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## **Standards for the Protection of Foreign Investments in Bilateral Investment Agreements and their Implementation in the Legal Systems of Developing Countries**

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### **ABSTRACT**

The author examines the impact of bilateral investment agreements (BIT) on the protection of foreign investments and the balance of interests between states and investors. The article analyzes the different approaches of developing countries such as India and Indonesia to the formulation of BIT, which are aimed at protecting state sovereignty and sustainable economic development while attracting foreign investment. Key elements of BIT are examined, such as dispute resolution mechanisms, fair treatment guarantees and limits on expropriation, as well as challenges associated with protecting investor rights and preserving the scope for national regulation in strategic areas.

**Keywords:** Bilateral Investment Treaties (BIT), Investment Protection, ISDS, Fair and Equitable Treatment (FET), Most Favored Nation (MFN), Expropriation, Government Regulation, Investment Guarantees, Developing Countries, Economic Development.

Foreign direct investment continues to grow rapidly around the world. However, many multinational corporations investing these funds may not be aware of the meaning and legal protections provided by the large number of international agreements known to us as BITs (bilateral investment treaties). BITs not only require host countries to guarantee certain protections for foreign investments, but also provide investors with legal tools to sue the host state if it fails to meet its obligations. While in most countries BITs involve the protection of investor rights, including protection from expropriation, the obligation to ensure fair and equitable treatment and access to investor-state dispute settlement (ISDS) mechanisms, the balance between ensuring investor rights and preserving the sovereignty of host countries becomes an important consideration. In recent years, many states, including developing ones, have begun to reconsider their approaches to these agreements, introducing exceptions and clarifications aimed at protecting state regulatory rights. These changes reflect the desire of developing countries to adapt BITs to their domestic needs and interests, ensuring the

sustainability of economic development while attracting foreign investment. It is important to consider how BITs, including their key provisions and protections, can impact the relationship between investors and host countries, and how states can use these agreements to encourage long-term and responsible investment flows. One of the key guarantees provided by the BIT is to provide foreign investors with rights similar to those of local businesses and other foreign investors. According to the BIT, foreign companies are required to receive the same favorable treatment as their local competitors.

This means that investors can expect protection from discrimination when it comes to national or MFN treatment. These regimes provide foreign investors with a level playing field in doing business, giving them the same rights and benefits as domestic companies, or the best of the terms afforded to other foreign investors. For example, Article 3 of the BIT between Uzbekistan and the Russian Federation states that investments from foreign investors will receive no less favorable treatment than investments from local or third countries. This MFN "most favored nation" principle allows investors to receive conditions equal to those provided to other investors, including tax benefits, legal privileges or other forms of support. This formulation is quite common in other BITs [1].

However, in practice their implementation faces problems: formal equality does not always mean real equality (local businesses may receive hidden support), investors abuse MFN for "negotiated shopping" (choosing the most profitable agreement through third countries, as in the case of *Maffezini v. Spain*), and states face restrictions on their regulatory space when even neutral laws (such as environmental ones) are challenged as discriminatory, requiring more detailed exceptions in BITs to maintain a balance between investment protection and host country sovereignty [2]. An important aspect of protecting foreign investment is limiting the rights of host governments to conduct expropriation. BITs place clear restrictions on this process, ensuring that expropriation can only take place in accordance with international law. This means that the expropriation must be carried out in the public interest, in a non-discriminatory manner, subject to due process of law and mandatory provision of "prompt, adequate and effective compensation". However, the term "expropriation" is not limited to the physical seizure of property. In a broader sense, expropriation can include various measures that may deprive an investor of the economic value of his investment, such as regulations or acts aimed at restricting or changing the conditions of business. This extension of the term avoids abuse by government agencies and prevents situations in which investors may be forced to relinquish their rights to an investment without proper redress. Bilateral investment protection agreements also provide additional guarantees aimed at ensuring fair treatment of foreign investors. Host countries are committed to providing "fair and equitable treatment" (FET) to foreign investments, which means that government authorities cannot discriminate or carry out arbitrary actions against foreign investors. It also establishes a guarantee of "full protection and security" (FPS), which means the obligation of states to take measures to protect investors from illegal actions of third parties, such as vandalism, violence or other forms of rights violations. In addition, BITs include obligations aimed at preventing arbitrary or discriminatory decisions. Such guarantees help create a stable legal environment for foreign investors and reduce risks associated with political instability or unpredictability of government decisions. One of the most important features provided by BIT is to ensure the right of foreign investors to transfer funds to and from the host country without delay and at market exchange rates. This includes investment-related transfers such as liquidation proceeds, interest, repatriated profits, as well as additional funds contributed by the investor after the initial investment. The right to freely transfer funds promotes a predictable financial environment by allowing investors to move capital in accordance with market conditions without undue restrictions.

In addition, BITs limit the ability of host governments to impose measures that could disrupt international trade. For example, requirements such as local content or export quotas are often prohibited under agreements.

Such measures may distort market competition and create undue barriers for foreign investors, limiting their ability to acquire needed inputs or sell products in local markets. Thus, BITs provide foreign investors with freedom in matters of import and export of goods and services, which is important for their successful activities in foreign markets [3].

In the national legislations of developing countries, BIT standards often receive an asymmetrical implementation - formally enshrining the above principles (prohibition of expropriation, FET, FPS, etc.), but allowing for variability in implementation mechanisms.

This is observed in the specific wording of exceptions, the procedure for resolving disputes and the interpretation of key concepts, which reflects an attempt to adapt universal norms to local economic and legal realities.

Given this dichotomy, it is advisable to consider the evolution of approaches to the design of investment guarantees within the framework of national BIT models, where the example of one of the largest developing economies, which has radically revised its contractual practice in response to the challenges of globalization, is especially instructive. Thus, India's new BIT model, published in 2015, contains many different innovative provisions, including the removal of the Most Favored Nation (MFN) clause, the basic standard of protection in international investment agreements. In turn, replacing the fair and equitable treatment (FET) standard with a specific list of government obligations, and the introduction of broad exclusionary clauses and an explicit section on investor responsibilities, complemented by provisions on corporate social responsibility and compliance with host state laws, reflecting India's desire to strengthen controls over foreign investment and balance investor rights with government interests [4].

Thus, the 2015 BIT reform significantly strengthened the regulatory capabilities of the Indian government. By introducing broad exceptions and specifying state obligations, the authorities received freedom of action in implementing key socio-economic programs [7].

This is important in strategic areas such as environmental policy, labor relations and consumer protection, where previously the threat of investment claims through the ISDS mechanism could deter necessary reforms.

On the one hand, the new BIT model contributed to the influx of more responsible investors focused on long-term partnerships. Large multinational corporations, especially in the high-tech sectors, have welcomed the clear requirements for compliance with local legislation and revised standards.

In turn, this served for more stable investment cooperation, where both parties - the investor [8] and the host country - have clear mutual obligations.

On the other hand, the reform has caused concern among some traditional foreign investors, especially in industries requiring large capital investments. The reduction in the level of protection through the abandonment of the MFN and FET standards, as well as restrictions on the ISDS mechanism, led to a temporary reduction in investment flows in some sectors. Many investors demanded additional guarantees and a transition period to adapt to the new rules of the game, which affected the dynamics of investments in the first years after the reform [5].

Indonesia, in turn, in its model Bilateral Investment Treaty (BIT), which includes broad exclusion clauses and clarifications aimed at protecting the state's right to regulate [8]. According to UNCTAD, the BIT model will also contain a definition of "investment" based on the Salini test, which requires the investment to contribute to the development of the host state. In addition, an Investor-State Dispute Settlement (ISDS) mechanism will be included, but its use will only be possible with the specific consent of the host state [6].

The Indonesian model of a bilateral investment agreement shows a more balanced approach between protecting the interests of the state and ensuring attractiveness for investors compared to the Indian model.

Including clear exceptions and clarifications aimed at protecting the state's right to regulate allows Indonesia to maintain sovereignty in strategically important areas.

Defining "investment" based on the Salini test, which requires contribution to the economic development of the host state, risk-taking by the investor and the investment itself, allows Indonesia to focus on attracting investment that contributes to sustainable development. This limits the ability to bring claims on minor or speculative investments, reducing the risk of investor abuse.

However, the very basis for taking the Salini test for the BIT model as a basis remains controversial. Indian experience shows that an overly protectionist approach can discourage potential investors. To attract investment, it is necessary to create a BIT model that provides sufficient protection of investor rights, including clearly defined fair and equitable treatment (FET) and most favored nation (MFN) standards[9], while preserving the government's right to regulate in the public interest[10]. In the context of global competition for investment, developing countries need to build a contractual policy in the field of BIT, taking into account both international standards for investor protection and domestic development priorities.

Universal application of Most Favored Nation (MFN), Fair and Equitable Treatment (FET) standards, and smooth transfer guarantees can enhance investment attractiveness. Particular attention should be paid to dispute resolution mechanisms when developing BIT[10]. Developing countries often face situations where investment arbitration is used to the detriment of public interests, especially in the areas of environmental protection.

To minimize such risks, it is necessary to either provide for mandatory prior recourse to national courts, or include provisions for prior consent to the use of ISDS, as implemented in the Indonesian model.

Thus, developing countries should strive not so much for a quantitative expansion of the BIT network, but rather for a qualitative revision of their content. The investment agreement model should aim to achieve a real balance between the need to attract foreign investment and preserve space for national regulation.

The introduction of flexible but clearly structured norms, exceptions and procedures will make it possible to build a system capable of ensuring sustainable economic development without compromising state sovereignty and public interests.

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