

Bridging the Legal Protection Gap: Evaluating Outbound Investment Safeguards for Indian Investors in the Indo-Pacific

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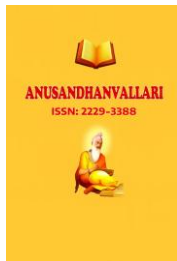
Abstract

As India transitions from a capital-importing economy to an increasingly influential source of Outward Direct Investment (ODI), the adequacy of legal safeguards protecting Indian investors abroad has become a critical concern within the broader Indo-Pacific framework. This study, titled “*Bridging the Legal Protection Gap: Evaluating Outbound Investment Safeguards for Indian Investors in the Indo-Pacific*,” examines the evolving architecture of investor protection with particular reference to the India–Australia investment corridor. The analysis situates this bilateral relationship within India’s post-2017 shift in international investment policy following the termination of several Bilateral Investment Treaties (BITs). The resulting “legal protection gap” is explored through the lens of fragmented mechanisms, including trade agreements such as the Economic Cooperation and Trade Agreement (ECTA), the operation of sunset clauses under terminated BITs, and reliance on host-state domestic legal systems. The paper critically evaluates the transition away from Investor-State Dispute Settlement (ISDS) towards “local remedies first” approaches, assessing their implications for legal certainty, investor confidence, and dispute resolution efficiency. Focusing on strategic sectors such as critical minerals, the study highlights the vulnerabilities faced by Indian investors in advanced economies despite robust regulatory environments. By situating the India–Australia case within broader Indo-Pacific investment dynamics, the paper identifies systemic gaps in India’s outbound investment protection strategy. The study concludes by emphasizing the urgent need for a comprehensive and enforceable investment protection framework, recommending the inclusion of a robust Investment Chapter within the proposed Comprehensive Economic Cooperation Agreement (CECA). Such reforms are essential to provide “hard law” certainty and to support India’s long-term economic vision under the Viksit Bharat 2047 agenda.

Keywords: International Investment Law; Bilateral Investment Treaties (BITs); Investor-State Dispute Settlement (ISDS); Outward Direct Investment (ODI); Indo-Pacific; CECA; Critical Minerals; Investment Protection; Economic Diplomacy.

Introduction: The Rise of Indian Global Capital

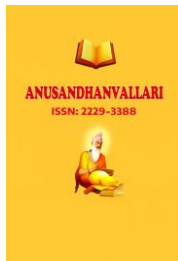
India has moved decisively beyond its historical role as a capital-importing economy to emerge as a significant source of outbound investment, reshaping its position within the global economic order. Indian corporations, particularly in sectors such as energy, infrastructure, technology, and mining, are increasingly pursuing strategic acquisitions abroad, with a pronounced emphasis on securing “upstream” assets. This outward orientation is not merely commercial; it is deeply intertwined with India’s long-term developmental priorities, including energy security, industrial resilience, and the transition toward a low-carbon economy. Within this broader transformation, the Indo-Pacific region has assumed central importance as a destination for Indian capital, offering both resource opportunities and geopolitical alignment. A compelling illustration of this shift can be observed in the investment trajectory toward Australia. Indian firms have shown growing interest in



Australia's abundant reserves of critical minerals such as lithium, cobalt, and rare earth elements, all of which are essential for renewable energy technologies, electric vehicles, and advanced manufacturing. These investments are closely aligned with India's domestic policy initiatives, particularly the National Critical Minerals Mission, which seeks to secure stable and diversified supply chains for strategic resources. In this sense, outbound investment is no longer a peripheral activity but a core instrument of India's economic diplomacy and developmental strategy. This rapid expansion of Indian global capital has exposed a fundamental structural concern: the adequacy of legal safeguards protecting Indian investors abroad. This issue lies at the heart of the study titled "*Bridging the Legal Protection Gap: Evaluating Outbound Investment Safeguards for Indian Investors in the Indo-Pacific.*" While capital flows have accelerated, the legal frameworks governing and protecting these investments have not evolved at the same pace, resulting in what can be described as a "legal protection gap."

The origins of this gap can be traced to India's recalibration of its international investment policy following the adoption of the Model Bilateral Investment Treaty and the subsequent termination or non-renewal of several earlier Bilateral Investment Treaties (BITs), including the 1994 India–Australia BIT. This policy shift was motivated by concerns over excessive investor privileges and the constraints imposed on regulatory sovereignty, particularly through mechanisms such as Investor-State Dispute Settlement. While the reforms were designed to restore balance in favor of host-state autonomy, they have also had the unintended consequence of reducing the level of treaty-based protection available to Indian investors operating abroad. In the absence of a modern, standalone BIT between India and Australia, the current legal architecture governing outbound investment in this corridor is fragmented. On one hand, trade agreements such as the Economic Cooperation and Trade Agreement provide a framework for economic engagement, but they do not offer comprehensive investment protection provisions equivalent to traditional BITs. On the other hand, residual protections persist through "sunset clauses" embedded in terminated treaties, as well as through reliance on the domestic legal system of the host state. While Australia's legal regime is widely regarded as stable and transparent, dependence on domestic remedies introduces uncertainties relating to jurisdictional limitations, procedural complexity, and the absence of neutral international arbitration mechanisms.

At the same time, it is important to note that not all cross-border flows are equally exposed to this protection deficit. The movement of skilled professionals, often conceptualized as "human capital," is increasingly governed by structured bilateral arrangements such as the Migration and Mobility Partnership Arrangement. These frameworks provide clarity, predictability, and institutional support. In contrast, the flow of "financial capital" remains comparatively under-institutionalized, lacking an equivalent level of legal certainty and dispute resolution assurance. This asymmetry underscores a broader challenge within India's Indo-Pacific engagement: the need to align its outward investment ambitions with a robust and coherent legal protection strategy. As Indian firms venture into strategically sensitive sectors such as critical minerals, infrastructure, and technology, the risks associated with regulatory changes, contractual disputes, and geopolitical uncertainties become more pronounced. Without adequate "guardrails," these investments may face vulnerabilities that could undermine both commercial outcomes and national strategic objectives. Against this backdrop, the present study seeks to critically evaluate the existing mechanisms of outbound investment protection, using the India–Australia corridor as a focal case within the wider Indo-Pacific context. It aims to identify the contours of the legal protection gap and to explore pathways for bridging it through more comprehensive, enforceable, and forward-looking frameworks. In doing so, the study contributes to the evolving discourse on how India can effectively safeguard its global capital while maintaining a balanced approach to regulatory sovereignty and international economic cooperation.



The Legal Vacuum: Life after the 1994 BIT

A central concern within “*Bridging the Legal Protection Gap: Evaluating Outbound Investment Safeguards for Indian Investors in the Indo-Pacific*” is the emergence of a regulatory vacuum following the termination of the India–Australia Bilateral Investment Treaty (BIT) in 2017. This development reflects India’s broader recalibration of its investment treaty regime, driven by the desire to limit expansive investor claims under Investor-State Dispute Settlement and to restore regulatory autonomy. However, while this policy shift may have strengthened the host-state position, it has simultaneously weakened the legal safeguards available to Indian outbound investors, particularly in strategically significant Indo-Pacific markets.

The post-termination landscape is characterized by a fragmented and transitional protection framework. One of its defining features is the continued operation of the “sunset clause” embedded in the earlier treaty. Under Article 15 of the 1994 BIT, investments made prior to March 23, 2017, remain protected for an extended period, effectively until 2032. This provision creates what may be described as a “legacy shield,” ensuring that long-standing investments, particularly in sectors such as infrastructure and energy, continue to benefit from treaty-based protections including fair and equitable treatment and access to international arbitration. While this offers a degree of continuity, its scope is inherently limited to pre-existing investments and does not extend to newer ventures.

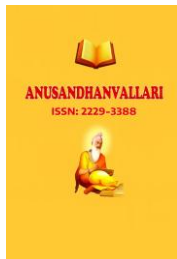
This temporal distinction is crucial. Indian investments made after 2017, especially in emerging and high-value sectors such as technology and critical minerals, fall outside the protective ambit of the sunset clause. As a result, these newer investments operate in a comparatively vulnerable legal environment, reliant primarily on domestic legal remedies within Australia. Although Australia’s legal system is widely regarded as robust, the absence of treaty-backed guarantees reduces predictability and limits access to neutral dispute resolution mechanisms, thereby increasing perceived investment risk. The situation is further complicated by developments under the Economic Cooperation and Trade Agreement, which marks a significant milestone in bilateral economic relations. As of January 1, Australia has extended zero-duty access across 100 percent of tariff lines for Indian exports, substantially enhancing trade liberalization and market access. While this advancement underscores the deepening of economic ties, it does not address the core issue of investment protection. Trade facilitation, though essential, cannot substitute for the comprehensive legal safeguards traditionally provided by BITs, particularly in relation to expropriation, dispute resolution, and standards of treatment.

This duality between liberalized trade and weakened investment protection exemplifies the broader “legal protection gap” confronting Indian investors in the Indo-Pacific. The India–Australia corridor thus serves as a microcosm of a wider structural issue: the misalignment between India’s expanding outbound investment ambitions and the inadequacy of its current legal protection architecture. Bridging this gap requires not only the restoration of robust treaty-based safeguards but also the development of innovative legal instruments that balance investor protection with sovereign regulatory interests in an evolving global investment regime.

Mechanisms of Protection in the India–Australia Corridor

Within the broader inquiry of “*Bridging the Legal Protection Gap: Evaluating Outbound Investment Safeguards for Indian Investors in the Indo-Pacific*,” the India–Australia corridor offers a nuanced example of how fragmented yet evolving legal mechanisms attempt to compensate for the absence of a comprehensive Bilateral Investment Treaty (BIT). In place of a single, cohesive framework, Indian investors must navigate a layered system combining trade commitments, domestic legal safeguards, and emerging treaty practices.

A key element of this protection architecture lies in the principle of **National Treatment**, secured under the Economic Cooperation and Trade Agreement and ongoing negotiations toward a Comprehensive Economic Cooperation Agreement (CECA). This principle ensures that Indian firms are not subjected to more burdensome regulatory requirements than their Australian counterparts, thereby fostering a baseline of



competitive equality. Complementing this, regulatory facilitation has been enhanced through Australia's Foreign Investment Review Board (FIRB) regime, where Indian investors, as partners under a Free Trade Agreement, benefit from elevated monetary screening thresholds in non-sensitive sectors. However, investments in critical minerals and national security-linked assets remain subject to stringent scrutiny, reflecting the strategic sensitivity of these domains. While these measures improve market access and procedural clarity, they stop short of offering substantive protections typically associated with investment treaties.

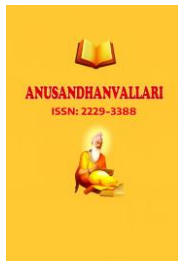
In the absence of treaty-based guarantees, protection against expropriation relies heavily on domestic constitutional law. Section 51(xxxi) of the Australian Constitution mandates that any acquisition of property by the state must occur on "just terms," effectively ensuring compensation at fair market value. This provision offers a robust form of judicial protection and serves as a partial substitute for international safeguards. Yet, its reliance on domestic courts introduces procedural limitations, particularly for foreign investors accustomed to neutral arbitration forums. The absence of direct recourse to international adjudication mechanisms may affect perceptions of enforceability and neutrality, especially in high-value or politically sensitive investments.

This shift is closely tied to the evolving global debate surrounding Investor-State Dispute Settlement. India's revised Model BIT approach, reflected in its policy orientation, signals a decisive move toward a "state-centric" framework. A central feature of this model is the requirement for the **exhaustion of local remedies**, obliging investors to pursue claims within the host state's judicial system for a minimum period before seeking international intervention. While this approach reinforces judicial sovereignty and reduces the risk of premature arbitration claims, it also prolongs dispute resolution timelines and may deter investors seeking swift and neutral remedies. Emerging treaty templates, such as the India-UAE BIT model, indicate a narrowing of investor protections through the exclusion of claims relating to indirect expropriation arising from non-discriminatory regulatory actions, as well as restrictions on third-party funding in arbitration. These provisions reflect a deliberate recalibration aimed at balancing investor rights with regulatory autonomy, yet they also contribute to the broader perception of a protection deficit. Taken together, these mechanisms illustrate a transitional legal landscape in the Indo-Pacific, where traditional treaty-based safeguards are being replaced by a hybrid system of domestic law and limited international commitments. While functional in certain respects, this framework underscores the persistence of the legal protection gap and highlights the need for more coherent and enforceable outbound investment safeguards.

Strategic Sector Protections: Critical Minerals

Within the framework of *"Bridging the Legal Protection Gap: Evaluating Outbound Investment Safeguards for Indian Investors in the Indo-Pacific,"* the critical minerals sector illustrates both the urgency of India's outbound investment strategy and the limitations of its current legal protection architecture. The deepening partnership between India and Australia in this domain reflects a shared recognition that access to minerals such as lithium, cobalt, and rare earth elements is indispensable for energy transition, advanced manufacturing, and long-term economic security.

A central institutional actor in this process is Khanij Bidesh India Limited (KABIL), which has been tasked with acquiring and developing overseas mineral assets to secure India's supply chains. Through partnerships with Australian mining firms, KABIL represents a state-backed approach to outbound investment that blends commercial objectives with national strategic priorities. What distinguishes this sector from traditional investment regimes is the nature of its legal protection. In the absence of a comprehensive Bilateral Investment Treaty (BIT), the safeguards available to Indian investors are predominantly **contractual rather than treaty-based**. These protections are embedded in Memoranda of Understanding (MOUs), project-specific agreements, and government-to-government (G2G) assurances. Such instruments provide a degree of political risk mitigation by signaling mutual commitment and diplomatic backing, thereby reducing the likelihood of adverse regulatory action or abrupt policy shifts. While this contractual model offers flexibility and can be



tailored to the specific contours of each project, it also reveals inherent limitations when viewed through the lens of long-term investment security. Unlike treaty-based protections, contractual safeguards lack uniformity, enforceability across jurisdictions, and access to neutral international dispute resolution mechanisms. In the event of disputes, investors may find themselves reliant on domestic courts or arbitration clauses that vary in scope and effectiveness. This creates a fragmented protection landscape, particularly for large-scale, capital-intensive ventures in critical minerals, where risks are both commercial and geopolitical. The reliance on G2G assurances, though valuable, is contingent upon the continuity of diplomatic relations and policy alignment. Such assurances do not carry the same legal weight as binding international treaties and may offer limited recourse in scenarios involving indirect regulatory impacts or evolving environmental standards. As investments in critical minerals are often long-term and infrastructure-heavy, the absence of predictable, treaty-backed guarantees can affect investor confidence and financing structures.

From a broader Indo-Pacific perspective, the India–Australia critical minerals collaboration exemplifies a transitional phase in international investment governance, where strategic partnerships are increasingly supplementing, rather than replacing, formal legal frameworks. This approach may be effective in the short term, particularly among trusted partners, but it does not fully address the systemic “legal protection gap” faced by Indian investors.

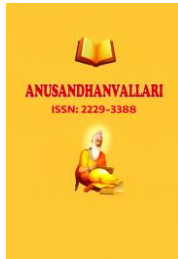
Conclusion: Building a Robust Guardrail

The analysis undertaken in “*Bridging the Legal Protection Gap: Evaluating Outbound Investment Safeguards for Indian Investors in the Indo-Pacific*” underscores a central paradox in India’s evolving economic trajectory. While Indian capital is expanding confidently across the Indo-Pacific, the legal frameworks designed to protect that capital remain fragmented and transitional. The India–Australia corridor illustrates this tension with particular clarity. Existing safeguards, including reliance on Australian domestic law and the residual protection offered by the sunset clause of the 1994 BIT, provide a degree of stability, but they are inherently temporary and uneven in scope. This interim arrangement cannot adequately sustain the scale and strategic depth of India’s outbound investments, especially in sectors such as critical minerals, infrastructure, and emerging technologies. The absence of a comprehensive, treaty-based protection mechanism exposes investors to legal uncertainties and limits access to neutral and enforceable dispute resolution forums. In this context, the broader objective of aligning India’s outward investment ambitions with its long-term developmental vision, including the aspirations of *Viksit Bharat 2047*, necessitates a recalibration of the legal architecture governing such investments.

A forward-looking solution lies in the incorporation of a “new generation” investment chapter within the proposed Comprehensive Economic Cooperation Agreement. Such a framework must move beyond traditional binaries of investor protection versus state sovereignty. Instead, it should craft a balanced regime that preserves India’s regulatory autonomy while simultaneously ensuring that investors have access to predictable, transparent, and enforceable legal remedies. This includes the careful design of dispute resolution mechanisms that may integrate elements of Investor-State Dispute Settlement in a moderated and context-sensitive form, avoiding past excesses while retaining its core advantage of neutrality.

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