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## **Regional Model Bit's : A New Down For the Developing Countries**

Abdallah Mohamed Othman El Nofely\* and Rehna Gul  
*PhD. Candidate in Zhongnan University of Economics and Law, Wuhan-China*  
Email: abdnofely@yahoo.com and rehnagul786@yahoo.com

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### **Abstract**

Foreign direct investment (FDI) plays a crucial role in the economic sector, particularly in developing countries. BIT lays down instrumental principles which help to protect investors' establishments in host states, by inter alia encouraging prompt compensation in case of expropriation. Governments need FDIs to gear up their economic growth, advance technology, and scale down unemployment. Most scholarly writings are in favor that BIT is a necessary tool for promoting FDIs, however this study takes a different approach and categorically unveils the draw backs of BIT in developing countries by highlighting some of the contentious provisions that have sparked unprecedented legal, economic, sociopolitical and diplomatic strife between the host countries, investors and investors' home countries. Therefore, the author proposes development for regional Model BITs that would go in line with national laws to curtail the persisting sovereignty and socio-economic challenges.

**Keywords:** Foreign direct investment; Bilateral Investment Treaty; Investor-state dispute settlement.

### **I. INTRODUCTION**

The bilateral investment treaty refers to "agreements between two countries for the reciprocal encouragement, promotion, and protection of investments in each other's territories by companies based in either country." (Grain, 2017) The BIT's primary purpose is to protect the interests and rights of foreign nationals in the host states, but it also seeks to elevate "reciprocal investments" between the countries based on agreed provisions. Professor Deshpande (2011) on this aspect reiterates that "Bilateral investment treaties are supposed to provide an enabling environment such that the rights and duties of investors, and recipient countries, are protected." (Deshpande, 2011) The important aspect of bilateral investment agreements is that they include conditions and clauses that guarantee investors to invest while still being protected from state action. Developing countries regard foreign Investments as a necessary means to attract foreign direct investments (FDI) in their territories; for instance, China has become the world's second-largest developing country in terms of investment and accounts for about 10% of the total investment in developing countries.

Besides, in order to accommodate BITs as well as the aspirations to revive the economic development, the developing countries are required to carry out necessary endeavor, including legal and policy reforms to attract FDIs but also to comply with the United Nations guiding principles on business and Human Rights, which confers that "States must protect the people against any human rights abuse within their territory and jurisdiction by third parties, including business enterprises. The measure requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations, and adjudication." Developing countries' attempts to defend public interests and statehood has caused a fierce uproar from investors that have triggered arbitrary litigations against the states. The above argument is further solidified by Sauvants and Sachs (2009), who opine that "In fact, virtually any public policy regulation can potentially be challenged through the dispute settlement mechanism as long as it affects foreign investors." (Sauvant & Sachs, 2009)

In essence, it becomes excruciating for the states to freely implement legislative sovereignty to

promote and protect human rights, labor rights, and environmental rights due to the rights and protection-power accorded to the transnational foreign corporations.

## **II. RESULT AND DISCUSSION**

### ***Genesis of Bilateral Investment Treaties***

A political shift from colonialism to independence faced a slew of problems, impacting the economy as well as sociopolitical conditions. The Cuban revolution in the early 1960s and subsequent confiscation of foreign investors' assets and the nationalization of the Iranian oil sector in 1952 are just a few of the thorny issues that have fatally undermined cross-border trade between countries. Increasingly, the situation resulted in unprecedented legal, diplomatic, and economic challenges that have outlasted for decades.

In 1959, the first bilateral investment treaty (BIT) was concluded between Germany and Pakistan, quickly followed by a wave of other countries signing BITs, including African countries, Central Asia, the Caribbean Islands, and Latin America. In 1962 the UN unanimously passed resolution No. 1803, which provides that "States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources under the Charter of the United Nations and the principles contained in the resolution." (Kilangi, 2016) Increasingly, the BIT subjects the host countries with a myriad of terms and conditions that they must fulfill in order to attract FDIs in their regions, whereas the foreign investors enjoy the protection of their investments in host countries, with little or no obligation whatsoever covered in the BITs. The argument is further elaborated by Salacuse (1990), who contends that the BITs' machinery' sole aim is to "protect foreign nationals' assets against expropriation, transfer of currency abroad, and restrictions on operations in the host states," among others. (Salacuse, 1990) Except for recent BIT models that employ provisions such as Corporate Social Responsibilities (CSR) and a set of rules that make the investment entities accountable for the breach of national laws including human rights, health, and environmental laws.

### ***Rights Guaranteed Under Bilateral Investment Treaties***

Foreign direct investment continues to be an effective platform that amalgamates economic growth and attracts FDI in emerging and developing countries. It has also augmented domestic savings and increased the domestic economy's competitiveness by changing management skills, technology, and growth in infrastructure, productivity gains, employment creation, and economic integration.

In this regard, to compete in attracting FDI, countries with low economic performance strive to facilitate trade and improve the business environment. The BITs act as a catalyst, containing reciprocal undertakings on the facilitation and protection of property rights and investment assets and the multi corporations that invest in the country.

Even when foreign investors abdicate their host countries' obligations, many investment agreements expressly forbid nationalization or confiscation of their properties. The contracts call for prompt payment at market rates in a freely convertible currency that can be transported internationally at the investor's discretion. Other significant privileges enjoyed by foreign investors in host countries include the government's inability to formulate laws and economic policies inconsistent with WTO regulations.

Ultimately, signing BITs' investment agreements marks the critical phase that the government will not undertake double standards against foreign entities' treatments. For instance, the Zanzibar' (a semi-autonomous government in East Africa) Investment promotion and protection Authority Act No. 14 of 2018 Section 33(1) states that "no approved enterprise, approved domestic enterprise or any property belonging to any investor shall be compulsory taken possession of, and no interest in or right over such enterprise or its properties shall be compulsory acquired except under the provisions concerning the payment of reasonable, full and adequate compensation as provided in section 17 of the Zanzibar constitution, 1984". ("Zanzibar Investment Promotion Authority (ZIPA).," 2019)

A particular platform known as an Investor-state dispute settlement was designed to settle down and address investment disputes between the State and the investor. The ISDS uses various trade and investment arrangements to resolve investment-related conflicts.

The privilege that allows foreign companies to sue the State when they are aggrieved by either impos

ing a law or discriminatory practices that appear to impede the profit input or smooth operation of the investment is one of the privileges afforded to foreign investors as outlined in most BITs. The United Nations Centre for International Trade Related Arbitration Law (UNCITRAL) or the International Court for the Settlement of Investment Disputes (ICSID) at the World Bank is usually used as venues for resolving investment disputes. As outlined earlier, that bilateral investment treaty is western designed legal machinery that categorically aims to protect foreign nationals' interests in the host states, so does the ISDS.

Recently, developing countries have been protesting the ISDS provisions and call for reforms to the old BIT model. Currently, "ISDS claims now exceed US\$1 billion, and although the compensation awarded is generally much lower than what is sought, the impact on the public purse can be substantial." For example, international arbitration ruled that the Ecuadorian government pay the Taxeco Company 9.5 billion US dollars for allegedly breaching the contract. ([Unctad.org](http://Unctad.org), 2020)

### ***Bit and Its Down Sides***

Many developing governments have unhesitatingly signed the investment agreements with volition to attracting FDIs to spearhead economic development in their countries. Jennifer I. Tobin & Susan Rose-Ackerman (2006) admits that "BITs' focus is to promote foreign direct investment and developing countries negotiate them as a tactic to attract FDI."(Tobin & Rose-Ackerman, 2011)

Nevertheless, an ambivalence view that the Investor-State BITs model deprives developing countries of their wealth and resources under the pretext of investment, has lately gained momentum. Such adjudication has prompted some nations to revoke their BIT obligations or terminate their BITs entirely, or initiate substantial adjustments to controversial clauses, such as introducing provisions that defend human rights. Ecuador, South Africa, and Indonesia are good examples of those countries that have either left BITs or called for foreign investment assessment in their regions as beneficiaries have rather become the third parties, the lawyers in arbitration tribunal rather than local communities in host states, as Sornarajah (2015) critically contends that "the only economic development the treaties bring is to the arbitrators who interpret these treaties and lawyers of large law firms who represent parties and argue before the arbitral tribunals."(Sornarajah, 2015) The developing countries are on the verge of losing economic benefits due to unwarranted provisions tightened with the investment agreements; hence, the countries have become incapable of moving forward economically with fear of being sued in international investment arbitration tribunals.

### ***The Experiences of Bits in Developing Countries***

From a positive perspective regarding BITs' investor protection clause, it is stipulated that BIT as a necessary mechanism to bar politicization of foreign investments and ensure that the investment receiving countries comply with the treaties' terms and international law's standard principles. The approach is underpinned by "the 2011 European Union parliament that passed a resolution on the future international investment policy, which asserted that investor protection, is to remain the priority of investment agreements."(Sornarajah, 2015)

However, the true meaning and implication of BITs are yet to be fully construed by many developing countries, signatories to the investment agreements. Had the developing countries been aware of the legal and financial repercussions caused by BITs, they could have restrained from signing them. For instance, in 2009, the South African government, through its special "task force" by the department of trade and investment, discovered a "lack of understanding regarding the real nature and consequences of BITs., and a common approach or strategic planning has not guided those negotiations."(Vis-Dunbar, 2009)

While addressing the South African experience concerning BIT, Poulsen (2015) again writes that the South African officials signed BITs without knowing precisely the consequences of the treaties "...we used to call them apple-pie agreements intended to give politicians comfort". (Vis-Dunbar, 2009) One can argue that developing countries' legislatures supposedly were fully aware of the legal constraints embodied in the BITs; they would undoubtedly have been more cautious in signing the BITs.

Recently, many countries protest their obligations towards investment agreement by openly opposing the "BITs' arbitrator discretion," of which arbitrators are vested with powers to decide on cases in their

favor and discretion. Egypt and Columbia are among the living testimonies to BITs' bothersome reality. Central to the painful experience, BIT possesses a very disputing and squabbling clause, an investor-state-dispute settlement clause. Several countries have publicly shown their discontentment and frustration over the allegedly trivialized trend of investment treaties towards the developing countries, which has scared the host countries even to carry out necessary tax and legal reforms, lest the investors would be aggrieved.

India, South Asia's economic powerhouse, has signed several BITs that involve ISDS-clauses; however, its newer BITs are crafted to resolve some problems that have caused catastrophic effects in the investment industries. The exhaustion of local remedies is viewed as a primary guarantee if either party breaches the terms of the treaty and the investor is still not contented with the decisions. Another alternative is to open international arbitration tribunals for litigation after the failure to exploit the local remedies.

On a separate account, various academic papers have revealed that developing countries have introduced tax incentives and various tax exemptions, especially in the mining sector, to attract foreign investors and also attract FDIs. Such incentives are among the terms embodied in the agreement and unfortunately have led governments to lose revenues meant to support countries' socio-economic development programs. Tax incentives have offered multinational companies the ability to flourish like mushrooms and expand their investment empires worldwide, leaving behind the host countries at dire economic dependency. The Bomanai Mining Companies reveals that "Most mining companies operating in the country are currently exempted from payments, including a 30 percent corporate tax and customs duties."([Maryknollogc.org](http://Maryknollogc.org), 2011)

### ***Bits, A Threats to State's Sovereignty***

Article 2 of paragraph 1 of the United Nations' Charter of Economic Rights and Duties of the States provides that "every State has and shall freely exercise full permanent sovereignty, including possession, use, and disposal over all its wealth, natural resources; and economic activities." Moreover, Article 2 paragraph 2(a) confers upon states to "regulate and exercise authority over foreign investment within the national jurisdiction, following national laws and regulations and in conformity with its national objectives and priorities."([Brower & Tepe, 1975](#))

Nonetheless, some BITs deliberately possess contentious survival clauses that render it practically impossible to re-negotiate or unilaterally denounce the investment treaty with immediate effect before reaching the valid deadline as underlined by the agreement. Suffice to say, due to such clauses, BIT's post-termination does not guarantee the end of investment operations unless the clause is silent or states the time limit of validity. Arguably, some clauses endorsed in the treaties contravene with the states' constitutions and even challenge States' obligations as laid down by international law as depicted in the case of "Parkerings-Compagniet AS Vs. the Republic of Lithuania," by and large, illustrates the challenge. The investment arbitration tribunal noted that "the government is free to exercise its natural obligations as it has an undeniable sovereign power and the right to exercise its sovereign legislative powers, to enact, amend or repeal a law at its discretion."([Italaw.com](http://Italaw.com), 2015)

The idea is further supported by the 2017 Ecuadorian Investment Treaties Audit Commission (CAITISA), of which Cecilia (2017) provides that "foreign investments had done so little worth noting, other than failing to deliver the promised foreign direct investment, dramatically undermining the economic and social development plans." Through BITs, investors launched several lawsuits against the Ecuadorian government, of which the World Bank arbitration center ordered Ecuador to pay the American oil company Occidental 2.3 billion dollars. ([Olivet, 2017](#)) From a critical legal perspective, one can conclude that the Investor-State-BIT is a web of intrigue that puts into trial the very framework of statehood and sovereignty underlined by international law.

### ***ISDS, A Cracked House That Needs Renovation***

There is a growing storm concerning trade agreements between countries that involve ISDS provisions. The BITs encompass ISDS as recourse for companies whose investments were taken over, nationalized by the host states. In recent years, ISDS has widely been used much more by foreign cooperation to sue governments for damaging their investments. Some countries do not agree with it and

are questioning its legitimacy. How can a corporate be given so much power to sue the government in foreign arbitration tribunals?

Chief Justice Roberts (2014) of the US Supreme Court wrote that by “consenting to investment arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary.”(Italaw.com, n.d.) It must be comprehended that, the investor-state dispute settlement is a collaborative process established by the Contracting Parties to settle investment conflicts between the investor and the host developing country to ensure that the injured party receives a rightful award. Usually, the parties to the treaty come to terms; if one party fails to fulfill the obligations rendered binding by the BIT, the other party may sue the party who has violated the terms of that treaty. International investors consider BIT as an indemnity and essential mechanism that, in principle, aimed at mitigating the robust draconian administrative decisions and the risk of politicizing the investment regime.

Most investment dispute awards by the International Tribunals have sparked complaints and prompted many countries to re-think another model that will be transparent, manageable and that assures mutual benefit for investors and host states. Other countries have walked away from BITs and have developed their models to attract FDI. South Africa openly protested the old BIT generation. It submitted “ISDS reforms” to UNCITRAL in 2019, along with other developing countries, underpinning the need for future ISDS to recognize the security of human rights, public health, and the environment as essential qualities of democratic and accountable governments.

South African government further objected that the Investor-State Disputes Settlement should begin at domestic courts followed by “the exhaustion of local remedies before turning to international arbitration as a meaningful gesture towards a successful and efficient BITs regime.”(Chidede, 2019) The recommendations address various aspects of the ISDS, such as the fairness, consistency, predictability, and accuracy of arbitral decisions, the avoidance of multiple proceedings in separate arbitral institutions for the same argument, the establishment of a binding code of ethics for arbitrators and other stakeholders in the ISDS scheme to ensure accountability and prevent conflicts of interest, the appointment of arbitrators and other stakeholders in the ISDS scheme”.

The uproar investigates the expenditures of arbitration administration, the neutrality of the arbitrator, and the transparency of the overall dispute resolution machinery.(Chidede, 2019)

The awards that tribunals decide in favor of the foreign investors have always left financial scars against the developing host countries that take quite some time to heal. The “ISDS case no. ARB/06/11 will suffice to support this argument which covers the Occidental Petroleum Corporation and the Vs. Republic of Ecuador. ARB/06/11”. The government of Ecuador is accused of having caused damage by the “violation of the participation contract,” the tribunal decided that the government pays the plaintiff “US\$1,769,625,000 billion.”(Iisd.org, 2013)

### ***The Bit and the Lesson for the Developing Countries***

Undisputed scholarly writings have proved that BITs have not attracted or promulgated ample FDIs in developing countries as anticipated before. The fact is clearly articulated in the ICDID Case No. ARB/09/1, of which three companies sued the Argentinian government for illegal expropriation, also failed to tender with “fair and equitable treatment” as ordained by the treaty. The tribunal found the government responsible for violating the treaty and therefore ordered it to pay USD320 million.

Recently, on similar account, the Tanzanian authorities barred the “exportation of gold and copper concentrate” by foreign companies, a move expounded by many people to be inclining towards resource nationalization. The introduction of these laws comes when there are speculations that foreign companies in the mining sector illegally export mine extract. Barrick Gold and Acacia Mining have evaded paying the due tax for a long time, which has deprived Tanzania’s government of royalties worth billions of American dollars annually. (Ethics., 2018)

Intuitively, the recent development of new generation BITs among developed; and developing countries seem credible because they stick to the international laws and avoid compromising either one’s national sovereignties. Morocco has recently improved its BIT model by carefully reshaping the “Equal and Equitable Treatment (FET),” a contentious provision that foreign investors have long violated.

Article 6 of Moroccan BIT has set out obligations, “the breach of which would constitute FET’s violation.”

Furthermore, in its Model BIT, the accredited example of a well-designed BIT is between Morocco and Nigeria, signed in 2016 has emphasized that “sustainable development” is the central component of the investment regime. (Iisd.org, 2020) The Moroccan-Nigerian BIT has shown a tremendous capacity to promote countries’ best interests relative to Western-dominated BITs. Among the very striking features embodied in the Morocco-Nigerian BIT is that “investment must contribute to the sustainable development of the two countries and an investor must take steps to make “full feasible contributions to the host country and local community’s sustainable development.” Such commitments incorporated in this legal document ushers a new horizon of hope, guarantees, and a bright future ahead of economic development amongst contracting parties and mirrors other developing countries’ cling onto similar model BIT.

Another BIT model carefully crafted is that of a Latin American country, Brazil. On several occasions, the country’s National Congress was hesitant to ratify the traditional BITs, arguing the need to safeguard countries’ interests over those of investors. This led Brazil to create its BIT model version, the “Cooperation and Facilitation Investment Agreement” model (CFIA). The CFIA has won global attention as the successful alternative to BITs. Brazil has about 27 CFIA, but with higher FDIs than other countries with multiple BITs; Contrary to conventional BITs, which aim to protect foreign investors’ interests first, the CIFAs mainly concentrate on collaboration and investment facilitation. (Iisd.org, 2015)

On the other hand, the Indian government has extended its recent modified investment proposal on a “joint Interpretative statement” to its 25 existing traditional BITs counterparts, consisting of clarification of a protective clause that allows the investors to sue the government in international arbitration tribunals. The JIS inquires that for an investing entity to sue the State, it must first “show that it has suffered actual and non-speculative damages as a direct and foreseeable of the breach and that its claims are ripe for adjudication under the BIT.”(Iisd.org., 2016) India does not walk away from BITs but instead aims to reshape the conventional BITs that either way appears to lose its credibility on the global stage. The modified Indian model BIT attempts to foster favorable business relations in friendly win-win business ties with other stakeholders.

### ***The Paradox of Bits in Developing Countries and the Way Forward***

Many states have now come to terms with the reality that BIT needs reforms, with particular emphasis on questionable provisions such as survival and ISDS clauses, frequently excoriated to weaken states’ sovereignties and prohibit governments from enforcing their legitimate public-policy obligations. Despite the developing countries’ desperation to address the social and economic challenges, yet, engaging in a BIT with inclusive and fair characteristics should be the prerequisite to sign the agreement. It is an eye opening fact to note that the people of a given host state must be informed of the issues that concern their countries’ investment dispute settlement. They have the right to be acquainted with the dispute proceeding, the procedures, and any related matters relating to the subject at hand. So how do the developing countries get out of this predicament? The host states must develop national justice systems that are transparent, reliable, predictable, and accountable in the absolute sense of fairness. Such an endeavor will guarantee “just outcomes” to the disputants and reflect the eminence in resolving investment disputes and abiding by international laws.

On the contrary, the absence of such a fundamental legal framework would certainly disregard investors’ confidence in national, local investment arbitrations instead of pushing them to turn their backs on international arbitration tribunals, the exasperated ones of developed countries. Another integral approach towards investment dispute is establishing a regional version of “BITs” like that of the European Union, which dictates and prioritizes the block’s public and economic interests in harmony with national laws, security, and the member states’ sovereignty in mining and natural resources. The approach is in the realm of possibility if the member countries have a good political will and agree to work together to mitigate the number of ISDS claims, which have been a colossal blow to the economic welfare of countries with low economies.

On another account, Guzman (1998) wonders, should the developing countries stand together as one

solid body, could have ripped more benefits, and saved them on gaining what they stood for, instead of that proceeding forth as individuals Countries against powerful capitalist nations. Andrew Guzman reiterated that developing countries as a group have sufficient market power in the “sell” of their resources that they stand to gain more when they act collectively; than when they compete against one another.” (Guzman, 1997)

The developing countries’ lack of coordinated-investment approach and collective efforts to establish a legal-regional binding BIT model, that in essence could help these countries to maintain balance between the investors’ interests vis-à-vis host states’ interests. Additionally, the suggested BIT model could curtail investment related-disputes that have caused undesirable outcomes in investment fraternity.

### **III. CONCLUSION**

Signing BITs signifies the readiness and the host state’s commitments towards respecting and protecting cross-border investors’ interests in the territory. However, recently BIT has become an epitome of complaints and discontentment, among host countries, that are the signatories to BITs, due to lack of proper, legal and economic technicalities tied with BIT. Therefore, the results is that, many developing host countries have fallen victims of pecuniary penalties worth millions to billions of American dollars that the foreign investors are being awarded by the arbitrary tribunals. In addition, controversial BITs’ provisions such as Most Favored Nations, Equal and Equitable Treatment, ISDS, stabilization clauses and the right for the foreign investors to sue the host governments in international arbitrary tribunals has daunted the developing countries, hence they become impuissant, tapped out and susceptible to harsh economic conditions that ultimately have crashed the ambitions of developing countries to revive their economies. The lack of consistency, transparency, and accuracy in arbitral decisions has angered many developing host countries, labeling it a biased tool.

Recent Ecuadorian Investment Treaties Audit Commission of 2017 (Olivet, 2017) has, among other things, proved beyond reasonable doubt that BIT bereaves host countries of their statehood, as well as undermining the socio-economic sustainable development endeavors.

The developing countries need BITs that do not grant foreign investors exorbitant immunity and power to denigrate the countries’ national legal systems, endangering the national security and or disdain countries’ economic and development initiatives. Likewise, the recent new wave of BIT models such as Morocco-Nigeria BIT or the massive termination of BITs as in case of Tanzania, South Africa, and Indonesia among others clearly indicates the growing grave concern of dissatisfaction with relation to BITs’ provisions that have downplayed the developing economies.

From the above results, a radical shift in developing countries’ investment regimes is of utmost importance. First and foremost, placing the nation’s interests as a prerequisite of signing the Investment contract or during the BIT negotiating process will set aside an ingrained suspicion that the BITs have neo-colonial ambitions to intimidate developing countries’ strategic development initiatives. Given the prevalence of investment disputes involving Investor-State BIT and the impracticality of terms and definitions relevant to BIT, it is a prime time for developing countries to establish a task force to conduct comprehensive risk assessments on evaluating the benefits and drawbacks of BIT.

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