# IMPACT OF GLOBALIZATION ON NATIONAL AND INTERNATIONAL INVESTMENT LAWS

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**ABSTRACT**

Globalization has caused the integration of societies. The phenomenon of globalization is not linear; it involves various aspects of human life. This includes an exchange of values and culture, but predominantly globalization has affected the economical aspect of every country. The territorial boundaries no longer limit the circulation of goods, services, and capital. It can be said that globalization has led to the growth of transborder activities. The flow of direct as well as indirect investments among the countries has increased due to globalization. Every country now seeks to attract foreign investors to facilitate its objective of economic development. Foreign investment has also been considered as a significant way to further the objectives of globalization. The discussion of this article will revolve around investment laws. The development of investment laws shall be traced, nationally and internationally. An important aspect of the article will be the generic impact of globalization on investment laws, which shall be periodized for better understanding. To understand the current scenario of investment laws nationally, the author shall thoroughly evaluate the stance of the Indian government. The author shall aim to study the investment law structure of developed and developing countries to draw the differences which have been created on this particular aspect as an impact of globalization. To do this the author has limited the study to two countries namely, the Philippines and the United States of America. This study shall help the reader observe the contrast between the perspectives of the countries. Lastly, the author shall also include some recommendations which can be introduced in the international system of laws which currently includes reducing the gap between the hegemonic and third world countries.

**Keywords:** Investment Laws, Developing Countries, Developed Countries, Globalization, Treaties

## Introduction

Law is not only meant to impose some restrictions, but it also reflects the needs of society. Thus, the national and international laws keep developing and changing as a reaction to the social as well as the economic phenomenon of globalization. Investment laws have also grown manifold from narrow rules to globally applicable customary principles. And like globalization, investment laws are not one-dimensional and its thorough analysis can be done only by studying its interdisciplinary aspects. Indian laws, since 1991 have aimed for liberalization of its economy by including sufficient measures which promote foreign investment in industrial and business sectors. The principal legislation which focuses on foreign investments in India is the Foreign Exchange Management Act (FEMA). The FDI policy designed by the Department of Promotion of Industry and Internal Trade lays down the sectoral requirements that must be complied with by foreign investors while investing.

The interdependence of economic globalization and investment laws is noteworthy. The foundation of globalization lies in the movement of goods and services within the world economy. Liberalisation of investment laws allows companies to accomplish tasks that favour globalization. Conversely, globalization has led to an increase in competition among the countries for profits. Every participant seeks an edge over the other. This has led to an expansion of the scope of the instruments that govern investment laws by various countries.

In the international scenario mostly, the treaties govern the investment laws. Countries have preferred bilateral treaties and have shown clear refusal for multilateral treaties.

The need for such treaties arises as once the investment is made the host country gains an unwarranted advantage over the investing countries.  This calls for an impartial dispute settlement mechanism that governs the countries, international instruments are means to achieve a balance of power between two countries. However, to achieve an edge over other participating countries growing liberalisation of the investment policies might result in a disadvantage for the host country.

## Development of National and International Investment Laws

### Post-Independence period: 1947 to 1990:

Post-independence India’s mindset in the direction of Foreign Direct Investment (FDI) was

only slightly responsive. [1] FDI was looked for mutually advantageous circumstances to help the native industries or to satisfy any export commitment; this was done by adopting the method for a joint endeavor. Back then, FDI was dependent on cautious scrutiny because of India's delicate Balance of Payment (BoP) position.[2]

Around 1970s, the attitude of India towards FDIs slowly started seeing a change. The country followed a more protective regime to back up India's growing industries which had established themselves over the decade. Foreign Exchange Regulation Act (FERA) was brought into force which required a foreign company to convert foreign equities into minority holdings. An alien company that has weakened its value in equity to minority holding of 40 percent only, could possibly seek a national treatment.[3] In 1980s, limited flexibility was introduced by adding some exceptions to this 40 percent rule. Till mid-1980s, the Indian investment-related laws focused only on the development of local industries.[4]

A significant development during the early post-independence period adoption of the document "Principles Concerning Admission and Treatment of Aliens" by the member states of the Asian-African Legal Consultative Organization (AALCO). This document made it clear that a foreign investing company would be governed by the laws of the host country. India had also played a major part in actively developing the Charter of Economic Rights and Duties of States. While the developing countries due to their fear of foreign interference wanted that the foreign investors to be subjected to domestic laws, the developed countries opposed this.

Thus, India had given importance to the national laws over the international laws.

**The period from 1990 till date:**

India faced a major BoP crisis in the year 1990 which required the country to take some risky measures towards liberalization of FDI and Foreign Institutional Investment (FII) income. Over-dependence on debt had started becoming an issue to which India reacted by making structural adjustments and economic reforms. Some of the newly introduced measures to

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[1]Kumar, N. (1998). '*Liberalization and Changing Patterns of Foreign Direct Investment'* 33(22) Economic Political Weekly 1321.
[2]Pandit, A. (2009). *'India's Foreign Investment Policy: Achievements and Inadequacies'*. https://www.ifri.org/sites/default/files/atoms/files/av18palitfinal.pdf (last visited on Sept. 25, 2021).
[3]Department of Industrial Development, Ministry of Industry https://dpiit.gov.in/sites/default/files/chap001%20%2013.pdf (last visited on Sept. 25, 2021).
[4]Rajan, P. (2014). '*India and Bilateral Investment Treaties-A Changing Landscape'*, ICSID Review- Foreign Investment Law Journal, 419-450, Vol. 29, Issue 2.

liberalize FDI were:

- Automatic approval in high priority industries of FDI up to 51%.
- In energy sectors, foreign equity of 100%
- Foreign Investment Promotion Board was set up. It gave clearance to foreign investments proposals.
- FERA was amended. The amendment brought in provision to treat foreign companies with more than 40% ownership on par with the Indian companies.
- The mining and telecommunication sectors started accepting foreign investment.

The investment laws went through significant transitions as new legislations were introduced. FERA was replaced by Foreign Exchange Management Act (FEMA) which intended to facilitate external trade and payment. Due to WTO obligations, the Indian Patent Act introduced product patents for pharmaceuticals, and the Customs Tariff Act was also amended. The enactment of Arbitration and Conciliation Act brought about considerable changes in the law relating to domestic and international arbitration. India entered into more than 80 bilateral investment treaties (BITs).

**Evolution of International Investment Laws:**

Even though international investment laws are considered to be a sub-branch of public international law, it has a distinct element. There are numerous instances of international arbitral awards in the early twentieth century, talking about the security of investment by alien companies from the self-assertive treatment of host governments. [5] The rules which reflected the current state of international investment laws could not be agreed upon in Hague Codification Conference 1930, making it a failed attempt. The earliest attempt with a definite outcome to develop an instrument dealing with investment protection was perhaps the Havana Charter 1948. Article 11 of the chapter focused on the importance of economic development, thus the member countries were supposed to abstain from causing damage to the foreign investors. Article 12 asked its member states to give foreign investment scope to grow and also provide for the security of investment. This article also required the member states to withhold certain rights to regulate the terms of foreign investment. Due to a lack of the required support, the Havana Charter never came into force. [6]

[5] U.S v Mex. 4 R.I.A.A. 60, 60-66 (Gen. Cl. Comm'n 1926).
[6] A. Lowenfeld. (2008) '*International Economic Law*', Oxford: Oxford University Press 483.

Failure in the codification of investment laws led many states to conclude treaties in order to protect their investment in a foreign country. The Federal Republic of Germany was the first state to bring BITs into a trend in the year 1959 by concluding a treaty with Pakistan. Since then, the world has seen a continuous increase in the number of BITs and also some region based economic instruments having provisions for the protection of investment. The conclusion of ICSID convention in the year 1965 was a major step as it established an international level forum to deal with the disputes in relation to foreign investment. As of 2021, 164 countries have signed the ICSID convention of which 156 have ratified it including the United States.[7] The latest endeavor to codify investment laws was OECD's draft Multilateral Agreement on Investment (MIA) for which negotiation discontinued after April 1998.[8]

Thus, International investment laws presently consist of bilateral investment treaties, free trade agreements, and foreign investment promotion and protection agreements. Due to the growth in the number of arbitral cases, there have been some arguments that international investment laws have adopted a universal regime that is globally applicable.[9] The extent up to which it can be claimed that common guiding principles should be used to settle disputes and not the terms of the parties to the treaty is still debatable.

**Impact of Globalization on Investment Laws**

Globalization has created change in various aspects of human life. But it can be said that the functional aspect of globalization can be studied through its effects on the economy. It has been settled that the term 'globalization' is usually related to the liberalization of markets, exports, imports and making the nations interdependent for economic development. Yet the boundaries of globalization have not just captured the economy but also politics and culture becoming a complete phenomenon in itself.

**Tracing the Origins of Investment Laws and Globalization:**

The 16th century Western Europe first saw the hints of globalization, during the rise of capitalism. It can be said that capitalism has played a very important role in the process of

[7]ICSID, List of the Contracting States and Other Signatories of the Convention (Sept. 3, 2021) https://icsid.worldbank.org/sites/default/files/documents/2021_Sep.ICSID.ENG.pdf (last visited on Sept. 28, 2021).

[8]OECD: *Multilateral Agreement on Investment*: *Draft Negotiating Text* https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm (last visited on Sept. 28, 2021).

[9]Salacuse, J.W. (2010). '*The Emerging Global Regime for Investment*', 51 Harvard International Law Journal 427, 431

globalization. After all, the need to accumulate and the, consume beyond the boundaries of geography was a capitalist attitude. International rules can also be traced back from Europe around the same period. The principle of reciprocity was followed by the European states to transfer capital and also entered into treaties that governed friendship, commerce, and navigation (FCN). As the drive for capitalism started picking up pace in countries beyond the European States along with the colonial expansion various places of the world started gaining access to universally applicable investment rules. Thus, it was the foreign investment laws that caused the legitimization of capitalism and, thus indirectly the process of globalization. Investment laws had become crucial for this phenomenon as it required the opening up of foreign markets. Globalization and investment had entered into a symbiotic relationship, where globalization led to the expansion of foreign investment and in return, the investment laws facilitated globalization.

When the English, Dutch and French trading companies started emerging, they had rights equivalent to the sovereigns. They could pursue endeavors for economic expansion for their nations and also had the power to sign treaties and conquer territories. Thus, the trading companies actively created investment laws and also were the first ones to cause commercial globalization. The 19th and 20th century saw the beginning of a clash between importing and exporting states, each trying to protect their powers.

**Periodizing the Impact of Globalization:**

Post Second World War: The colonial states after regaining their freedom, wanted to develop their economies free from colonial control. This period saw the development of international contracts[10], which helped the host states to safeguard their interests. This phase of globalization was mostly politics-dominated. Thus, the nations started one-on-one negotiations to enter into treaties. The FCN treaties between the USA and European countries were among the first treaties which had provisions relating to the investment. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) entered into force in the year of 1966. [11]

Globalization had interlinked itself with a political power play and, thus the nations used their power to develop the investment laws which best suited their interests. An important example

[10]K, Talus. (2014). Research Handbook On International Energy Law 21.
[11]ICSID, World Bank Group https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview (last visited on Sept 29, 2021).

in this scenario can be the New International Economic Order (NIEO) movement which was constructed by the initiatives of the developing states and resulted in some resolutions. However, the efforts failed to bring results as the resolutions were not binding. For the developing countries to be a part of the process of globalization and gain foreign capital, each country sought an edge over the other. In search of this, the countries entered into treaties that considerably deviated from the spirit of NIEO. While the developing countries were at a disadvantage, the developed countries used it in their stride to further globalization and protect their investments.

The failure of NIEO made international law uncertain. To combat this situation, the states started entering into bilateral treaties. BITs in their early-stage were short and included the major protections[12]. These treaties were drafted by the developed countries and naturally included provisions to safeguard their own interests.[13]

**Changing Times:**

To recover from the increasing debts, the developing countries aimed to gain foreign capital. Thus, the early 90s brought in a large number of BITs. This development can also be noticed by studying the evolution of the investment laws of India. It was in the 90s that the government of India brought in major reforms to liberalize the economy and attract foreign investors.

To study the shift in power in the modern phase of globalization, it is relevant to discuss the *AAPL v. Sri Lanka case* here. The investors could sue the government by resorting to arbitration. This case paved the way for a globalized economy. International law replaced the host country's laws. This decade also saw a number of attempts to codify the international investment laws but they went in vain.

The multi-national companies significantly differ from the domestic companies in terms of their impact on the different aspects of society.[14] Companies like Google, Amazon, and Facebook have significant supremacy. A company that has its business spread all over the world would seek more liberalized policies. These companies can influence the policy-making by systematizing the investment regulations beyond the borders of one country. With such a

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[12]Newcombe, A. & Paradell, L. (2009) *Law and Practice of Investment Treaties, Kluwer Law International* 43.
[13]Guzman, A. T., (1997). *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, Virginia Journal of International Law, 639-688 Vol. 38.
[14]Kim, S., & Milner, H.V. (2021). *Multinational Corporations and their Influence through Lobbying on Foreign Policy*, The Brookings Institution, 497-536.

scenario the development of investment laws on the basis of legitimacy[15] and fair principles are debatable.

The latest investment treaties include various clauses which are slowly bringing back the power to the hands of the host states to regulate their policies. These treaties now include clauses like sustainable development, regulating power for public health, and also some limitations to the dispute resolution system. India's new BITs model also includes a similar clause that the investments should further develop in the country. The term development can be widely interpreted which results in giving the sovereign its power to regulate the investments.

A landmark case based on this can be the *Plain Tobacco Packaging Case,* where Australia justified its regulatory power on the ground of public health against Indonesia. While this case was dealt with under the TRIPS agreement, it is believed that it can also bring significant changes in the application and negotiation of investment treaties.

**Present Scenario of Investment Laws in India**

The objective of the foreign investment liberalization policies can be traced through the Foreign Exchange Management Act which was enacted in the year 1999. The Indian Government through foreign investment regulations seeks to "facilitate external trade and payments and promote orderly development and maintenance of foreign exchange market in India".[16] FEMA is the primary governing act for foreign direct investment and it is supplemented by Foreign Exchange Management Regulations 2000 and Foreign Exchange Management (Transfer of Issue of Security by a person resident outside India) Regulations 2017. These regulations were published by the Reserve Bank of India.

Foreign Portfolio Investment is regulated by SEBI (Foreign Portfolio Investment) Regulations, 2019 which is also known as the FPI regulations notified by the Security and Exchange Board of India. The establishment of Security and Exchange Board of India is to "protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected with it."[17]

Some other laws which govern foreign direct investment in India are Foreign Contribution

[15]Brower, C.N. & Schill, S.W. (2009) I*s Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* Chicago Journal of International Law. Vol. 9. 471-498.
[16]Foreign Exchange Management Act, 1999, No.42, Acts of Parliament, 1999 (India).
[17]Security and Exchange Board of India Act, 1992, No.15, Acts of Parliament, 1992 (India).

(Regulation) Act 2010, Foreign Contribution (Regulation) Rules 2011 and the government may also notify other rules under the FCRA, 2010.

There are two routes through which international companies can invest in India. Investing through an automatic route does not require the approval of the Indian government. In case an activity is not permitted by the automatic route, the investor has to make an application to seek prior approval.[18]

**Incentives:** Even while India had a receptive attitude towards foreign investments during the early years of independence, it still aimed to provide the foreign companies some incentives.

India had entered into an agreement with Japan to waive double taxation. Article XI(3)(b) stated:

"There shall be deemed to have been paid by the taxpayer the amount by which Indian tax has been reduced by the special incentive measures designed to promote economic development in India... Provided that the scope of the benefit accorded to the taxpayer by the said measures effective on the date of the signature of the present agreement is not increased."[19]

Some of the incentives might also be discussed under the Income-tax Act, 1961. These incentives have been provided to attract foreign investments and new industries. It has a provision for concession on royalty taxes and technical service fees.

**Analysis of Indian BIT Programme:**

Nations worldwide have entered into bilateral treaties to promote foreign investment. As this investment involves a foreign company, investing in a foreign state puts them at a disadvantage once the investment has been made. Thus, these treaties aim to provide special protection in order to attract foreign investors. The most important provision of a bilateral investment treaty is that it allows the investors to bring forward a case against the host country when the regulatory measures of that country do not comply with the BIT. This is called investor-state-dispute-settlement.

Recently, the government of India acknowledged the fact that the treaties signed by India do

[18]Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulation, 2017, FEMA.20(R)/2017-RB/GSR 1374(E) (Issued on July 7, 2017)
[19]384 U.N.T.S. 3.

not create a balance between the protection and regulatory powers of the country. This realization can be linked to the number of ISDS cases that lie against India. A major case that can be referred to here was the *White Industries case*[20]where an ICC award was rendered in the favor of White industries. Based on the information provided by UNCTAD settlement dispute navigator, the amount of compensation awarded by the tribunal was 4.10 mln AUD.[21]

Thus, a new Indian BIT model was approved by the cabinet in the month of December 2015.

Investment: The majority of the BITs entered into by India had a much broader definition of investment which was 'asset-based'. Now the definition is considered to be 'enterprise-based' resulting in the fact that only a legally constituted enterprise in India can bring forward a claim. The new BIT policy also subjects the enterprise to a ‘certain duration’ clause to be classified as foreign investment.

**Investor Dispute Settlement:** The 2016 BIT model specifies that an investor should first exhaust all the judicial and administrative remedies available and at least for a period of five years to be eligible for international arbitration.[22]

The provisions reflect the clear change between the 2003 BIT programme and the 2015 BIT programme. The model is now more state-centric. As a consequence, India has already terminated BITs with 71 countries.[23] Since the introduction of the new BITs model, India has signed only three bilateral investment treaties.[24]

**Other Factors Affecting FDI in India:** India has now necessitated financial service concern which requires the national consumers to store data in the country itself and this has caused expenditure growth. Conducting simple transactions has also become a tedious process within the country.

India has been wary of the concern that foreign investments on a large scale might affect its mission to build a socialist nation. After facing the wrath of a number of ISDS cases, the

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[20] White Industries Australia Limited v. The Republic of India UNCITRAL, Final Award (Nov. 30, 2011).
[21]UNCTAD, Investment Dispute Settlement Navigator https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/378/white-industries-v-india (last accessed on Sept. 30, 2021).
[22]Department of Economic Affairs, Ministry of Finance, India’s Model Bilateral Investment Treaty Text https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf(last visited on Sept. 29, 2021).
[23]Department of Economic Affairs, Ministry of Finance https://dea.gov.in/bipa?page=1 (last visited on Sept. 29, 2021).
[24]UNCTAD, International Investment Agreements Navigator https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india (last accessed on Sept. 29, 2021).

initiative of India to modify its vague BIT model is welcome worthy. This BIT model is India's attempt to claim its regulatory power back after what can be called a period of "backlash". However, some analysis claims that this new BIT model will fail to attract the required investments in India, especially when the Indian government is running its Make in India campaign. It might be said, that India has taken a 'radical departure' from the existing practice of investment laws. India has signed only four BITs[25] subsequent to the adoption of the new BIT model, which shows that India is departing from investor-friendly culture and bringing in the protective regime.

**Investment Laws in Developing Countries: Case Study of Philippines**

The governments of developing countries have sought for all round socio-economic development of their nations. Most of these countries are low on capital. Many attempts highlighted the link between foreign direct investment and economic growth. Along with this economic growth, foreign investment can bring in technological advancements and a larger market to network with. Thus, in order to derive the benefits from Foreign Direct Investments, these governments aim to provide an investor-friendly environment through their legislation.

**Investment Laws in the Philippines:**

The reason why the Philippines holds the potential to attract investors is its natural resources. Along with Malaysia, Indonesia, and Thailand, the economy of the Philippines is known as the tiger cub economy.

The country has established a Board of Investments (BOI) to deal with the application as well as the registration for investments from foreign countries. To regulate the foreign investment BOI was guided by three statutes; Investment Incentives Act[26], Foreign Business Regulation Act[27] and by Export Incentives Act[28]. The Security and Exchange Commission (SEC) of the Philippines is recognized as a collegial body that consists of three commissioners vested with quasi-judicial powers.[29]The SEC has developed a constituent department to provide investment

[25]Department of Economic Affairs, Ministry of Finance https://dea.gov.in/bipa?page=7 (last visited on Sept. 29 2021).
[26]Republic Act No. 5186, (Phil.).
[27]Republic Act No. 5455, (Phil.).
[28] Republic Acy No. 6135, (Phil.).
[29]Securities and Exchange Commission, Republic of Philippines https://www.sec.gov.ph/laws-rules-decisions-and-resolutions/legislation/ (last visited on Sept. 29, 2021).

protection known as the Investor Protection and Surveillance Department.

Even though the country has taken major measures to liberalize the FDI policy, it is still not free from fencing. The constitution applies certain restraints on foreign investments and keeps them restricted in some industries. These restrictions apply to the sectors of private security agencies, mining, mass media, and pyrotechnic devices. These sectors come under Foreign Investment Negative Lists (FINL). The two lists constituting the FINL are: List A and List B. List A includes the areas which are reserved the nationals by constitutional mandate. List B is constituted of areas where investment is limited to safeguard security, health, morals and to protect the small scale and medium scale local industries.

The most recent regulation in relation to FDI was brought in 2000 by the name of the Security Regulation Code. This was enacted with an aim to strengthen investor protection. The regulation demanded full disclosure in public offerings. The code has considerably increased the penalties for securities violations. It cannot be said that the laws are being enforced in full force. The enforcement is still subject to some delays in the legal system of the Philippines.

**Factors Inhibiting FDI:** This country has a higher minimum labor wage with low productivity. The laborers lack vocational and technical skills. The cost of industrial power supply is also relatively higher in the Philippines.

While studying the Investment laws of Philippines, the study of the much-discussed case SGS v Republic of Philippines[30] seems relevant. On the basis of a contract entered into by SGS, the Philippines had to perform the custom services. When the Philippines changed its policy in order to fulfill its WTO obligations, it chose not to renew the contract with SGS. The contract had enunciated the forum to be Filipino courts but SGS brought a claim in ICSID on the basis that the umbrella clause in the bilateral investment treaties between the two countries gave the required jurisdiction. The umbrella clause stated that each contracting nation "shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other." The tribunals focused on the words 'shall' and 'any obligation' to reach a decision that non-renewal of the contract amounted to a violation of BIT.

It can be inferred from the measures of the developing countries that foreign investment has become a necessary evil. A developing country does want to lure foreign investors to invest in

[30]Société Générale de Surveillance S.A. v. Republic of the Phil. ICSID Case No. ARB/02/6, Objections to Jurisdiction, 154 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

its country so it can stabilize the economy. But this country also approaches the territory of foreign investment with vulnerability and caution. This two-faced outlook of the countries is visible in its legislation which is an accumulation of incentives and disincentives. The developing countries always face the dilemma of whether to retain their sovereign regulatory powers or to provide legislations that give them an advantage over the other developing countries. After the failure of the NIEO movement, the protesting countries came across an "enlightenment" that their benefits lie in foreign investments which can only be achieved by providing investment protection. Liberalized legislation might make a country look more reliable but it comes at an expense of other developing countries. Time and again many developing countries have supported CERDS- Charter of Economic Rights and Duties of States as it promotes collective efforts to increase the profits from an investment.

**Investment Laws in Developed Countries: Case Study of America**

The growth of the United States has been dependent on the capital invested by foreign investors. This can be concluded by tracing the growth in investment of foreign capital over the period of the nineteenth century which resulted in rapid industrialization.[31]The United States has always stood up for the protection of the rights of foreign investors. According to the US constitution, all persons within the US are entitled to property rights. [32]By recognizing the need for foreign capital, the US applies an 'open-door' policy for the foreign investors. The federal government does not provide foreign investors with any special incentives neither do the investors face any special barriers.

An investment treaty entered into by the US government has the same status as the federal law. Advice and consent of two-thirds members of the Senate are taken to ratify a treaty.[33] A treaty might be binding from the perspective of international law yet a federal law that is enacted eventually can override its provisions. Similarly, a self-executing treaty can also override the existing federal law. The United States is a contracting party to the International Centre for the Settlement of Investment Disputes.[34]

All levels of hierarchy include laws to protect the rights of an investor. However, the restriction to impair an obligation under a contract is not applicable to the federal government as it has

[31]A, Roth. (1979). *'A Guide to Foreign Investment under United States Law' 8.*
[32]U.S CONST. Amend. V.
[33]US. CONST. art 2, § 2, cl. 2.
[34]ICSID https://icsid.worldbank.org/about/member-states (last visited on Sept. 30, 2021).

the power to regulate 'commerce with other nations.' A state is forbidden from discriminating between local and alien resident investors.[35] Excluding some sectors, a foreign investor is not required to get a special authorization from the government for admission.[36] Even though the legislations invite capital, some popular reactions or political influences might discourage foreign investments. A foreign subsidiary is expected to adhere to the federal and state laws while conducting its business. For example, while entering the US market by acquiring a foreign investor has to comply with antitrust laws.

**Investor Incentives:** The federal government of the US refrains from engaging in investment contracts. The only incentive given by the government is when an investor invests more than one million dollars in their country, it becomes eligible to get a special investor's visa.[37] The US constitution also has a contracts clause that safeguards the investors from the arbitrary action of the state or local government.[38]

**Expropriation:** The constitution states that the government can only engage in takings that are for "public purpose". The case Kelo v City of New London,[39]the Supreme Court allowed the authorities to acquire a home. This acquisition came under a redevelopment plan that transferred most of the land to a pharmaceutical company. This interpretation of the Supreme Court shows that phrase "public purposes" can be interpreted widely. Any dispute resolution regarding the takings of the property occurs in the courts of general jurisdiction. The few international arbitration claims against the U.S. government can be linked to the provision that a foreign investor must exhaust all the remedies offered by the judiciary before approaching diplomatic representations.

The Supreme Court has held in its decisions that the government is allowed to make some changes to contracts when a situation of economic emergency arises.[40] Also, some contracts are subject to government regulation.[41]

**Investment Favorable Market:** US attract investment as it gives its investor a stable economy. The regulations foreign investors are subjected to are limited. The US also brings in

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[35]Yick Wo v Hopkins, 118 U.S. 356, 369 (1886).
[36]Morrison, F. L. (1976), *Limitations on Alien Investment in American Real Estate*, 60 Minnesota Law Review 621, 631-636.
[37]8 U.S.C. § 1153(b)(5) (Supp.II 1990).
[38]U.S. CONST. art. I, § 10.
[39]Kelo v City of London, 545 U.S. 469, 473 (2005).
[40]Home Savings and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
[41]Energy Reserves Group v. Kansas, Power & Light Co., 459 U.S. 400 (1983).

the largest consumer market for its investors. With the right infrastructure, technology, and skills the US has been one of the most preferred markets fetching foreign capital.

It can be easily noted that the US carefully regulates its foreign investments even though it claims to be an advocate of the rights of foreign investors. The federal court has also proved its supremacy over the investors within the territory of the nation. The legal framework provides the country and local investors with the much-needed balance between liberalization and regulation. The only concern of the developed states has been increasing the protection available to foreign investors.

## Conclusion

Foreign investment not only further economic globalization but can also create influence over the livelihood of people in the host countries, hence bringing about a social change.

Once an investment has been made in a foreign country, the investor might have to face significant losses because of changes in regulatory measures of the host country at the whims of its government. This led to the establishment of institutions that work on reducing the risks. It can be safely concluded that attracting FDI has been a major concern for developing countries. To gain this foreign capital, the developing countries have also been taking measures to put limitations on the government's power to regulate and on the interference of the host country's legal system. While a liberalized economic system has entered into enforceable contracts, provides incentives, and has provisions for dispute resolution mechanisms, a system without these institutions is at a disadvantage. It is clear that these policies are tilted to the benefit of capital-exporting countries. In this battle of becoming the most investor-friendly country, the environmental standards, labor standards, and public health are being ignored.

An area of concern is the way bilateral investment treaties are negotiated and implemented. These treaties have now become a written instrument used by the investing state to exercise its dominance over the economically weaker countries. The purpose of an investment treaty was to create a balance between the capital-exporting states and host countries yet it has resulted in creating an imbalance between the protection of investor's rights and sovereign power. This finding can be reached by studying the Indian economy, where entering into bilateral investment treaties backfired in the long run. With the world coming closer day by day and opening up of markets, the question of achievement of the balance has become a topic of growing relevance.

It can also be noticed that the rise in the number of BITs has resulted in a reduction of the market which is held by developing countries. This has affected the welfare of the developing countries considerably. Before entering into a desperate attempt of signing treaties to gain foreign investment there are some primary reforms that can be brought in a capital importing country (usually developing nations). The efficacy of BITs has varied in different nations. This implies that growth in foreign investment also depends upon some macroeconomic factors. Such factors include the national economic stability, expenditure to be incurred for various purposes, the suitability of location with respect to the availability of natural resources, availability of skilled labor and infrastructure. Some of these factors have resulted in slower growth of foreign investment in a higher liberalized economy of Philippines. The positive impact of BITs is not to be negated but it can be held that it is not the only way to promote globalization.

It has been noticed that developing countries like India, following the footsteps of the developed countries are now including some innovative clauses in their BITs model to retain some power to regulate their policies. Earlier, the developing countries had set their goal on promoting foreign investment and hardly considered the fact that, such treaties might affect their regulating power too. This is a welcome change. Fair and Equitable Treatment is in itself a very wide terminology that can easily subject any regulating policies to arbitral scrutiny. While drafting this clause, proper attention needs to be given textual context. An ideal example for a well-drafted clause would be Canada which provides the specifics about when a fair and equitable obligation is breached.

Multilateral Treaties: International law has adopted multilateralism in other areas such as trade and monetary law. Hence, bilateralism for investment laws comes as a surprise. Multilateralism as an institution provides some general principles to govern either three or more three countries. Multilateralism is based on the principle of "diffuse reciprocity" with ensures that once a treaty-based obligation arises, it cannot be predicted that who will seek the benefits from whom. This brings about the consequence that the participating countries are placed on an equal footing. Hence, the balance of power which the bilateral treaties have failed to create can be attained through multilateralism. Yet despite some attempts, the nations have failed to develop a multilateral investment treaty.

The current investment laws are more focused on capital-exporting and capital importing countries. This defeats the objective of globalization which should be a competition of private

actors in a globalized economy. Thus, it brings a question to the mind of the author that if the investment laws have been successfully furthering globalization. Therefore, in this context, it might be safely inferred that economic globalization can be achieved in a true sense through the emergence of multilateral investment treaties.