



ความตกลงทวิภาคีด้านการลงทุนคือหนทางเดียว ที่ทำให้นักลงทุนต่างชาติได้รับความคุ้มครอง ทางกฎหมายหรือไม่

**Whether Bilateral Investment Treaties are the only
useful source of legal protection for foreign investors**

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บทคัดย่อ

ในปัจจุบันการพัฒนาทางด้านเทคโนโลยีสูงขึ้นทำให้นักลงทุนสามารถติดต่อสื่อสารกันได้สะดวกและรวดเร็วกว่าในอดีต ส่งผลทำให้มีการลงทุนระหว่างประเทศสูงขึ้น นักลงทุนส่วนใหญ่พยายามที่จะไปลงทุนในต่างประเทศมากขึ้น อย่างไรก็ตาม ความสัมพันธ์ระหว่างนักลงทุนต่างชาติกับประเทศที่รับการลงทุนอาจมีการเปลี่ยนแปลงได้ตลอดเวลา ส่งผลทำให้นักลงทุนต่างชาติต้องเผชิญกับปัญหาต่างๆ เช่น หลังจากที่นักลงทุนต่างชาติได้ลงทุนในต่างประเทศแล้ว ประเทศที่รับการลงทุนอาจมีการเปลี่ยนแปลงกฎหมายซึ่งส่งผลเสียนักลงทุนต่างชาติ เป็นต้น ซึ่งจากปัญหาดังกล่าวทำให้นักลงทุนต่างชาติต้องการมาตรการทางกฎหมายที่เหมาะสม เพียงพอที่จะคุ้มครองนักลงทุนต่างชาติ ความตกลงทวิภาคีด้านการลงทุนเป็นหนทางหนึ่งที่ทำให้นักลงทุนต่างชาตินำมาใช้เพื่อให้ได้รับความคุ้มครอง อย่างไรก็ตาม มีคำถามเกิดขึ้นว่า ความตกลงทวิภาคีด้านการลงทุนคือหนทางเดียวที่ทำให้นักลงทุนต่างชาติได้รับความคุ้มครองทางกฎหมายหรือไม่ ดังนั้น ในบทความนี้จะวิเคราะห์ว่า ความตกลงทวิภาคีด้านการลงทุนคือหนทางเดียวที่ทำให้นักลงทุนต่างชาติได้รับความคุ้มครองทางกฎหมายหรือไม่ จะเห็นได้ว่าความตกลงทวิภาคีด้านการลงทุนเป็นเครื่องมือที่ทำให้นักลงทุนต่างชาติได้รับการคุ้มครองทางกฎหมาย เช่น ความตกลงทวิภาคีด้านการลงทุนจะประกอบด้วยเงื่อนไขหลายประการที่ประเทศที่รับการลงทุนให้การคุ้มครองนักลงทุนต่างชาติ นอกจากนี้ ในกรณีที่นักลงทุนต่างชาติเป็นนักลงทุนรายย่อยที่ไม่มีอำนาจพอที่จะต่อรองกับประเทศที่รับการลงทุน ความตกลงทวิภาคีด้านการลงทุนก็เป็นเครื่องมือหนึ่งที่จะช่วยคุ้มครองนักลงทุนต่างชาติรายย่อยได้ อย่างไรก็ตาม ความตกลงทวิภาคีด้านการลงทุนไม่ใช่หนทางเดียวที่ทำให้

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นักลงทุนต่างชาติได้รับความคุ้มครองทางกฎหมาย แต่นักลงทุนต่างชาติสามารถใช้วิธีการอื่นเพื่อให้ได้มาซึ่งความคุ้มครองทางกฎหมายได้ เช่น สนธิสัญญาพหุภาคี กฎหมายจารีตประเพณีระหว่างประเทศ หลักกฎหมายทั่วไป สัญญาการลงทุน ข้อสัญญาเพื่อความมั่นคงทางกฎหมาย และการประกันการลงทุน ทั้งนี้ นักลงทุนต่างชาติควรที่จะเลือกแนวทางที่เหมาะสมที่สุดสำหรับสถานการณ์การลงทุนของตนเอง หรืออาจใช้หลายแนวทางประกอบกันเพื่อให้สามารถได้รับความคุ้มครองทางกฎหมายมากที่สุด

คำสำคัญ : นักลงทุนต่างชาติ ความตกลงทวิภาคีด้านการลงทุน ความคุ้มครองตามกฎหมาย

Abstract

Nowadays, because of the development of technology, there has recently been some improvement in the investment climate. Most investors try to invest in foreign countries, creating relationships between foreign investors and their host countries. However, relationships between foreign investors and their host countries are quite dynamic in nature. Thus, foreign investors face a number of risks and problems. For example, after an investment is made, a host state may change the law to the disadvantage of foreign investors. Therefore, foreign investors need appropriate sources of legal protection to guarantee their interests if faced with such problems. Bilateral Investment Treaties (BITs) have become essential international legal sources of protection for foreign investment, ensuring that foreign investors are protected by host countries. However, a question arises as to whether BITs are the only available tools for protecting foreign investors investing in another country. Thus, the aim of this essay is to analyze whether BITs are the only useful source of legal protection for foreign investors. The author finds that BITs are useful sources of legal protection for foreign investors. For example, BITs include several clauses providing that host states protect foreign investors. Moreover, BITs are also sources of protection for small foreign investors who cannot negotiate with host countries on an equal footing. However, BITs are not the only useful sources of legal protection for foreign investors. There are also various other sources of legal protection available for foreign investors such as multilateral treaty, customary international law, general principle of laws, investment contracts, stabilization clause and investment insurance. Foreign investors should decide which one is the most appropriate tool for their investment situations or combine sources of legal protection in order to acquire effective legal protection.

Keyword : foreign investor, bilateral investment treaties, legal protection

Introduction

In the past, there were not a lot of investments between countries, but thanks to highly advanced information technology, international communications have become easier, faster and more convenient. Consequently, more people invest in foreign countries outside their own.¹ However, foreign investors are undeniably faced with issues. For example, after an investment is made, a host state may change the law or a host government official may implement local laws to the disadvantage of foreign investors.² Therefore, foreign investors need appropriate sources of legal protection to guarantee their interests if faced with such problems. Bilateral Investment Treaties (BITs) have become essential international legal sources of protection for foreign investment, ensuring that foreign investors are protected by host countries.³ However, a question arises as to whether BITs are the only available tools for protecting foreign investors investing in another country.⁴

Thus, the aim of this essay is to analyze whether BITs are the only useful source of legal protection for foreign investors. Beginning with an overview of BITs and how they can provide legal protection for foreign investors, it will go on to make the case that BITs are not the only useful source of legal protection for foreign investor. This will be followed by a conclusion.

Overview of Bilateral Investment Treaties (BITs) and how they can provide legal protection for foreign investors

A BIT is intended to be a binding agreement between two state governments in relation to investment⁵. BITs grant privileges to private agents of another state, that is, standard rules of protection that investors from each of the two states receives from the other state. There are a number of elements in the BITs that provide useful sources of protection for foreign investors, as outlined below.

¹ Rudolf, D., and Christoph, S., *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) 3.

² Jwswald, W. S., and Nicholas, P. S., “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain” (2005) 46:1 *Harvard International Law Journal* 67, 67.

³ Ibid, 68.

⁴ Jason, W. Y., “Do We Really Need BITs? Toward a Return to Contract in International Investment Law” (2008) 12:2 *Asian Journal of WTO and International Health Law and Policy* 121, 122.

⁵ Sornarajah, M., *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010) 172-187.

1. General standard of treatment

According to BITs, each state must provide general standards of treatment for investors from its treaty partners. This can be considered a clause designed to protect foreign investors. General standards of treatment include:

A) Fair and Equitable Treatment (FET)

A FET clause means foreign investment and foreign investors should be treated fairly and equitably by host countries. In the *Eureko* case⁶, *Eureko* was a foreign investor whose contract was withdrawn by the host country. The court ruled that the contract could not be withdrawn, stating that the act of the host country violated the FET principle under the *Netherlands-Poland BIT*.

B) National Treatment (NT) and Most-Favoured National (MFN)

NT is a principle providing that host countries must treat investors from its treaty partners in a manner no less favourable than the host country's investors. Moreover, under the MFN principle, foreign investors are

further protected: host states must provide protection to foreign investors that is not less favourable than that provided to a third country.⁷ Thus, it seems that BITs guarantee foreign investors that they will be protected in the same level as the host state's nationals or third country.

C) Full protection and security

Host states are obliged to use active measures to protect foreign investors from adverse actions such as physical violence⁸ and rights violations derived from the host state's legislation.⁹

D) Protection from expropriation

According to this principle, foreign investors are protected from expropriation. It is stated that in case of expropriation, the host state must provide compensation to foreign investors.¹⁰

2. Compensation for loss (war clause)

BITs designed this clause to protect foreign investors. In case of damage to the foreign investor's property as a result of

⁶ *Eureko v Poland*, Partial Award, 19 August 2005.

⁷ Surya, P. S., *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing, 2008) 57.

⁸ *Saluka Investments BV(the Netherlands) v the Czech Republic* (A Partial Award) of 2 March 2006.

⁹ Rudolf, D., and Christoph, S., above n 1, 149.

¹⁰ Surya, P. S., above n 7, 74.

war, host countries have a responsibility to compensate foreign investors, as can be seen in *AMT v Zaire*.¹¹

3. Dispute settlement

BITs provide for the settlement of investment disputes between state and state, and foreign investors and host states. In case of a dispute between a foreign investor and a host state, BITs provide protection to the foreign investor by granting him the right to sue the host state if the latter violates the agreement. Generally, BITs allow countries to choose their own method of dispute settlement either via competent tribunal or arbitration proceedings. Typically, most BITs allow foreign investors to participate in international arbitration especially international investment arbitration such as the International Centre for the Settlement of Investment of Disputes (ICSID).¹² It can be seen that treaty-based investment arbitration, in which a third party makes a judgment, and dispute settlement through the arbitration work in favour of foreign investors: they do not have to go to a

domestic court (the host state's court), which could be liable to bias in favour of the host state or to government intervention. BITs can therefore be seen as useful and effective sources of protection for foreign investors.

It can be concluded that BITs are useful sources of legal protection for foreign investors for many reasons. Firstly, BITs' standards of protection, including the FET and NT, compensation for loss clause and dispute settlement mechanisms, are all designed to ensure that foreign investors will be protected from any risks when they invest in host states and will not be compelled to rely on host state law.¹³ For example, in case of political risk, such as political unrest, foreign investors can still receive protection from the BITs.¹⁴ In case of obsolescing bargain risks, BITs will protect foreign investors after they have invested their money in host states since after investments the bargaining power is usually shifted to the host countries that might use it in their favour.¹⁵ Secondly, BITs provide foreign investors, especially small foreign investors,

¹¹ *AMT v Zaire*, Award, 21 February 1997.

¹² Surya, P. S., above n 7, 96.

¹³ Jwswald W Salacuse and Nicholas P Sullivan, above n 2, 75.

¹⁴ *Ibid*, 76.

¹⁵ Jean, B., "Early U.S. Business-School Literature on International Business-Government Relations: its Twenty-First-Century Relevance" In Robert Gross (ed), *International Business and Government Relations in the 21st Century* (Oxford: Hart Publishing, 2005) 1, 24.

with legal protection rights, which they could not obtain under investment contracts because they have low power bargaining to bargain with host state countries.¹⁶

Nonetheless, there are defects in the BITs so other sources of legal protection should be sought to protect foreign investors, as explained below.

Argument that Bilateral Investment Treaties (BITs) are not the sole useful sources of legal protection for foreign investors

It is clear that BITs are useful sources of legal protection but there are also various other sources of legal protection available for foreign investors. This section will give examples of other useful sources of legal protection compared with BITs in some cases.

1. Multilateral treaty

Apart from BITs, multilateral treaties are also useful sources of protection for foreign investors. Multilateral treaties are ‘treaties between two or more states’. Even

though most countries use BITs as basic international legal sources of foreign investment protection, in some cases states entering into a BIT have different levels of bargaining power.¹⁷ Multilateral treaties are, therefore, another useful sources of protection for foreign investors. For example, when a BIT is drawn up between a developed country and a developing country, foreign investors from the developing country may receive less protection or may be treated unfairly.¹⁸ Thus, multilateral treaties, namely Association of Southeast Asian Nation (ASEAN), are set up between developing countries to increase their bargaining power.

Besides the ASEAN agreement, North American Free Trade Agreement (NAFTA) is another example of regional agreements that are useful sources of legal protection for foreign investors. NAFTA states that host states provide substantive rights such as NT, MFN, FET and protection from expropriation, which is similar to BITs, to protect foreign investors.¹⁹ However, although the NAFTA and ASEAN agreements are useful sources of legal

¹⁶ Jason, W. Y., above n 4, 131.

¹⁷ Jwsald, W. S., and Nicholas, P. S., above n 2, 78.

¹⁸ Ibid.

¹⁹ Cambell, M., and others, *International Investment Arbitration-Substantive Principles* (Oxford: Oxford University Press, 2008) 34.

protection for foreign investors, there are more difficult and complicated negotiations in these agreements than in BITs.²⁰ International Centre for the Settlement of Investment Disputes (ICSID) is another useful source of legal protection for foreign investors at the multilateral level because ICSID, being a credible mechanism used to resolve disputes directly related to investments, involves an arbitrator who ensures fair judgments for foreign investors.²¹ ICSID is currently considered an effective and successful multilateral agreement.

2. Customary international Law

Apart from BITs, customary international laws are useful sources of protection for foreign investors. Customary international laws are composed of two elements: state practice and *opinion juris*.²² Thus, this principle is a form of practice recognized as the law. Customary international laws are useful sources for ascertaining what constitutes international minimum standards when there are no

internationally negotiated treaties such as BITs in place to determine protecting conditions for foreign investment.²³ Basic protection methods for foreign investment, including foreign investors under customary international law, comprise several traditional notions such as FET, diplomatic protection, compensation against expropriation and the non-discrimination principle inherent in the FET.²⁴

Diplomatic protection is another useful source of legal protection for foreign investors. Diplomatic protection enables a state to exercise rights on behalf of its citizens in other countries. The state can claim compensation and protection from host countries accused of violating international minimum standards of protection for foreigners. This principle is recognized in the *Mavrommatis Palestine Concessions* case²⁵. Additionally, the court in the *Barcelona Traction* case accepts that diplomatic protection under the customary international law is widely accepted as a state practice and *opinion juris*.²⁶ Diplomatic

²⁰ Jwsward, W. S., and Nicholas, P. S., above n 2, 78.

²¹ Surya, P. S., above n 7, 30.

²² Malcolm, N. S., *International Law* (Cambridge: Cambridge University Press, 2008) 74.

²³ Surya, P. S., above n 7, 10.

²⁴ Ibid, 56.

²⁵ Mavrommatis Palestine Concessions Case, PCIJ, Ser. A, No. 2p.12.

²⁶ Baccelona Traction, Light and Power Co.,Ltd. (Belgium v Spain).

protection can be another source of protection for some groups of foreign investors. The first group of investors invests in another country without an international legal framework so they cannot bring about a direct action. The second group of investors invests in a country that does not have BITs with their own country so they are not protected by the BITs. Thus, it can be seen that foreign investors are protected by their home countries, which can file claims on behalf of their citizens or request protection from host states breaking the international minimum standards of protection for foreign investors through diplomatic protection measures, evidently seen in the ICJ reports.²⁷

FET is a core principle under the international minimum standard of protection for foreign investors. This can be seen in the *Saluka* case²⁸, where the court orders the host state to provide a minimum standard of protection FET to foreign investors. Moreover, the NAFTA tribunal²⁹ and BITs also accept interpretation of Article 1105(1) by the NAFTA Free Trade Commission (FTC) that reflects the customary international law

minimum standard in regard to FET. However, FET is considered quite obscure because there are no clear specifications and it is open to differing interpretations.

Similarly, even though customary international law can be considered a useful source of legal protection for foreign investors, it has certain shortcomings. First, customary international law is not codified so it is dynamic and changes through time. Then, it is ambiguous and open to different interpretations. Another point is that customary international law still lacks generally accepted rules. Also, customary international law does not have binding mechanism of dispute settlement and monetary transfer that BITs do.

3. General principle of laws

The general principle of laws is one of primary source in international law. In the event where there are no international treaties such as BITs that outline protecting conditions of foreign investment, especially for foreign investors, the court has to use the general principle of laws. Thus, the general principle of laws is another source of protection for

²⁷Nottebohm case (*Liechtenstein v Guatemala*) and *Bacelona Traction, Light and Power Co.,Ltd. (Belgium v Spain)*, Judgement.

²⁸*Saluka Investment BV (the Netherland) v the Czech Republic* para 292.

²⁹*Pope Talbot v Canada*, Award on Damages, 31 May 2002, paras 17-69.

foreign investors. In the *Revere* case³⁰, the court ruled that the government's actions had caused damages to the economic interests of a foreign investor, so the government did not comply with good faith. It is likely that the court implements the general principles of laws to decide protection measures for foreign investors. Moreover, with reference to the duration of investment projects, it is clear that BITs cannot cover all possible turns of future occurrences and modalities, so good faith has to be used in circumstances that are not specified in investment contracts or treaties.³¹ Furthermore, investment tribunals employ good faith in circumstances concerning the renewal of licences.³² However, although the general principle of laws is another useful source of legal protection for foreign investor, it is subject to different interpretations.

4. Investment contracts

In addition to BITs, Yackee finds that investment contracts are important useful sources of legal protection for foreign investment.³³ Investment contracts are

agreements between foreign investors and host states.³⁴ Most investors ranked in the high-risk group usually use investment contracts as their legal protection, rather than BITs.

There are many reasons why investment contracts can be more useful sources than BITs.³⁵ Firstly, conditions of laws are generally adjusted to meet the intricacies of each investment. BITs are general agreements not specific to any kind of investment ('one-size-fits-all default terms of bargain'), so BITs may not be able to adequately protect foreign investors or be applicable to particular investment projects. Conversely, investment contracts allow specification of more detailed legal provisions, especially protection for foreign investors such as tax rate clauses or legal stabilization or choice of law, which can better satisfy foreign the investor's needs and offers better protection than BITs.

Secondly, BITs may reduce the bargaining power of individual foreign investors so they do not receive the level of protection they deserve. For example, BITs

³⁰ *Revere Copper v OPIC*, Award, 24 August 1978.

³¹ Rudolf, D., and Christoph, S., above n 1, 6.

³² *Tecmed v Mexico*, Award, 29 May 2003, para 154.

³³ Jason, W. Y., above n 4, 134.

³⁴ Tom G., "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance" (2005) 25:1 *International Review of Law and Economics* 107, 108.

³⁵ Jason Webb Yackee, above n 4, 133-139.

state that according to NT, foreign investors must receive the same treatment as domestic investors. In other words, foreign investors should not receive more legal advantages than domestic investors. Therefore, under BITs, foreign investors are precluded from asking for more protection than domestic investors. On the other hand, investment contracts offer opportunities for foreign investors to exercise their right of bargaining.

Thirdly, under changing political or economic circumstances, the bargaining power of investors may increase. In these situations, investment contracts give foreign investors the chance to renegotiate agreements and adjust their bargaining power to meet current economic and political conditions. Conversely, under BITs, foreign investors cannot ask for more protection in accordance with their current bargaining power because BITs issued by past governments are binding on future governments.

Finally, one feature of investment contracts is that foreign investors have enough power to ask host countries to apply arbitration

of investment disputes by way of an ‘international arbitration clause’.³⁶ As a result, they do not have to go to domestic tribunals that may involve political influence, so disputes are settled in a neutral forum and foreign investors are treated more fairly.

5. Stabilization clause

This clause is an important factor in making investment contracts useful sources of legal protection for foreign investors instead of BITs. A stabilization clause declares that ‘the law in force in the given date is the law that will apply to supplement the contract, regardless of future legislation’³⁷. Thus, the stabilization clause protects foreign investors from any future changes, especially host state’s regulatory changes. Conversely, no principles in BITs are equal to stabilization agreements that can protect investors against regulatory changes. For example, although expropriation is mentioned in BITs, it is covered under ‘regulatory taking,’ which is highly uncertain.³⁸ Moreover, despite its presence in BITs, FET is ambiguous and uncertain, i.e. in case of regulatory changes, interpretations of laws

³⁶ Ibid.

³⁷ Ibid, 23.

³⁸ Micheal, G. P., “Moving Toward Transparency? An Examination of Regulatory Taking in International Law” (2005) 19:1 *Emory International Law Review* 211, 383.

also change. Thus, it could be seen that stabilization clauses under investment contracts may provide more legal stability than BITs.

However, stabilization clauses still lack certainty in terms of accurate legal meanings and effects. For example, if a host state makes changes to applicable contract laws, the stabilization clauses will be violated. Moreover, it can be seen that decisions in this regard remain contradictory: the question remains of whether stabilization clauses under contracts can be violated in case of sovereignty rights of host countries. In the *Texaco* case³⁹, the court ruled that expropriation was void and stabilization under contract was applicable in accordance with *pacta sunt servanda*. Conversely, in the *Liamco* case⁴⁰, the court ruled that stabilization clauses under contract can be violated if they affect the sovereignty rights of host states but that compensation must be provided.

In summary, investment contracts are useful sources of protection for foreign investors with higher bargaining power than small or medium-size enterprises.

6. Investment insurance

Foreign investors investing in developing countries are liable to higher risks, especially expropriation and political risks.⁴¹ Besides relying on BITs, foreign investors can reduce risks of expropriation or political instability by buying risk insurance, especially political risk insurance via insurance contracts. There are two credible agencies selling investment insurance: the World Bank's Multilateral Investment Guarantee Agency (MIGA) and the Overseas Private Investment Corporation (OPIC).⁴² From this source, foreign investors will receive the compensation quicker than BITs.

Conclusion and suggestions

According to the above analysis, BITs are useful sources of legal protection for foreign investors. Firstly, BITs include several clauses providing that host states protect foreign investors. They state that host states must provide general standard treatment for foreign investors and include clauses regarding compensation for loss on the part of foreign investors as a result of war, as well as a

³⁹Texaco Calasiatic (Topco) v Libya.

⁴⁰Liamco v Libya.

⁴¹Jason, W. Y., above n 4, 134.

⁴²Ibid.

binding mechanism for commercial dispute settlement. Secondly, BITs are also sources of protection for small foreign investors who cannot negotiate with host countries on an equal footing and are not protected by investment contracts. However, BITs are not the only useful sources of legal protection for foreign investors.

Therefore, from the above mentioned, author would like to suggest that although BITs remain the main fundamental international source of legal protection for foreign investors, they are not the only useful sources of legal protection for foreign investors. There are also various other sources of legal protection available for foreign investors. Foreign investors should decide which one is the most appropriate tool for their investment situations. For example,

multilateral treaties such as NAFTA are another useful source of protection for foreign investors similar to BITs. Moreover, when there are no BITs or some provisions are not stated in BITs, customary international laws and general principles of laws can also act as useful sources of protection for foreign investors. Investment contracts are another useful source of protection that foreign investors recognize as giving special legal protection specific to each investment project. In some cases, foreign investors with high bargaining power can negotiate with a host state to ask for more protection. Moreover, stabilization clauses in investment contracts can protect foreign investors from the impact of any future changes. Finally, investment insurance is another source of protection against risks in case of loss sustained by foreign investors.



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