Prabhash Ranjan on India’s new stance on trade agreements: It takes India back to the pre-reforms era

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India seems to be on a free trade agreement (FTA) signing and negotiating spree. In the last few years, India has signed FTAs with Mauritius and the UAE and an interim one with Australia. India is currently negotiating FTAs with the UK, European Union, Canada, and Israel. Since trade and investment are inextricably linked, especially when the objective is to build global value chains, countries sign FTAs that legalise the full gamut of international economic relations between themselves. FTAs create binding international rules on trade and investment. Through these rules, states accept the instrument of international law to be held accountable for their sovereign conduct on trade and investment. International law increases costs for states to act unilaterally, thus ushering in predictability and certainty in international economic relations.

India followed this logic in signing several FTAs in the 2000s with countries like Singapore, Korea, Malaysia, and Japan. These FTAs include binding rules on both, international trade liberalisation, and the protection of foreign investment from arbitrary

state conduct. Additionally, these FTAs give foreign investors the guarantee to use international treaty arbitration to settle disputes with states.

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However, India's extant FTA policy seems to be a break from the past. As part of its FTA 2.0 approach, India is decoupling international trade law from international investment law (IIL). The FTAs with Mauritius, UAE, and Australia contain detailed international rules on trade, but rules on foreign investment protection are missing. The absence of investment protection in these FTAs is even more striking because India has unilaterally terminated its bilateral investment treaty (BIT) – conventional international law instruments that protect foreign investment — with Mauritius and Australia.

In FTA 2.0, India is ostensibly following an approach that lawyers Julien Chaisse and Georgios Dimitropoulos describe as the "domestication of IIL" — a process where countries develop domestic rules instead of, or sometimes in parallel to, IIL rules to protect foreign investment. They give primacy to their domestic laws in safeguarding foreign investment by doing two things. First, domestically legislating investment protection standards that are typically part of IIL. Second, providing a dispute resolution mechanism at the municipal level instead of treaty arbitration. South Africa is a good example of this kind of domestication. In 2015, after terminating its BITs, South Africa enacted a new law, "Protection of Investments Act", to replace investment treaties as the key instrument for protecting foreign investment.

India has also unilaterally terminated most of its investment treaties and barely signed a handful of inconsequential BITs in the last decade or so. Given this, coupled with the absence of investment protection chapters in FTAs, India too is following the approach of domesticating IIL, by effect if not by design. Unlike South Africa, India hasn't legislated an exclusive law for the protection of foreign investment, but the message is quite clear – while international trade commitments will be protected under international law, foreign investment will be guarded as per municipal laws.

India's approach can also be explained by adopting the lens of what lawyer Anthea Roberts calls "de-legalisation of international economic law". Thus, countries prefer to bind themselves to domestic adjudication for trade and investment matters at the cost of international law. India's action of terminating investment treaties, its reluctance in signing new ones, and not including investment protection as part of its latest FTAs tantamount to de-legalising or moving away from binding IIL. While this surely gives India greater control over foreign investment, whether this is the correct course of action is a moot point.

The domestication or de-legalisation of IIL takes India back to the pre-1991 era when India was timid about the international legalisation of economic relations, with one difference. Before 1991, India looked at, both, foreign investment, and international law on it with some mistrust. Today, India desperately seeks foreign investment but is

suspicious about IIL. The decoupling of international trade law from IIL is not in sync with the approaches of India's current and potential FTA partner countries. How India will tread this FTA 2.0 path remains to be seen.

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