Overall, it is impossible to contest the fact that it is now simpler to comply with the relevant criteria. There have been significant relaxations implemented in response to acknowledged practical difficulties brought on by the previous administration.[14]

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[14] Ketan Mukhija, & Gaurav Priyadarshi. (2022). Manupatra. *Articles*. Manupatra. Retrieved July 30, 2023, from <https://articles.manupatra.com/article-details/REVAMPED-OVERSEAS-INVESTMENT-RULES-A-

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As a result, the recently announced OI Regime, 2022 aims to make some aspects of the prior framework for foreign investments clearer and simpler. In other words, these regulations increase the variety of options open to Indian citizens living overseas who are looking for worthwhile investment opportunities. For companies affected by mergers and acquisitions or for entrepreneurs looking to start a business, there is a clear base from which to build. Overall, it seems that the most recent legislation offer much-needed clarity and a sigh of relief to regular transactions. As a result, more locals will engage in foreign investment activities as they search for opportunities in global markets.

V. INDIA'S NEW OVERSEAS INVESTMENT LAW

The long-awaited revisions to the rules, regulations, and guidelines that apply to investments made abroad by Indian businesses and people were released by the Indian government on August 22, 2022. The Foreign Exchange Management (Overseas Investment) Rules, 2022 (the "Overseas Investments Rules"), the Foreign Exchange Management (Overseas Investment) Regulations, 2022 (the "Overseas Investments Regulations"), and the Foreign Exchange Management (Overseas Investment) Directions, 2022 (the "Overseas Investments Directions"), all issued by the Reserve Bank of India (the "RBI"). The "New Regime" is herein referred to collectively as the Overseas Investments Rules, Overseas Investments Regulations, and Overseas Investments Directions.

The proposed Foreign Exchange Management (Non-debt Instruments - Overseas Investment) Rules, 2021 (the "Draft Rules") were published by the RBI in August 2021. The Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004, as amended, and the Master Direction on Direct Investment by Residents in Joint Venture / Wholly Owned Subsidiary Abroad dated January 1, 2016 (updated until June 24, 2021) (collectively, the "Old Regime") have been updated and replaced by the Draft Rules in the New Regime, which the RBI appears to have taken into consideration.

The New Regime's modifications and their effects on cross-border transactions are covered in this note, with specific reference to the following:[15]

1. scope of overseas investments;
2. definition of control;

CRITICAL-INSIGHT>

[15] Divyanshu Pandey, Mohit Gogia Lakshmi, & Anoushka Borker. (2022, November 24). *New Overseas Investments Regime in India*. Articles. https://articles.manupatra.com/article-details/New-Overseas-Investments-Regime-in-India

3. pricing guidelines;
4. financial commitment;
5. guarantees; and
6. pledge and charge.
7. round tripping;

A succinct summary of the subjects addressed above:

(A) Scope of overseas investments

The New Regime clarifies the kind and range of foreign investments that Indian businesses and people may make. The authorized dealer banks that Indian entities and individuals designate for their overseas investments (referred to as "AD Banks") determined whether an investment was a portfolio investment on the basis of the amount invested, the type of security purchased (listed or unlisted), and whether the Indian investor exercised any form of management control over the target foreign entity. The Old Regime did not prescribe a definition for portfolio investments. The RBI has included OPIs to the New Regime specifically so that it is now in charge of regulating those assets.

In accordance with the New Regime, an Indian investor must hold an ODI for a full year before selling their stake. Under the Old Regime, there was no required holding period. The target foreign entity simply needed to have been in existence for a year under the Old Regime; the New Regime does away with this condition. The minimum one-year holding term rule is anticipated to have an impact on foreign investments made by Indian entities and individuals who are trying to create special purpose vehicles (SPVs) or other organizations that are quickly transferred to other people.

(B) Definition of control

The definition of a subsidiary or step-down subsidiary of a foreign entity, which is defined as "an entity in which the foreign entity has control," and the definition of an overseas direct investment (ODI), which specifies among other things that an ODI may be made in a listed foreign entity with "control" (if less than 10% stake is held in such listed foreign entity), are the two key references where "control" is used in the Overseas Investments Rules.

"Control" is defined in the New Regime as "the right to appoint a majority of the directors or to control management or policy decisions exercisable by a person or persons acting alone or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements that entitle them to ten percent or more of

voting rights or in any other manner in the entity" (emphasis supplied).

The words underlined above are the only differences between the definitions of control contained in the New Regime and those found in the Companies Act, 2013 (the "Companies Act") and the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the "Takeover Code"), each as amended. It should be noted that a company is deemed to be a subsidiary of another company under the Companies Act and the Takeover Code if it (i) controls the makeup of the board of directors or (ii) exercises or controls more than 50% of the total voting power on its own or jointly with one or more of its subsidiary companies. As a result, the New Regime's definitions of control and subsidiary are more expansive than those found in the Companies Act and the Takeover Code. The additional words' meaning is not entirely apparent. The RBI's goal, however, appears to be that, for the purposes of defining the layers of subsidiaries, a holding of 10% or more of a corporation automatically qualifies as control.

(C) Round tripping

Round-tripping refers to a collection of financial operations that involve the transfer of funds between jurisdictions and ultimately end with a return to the original jurisdiction. Such transactions are frequently not genuine and are set up to get tax advantages or for money laundering. Therefore, traditionally, the RBI has taken a strong stance regarding transactions that might be set up with Indian monies sent overseas and then utilized to produce assets or resources in India.

Under the Old Regime, there were no particular rules regarding circular trips. However, FAQ No. 64 of the Frequently Asked Questions on Overseas Direct Investments (the "FAQs"), which can be found on the RBI website and was last updated on September 19, 2019, stated the following:

"*Q. Can an Indian Party (IP) set up a step-down subsidiary/joint venture in India through its foreign entity (WOS/JV), directly or indirectly through step-down subsidiary of the foreign entity?*

Ans. No, the provisions of Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time, dealing with transfer and issue of any foreign security to Residents do not permit an IP to set up Indian subsidiary(ies) through its foreign WOS or JV nor do the provisions permit an IP to acquire a WOS or invest in JV that already has direct/indirect investment in India under the automatic route. However, in such cases, IPs can approach the Reserve Bank for prior approval through their Authorised Dealer Banks which will be

considered on a case to case basis, depending on the merits of the case." (emphasis supplied)

The Draft Rules included unclear language indicating that the financial commitment should not be created with the intention of engaging in tax avoidance or evasion, even as they proposed loosening the rules linked to round trips.

The RBI has relaxed the round-trip rules under the Overseas Investments Rules so that no financial commitment in a foreign entity will be allowed if it has invested in or makes indirect investments in India, resulting in a structure with more than two layers of subsidiaries. For banking institutions and specific types of non-banking financial institutions, there are some exceptions to this regulation. It is unclear, though, why the prohibition on the two-layer subsidiaries was added given that it is generally legal to route money into India from abroad.

In order to clarify the effects of this restriction, read the example below with the concept of "control" in respect to compliance with the updated round tripping restrictions:

In the aforementioned example, the rule will be broken if the Indian subsidiary holds 10% or more of another business.

This may be the most important modification made in accordance with the New Regime for cross-border transactions, and it reflects the RBI's shift in perspective from its previous strict policies in this area. The RBI has allowed structures where an Indian entity invested in a foreign entity that then made investments in India, but this easing will make it easier for international corporations and conglomerates with operations in India to conduct business. The simplicity of global listing and increased accessibility to other foreign investors may now be encouraging Indian corporations to adopt holding structures abroad.

Despite the New Regime, the RBI will still need to issue updated rules, regulations, and directives in respect of areas under its supervision that contained provisions relating to international investments, such as the Core Investment Companies (Reserve Bank) Directions, 2016, as amended (the "CIC Directions"), in order to be consistent with the New Regime. Conditions for overseas investments by Indian entities that are registered with the RBI as core investment companies are outlined in the CIC Directions. For example, "The WOS/JV being established abroad by the CIC shall not be used as a vehicle for raising resources for creating assets in India for the Indian operations." As a result, it is unsure whether an Indian corporation that is registered as a core investment company can profit from the liberalized New Regime prior to the RBI amending the CIC Directions.

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(D) Pricing guidelines

Compliance with pricing guidelines (i.e., arm's length basis confirmed by a valuation conducted in accordance with any internationally accepted pricing technique for valuation) in relation of the issue or transfer of equity capital is a new requirement established under the New Regime.

In order to comply with the pricing criteria, it is not obvious if the price established by the valuation should be the minimum or maximum price. We take note of the Draft Rules' requirement that the price fall within 5% of fair value. Given that the RBI will be eager to control the outflow of foreign exchange, it is likely that the RBI will adhere to a principle similar to pricing guidelines for foreign direct investments into India, where the fair value becomes the cap where money must be paid by resident Indians to purchase or subscribe to foreign securities and the floor price if the money must be received back into India after transferring foreign securities.

Additionally, it appears that the pricing guidelines will only apply to the initial overseas investment made by the foreign entity and not to any subsequent investments made by it or to the creation of any subsidiaries by it (i.e., no guidelines have been established for any downstream investments, unlike in the case of foreign direct investments made into India). Regarding the difficulties raised above in connection to pricing guidelines, the RBI will need to provide clarification.

Furthermore, according to the Overseas Investments Directions, AD Banks must create a board-approved policy about the documents that must be requested from Indian firms in order to verify compliance with the pricing criteria. It will be interesting to observe the various policies introduced by the AD Banks, including if such policies will stipulate whether the price should be the minimum or maximum cap in terms of fair value, in the absence of the RBI prescribing any detailed guidelines for the AD Banks to adhere to (certain brief guidelines have been provided in the Overseas Investments Directions). AD Banks must be aware that a stricter policy may influence an investor's decision to use an AD Bank.

The New Regime now authorizes deferred compensation for the purchase of equity capital, provided that the deferred payment is made within the time frame determined by the parties to the transaction and without regard to a maximum time frame. This is distinct from the RBI's 18-month criterion for foreign direct investments in India, where the goal is to prevent unnecessarily long delays in the importation of necessary foreign investment.

(E) Financial commitment

The following requirements must be met before lending to, investing in debt issued by, or

extending non-fund based commitment to, a foreign entity, including any level of step down subsidiary of such foreign entity:[16]

i. "*the Indian entity is eligible to make Overseas Direct Investment (ODI);*
ii. *the Indian entity has made ODI in the foreign entity;*
iii. *the Indian entity has acquired control in such foreign entity at the time of making such financial commitment.*"

It is unclear whether an investor must meet all of the aforementioned conditions or just one of them in order to be able to make debt investments in a foreign entity because the RBI did not specify "and" or "or" at the end of each condition, leaving some room for interpretation. Assuming a cautious approach, debt lending and investment will be allowed, if the Indian business has invested in equity in a foreign entity and has also gained control over the pertinent foreign entity. Previously, lending by an Indian entity to a foreign entity did not require "control" and simply required direct equity participation. Additionally, it is required that loans or investments in debt instruments be documented in the form of a loan agreement, and that the interest rate on such loans be established on an arm's length basis. Before remitting money from India to a foreign company in the form of a loan, AD Banks must now make sure that the conditions are met because they weren't specified under the Old Regime.

The maximum amount that can be borrowed remains 400% of net worth as of the date of the most recent audited balance sheet; however, (a) the time period for the most recent audited balance sheet has been extended from 12 to 18 months; (b) the Indian entity is no longer permitted to use the subsidiary's or holding company's net worth, which had previously helped to increase the amount of net worth; and (c) the definition of net worth has been made consistent with the Commitment. Keep in mind that portfolio investments are still not taken into account when determining the financial commitment limit.

Separately, a resident of India is not allowed to provide a loan to a foreign company in which they have invested equity.

(F) Guarantees

An outline of the framework for financial commitment by way of guarantee is provided below:[17]

[16] Divyanshu Pandey, Mohit Gogia Lakshmi, & Anoushka Borker. (2022, November 24). *New Overseas Investments Regime in India*. Articles. https://articles.manupatra.com/article-details/New-Overseas-Investments-Regime-in-India
[17] Divyanshu Pandey, Mohit Gogia Lakshmi, & Anoushka Borker. (2022, November 24). *New Overseas Investments Regime in India*. Articles. https://articles.manupatra.com/article-details/New-Overseas-Investments-Regime-in-India

Category of Guarantor	Type of Guarantee	Limitations
Indian investing entity	Corporate or Performance Guarantee	If guarantee provided by two or more Indian entities jointly and severally, 100% of the guarantee amount to be counted towards financial commitment limit of each such Indian entity
Group company of the Indian investing entity (holding company / subsidiary company / promoter group company	Corporate or Performance Guarantee	• To be counted towards the financial commitment limit of the group company • Any fund-based exposure to or from the Indian investing entity to be deducted from the net worth of the group company for determining the financial commitment limit.
Resident individual promoter of the Indian investing entity	Personal Guarantee	To be counted towards the financial commitment limit of the Indian investing entity
Indian Bank	Bank Guarantee	Backed by counter-guarantee or collateral by the Indian entity or its group company

(G) Pledge and charge

The ability to pledge or charge assets in behalf of foreign lenders (and not just foreign banks) and debenture trustees has been extended to Indian entities. This is a significant RBI liberalization since it helps overseas companies get loans from sources other than banks. Previously, an Indian entity may, even for the borrowings of its group company or associate company in India, provide security in respect of shares of any foreign entity in which it had invested. As of right now, the security can only be created in relation to the shares of the foreign firm that borrowed the money or its step-down subsidiary.

The following are some additional factors to take into account when making a pledge or charge

under the New Regime:[18]

1. The financial commitment limit will be determined by the lesser of the pledge or charge's worth or the facility's cost. It is unclear, however, whether the financial commitment will be determined on a going-forward basis if the facility is amortizing. If a charge or pledge is made for the Indian entity's loan, the financial obligation for that entity will be nil. This differs from the previous stance, in which the value of the charge was viewed as a financial obligation. Additionally, the New Regime makes no mention of whose determination of the financial commitment restrictions will be legally obligatory on all pertinent parties.
2. The financial commitment limit will not be affected by negative pledges, negative charges, or bid bond guarantees.
3. The applicable legislation that enables the creation of a pledge and charge does not use the phrase "control." If a pledge or charge is made for a loan by a foreign entity or its step-down subsidiary, it would be beneficial to get some clarification from the RBI regarding whether an Indian party should have "control" over the foreign entity or its step-down subsidiary.
4. In relation to the pledge and charge framework, the Old Regime included the following end-use restriction: "The loan / facility availed by the JV / WOS / SDS shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever." The New Regime does not contain such a restriction, which appears to be consistent with the RBI's approach to loosened round-tripping rules.

(H) Certain other key changes

1. OPI

Unlisted Indian entities may only make OPI through (i) the acquisition of equity capital through a rights issue or the allocation of bonus shares, (ii) capitalization for the realization of any amounts owed to the Indian entity by the foreign entity, (iii) the swapping of securities, (iv) merger, demerger, amalgamation, or scheme or arrangement, and (v) (i) (iv). Individuals who are Indian residents may submit an OPI by: (i) acquiring equity capital through the issuance of rights or bonus shares; (ii) capitalizing for the realization of any sum owed by the foreign entity to the Indian entity; (iii) swapping securities in connection with a merger, demerger,

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[18] Divyanshu Pandey, Mohit Gogia Lakshmi, & Anoushka Borker. (2022, November 24). *New Overseas Investments Regime in India*. Articles. https://articles.manupatra.com/article-details/New-Overseas-Investments-Regime-in-India

amalgamation, or liquidation; (iv) giving or inheriting property; (v) purchasing sweat equity shares; (vi) purchasing minimum qualification shares required to hold a management position in a foreign entity; and (vii) acquiring sweat equity shares The purchase of equity capital, the subscription as part of a memorandum of association, or the acquisition through a tender or bidding process all appear to be prohibited for unlisted Indian firms and Indian residents.

2. **ODI in Financial Services**

Under specific restrictions, Indian companies not involved in the financial services industry are allowed to participate in international companies that provide financial services, with the exception of banking and insurance. This enables companies based in India to invest in companies that may have quasi-banking characteristics and emerging technology. Be aware that if a foreign entity engages in an activity that, if carried out by an Indian entity, would require registration or regulation by an Indian financial sector regulator, it will be deemed to be engaging in financial services activities.

3. **No-Objection Certificate**

A no-objection certificate must be obtained from the bank, regulatory body, or investigative authority, and it must be given to the AD Bank if the investor falls into one of the following categories: any Indian investor who has any non-performing assets, has been labeled a wilful defaulter, is being investigated by a financial service regulator or by an Indian investigative agency (who are listed in the Overseas Investments Rules). The New Regime has made clear which organizations would be regarded as "investigative agencies"; earlier, there was ambiguity and this applied to all organizations having investigative authority. In accordance with the New Regime, it will also be assumed that the relevant authority has no objections to the proposed transaction if the no-objection certificate is not delivered within 60 days of the application's receipt.

4. **Supersession of Old Regime**

The Overseas Investments Directions do not appear to have replaced all circulars issued during the Old Regime. The RBI placed restrictions on the issuance of standby letters of credit, guarantees, letter of comforts, etc. by banks on behalf of overseas joint ventures, wholly-owned subsidiaries, and step-down subsidiaries of Indian companies for the purpose of raising loans or advances of any kind from other entities except in connection with the regular course of international business. These include (a) a circular dated April 22, 2014, and (b) a circular dated November 25, 2014. It is likely that these circulars also stand superseded given the RBI's overall policy regarding the routing of funds raised outside to India; however, a clarification from the

RBI will need to be acquired.

All things considered, the New Regime is a positive improvement, particularly in light of the stringent Draft Rules released by the RBI in August 2021. Similar to the Old Regime, it is anticipated that the RBI would publish FAQs to further explain the New Regime's changes. Waiting will be required to determine whether the RBI would impose restrictions through the FAQs (as it did through FAQ 64 previously).

VI. India's position in the international investment regime is the "elephant in the room." [19]

In a recent ruling from the Delhi High Court, dated August 29, 2022 (the "Augustverdict")[20], the International Chamber of Commerce ("ICC")[21]'s 2015 arbitral award over the protracted Antrix-Devas dispute was annulled. Although the August judgment is being heralded as a major victory for the Indian government, it also gives India a chance to figure out how to prevent similar scenarios from occurring in the first place. It is time for India to stop playing defense and start establishing itself as a vital player in the international investment system (and its related dispute resolution framework) as the traditional split between capital-exporting and capital-importing countries continues to blur.

The ICC proceedings were a component of an international commercial arbitration ("ICA") between two businesses: Antrix Corporation Limited ("Antrix"), a government-owned commercial arm of the Indian Space Research Organization ("ISRO"), on the one hand, and Devas Multimedia Private Limited ("Devas"), an Indian company with foreign shareholders, including Deutsche Telekom ("Deutsche"), on the other. The ICA hearings also resulted in two investor-state arbitrations ("ISA")[22] based on treaties, in which Deutsche under the India-Germany Bilateral Investment Treaty ("BIT") sued the Indian government directly.

A key design element of ISA is the ability of foreign private firms to sue sovereign states, primarily to ensure legal protection for investors in the event that something goes wrong abroad (as it frequently can and does). Furthermore, as practically every BIT's preamble makes clear, the deal that sovereign states make when they join such treaties in exchange for losing

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[19] Deborshi Barat. (2022, November 24). *The Elephant in the Room: India's Place in the International Investment Regime*. Articles. https://articles.manupatra.com/article-details/The-Elephant-in-the-Room-Indias-Place-in-the-International-Investment-Regime

[20] Antrix Corporation Ltd. v. Devas Multimedia Private Limited, O.M.P. (COMM) 11/2021 & I.A. 3035/2021, I.A. 3037/2021, I.A. 4940/2021, I.A. 12541/2021 & I.A. 2507/2022

[21] Devas Multimedia Private Limited v. Antrix Corporation Limited, ICC Case No. 18051/CYK

[22] CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, PCA Case No. 2013-09; and Deutsche Telekom v. India, PCA Case No. 2014-10

regulatory space is to both safeguard and promote foreign investment. The two are dependent on one another.

The failure to uphold this duty to protect may have legal repercussions under international law. India has thus been sued 26 times (in documented ISA instances as of date), which is second only to Argentina (62), Venezuela (55), Egypt (46), Czechia (41), Poland (36), Peru (31), and Ukraine (30). This is despite the fact that India continues to be a key center for international investment.[23] To put things in perspective, China's equivalent number is 9. Additionally, while the United States has been a responder in 23 of these (known) cases, American investors have started an astounding 204.[24] of them. Additionally, although some cases have been dropped or settled, some are still pending, and some may have gone unreported, the US has not yet lost a single ISA issue in which it served as the respondent. India has currently lost five games and won two (the other games are either still pending, terminated, or settled).[25]

The August verdict refers to acts of fraud in relation to the 2005 satellite-based contract involving Antrix and Devas, taking its inspiration from a Supreme Court decision made in January of this year[26]. Antrix/India did not, however, cite corruption or the related criminal investigation involving former ISRO officials (conducted by the Central Bureau of Investigation and the Enforcement Directorate since 2014) to support contract-cancellation; instead, it relied on claims of security interest and sovereign discretion in both its ICA defense and the two BIT-based ISA proceedings. However, Devas might have invoked the doctrine of estoppel, arguing, for example, that India ought to be "estopped" from citing breaches of its own law as a jurisdictional challenge - such as those under the Indian Penal Code, the Prevention of Money Laundering Act, etc.) While it is still debatable whether the concerned tribunals would have declined jurisdiction on the basis of corruption alone, it would not have been the first time if they did, whether under ICA or ISA.

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[23] Also in the list are Spain (55), Mexico (38), Canada (31), and Russia (27). Among these, the high number for Canada and Mexico is on account of the (erstwhile) North American Free Trade Agreement ("**NAFTA**") between the US, Canada, and Mexico. Canadian investors have, in fact, initiated twice the number of cases (63) that Canada itself has been a respondent to. Further, countries like Russia and Spain have been frequently sued under the Energy Charter Treaty ("**ECT**"), a multilateral agreement (and like the Canadian example under NAFTA, their own investors have sued as much, or more). Further, 10 cases against Russia relate to the annexation of Crimea (in 2014). Spain has faced several claims in the recent past arising out of a set of energy reforms affecting the renewables sector. The ECT and NAFTA, perhaps by dint of being multilateral/regional treaties, are the two most-invoked international instruments in ISA claims.

[24] Several of these under NAFTA

[25] Data from the Investment Dispute Settlement Navigator, Investment Policy Hub maintained by the United Nations Conference on Trade and Development ("**UNCTAD**"), available at: https://investmentpolicy.unctad.org/investment-dispute-settlement, last accessed on September 11, 2022

[26] Devas Multimedia Private Limited v. Antrix Corporation Limited & Another, Civil Appeal No. 5766 of 2021 with Civil Appeal No. 5906 of 2021

In fact, when the underlying contract was shown to have been entered into through corrupt practices, several ISA tribunals in the past declined to evaluate the merits of treaty-based claims, even when such practices were carried out by government officials themselves. Ironically, this arbitral trend has drawn criticism since it gives rogue nations an incentive to participate in (and/or tolerate) corrupt activity—if only to build a strong defense in the event that they are later sued.

A sobering lesson, including for India, can be learned from Malaysia's tactical failure earlier this year to stop a US$ 15 billion verdict from being issued in favor of the descendants of a former Sultan under a colonial-era territory grant[27] (despite the sole arbitrator's actions raising major controversy). While Malaysia's defense had a number of instances of poor planning, investors in Devas are continuing to take Indian governmental assets in a number of countries, much as the "sultans" who have now been successful in having Petronas assets frozen in Luxembourg. In addition, Antrix did not exercise its right to choose an arbitrator despite being prompted to do so multiple times, and instead contested the ICC's jurisdiction, much as Malaysia had initially declined to take part in the arbitration proceedings due to a lack of jurisdiction. When the award was nonetheless made, even if both nations continued to look for creative ways to overturn the separate decisions, the outcome was the same: a domestic backlash against international arbitration on an abstract, nationalistic level. In each instances, the economic, political, and reputational harm that was done was not only severe but also dealt with after the fact.

India, like the majority of other nations, has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which enables investors to enforce arbitral awards when they triumph, including through the seizure or attachment of state-owned property/assets situated in other countries (so long as those countries have also ratified the New York Convention). Devas was therefore working to seize Antrix assets in the US in accordance with orders from local courts even as the August judgement was being announced, which is identical to earlier events in France and Canada.

Apart from the fact that it needs to put its legal, policy, and regulatory policies in place - rather than having to firefight on every such occasion - these are crucial lessons for India. India must first consider the type of sovereign it wants to be, both in the eyes of the global investment

[27] Ad Hoc Arbitration, Nurhima Kiram Fornan, Fuad A Kiram, Sheramar T Kiram, Permaisuli Kiram-Guerzon, Taj-Mahal Kiram-Tarsum Nuqui, Ahmad Narzad Kiram Sampang, Jenny Ka Sampang and Widz-Raunda Kiram Sampang (Heirs to the Sultanate of Sulu) v. Malaysia, FINAL AWARD, February 28, 2022; Tribunal: Gonzalo Stampa (Sole arbitrator)

community and for the benefit of its own citizens who choose to make investments overseas. Second, it needs to begin upholding its worldwide reputation by taking an active role in discussions about international investments, particularly by explicitly stating its stance on important topics. Thirdly, it must adopt a unified position on how international investment law disputes should be resolved.

India has not performed particularly poorly in this sense, to be sure. BITs proliferated during the post-Cold War era, which also saw the beginning of Indian liberalization, and there was a comparable rise in foreign investment globally. The complex web of treaties that the majority of developing countries had signed with western countries (and with each other) in the hope of attracting more foreign direct investment ("FDI"), however, also contained clauses relating to mandatory international arbitration in the event of dispute, which made countries realize that BITs could "bite"[28] a few years later.

Other arbitral institutions and rules, such as those related to and/or under the United Nations Commission on International Trade Law ("UNCITRAL") and the Permanent Court of Arbitration (PCA), still apply in accordance with the BITs that India has signed. India has avoided ratifying the primary treaty related to ISA, thereby managing to evade jurisdiction of the largest dispute-administering body in investment law (ICSID). In essence, signing (and ratifying) a BIT commits both parties to ensure that investors from the other country are treated fairly. This obligation only applies to countries that are traditional objects of international law.

Additionally, when signing a treaty of this kind, a nation often agrees to allow ISA to handle any future issues involving harmed foreign investors. The investor from the other nation may "accept" this "offer" to arbitrate made by a State Party at any time simply by starting arbitration proceedings, and the host state's consent (i.e., the consent of the nation "hosting" the investment) is subsequently not required on a case-by-case basis (as norms of sovereignty and consent under international law normally demand). Due to this process, BITs are an especially effective tool for securing self-reparations for international investors. For the same reason, nations that sign and ratify such treaties must be aware of the associated costs to their sovereignty.

According to its present approach, India has canceled or allowed to expire a number of its former investment treaties. This is ostensibly a calculated response to the unfavorable awards resulting from the (a number of) ISA cases brought against it. However, because to "sunset" terms in the relevant BITs, earlier investments, or those made before such treaties were terminated, will

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[28] Tobin, Jennifer L., and Susan Rose-Ackerman. "When BITs have some bite: The political-economic environment for bilateral investment treaties." *The Review of International Organizations* 6, no. 1 (2011): 1-32.

continue to be protected for a while. These sunset clauses and the ongoing ISA proceedings against India imply that there may be more to come in terms of Indian firefighting.

Despite frequent accusations that the BIT-based ISA regime is biased or "investor-friendly," the World Investment Report 2022:[29] found that four out of ten ISA cases were adjudicated in favor of the state, as opposed to three in favor of investors.[30]

Conclusion: In addition to winning ISA cases, countries also tend to do so more frequently than investors. Furthermore, just because a nation has signed many BITs does not always mean that it will be subject to many ISA claims. For instance, despite having signed around 150 treaties each,[31] the United Kingdom[32], Switzerland[33], France[34], Belgium[35], and the Netherlands[36] have only been brought up in a handful of ISA lawsuits.

Despite the fact that these nations have historically transferred money to developing nations, one could equally argue that the rarity of lawsuits against them is a sign of stronger government, superior planning, and greater adherence to due process.

China is also present, as usual. China continues to receive large amounts of FDI, but it has been able to pioneer the shift from a capital-importing to a capital-exporting status, signing the most BITs in the world (more than the above-mentioned nations combined), while only being sued nine times.[37] Truth be told, even former imperial nations attempted to boost foreign investment through the strategic application of international law and a complex web of treaties as 'gunboat diplomacy'[38] declined early last century in the wake of a liberalized international system. As a result, BITs symbolize both handcuffs and signals:[39] it just depends on your perspective and national aspirations.

India is not alone in its treaty termination policies, though; South Africa, Indonesia, and other nations in Latin America have also followed a similar path. In addition, India enacted a new Model BIT in 2015–16 that, among other things, pays healthy deference to a state's valid

[29] Published by UNCTAD, available at: https://unctad.org/webflyer/world-investment-report-2022

[30] 38% of all concluded ISA cases in the period between 1987 and 2021 were decided in favor of the respondent host state, while only 28% were decided in favor of the investor The rest were settled (19%), discontinued (12%), or decided in favor of neither party (liability found but no damages awarded - 3%).

[31] Prior to its treaty terminations, India had signed about a hundred (including both BITs and TIPs)

[32] 101 BITs, 90 in force; 31 other treaties with investment provisions ("**TIPs**"), 7 in force

[33] 114 BITs, 110 in force; 37 TIPs, 35 in force

[34] 91 BITs, 84 in force; 74 TIPs, 58 in force

[35] 82 BITs, 58 in force; 74 TIPs, 58 in force

[36] 81 BITs, 76 in force; 74 TIPs, 58 in force

[37] China has signed 125 BITs (106 in force), and 25 TIPs, of which 22 are in force

[38] Where the 'home' state of a foreign investor would use military force to coerce compliance upon a recalcitrant host country - *e.g.,* in the event of an expropriation

[39] Salacuse, Jeswald W. "Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries." *Harv. Int'l LJ* 58 (2017): 127.

regulatory measures while maintaining ISA. Even though India has utilized this model to sign a few new treaties (which have not yet come into effect), its Model BIT has come under fire for sending conflicting signals to both global and domestic investors. After all, why not better protect Indian investors if such new accords are negotiated with nations where Indian investment is anticipated to rise in the future?

This leads us to the topic of posturing: based on official comments, it appears like India still wants to draw in foreign investment, but given its poor track record of doing so and the recent wave of treaty terminations, this is not entirely surprising. However, even without the protection of BITs, Brazil, which only recently began ratifying investment treaties, has seen a constant infusion of FDI: perhaps the Brazilian experience is something that India aspires to? However, although being debatable, a number of empirical assertions imply that BITs do have a tendency to raise FDI and boost national credit ratings. Furthermore, according to a recent study, India's FDI inflow has decreased by more than 30% in reaction to its strategy for terminating treaties (in comparison to nations that did not).[40] The report also discusses "treaty-shopping," in which investors who channel capital through subsidiaries incorporated in advantageous countries (for tax considerations, for example) may also choose the best treaty to rely on for their ISA claim, should they become laterally harmed (for example, Dutch BITs). In this regard, the paper contends that rather from avoiding India altogether out of concern over its practices on treaty termination, investors are routing FDI toward India through more advantageous channels. If this tendency is accurate, it may undermine India's stated goal of completely avoiding BIT-based liability (whatever of the merits of such a goal).

The fact that BITs stand for reciprocal commitments made by nations to one another is another essential component. Therefore, the range of protections that Indian investors may have desired for themselves when they make investments abroad is limited by India's conservative approach to treaty language, as demonstrated by its current Model BIT. According to current rules, regulations, and directives, including those notified on August 22, 2022[41] (the "OI Guidelines"),

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[40] Hartmann, Simon, and Rok Spruk. "The impact of unilateral BIT terminations on FDI: Quasi-experimental evidence from India." *The Review of International Organizations* (2022): 1-38. Available at: https://link.springer.com/article/10.1007/s11558-022-09471-3

[41] The Foreign Exchange Management (Overseas Investment) Rules, 2022 ("OI Rules"), Foreign Exchange Management (Overseas Investment) Regulations, 2022 ("OI Regulations"), and the Foreign Exchange Management (Overseas Investment) Directions, 2022 ("OI Directions"). The OI Rules, the OI Regulations and OI Directions (collectively, the "OI Guidelines") have been notified with the purpose of overhauling the existing regulatory framework in relation to overseas investments and acquisition of immovable property outside India and are notified in supersession of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004, Master Direction - Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015.

India is likely anticipating further overseas investment ("OI") by local firms in the future. So it could be a good idea to start by looking at tried-and-true precedents, such as those involving the US. For instance, the former Overseas Private Investment Corporation (OPIC) offered loans, guarantees, insurance against political risk, and general assistance to American businesses in order to help them better penetrate international markets. However, despite the OI Guidelines' attempts to streamline and enhance the prior OI framework, there is still no investment guarantee scheme for Indian investors abroad, and the government does not provide any other forms of protection for them, such as political risk insurance.

Additionally, the US Department of State's Office of International Claims and Investment Disputes is tasked with pursuing and defending international claims brought by, respectively, (i) American citizens against foreign governments and (ii) foreign citizens against the US government. Additionally, displeased American investors may ask the government to support their investment-related claims against a host state (referred to as "diplomatic protection"), provided that certain criteria are met, such as the exhaustion of local remedies. Such state-sponsored OI initiatives by Indian nationals may be helpful in fostering more international mergers and acquisitions in the future.[42]

A "high level committee" was established by the government more than five and a half years ago to assess the institutionalization of arbitral mechanisms in India.[43] In its final report, this committee specifically proposed conflict resolution methods with regard to ISA.[44] It also covered the topic of choosing a side (from several alternatives) in a dispute over international investment law. India's position in that regard is still ambiguous as of right now. While its Model BIT incorporates ISA, it signed an investment agreement with Brazil in early 2020 (which has not yet come into effect) that calls for state-state dispute settlement (rather than investor-state) as the principal model for resolving disputes. This agreement was modeled after the latter's Model BIT. On the other hand, India and the European Union ("EU") are due to have their second round of negotiations for a trade and investment deal later this month (as of the time of writing). The new European approach for resolving investment disputes may be adopted by this

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[42] Deborshi Barat. (2022, November 24). *The Elephant in the Room: India's Place in the International Investment Regime*. Articles. https://articles.manupatra.com/article-details/The-Elephant-in-the-Room-Indias-Place-in-the-International-Investment-Regime

[43] On January 13, 2017, the Ministry of Law and Justice constituted a High Level Committee under the Chairmanship of Justice B.N. Srikrishna, Retired Judge, Supreme Court of India. On August 3, 2017, the ten-member committee submitted its report to the Minister of Law & Justice. See the notification dated August 4, 2017 issued by the Press Information Bureau in this regard, available at: https://pib.gov.in/newsite/PrintRelease.aspx?relid=169621

[44] "Report Of The High Level Committee To Review The Institutionalisation Of Arbitration Mechanism In India," dated July 30, 2017, available at: https://legalaffairs.gov.in/sectiondivision/report-high-level-committee-review-institutionalisation-arbitration-mechanism-india

agreement. An important aspect of this plan is that it completely replaces ISA with a standing bilateral court that will eventually give way to a multilateral (and permanent) investment court (or "MIC"). In the future, the MIC might be created in accordance with an international convention by means of universal agreement. India's voice in such international negotiations is still quiet or goes unnoticed, even while other possibilities including appellate processes, mediation, etc. are being discussed under the aegis of UNCITRAL's Working Group III.

Local media sources stated two years ago that India would be preparing to pass a new law with the aim of safeguarding foreign investors through quick dispute resolution procedures, including as mediation and fast-track courts.[45] According to reports, if this proposed bill, which is structured like a standard BIT (but without international responsibility, presumably), is successful in giving foreign investors enough security, the government may decide against joining any additional accords. Even if that were to occur, and/or if India decided to create its own dispute resolution system for foreign investors instead - such as by relying on local courts or joint interpretive statements - such a position must be distinctly stated to the global investment community. After all, FDI strongly depends on openness, clarity, coherence, and predictability. However, with increased FDI flows anticipated in developing industries that call for careful oversight and regulation (like high-end technology or renewable energy), India cannot afford to overcommit in the short term to attract FDI lest it be forced to break those commitments down the road, violating the legitimate expectations of investors. The renewable energy sector's experience in Spain serves as a lesson.[46]

At the UNCITRAL Working Group III discussions on ISA reform, some nations support keeping the current system more or less in tact (US, Japan); others propose modifications, like holding arbitrators accountable through a strict code of conduct; still others want to introduce a forum of appeal, whether under the current regime or by creating a parallel platform; and still others want to completely overhaul ISA, either replacing it with local courts (Australia), or both (intellectual property). The EU, in particular, contends that because ISA involves a sovereign claimant, it fundamentally differs from ICA. As a result, these disagreements should be seen as a type of "public" law. In that regard, a permanent court with tenured justices (as opposed to ad hoc and temporary tribunals made up of arbitrators chosen by the parties) is the best option. Critics of the MIC (including Russia and China) are worried that it will become politicized, as

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[45] See, e.g., https://www.reuters.com/article/us-india-investment-law-exclusive-idUSKBN1ZE151

[46] Spain faced several arbitral proceedings under the ECT when it rolled back the incentive schemes it had earlier introduced (in the early 2000s) in order to attract foreign investors to the renewable energy sector. Despite an FDI surge in the sector, Spain was forced to change applicable regulations pursuant to the 2008 global financial crisis. Thereafter, several foreign investors alleged a violation of fair and equitable treatment (FET) due to a frustration of their legitimate expectations.

the International Court of Justice (ICJ) has done. The majority of other significant economies, including South Korea, Israel, Indonesia, South Africa, Turkey, Mexico, and Chile, have provided written submissions to the Working Group outlining their positions on this issue.

VII. CONCLUSION

What does India want, though? We are unsure.

Another choice is to do away with BITs completely and switch to a system based on contracts. India might claim, for instance, that only Indian law and national courts (or domestic arbitral tribunals) may be used to resolve issues involving foreign investments in its own territory. The US and Canada struck such a "deal" in the US-Mexico-Canada Agreement, which replaced the North American Free Trade Agreement (NAFTA) under President Trump — predictably without involving Mexico in the "deal" — and other nations and investors frequently feel secure enough to commit capital even without ISA. Similar to that, this may be an opportunity for India to improve upon and show off strong governance, including to the delight of international investors.

However, given India's status and expanding desire, it makes sense to use treaties to send "signals" to foreign investors and to safeguard domestic investors overseas.[47]

Whatever system India chooses for itself, it might be better for it to quickly share its opinions with the rest of the globe. This is in addition to the requirement to create a long-term plan for safeguarding inbound and outbound FDI, taking into account potential legal issues and litigation. Last but not least, India must periodically consult with lawyers, policy advisers, regulators, and even arbitrators before enacting any measure that may compromise or in any other way interfere with the property and other rights of investors, both foreign and domestic. India is a major investment destination as well as a potential home state for FDI overseas.

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[47] Deborshi Barat. (2022, November 24). *The Elephant in the Room: India's Place in the International Investment Regime*. Articles. https://articles.manupatra.com/article-details/The-Elephant-in-the-Room-Indias-Place-in-the-International-Investment-Regime

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