BIISS JOURNAL, VOL. 46, NO. 2, APRIL 2025: 221-246
DOI: https://www.doi.org/10.56888/BIISSj2025V46n2a4
ISSN: 1010-9536 (Print)

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REVISITING BANGLADESH'S BITS: INSIGHTS FROM INTERNATIONAL INVESTMENT LAW AND COMPARATIVE GLOBAL PRACTICES

Abstract

As states are increasingly revising their Bilateral Investment Treaties (BITs) to align with modern priorities, significant challenges arise. Terminating outdated treaties alone do not relieve states from obligations under international law, and 'survival clause' often extends commitments. Revising and renegotiating BITs also requires a thorough cost-benefit analysis, while model BITs frequently fail to address structural imbalances between negotiating parties. This article focuses on strategies Bangladesh can adopt in transitioning from older BITs to contemporary frameworks, drawing insights from global practices. Examining case studies of countries like Venezuela, Ecuador, India, and Brazil, the article highlights the varied approaches states implement, ranging from unilateral termination, withdrawal from dispute settlement mechanisms to adopt model BITs. These experiences underscore that there is no universal solution for modernising BITs. Effective reform depends on tailoring strategies to each state's unique domestic context while ensuring the legality, sustainability, and balance of investment frameworks. In the context of Bangladesh, where most existing BITs are outdated and expose the state to potential arbitration risks, a context-specific approach is imperative. Reform efforts must balance the need to attract foreign direct investment with safeguarding regulatory autonomy and promoting national development priorities. The article concludes that Bangladesh can benefit from lessons in international investment law by crafting a revised BIT framework that reflects its socio-economic realities and aligns with the evolving global landscape of investment governance.

Keywords: Bangladeshi BITs, International Investment Agreements, FDI, BIT Reform, Model BITs.

1. Introduction

'Globalization can be very unjust and unfair and unequal, but these are matters under our control. It's not that we don't need the market economy. We need it. But the market economy should not have priority or dominance over other institutions.'

Amartya Sen (2011)

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Interestingly, this remark on globalisation almost sums up the phase of critical introspection that the International Investment Law (IIL) regime is going through, with states and scholars questioning its fairness, balance, and sustainability.[1] This legitimacy crisis stems from the expansive substantive rights granted to foreign investors through International Investment Agreements (IIAs), enforced through Investor-State-Dispute-Settlement (ISDS) mechanisms.[2] These treaties, once seen as tools to attract Foreign Direct Investment (FDI), are now criticised for undermining state sovereignty and prioritising investor interests over public welfare.[3] The growing volume of investment arbitration cases has exposed the flaws in many older IIAs. States increasingly find themselves defending domestic policies before international arbitral tribunals, often facing significant financial penalties for actions they consider lawful under their sovereign jurisdiction.[4] This tension between investor protections and regulatory autonomy has led to a 'return of the state where countries seek to reassert control over their investment treaty frameworks'.[5] The backlash against IIAs, however, is neither uniform nor monolithic.[6] States differ in their motivations and strategies, shaped by economic, political, and institutional factors, as well as their experiences with the international investment regime.

Bangladesh, as a signatory to multiple old generation Bilateral Investment Treaties (BITs), can potentially fall into a similar dilemma. Many of its agreements were signed decades ago, the latest being signed nine years back, in 2016 and reflect outdated priorities, leaving the country vulnerable to arbitration risks and regulatory constraints.[7] At the same time, these treaties often fail to address contemporary policy considerations, such as sustainable development, environmental protection, public health, labour standards and human rights.[8] Thus, Bangladesh's BIT framework does

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[1] Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin, *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010).

[2] Malcolm Langford, "Cosmopolitan Competition: The Case of International Investment," in *Cosmpolitan Justice and Its Discontents*, ed. Cecilia Bailliet and Katja Aas (Routledge, 2011), 178.

[3] Lauge N. Skovgaard Poulsen and Emma Aisbett, "When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning," *World Politics* 65, no. 2 (2013): 273-313, https://doi.org/10.1017/S0043887113000063.

[4] David Collins, "Loss Aversion Bias or Fear of Missing Out: A Behavioral Economics Analysis of Compensation in Investor–State Dispute Settlement," *Journal of International Dispute Settlement* 8, no. 3 (2016): 460–482, https://doi.org/10.1093/jnlids/idw024.

[5] José E. Alvarez, "The Return of the State," *Minnesota Journal of International Law* 20 (2011): 223-264, https://scholarship.law.umn.edu/mjil/268.

[6] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017).

[7] Wolfgang Alschner and Dmitriy Skougarevskiy, "Mapping the Universe of International Investment Agreements," *Journal of International Economic Law* 19, no. 3 (2016): 561–588, https://doi.org/10.1093/jiel/jgw056.

[8] Rumana Islam and Shahrima Tanjin Arni, "Climate Change Considerations in International Investment Law: The Case for Bangladesh," in *International Law, Climate Change and Bangladesh*, ed. Mahtab Uddin (Springer, 2025), 221.

not reflect the changing landscape of policy priorities over the years. Revisiting these treaties offers Bangladesh an opportunity to recalibrate the balance between attracting FDI and preserving its policy space to regulate in the public interest.

Drawing on global practices, this article follows a case-study method among the developing countries to meet the stated objective of the study. It explores two sets of case studies. The first set will investigate exit policies of states (Ecuador and Venezuela) which have radically denounced or declared to denounce their obligations under BITs through 'termination'. These cases are selected to highlight the legal, economic, and diplomatic consequences of abrupt exits from the BIT regime, providing insight into the risks and motivations behind such decisions. The second set will explore states (India and Brazil) that have taken a more hybrid approach of revisiting the BIT regime by terminating older BITs and negotiating new ones based on a 'reform' model. These are chosen to illustrate how states can recalibrate their investment treaty policies without fully disengaging from the international investment system. The selection of these two sets of case studies is strategic in analysing developing countries' diverse approaches to reforming BITs, as these countries, like Bangladesh, are majorly FDI receiving host states. Ecuador terminated all its BITs between 2008 and 2017 and Venezuela withdrew from the International Centre for Settlement of Investment Disputes (ICSID) in 2012, reflecting scepticism towards international arbitration. Conversely, India and Brazil have adopted reformist approaches; India terminated outdated BITs and is renegotiating new ones based on a new model, while Brazil maintains a stance against BITs with ISDS provisions, yet continues to attract FDI with alternative agreements. These nations exemplify unique strategies providing a comprehensive understanding of the implications and outcomes associated with each approach, allowing for a longitudinal analysis that informs balanced and pragmatic policy recommendations.

This article does not aim to address the broader legitimacy crisis within the international investment regime but focuses instead on the practical strategies states employ to transition from older IIAs to contemporary agreements. The objective of this study is to examine how states like Bangladesh can navigate the complexities of BIT reform. Having an introduction, the second section details the global debate surrounding BITs and their enforcement mechanisms, highlighting the complexities and criticisms of these agreements. The next section focuses on the termination of BITs under international law, addressing termination both under treaty terms and in accordance with the Vienna Convention on the Law of Treaties (VCLT), including issues like the survival clause. The article then delves into case studies, starting with the revision of BITs through model BITs and alternative agreements. The next case studies discuss the withdrawal from BITs and dispute settlement mechanisms like

ICSID. The sixth section examines the past, present, and future of Bangladesh's BITs, discussing the country's current investment treaty landscape and potential avenues for reform. The article then draws lessons from these case studies, offering valuable insights for Bangladesh. It concludes by summarising key findings and suggesting how Bangladesh can adapt its BIT policy to better serve its developmental needs while remaining an attractive destination for FDI. By understanding the diverse responses of states to the international investment regime's challenges, the article argues that Bangladesh can craft a more balanced, sustainable, and context-specific approach to revise its BIT framework.

2. Literature Review: Debate on Enforcement and Termination of BITs

The evolution of international legal institutions reflects a gradual shift from coexistence among states to active cooperation, driven by the increasing 'legalisation of world politics'.[9] This transition is marked by the proliferation of treaties, the inclusion of diverse actors under international law, and innovative mechanisms for resolving disputes.[10] In the context of foreign investment, these developments are particularly pronounced. IIA consists of a dense network of over 3,500 BITs, Free Trade Agreements (FTAs), and customary international law.[11] Initially, these instruments aimed to protect foreign investments, particularly in developing countries, from risks such as expropriation.[12] However, as BITs expanded, criticism emerged regarding their implications for state sovereignty and regulatory autonomy.

2.1 *Criticisms Against Enforcement Mechanism*

BITs, while supplementing domestic legal protections, often bypass the host country's judicial systems. They typically provide guarantees such as Fair and Equitable Treatment (FET) and Most-Favored-Nation (MFN) Treatment, along with robust investor-state dispute settlement (ISDS) mechanisms. These mechanisms allow foreign investors to directly bring claims against states before international arbitration panels, often bypassing local remedies. Arbitration tribunals, empowered to award significant monetary compensation for treaty breaches, have drawn criticism

[9] Thomas Gammeltoft-Hansen and Tanja Aalberts, "The Changing Practices of International Law," in *The Changing Practices of International* Law, ed. Tanja Aalberts and Thomas Gammeltoft-Hansen (Cambridge University Press, 2018), 1.

[10] Malcolm Langford, Daniel Behn and Ole Kristian Fauchald, "Backlash and State Strategies in International Investment Law," in *The Changing Practices of International Law*, ed. Tanja Aalberts and Thomas Gammeltoft-Hansen (Cambridge University Press, 2018), 70.

[11] Investment Policy Hub, *IIA Mapping Project* (UNCTAD, 2017), https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping#iiaInnerMenu.

[12] Kenneth J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty," *American Journal of International Law* 92, no. 4(1998): 621–641, https://doi.org/10.2307/2998126.

for the expansive privileges granted to foreign investors compared to other private actors.[13]

Disputes under BITs have historically involved claims of state misconduct, such as expropriation, or challenges to regulatory measures perceived as oppressive by foreign investors. Initially hailed as tools for signalling openness to foreign investment, BITs soon faced backlash as arbitration claims surged. Prominent cases involving big corporations like British Petroleum and Siemens exposed states, particularly in the Global South, to expensive litigation and the risk of enforcing arbitral awards through asset seizures.[14] Consequently, the rapid adoption of BITs slowed, as states became aware of their financial and regulatory risks. Scholars like Poulsen and Aisbett argue that many countries underestimated the high-impact costs associated with BITs when signing these treaties, viewing them as low-risk commitments at the time.[15]

The backlash was further fueled by the ISDS system. While institutions like the World Bank's International Centre for Settlement of Investment Disputes (ICSID) at least ensure some transparency, many arbitration cases outside ICSID remain confidential. The PluriCourts Investment Treaty Arbitration Database documents over 850 known investment treaty arbitrations, with numerous others undisclosed.[16] These mechanisms have allowed private entities to directly challenge state policies, often leading to substantial compensation awards, even for measures deemed legitimate exercises of state sovereignty.

This growing dissatisfaction with BITs has led to what Waibel et al. describe as a 'legitimacy crisis'.[17] The regime is increasingly criticised for the imbalance between extensive investor rights and the sovereign authority of states to regulate in the public interest. In response, many states have sought to reassert their regulatory autonomy. Efforts to reclaim sovereignty have included terminating or renegotiating treaties, narrowing the scope of investor rights, and reforming domestic laws. While some states have withdrawn from the system entirely, most pursue incremental reforms

[13] Beth A. Simmons, "Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment," *World Politics* 66, no. 1 (2014): 12–46, https://doi.org/10.1017/S0043887113000312.

[14] Anne van Aaken, "The International Investment Protection Regime through the Lens of Economic Theory," in *The Backlash against Investment Arbitration*: *Perception & Reality*, ed. Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balcin (Kluwer Law International, 2010).

[15] Bonnitcha, Poulsen and Waibel, *The Political Economy of the Investment*.

[16] "PluriCourts Investment Treaty Arbitration Database," PITAD, accessed January 1, 2025, https://pitad.org/index#welcome.

[17] Waibel et al., *The Backlash against Investment.*

shaped by their economic priorities, diplomatic strategies, and ideological orientations.

This delicate balancing act underscores the evolving nature of the international investment regime. It highlights the persistent tension between the goals of global governance and the need to preserve national sovereignty, as states navigate overlapping legal frameworks and fragmented jurisdictions to protect their regulatory space while maintaining their commitments to international law.

2.2 *Discourse on BIT Termination Under International Law*

2.2.1 Termination Under Treaty Terms

Most IIAs, including BITs, do not have fixed end dates and are designed to remain effective indefinitely. However, they typically allow a party to terminate the treaty by providing a notice of termination. According to a UNCTAD study on BITs between 1995 and 2005, these treaties often include an initial protection period (or shelf life) of 10 to 15 years.[18] For instance, the 2012 US Model BIT exemplifies this. After this initial term, many BITs are renewed automatically for another fixed term unless one party chooses to terminate during a short window, often six months before the first term ends.[19] The Dutch Model BIT illustrates this approach, with automatic renewal for five years unless terminated during the designated window. Approximately 20% of BITs mapped by UNCTAD include such 'tacit renewal' clauses.[20]

In other cases, IIAs allow termination after a designated period, requiring only a formal notice. The Canadian model FIPA (2021), for example, allows termination through written notice with a one-year notice period. Around 60% of BITs reviewed by UNCTAD include this 'fixed-term termination' clause. The Indian Model BIT (2015) diverges from the default practice by requiring explicit written agreement between the parties for renewal after 10 years. This design benefits states by allowing them to avoid potential investor claims after the treaty's initial term without triggering sunset clauses. For instance, the Brazil-India BIT (2020) permits unilateral termination with a one-year notice after it enters into force, allowing states to exit treaty obligations efficiently.

[18] Investment Policy Hub, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (UNCATD, 2007), https://unctad.org/system/files/official-document/iteiia20065en.pdf.

[19] Nathalie Bernasconi-Osterwalder, Sarah Brewin, Suzy H. Nikièma and Martin Dietrich Brauch, *Terminating a Bilateral Investment Treaty* (International Institute For Sustainable Development, 2020), https://www.iisd.org/publications/guide/iisd-best-practices-series-terminating-bilateral-investment-treaty.

[20] Investment Policy Hub, *IIA Issues Note: Phase 2 of IIA Reform* (UNCTAD, 2017), https://investmentpolicy.unctad.org/publications/173/iia-issues-note-phase-2-of-iia-reform.

Additionally, some IIAs feature amendment clauses, enabling parties to assess and update the treaty. For example, the Colombia-United States Trade Promotion Agreement (2012) allows amendments to enhance the treaty. However, even with termination or modification, parties must comply with sunset/survival clauses that may extend treaty obligations for a specified period after termination.

2.2.2 The Conundrum of 'Survival Clause'

A survival clause ensures that rights and obligations regarding investments made before the treaty's termination remain effective for a defined period, typically 5 to 20 years. For instance, the Colombia-France BIT (2014) provides a 5-year survival clause, while the Kuwait-Mauritius BIT (2013) extends it to 20 years. This clause builds investor trust by protecting investments from sudden or arbitrary state actions.[21] For example, in *Yukos v. Russian Federation* (2014), the tribunal ruled that investments made before Russia's withdrawal from the Energy Charter Treaty (ECT) would remain protected for 20 years. Although unilateral termination of a BIT is often permitted, states cannot unilaterally neutralise the survival clause. As Reinisch and Fallah explain,[22] most BITs design survival clauses to extend treaty protections after termination. To neutralize these clauses, states must negotiate mutual consent. Scholars like Lavopa et al. (2012) describe survival clauses as the 'immune system' of BITs, ensuring ongoing protection for investors.[23]

The legal complexity arises from differing tribunal interpretations. In *Jan de Nul NV and Dredging International NV v. Egypt* (2006), the tribunal held that survival clauses could not be neutralised even by mutual agreement. However, in *Mohamed Abdel Raouf Bahgat v. Egypt* (2017), it was suggested that mutual consent between states can override survival clauses. Ultimately, the wording of the survival clause and adherence to general treaty law, such as Articles 54 and 70 of the Vienna Convention on the Law of Treaties (VCLT), determine whether mutual consent can neutralise such clauses.

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[21] Gisela Bolívar, "The Effect of Survival and Withdrawal Clauses in Investment Treaties: Protection of Investments in Latin America," in *Regionalism in International Investment* Law, ed. Leon Trakman and Nicola Ranieri (Oxford Academic, 2014), 175.

[22] August Reinisch and Sara Mansour Fallah, "Post-Termination Responsibility of States? The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors," *ICSID Review - Foreign Investment Law Journal* 37, no. 1-2 (2022): 101-120, https://doi.org/10.1093/icsidreview/siab023.

[23] Lavopa, Federico and Barreiros, "How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties," SIEL 3rd Biennial Global Conference, July 9, 2012.

2.2.3 Termination Not in Accordance with Treaty Terms

Outside treaty terms, a party seeking to terminate a BIT may either do so unilaterally or through mutual agreement, depending on the circumstances. In most cases, parties must wait for the initial fixed period of the treaty to lapse. Certain BITs, such as the Rwanda-USA BIT (2008), permit unilateral termination by giving the required notice. In absence of specific treaty provisions, Article 56 of the VCLT governs such situations. It allows denunciation or withdrawal only if the parties intended to permit it or if the treaty's nature implies such a right. States may also issue a termination notice while proposing negotiations for a new BIT. This approach allows the terminating state to prepare for negotiations during the post-termination period, ensuring discussions proceed without urgency or pressure.[24] However, there is no binding obligation to finalise a new BIT. If negotiations fail or are abandoned, Johnson (2017) warns that addressing the implications of the survival clause may become more difficult.[25]

In contrast, a BIT can be terminated at any time through mutual agreement under conditions set by the parties.[26] Mutual termination allows states to negotiate a new BIT or modify the survival clause of the terminated BIT, shortening or neutralising it, or both. According to UNCTAD (2017), among 212 BITs terminated by March 2017, 9% were mutually terminated without negotiating a replacement, 28% were unilaterally terminated without a replacement, and 63% were replaced with new treaties.[27] The authority to terminate by mutual agreement is established in customary international law, reflected in Article 54(b) of the VCLT. The International Law Commission (ILC) clarified in its commentary on VCLT draft articles that regardless of a treaty's termination provisions, parties may always agree to end it by mutual consent.[28]As Oppenheim stated, even treaties set for indefinite or fixed durations can be dissolved by mutual agreement.[29]

A practical approach to mutual termination is negotiating a new BIT that explicitly terminates the old one. This method is especially relevant when mutual agreement is the only feasible option due to restrictive termination clauses in the

[24] M. Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000), 118.
[25] Emma Johnson, "Is the sun setting on BITs?" *Ashurst*, December 18, 2017, https://www.ashurst.com/en/news-and-insights/legal-updates/is-the-sun-setting-on-bits/.
[26] Lassa Oppenheim, *International Law: A Treatise* (Green & Co, 1912), 362-64.
[27] Bernasconi-Osterwalder, Brewin, Nikièma and Brauch, *Terminating a Bilateral Investment Treaty*.
[28] International Law Commission, *Draft articles on the Law of Treaties with commentaries*, 1966, no. II, Yearbook of the International Law Commission, art. 51, para. 3.
[29] Yearbook of the International Law Commission, art.51, para.3.

existing BIT, as argued by Ortino.[30] It also provides an opportunity to address survival clauses, as demonstrated by Australia's recent BITs with Hong Kong and Uruguay. However, concerns arise regarding whether a pre-agreed survival clause or a post-hoc mutual termination agreement should prevail. According to Article 54 of the VCLT, the latter prevails, as states can terminate a treaty by mutual consent, aligning with the principle that laws can be altered through agreement.[31] Nonetheless, this approach has practical risks, as states may feel pressured to conclude negotiations for a new BIT even if their positions or model BITs are incompatible.

2.2.4 Termination Under the Vienna Convention on the Law of Treaties

If a state cannot secure the other party's consent to terminate a treaty early, its options are limited to the grounds for termination provided in Articles 60, 61, and 62 of the VCLT.[32] However, Bordin emphasises that general international law offers little assistance for states seeking to escape their obligations under investment treaties.[33] The VCLT specifies three scenarios that permit termination or withdrawal from a treaty: material breach by the other party (Article 60), supervening impossibility of performance (Article 61), and fundamental change of circumstances (Article 62). These grounds are narrowly interpreted, with the International Court of Justice (ICJ) imposing stringent standards for their application.

A material breach does not automatically terminate a treaty; it may justify suspension or termination but only under specific conditions. Bordin argues that the most viable argument for unilateral withdrawal from a BIT is invoking a fundamental change of circumstances under Article 62.[34] However, as demonstrated by the ICJ's decision in *Gabčíkovo-Nagymaros Project* (1997), this argument is exceptionally difficult to succeed. In that case, the ICJ rejected Hungary's claims that changes in political conditions, economic feasibility, and advancements in environmental knowledge constituted a fundamental change under Article 62. What, then, is required to rely on Article 62? The ICJ, in the *Fisheries Jurisdiction* (1974) case, established that a party must demonstrate a substantial escalation in the 'burden of obligations' to

[30] Federico Ortino, "Italy," in *Commentaries on Selected Model Investment Treaties*, ed. Chester Brown (Oxford University Press, 2013), 345.
[31] Ulrich K.a Preuss, "The Implications of "Eternity Clauses": The German Experience" *Israel Law Review* 44, no. 3 (2011): 429–48, https://doi.org/10.1017/S0021223700018124.
[32] Fernando Lusa Bordin, "Reasserting Control through Withdrawal from Investment Agreements: What Role for the Law of Treaties?" in *Reassertion of Control over the Investment Treaty Regime*, ed. Andreas Kulick (Cambridge University Press, 2016), 209.
[33] Bordin, "Reasserting Control through Withdrawal," 209.
[34] Bordin, "Reasserting Control through Withdrawal," 209.

the extent that fulfilling them becomes fundamentally different from what was originally agreed upon.

In summary, the methods for terminating a BIT under international and treaty law depend on the state's specific circumstances and the treaty's terms. Understanding these legal pathways and their implications is essential for evaluating the risks associated with each approach. The next part of the article will explore why and when states choose particular termination methods to reassert control over their BIT regimes, highlighting the practical relevance of these strategies. The first set under the next chapter examines countries like India and Brazil, which have adopted a more nuanced, reform-oriented approach. The second set under the subsequent chapter examines countries such as Ecuador and Venezuela, which represent a more radical approach to BIT withdrawal by formally denouncing or terminating their BIT obligations.

3. Case Study: BIT Reform Through Model/Alternative Agreements

Many countries, including India and Brazil, have developed models to create consistency in their IIA framework. These templates are periodically reviewed and updated to reflect their experiences and address emerging challenges in the investment landscape. While Model BITs provide a structured framework for negotiations, the final terms depend on specific discussions and negotiations between parties. This section examines India and Brazil's approaches to reform their BIT regimes and considers lessons for Bangladesh in light of these experiences.

3.1 *India*

India's approach to foreign investment and BITs has evolved significantly since its post-colonial period.[35] Initially, Nehru's government was open to foreign investment, but it was not a priority.[36] India's openness to foreign investment expanded after the economic crisis of 1991, which led to significant reforms. These changes were partly driven by global shifts in economic thinking, leading India to embrace BITs from 1991 until 2010. However, the issuance of the first BIT arbitral award against India in the case of *White Industries v. India* (2011) marked a turning point. This case, followed by several other ISDS claims, highlighted the risks and

[35] Ashutosh Kumar and Anjali Anchayil, "Keeping a Distance: India's Approach towards Investment Treaties" *Kluwer Arbitration Blog*, October 20, 2022, https://arbitrationblog.kluwerarbitration.com/2022/10/20/keeping-a-distance-indias-approach-towards-investment-treaties/.

[36] Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (Oxford Academic, 2019), 56.

challenges of the BIT framework, especially after the period of relative acceptance between 1994 and 2010.[37] Since 2011, India has adopted a two-phase reform strategy to its BIT regime: introducing a new model BIT and terminating older treaties. The *White Industries* ruling, which many Indian lawmakers described as an attack on the sovereignty of the Indian judiciary, spurred this change.[38]

The new model BIT reflects India's desire to safeguard its regulatory space, drawing from experiences with ISDS. For example, it eliminated clauses like the MFN provision, which had caused problems in the *White Industries* case, and narrowed the scope of FET and National Treatment (NT) provisions, inspired by the *Devas Multimedia v. India case* (2016).[39] While India retained the ISDS mechanism, it now requires that foreign investors exhaust local remedies before pursuing arbitration. This shift in policy is a direct response to the negative experiences with ISDS, as well as an effort to strengthen domestic judicial processes and maintain regulatory control. Whether this policy change stems from a broader shift in India's approach to foreign investment or is simply a reaction to past ISDS claims is still debated, but it may be a combination of both.

A closer look at the ISDS claims against India shows that they were largely driven not by the country's pursuit of public policy goals like environmental protection or public health but by perceived delays in the judicial system and issues related to controversial retroactive amendments to tax laws.[40] In some cases, state governments failed to honour commitments to foreign investors. Such issues highlighted the very concerns BITs were meant to address; protecting foreign investments from arbitrary or unfair actions by governments. Despite the criticism of India's new BIT framework, the country has managed to attract significant FDI, even surpassing China as the leading destination for FDI in 2015, with USD 63 billion in investments.[41] This suggests that India's new BIT framework, which emphasises local dispute resolution, has not deterred investors. In fact, it aligns with the idea that robust domestic legal systems can reduce reliance on BIT protections.

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[37] Prabhash Ranjan, "The White Industries Arbitration: Implications for India's Investment Treaty Program," *Investment Treaty News Quarterly* 3, no. 2 (2012): 12-14, https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.

[38] Prabhash Ranjan, "India and Bilateral Investment Treaties - A Changing Landscape," *ICSID Review* 29, no. 2(2014): 419-450, https://doi.org/10.1093/icsidreview/sit052.

[39] Aniruddha Rajput, "Shifting Treaty Practice of India: From 2003 Model BIT to 2015 Model BIT" *Jindal Global Law Review* 7, no. 2 (2016): 201-226, https://doi.org/10.1007/s41020-016-0032-9.

[40] Martins, "Brazil's Cooperation and Facilitation".

[41] BS Web Team, "India overtakes China as top FDI destination" *Business Standard*, April 22, 2016, https://www.business-standard.com/article/economy-policy/india-overtakes-china-as-top-fdi-destination-report-116042200192_1.html.

Investors operating in countries with strong legal institutions are better equipped to manage challenges without relying on international arbitration. India's experience underscores the importance of effective domestic legal frameworks in managing foreign investments, showing that it is possible to balance regulatory control with the attraction of foreign capital.

3.2 *Brazil*

Brazil's approach to BITs presents a unique and, at times, perplexing case. Like many developing countries in the 1990s, Brazil signed numerous BITs. However, it remains the only country that failed to ratify any of these agreements, a stark contrast to other emerging economies that typically signed and ratified such treaties without significant political opposition.[42] Despite BIT negotiations being a key concern for the Ministry of Foreign Affairs, studies by Campelloa and Lemos show a lack of involvement from other government branches, such as the Finance Ministry and the Office of the President (Casa Civil).[43] This absence of cross-governmental support likely explains why BITs were not activated in Brazil. Though Brazil has not fully engaged with the IIL regime, it still offers protection to foreign investors. Since the introduction of arbitration laws in 1996, contractual arbitration has become a popular method for resolving state contract disputes, with Brazil's top courts consistently upholding arbitration clauses, even against the state.[44] Brazil, however, remained passive in broader international investment matters until 2015, when it introduced the Cooperation and Facilitation Investment Agreement (CFIA) model. Brazil signed six CFIAs with countries like Mozambique, Angola, and Chile, marking a shift in policy.[45] This shift was largely driven by Brazil's economic transformation.

Over the past two decades, Brazil's outward FDI surged, particularly in South America and Africa, sparking debate about the need for a regulatory framework

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[42] José Henrique Vieira Martins, "Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments" *Investment Treaty News*, June 12, 2017, https://www.iisd.org/itn/en/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/#_edn1.

[43] Daniela Campello and Leany Lemos, "The non-ratification of bilateral investment treaties in Brazil: a story of conflict in a land of cooperation' *Review of International Political Economy* 22, no. 5 (2015): 1055-1086, http://dx.doi.org/10.2139/ssrn.2243120.

[44] Geraldo Vidigal and Beatriz Stevens, "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" *Journal of World Investment and Trade* 19 (2018): 475-512, doi:10.1163/22119000-12340100.

[45] Nathalie M-P Potin and Camila Brito de Urquiza, "The Brazilian Cooperation and Facilitation Investment Agreement: Are Foreign Investors Protected?" *Kluwer Arbitration Blog*, December 29, 2021, https://arbitrationblog.kluwerarbitration.com/2021/12/29/the-brazilian-cooperation-and-facilitation-investment-agreement-are-foreign-investors-protected/.

governing foreign investment.[46] Historically resistant to IIAs, Brazil's policy change with CFIAs marks a focus on investment facilitation rather than protection. Unlike traditional IIAs, CFIAs exclude ISDS mechanisms. Instead, they rely on dispute prevention and state-to-state arbitration, allowing home governments to defend their nationals' interests through direct negotiations or arbitral proceedings against the host state.[47] The aim is to ensure compliance rather than to compensate investors for breaches.[48] CFIAs also impose obligations on investors to adhere to Corporate Social Responsibility (CSR) practices aligned with international standards like those set by the OECD, encouraging sustainable development in areas such as environmental protection, human rights, and political respect.[49] Commentators like Vidigal and Stevens, who criticise BITs for restricting states without imposing similar obligations on investors, may appreciate the absence of ISDS in CFIAs and advocate for further strengthening of investor obligations.[50]

However, CFIAs could also be seen as a return to a politicised investment protection model, where foreign investors rely on the diplomatic efforts of their home governments. BITs, in contrast, aim to depoliticise investment disputes by allowing investors to bypass their home governments and challenge host state actions directly. The role of home states in advancing their nationals' economic interests is significant. States can bring claims before international adjudicators, as seen in systems like the WTO dispute settlement mechanism.[51] The concern is whether the remedy system under CFIAs, influenced by WTO law, is adequate for addressing investor claims. If not, CFIAs may fail to provide sufficient redress, requiring investors to rely on their home governments for meaningful remedies. Brazil's decision to adopt the CFIA comes at a time when some countries are rethinking their reliance on BIT-based investment systems. The CFIA model focuses on investment facilitation, shifting away from traditional protectionist BITs. Brazil's experience shows that there is potential for innovation in the international investment law system, offering a framework that balances the interests of investors and host states.

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[46] Michelle Ratton Sanchez Badin and Fabio Morosini, "Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)," in *Reconceptualizing International Investment Law from The Global South*, ed. Fabio Morosini and Michelle Ratton Sanchez Badin (Cambridge University Press, 2017), 218.

[47] Martino Maggetti and Henrique Choer Moraes, "The Policy-Making of Investment Treaties in Brazil: Policy Learning in the Context of Late Adoption," in *Learning in Public Policy*, ed. Claire A. Dunlop, Claudio M. Radaelli and Philipp Trein (Palgrave Macmillan, 2018), 295.

[48] Maggetti and Moraes, 295.

[49] Maggetti and Moraes, 295.

[50] Potin and Urquiza, "The Brazilian Cooperation and".

[51] Anthea Roberts, "UNCITRAL and ISDS Reform: Not Business as Usual," *EJIL: TALK*! December 11, 2017, https://www.ejiltalk.org/uncitral-and-isds-reform-not-business-as-usual/.

By emphasising state-to-state dispute prevention and excluding ISDS, Brazil's model supports a government-led investment framework that respects domestic legal standards and sovereignty. This includes strengthening internal regulatory systems, such as the 1996 arbitration law, allowing Brazil to independently manage investor disputes. The institutional focus of this model aligns regulatory needs with investor interests, providing an alternative for countries concerned with the regulatory and fiscal costs of BITs and ISDS. In conclusion, Brazil's CFIA framework introduces a new approach to managing foreign investment, moving beyond the traditional BIT structure. This approach emphasises collaboration between home and host governments, strengthens domestic legal systems, and aligns with global efforts to create sustainable, equitable investment environments.

4. Case Study: Exiting BITs and ISDS Mechanism

The International Centre for Settlement of Investment Disputes (ICSID), or Washington Convention, was established to resolve disputes between foreign investors and host countries.[52] In the past, Latin American countries faced a rise in arbitration cases.[53] Initially, many of these nations rejected the idea of an international body for investment disputes in the 1960s.[54] However, by the 1980s, many began signing BITs to attract investment. By the 1990s and 2000s, both the number of BITs and legal claims increased, raising concerns about fairness and the system favouring capital-exporting countries.[55] Issues like unequal wealth distribution, environmental damage, and restrictions on sovereignty were common criticisms.[56] This led some countries, like Ecuador and Venezuela, to question whether withdrawing from ICSID could help avoid these challenges. Their experiences will shed light on whether they were truly able to escape the international investment law system.

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[52] Ignacio Vincentelli, "The Uncertain Future of ICSID in Latin America," *Law and Business Review of the Americas* 16, no. 3 (2010): 409, https://dx.doi.org/10.2139/ssrn.1348016.

[53] Katia Fach Gómez. "Latin America and Icsid: David Versus Goliath," *Law and Business Review of the Americas* 17, no. 2 (2010): 195, https://dx.doi.org/10.2139/ssrn.1708325.

[54] Andreas F. Lowenfeld, "The ICSID Convention: Origins and Transformation," *Georgia Journal of International and Comparative Law* 38 (2009): 47, https://digitalcommons.law.uga.edu/gjicl/vol38/iss1/5.

[55] Matthew C. Porterfield, "An International Common Law of Investors Rights," *University of Pennsylvania Journal of International Law* 27 (2006): 79, https://scholarship.law.upenn.edu/jil/vol27/iss1/2.

[56] Xavier Andrade Cadena and Marco Tulio Montañes, "Ecuador's Notice Under ICSID Article," *International Legal Materials* 25, no. 4 (2008): 154-163, https://doi.org/10.1017/S002078290000560X.

4.1 *Ecuador*

Ecuador's foreign investment policies have historically shifted with changes in administration, which is evident in the formulation of policies after elections.[57] This was particularly noticeable when socialist Rafael Correa took office in 2006, marking a significant turn in the country's approach to foreign investment.[58] In May 2006, the Correa administration seized the assets of Occidental Petroleum, Ecuador's largest investor at the time. By October 2007, the government imposed a new tax on foreign oil corporations, requiring them to pay 99% of their exceptional profits to the state. This move occurred amid a regional surge in resource nationalism, largely driven by rising oil prices, with most ISDS cases against Ecuador originating in the energy and mining sectors.[59] In response, President Correa notified ICSID in October 2007 of the intention to restrict arbitration related to energy and mining disputes.[60]

In 2008, Ecuador initiated a departure from the IIA framework, employing a three-pronged strategy:[61] introducing a constitutional clause to prevent yielding sovereignty to international arbitration, denouncing the ICSID convention,[62] and terminating existing Bilateral Investment Treaties (BITs).[63] Correa argued that pulling out of ICSID was crucial for the "liberation" of Ecuador and Latin America from what he viewed as colonialism and subjugation to multinational corporations and international financial institutions.[64] This stance was largely motivated by Ecuador's significant financial obligations arising from ICSID tribunals, including a USD 2.3 billion award to Occidental Petroleum under the *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* (2012), which at

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[57] Hernando Rocha, "Free-market reformer inaugurated president of Ecuador," *UPI*, August 10, 1992) https://www.upi.com/Archives/1992/08/10/Free-market-reformer-inaugurated-president-of-Ecuador/7428713419200/.

[58] Julie Turkewitz, "Ecuador's Former President Convicted on Corruption Charges," *The New York Times*, April 7, 2020)https://www.nytimes.com/2020/04/07/world/americas/ecuador-correa-corruption-verdict.html.

[59] Energy Intelligence, "Ecuador's Correa Ups Windfall Tax Rate to 99%," *Energy Intelligence*, October 24, 2007, https://www.energyintel.com/0000017b-a7b1-de4c-a17b-e7f312ee0000.

[60] Andrés Larrea, "Enforcing international arbitral awards in Ecuador after recent legal reforms: Is this the end of the exequatur process?" *Kluwer Arbitration Blog*, May 17, 2020, https://arbitrationblog.kluwerarbitration.com/2020/05/17/enforcinginternational-arbitral-awards-in-ecuador-after-recentlegal-reforms-is-this-the-end-of-the-exequatur-process/?doing_wp_cron=1593121939.0552499294281005859375.

[61] Gustavo Prieto, "Ecuador returns to the ICSID Convention: A brief assessment of its decade-long international investment law exit strategy," *EJIL: Talk*, July 19, 2021, https://www.ejiltalk.org/ecuador-returns-to-the-icsid-convention-a-brief-assessment-of-its-decade-long-international-investment-law-exit-strategy/.

[62] Tolga Yalkin, "Ecuador Denounces ICSID: Much Ado About Nothing?" *EJIL: Talk!* July 30, 2009, https://www.ejiltalk.org/ecuador-denounces-icsid-much-ado-about-nothing/.

[63] Daniel Uribe, "Ecuador withdraws from its remaining investment treaties" *bilaterals.org*, May 23, 2017, https://www.bilaterals.org/?ecuador-withdraws-from-its.

[64] Fernando Carbrera Diaz, "Ecuador continues exit from ICSID" *Investment Treaty News*, June 8, 2009, https://www.iisd.org/itn/en/2009/06/05/ecuador-continues-exit-from-icsid/.

the time was the largest sum ever ordered by an investor-state tribunal.[65] Ecuador also faced a USD 77 million compensation claim in the *Chevron and TexPet v. Ecuador II* case under UNCITRAL rules (2011).

The termination of BITs was seen as part of Ecuador's broader regional integration efforts, aligning with countries like Bolivia and Venezuela in rejecting BITs and advocating for investment models that better protect states' right to regulate their economies.[66] However, Ecuador's withdrawal from ICSID was not immediate. Despite political rhetoric and a shift in the country's stance, this move did not significantly alter Ecuador's vulnerability to investment claims or its ability to attract FDI.[67] While the denunciation of ICSID sent a strong political message aligned with anti-investor rhetoric, its actual impact on Ecuador's international legal standing warrants closer examination. Three key aspects explain the limited efficacy of this strategy:

4.1.1 Vulnerability to Alternative Investment Claims

Many of Ecuador's BITs provided investors with various avenues for dispute resolution, including ICSID, UNCITRAL, ad-hoc arbitration, and domestic courts. Only Chile and France limited recourse to ICSID alone. Consequently, Ecuador remained vulnerable to arbitration in other forums even after exiting ICSID.

4.1.2 Entry into Force of BIT Termination

Some of Ecuador's BITs, including those with Finland, Netherlands, Peru, and Sweden, had not yet expired, and termination notices could take effect after one year. While Ecuador could limit new investment claims by terminating these treaties, the existence of sunset clauses meant that obligations could extend for several years after termination. For example, the UK-Ecuador BIT had a sunset clause that ensured protection for 15 years after the treaty's termination (Macrotrends, 2023).

[65] Ben Beachy, "Tribunal Slams Ecuador with Largest Ever Investor-State Penalty," (*Eyes on Trade*, 23 October 2012), https://citizen.typepad.com/eyesontrade/2012/10/tribunal-slams-ecuador-with-largest-investor-state-penalty-ever.html.

[66] Xavier Andrade Cadena and Marco Tulio Montanes, "Introductory Note to Ecuador's Notice Under ICSID Article 25(4)," *International Legal Materials* 47, no. 2 (2008): 154–161, https://doi.org/10.1017/S002078290000560X.

[67] Álvaro Galindo and Francisco Endara, "Ecuador," in *Recognition and Enforcement of International Commercial Arbitral Awards in Latin America: Law, Practice And Leading Cases*, ed. Omar E. García-Bolívar and Hernando Otero (Brill, 2015), 121.

4.1.3 Declining FDI and Policy Reversal

After Correa's departure, Ecuador experienced a significant decrease in FDI from 2006 to 2017, with FDI inflows reaching a record low in 2016.[68] As a result, the government sought to reverse this trend by re-engaging with international investment frameworks. In June 2021, Ecuador rejoined ICSID, although its constitutional court had not fully reversed its previous stance on arbitration.[69] Ecuador also remained subject to obligations under older BITs due to survival clauses, continuing to face ISDS claims. By 2022, Ecuador had been involved in eighteen ISDS cases, six of which resulted in unfavorable awards, with seven still pending.

In conclusion, while Ecuador's withdrawal from ICSID was politically significant, its legal and economic implications were more complex. The country's vulnerability to alternative arbitration mechanisms and the continued effect of older BITs, combined with the negative impact on FDI, suggest that Ecuador's approach to international investment law remains fluid and evolving.

4.2 *Venezuela*

In January 2012, Venezuela became the third country to denounce its membership in the ICSID Convention, following Bolivia and Ecuador.[70] President Hugo Chávez's administration viewed the ICSID membership as a mistake by a provisional government influenced by transnational economic interests, lacking popular legitimacy.[71] Chávez's reforms, which included the nationalisation of domestic and foreign-owned assets across various industries, led to disputes with foreign investors over compensation. These actions triggered significant consequences, including numerous arbitrations filed against Venezuela and its state-owned oil company, Petróleos de Venezuela, S.A. (PDVSA). For instance, ExxonMobil, which faced asset

[68] "Ecuador Foreign Direct Investment," Macrotrends, accessed January 5, 2025, https://www.macrotrends.net/global-metrics/countries/ECU/ecuador/foreign-direct-investment#google_vignette.

[69] Client Alert, "Back to the future – Ecuador (re-)signs the ICSID Convention, admitting the failure of its policy of trying to attract foreign investment whilst simultaneously rejecting investment treaties and international arbitration," *Volterra Fietta Client Alerts*, July 16, 2021, https://www.volterrafietta.com/back-to-the-future-ecuador-re-signs-the-icsid-convention-admitting-the-failure-of-its-policy-of-trying-to-attract-foreign-investment-whilst-simultaneously-rejecting-investment-treaties-an/.

[70] Ewan Robertson, "Venezuela Announces 'Irrevocable' Withdrawal from World Bank's Arbitration Body," *Venezuelanalysis.com*, January 26, 2012, https://venezuelanalysis.com/news/6773>.

[71] Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve," International Institute for Sustainable Development, April 12, 2012, https://www.iisd.org/itn/en/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/#_ftn2.

nationalisation, pursued arbitration both against the state-owned entity and under ICSID.

By 2012, Venezuela faced nine new arbitration claims, winning three, losing four, and seeing two discontinued.[72] At the time of its denunciation, 21 ICSID cases were pending against Venezuela, with investors winning eleven and Venezuela winning 6.[73] Under ICSID rules, a six-month waiting period follows a formal denunciation, allowing further arbitration claims to be filed during this period. Venezuela's withdrawal aimed to assert national sovereignty over foreign investment, but was it possible to permanently sever ties with ICSID? Interestingly, Venezuela did not terminate all its BITs upon withdrawing from ICSID. It terminated its BIT with the Netherlands in 2008, citing concerns over treaty shopping, but retained 25 active BITs.[74] This created a legal dilemma regarding the precise moment Venezuela's consent to ICSID arbitration ceased; a question that remains unresolved.[75]

Professor Schreuer distinguishes between Articles 71 and 72 of the ICSID Convention regarding the effective date of denunciation.[76] While Article 71 mandates a six-month notice period, Schreuer argues that withdrawal of consent occurs immediately upon the ICSID depositary's receipt of denunciation, precluding new arbitration agreements from that point.[77] The tribunal in *Fábrica de Vidrios v. Venezuela* (2017) adopted this view, rejecting jurisdiction to prevent states from facing indefinite claims. However, critics, including Emmanuel Gaillard (2007), contend this interpretation undermines Article 71's purpose, which is to allow claimants time to initiate cases.[78] Tribunals like *Blue Bank v. Venezuela* (2017) support Gaillard's view, holding that denunciation becomes effective only after the six-month period, preserving claimants' rights during this phase. A third perspective,

[72] PLC Dispute Resolution, "Venezuela gives notice to terminate Netherlands' BIT," *Thomson Reuters*, May 21, 2008) https://uk.practicallaw.thomsonreuters.com/93817749?contextData=(sc.Default)&transitionType=Default&firstPage=true.

[73] *Thomson Reuters*, 2008.

[74] *Thomson Reuters*, 2008.

[75] Lisa Bohmer, "Analysis: Reasons revealed as to why an Ad Hoc Committee has upheld restrictive reading of ICSID denunciation provisions; citing lack of stare decisis doctrine, committee sees no basis to annul award that diverged from others," *Investment Arbitration Reporter*, November 27, 2019, https://www.iareporter.com/articles/analysis-reasons-revealed-as-to-why-an-ad-hoc-committee-has-upheld-restrictive-reading-of-icsid-denunciation-provisions-citing-lack-of-stare-decisis-doctrine-committee-sees-no-basis-to-annul-award/.

[76] Christoph Schreuer, "Consent to Arbitration," in *The Oxford Handbook of International Investment Law*, ed. Christoph Schreuer, Federico Ortino, and Peter Muchlinsky (Oxford University Press, 2008), 1087.

[77] Schreuer, 1087.

[78] Emmanuel Gaillard, "The Denunciation of ICSID Convention," *Transnational Dispute Management* 5 (2007), www.transnational-dispute-management.com/article.asp?key=1074.

articulated in a separate opinion in the *Blue Bank* award, questions the applicability of the offer-acceptance model to BITs. Söderlund suggested that arbitration consent, whether unilateral or mutual, should persist for the BIT's duration. Although this model has not been adopted by any tribunal, it remains widely discussed. The debate reflects an ongoing lack of consensus regarding the implications of ICSID denunciation.

Despite its withdrawal, Venezuela continued to face a significant number of arbitrations. Tribunal only in the *Fábrica de Vidrios* claim declined jurisdiction based on denunciation. During the six-month post-denunciation period, nine new ICSID cases were filed against Venezuela, with an equal number filed thereafter. Currently, Venezuela faces 16 pending ICSID cases, seven of which fall under the Additional Facility Rules.[79] This contrasts with Ecuador, where most post-denunciation claims were filed under UNCITRAL rules.[80] The distinction arises from the language of Venezuela's BITs, which often limit UNCITRAL arbitration to cases where ICSID is unavailable. In some instances, UNCITRAL tribunals declined jurisdiction when ICSID arbitration was still reasonably accessible. Furthermore, certain BITs allow UNCITRAL arbitration only if both ICSID and the ICSID Additional Facility are inaccessible. Consequently, investors from ICSID contracting states could still file claims under the Additional Facility Rules, even after Venezuela's denunciation. This legal framework, combined with survival clauses in BITs, rendered Venezuela's ICSID withdrawal largely symbolic.

The Venezuelan experience underscores that denouncing the ICSID Convention does little to shield states from arbitration unless accompanied by broader reform of existing BITs.[81] Countries seeking to exit the ICSID system must address legacy BITs comprehensively to mitigate ongoing obligations. Venezuela's approach, though politically significant, offers limited practical relief.

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[79] Claudio Salas, Maria Camila Hoyos and Soledad Peñ, "The Sound and Fury of Venezuela's ICSID Denunciation," *Principia* 5 (2021): 139–158, https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/documents/20210928-the-sound-and-fury-of-venezuelas-icsid-denunciation.pdf.

[80] Luke Eric Peterson, "Bilateral Investment Treaties and Investment Arbitration," in *The Human Right to Water: Theory, Practice and Prospects*, ed. Malcolm Langford and Anna F. S. Russell (Cambridge University Press, 2017), 531.

[81] Diana Marie Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," *Journal of International Business and Law* 11, no. 2 (2012): 239, https://scholarlycommons.law.hofstra.edu/jibl/vol11/iss2/2.

5. Past, Present and Future of Bangladeshi BITs

Bangladesh entered the international investment regime in 1980, signing its first BIT with the United Kingdom, only nine years after gaining independence. Since then, Bangladesh has become a party to 34 BITs, with 25 currently in force, 2 terminated, and the remainder yet to take effect.[82] Most of these BITs were signed before 2010, with the recent one, with Kuwait, dating back to 2016. Notably, none of Bangladesh's BITs explicitly recognises the state's right to regulate in the public interest, a critical feature in more modern investment treaties designed to balance investor rights and host state sovereignty. The Bahrain-Bangladesh BIT (2015) stands out as a partial exception by allowing public interest measures to serve as a defence against expropriation claims,[83] but only in a limited context. Public interest measures in this BIT are framed as exceptions rather than positive rights, signalling that investor protections remain the priority.

Similarly, two other BITs briefly mention regulatory space in their preambles,[84] but these references are confined to specific sectors like the environment, health, or labor, without acknowledging broader sovereign rights. In contrast, more recent IIAs have evolved to include clauses safeguarding states' regulatory autonomy, such as general exceptions, non-lowering of standards commitments, and clearer definitions of treaty provisions. This shift stems from concerns over the 'regulatory chill' effect, where the threat of ISDS may deter governments from enacting necessary public interest regulations.[85] Critics, including Coleman, Johnson and Sachs argue that older IIAs, such as Bangladesh's BITs, undermine public policy goals like climate change mitigation and human rights protections by prioritising investor interests over legitimate regulatory actions.[86]

The ISDS mechanisms embedded in BITs have been a focal point of criticism. These mechanisms, which allow investors to directly challenge state actions before international arbitration panels, have often resulted in costly disputes for host states. For example, international tribunals have frequently interpreted public interest

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[82] Investment Policy Hub, *International Investment Agreements Navigator: Bangladesh* (UNCATD, 2017), https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh.

[83] Article 6(a), Bangladesh – Bahrain BIT (2015), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/7018/download

[84] Bangladesh – Cambodia BIT (2014); Bangladesh – Turkey BIT (2012).

[85] Eric Neumayer, *Greening Trade and Investment: Environmental Protection Without Protectionism* (Routledge, 2001).

[86] Jesse Coleman, Lise J Johnson and Lisa E Sachs, "International Investment Agreements, 2015–16: A Review of Trends and New Approaches," in *Yearbook on International Investment Law and* Policy 2015–2016, ed. Lisa E. Sachs and Lise J. Johnson (Oxford University Press, 2017), 42.

considerations narrowly, favoring investment protection over regulatory autonomy.[87] However, global advocacy for holding multinational corporations accountable for environmental, labor, and human rights abuses has prompted some countries to reframe their BITs to better address these concerns.[88] Among Bangladesh's 34 BITs, only 7 address environmental protection[89] and another 6 include provisions for public health,[90] though none explicitly mention human rights. Commonly, these provisions prohibit the relaxation of regulations in environment, health etc. to attract investments. For instance, the BITs with Bahrain (2015) and Cambodia (2014) explicitly protect environmental and public health standards. Some treaties, like those with Bahrain (2015), Denmark (2009), and Belarus (2012), go further, holding investors accountable for damages to public health or the environment, with compensation required under local or international law. These provisions aim to strike a balance between investment protection and public welfare by excluding legitimate regulatory measures from indirect expropriation claims.

Despite these inclusions, the absence of explicit language on human rights and climate change reflects a significant gap in Bangladesh's BIT framework. This omission underscores a broader challenge: balancing the protection of foreign investments with the need to address critical public interest concerns. While some states have adopted uniform approaches to incorporate such protections, Bangladesh's BITs remain fragmented and outdated, relying heavily on traditional investment protection frameworks that prioritise investor interests over the host state's policy space. As of now, Bangladesh has faced only 7 ISDS claims in four decades, with just 1 claim brought under a BIT.[91] Compared to neighboring countries like India, Sri Lanka, and Pakistan, this is relatively low. However, the potential for disputes increases significantly when public interest regulations, such as those addressing environmental or human rights concerns, are contested. Among Bangladesh's BITs,

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[87] Jose E. Alvarez and Karl P. Sauvant, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford Academic, 2011).

[88] Helen V. Milner and Song Kim, "Multinational Corporations and their Influence Through Lobbying on Foreign Policy," in *Global Goliaths: Multinational Corporations in the 21st Century Economy*, ed. C. Fritz Foley, James Hines, and David Wessel (The Brookings Institution, 2021).

[89] Article 13, Bangladesh – Kuwait BIT (2016); Article 4, Bangladesh – Bahrain BIT (2015); Article 4, Bangladesh – Cambodia BIT (2014); Article 5, Bangladesh – Belarus BIT (2012); Article 4, Bangladesh – Turkey BIT (2012); Article 3, Bangladesh – UAE BIT (2011); Article 4, Bangladesh – Denmark BIT (2009), https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh.

[90] Article 4, Bangladesh – Bahrain BIT (2015); Article 4, Bangladesh – Cambodia BIT (2014); Article 5, Bangladesh – Belarus BIT (2012); Article 4, Bangladesh – Turkey BIT (2012); Article 3, Bangladesh – UAE BIT (2011); Article 4, Bangladesh – Denmark BIT (2009), https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh.

[91] Rumana Islam, "Mapping the Investor State Dispute Settlement (ISDS) Regime of Bangladesh: Past, Present, and Future," in *Handbook of International Investment Law and Policy*, ed. Julien Chaisse, LeïlaChoukroune and SufianJusoh (Springer, 2020), 25.

except the Bangladesh-Germany BIT (1981) and the Bangladesh-Republic of Korea BIT (1986), all other BITs generally allow investors to bypass local remedies and directly access international arbitration,[92] exposing the country to significant risks of costly disputes regardless of the outcome.[93]

For capital-importing countries like Bangladesh, the fear of facing ISDS claims has a spillover effect. As the importance of attracting FDI for emerging economies like Bangladesh is crucial, a rigid and investor-centric BIT framework discourages regulators from addressing pressing public policy issues. Coupled with outdated investment protection provisions, this fear may perpetuate regulatory inertia. As developed and developing economies increasingly negotiate IIAs among themselves, shifting traditional power dynamics,[94] it becomes essential for Bangladesh to reassess its BIT framework. By leveraging principles of IIL and public international law, Bangladesh can explore pathways to modernize its BITs, balancing the need for foreign investment with the imperative of protecting public interest concerns.

6. Lessons for Bangladesh

State institutions, often overlooked in the discourse on revising old BITs, are pivotal in determining how BITs impact FDI and the regulatory autonomy of host countries.[95] When BITs prioritize investor protections without considering the capacity of domestic institutions, they risk undermining governance, discouraging institutional development, and creating conflicts between states and investors.[96] Traditional BITs, heavily reliant on international protections and mechanisms like ISDS, often bypass local courts and weaken legal frameworks that deter public policy reforms essential for sustainable growth.[97] Reforms should integrate measures to

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[92] Rumana Islam, "Features of the Investor State Dispute Settlement (ISDS) Provisions under Bilateral Investment Treaties (BITs) of Bangladesh: An Overview," *Dhaka University Law Journal* 31, no.1 (2020); 85-103, https://www.researchgate.net/publication/348565980_Features_of_the_Investor_State_Dispute_Settlement_ISDS_Provisions_under_Bilateral_Investment_Treaties_BITs_of_Bangladesh_An_Overview.

[93] Crina Baltag, Riddhi Joshi and Kabir Duggal, "Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?" *ICSID Review - Foreign Investment Law Journal* 38, no. 2 (2024): 381–421, https://doi.org/10.1093/icsidreview/siac031.

[94] Mahnaz Malik, *South-South Bilateral Investment Treaties: The same old story?* (International Institute for Sustainable Development*, 2010),* https://www.iisd.org/system/files/publications/dci_2010_south_bits.pdf.

[95] Richard C. Chen, "Bilateral Investment Treaties and Domestic Institutional Reform," *Columbia Journal of Transnational Law* 55, no. 3 (2017): 547-591, http://digitalcommons.mainelaw.maine.edu/faculty-publications/78.

[96] Agnès Bénassy-Quéré and MaylisCoupet, "Institutional Determinants of Foreign Direct Investment," World Economy 30, no. 5 (2007): 764-782, http://dx.doi.org/10.1111/j.1467-9701.2007.01022.x.

[97] Markus W. Gehring and Marie-Claire Cordonier Segger, "Overcoming obstacles with opportunities: Trade and investment agreements for sustainable development," in *International Investment Law and Development,* ed. Stephan W. Schill, Christian J. Tams, and Rainer Hofmann (Edward Elgar, 2015), 93-124.

strengthen domestic institutions, such as conditional aid, capacity-building, and benchmarks for governance improvements.

For FDI-seeking countries like Bangladesh, ISDS is still a reality during negotiations. Reliable, transparent and effective local courts and regulatory bodies can enhance quality of local dispute resolution, reducing reliance on costly international arbitration while maintaining investor confidence. By aligning BITs with domestic institutional development, Bangladesh can balance investor protections with regulatory flexibility, fostering a stable, sustainable investment climate that meets developmental needs while ensuring transparency and legal certainty for investors. This brings us to the question: why is it important to assess how Bangladesh should revise their IIA regimes? The evolving landscape of international investment law underscores the urgency for states to revisit their IIAs. A few primary reasons stand out.

6.1 *Age and applicability of treaties*

Historically, the average age of treaties invoked in arbitration claims was six years, whereas, today it is nearly 20 years, with many claims based on older treaties.[98] These outdated agreements often lack provisions that reflect modern priorities such as sustainable development, regulatory space, or balanced investor obligations. The oldest Bangladeshi BIT is 45 years old, the latest being signed almost a decade back. Updating older BITs is therefore critical to ensure they are consistent with contemporary economic realities and emerging public interest goals.

6.2 *A long-term process*

Ecuador's experience illustrates that exiting the IIA regime is neither immediate nor sufficient to regain regulatory control. Despite denouncing ICSID and terminating BITs, Ecuador faced obligations under sunset clauses and alternative arbitration forums. This highlights that denouncing ICSID or terminating BITs is only a partial solution. True reform requires states to reconsider how they consent to arbitration and balance foreign investment with policy autonomy.

6.3 *Strategic reform: The role of model BITs*

Crafting a model BIT can provide a proactive framework for renegotiating or exiting outdated treaties. However, as observed in case studies, overly protective reforms that shield states from investor claims can undermine trust and shift the

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[98] Alschner and Skougarevskiy, "Mapping the Universe of International".

imbalance toward states. This approach, termed by scholars as 'reasserting state control', risks deterring quality investments and impeding balanced development.

6.4 *Dual role of states: Home and host*

States often play dual roles as both capital exporters and importers. For instance, Bangladesh, with an outward investment of USD 29.88 million in 2023,[99] require a balanced reform approach that addresses the interests of both foreign investors and domestic investors in other jurisdictions. Brazil's CFIAs demonstrate this balance by ensuring protections for both Brazilian investors abroad and foreign investors within Brazil. However, countries like Bangladesh, lacking Brazil's enabling conditions, such as market size and growth potential, should explore native standards tailored to their unique contexts.

6.5 *Active engagement with treaties*

Treaty design alone does not guarantee effective reform. States must actively engage with new treaty provisions during disputes.[100] For example, the limited practical application of general public policy exceptions highlights that treaty reform is not a one-time process but requires ongoing adaptation and strategic use of provisions during litigation.

6.6 *Why act now?*

Even if Bangladesh ceases negotiating agreements with ISDS provisions or improves new treaties, the existing stock of treaties remains a concern. Many older agreements continue to provide access to ISDS under outdated terms, posing risks for decades due to survival clauses. Although states may include post-termination protections in treaties, several legal and practical implications of treaty termination remain unsettled. Exploring these gaps is essential to address the future of international investment law for states and investors alike, where expectations often clash with realities. To balance investor protections with developmental needs, reforms in Bangladesh must focus on:

- ***Institutional development*:** Incorporating capacity-building initiatives to strengthen domestic legal and infrastructural frameworks.

[99] Tonmoy Modak, "70% of Bangladesh's outward FDI went to India in 2023," *The Business Standard*, May 29, 2024, https://www.tbsnews.net/economy/banking/70-bangladeshs-outward-fdi-went-india-2023-863076.

[100] Daniel Behn, Tarald Laudal Berge and Malcolm Langford, "Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration," *Northwestern Journal of International Law and Business* 38, no. 3 (2018), https://scholarlycommons.law.northwestern.edu/njilb/vol38/iss3/1.

- ***Dispute prevention mechanisms*****:** Introducing and building capacity in mandatory negotiation or mediation stages to minimize arbitration.
- ***Alignment with Sustainable Development Goals (SDGs)*****:** Promoting environmental, labor, and public welfare standards, keeping at par with domestic policies.
- ***Holistic redesign:*** Integrating provisions addressing political risk, institutional growth, and adaptive governance.
- ***Develop a Model BIT:*** Bangladesh should draft a model BIT that incorporates latest practices and arbitration experiences to develop a consistent regulatory and policy approach in future BITs.

By adopting these measures, Bangladesh can modernize its BIT framework to attract foreign investment while maintaining control over its regulatory landscape.

7. Conclusion

The experiences of different states in exiting or reforming their BIT frameworks offer important lessons for Bangladesh. Countries like Ecuador and Venezuela adopted a confrontational approach, denouncing ICSID membership and terminating BITs to assert sovereignty over investment policies. While such moves sent strong political signals, their long-term effectiveness was limited by survival clauses and alternative arbitration mechanisms, leaving these countries exposed to disputes for years. For Bangladesh, a more calculated and reform-oriented approach is necessary to balance the need for policy autonomy with the imperative of attracting foreign investment. Incremental reforms, as seen in India's model BIT, provide a pragmatic blueprint. By terminating outdated treaties and introducing measures that require investors to exhaust domestic remedies before pursuing international arbitration, India has managed to safeguard its regulatory space without completely abandoning ISDS. Brazil's CFIAs offer another perspective, focusing on investment facilitation and dispute prevention through state-to-state arbitration rather than traditional ISDS mechanisms.

These studies demonstrate that reform need not be adversarial; it can be collaborative and tailored to national priorities. Bangladesh must navigate its BIT framework by addressing the inherent tensions between investor protections and regulatory autonomy. Reforming its treaties to include provisions that prioritise sustainable development, ensure public policy flexibility, and minimise exposure to costly arbitration is critical. Strengthening domestic institutions, such as judicial systems and regulatory bodies, can reduce dependence on external dispute resolution while fostering confidence among investors. The pluralistic nature of IIL enables

Bangladesh to learn from the diverse strategies employed by other states while crafting a framework suited to its unique socio-economic context. While coherence in investment policies is desirable, diversity in reform approaches allows for innovation and better addresses the specific needs of developing economies like Bangladesh. This careful balancing act requires Bangladesh to be cautious yet proactive, ensuring its investment treaties serve both its developmental goals and international obligations.

As aptly observed by Bohdi Sanders, '*When you react, you let others control you. When you respond, you are in control*'. By choosing to respond strategically, Bangladesh can assert control over its BIT regime and align it with its broader national interests.