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Research Article

Balancing Investment Protection and State Regulatory Autonomy in Bilateral Investment Treaties (BITs)

Sijuola Atanda-Lawal PhD

University of London, IALS

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Abstract

This paper explores how Bilateral Investment Treaties (BITs) seek to strike a balance between two fundamental objectives: safeguarding the interests of foreign investors and preserving the regulatory autonomy of host states to promote public welfare. Historically, BITs have tended to prioritize investor protection, often at the expense of domestic policy space. However, a noticeable shift is emerging in recent treaty practice. The study highlights how modern BITs are increasingly incorporating clearer provisions, explicit exceptions, and more transparent dispute resolution mechanisms. These developments aim to maintain a favorable investment climate while empowering states to implement policies that address critical national and global concerns. Through the analysis of case studies and pressing global challenges such as climate change, the paper underscores the need for ongoing reform. It concludes that well-drafted, balanced treaties can simultaneously protect investor interests and uphold state sovereignty. Finally, the study offers practical recommendations for updating older BITs to align with contemporary standards of fairness, sustainability, and development.

Keywords: Foreign Investment; Bilateral Investment Treaties (BITs); Balancing Investment Protection

Introduction

Following the first Industrial Revolution and the rise of modernization, societies have become more open to each other, and activities like trade and business have grown a lot (Stearns, 2020). Now, things like goods, services, and even workers can move from one country to another more easily, all thanks to something called international trade. This kind of trade brings benefits like people sharing their skills, moving money from one place to another, and even getting new investments through deals between countries.

As more countries started doing business with each other, especially in the form of investment, there came a need to write formal agreements. These are called bilateral investment treaties. In simple terms, they are official promises made between two countries to protect and support investments. These agreements have become an important part of international law. Since the 1960s, they have helped shape how countries invest in each other. According to Güran (2024), these treaties help protect investors by making sure they are treated fairly and that their property is not taken away unfairly. Investors, especially from rich countries, feel more confident investing in places they are not familiar with when they know there are rules to protect them. This comes to play in developing and struggling nations because they have weak governments and economies that one cannot write home about. It is also important to note that countries that receive capital funding in the form of investment have the leisure to grow and develop their economic system with the foreign capital received from investors.

However, a significant challenge is that many of these treaties and agreements place the governments of recipient nations in a vulnerable position, often constraining their ability to advocate for their citizens or to protect the environment effectively. A good example of this could be seen in the laws, rules, and regulations guiding the environment and health of countries. These laws are referred to as national health and environmental policies and they sort of cause cases between foreign direct investors and the government of the day. This is because the investors are not used to it and may not have a business workflow that aligns with them. The constant court cases between foreign investors and national governments common in many countries can be seen as a cofactor for the drafting of BITs.

This then brings us to the fundamental questions underlying this research: how can we get on with the government making good decisions without chasing investors who are sure sources of foreign direct investment? Should one party suffer for the other to thrive? This paper therefore speaks to how we can balance investment protection and still give countries the overall freedom they need while trying to achieve that.

Conceptual Clarification

Investment Protection: Investment protection means rules that help foreign businesses feel safe putting money in another country (Schreuer, 2011). These rules stop the government from suddenly taking their money or property without good reason. It is a promise in agreements between countries that foreign investors won't be treated badly or unfairly. It helps make sure their businesses are respected and not harmed without cause. This is when a country agrees to treat outside investors fairly and to pay them if something happens to their investment that wasn't their fault or part of a legal plan (Mangan & Rubins, 2022).

State Regulatory Autonomy: State regulatory autonomy is a country's power to create laws that protect its people and economy (Koop & Kessler, 2020). It lets governments make their own choices without needing permission from others. It means a country can handle important issues like education, safety, or the environment using its own rules. It allows leaders to do what they think is best for citizens. This is when a country decides how to run things like health care, jobs, or the environment without being stopped or told what to do by outside investors or foreign groups (Henckels, 2016).

Fair and Equitable Treatment (FET): Fair and Equitable Treatment is a rule that says foreign investors must be treated in a kind, honest, and steady way, without tricks or unfair changes to the rules (Dolmans, 2017). It means a government cannot treat foreign businesses badly just because they are from another place. It should deal with them in a clear and reasonable way. This is the idea that all investors, no matter where they are from, should be given equal respect and not face surprise decisions that harm their business.

Mechanisms and Strategies for Balancing Investment Protection and State Regulatory Autonomy in BITs: Based on the knowledge of how complex international trade and globalization can get, it is right to state that countries need to sign Bilateral Investment Treaties (BITs) (Bodea & Fangjin, 2017). In this section, we will be itemizing some of the ways to ensure investments at this scale are protected without affecting the sovereign rights that host countries should ideally enjoy when signing BITs.

Innovations in Treaty Design

BITs are legal papers that state the conditions for international trade. One of the major sources that most BITs are drafted from is the Vienna Convention on the Law of Treaties (VCLT). Before now, BITs mostly supported investors. They included things like Fair and Equal Treatment (FET), Most-Favored Nation (MFN) status, and protection from unfair takeovers (expropriation) (Lo, 2017). One of the shortfalls of this style is that it does not cover for new issues such as environmental laws as many foreign trade parties are now afraid of being sued. That's why countries are changing the way they write BITs now.

Clearer Rules for Fair and Equitable Treatment (FET)

FET is a crucial form of protection in BITs and is meant to make sure that investors are treated fairly. But older BITs did not explain clearly what FET really meant, so different courts interpreted it in different ways (Dumberry, 2016). Sometimes they even ruled against countries just because new rules made it harder for a company to make money.

Now, countries like Canada, India, and those in the European Union have started to explain FET better in their treaties. For example, in the Canada-EU trade agreement (CETA), FET only applies when there's clear injustice, obvious unfairness, or discrimination. This makes the rule fairer and less open to abuse (Dumberry, 2023). Also, treaties now focus on promises that host countries can fulfil and as such most investors must deal based on this expectation and not what they hoped would happen. This means investors must have a good reason to expect the rules will stay the same.

Making Space for Public Interest Laws

A big new change is that countries are adding special sections, called carve-outs or general exceptions, that protect their right to pass laws for things like health, safety, and the environment. These are like the rules in Article XX of the GATT, which let countries protect important values without breaking trade rules.

For example, SADC in their 2012 clearly said that countries can make rules for public interest, and these rules won't count as expropriation. India's 2016 Model BIT also lists many situations where countries can act freely, like protecting labor rights or the environment, if the rules are fair and not used to secretly harm investors.

These carve-outs help make sure countries don't get sued for doing what's best for their people. They protect public laws and stop companies from using BITs to fight against new, important policies.

Balancing Rules for Taking Property (Expropriation)

One major issue in BITs is about indirect expropriation (Kebede, 2019). This happens when a government does not take a company's property outright, but new rules make the property lose value. That creates a problem: how do you let governments protect the public while making sure investors don't suffer too much?

A solution is to use something called proportionality analysis. This means checking:

i. Is the rule trying to do something important?
ii. Is the rule the best way to do it?
iii. Is the harm to the investor reasonable compared to the benefit to the public?

For example, if a government makes a law to stop pollution from mining, and that affects a mining company's profits, the court will ask: Does this law really help the environment? Is there a less harmful way to do it? And is the harm to the company fair compared to the public good?

Countries like Colombia include this kind of balancing test in their BITs (Londoño-Vélez & Ávila-Mahecha, 2021). It helps protect both sides – the public and the investor.

Treaty Preambles and Interpretations

Most people do not pay much attention to the beginning parts of treaties, called preambles. But they matter a lot. Preambles explain the goals of the treaty and can help judges understand how to interpret the rest of the text.

Old BITs mostly talked about protecting investment. But new ones mention sustainable development, human rights, and the right of countries to regulate. For example, the Dutch Model BIT (2019) says its goal is to promote responsible investment and development (Duggal & van de Ven, 2019). This helps courts consider things like fairness and environmental protection when deciding cases.

How Well These Changes Work

From the discussions above, it is right to say the new ideas surrounding how BITs can be made better are generally quite interesting. What now seems like a challenge are the hindrances to the successful drafting and implementation of these BITs. These hindrances come in several forms but the most notable are language barriers (as countries do not primarily speak the same languages) and the shortage in the number of lawyers that specialize in treaties and international law in its entirety (Wilske, 2021). This shows the need for more effort to make these changes work and this can be in the form of translation support or training. With this, host countries can draw up better treaties that would make foreign investors see them as home.

Reforms in Dispute Resolution Mechanisms

As far as BITs are concerned, Investor-State Dispute Settlement (ISDS) is a major matter of concern. Because of the loophole ISDS create many investors who do not feel just by the laws of their host countries run to international courts.

Problems with ISDS

Traditional ISDS systems are not always fair. Tribunals have made very different decisions in similar cases, and some arbitrators have worked on many cases, raising questions about bias. ISDS can also cost countries a lot of money. For poorer countries, this can be a huge burden. There's also the risk that countries avoid making new public rules because they fear being sued. This is known as the "regulatory chill."

Making ISDS More Transparent

To fix some of these problems, new treaties and international rules are trying to make the process more open. The UNCITRAL Rules on Transparency (2014) say that documents should be public, hearings should be open, and outside groups should be allowed to join (Shirlow, 2016). Treaties like CETA and the EU-Vietnam deal follow these rules. This helps people trust the system more, especially when the issues affect the public, like clean water or medicine prices.

Allowing Third Parties to Join (Amicus Curiae)

Some treaties now let groups who are not part of the dispute like environmental groups or researchers submit opinions. This is called amicus curiae participation. It helps the tribunal hear more sides of the story.

One famous example is Methanex v. United States, where environmental groups were allowed to explain how the dispute affected the environment (Miles, 2019). This makes the arbitration process less one-sided and more balanced.

Throwing Out Weak Claims Early

Another useful change is letting tribunals throw out clearly bad cases early. These are cases that don't have any real legal arguments. For example, in the CPTPP (a trade deal that includes countries like Japan and Australia), tribunals can reject weak claims at the start (Ubilava & Nottage, 2020). This saves time and money for countries.

This idea has been well received because it stops investors from using lawsuits to scare countries into dropping new laws. But for this to work well, tribunals need to apply the rule strictly. If they're too soft, bad cases will still go through. And even proving a case is weak can still cost poor countries a lot of effort.

State Practices and Case Studies

Different countries have taken different steps to protect their ability to make laws while still welcoming foreign investment. Some countries have even cancelled or changed their BITs to better reflect their national priorities.

For example, India made a new model BIT in 2015 (Chaisse & Nottage, 2018). It gives less power to investors, protects the public interest more clearly, and limits how much investors can sue the government. South Africa also ended some of its BITs and created a new law in 2015 that gives protection to investors but still lets the government make important decisions.

Example: Philip Morris v. Uruguay

In 2010, a tobacco company, Philip Morris, sued Uruguay (Crosbie et al., 2017). The company didn't like new health laws that required graphic warnings on cigarette packs and limited the number of cigarette types sold. They said these rules hurt their business and broke the rules of the BIT between Uruguay and Switzerland.

Uruguay said the laws were about protecting public health, which is more important. In 2016, the tribunal agreed with Uruguay. They said the rules were fair, not discriminatory, and backed by science.

This case shows how important it is to have exceptions in BITs that protect public health. It also shows that if a country has a good reason and acts in good faith, it can win these disputes. But it also cost Uruguay a lot of money to fight the case. That's why it's important to have tools like early dismissal to help countries avoid long, expensive legal battles.

Example: Vattenfall v. Germany

Another important case is Vattenfall v. Germany (Zimakov & Popov, 2021). After the nuclear disaster in Japan (Fukushima), Germany decided to stop using nuclear power. A Swedish company, Vattenfall, owned nuclear plants in Germany and sued, saying this decision was like taking their property.

This case shows how hard it can be to balance investment protection and important policy changes. Germany wanted to protect its people and the environment, but it had to deal with legal claims from a foreign investor.

Cases like this show why BITs need to have clear rules that allow countries to make major decisions in the public interest without always having to pay big compensation to investors.

Reforms in Dispute Resolution Mechanisms

Making Dispute Processes Better

One big problem with BITs is the **Investor-State Dispute Settlement (ISDS)** can get. The ISDS is a system used by investors to sue countries when they falter in trade agreements. This system often favors powerful investors and can be expensive for poorer countries.

How Countries Are Fixing It:

i. **Appeals and Transparency:** New agreements now include ways to appeal unfair decisions and allow the public to see what's going on. For example, the **UNCITRAL rules** make sure hearings are open and documents are shared with the public (Paulsson & Petrochilos, 2025).
ii. **Code of Conduct for Arbitrators:** In the past, the people who decided these cases (called arbitrators) could be biased. New rules require them to be fair, avoid conflicts of interest, and be held accountable.
iii. **Permanent Courts:** Some countries and organizations are creating permanent investment courts. These are like regular courts with full-time judges, not just hired lawyers. An example is the Multilateral Investment Court idea by the EU, which aims to make the process fairer and more predictable (Palombo, 2018).
iv. **Limiting Who Can Sue:** Some BITs now say that only investors who have followed all local rules and are truly affected by unfair treatment can sue. This stops fake or opportunistic lawsuits.

Problems Still Exist

Although these reforms help, some rich investors still try to exploit legal loopholes. That's why experts say reforms need to be global and not just from one country or region.

Domestic Legal Reforms and Institutional Strategies

How Countries Protect Themselves at Home

Apart from fixing treaties and dispute systems, many countries are changing their own laws and government systems to better handle foreign investments.

Some Strategies Include:

i. **Reviewing Treaties Regularly:** Countries like South Africa and India are going through their old BITs and updating or even cancelling ones that are unfair (Han, 2017). They are replacing them with modern treaties that protect both investors and public interest.

ii. **Creating Stronger Legal Teams:** Developing countries are hiring and training legal experts who understand international law. These professionals help make sure treaties are negotiated well and the country is defended properly in case of a dispute.
iii. **Making New Laws:** For example, **South Africa's Protection of Investment Act (2015)** protects investors but also makes it clear that the government can still make important laws for health, safety, and the environment (Garcia et al., 2015).
iv. **Improving Courts and Legal Systems:** When local courts are trustworthy, investors are less likely to sue the country internationally. So, some countries are improving their court systems to handle investment issues better.

Developing vs. Developed State Experience

Less economically developed countries often accept disproportionate risks in international trade negotiations due to limited access to legal expertise and financial resources, particularly when compared to wealthier nations (Irwin, 2020). As a result, they may prematurely withdraw from disputes, forgo beneficial reforms, or adopt overly investor-centric language in trade agreements. Increasingly, there is recognition of the need to support these countries through capacity-building initiatives, tailored trade frameworks that reflect their developmental stages, and multilateral approaches to negotiation that promote equity and collaboration. (like rules in the African Continental Free Trade Area).

Emerging Trends and Future Direction

Bilateral Investment Treaties (BITs) were first made to help and protect money coming in from other countries, but now they need to change because the world has become more connected and complicated. At the beginning, these treaties mainly focused on opening markets and keeping investors safe from unfair treatment or having their property taken. But now, the world has changed a lot. Big problems like climate change, rules guiding use of internet for businesses, health emergencies, and the push for fairness in society and the environment are making countries and experts start to rethink how these treaties should really work. This section talks about new ideas that could change how these deals are made in the future and suggests ways to update BITs, so they give benefits to investors while also doing what's best for the public.

Climate change is one of the biggest and most serious problems in the world right now. As countries try to keep the promises they made in global climate deals like the Paris Agreement, they need to create new laws that might affect businesses from other countries. For example, laws that cut down carbon pollution, reduce the use of fossil fuels, or support clean energy can be hard for companies that still use old energy sources. A lot of older BITs didn't have anything about protecting the environment, which made it easier for companies to sue governments (Wiseman, 2024).

These companies might claim that newly introduced regulations are unjust or detrimental to their business interests, even when such measures are designed to protect the environment. As a result, some governments have been hesitant to implement robust climate policies due to concerns about potential lawsuits and the significant financial burdens associated with defending their actions in international arbitration. This problem is even worse for poorer countries that do not have a lot of money to start with. To fix things, newer BITs are now adding rules that pay more attention to the environment. These new rules clearly say that countries are allowed to make laws that protect people and fight climate change. Some treaties even talk about things like sustainable development and taking care of nature right at the beginning, which helps judges look at the treaty in a way that supports public needs. Other treaties go even further and have special exceptions that let countries make climate laws without going against the treaty. For example, some treaties say that certain climate actions can't be taken to court by investors (Paine & Sheargold, 2023). Also, some trade deals now support investments in clean energy, eco-friendly buildings, and projects that are good for the environment. This shows a slow but important change in making sure both investors and the planet are protected. As the climate problem keeps getting worse, countries will need to keep coming up with new ideas when writing treaties. In the future, BITs could make investors follow rules that protect the environment, like checking how their projects affect nature before they invest. Also, when there are arguments between countries and investors, the people in charge of solving them should not see climate laws as unfair to investors, but as important actions taken by countries to protect the planet. If BITs support a country's right to fight climate change, they can help build a greener and fairer future, instead of standing in the way.

Beyond environmental concerns, the rapid expansion of the digital economy has introduced complex challenges to the current framework of international investment law. Significant capital is now directed toward sectors such as e-commerce platforms, data-driven enterprises, fintech firms, and AI-based services. However, most of the Bilateral Investment Treaties (BITs) were drafted prior to the rise of these industries and thus lack provisions specifically tailored to digital investments (Polanco, 2023). As states introduce regulations to govern the digital sphere such as data localization mandates, algorithmic transparency requirements, and cybersecurity measures, foreign investors may perceive these domestic policies as violations of treaty obligations. Digital firms may argue that such measures amount to unfair or inequitable treatment under BITs, thereby triggering investor-state dispute settlement (ISDS) proceedings, which are often financially and administratively burdensome for host states (Agrawal, 2016). The absence of treaty language addressing these modern regulatory needs creates a grey legal area that undermines states' capacity to safeguard digital sovereignty and public interest objectives.

Recognizing these limitations, recent investment agreements have begun incorporating provisions that directly address the complexities of digital trade and regulation. These newer frameworks seek to balance investor protection with the regulatory autonomy of states by affirming governments' rights to enforce data protection standards, tax digital transactions, and regulate emerging technologies. Agreements such as the United States-Mexico-Canada Agreement (USMCA) and selected chapters of the Regional Comprehensive Economic Partnership (RCEP) illustrate a growing international consensus toward updating investment disciplines to reflect the digital era. The central challenge now lies in developing a normative equilibrium one that facilitates cross-border digital investment while preserving national authority to enact public interest regulations. This may entail crafting precise definitions for digital investments, establishing clearer guidelines for digital service provision, and recalibrating treaty obligations to prevent them from obstructing legitimate regulatory actions in the digital domain.

Another area where BITs need to change is how they deal with public health emergencies (Gandhi et al., 2023). The COVID-19 pandemic clearly showed how much big health problems can shake up economies and force governments to act fast and in big ways. Countries made all kinds of emergency rules like stopping exports of medical tools, allowing others to make vaccines without permission, setting lockdowns, and putting limits on rent to keep people safe and protect their health systems. But some of these actions hurt the businesses of foreign investors, and a few of those investors reacted by starting or threatening legal cases. This made people start asking serious questions about how much power governments should have to protect public health when there's a major crisis. To fix this problem, more treaties today are starting to include special rules that protect actions taken for public health from ending up in court. These rules say that when there is a serious situation, governments should be free to focus on keeping their people safe and healthy without worrying about getting sued by investors. At the same time, these newer treaties explain that any emergency actions should not last too long, should treat everyone fairly, and should not go further than what is really needed. This helps make sure that people are protected while still making investors feel safe to do business. Also, by adding health-related words and ideas into these treaties, countries are trying to make sure that investment rules match better with global health laws, like the ones made by the World Health Organization through the International Health Regulations (IHR) (Pudic, 2018). As the world faces new health problems, like pandemics, diseases that resist medicine, or other threats to health and safety, BITs must be ready to deal with them. One way to help is by making investors follow national health rules if they want to invest or even asking them to help when health emergencies happen. Treaties could also include a rule that puts legal cases on hold during health crises, so governments can act fast and strong without being worried about getting sued. By including these health ideas, BITs can help countries get stronger instead of causing more problems when things get tough.

Even though BITs have mostly been between just two countries, more countries are now teaming up to make bigger investment deals at the regional or global level. These larger agreements try to bring more countries together under one set of rules and shared goals that are harder to fit into deals between just two countries. These goals can include protecting the environment, supporting workers' rights, and making sure that the benefits of economic growth are shared by everyone. For example, AfCFTA is creating a plan that focuses on what African countries need most for their economies (Aniche, 2020). The European Union is also working on deals that support human rights, green development, and democracy. Regional agreements have a lot of advantages. They help different countries follow the same rules, which makes everything clearer and better organized. They also give smaller or developing countries more strength by letting them negotiate together instead of on their own. Some of these

agreements even bring in new ways to solve problems, like having a special court or panel that can explain what the treaty really means. These regional deals also give countries the chance to try out new ideas, such as asking investors to follow certain rules, use local workers or materials, or think about how their business might affect the environment. If these ideas work well, they can be used in bigger, global agreements later. Still, working together isn't always easy, especially when the countries involved have different types of governments, different goals, or are at different stages of development. To make sure these regional deals truly benefit everyone, the talks must be fair, open, and include all voices not just the powerful ones. Even with these challenges, the growing interest in regional partnerships shows that countries are moving away from one-on-one deals and toward a more connected, thoughtful way of managing investments.

When thinking about the future, many people in the international investment world are talking about ways to make things better. One popular idea is to create sample treaty templates that put public interest like people's well-being and the environment at the centre instead of treating them as side concerns. These templates could clearly explain important terms like "indirect expropriation," "minimum standard of treatment," and what investors are expected to do. They might also include ready-made rules on protecting nature, supporting human rights, and promoting fair development, which would help avoid confusion and legal problems later.

Another important way to improve things is by doing ex-ante impact assessments, which means checking out a treaty before it gets signed. These assessments help governments see how a new BIT might affect their power to make laws, control businesses, or reach their country's goals. By spotting problems or unfair parts early, countries can ask for better rules that match what they want. Also, people are starting to regularly review old treaties because many don't fit today's economy or big issues like climate change and online rules. Adding stuff like sunset clauses (which end the treaty after a while), chances to renegotiate, or set time limits makes it easier to change or stop old treaties. This way, a country's investment rules can stay fresh, flexible, and good for growth.

Conclusion

Balancing the protection of foreign investments with the preservation of regulatory autonomy remains a central challenge for Bilateral Investment Treaties (BITs). This paper examined how BITs address this balance through treaty design, dispute resolution mechanisms, state practice, and emerging trends. The findings indicate that although traditional BITs largely favored investor rights, recent innovations are contributing to a more equitable framework.

Reforms such as express carve-outs, more precise formulations of the Fair and Equitable Treatment (FET) standard, and proportionality tests are enhancing states' capacity to enact regulations in public interest. Evolving dispute resolution procedures including increased transparency and greater opportunities for third-party participation are mitigating concerns about investor bias in arbitration. Landmark cases such as *Philip Morris v. Uruguay* and *Vattenfall v. Germany* underscore the importance of clearly articulated exceptions and robust state defenses in safeguarding regulatory space, though challenges persist.

Contemporary trends, including the integration of environmental obligations and the development of regional treaty models, suggest that BITs are gradually adapting to modern global realities. To further improve their effectiveness, future BITs should employ unambiguous language to reduce interpretive uncertainty and minimize disputes. Dispute settlement systems should aim for greater consistency, possibly through the establishment of a permanent multilateral investment court. Developing countries must advocate for treaty provisions that preserve their right to regulate in pursuit of sustainable development goals. Additionally, including local communities and civil society in treaty negotiations would enhance legitimacy and ensure broader stakeholder representation.

When properly designed, BITs can both attract foreign investment and respect national sovereignty. As global priorities shift, driven by climate change, technological transformation, and equity concerns BITs must evolve to support inclusive and sustainable economic development. International legal frameworks can serve as crucial tools to uphold fairness, enabling BITs to contribute meaningfully to a more balanced and just global economy. By learning from past disputes and embracing forward-looking reforms, BITs can better align with the public interest while maintaining investor confidence.

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