G. Manicandam

INDIA’S FREE TRADE AND INVESTMENT AGREEMENTS

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New Delhi, December 2021
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PREFACE

The handbook on India’s Free Trade and Investment Agreements is an attempt to keep pace with the dynamic nature of free trade and investment agreements. This book explains the complex economic and technical jargon in lucid language for an intelligent layperson. This handbook maps India’s free trade and investment agreements and flags concerns with regard to their implications in various sectors, attempting to bring to fore how these agreements, in the absence of multilateral agreements, often mimic the unequal power equations that exist in the geopolitical sphere.

It has been the attempt of the Centre for Financial Accountability to simplify and widen the discussion on the economy, finance and trade from academic and intellectual circles to civil society organisations and actors for a better understanding of the policies and agreements that impact the political economy of the country. Since many of these negotiations are done in secret, analytical publications like this can deepen democratic debate through informed opinion-making.

We hope that the handbook will provide an easy reference for civil society organisations to understand the implications of free trade and investment agreements in their respective areas of enquiry, be it agriculture, labour, public sector among others. As time goes by, we aim to periodically update the handbook with the latest happenings in the arena.

We are thankful to G. Manicandan for translating his experience and involvement in the sector into this handbook. We would also like to thank the staff at the Centre for Financial Accountability for coordinating these efforts and for their editorial support. The publication and dissemination would not have been possible without support from Rosa-Luxemburg-Stiftung in India.

MAJU VARGHESE
CENTRE FOR FINANCIAL ACCOUNTABILITY
INTRODUCTION

Free Trade Agreements (FTAs) and investment agreements have a significant impact on overall economic activities and in many ways impact the government’s ability to evolve policies to address economic and social objectives.

This Handbook on India’s Free Trade and Investment Agreements is an attempt to break down the complex policy issues into simple and understandable concepts for all. This handbook is useful for many stakeholders including farmers, workers, small traders, self-employed, women entrepreneurs, public sector employees and many other sections of the society who are directly affected by the FTAs can educate themselves on the implications of FTAs and how they can take actions to protect their interests through democratic processes.

India is involved in numerous bilateral and regional free trade agreements (FTAs). So far, the government of India has signed 12 free trade agreements (FTAs) including regional trade agreements (RTAs) with ASEAN, South Asian countries and bilateral FTAs with Mauritius, South Korea, Japan, Malaysia, Singapore, Thailand, UAE and others. India is currently in different stages of negotiating FTAs with Canada, the United Kingdom, the European Union, Australia, New Zealand and others.

In addition to FTAs, India is also part of many bilateral investment treaties (BITs) or International Investment Agreements (IIAs) which were evolved with the intention to protect and promote foreign direct investments in India.

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India recently walked out of the Regional Comprehensive Economic Partnership (RCEP), comprising the Association of Southeast Asian Nations (ASEAN) together with China, Japan, South Korea, Australia and New Zealand. New Delhi is also reviewing its FTAs with ASEAN, Japan, South Korea and other countries. In addition, India is also reviewing its existing trade agreements such as the CECA with Singapore and ASEAN-India Trade in Goods Agreement (AITIGA) with ASEAN, among others.
WHAT ARE FREE TRADE AGREEMENTS?

FTAs are treaties between two or more countries to facilitate trade. Traditionally FTAs were used to undertake legally binding commitments to eliminate and reduce customs tariffs for agricultural and industrial goods. It gradually evolved into Comprehensive Economic Partnership Agreements (CEPAs), and Comprehensive Economic Cooperation Agreements (CECAs) which are also known as new generation FTAs. Comprehensive FTAs cover following disciplines:

- Trade in goods
- Services (banking, construction, trading, insurance, telecom, etc.),
- Investment,
- Government procurement,
- Intellectual Property rights,
- Digital trade,
- Competition policies,
- Rules of Origin
- Sanitary and phytosanitary (SPS) measures,
- Trade Facilitation
- Labour Standards,
- Environmental Standards
- Trade Remedies
- Dispute Settlement

In addition, apart from the above-mentioned trade and regulatory policy disciplines other areas agreed upon by negotiating countries are also included in the comprehensive FTAs. It is believed that such trade agreements with legally binding obligations provide predictable trade and regulatory policy regimes leading to economic efficiency. It is believed that such a predictable and stable policy regime helps efficient decisions on investments and the free flow of goods and services. However, the trade agreements also restrict the government’s policy space, as often they cannot enact policies to fulfil their development objectives going beyond their commitments in the free trade agreements.
HOW HAVE FTAS BECOME A MORE PROMINENT PART OF INTERNATIONAL TRADE POLICY?

In the past three decades starting from the 1980s, the era of globalization witnessed massive transformation through the so-called ‘economic reforms’ policies. Simultaneously, trade policies have witnessed major changes.

As many developing countries, including India, shifted from the model of command economy dominated by the public sector to market-oriented export-led growth, the period was marked by liberalization and deregulation policies with gradual withdrawal of the state from direct economic activities of production and distribution of goods and services. Since the 1990s the World Trade Organisation (WTO) trade rules and a plethora of regional and bilateral free trade agreements (FTAs) continue to shape the trade policies with significant consequences for the country’s economy.

The WTO is the successor of the General Agreement on Tariffs and Trade (GATT), a legal agreement between countries that was established in 1948 to promote international trade after the Second World War. International trade rules evolved through various rounds of negotiations under GATT.

In 1995, the WTO multilateral body was established. The GATT rules were absorbed into WTO. Currently, WTO has 164 member countries representing 94 per cent of world trade. The GATT mainly dealt with trade in goods, whereas the WTO and its agreements also cover trade in services and Intellectual property rights. WTO is the forum for negotiations of international trade rules by member countries. Its function includes administering WTO trade agreements, handling trade disputes, monitoring national trade policies and providing technical assistance and training for developing countries.

In 2001 WTO launched the Doha Development Round (DDR) launched with the promise of developmental outcomes and improving trading prospects for developing countries. In the past decade DDR WTO negotiations centred on the areas of evolving market-opening trade rules for trade in Agricultural goods, Non-Agricultural Goods Market Access (mainly covering Industrial goods), trade-in Services and other areas.
Over a period, these negotiations exposed divergence of interests among its members, while developed countries are demanding more market access and in return, the developing countries demand an outcome with developmental objectives. The impasse in WTO negotiations weakened the very nature of the consensus-based decision-making process in the WTO. The recent WTO ministerial meetings were concluded without formal declarations of providing the future course of action. The WTO has so far failed to evolve a consensus among its 164-member countries.

As WTO multilateral negotiations are not progressing towards opening new markets, momentum has been created by most developed and industrialized countries through bilateral and regional free trade agreements to deepen the liberalization commitments to gain new market access. Simultaneously certain members of WTO launched plurilateral trade negotiations such as Trade in Services Agreement (TISA), Information technology Agreement (ITA) and Environmental Goods Agreement (EGA) to open new market access.

Further deviating from Doha Development Agenda, a group of countries at the 11th Ministerial Conference in December 2017, issued joint statements on advancing discussions on e-commerce, developing a multilateral framework on investment facilitation, on launching a working group on micro, small and medium-sized enterprises (MSMEs) and on advancing ongoing talks on domestic regulation in services trade. In November 2020, a group of WTO members announced their intention to intensify work on trade and environmental sustainability at the WTO by organizing ‘structured discussions’.

As negotiations in WTO began with the promise of development, it was characterized by a certain amount of transparency and recognition of the varying developmental needs of its member countries. Principles such as ‘special and differential treatment’ under which, developing countries can get a longer period of implementation of liberalization commitments and the principle of less than full reciprocity reflected the developmental dimensions of WTO negotiations. However, it is highly debatable as to whether these principles were followed in practice. The WTO also witnessed groupings of developed, developing and least developed countries, which collectively articulated their positions on trade issues.

Unlike in WTO, the bilateral and regional free trade agreements treat their partners as equal and demand reciprocal obligations in market-opening commitments. Most of these new-generation agreements go beyond WTO trade rules deepening market commitments in the areas of trade in goods, services, financial services, telecommunications, electronic commerce, competition policies, government procurement, investment and intellectual property rights and other areas.
For the new generation trade agreement results in certain developmental outcomes, the primary objective has been dominated by corporate trade agenda and to gain access to a new market. At the WTO, to evolve consensus and reach an agreement, it takes great effort to create consensus among the least developed, developing and developed countries. However, in the case of bilateral and regional free trade agreements, reaching an agreement is relatively smooth and liberalization and deregulation commitments go far beyond WTO trade discipline. The proliferation of FTAs, in a way, contributed to weakening the multilateral trade negotiations.

Countries like India are considered to be a strong player and has relatively strong human resources to negotiate trade agreements. However, many developing and least developed countries do not even have bureaucrats with adequate expertise to deal with highly technical trade negotiations. Many countries have signed these negotiations under political pressures in the backdrop of powerful corporate lobbies. Negotiations were held in secret with a lack of democratic process and in the absence of public scrutiny. While corporate representatives were provided with privileged access to negotiations, various stakeholders who will be directly affected by the trade negotiations were kept in dark.

Many of the FTAs include countries that are at different stages of development. Deepening liberalization rules are fraught with the danger of reinforcing the economic social and environmental crisis and severely limiting the government’s ability to address developmental challenges in front of them. Governments need a mix of regulatory policy space to restore growth and pursue the structural transformation towards inclusive and sustainable development.
WHY DO COUNTRIES SIGN FTAS?

FTAs are often justified for both economic and political reasons. On the political front, leaders often paint rosy pictures and present FTAs as an opportunity to build strategic and friendly relations with other countries, while gaining economic benefits with win-win trade rules. India’s FTAs with many neighbouring countries in South Asia were predominantly guided by political objectives. India’s FTAs with Southeast and East Asian countries including Thailand, Singapore, Japan, Korea, and its FTA with ten countries regional block Association of South-East Asian Nations (ASEAN) are also largely guided by geopolitical interests.

On the economic front, countries sign FTAs, to avoid being isolated, to be part of the global supply chain, to become an attractive investment destination, to ensure a predictable business environment, to reduce so-called trade barriers and to gain new market access and improve competition and productivity. In many instances, the government of India has not fully evaluated the economic costs and benefits of signing these agreements. On many occasions, government officials themselves agreed that India’s experiences with FTAs have been a mixed bag.

Many countries want to sign FTAs with India as India is one of the fast-growing developing countries. India still has relatively higher tariffs for many industrial and agricultural goods. In many key areas including investment, services, digital trade, public procurement, and intellectual property rights India is looking to protect its policy space.¹

India’s intellectual property laws provides a fair balance between the rights of the patent holders and the need to provide affordable medicines to its citizens. India is world’s largest producer of generic medicines and supplies more than 80% of generic anti-retro viral (ARV) medicine to treat HIV in low and middle income (LMIC) countries. Its generic medicine industry has reduced the cost of ARV medicines over time by up to 98%, vastly increasing access to medicines for those most in need.

The document highlighting the UK’s strategic approach in UK-India FTAs underlines some of the strategic reasons for which India is considered a valuable trade partner.² India’s growing middle class makes it as one of the attractive markets in the world. India’s middle class is expected to double from 30 million in 2019 to 60 million in 2030, before reaching nearly 250 million in 2050. Middle class is defined as earning over $12,525 a year. This demographic change represents a great increase in demand for products and services, creating huge opportunities for corporations selling high end brands and products. India has an expanding services sector which accounts for 54% of its economy.

The Government of India is aiming to have a trillion-dollar online economy by 2025, while internet penetration in India was expected to hit 50% or 622 million users in 2020. Many countries are looking to gain new market access in India’s automotive, agri-food, machinery, pharmaceutical industries are considered some of the attractive industries. On services sector financial and digital services seem to be key areas of interests for India’s trade partners.
INDIAN CIVIL SOCIETY PROTEST FTAs AND RCEP

Across India civil society organizations raised voice protesting FTAs time and again. In 2016, the Regional Comprehensive Economic Partnership (RCEP) negotiations were started between the ten members of the Association of South East Asian Nations (ASEAN) and the six countries that have existing trade agreements with ASEAN: Australia, China, India, Japan, New Zealand and the Republic of Korea.

As the RCEP negotiation process did not involve civil society organizations or a public consultation mechanisms, it raised great concerns among stakeholders across the board. Trade unions and civils society organization gradually intensified their protest highlighting negative consequences of the mega regional FTA. Ultimately the government of India withdrew from RCEP negotiations on 4 November 2019. Consistent protests various sections of civils society made the government to stay away from RCEP.

In 2019, as India was intensely involved in RCEP All India Kisan Sangharsh Coordination Committee (AIKSCC), a coalition of over 250 farmer organisations in the country called on the government to immediately halt RCEP negotiations.

PHOTO: MEMBERS OF KARNATAKA STATE FARMERS’ UNION STAGED A PROTEST AGAINST THE RCEP FREE TRADE AGREEMENT.
Farmers’ organizations argued that “the world over, governments have been heavily subsidising crop inputs and providing quality infrastructure to their farmers in order to maintain competitive prices of their produce. The Indian government has not done that. In India, input prices are heavily taxed and farmers are not given profitable prices, resulting in heavy losses and farmer debts. RCEP will aggravate this crisis immensely”.

In July 2017, in the run up to which the RCEP negotiations in Hyderabad, civil society organizations across the spectrum gathered in Hyderabad to register protest against the RCEP. A people convention was jointly organized various stakeholders including farmers organisations, trade unions, patient groups, academicians and civils society experts took part in the event deliberating the implications of RCEP.

PHOTO: HIV POSITIVE GROUPS HELD PROTEST AGAINST RCEP IN HYDERABAD ON 23 JULY 2017

PHOTO: 23 JULY 2017, CIVIL SOCIETY LEADERS ADDRESSING PEOPLE’S CONVENTION AGAINST FREE TRADE AGREEMENTS AND RCEP AT HYDERABAD.

In an open letter to the sixteen governments negotiating the Regional Comprehensive Economic Partnership (RCEP) in October 2016, health organisations called on trade ministers to reject provisions that would negatively affect access to generic medicines in the RCEP. In the initial round of negotiations South Korea and Japan, going beyond WTO TRIPS provisions were pushing for data exclusivity provision in RCEP. Data exclusivity could delay regulatory approval for medicines that are off-patent, and provisions that will lengthen medicine patent monopoly periods. These provisions would delay the market entry of affordable generic medicines.

Health groups argued that, If India is forced to sign onto TRIPS-plus measures, access to affordable generics of new essential medicines for a number of diseases for the world’s poorest people in Sub Saharan Africa and other low and middle-income countries will be seriously compromised.

For example, Malaysia provides Indian generic ARVs free of charge to their HIV positive population. It is highly unlikely that Malaysia could afford to sustain their HIV treatment program if they are unable to access Indian generics.4

PHOTO: HEALTH GROUP ACTIVISTS PROTESTING AGAINST RCEP IN FRONT OF JAPANESE EMBASSY IN DELHI.

Despite the government India’s withdrawal, 15 countries signed the RCEP deal in November 2020. Recognizing India’s strategic importance, the RCEP ministers declared that the RCEP Agreement is open for accession by India from the date of entry into force of the Agreement. If India submits its intention to join RCEP at any time, member countries will commence negotiations.5 Even though India withdrew from RCEP major concerns raised by civil society groups around free trade agreement are still not answered.

PHOTO: MEMBERS OF FORUM AGAINST FTAS PROTEST RCEP, 21 JULY 2017

PHOTO: PROTEST AGAINST EU-INDIA FTA IN DELHI, JUNE 2010

WHAT ARE THE MAJOR AREAS OF CONCERN OVER FREE TRADE AGREEMENTS?

Lack of democratic process and transparency in trade negotiations

Imposition of secrecy, lack of democratic process and transparency in the process of negotiations of free trade agreements is one of the foremost concerns. In almost every trade agreement the negotiating texts are kept secret and away from public scrutiny. Even people's representatives and members of parliament do not have access to negotiating texts. In India, the positive and negative consequences of the agreement are not even discussed and voted in the parliament. Such secrecy in the negotiation process does not allow for informed public debate over the consequences of trade agreements. It is unfortunate that, only through leaked documents and negotiating texts, did people come to know of details of the trade negotiations.

Often there is no adequate consultation with stakeholders, including farmers, trade unions, and micro small and medium enterprises (MSMEs) who are directly affected by these negotiations. Some governments including European Union, Australia and New Zealand have established a very limited process for improving transparency and stakeholder consultations. Despite frequent demands from civil society, the government of India is far behind in improving transparency. In the absence of actual information in the public domain as to what exactly is being negotiated behind the doors, public meetings and press briefings with very general information are inadequate.

In the case of India, full details of almost all agreements are made available to the public only after negotiations are concluded and respective ministers sign on the dotted lines. Sometimes bureaucrats argue that these agreements are not set in stone and include review provisions, through which contents can be changed. But in reality, once concluded, it becomes exceptionally difficult to change any specific provisions of the agreement. It is far more urgent that the veil of secrecy over the trade negotiations processes and the negotiating texts be removed. A democratic process should be followed in the trade negotiations.

Reciprocal trade obligations

In bilateral trade negotiations countries are often considered equal trade partners. Developed and industrialized countries expect reciprocal and equal trade policy obligations with their trade partners through the free trade agreement. However, developing countries cannot be considered equal to their northern trade partners.
Countries like India, which is still a developing country with a large number of people living in poverty have different needs to fulfilling social and economic objectives. So, one size fit for all approach will not work.

In the case of WTO recognizing the differences in the level of economic development, the negotiations adhere to the principle of special and differential treatments. It is another issue that, now developing countries are fighting to retain the principle of special and differential treatment in the ongoing trade policy negotiations.

**Trade in Goods: What are the implications of tariff reductions/eliminations in Industrial and agricultural goods?**

Through the FTAs, governments undertake legally binding commitments to reduce or eliminate tariffs. The new generation FTAs call for ambitious commitments to eliminate and reduce tariffs for more than 90 per cent of goods traded between FTA partners. These commitments usually go beyond the bound tariff commitments undertaken in the WTO. In order to understand the dynamics of tariff reductions, it is essential to understand various types of tariffs that are in use such as Bound Tariffs, Most Favored Nation (MFN) Applied tariffs and Preferential tariffs.

**Figure 1: Various Types of Tariffs.**

**Bound Tariffs:** Bound tariffs are specific tariff rate commitments made by Individual WTO member countries. It is the maximum level of customs duty for a commodity. WTO members have the policy space and flexibility to increase or decrease their tariffs but tariffs cannot be raised above the bound levels.

**MFN Applied Tariffs:** MFN applied tariffs are customs duties actually levied by the WTO member for a specific product. Often MFN applied tariffs are lower than the bound tariff rate. The gap between Bound Tariff and MFN Applied tariff provides the flexibility to reduce or increase the tariff rates. The MFN applied tariff rates are non-discriminatory and equally applied to all WTO members unless there is a preferential trade agreement to reduce tariffs.

** Preferential Tariffs:** Preferential tariffs are lower than the MFN applied tariff rate, which are committed to a trade partner through free trade agreements or through other methods. Developed countries like the US and the EU also provide unilateral preferential market access treatment through a generalized system of preferences (GSP) for the products of developing and least developed countries.

Figure 1 provides more clarity on the difference between various types of tariffs.

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6 Types of Tariffs, Source: https://wits.worldbank.org/wits/witsidhelp/content/data_retrieval/pivintro/c2types_of_tariffs.htm
India’s simple average final bound tariffs is 50.8% and for the year 2020, the simple average MFN applied tariffs are 15%. India’s applied tariffs have been progressively reduced over a period of time. These numbers vary for various groups of products. For example, the average bound tariffs for India’s coffee and tea products is 133.1%, while the MFN applied duties are 56.3%. For fish and fish products the average bound duty is 135.7%, while the MFN applied rate is 29.9%. For leather and footwear products the average bound duty is 34.6% and the average MFN applied customs duty is 13.7%.  

Each product is identified as tariff line through harmonized system of code numbers for tariffs. It has been argued that tariff reductions help reducing cost of the product for end consumers. Further it helps reducing the cost of imported raw materials, leading to reduction in overall cost of production. Such policies also attract foreign investments to set up assembling units generating employment in India, while they can import cheap raw materials / parts from other countries.

These arguments also have a flip side and more often triggers the race to bottom. Cheaper imports affect nascent domestic industry and leads to intensification of work, low wages, poor working conditions and ultimately closure of manufacturing units leading to job losses. More importantly government also loses much needed tariff, revenue.

In 1996, India signed a plurilateral Information Technology Agreement, which is known as ITA-1 in WTO. The ITA 1 has completely eliminated tariffs for certain number of information technology products. The agreement proved costly for India as in subsequent years, the flood of cheap IT products into India has almost eliminated India’s domestic IT manufacturing capacity. 8 Realizing its mistake, India refused to participate when the ITA-2 was evolved incorporating more IT products in 2015.

Policy tools like ‘export taxes’, which are used to limit the rampant export of raw materials and make them available for domestic industry cannot be used anymore if India commits to not use these provisions under FTAs. India frequently used the export taxes on iron ore and leather raw materials to ensure availability of raw materials for domestic industries. These policy tools can also help the domestic industry to move up the value chain to produce value added final products, thereby improving the revenue, quality of employment, wages and working conditions.

Further, particularly for developing countries like India ability to generate manufacturing capacity in areas like information and communication technology products and environmental products including solar panels, wind energy products, which has the potential to generate employment in future will be deeply affected. When the need arises to protect domestic industries and protect a nascent sector from international competition, governments can no longer utilize the Industrial policy tools.

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8 India to skip talks on expanding ITA scope, The Hindu, 13 March 2013, Source: https://www.thehindu.com/business/Economy/india-to-skip-talks-on-expanding-ita-scope/article6505488.ece
What are non-tariff barriers (NTBs) and how they are used in trade policies?

Non-tariff measures are generally defined as policy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both. In other words, any measure other than customs tariff, affecting international trade can be called as NTBs.

Reports suggest that, despite having Comprehensive Economic Partnership Agreement (CEPA) with South Korea, India face NTBs in textiles, mangoes, steel, engineering goods, pharmaceuticals, rice and in many other products. Some of these examples would help in understanding. In the textile sector South Korea uses the Korean Certification mark (KC mark) for all textile items sold in the country. This mark indicates compliance with mandatory requirements and under acts for safety management of children’s products, products must be mandatorily tested and inspected by local authorised Korean testing institutions. It is difficult for Indian exporters to access local testing and certification process, so they are not able to export their products to Korea. Similarly exporters of agricultural products are facing NTBs in different form. Exports of mangoes require pre-shipment inspection done by the Korea Animal and Plant Quarantine agency. Such inspection requirement affect export agricultural products.

There are numerous measures adopted by industrialised and developed countries to protect their markets. These policy measures are often justified as environmental and health standards, they often play as barriers to market access. Industrialised and developed economies have gone through a process of industrial development and have the experience of understanding the nature of the industry. So they are able to develop such difficult policy measures, which can act as non-tariff barriers. Developing countries like India, often do not have the capacity to identify the existence of NTBs before signing the FTAs. They often face difficulties in using FTA provisions to access the market of their trade partners.

What are the implications of Investment provisions in FTAs?

 Mostly, the investment chapter in trade agreements is negotiated with the objective to gain equal treatment for foreign investment as that of domestic players. Technical approaches in investment chapter negotiations such as “negative listing”, “standstill”, “ratchet clauses”, and methods in trade agreements have serious negative implications.

The ‘negative listing’ method is one of the usual approaches followed in Investment chapter negotiations. A negative list means the country should list all exceptions or conditions for Market Access and/or National Treatment limitations it wants to apply. All sectors or sub-sectors that are not listed are, by default, open to foreign investors and service suppliers under the same conditions as domestic players. It is impossible that any country can list all its reservations when they are negotiating an FTA.

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10 India wants South Korea to lower non-tariff barriers for textiles, pharma, rice, engineering, steel, Anshi Sen | New Delhi, January 12, Source: https://www.thehindubusinessline.com/economy/india-wants-south-korea-to-lower-non-tariff-barriers-for-textiles-pharma-rice-engineering-steel/article38254001.ece
The world is increasingly witnessing newer areas of economic activities that were not present in the recent past. For example, a few years ago 3D manufacturing or E-commerce was not conceived as a major area of economic activity. But today these sectors are key aspects of economic activity. These need to be regulated in order to fulfil the developmental needs and social objectives of the country. Without even understanding the developmental potential of these sectors, the government should not commit to a ‘negative listing’ approach in FTAs. Writing off future policy space on such future areas of economics through a negative listing approach is not acceptable.

Investment and services chapters’ negotiations often include standstill and ratchet provisions. ‘Standstill’ provision, means ‘locking in’ the existing level of liberalisation. Additional liberalisation can take place, but the government can not roll back the existing level of liberalisation at the time of the agreement. It means, that in future if the government decides to roll back a particular liberalisation decision, it will not be allowed to do so.

Further, the standstill provision is complemented with a “ratchet clause”, a provision through which the country commits that, if it unilaterally decides in the future to further open up their respective markets in one specific sector, such opening would be locked in and there can be no step backwards.

Under the investment chapter, negotiations are also held on performance requirement regulations. Policy tools to impose performance conditions on foreign investments including procurement of raw materials locally, employment of local workers, technology transfer and indigenization, which are often used to regulate foreign investments according to the domestic requirements are also proposed to be removed.

Public services should be excluded from the legally binding commitments under trade agreements. Democratically elected governments must have the absolute right over utilizing policy tools to ensure that citizens have access to public services.

What are the implications of the digital trade agenda and its impact on digital industrial policy tools?

The world economy is witnessing a rapid digital shift that is resulting in growing digital-based restructuring and transformation of the manufacturing, agriculture and services sectors. While traditional areas of trade in goods and services are governed through multilateral, regional and bilateral trade agreements, governments are still exploring policy tools to regulate key areas of the digital economy. Minimal regulation of the digital economy also provides an important opportunity for governments to devise digital industrial policy tools to facilitate and promote developmental objectives. Further effective use of digital policy tools would enable developing countries to achieve technological catching-up.
New generation plurilateral, regional and bilateral trade agreements are promoting policy instruments in areas such as internet governance, data localization, cyber security, data privacy and security, cross border digital trade flows, cross border data flows, high-tech intellectual property rights, cloud computing, electronic commerce, public procurement, encryption regulation and big data. It is also important to recognize that leading information and communication technology corporations and industry associations are heavily involved in lobbying for digital trade agenda.

It is essential that governments should not lose policy space to regulate the digital economy, even before understanding its developmental implications. Governments should deploy adequate resources and make a conscious effort to inform the public of digital trade policy issues and facilitate an informed public debate, before undertaking legally binding commitments through trade and investment agreements.

What is the role of labor provisions and sustainable development clauses in FTAs?

It is important to note that none of India’s FTAs include provisions to protect labour standards or sustainable development. The view that these provisions are non-trade issues and should not be linked with FTA negotiation dominates the government of India’s approach to these provisions.

International trade and investment agreements in recent times rewrite rules that affect production activities in global value chains with deep implications for employment relations and labour standards. It has been amply established that liberalization measures and tariff reductions and elimination through trade agreements create winners and losers in the labour market. While some experience enhanced market access and increased production, many firms face the competition of cheaper imports from domestic and international markets.

In order to stay competitive and reduce the cost of production, they resort to strategies that trigger the race to the bottom such as lowering wages, retrenchment, intensification of work with long working hours, poor working conditions and growing precarious work. We are also witnessing that the government is changing labour regulations and protections, in the name of so-called ‘labour law reforms’ in order to enhance trade and attract investments. It profoundly affects workers’ fundamental rights and international labour standards.

While an increasing number of free trade agreements include labour provisions with a commitment to protect fundamental principles and rights at work, in varying degrees these provisions are inadequate to address workers’ concerns. It is paradoxical to note that the investment chapter of trade agreements, provides detailed legal and arbitration procedures to protect investor rights, while the labour chapter predominantly champions cooperative approaches and consultative processes with a lack of legally binding commitments to protect workers’ rights.

There is a need for a renewed approach toward understanding the impact of trade policies on workers’ rights and evolving responsive and effective participatory mechanisms and a strong transparent institutional structure to protect workers’ rights.
What are the implications of Intellectual property rights (IPR) provisions?

Rules governing standards of IPR protection and enforcement have become core issues of trade agreements. IPR provide monopoly rights to persons or companies over matters including innovations, technology, test data for medicines and agrochemicals, plant varieties, geographical indicators and a host of intangible goods and services.

Third parties cannot produce or perform or use the creations that are protected under IPR, without the authorization of the right holder. Production and importation of domestically patented products from the international market may attract punishment. A strong patent regime with stricter protection and enforcement rules is advocated with the view that such protection would promote innovation, and industrial development and attract foreign direct investment. However, it has not been unambiguously established that a strict IPR regime would provide such benefits.

A stronger IPR regime often raises the costs of protected goods and reduces access to innovation. It facilitates a greater degree of monopoly power to patent holders, who are mostly multinational corporates. The premium cost associated with IP protected technology also forms a hurdle for the diffusion of innovative technology, which otherwise would contribute to the greater wellbeing of the larger number of people. It also affects the development of infant domestic industries limiting their abilities to learn and catch up with foreign technology at a lower cost.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) signed as the outcome of the Uruguay Round, which forms the part of the Marrakesh Agreement Establishing the WTO in 1994, provides extensive standards of IP protection legally binding to all WTO members. This agreement also provides for flexibilities that can be used by developing countries to pursue industrialization and developmental objectives. However, the new generation trade and investment agreements seek binding commitments beyond TRIPS provisions and call for a stringent IP regime. Such provisions deeply affect industrial development, access to medicines, agricultural inputs, educational materials and diffusion of innovative technologies. There is a need for a balanced approach to the IP regime. It is essential that the IP regime, should contribute to and facilitate governments’ efforts to achieve sustainable development goals, and should not form a hurdle in the process.

What are the implications for public procurement?

Public or government procurement is the official process through which government agencies purchase goods and services to carry out government activities. In India and across the world public procurement has been utilized as one of the key policy tools to promote industrial development and fulfil sustainable development objectives. Public procurement processes are often used as policy tools objectives including employment generation, encouraging small and medium enterprises, rural development, promotion of innovation among domestic industries, and green public procurement. Most governments when purchasing goods and services and granting infrastructure projects provide preferential treatment to domestic firms.
Overall the public procurement represents an average of 10 to 25% of GDP. It occupies a substantial share of world trade amounting to more than €1.3 trillion per year. Particularly developing countries spend much more for public procurement. Public procurement percentage share of GDP for countries in South Asia 19.27%, Sub-Saharan Africa 14.91%, Latin America and Caribbean 14.53%, Europe and Central Asia 12.30%, North America 11.70%, Middle east and North Africa 11.38% and for East Asia and Pacific it is 9.26%. In the EU alone, public procurement is estimated to be 16% of GDP. Thus the public procurement carried out by governments has significant implications for global economy and development.

Public procurement regulatory disciplines in the trade and investment agreements seek to end the preferential treatment for domestic firms and demand equal treatment for foreign firms. Opening up the public procurement for international firms, not only at the national level, but also at federal, local government and municipal level through legally binding and irreversible commitments would erode governments' policy space.

**India-UK FTA: Key concerns**

At a virtual summit on 4th May 2021 India and the United Kingdom announced their intent to negotiate a Free Trade Agreement (FTA) as part of a wider Enhanced Trade Partnership. As of the third week of March 2022, the second round of talks for the India-UK FTA have been concluded. Recent reports suggest that India and UK initially try to avoid sensitive issues and aim of concluding an early harvest trade agreement over the next few months. At the initial stage, it is expected that the ‘early harvest agreement’, which is a precursor to a comprehensive trade agreement, would cover tariff reductions/elimination in 65% of goods and 40 % coverage for services. At a later stage, the final agreement would cover more than 90% of goods.

**Trade in goods:** UK businesses consider Indian tariffs for Industrial and agricultural goods as ‘significant barrier’ and seems to have offensive interest in reducing tariffs.In 2019, India imported goods worth £5.35 billions from the UK, of which £5.24 billion worth goods were subjected to Indian tariffs. India’s applied tariffs for vehicle manufacturers are currently 125%, and annual tariffs paid on UK’s exports to India total £49 million. The UK business wants to remove India’s tariffs on imports, which would save British companies a lot of money and increase their competitiveness. However, this will go a long way in reducing India’s tariff revenue and affecting India’s ability to protect and develop domestic industries. As UK’s tariffs for Industrial goods are already low, India may not gain any new market for its products. So due to tariff reduction, impact on UK will be far less while India would lose a significant amount of tariff revenue.

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14 Explained: Why India is trying to seal a free trade agreement with UK, The Indian Express, 15 January 2022, Source: [https://indianexpress.com/article/explained/india-uk-fta-talks-early-banquets-7724819/](https://indianexpress.com/article/explained/india-uk-fta-talks-early-banquets-7724819/)
On services, the UK is aiming for ambitious commitments from India on market access for key UK export sectors, such as financial services including banking, capital markets, insurance, and financial technology (FinTech), professional and business services, digital services and transport services. The UK is also aiming to increase opportunities for UK businesspeople to operate in India by enhancing opportunities for business travel. Other major issues the UK is looking to get commitments from India are in relation to data flows and data localization, cross-border provision of services, taxes, regulations on insurance and reinsurance market, and regulatory cooperation.

On digital trade, the UK is looking to pursue a comprehensive digital chapter with far-reaching commitment and locking in existing regulations. It wants to prevent the evolution of new regulations and promote greater openness on digital trade policies. Further, the UK wants to reduce or remove regulations or performance requirements regarding the investment of digital corporations. These regulations may include rules around data crossing borders and regulations on data flows to enable UK firms to access overseas digital markets and operate across borders freely. Other offensive interests for the UK are to protect source code, encryption keys of businesses operating in India, seek commitments on cross-border data flows, prevent data localisation requirements, data protection and data security. The UK also want to ensure that the FTA helps to prohibit technology transfer as a condition of market access.

The UK has offensive interest in securing commitment on intellectual property rights on copyright provisions and stringent enforcement of IP rights. It is important to ensure that IPR provisions are inconsistent with fulfilling the developmental needs of India. More importantly protecting affordable access to medicines should not be affected by IP provisions in India UK FTA.

The UK also looking to seek commitments on rules regulating subsidies and the role of state-owned enterprises in Indian economy. The state-owned enterprises, in other words popularly known as public sector undertakings in India, play a significant role in India’s development strategies. Any commitments through India UK FTA should not affect the social and developmental contributions made by Indian public sector enterprises.

Seeking access for UK businesses to valuable Indian government procurement opportunities are other key objectives. Many rules regulating government procurement in India are aimed at promoting domestic industrialisation, employment generation and fulfilling the domestic developmental needs. The government often use policy instruments such as requirements for local presence, local purchasing, preferences in India and high local content requirements for suppliers of public procurement contracts. The developmental role played by public procurement policies should not be compromised in the India UK trade deal.
BILATERAL INVESTMENT TREATIES (BITS)

India has recently terminated bilateral investment treaties with over 73 countries. Based on legally binding commitments undertaken through the BITs, India faced numerous litigations by foreign corporations suing the government of India demanding millions of US $ compensation for policy action taken by the government. In the face of mounting cases, which are still going on in international tribunals, India has evolved alternative policies and terminated the previous agreement.

Implications of Investor-state dispute settlement (ISDS) clauses in trade agreements:

The investor-state dispute settlement (ISDS) provisions provide special legal rights to corporates to sue governments for huge sums of money, in international arbitration tribunals, if the government legislation or policies affect the profitability of the foreign investor. ISDS provisions were initially included in the bilateral investment treaties (BITs), which later became the mainstay of the investment chapter in FTAs, and were initially signed with the view to encourage foreign investment by protecting the investor from discrimination and expropriation. However, its implementation has been a disaster.

So far India faced 26 known cases based on investor-state dispute settlement clauses in trade agreements. See Annexure 1 for a summary of the cases. There could be a possibility that the real number of cases India faced may be more than these known cases.

ISDS provisions provide enormous power to corporates to challenge government decisions and limit the government’s policy space to regulate investments to suit the developmental requirements of the country. Undermining the domestic constitution and rule of law, the ISDS arbitration process takes place outside of the domestic judicial processes and it is held entirely in secret. Federal units and local governments have no capacity to defend ISDS cases that are often challenged.

Any law or policy, that may be enacted with the view to protect workers’ rights, enhance minimum wages and working conditions, generate employment, environmental protection, consumer protections, provide public services and health and a host of other social and welfare regulations run the risk of being challenged by corporates. The government must be free and possible threats of being sued by multinational corporations should not undermine the government’s ability to conceive, adopt and implement policies in people’s interest.

Realizing the risks associated with the investment treaties, the government of India has formulated a new model bilateral investment treaty text in 2015. Subsequently, the government terminated 73 bilateral investment treaties and sent the model investment treaty text for renegotiations. Its renegotiation process covering about 70 countries is in different stages of negotiations. Currently, only about 6 investment treaties are in force and about four treaties that are already signed have not yet come into force.
# ANNEXURE: I

## KNOWN TREATY BASED INVESTOR STATE DISPUTE SETTLEMENT CASES IN INDIA

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<tr>
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<th>Outcome of original proceedings</th>
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| 1  | 2020               | GPIX v. India   | **Investment:** Linked to another British private equity firm, GPIX pursuing a treaty claim against India towards transportation and storage (airport ground handling services)  
**Summary:** GPIX LLC instituted these arbitral proceedings against the Republic of India by Notice of Arbitration dated 9 March 2020 pursuant to Article 8 of the Agreement between India and Mauritius for the Promotion and Protection of Investments dated 4 September 1998 and the 1976 UNCITRAL Arbitration Rules. | Pending | India | Mauritius |
| 2  | 2019               | Kowepo v. India | **Investment:** Shareholding of 40% in Pioneer Gas Power Plant Limited (PGPL), the operator of a 388 MW project in the Raigad district in the Indian state of Maharashtra. | Pending | India | Korea, Republic of |
| 3  | 2017               | Carissa v. India | **Investment:** Carissa Investments LLC of Mauritius, held 49% stake in InduTech Zone, through FDI.  
**Summary:** Claim against India under the India-Mauritius BIT sought damages in the order of US$50 million. The dispute relates to the development of a special economic zone ("SEZ") (the InduTechZone) in the state of Telangana. The development of the project was said to have halted because of investigations into allegations of money laundering against a senior politician involving the land intended for the new development. | Discontinued | India | Mauritius |
<p>| 4  | 2017               | Nissan v. India | <strong>Investment:</strong> 70 per cent share in Renault Nissan Automotive India Private Limited, a consortium that built an industrial automotive facility in Chennai, the capital of Tamil Nadu. | Settled | India | Japan |</p>
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<td>5</td>
<td>2017</td>
<td>Vodafone v. India (II)</td>
<td><strong>Summary</strong>: Claims arising out of non-payment of incentives by the Indian State government of Tamil Nadu, which had been allegedly promised to the claimant under the agreement for building of a car plant, signed with the State government in 2008.</td>
<td>Pending</td>
<td>India</td>
<td>United Kingdom</td>
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| 6  | 2016              | Astro and South Asia Entertainment v. India | **Investment**: Ownership of an Indian telecoms company.  
**Summary**: Claims arising out of a retrospective transaction tax imposed by the Government over claimants’ acquisition of Indian-based Hutchison Whampoa telecoms business. | Discontinued | India | United Kingdom, Mauritius |
| 7  | 2016              | RAKIA v. India | **Investment**: Investment in the Indian satellite TV company Sun Direct.  
**Summary**: Claims arising out of an allegedly unfair and biased criminal investigation by the Government relating to the suspected bribery by the claimants of Indian government officials. | Pending | India | United Arab Emirates |
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| 8  | 2016              | Nissan v. India| **Investment:** 70 per cent share in Renault Nissan Automotive India Private Limited, a consortium that built an industrial automotive facility in Chennai, the capital of Tamil Nadu.  
**Summary:** Claims arising out of non-payment of incentives by the Indian State government of Tamil Nadu, which had been allegedly promised to the claimant under the agreement for building of a car plant, signed with the State government in 2008. | Settled | India | United Arab Emirates |
| 9  | 2016              | Vedanta v. India| **Investment:** 59.9% shareholding in Cairn India Limited, one of the largest oil and gas exploration companies in India.  
**Summary:** Claims arising out of a tax bill of approximately USD 3.29 billion, imposed by the Government on Cairn India Limited in 2015, for the alleged failure to pay taxes on capital gains arising from Cairn’s operations in 2006-2007. | Pending | India | United Kingdom |
| 10 | 2015              | Cairn v. India | **Investment:** Interests in subsidiary Cairn UK Holdings Limited and 10 per cent shareholding in Cairn India Limited (CIL), one of the largest oil and gas exploration companies in India.  
**Summary:** Claims arising out of a draft assessment order issued by the Indian Income Tax Department addressed to the claimant’s subsidiary, Cairn UK Holdings Limited, in respect of fiscal year 2006/7 in the amount of USD 1.6 billion-plus any applicable interest and penalties; and the alleged prohibition for the claimant to sell its 10 per cent shareholding in Cairn India Limited. | Decide in favour of the investor | India | United Kingdom |
| 11 | 2014              | LDA v. India   | **Investment:** Shareholding in a joint venture with Indian port operator ABG InfraLogistics to implement a project aimed at the mechanisation of berths at Haldia in West Bengal.  
**Summary:** Claims arising out of a series of measures by the Indian Government that allegedly prevented the effective implementation of a joint venture related to a port modernization project at Haldia, in the city of Kolkata, in which the claimant held stakes; including allegedly failing to provide protection and security to the project, and to obey court orders concerning the removal of equipment from the port. | Discontinued | India | France |
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| 12 | 2014               | Vodafone v. India (I) | **Investment:** Ownership of an Indian telecoms company.  
**Summary:** Claims arising out of a retrospective transaction tax imposed by the Government over the claimant’s acquisition of Indian-based Hutchison Whampoa telecoms business. | Decide in favour of investor | India             | Netherlands               |
| 13 | 2013               | Deutsche Telekom v. India | **Investment:** Indirect shareholding (20 per cent stake via a Singaporean subsidiary) in the Indian company Devas Multimedia, that had concluded contracts with Antrix -related to the Indian Space Research Organisation- for the launch and operation of two satellites.  
**Summary:** Claims arising out of the Government's cancellation of a contract concluded with Devas, a company in which the claimant held interests, concerning the provision of broadband services to Indian consumers. | Pending | India             | Germany               |
| 14 | 2013               | KHML v. India | **Investment:** Minority shareholding (27 per cent) in Loop Telecom, a telecommunications company that held twenty-one 2G licences in India.  
**Summary:** Claims arising out of the cancellation by India's Supreme Court of a telecoms licence held by a company in which the claimant had invested, and its reassignment through a public auction process. | Pending | India             | Mauritius             |
| 15 | 2012               | Devas v. India | **Investment:** Shareholding in Devas Multimedia Private Limited, an Indian company that had concluded a telecommunication contract with an Indian state entity under the control of the Indian Space Research Organization.  
**Summary:** Claims arising out of the alleged Government’s cancellation of an agreement to lease capacity in the S-Band, part of the electromagnetic spectrum, for claimants' subsidiary to launch two satellites to provide multimedia services to mobile users across India. | Decide in favour of investor | India             | Mauritius             |
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<td>16</td>
<td>2012</td>
<td>Naumchenko and others v. India</td>
<td><strong>Investment:</strong> Majority shareholding in the Indian telecoms company ByCell India. <strong>Summary:</strong> Claims arising out of the withdrawal by Indian authorities of an approval to grant frequency allocation licences to claimants’ local telecoms company ByCell, after it had previously obtained clearance from India’s Foreign Investment Board.</td>
<td>Pending</td>
<td>India</td>
<td>Russian Federation, Cyprus</td>
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<tr>
<td>17</td>
<td>2010</td>
<td>White Industries v. India</td>
<td><strong>Investment:</strong> Rights under a certain contract concluded with a State-owned mining company, a bank guarantee and an ICC award rendered in White Industries’ favour. <strong>Summary:</strong> Claims arising out of alleged judicial delays by the Government of India that left the claimant unable to enforce an ICC award for over nine years concerning a contractual dispute with Coal India, a State-owned mining entity.</td>
<td>Decide in favour of the investor</td>
<td>India</td>
<td>Australia</td>
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<td>18</td>
<td>2004</td>
<td>ABN Amro v. India</td>
<td><strong>Investment:</strong> Creditor of loans associated with the financing of the Dabhol energy project in Maharashtra, India. <strong>Summary:</strong> Claims arising out of the respondent’s alleged failure to protect the investor’s loans in the Dabhol combined cycle power plant project in India, the default of which resulted in significant losses to the claimant’s financing of the failed project.</td>
<td>Settled</td>
<td>India</td>
<td>Netherlands</td>
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<td>19</td>
<td>2004</td>
<td>ANZEF v. India</td>
<td><strong>Investment:</strong> Creditor of loans associated with the financing of the Dabhol energy project in Maharashtra, India. <strong>Summary:</strong> Claims arising out of the respondent’s alleged failure to protect the investor’s loans in the Dabhol combined cycle power plant project in India, the default of which resulted in significant losses to the claimant’s financing of the failed project.</td>
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<td>United Kingdom</td>
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<td>20</td>
<td>2004</td>
<td>BNP Paribas v. India</td>
<td><strong>Investment:</strong> Creditor of loans associated with the financing of the Dabhol energy project in Maharashtra, India.</td>
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<td>21</td>
<td>2004</td>
<td>Credit Lyonnais v. India</td>
<td><strong>Summary:</strong> Claims arising out of the respondent’s alleged failure to protect the investor’s loans in the Dabhol combined cycle power plant project in India, the default of which resulted in significant losses to the claimant’s financing of the failed project.</td>
<td>Settled</td>
<td>India</td>
<td>France</td>
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</table>
| 22 | 2004              | Credit Suisse v. India | **Investment:** Creditor of loans associated with the financing of the Dabhol energy project in Maharashtra, India.  
**Summary:** Claims arising out of the respondent’s alleged failure to protect the investor’s loans in the Dabhol combined cycle power plant project in India, the default of which resulted in significant losses to the claimant’s financing of the failed project. | Settled | India | Switzerland |
| 23 | 2004              | Erste Bank v. India | **Investment:** Creditor of loans associated with the financing of the Dabhol energy project in Maharashtra, India.  
**Summary:** Claims arising out of the respondent’s alleged failure to protect the investor’s loans in the Dabhol combined cycle power plant project in India, the default of which resulted in significant losses to the claimant’s financing of the failed project. | Settled | India | Austria |
| 24 | 2004              | Offshore Power v. India | **Investment:** Majority shareholding, through a subsidiary company, of the Indian Dabhol Power Company.  
**Summary:** Claims arising out of the respondent’s alleged failure to protect claimants’ investment in the Dabhol power plant project in India, which resulted in significant losses to the claimants’ financing of the failed project. | Settled | India | Netherlands |
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<td>25</td>
<td>2004</td>
<td>Standard Chartered Bank v. India</td>
<td><strong>Investment:</strong> Creditor of loans associated with the financing of the Dabhol energy project in Maharashtra, India. <strong>Summary:</strong> Claims arising out of the respondent's alleged failure to protect the investor's loans in the Dabhol combined cycle power plant project in India, the default of which resulted in significant losses to the claimant's financing of the failed project.</td>
<td>Settled</td>
<td>India</td>
<td>United Kingdom</td>
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<td>26</td>
<td>2003</td>
<td>Bechtel v. India</td>
<td><strong>Investment:</strong> Shareholding in local corporations established to operate the Dabhol power project in the state of Maharashtra, India.</td>
<td>Settled</td>
<td>India</td>
<td>Mauritius</td>
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Source: Investment Policy, UNCTAD, [https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india](https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india)
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- WTO, Regional Trade Agreements Database, Source: https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx
Centre for Financial Accountability (CFA) engages and supports efforts to advance transparency and accountability in financial institutions. We use research, campaigns and trainings to help movements, organizations, activists, students and youth to engage in this fight, and we partake in campaigns that can shift policies and change public discourse on banking and the economy. We monitor the investments of national and international financial institutions, engage on policies that impact the banking sector and economy of the country, demystify the world of finance through workshops and short-term courses and help citizens make banks and government more transparent and accountable, for they use public money.

The ROSA LUXEMBURG STIFTUNG (RLS) is a German political foundation that is part of the democratic socialist movement. True to the legacy of its namesake Rosa Luxemburg (1871-1919), it stands in solidarity with the workers’ and women’s rights movements. The organization serves as a forum for debate and critical thinking about political alternatives, as well as a research centre for social development. The RLS has close ties to the German party DIE LINKE. RLS provides political education and a centre for advanced social research in both Germany and throughout the world. RLS is one of six party-affiliated political foundations in Germany; it supports partners in over 80 countries striving for social justice, strengthening public participation, and social-ecological development.