CONSENT-FILTERED MULTILATERALISM AND THE TRANSFORMATION OF GLOBAL ECONOMIC LAW: INDIA'S RECALIBRATION OF TRADE AND INVESTMENT GOVERNANCE

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ABSTRACT

Consent-Filtered Multilateralism and the Transformation of Global Economic Law looks at the way states interact with international economic law by not committing or rejecting legal obligations but by selectively accepting them. The idea of Consent-Filtered Multilateralism describes a systematic procedure by which states assess international rules in terms of their power to make international rules, to incorporate them into law, and to adjudicate international disputes. It is indicative of a wider shift in the global economic governance whereby the legitimacy of obligations is becoming more and more reliant on the procedural pathways by which they are generated and internalised.

It is against this backdrop that the article answers a key puzzle why states are willing to make some economic commitments and unwilling to make functionally equivalent commitments in trade and investment regimes. Current explanations based on fragmentation, bargaining strategy or sovereignty are not adequate because they do not explain this patterned selectivity. The article states that the more profound problem is that post-consensual governance has emerged whereby rule production gains political power prior to gaining formal legal legitimacy.

The article is methodologically based on a doctrinal-analytical approach based on WTO constitutional provisions, investment treaty design, and arbitral practice. It constructs a Consent-Filtered Multilateralism Framework that is organized around three filters, namely production control, incorporation control, and adjudicatory exposure. Applying the case of India as a critical example, it shows that the opposition to WTO plurilateral incorporation and the re-calibration of investment treaties are doctrinally connected reactions that are conditioned by these filters.

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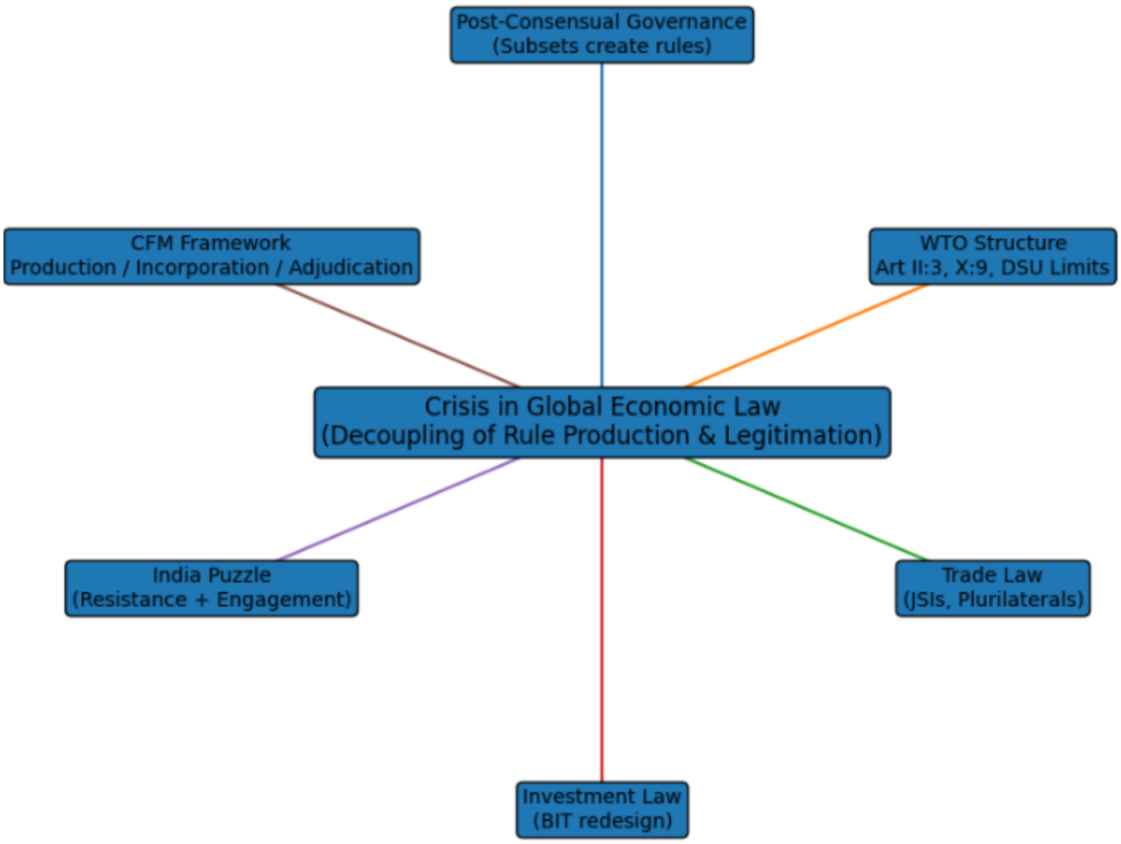
The article concludes that the actions of India can be interpreted not as obstructionist but as a logical reaction to the changes in the legal framework of the global economic law. In a broader sense, it provides a generalisable model of examining such similar patterns of selective engagement outside India.

I. Introduction



The central crisis of contemporary global economic law is not fragmentation *per se*. It is the decoupling of rule production from rule legitimation. Rules are increasingly drafted, stabilised and circulated within subsets of states, expert groupings and issue-specific coalitions before they have secured the consensual authority that once underwrote the legitimacy of multilateral trade law.[2] This matters because the legal architecture of the system still allocates authority through formal pathways. Article II:3 of the Marrakesh Agreement confines Annex 4 obligations to members that accept them, Article X:9 requires consensus to add a new Annex

[2] Basedow, 'The WTO and the Rise of Plurilateralism' 412-18; Johnston and Trebilcock, 'Fragmentation in International Trade Law' 621-24.

4 agreement and Articles 3.2 and 19.2 of the DSU deny adjudicators any authority to add to or diminish covered-agreement obligations.[3]

This structural tension is visible in two domains that are usually studied separately. Within the WTO, the paralysis of the classic negotiating function has encouraged joint statement initiatives and plurilateral pathways for new disciplines, especially in electronic commerce and investment facilitation.[4] Within investment law, dissatisfaction with broad substantive standards and investor-state dispute settlement has prompted many states to revise, terminate or replace older bilateral investment treaties with instruments that place greater weight on domestic regulatory autonomy and tighter control over arbitral review.[5]

India sits at the intersection of these developments and presents a puzzle that prevailing accounts do not adequately resolve. At the WTO, India continues to affirm deep commitment to the multilateral trading system while rejecting the claim that rule-making by subsets of members should be normalised within the WTO framework without consensus.[6] In investment law, India allowed large parts of its older treaty network to lapse, adopted a restrictive model BIT in 2015 and yet has not abandoned treaty-making. It has instead resumed agreement-making through more carefully designed instruments, including the India-UAE BIT, the India-Uzbekistan BIT and the India-Brazil Investment Cooperation and Facilitation Treaty.[7]

This combination of resistance and engagement is precisely what makes India analytically important. If India were simply anti-trade or anti-investment, its conduct would be

[3] Marrakesh Agreement arts II:3 and X:9; DSU arts 3.2 and 19.2.
[4] WTO, 'Joint Statement Initiative on E-Commerce' https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm accessed 29 March 2026; WTO, 'Investment Facilitation for Development (IFD) Agreement' https://www.wto.org/english/tratop_e/invfac_public_e/invfac_intro_e.htm accessed 29 March 2026.
[5] Prabhash Ranjan, 'India and Bilateral Investment Treaties - A Changing Landscape' (2014) 29(2) *ICSID Review - Foreign Investment Law Journal* 419, 419-23; Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 *Northwestern Journal of International Law and Business* 1, 3-6.
[6] Government of India, Ministry of Commerce and Industry, '7th Trade Policy Review of India: Closing Statement' (8 January 2021) https://www.commerce.gov.in/wp-content/uploads/2021/07/TPR-Closing-Statement_8th-January-2021_FINAL.pdf accessed 29 March 2026, 4.
[7] Government of India, Department of Economic Affairs, 'Bilateral Investment Promotion and Protection Agreement (BIPA)' https://dea.gov.in/index.php/documents-bilateral-investment-treaties accessed 29 March 2026; Press Information Bureau, Ministry of Finance, 'Bilateral Investment Treaty between India and the United Arab Emirates comes into effect' (7 October 2024) https://www.pib.gov.in/PressReleasePage.aspx?PRID=2062692 accessed 29 March 2026; Henrique Choer Moraes and Pedro Mendonca Cavalcante, 'The Brazil-India Investment Co-operation and Facilitation Treaty: Giving Concrete Meaning to the "Right to Regulate" in Investment Treaty Making' (2021) 36(2) *ICSID Review - Foreign Investment Law Journal* 304.

straightforward. The real puzzle is that India resists some legal pathways while continuing to support institutions, endorse other forms of economic cooperation and conclude new investment arrangements. Existing literatures often classify India either as a hard bargainer, an obstructionist spoiler, or a defensive developing country concerned with distributional effects.[8] Those interpretations capture part of the story, but they miss the juridical pattern that links India's behaviour across trade and investment law.

This article does not merely restate sovereignty-based resistance. It identifies a structured, three-stage filtering mechanism - production, incorporation and adjudication - that explains why states accept bilateral obligations while rejecting functionally similar multilateral ones. Existing literature usually treats resistance to WTO plurilateralism and investment treaty redesign as distinct phenomena. This article demonstrates that they are doctrinally linked. Article X:9 of the Marrakesh Agreement makes Annex 4 incorporation a consensus decision, while Article 15 of India's 2015 Model BIT conditions arbitration on prior resort to domestic remedies.[9] The contribution of the framework lies in explaining not divergence alone, but patterned selectivity across regimes.

This article therefore demonstrates that prevailing accounts are analytically incomplete because they do not distinguish with sufficient precision between three sites of legal control: rule production, rule incorporation and adjudicatory exposure. India's conduct is best understood not as episodic obstruction, nor as an undifferentiated defence of sovereignty, but as an instance of what this article calls Consent-Filtered Multilateralism. Under this framework, states do not uniformly accept or reject multilateralism. They accept obligations when they retain adequate control over the forum in which rules are produced, the pathway through which those rules become binding and the institutions that will interpret and enforce them. They resist obligations when any of those filters is bypassed or weakened.

The article makes three claims. First, it argues that contemporary global economic law is entering a phase of post-consensual governance, in which subsets of states increasingly stabilise new rules before broad-based constitutional legitimation is secured.[10] Secondly, it

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[8] Amrita Narlikar, 'Peculiar Chauvinism or Strategic Calculation? Explaining the Negotiation Strategy of a Rising India' (2006) 82(1) *International Affairs* 59; Hopewell 577-80; Amrita Narlikar, 'India's Foreign Economic Policy under Modi: Negotiations and Narratives in the WTO and Beyond' (2022) 59(1) *International Politics* 148, 149-52.

[9] Marrakesh Agreement art X:9; Government of India, Department of Economic Affairs, 'Model Text for the Indian Bilateral Investment Treaty' art 15.

[10] Basedow, 'The WTO and the Rise of Plurilateralism' 413-17; WTO, 'Information on the Agreement on

proposes a Consent-Filtered Multilateralism Framework ('CFM') to explain how states respond to this environment. Thirdly, using India as a critical case, it shows that resistance to WTO plurilateral incorporation and the redesign of investment treaty commitments are connected manifestations of a single structural logic. The key issue is not whether India favours cooperation in the abstract. It is whether India accepts that obligations should enter binding law without preserving procedural control over how they are produced, incorporated and adjudicated.

Methodologically, the article adopts a doctrinal-analytical method combined with structured comparative inference. The doctrinal analysis focuses on WTO constitutional provisions, official Indian statements, arbitral experience and the design of India's treaty practice, particularly the 2015 Model BIT and later agreements.[11] The comparative dimension is deliberately limited and inferential rather than exhaustive: Brazil, South Africa and Indonesia are used not as full case studies but as strategically selected parallels for testing whether the Indian pattern is idiosyncratic or indicative of a broader shift.[12] India is treated as a *critical case* because the same legal logic appears with unusual clarity across both trade and investment law, thereby making visible a broader transformation that is often obscured when the two fields are analysed separately.

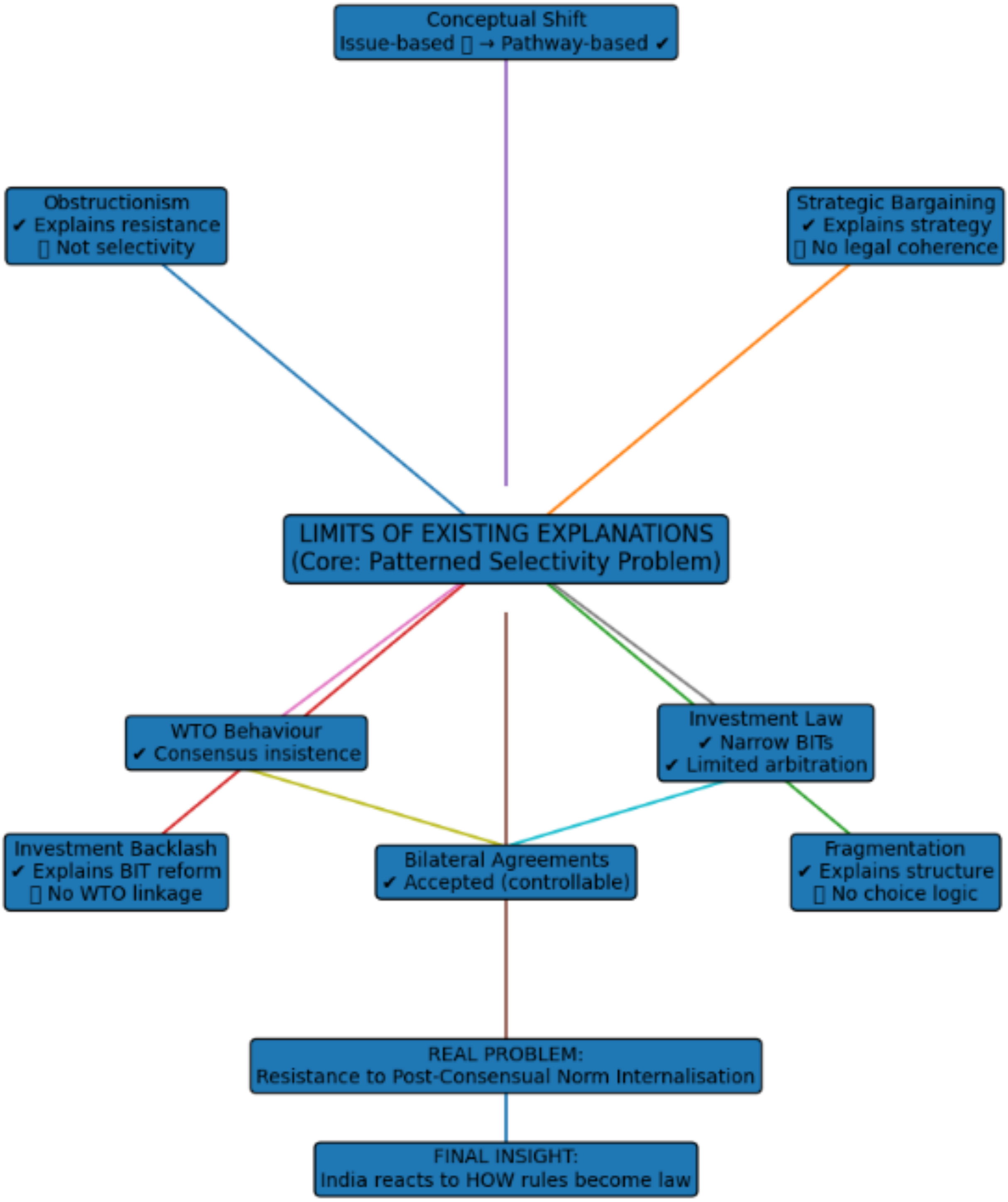
The article proceeds in seven parts. Part II shows why the dominant explanations of India's behaviour remain incomplete. Part III develops the CFM and explains why the contemporary problem is one of post-consensual governance rather than fragmentation alone. Part IV applies the framework to India's conduct at the WTO. Part V applies it to India's investment treaty recalibration. Part VI tests the framework's wider purchase through selected comparisons beyond India. Part VII examines the limits and contradictions of the model. Part VIII concludes that India is best understood neither as a spoiler nor as a retreating state, but as an especially clear articulation of a broader movement toward consent-filtered governance in global economic law.

Electronic Commerce' https://www.wto.org/english/tratop_e/ecom_e/information_on_agreement_ecom.pdf accessed 29 March 2026, 2-4.

[11] Marrakesh Agreement arts II:3, IX:1 and X:9; DSU arts 3.2 and 19.2; *White Industries Australia Limited v Republic of India* UNCITRAL, Final Award, 30 November 2011, paras 11.2.1-11.2.8, 11.4.20 and 16.1.1(a); Government of India, Department of Economic Affairs, 'Model Text for the Indian Bilateral Investment Treaty'; Government of India, Department of Economic Affairs, 'Bilateral Investment Promotion and Protection Agreement (BIPA)'.

[12] Moraes and Cavalcante 304-07; Mossallam 1-3; Price 124-28.

II. Limits of Existing Explanations



The first step in establishing the paper's framework is to show why the existing explanations are not enough. This section demonstrates that four influential literatures - on obstructionism, strategic bargaining, fragmentation and investment backlash - each illuminate important features of India's conduct but ultimately fail to explain its patterned selectivity across legal regimes.

The first literature casts India as obstructionist or recalcitrant. In this view, India has repeatedly adopted a defensive and often uncompromising posture in WTO negotiations, especially where agriculture, development flexibilities, or new agenda items are concerned.[13] Even scholarship that is more sympathetic to India often takes the 'spoiler' narrative as its starting point, whether to rebut it or qualify it.[14] This literature is useful because it captures the fact that India does say 'no' with some frequency and is often willing to block consensus where it regards legal outcomes as developmentally or politically harmful. But it remains incomplete for present purposes because it treats India's trade behaviour largely as a question of negotiating posture. It tells us far too little about why India resists some forms of rule-making while continuing to support the WTO as an institution and while simultaneously increasing its use of bilateral and regional economic instruments outside the WTO.

The second literature explains India in terms of strategic bargaining by a rising power. Here the emphasis falls on distributive tactics, coalition formation, issue-linkage and negotiating narratives shaped by India's rise and self-conception.[15] This perspective performs valuable work because it reminds us that negotiating style is often historically embedded and politically rational. Yet as an explanation of legal behaviour it is still under-specified. A bargaining account can explain why India might take a hard line on a particular dossier, but it does not explain the doctrinal coherence across trade and investment law. It cannot readily account for why India opposes the incorporation of open plurilateral agreements into WTO law while continuing to conclude bilateral agreements that contain some of the very disciplines it resists multilaterally. Nor can it explain why treaty recalibration in investment law takes the particular form of narrowing definitions, preserving domestic remedies and limiting adjudicatory authority rather than simply abandoning treaty commitments altogether.

The third literature is the fragmentation literature. Scholars of international economic law have shown persuasively that the stalling of multilateral negotiations and the proliferation of preferential agreements create risks for legal coherence, interpretive consistency and systemic

[13] Narlikar, 'Peculiar Chauvinism or Strategic Calculation?' 59-64; Narlikar, 'India's Foreign Economic Policy under Modi' 149-154.
[14] Hopewell 577-582.
[15] Narlikar, 'Peculiar Chauvinism or Strategic Calculation?' 64-76; Narlikar, 'India's Foreign Economic Policy under Modi' 155-163.

hierarchy.[16] This scholarship is indispensable because it identifies the structural environment in which the present paper is situated. But it does not adequately explain selectivity. Fragmentation analysis tells us why legal regimes become layered and disaggregated. It does not tell us why states sometimes welcome fragmentation through bilateral or regional treaty-making while resisting other, ostensibly more inclusive, forms of norm production such as open plurilateral agreements at the WTO. To put the point differently: fragmentation describes the *condition* of the system, but it does not supply a sufficiently precise account of the *filters* through which states accept or reject particular obligations.

The fourth literature concerns backlash against investment treaties and investor-state dispute settlement. This scholarship explains why states have rethought first-generation BITs, highlighting concerns about expansive substantive standards, arbitrator discretion and the constraining effect of external review on domestic policy-making.[17] This literature is highly relevant to India's 2015 Model BIT and to the broader move among developing states to reclaim regulatory space. Its limitation, however, is that it is usually sector-specific. It seldom asks whether investment treaty recalibration and WTO resistance might be linked through a common theory of legal consent. As a result, it tends to treat India's BIT redesign as a response to arbitration risk alone, rather than as part of a wider shift in how India understands the legitimate production and internalisation of international economic obligations.

These limitations matter because they distort the question. The prevailing debate is often framed as whether India is anti-trade, anti-reform or anti-investment. That framing is too coarse. It obscures the crucial distinction between an objection to *cooperation* and an objection to *post-consensual norm internalisation*. India is not best understood as resisting cooperation as such. It is better understood as resisting forms of legal incorporation that, in its view, sever obligations from the procedural conditions that make them legitimate.

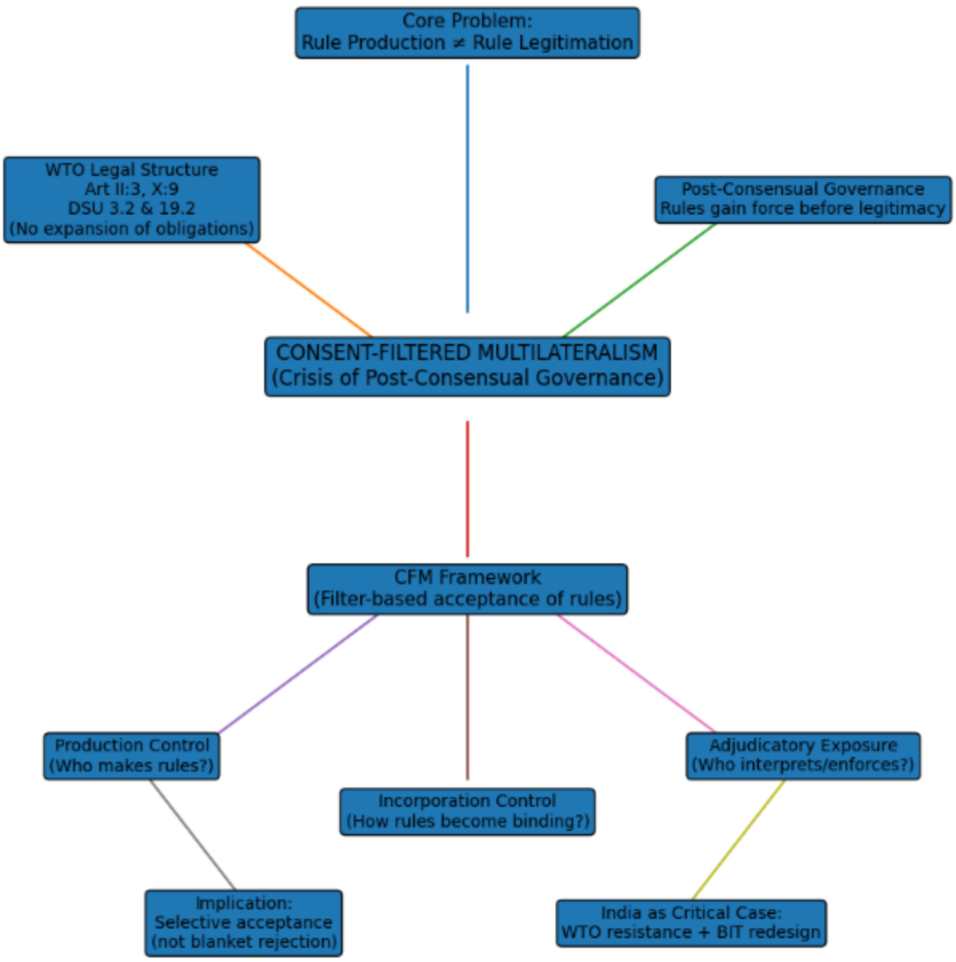
Once the question is reframed in that way, several features of the Indian case become intelligible. India's insistence on consensus in relation to WTO joint initiatives looks less like obstruction and more like a position on constitutional form. Its willingness to negotiate investment agreements that narrow adjudicatory exposure looks less like retreat and more like a theory of acceptable consent. And its readiness to use bilateral or regional agreements where

[16] Johnston and Trebilcock 621-624; Basedow 411-417.
[17] Ranjan 433-447; Ranjan and Anand 6-18; Mossallam 1-3.

rules are bespoke and politically controllable no longer appears inconsistent with its resistance to multilateral incorporation. What the existing literatures miss, in short, is the underlying architecture of selectivity.

This article therefore takes issue with the dominant explanations on a deeper level. The problem is not simply that they are incomplete. It is that they are organised around the wrong unit of analysis. They treat India as reacting to issues. The present article argues that India is reacting to pathways of legal authority. Once that move is made, the connection between trade and investment law becomes visible.

III. Consent-Filtered Multilateralism and the Crisis of Post-Consensual Governance



The theoretical claim of this article is deliberately modest. It is not that consent has disappeared from global economic law. It is that the legal pathway between negotiating a rule and giving that rule binding force has become increasingly contested. That shift is visible in the WTO's own positive law. Article II:3 of the Marrakesh Agreement makes clear that Annex 4 agreements bind only those members that have accepted them, while Article X:9 provides that a new Annex 4 agreement may be added only 'exclusively by consensus'.[18] The same textual discipline appears in dispute settlement. Articles 3.2 and 19.2 of the DSU instruct panels and the Appellate Body not to add to or diminish the rights and obligations contained in the covered agreements.[19] In *Chile - Taxes on Alcoholic Beverages*, the Appellate Body underscored the point by treating adjudication as an exercise in correct interpretation of agreed text rather than free-standing law-making.[20]

This article describes the growing gap between negotiating a rule and authorising it as post-consensual governance. The term does not mean that consent is irrelevant. It means that legal and political pressure to accept new rules increasingly arises *before* the constitutional legitimacy of those rules has been secured. The disjunction is therefore not between law and politics in the abstract. It is between the site where rules are produced and the site where they become legally authoritative. This is why the present argument focuses on legal pathway, not simply on substantive preference.[21]

The Consent-Filtered Multilateralism Framework explains how states respond to that condition. It has three elements. First, production control concerns participation in the site of rule production: who drafts, negotiates and structures the trade-offs. Secondly, incorporation control concerns the route by which a rule becomes binding: whether the state retains a meaningful veto over insertion into an existing legal framework or over acceptance of a new treaty text. Thirdly, adjudicatory exposure control concerns who interprets and enforces the obligation once it exists: whether disputes are channelled through domestic institutions, tightly bounded external mechanisms, or expansive arbitral structures.[22]

The key point is that the framework does not sort states neatly into pro-multilateral and anti-multilateral camps. A state may support an institution and still resist obligations generated through pathways it does not control. It may prefer bilateral or regional agreements where incorporation is fully negotiated and adjudicatory exposure can be calibrated. It may also revise

[18] Marrakesh Agreement arts II:3 and X:9.
[19] DSU arts 3.2 and 19.2.
[20] Appellate Body Report, *Chile - Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, [79].
[21] Basedow, 'The WTO and the Rise of Plurilateralism' 417-22; WTO, 'Information on the Agreement on Electronic Commerce' 2-4.
[22] Marrakesh Agreement arts II:3 and X:9; Government of India, Department of Economic Affairs, 'Model Text for the Indian Bilateral Investment Treaty' arts 3.1, 15, 23, 26 and 29.

older treaties that delegated too much interpretive authority while continuing to make new ones. The framework is therefore intended to explain *patterned selectivity*, not blanket rejection.

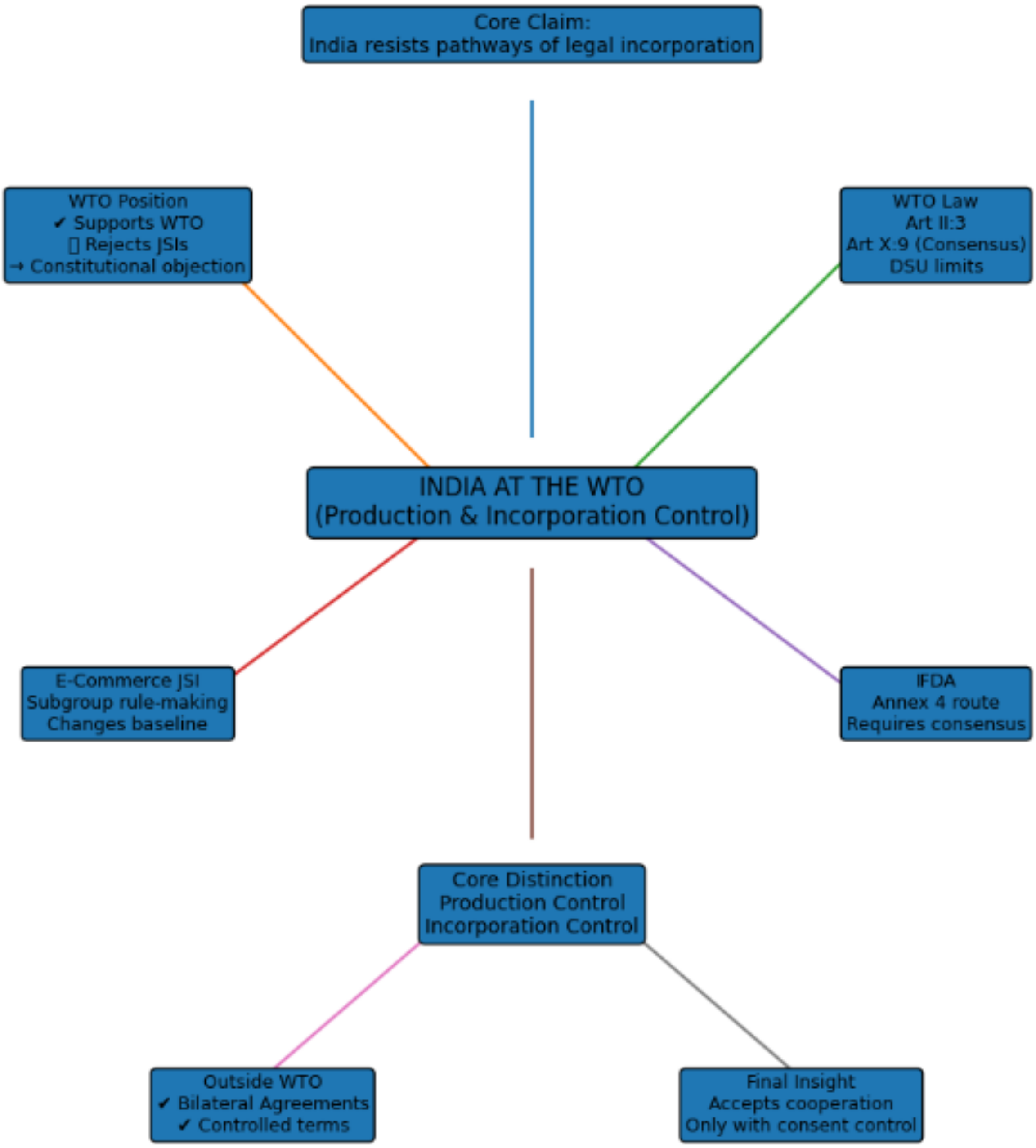
Figure 1. Consent-Filtered Multilateralism Framework

The diagram above summarises the logic. Rule creation alone does not generate acceptable obligation. Rules are filtered through questions of production control, incorporation control and adjudicatory exposure. Where those filters are satisfied, states are more likely to accept binding obligation. Where one or more filters fails, states may resist, delay or redesign the commitment.

India is a critical case because all three filters are visible across both trade and investment law. At the WTO, India participates actively in the institution and insists on its centrality, yet resists the conversion of joint initiatives into WTO law where it believes the constitutional conditions of incorporation are absent.[23] In investment law, India continues treaty-making but redesigns treaty form to preserve domestic legal authority, narrow substantive standards and constrain arbitral review.[24] That combination allows the article to do more than describe India. It allows the article to demonstrate that the same legal logic travels across regimes that are often treated in isolation.

[23] Government of India, Ministry of Commerce and Industry, '7th Trade Policy Review of India: Closing Statement', 4; WTO, 'Members supporting Investment Facilitation for Development discuss next steps' (19 March 2024) https://www.wto.org/english/news_e/news24_e/infac_19mar24_e.htm accessed 29 March 2026.
[24] Government of India, Department of Economic Affairs, 'Model Text for the Indian Bilateral Investment Treaty'; Press Information Bureau, Ministry of Finance, 'Bilateral Investment Treaty between India and the United Arab Emirates comes into effect'.

IV. India at the WTO: Production Control and Incorporation Control



This section demonstrates that India's WTO conduct is best understood through the first two filters of the CFM. India's objection is not to new issues *as such*. It is to the attempt to normalise new obligations through pathways that weaken consensual control over production and incorporation.

The starting point is India's explicit and repeated commitment to the WTO as the principal forum for trade governance. India has not argued that the WTO is obsolete. On the contrary, official statements continue to emphasise a 'deep commitment to the multilateral trading system'.[25] The same statement is more revealing because it also rejects India's participation in joint statement initiatives on the ground that 'multilateral avenues, based on consensus, are the most effective means to achieve inclusive development-oriented outcomes'.[26] That is not the language of exit. It is the language of constitutional objection.

The doctrinal foundation of that objection is straightforward. Article II:3 of the Marrakesh Agreement provides that Annex 4 agreements bind only those members that accept them. Article X:9 provides that the Ministerial Conference may decide 'exclusively by consensus' to add such an agreement to Annex 4. Between ministerial meetings, Article IV:2 allocates that function to the General Council.[27] The key point is that the proponents of new plurilateral instruments accept this architecture themselves. The WTO's own information note on the Agreement on Electronic Commerce states that, 'in line with Article X.9', participants are seeking the consensus of all WTO members to incorporate the agreement into Annex 4.[28] The WTO's IFD toolkit makes the same point even more expressly: the IFDA 'shall be added to Annex 4 … upon a multilateral decision by consensus' and, until then, creates no obligations for members that have not accepted it.[29]

This matters because India's position is often described as a political refusal when it is better understood as a legal objection to pathway. The WTO's internal discipline supports that reading. Articles 3.2 and 19.2 of the DSU preserve the rights and obligations in the covered agreements and deny adjudicators any authority to enlarge them.[30] Although WTO jurisprudence does not decide the legality of the joint statement initiatives themselves, the Appellate Body has repeatedly insisted that WTO adjudication remains tethered to the agreed text of the covered agreements.[31] India's insistence on Article X:9 therefore sits within, rather than outside, the constitutional grammar of WTO law.

[25] Government of India, Ministry of Commerce and Industry, '7th Trade Policy Review of India: Closing Statement', 4.
[26] ibid.
[27] Marrakesh Agreement arts II:3, IV:2 and X:9.
[28] WTO, 'Information on the Agreement on Electronic Commerce' 2.
[29] WTO, *Investment Facilitation for Development Agreement Toolkit* (25 February 2024) https://www.wto.org/english/tratop_e/invfac_public_e/ifd_toolkit_e.pdf accessed 29 March 2026, 2, 8-9.
[30] DSU arts 3.2 and 19.2.
[31] Appellate Body Report, *Chile - Taxes on Alcoholic Beverages* [79].

India's position on electronic commerce illustrates the point. Participants in the Joint Statement Initiative on E-Commerce began exploratory work in 2017, expanded the process to 91 participants and published a stabilised text in July 2024.[32] The initiative describes itself as transparent and open and the informational material emphasises that the resulting agreement does not itself alter market-access commitments under existing WTO agreements.[33] Yet openness in accession terms does not resolve India's concern. For India, the problem is that rule production among a subset of members, even if formally open, alters the practical baseline of future obligation before consensus has been secured at the institutional level.

That concern is visible in India's long-running position on the e-commerce moratorium and digital trade discussions. In their 2020 communication, India and South Africa argued that the scope and consequences of the moratorium remained unsettled and that the developmental and fiscal implications for developing members had been insufficiently addressed.[34] This matters because the communication does more than raise tariff-revenue and policy-space concerns. It resists the rapid juridification of digital trade in the absence of agreement on underlying effects. The objection is therefore not simply to digital trade as a topic. It is to the accelerated internalisation of digital obligations before their distributive and regulatory consequences have been collectively assessed.

The same logic appears, even more clearly, in relation to the Investment Facilitation for Development Agreement. The IFD process matured from structured discussions into a negotiated plurilateral agreement finalised in February 2024. Its supporters then requested incorporation into the WTO framework as an Annex 4 plurilateral agreement open to all members.[35] Supporters characterise the agreement as development-oriented, transparent and open. The WTO's own materials also emphasise that the IFDA excludes market access, investment protection and ISDS and that it contains a 'firewall provision' to prevent spillover into international investment agreements.[36] Even so, the legal route remains decisive. The same toolkit expressly states that Article X:9 requires consensus and that the IFDA creates no

[32] WTO, 'Information on the Agreement on Electronic Commerce' 1-2.
[33] ibid 1-2.
[34] Government of India and South Africa, 'Work Programme on Electronic Commerce: The E-Commerce Moratorium - Scope and Impact' WT/GC/W/798 (14 July 2020).
[35] WTO, 'Investment Facilitation for Development (IFD) Agreement'; WTO, 'Members supporting Investment Facilitation for Development discuss next steps'.
[36] WTO, *Investment Facilitation for Development Agreement Toolkit* 1-2, 6.

obligations or rights for members that have not accepted it.[37]

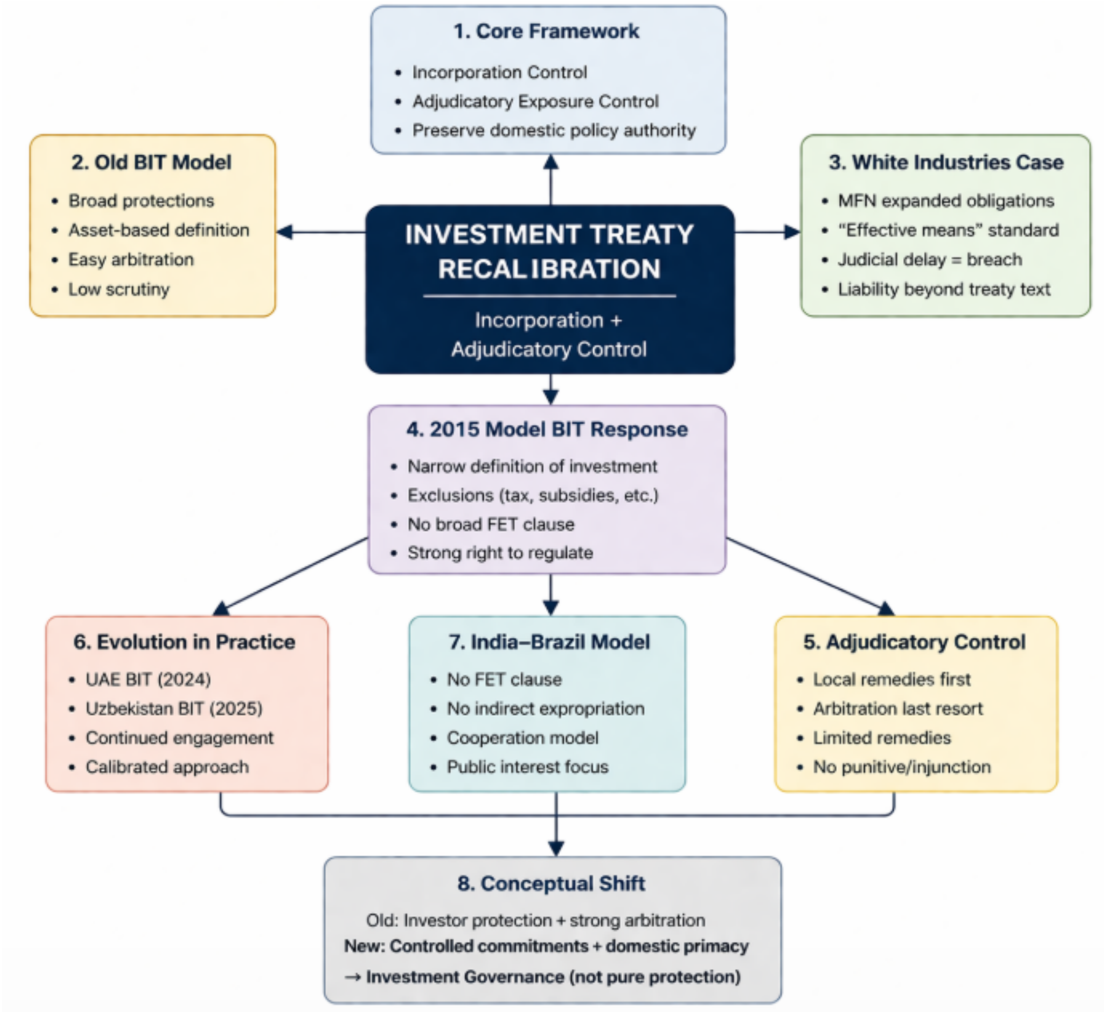
At this point the distinction between production control and incorporation control becomes analytically decisive. India's objection cannot be reduced to hostility toward investment facilitation. Nor is it exhausted by concern that facilitation might slide into market access or investor protection. Those concerns may exist, but the deeper problem is one of incorporation control. A subgroup of members may produce text. That does not entitle it to reset the WTO's constitutional baseline by normalising Annex 4 incorporation absent consensus. In that sense, India's position is legal rather than merely political.

The contrast with India's conduct outside the WTO sharpens the point. India has not withdrawn from trade agreement-making. It has intensified it. The India-EFTA Trade and Economic Partnership Agreement, signed in March 2024, contains a chapter on investment promotion and cooperation rather than a traditional investment-protection chapter.[38] India is therefore willing to negotiate disciplines that facilitate economic engagement when those disciplines are bespoke, consent-based and embedded in an architecture it can shape. What India resists is not the subject matter of digital trade or investment facilitation alone. It is the combination of low production control and contested incorporation within the WTO structure.

The section's claim can therefore be stated plainly. India's resistance to WTO plurilateral incorporation is not resistance to cooperation *as such*. It is resistance to the internalisation of obligations where production and incorporation are decoupled from the consensual logic that India regards as central to multilateral legitimacy. That is exactly what the first two filters of the CFM predict.

[37] ibid 8-9.
[38] Government of India, Ministry of Commerce and Industry, 'Trade and Economic Partnership Agreement between the Government of the Republic of India and the Governments of EFTA States' https://www.commerce.gov.in/international-trade/trade-agreements/india-efta-tepa/ accessed 29 March 2026.

V. Investment Treaty Recalibration: Incorporation Control and Adjudicatory Exposure



If Part IV showed India's insistence on production and incorporation control in the WTO, investment law reveals the framework's third filter: adjudicatory exposure control. This section demonstrates that India's redesign of investment treaty practice is best understood as an effort to ensure that obligations are incorporated only on terms that preserve domestic policy authority and sharply narrow external review.

India's older BIT programme emerged in the 1990s as part of broader economic liberalisation. For many years it reproduced familiar first-generation treaty features: broad standards of protection, asset-based definitions of investment and ready access to investor-state arbitration.[39] As in many other jurisdictions, however, these treaties attracted limited political attention until they began to generate visible litigation risk. The turning point was not merely

[39] Ranjan, 'India and Bilateral Investment Treaties' 419-23.

that India faced arbitration. It was the way treaty interaction and adjudicatory interpretation could expand liability beyond what policymakers had anticipated.

White Industries is central here. The tribunal held that India had breached Article 4(2) of the Australia-India BIT by importing, through the BIT's most-favoured-nation clause, the 'effective means of asserting claims and enforcing rights' obligation in Article 4(5) of the India-Kuwait BIT.[40] The tribunal then treated prolonged delay in the enforcement proceedings before Indian courts as sufficient to establish breach and awarded compensation plus interest.[41] This was doctrinally significant for two reasons. First, liability expanded through MFN incorporation rather than through the face of the basic treaty text alone. Secondly, the case showed how external adjudication could treat the performance of domestic courts as an internationally compensable wrong. What India saw, in short, was not simply an adverse award, but an exposure pathway it did not regard as tightly controlled.[42]

The 2015 Model BIT responded through a comprehensive redesign. Article 1.4 narrowed the definition of investment by tying protection to an enterprise constituted and operated in good faith in accordance with host-state law, together with that enterprise's assets.[43] Articles 2.2 and 2.4 excluded pre-investment activity and carved out significant areas including taxation, local government measures, government procurement, subsidies and compulsory licences consistent with WTO obligations.[44] Article 3.1 avoided a free-standing fair and equitable treatment clause and instead limited treaty breach to a narrower set of customary international law wrongs such as denial of justice, fundamental breach of due process, targeted discrimination and manifestly abusive treatment.[45] Article 23.1 added a high level of deference to the development and implementation of domestic policy.[46]

These provisions are not random restrictions. They reflect the CFM's second and third filters. Incorporation control is tightened by making treaty commitments more bespoke and textually precise. India remains willing to consent to protection, but only in a form that reduces textual openness and lowers the risk of unanticipated expansion. Adjudicatory exposure is then

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[40] *White Industries Australia Limited v Republic of India* UNCITRAL, Final Award, 30 November 2011, paras 11.2.1-11.2.8 and 16.1.1(a).
[41] ibid paras 11.4.20 and 16.1.1(a)-(b).
[42] Ranjan, 'India and Bilateral Investment Treaties' 433-37.
[43] Government of India, Department of Economic Affairs, 'Model Text for the Indian Bilateral Investment Treaty' art 1.4.
[44] ibid arts 2.2 and 2.4.
[45] ibid art 3.1.
[46] ibid art 23.1.

constrained through procedural and remedial design. Articles 15.1 and 15.2 require investors first to submit disputes to domestic judicial or administrative fora and, where applicable, to pursue local remedies for at least five years before arbitration may begin.[47] Article 26 limits relief to monetary compensation, excludes punitive and moral damages and bars injunctive remedies.[48] Article 29 even contemplates an appellate mechanism capable of imposing greater coherence on arbitral outcomes.[49]

The key point is that the model restructures the relationship between treaty commitment and external review. The classical liberal investment model treated international adjudication as the natural guarantor of investor confidence. India's model treats external adjudication as a contingent and carefully bounded exception to the primacy of domestic legal institutions. This is why the language of 'BIT backlash' is too blunt. It captures dissatisfaction with first-generation treaties, but it does not capture the positive constitutional design choice embedded in the new model. India is not simply repudiating a regime. It is re-specifying the legal conditions under which treaty protection remains acceptable.

Later treaty practice confirms this reading while also revealing adjustment. The India-UAE BIT, which entered into force in August 2024, retains a closed asset-based definition of investment, preserves right-to-regulate language and general exceptions and permits arbitration only after mandatory resort to local remedies for three years rather than the five years required by the 2015 Model BIT.[50] The India-Uzbekistan BIT, signed in September 2024 and brought into force in May 2025, further confirms that India has resumed treaty-making rather than abandoned it.[51]

This adjustment is analytically revealing. If the old story were simply one of defensive sovereignty, renewed treaty-making would be hard to explain. Under the CFM, by contrast, it is unsurprising. Once incorporation control is restored by a treaty text India has directly negotiated, India can afford to relax some elements of adjudicatory filtering while preserving the broader architecture of control. A three-year domestic-remedies requirement, a closed asset-based definition and express right-to-regulate language still keep adjudicatory exposure

[47] ibid arts 15.1 and 15.2.
[48] ibid art 26.
[49] ibid art 29.
[50] Press Information Bureau, Ministry of Finance, 'Bilateral Investment Treaty between India and the United Arab Emirates comes into effect', lines 16-25.
[51] Government of India, Department of Economic Affairs, 'Bilateral Investment Promotion and Protection Agreement (BIPA)'.

significantly narrower than under many older treaties.[52] India is therefore not moving from sovereignty back to liberalisation. It is testing how much external protection can be offered once the filters of consent are rebuilt.

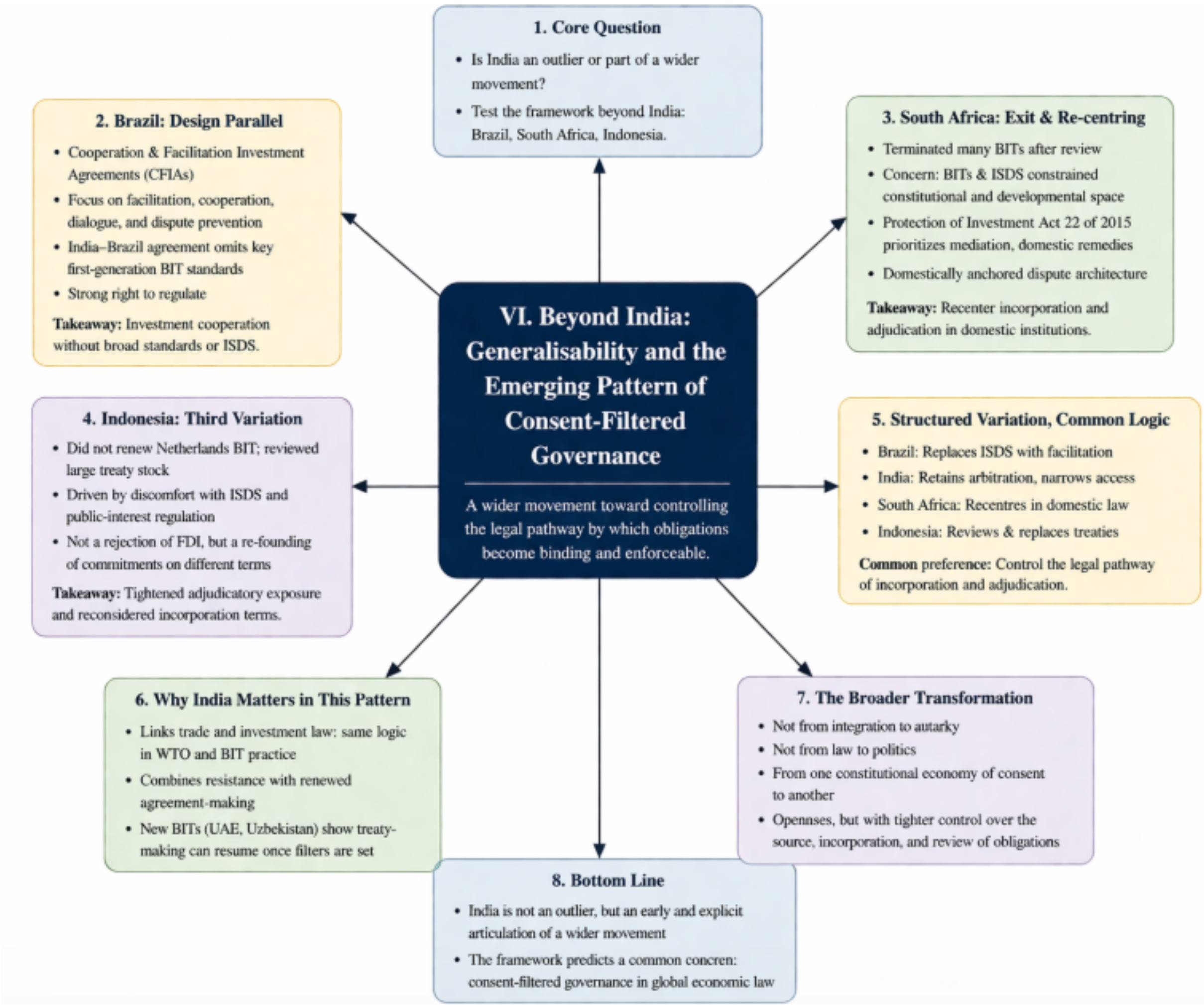
The India-Brazil Investment Cooperation and Facilitation Treaty reinforces the same point from a different angle. As Moraes and Cavalcante show, the agreement departs from the orthodox BIT model by omitting fair and equitable treatment and indirect expropriation, strengthening the right to regulate and organising dispute management closer to cooperation and public-interest balancing than to classic investor-state arbitration.[53] The significance of this agreement is not merely bilateral. It demonstrates that India is willing to develop forms of investment governance that preserve cooperation and investor support while refusing the older assumption that broad investor rights and strong external arbitration are the default currency of treaty credibility.

Taken together, these developments support the paper's core claim. India's treaty practice reflects a structural shift from investment protection as default to investment governance as design choice. The issue is no longer whether treaties protect investors, but on what institutional terms, through what dispute architecture and with how much deference to domestic policy. That is why the old opposition between openness and sovereignty is analytically unhelpful. India remains open to protection, but only after the terms of incorporation and adjudication have been filtered through a sovereignty-conscious theory of legitimate consent.

This section also clarifies why trade and investment law should be analysed together. In both domains, India is objecting to the same underlying risk: the internalisation of obligations under conditions where either procedural authorship is weak or external interpretation is too detached from domestic control. In the WTO, that concern is expressed through opposition to plurilateral incorporation without consensus. In investment law, it is expressed through restrictive definitions, domestic-remedy requirements and narrowed arbitral authority. The two moves are doctrinally distinct, but structurally unified.

[52] Press Information Bureau, Ministry of Finance, 'Bilateral Investment Treaty between India and the United Arab Emirates comes into effect', lines 16-25.
[53] Moraes and Cavalcante 304, 316-18.

VI. Beyond India: Generalisability and the Emerging Pattern of Consent-Filtered Governance



The framework must travel beyond India if it is to be more than a descriptive label. This section therefore tests its purchase against Brazil, South Africa and Indonesia. The aim is not to claim perfect equivalence. It is to ask whether India is an outlier or an especially clear articulation of a wider movement toward consent-filtered governance.

Brazil provides the clearest parallel on the design side. Brazil's Cooperation and Facilitation Investment Agreements were developed as an alternative to the orthodox BIT model, emphasising facilitation, cooperation, institutional dialogue and dispute prevention rather than classical investor-state arbitration.[54] The India-Brazil agreement is especially revealing

[54] Jose Henrique Vieira Martins, 'Brazil's Cooperation and Facilitation Investment Agreements (CFIA): Recent Developments' (12 June 2017) *Investment Treaty News* https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/ accessed 29 March 2026.

because it omits several canonical standards associated with first-generation BITs and gives concrete weight to the right to regulate.[55] Brazil is not identical to India, but the family resemblance is obvious. Both states accept the value of investment cooperation while rejecting the assumption that such cooperation must take the form of broad substantive standards enforced by investor-state arbitration.

South Africa illustrates the same pattern from the angle of exit and domestic re-centring. After a multi-year review, South Africa terminated many of its BITs and shifted toward domestic legislation for investor protection.[56] The rationale, as contemporaneous analyses emphasised, was concern that BITs and investor-state arbitration constrained constitutional and developmental policy space.[57] South Africa's subsequent Protection of Investment Act 22 of 2015 expresses a preference for mediation, domestic remedies and a more domestically anchored dispute architecture.[58] Here again the point is not simple withdrawal. It is the recentering of legal incorporation and adjudicatory exposure around domestic institutions.

Indonesia presents a third variation. Its decision not to renew the Netherlands BIT and its broader review of a large treaty stock were driven in significant part by discomfort with investor-state dispute settlement and concern that older agreements were inconsistent with public-interest regulation.[59] Price's account is especially useful because it shows that Indonesia's move was not a rejection of foreign investment as such, but an attempt to re-found investment commitments on different terms.[60] In the language of the present article, Indonesia tightened adjudicatory exposure and reconsidered the terms of incorporation without abandoning the pursuit of investment governance altogether.

The comparisons are instructive because they show structured variation rather than simple convergence. Unlike Brazil, which more fundamentally displaces ISDS in favour of facilitation and state-state management, India retains arbitration but narrows the route to it. Unlike South Africa, which recentres investor protection in domestic legislation, India continues treaty-making but with tightly controlled consent structures. Indonesia occupies an intermediate

[55] Moraes and Cavalcante 304, 316-18.
[56] Mossallam 1-3.
[57] Mossallam 1-3; M F Qumba, 'South Africa's Move Away from International Investor-State Dispute: A Breakthrough or Bad Omen for Investment in the Developing World?' (2019) 22(1) *Potchefstroom Electronic Law Journal* art 21, paras 74-76.
[58] Protection of Investment Act 22 of 2015 (South Africa); Qumba para 76.
[59] Price 124-29.
[60] Price 124-51.

position: it reviewed and replaced older BITs without adopting a single model as restrictive as India's 2015 template. The CFM therefore does not predict uniform outcomes. It predicts a common preference for controlling the legal pathway by which obligations become binding and enforceable.[61]

India remains especially important within this pattern for two reasons. First, it links trade and investment law more visibly than the comparator states. Brazil's alternative model is primarily an investment story; South Africa's and Indonesia's trajectories are principally about BITs and ISDS. India, by contrast, exhibits the same logic in both investment treaty practice and WTO constitutional argument. Secondly, India combines resistance with renewed agreement-making. Its recent BITs with the UAE and Uzbekistan show that treaty-making can resume once the filters of incorporation and adjudication are recalibrated.[62]

That combination makes India a particularly strong case through which to theorise a broader transformation. It demonstrates that the relevant shift is not from integration to autarky, nor from law to politics. It is from one *constitutional economy of consent* to another. Older models presumed that economic openness and external adjudication were mutually reinforcing defaults. The emerging pattern suggests instead that states increasingly want openness on terms that preserve tighter control over the source, incorporation and review of obligations.

The broader claim can therefore be stated directly. India is not an outlier, but an early and unusually explicit articulation of a wider movement toward consent-filtered governance in global economic law. The framework does not predict identical policy choices across states. It predicts a common concern with controlling the legal pathway by which obligations are made authoritative.

VII. Limits and Contradictions

The CFM explains a great deal, but it is not a triumphalist story. This section identifies the limits of the model and, by doing so, clarifies the framework's boundaries. To say that India acts through consent filters is not to say that the resulting legal order is coherent, costless or

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[61] Moraes and Cavalcante 316-18; Mossallam 1-3; Price 124-29.

[62] Government of India, Department of Economic Affairs, 'Bilateral Investment Promotion and Protection Agreement (BIPA)'; Press Information Bureau, Ministry of Finance, 'Bilateral Investment Treaty between India and the United Arab Emirates comes into effect'.

always normatively desirable.

A preliminary caution is necessary. The framework may risk over-systematising state behaviour that is partly contingent and politically driven. States do not reason in perfectly linear fashion across regimes and domestic coalitions, diplomatic bargaining and sector-specific interests continue to matter. The value of the CFM is therefore interpretive rather than deterministic. It identifies a recurring legal logic. It does not supply a mechanical decision rule.

The first substantive limit is that insistence on consensus can harden into veto politics. At the WTO, India's constitutional objections may well be legally serious, but they also contribute to institutional inertia where formal unanimity is difficult to obtain. This creates a genuine problem. If new issues cannot be incorporated multilaterally and plurilateral pathways are treated as constitutionally suspect, the system risks becoming incapable of timely rule adaptation. The CFM therefore explains why India resists; it does not by itself resolve how multilateral institutions should evolve when consensus is persistently elusive.

Secondly, the framework does not eliminate fragmentation. It may reproduce fragmentation in a different form. India's resistance to plurilateral incorporation at the WTO coexists with a willingness to negotiate bilateral and regional arrangements when treaty design is controllable.[63] The defence of multilateral constitutional form can therefore coexist with a pragmatic embrace of bilateral or minilateral layering elsewhere. Put differently, India opposes some kinds of fragmentation while accepting others. The framework predicts this outcome, but it also reveals a tension: a state may defend multilateral legitimacy in one register while contributing to regime differentiation in another.

Thirdly, tighter adjudicatory filters can create uncertainty for investors and treaty partners. The 2015 Model BIT's five-year domestic-remedies requirement was widely criticised as too restrictive and as reducing the practical utility of treaty arbitration.[64] The fact that the India-UAE BIT reduced the domestic-remedies period to three years suggests that India itself recognised some of these concerns.[65] Yet that moderation also introduces a second-order

[63] Government of India, Ministry of Commerce and Industry, 'Trade and Economic Partnership Agreement between the Government of the Republic of India and the Governments of EFTA States'; Government of India, Department of Economic Affairs, 'Bilateral Investment Promotion and Protection Agreement (BIPA)'.
[64] Ranjan and Anand 25-31; Prabhash Ranjan and others, *India's Model Bilateral Investment Treaty: Is India Too Risk Averse?* (Brookings India Impact Series 082018, 2018).
[65] Press Information Bureau, Ministry of Finance, 'Bilateral Investment Treaty between India and the United Arab Emirates comes into effect', lines 16-25.

difficulty: if newer treaties relax some model features while retaining others, the contours of Indian treaty design may become less predictable.

Fourthly, the Indian approach depends heavily on the credibility and accessibility of domestic institutions. A theory that privileges local remedies and domestic review assumes that those institutions can provide meaningful relief within a reasonable period. Where domestic systems are slow, costly or unevenly accessible, the normative case for demanding extended resort to domestic fora weakens. The CFM is therefore not a universal normative endorsement of domestic primacy. It is an explanation of why states increasingly demand it. Whether such demand is justified in particular circumstances remains an evaluative question.

Fifthly, generalisability has limits. India can operationalise consent filters in part because of its market size, geopolitical relevance and bargaining capacity. Smaller developing states may share the same concerns yet be less able to insist on them. For them, the costs of saying 'no' may be significantly higher. The framework thus identifies a broader pattern, but the intensity with which any given state can deploy the filters will vary with power and market attractiveness.

These limitations matter because they prevent the theory from hardening into ideology. The article's claim is not that India has solved the legitimacy crisis of global economic law. It is that India reveals the terms on which legitimacy is increasingly contested. The framework is therefore diagnostic rather than celebratory. It shows how states respond to post-consensual governance; it does not imply that every filtered response produces a better or fairer legal order.

VIII. Conclusion

This paper has suggested that the Indian course in trade and investment law can be best explained by a Consent-Filtered Multilateralism Framework. The main argument is that states distinguish between rule production, incorporation and adjudicatory exposure, accepting obligations where they have control over such pathways and rejecting them where they do not. The analysis thereby changes the focus of the results of cooperation to the legal procedures by which obligations are made binding.

The article has demonstrated using India as a critical case that opposition to WTO plurilateral incorporation and redesign of investment treaties are not a one-off event but manifestations of one structural logic. India is a supporter of the WTO and opposes the institution in creating obligations that are created in non-consensual channels. In investment law, it still makes treaties but on conditions that reduce exposure and focus on domestic control. These roles are not conflicting, but synchronized reactions based on pathway control.

The larger point is that the global economic law is moving into a post-consensual governance era, in which rules are gaining political power prior to their constitutionalization. States are in turn reasserting their control over the production, incorporation and interpretation of rules. India is not the only example of this change.

The importance of this change is obvious. The future of the global economic law will not be determined by the cooperation of the states, but by the acceptance of the procedural routes by which the cooperation can be transformed into the binding law. India is not withdrawing itself in the world governance; it is renegotiating the terms in which it will be working.