BILATERAL INVESTMENT TREATIES AND INVESTOR-STATE DISPUTE SETTLEMENT IN AZERBAIJAN AND CENTRAL ASIA

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This thesis critically examines the evolution and contemporary practices of Bilateral Investment Treaties (BITs) and Investor-State Dispute Settlement (ISDS) mechanisms in Azerbaijan and five Central Asian republics: Kazakhstan, Uzbekistan, Kyrgyzstan, Tajikistan, and Turkmenistan. Following independence from the Soviet Union, these states utilized BITs to attract foreign direct investment (FDI), particularly in extractive and strategic industries. Early treaty practice emphasized investor protections such as Fair and Equitable Treatment (FET), Most-Favoured-Nation (MFN) clauses, and access to international arbitration. However, the practical deployment of ISDS has revealed substantive and procedural shortcomings, including vague treaty drafting, limited regulatory space, and imbalanced commitments. This article maps convergences and divergences in treaty formulation across the region using comparative legal analysis and evaluates current reform efforts influenced by UNCITRAL Working Group III and Environmental, Social, and Governance (ESG) considerations. The study concludes with targeted policy recommendations aimed at modernizing the regional investment law framework to ensure alignment with contemporary international standards and sustainable development imperatives.

Bilateral Investment Treaties (BITs) serve as pivotal instruments in the international legal architecture for promoting and protecting foreign investment. These treaties are typically underpinned by Investor-State Dispute Settlement (ISDS) provisions that grant investors the procedural right to arbitrate claims against host states. In the aftermath of the Soviet Union's dissolution, Azerbaijan and the Central Asian republics rapidly adopted BITs to facilitate economic integration and attract capital inflows. These efforts were accompanied by domestic legal reforms, including foreign investment laws and accession to multilateral treaties such as the Energy Charter Treaty (ECT).

The early BITs signed by these states generally replicated first- and second-generation treaty models, prioritizing investor protections over host state regulatory discretion. These treaties were instrumental in unlocking investment in critical sectors—oil and gas in Azerbaijan and Kazakhstan, mining in Kyrgyzstan and Uzbekistan, hydropower in Tajikistan, and hydrocarbons in Turkmenistan. Despite the ambitious scope of these BITs, they often lacked precision in key provisions, resulting in interpretive ambiguity and unanticipated litigation risks under ISDS.

Azerbaijan’s BIT program has been particularly aggressive since its independence, reflecting the country’s strategy to leverage its hydrocarbon wealth for development. By 2024, Azerbaijan had concluded over 52 BITs, including agreements with the United States, the United Kingdom, and various European and Asian states. Azerbaijan's treaty practice is characterized by heterogeneity, as it lacks a unified model BIT. As a result, treaties vary significantly in terms of scope and investor protections. Azerbaijan’s 1992 Law on the Protection of Foreign Investments offers additional guarantees, such as protections against expropriation and unrestricted profit repatriation. Moreover, Azerbaijan is a signatory to the ICSID Convention and the ECT, underscoring its commitment to ISDS.

Kazakhstan has the most comprehensive BIT network in Central Asia, with 53 treaties concluded and 43 in force. These include treaties with key global investors such as the United States, the United Kingdom, Germany, and China. Early Kazakh BITs are based on traditional models, offering broad protections but often lacking definitional clarity. For instance, many treaties exclude state-owned enterprises from the definition of investors and offer vague standards for expropriation and national interest. Modern BITs, such as those with the Netherlands, include nuanced formulations and regulatory exceptions. Although Kazakhstan has not published a formal model BIT, there is evidence of a shift toward more balanced treaty practice in recent years.

Uzbekistan's 57 BITs (49 in force) similarly reflect the investment liberalization efforts of the late 1990s and early 2000s. Many of these treaties impose admission requirements and legality clauses, limiting protections to investments compliant with national laws. Treaties such as the Uzbekistan–Portugal BIT (2001) and the 2011 China–Uzbekistan BIT restrict treaty benefits to genuine economic linkages, aiming to curb treaty shopping. While offering FET and MFN protections, these treaties also contain sector-specific carve-outs due to restrictions under Uzbek law, particularly in areas such as telecommunications, mining, and air transport.

Kyrgyzstan has signed approximately 39 BITs and is a party to the ECT, although it has not ratified the ICSID Convention. Its BITs generally follow traditional formulations, including FET, MFN, and expropriation clauses. The U.S.–Kyrgyzstan BIT (1993) is particularly expansive but relies on arbitration frameworks other than ICSID. Despite legal commitments, Kyrgyzstan's political volatility has hampered effective investor protection. The gap between formal treaty promises and practical enforcement continues to be a significant challenge for the Kyrgyz investment environment.

Turkmenistan maintains the smallest BIT portfolio, with 30 treaties signed and 25 in force. Its BITs include core protections such as MFN and expropriation clauses, and nearly all include ISDS provisions. However, Turkmenistan's restrictive investment environment and reliance on presidential decrees often override or limit the application of BIT protections. Many treaties condition protections on investments made in accordance with domestic laws, effectively excluding unapproved investments. State-controlled economic policies and a lack of transparency further complicate BIT implementation.

BITs across Azerbaijan and Central Asia exhibit a high degree of textual convergence in core areas but diverge significantly in interpretative and regulatory scope. Notable features include:

Broad Definitions: The term "investment" often includes tangible and intangible assets, while "investor" encompasses both natural and legal persons. Some treaties impose nationality or control-based limitations to prevent treaty abuse.

Substantive Standards: FET and Full Protection and Security (FPS) clauses are universal but frequently undefined, leaving their interpretation to arbitral tribunals. MFN clauses allow importation of more favorable terms from other treaties, occasionally leading to procedural fragmentation.

Expropriation Clauses: All treaties require compensation for direct or indirect expropriation but often fail to clarify what constitutes a public purpose or indirect taking, creating legal uncertainty.

Umbrella Clauses: Several BITs elevate host-state contractual obligations to treaty level, effectively internationalizing domestic commitments.

ISDS Mechanisms: Most treaties provide access to international arbitration under ICSID or UNCITRAL rules. However, non-ratification of ICSID by some states (e.g., Kyrgyzstan, Tajikistan) complicates procedural consistency.

The global investment regime is undergoing significant reform, particularly under the auspices of UNCITRAL Working Group III. Key trends include:

Clarification of Treaty Standards: Precision in defining FET, indirect expropriation, and MFN clauses is increasingly emphasized to enhance predictability.

Sustainable Development Integration: Environmental, Social, and Governance (ESG) factors are influencing BIT reform, prompting states to insert regulatory carve-outs and general exceptions to safeguard public interests.

Model BIT Development: Some states, such as Uzbekistan and Kazakhstan, are considering new model BITs to recalibrate the balance between investor protection and state sovereignty.

Dispute Prevention and Alternatives: Interest in dispute prevention mechanisms and alternative dispute resolution (ADR) tools is growing, including mediation and state-state consultations.