



RESEARCH ARTICLE

International Investment Law and the Right to Regulate: Treaty Design, Arbitral Interpretation and ISDS Reform

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ARTICLE HISTORY

Received [02-07-2026]

Accepted [02-10-2026]

Published [10-10-2026]

KEYWORDS

international investment law;
right to regulate; fair and
equitable treatment; indirect
expropriation; police powers;
legitimate expectations;
investor-State dispute
settlement; treaty drafting;

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<https://doi.org/10.68740/jiil23>

ABSTRACT

This paper considers the ability of international investment law to protect foreign investors, while preserving the regulatory sovereignty of host States in pursuit of public objectives. It posits that the balance is generated through the interaction of three levels: the substantive treaty text, the interpretive practices of tribunals, and the procedural and remedial architecture through which claims are decided and valued. The analysis concentrates on fair and equitable treatment (FET), indirect expropriation and the police-powers doctrine, with special focus on legitimate expectations, regulatory change, public-interest objectives and taxation. It then explores recent treaty practice in Canada, Australia, India and the United Kingdom, with Pakistan examined as a significant resource-dispute and treaty-reform case study. It also reviews the work of the UNCITRAL Working Group III on procedural and cross-cutting provisions, damages and compensation and standing mechanisms in 2025–2026. The key finding is that there is no single right to regulate clause that can solve the dilemma between investment protection and regulatory autonomy. More precise FET provisions, expropriation annexes, carefully drafted exceptions, tax filters, treaty-party interpretations and procedural safeguards can reduce interpretive uncertainty. Their effectiveness depends, however, on the applicable treaty, and on the interaction between liability and quantum. The article thus proposes a layered drafting approach: narrowly define substantive obligations to preserve legitimate regulatory change, preserve meaningful protection against discrimination and denial of justice, and align ISDS and damages rules with the substantive allocation of risk. This comparative evidence suggests divergence, not convergence, and renders treaty-specific analysis indispensable.

1. INTRODUCTION

International investment treaties protect investors against certain types of State conduct, but do not typically freeze the regulatory framework of the host State. Difficult cases arise where public measures have a material impact on an investment: climate-transition rules, public-health regulation, taxation, environmental licensing and investment screening can all alter expected returns. The legal question, then, is not whether a State has regulatory authority in the abstract. It is whether the specific measure falls within the protection promised by the applicable treaty, and whether the treaty itself has allowed sufficient interpretive space for legitimate regulatory change. This distinction matters, because different treaties impose materially different obligations.

The main research question is: how can international investment law protect foreign investors while respecting the legitimate regulatory space of the host State? Three subsidiary questions come to mind. First, how do the FET and indirect expropriation rules address the risk of regulation? Second, what treaty drafting devices and interpretive techniques have been used to sustain public-interest regulation without undermining protection for investors? Third, how does the current reform of ISDS, especially the work of UNCITRAL Working Group III on procedure, damages and standing mechanisms, impact that balance? The article presents “balance” as a legal-design question, not as a normative claim about whether investors or States should win.

The comparative inquiry includes Canada, Australia, India and the United Kingdom with Pakistan as a focused fifth case study. The choice of Pakistan as a case study is based on the Tethyan Copper dispute and Pakistan’s ongoing treaty-reform concerns. The selection is not statistically representative but purposive. It reflects jurisdictions that combine capital-exporting and importing functions, and that have adopted materially different treaty responses: Canada’s modern FIPA model, Australia’s policy of reforming older BITs and excluding ISDS from new agreements, India’s restrictive 2016 Model followed by newer treaty practice, and the United Kingdom’s coexist of older BITs with newer FTA commitments. Pakistan offers an alternative resource-dispute view. The comparison is therefore not a league table of national systems but rather a mapping of legal design patterns.

The article steers clear of two opposite propositions. The first is that the success or failure of an investor in a specific ISDS case demonstrates that investment law generally prohibits or permits regulation. Awards are fact- and treaty-specific. The second is that a right to regulate clause automatically immunises public measures. The modern treaties usually contain substantive protections as well as regulatory provisions. The legal effect of a right-to-regulate provision must thus be evaluated in light of the text, context and object and purpose of the treaty and, where applicable, its annexes and interpretive instruments. Such an approach is consistent with the ordinary principles of treaty interpretation under the Vienna Convention on the Law of Treaties.

UNCITRAL Working Group III is relevant, but not sufficient to answer the substantive question. Its mandate is to reform investor-State dispute settlement, not to revise the thousands of existing investment treaties. The 2026 work on procedural provisions, damages and standing mechanisms could affect cost, consistency, valuation and institutional design but will not automatically amend the FET or expropriation clauses in existing treaties. Accordingly, the article understands UNCITRAL reform as a procedural and remedial layer that needs to be analysed in conjunction with, rather than as a substitute to, substantive treaty reform.

The analysis does not take for granted the incompatibility of investor protection and regulatory autonomy. A State may have a legitimate public purpose but still violate a treaty by discriminatory implementation, denial of justice, failure to observe a particular commitment, or unlawful expropriation. Conversely, a measure that causes significant economic loss may be not an indirect expropriation under a treaty that includes a police powers rule. The core analytical task is to

identify the treaty rule that allocates the risk in question and then to test the measure against that rule.

1 Objectives and Method

The objectives are fourfold: (1) to clarify the legal meaning and limits of the right to regulate in contemporary investment treaties; (2) to analyse FET, indirect expropriation, legitimate expectations and police-powers reasoning as the principal substantive pressure points; (3) to compare treaty practice in Canada, Australia, India, the United Kingdom and Pakistan using consistent criteria; and (4) to assess whether current UNCITRAL Working Group III reforms address substantive regulatory risk. The methodology adopted is doctrinal and comparative. Primary sources include texts of treaties, official model treaties, arbitral awards, government treaty databases and documents of UNCITRAL. Secondary literature contains doctrinal disagreement and competing interpretations. The criteria for comparison are: definition of investment, FET, expropriation, right-to-regulate language, exceptions, tax provisions, ISDS architecture and treatment of surviving older treaties. This is not an empirical study: the figures in the manuscript are visualisations that show a point, not statistical measurements.

2. REVIEW OF LITERATURE AND FRAMEWORK OF ANALYSIS

The literature on the right to regulate has moved from a binary debate – investor protection versus State sovereignty – to a discussion of treaty design and interpretive technique. Recent scholarship has looked at how newer investment agreements define FET, indirect expropriation and public-interest objectives, and has also questioned whether more detailed drafting actually reduces arbitral discretion. Gazzini's latest treatment places the right to regulate within the broader recalibration of investment law, relating it to indirect expropriation, FET and contemporary treaty practice (Gazzini, 2025). Likewise, Hailes explores the customary-law underpinnings and constraints of police-powers reasoning (Hailes, 2024). These approaches support the proposition that regulatory space is a doctrinal issue and not just a policy preference.

A second body of literature addresses the challenge of defining FET. The debate is about legitimate expectations, transparency, due process, arbitrariness and the relationship between the treaty language and the minimum standard of customary international law. The critique of the 2016 Indian Model BIT by Ranjan and Anand (2017) is especially relevant, as they argue that limiting treaty language does not necessarily eliminate arbitral discretion. The implication for this article is that the measure of drafting precision must be not only the number of protections removed, but the interpretive work left for tribunals. The 2021 Canadian Model FIPA takes a different approach: it retains FET but explicitly links it to customary international law and articulates a right to regulate (Government of Canada, 2021).

A third theme is about police powers and expropriation. Methanex is often cited for the proposition that non-discriminatory regulation for a public purpose and consistent with due process will generally not be expropriatory if the State has not made a specific promise not to regulate. This reasoning is echoed in Canadian government materials themselves, when talking about later regulatory disputes (Government of Canada, n.d.). Further examples of tribunals considering public-health and environmental regulation are provided by Chemtura and Philip Morris v. Uruguay. Jurisprudence should not however be reduced to a categorical immunity. Treaty language, discrimination, due process, the nature of the property right and the severity and character of the measure remain relevant.

A fourth strand addresses ISDS and damages reform. But valuation can magnify the impact of a finding of liability, and damages have been insufficiently incorporated into the reform debate (Behn, 2023). UNCITRAL Working Group III has subsequently put damages and compensation

directly on its agenda, with draft guidelines and work on standing mechanisms (UNCITRAL, 2026a). This body of literature and institutional work points to an important gap in the research agenda: substantive treaty drafting and procedural reform are often studied in isolation, yet a State's regulatory exposure is a function of both the liability rule and the remedial architecture. This article links those layers and tests the link by reference to selected national treaty practice.

General exceptions and non-precluded-measures clauses should be distinguished from substantive definitions of FET and expropriation. An exception of the GATT Article XX-style may entail a necessity and chapeau analysis that differs from investment law reasoning. However, an operative right-to-regulate clause or an expropriation annexe may affect the primary rule itself. The legal effect thus hinges on the architecture of drafting. Interpretively relevant is the preambular reference to sustainable development, but this is not the same as an operative provision, which expressly limits the scope of an obligation.

The essential-security and non-precluded-measures clauses address another problem. They may preserve governmental discretion in specific emergencies, but the breadth and reviewability of these differ significantly from treaty to treaty. They should not be treated as a universal defence to normal regulatory disputes. Rather, the question should be whether the measure is part of the substantive obligation, a specific exception or an autonomous defence, and whether there is a treaty-specific burden of proof or standard of review.

Another underutilised instrument is joint interpretations by treaty parties. Where the treaty provides for or recognises binding interpretations by the parties, those interpretations may bind later tribunals without rewriting the treaty. Their legal effect depends on the applicable treaty and the rules of interpretation of treaties. The article therefore sees joint interpretations as a complement to the drafting process rather than a substitute for clear substantive clauses.

3. FAIR AND EQUITABLE TREATMENT

FET remains central because it can capture State conduct that is short of a taking. Overbreadth arises when tribunals convert general notions of stability or investor expectations into a complete ban on regulatory change. Modern treaties react by articulating customary-minimum-standard, closed lists of treaty violations, or expressly stating that frustration of expectations alone does not constitute a breach. The correct question is still treaty-specific.

Contemporary treaty practice contains a number of distinct FET techniques. Canada's 2021 Model FIPA specifically mentions denial of justice as part of customary international law and connects FET to that body of law. The 2016 Indian Model BIT does not contain a traditional FET clause, but defines protected treatment in a closed formulation tied with customary international law. India's subsequent treaties, such as the 2025 India-Israel BIA, retain this restrictive architecture but modify other features of the 2016 model. These developments demonstrate that "modernisation" does not imply a one-size-fits-all drafting model.

Legitimate expectations should not be reduced to a rule that only express promises count. Arbitral practice has recognised that sufficiently specific representations or assurances can matter, but also that investors cannot generally assume that a regulatory framework will not change. The case of *Parkerings v. Lithuania* is good authority for the distinction between commercial expectations and those protected by international investment law. Thus, a defensible formulation asks if the State made a sufficiently specific representation, whether reliance was reasonable under the circumstances, and whether the challenged change was consistent with the treaty's allocation of regulatory risk.

The notion of denial of justice is different from an ordinary administrative delay or a disagreement with a domestic judgement. Customary-minimum-standard formulations have a high threshold.

The tribunal should not be a general court of appeal for national administrative decisions. The article thus considers the denial of justice as a key but limited element of FET and distinguishes it from claims of policy instability, procedural unfairness or arbitrariness.

Manifest arbitrariness might be a residual protection, but not a free-standing proportionality jurisdiction. The critical question is whether the measure is rationally and legally defensible in terms of its stated objective and also takes account of discrimination, process and the text of the treaty. Examples such as targeting an investor solely on the basis of nationality may engage non-discrimination obligations; they should not be automatically labelled arbitrary without identifying the applicable treaty rule.

Conceptually, full protection and security should also be differentiated from FET. Many modern treaties link the obligation to the customary international-law standard of physical or police protection, rather than guaranteeing against all commercial or regulatory losses. If it is to be considered a second general fairness clause, then we are treating the treaty beyond its text.

4. POLICE POWERS AND CONFISCATION

Direct expropriation is the formal taking or equivalent deprivation of title. Indirect expropriation is measures that may have an effect equivalent to a taking but without formal transfer of title. Modern treaty annexes frequently require tribunals to take account of economic impact, duration, interference with distinct reasonable investment-backed expectations and the character of the measure. For example, the Canada-UAE FIPA explicitly states that a non-discriminatory measure adopted and maintained in good faith to protect legitimate public-welfare objectives does not amount to indirect expropriation, but nonetheless requires a case-specific inquiry (Government of Canada, 2026).

The police-powers doctrine is important but should not be seen as a uniform customary rule with identical elements in all treaties. *Methanex*, *Chemtura* and subsequent awards provide important examples of the reasoning, and modern treaties increasingly codify aspects of that reasoning. The safer doctrinal proposition is that bona fide non-discriminatory regulation for legitimate public welfare purposes may be outside indirect expropriation subject to the applicable treaty and its express exceptions or annexes. 135

Police powers are not therefore an absolute immunity. A measure may also be expropriatory where it is discriminatory, confiscatory, contrary to due process or outside the conditions set out in the applicable treaty. The difficulty is illustrated by disputes over resource licences, where refusal of a licence may be both an exercise of public authority and a measure with severe economic consequences. *Tethyan Copper* is important for Pakistan, but it is not a police-powers holding, the award being part of a broader treaty dispute and quantum. The settlement has changed the structure of the project.

Proportionality also must be approached with caution. Some tribunals assess suitability, necessity or means-ends relationship; others prefer treaty-specific factors such as economic impact, character and legitimate expectations. The article therefore rejects a universal proportionality test. If a treaty expressly requires proportionality, or incorporates it into an exception, then it must be applied as such. Where it does not, tribunals should not import a free-standing policy-review standard unless there is a clear legal basis for doing so.

Compensation must be distinguished according to the legal nature of the measure. There is no right to expropriation compensation for a lawful exercise of police powers that is not an expropriation. A lawful expropriation activates the compensation standard of the treaty. An unlawful expropriation or other breach of a treaty may give rise to remedies under international law, in accordance with the applicable treaty and general rules. Thus, the damages stage can

materially affect the regulatory exposure. But draft guidelines are not binding law unless they are incorporated or otherwise made applicable.

5. HEALTH, TAXATION AND ENVIRONMENT.

One particularly useful stress test is based on climate regulation, which can change the economic assumptions underpinning long-term investments. Carbon pricing, phase-outs, protected areas and licensing changes can also reduce asset value, without being expropriation. The legal analysis should concentrate on the FET and expropriation language of the treaty, any explicit climate or environmental objectives, the presence of specific State commitments, discrimination, due process and the duration and character of the measure.

The same distinction is illustrated by public-health disputes. *Philip Morris v. Uruguay* is important because the tribunal considered tobacco-control measures under the applicable treaty and rejected the expropriation and FET claims. The case of *Philip Morris Asia v Australia* is different: the tribunal's award in 2015 was jurisdictional and related to the timing and circumstances of the claimant's restructuring, but it did not rule on the substantive legality of Australia's plain-packaging legislation. Therefore, the two cases should not be collapsed into one "public-health victory."

Investment screening is conceptually distinguished from post-establishment FET. Canada, Australia and United Kingdom have tightened screening or security-related controls and UN Trade and Development reports a broader global trend toward selective investment policy and screening in strategic sectors (UN Trade and Development, 2026). A screening determination may fall outside the scope of the treaty, be subject to a reservation or be protected by an essential-security or national-security provision. As such, it should be examined in light of the scope and exceptions of the treaty, before it can be characterised as a regulatory-space problem.

Human rights and Indigenous rights can be included in investment treaties through preambles, operative provisions, exceptions, responsible-business provisions or legality requirements. The Canada-UAE FIPA explicitly mentions the rights of Indigenous peoples as a legitimate policy objective and contains transparency provisions to this end (Government of Canada, 2026). The significance is doctrinal: an objective can be named to guide interpretation, but it does not automatically defeat an investor claim. The tribunal remains bound to apply the operative provisions of the treaty.

6. TREATY PRACTICE COMPARED

6.1 Canada

Canada provides a shining example of modern treaty architecture. The 2021 Model FIPA explicitly reaffirms the right to regulate and ties FET and full protection and security to customary international law. Like the Canada-UAE FIPA, which will come into force on 19 May 2026, it has a similar architecture but adds detailed procedural provisions, third-party-funding disclosure and optional expedited arbitration for claims below CAD 10 million (Government of Canada, 2021, 2026). The importance is not that Canada has solved the regulatory problem but that substantive and procedural safeguards are being built in parallel.

Canada has also accepted different ISDS arrangements in different treaty relationships. Canada faces a different ISDS architecture under the Canada–United States–Mexico Agreement than under older agreements, whereas CETA and the 2021 FIPA model feature more developed dispute settlement mechanisms. This variation supports a key proposition of the article: regulatory

balance cannot be inferred from the mere presence or absence of ISDS. Even if the forum changes, the substantive obligations imposed by the treaty remain relevant.

The Canadian model of indigenous rights is particularly instructive because the Canada-UAE FIPA embeds those rights within the treaty's legitimate-policy framework. The provision can provide interpretive context where a measure affects Indigenous rights, but it does not convert domestic constitutional obligations into automatic defences. The stronger argument is that treaty drafting can take account of the regulatory context in which investment decisions are made, thus decreasing the risk that compliance with domestic public law obligations will be treated as an unexpected breach of treaty.

The Canadian FIPA architecture also exemplifies the procedural side of regulatory balance. It provides for the disclosure of third party funding, provision for preliminary objections, transparency and an optional expedited procedure for smaller claims and envisages the possible future use of a first instance investment tribunal or appellate mechanism. These mechanisms do not change the substantive standard of protection, but they can affect the cost, duration and settlement value of claims.

6.2 In Australia

Australia's experience with Philip Morris Asia is often described as a warning about legacy treaties, but the legal holding should be put precisely. The tribunal's 2015 Award on Jurisdiction and Admissibility upheld Australia's objection as to the claimant's restructuring and did not reach the substantive merits of the tobacco-control measures. However, Australia did refer to the wider experience in its subsequent policy debate on ISDS and treaty modernisation (PCA, 2016; DFAT, n.d.).

Australia has a stated policy of excluding ISDS from new trade agreements and reforming older BITs while preserving investment protection. DFAT notes that the 2024 Australia-UAE investment agreement contains investment protections but no ISDS and that Australia is seeking to renegotiate older treaties to enhance public-interest regulatory space (DFAT, 2026a). Investment screening is a separate policy tool and should not be confused with ISDS reform.

The plain packaging episode thus has two distinct legal lessons. First, a claimant may seek to use an older treaty to challenge public-health regulation even where the measure is framed as general regulation. Second, winning on jurisdiction does not mean that every public-health measure is beyond review by treaty. The key lesson for drafting is to clarify in the text the relationship between public-health objectives, expropriation and FET, rather than to rely on litigation after the measure has been enacted.

Australia is a home State and a host State for outward investment. Its renegotiation program is a reflection of that duality. DFAT observes that the Australia-Pakistan BIT has been in force since 1998 and is one of the older treaties being renegotiated. Negotiations in 2025 saw significant progress, with a view to concluding negotiations by 2026 (DFAT, 2026b). The comparison should not, therefore, assume that a concern with regulatory space is only a concern of a capital-importing State.

6.3 India

India's Model BIT of 2016 was a significant departure from its previous treaty practice. It had an enterprise-based definition, deleted a standard MFN clause, replaced an open-ended FET clause with a more restrictive treatment provision and required a minimum of five years' exhaustion of local remedies before arbitration. They are designed to limit arbitral discretion and expand domestic regulatory space, but scholarship has questioned whether they achieve the right balance (Ranjan & Anand, 2017).

The 2016 Model by itself is no longer adequate to describe the Indian position. The existing model BIT is to be revamped to make it more investor-friendly as mentioned in the Union Budget 2025. The official implementation report mentions that work is in progress (Government of India, 2025a, 2025b). There are also newer agreements that India has entered." The India–UAE BIT was signed in 2024 and became effective in 2024 while the India–Israel BIA was signed in 2025 and became effective on 4 July 2026 (Government of India, 2026). It thus represents India as a moving system and not as a static 2016 one.

Although the five-year local-remedies requirement remains a defining feature of the 2016 Model, subsequent treaty practice has adapted the model. Recent treaty analysis notes that the India–Israel BIA retains exhaustion of local remedies but limits the period to three years (WilmerHale, 2026). This is crucial, as it demonstrates that India's current policy is not merely a return to first generation BITs; it is a recalibration of the restrictive 2016 approach.

Here the research gap is particularly clear. The 2016 Model is often seen as the end point of India's regulatory-space strategy in existing commentary. Conversely, the 2024–2026 treaty practice suggests a more complex approach, with India retaining restrictive substantive standards but changing investment definitions and dispute settlement conditions. The article thus uses India to test whether "balance" is better understood as a package of interacting provisions rather than the presence or absence of FET.

6.4 UK

The United Kingdom has a mixed treaty position. It has retained older bilateral investment treaties and is a party to newer FTA and CPTPP arrangements. The UK–Australia FTA includes investment protections and regulatory exceptions, while the UK's accession arrangements for CPTPP disapply CPTPP ISDS as between the UK and Australia and as between the UK and New Zealand (UK Government, 2021, 2023). This makes the United Kingdom a handy example of differentiated treaty design rather than a single national model.

The UK's position on the Energy Charter Treaty also needs to respond to the original draft's implication that the UK remains vulnerable under the ECT. After attempts to modernise the treaty failed, the UK confirmed its withdrawal in February 2024. The withdrawal became effective following the period provided for by the treaty, subject to its terms. That is, the discussion in the UK should view the ECT not as a current member, but as a case of a treaty transition and legacy exposure (UK Government, 2024).

Thus, the UK's contribution to the right-to-regulate debate is one of treaty differentiation, with older BITs co-existing with newer agreements with more detailed exceptions, reservations and ISDS arrangements. The UK Government explicitly confirms that its CPTPP investment policy reserves the right to regulate in the public interest and that some investment-screening decisions are excluded from CPTPP dispute settlement. This reinforces the conclusion of the wider article that regulatory space is being increasingly defined through multiple treaty layers rather than a single universal clause.

6.5 Pakistan

Pakistan is important both historically and in the present day. The first concluded BIT is generally acknowledged to be the Germany–Pakistan BIT, signed on 25 November 1959 and entered into force on 28 April 1962 (UNCTAD, 2006). Later, the Tethyan Copper dispute illustrated the fiscal significance of legacy investment treaties. The ICSID tribunal issued its award on 12 July 2019 and awarded around US\$4.087 billion in damages against Pakistan, compared to a claimed US\$8.5 billion (UNCTAD, n.d.).

The following settlement of Reko Diq needs to be described carefully. In March 2022 Pakistan, Balochistan and Barrick Gold signed a restructured project under which Barrick would own 50 percent and Pakistan and Balochistan the other 50 percent. In the official record of Pakistan, the arrangement is described as an out-of-court settlement and project revival, rather than merely payment of the arbitral award (Government of Pakistan, 2022a). Accordingly, the case is a good example of the risk of liability under an investment treaty, and the role of settlement and project restructuring in resolving a major dispute.

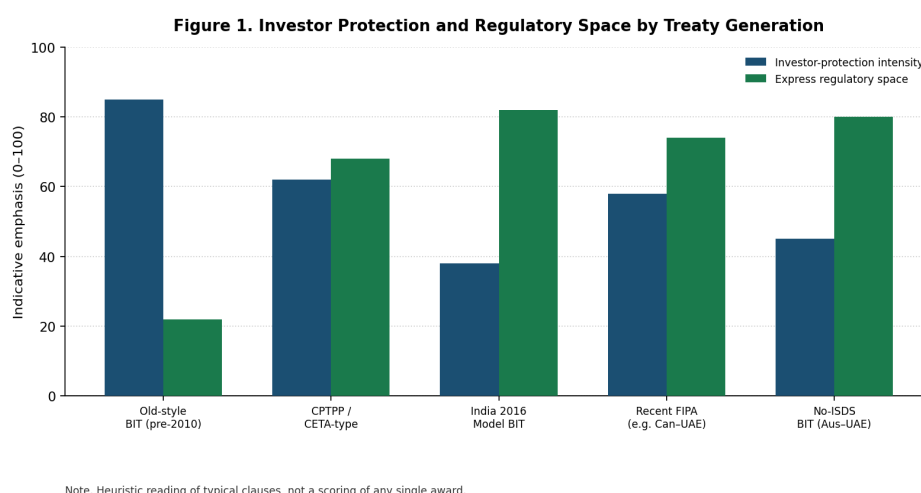
Debate on termination and renegotiation has also been part of Pakistan's treaty policy. A more tangible present development is the renegotiation of the Australia-Pakistan BIT. Australia confirms that the treaty entered into force in 1998 and that negotiations in 2025 were on core provisions including the right to regulate, with a view to completing the process in 2026 (DFAT, 2026b). The article should not assume that an unsigned future treaty is the law of the land. It is important as an indicator of the direction of treaty reform, rather than a binding legal obligation.

Table 1.

Comparative investment treaty stance by 2026. The table retains the four main comparator jurisdictions used in the draft version. Pakistan is analysed separately because its treaty history and Reko Diq dispute make it a different case study.

Feature	Canada	Australia	United Kingdom	India
Model / recent template	Model FIPA; Canada–UAE FIPA 2026	Renegotiation programme; UAE BIT without ISDS	CPTPP accession; AUKFTA	2016 Model BIT; refresh announced 2025–26
FET drafting	Closed / specified in newer texts	Modernised chapters; older BITs remain	Mixed old BITs and new FTA chapters	Customary minimum standard; no broad FET
Right-to-regulate clause	CETA 8.9 lineage; UAE FIPA enumerates climate, Indigenous rights	Policy of strengthening public-interest capacity	CETA/CPTPP language where applicable	Broad exceptions and enterprise-based definition
ISDS posture	Reformed ISDS in FIPAs; opted out in some CPTPP pairings	No ISDS in new UAE BIT; renegotiating older BITs incl. Pakistan	Selective; CPTPP side-letter practice	ISDS after local remedies; sunset of old BITs
Signature cases	Abitibi, Mobil, Windstream line	Philip Morris Asia (jurisdiction)	Energy / utilities claims under older instruments	White Industries; Vodafone / Cairn tax line

Fig. 1. Treaty regulatory space creation for investor protection.



7. UNCITRAL WORKING GROUP III ISDS REFORM

UNCITRAL Working Group III has been tasked with reforming investor-State dispute settlement, not with substantive reform of investment treaties wholesale. In 2026, the Group continued its

work on procedural and cross-cutting provisions, draft guidelines on damages and compensation and the design of a standing mechanism. The tenth intersessional meeting in September 2026 was devoted specifically to standing mechanisms and damages (UNCITRAL, 2026a, 2026b). These materials are draft documents and do not themselves change existing treaty obligations.

Nevertheless, the damages work is important because remedial methodology can affect the practical significance of a liability finding. The 2026 draft guidelines address damages and compensation calculation and scholarship has noted that damages raise issues of consistency, correctness, cost and independence in ISDS (Behn, 2023). The article thus discusses damages reform as a complement to, rather than a substitute for, substantive treaty drafting.

A permanent first instance tribunal and appellate mechanism could allay concerns about consistency and correction of awards. Institutional reform does not change the substantive treaty applied by the tribunal unless the relevant instrument provides otherwise. The Canada-UAE FIPA itself anticipates the possible future use of a first-instance investment tribunal or appellate mechanism should such mechanism be available (Government of Canada, 2026). This is an example of treaty design that anticipates multilateral institutional reform.

Appellate review of quantum may be especially important where the economic impact of a liability finding is magnified by assumptions made in the valuation. But the article should not assume that a lower award is necessarily more consistent with regulatory autonomy. The question of legal relevance is whether the valuation approach is consistent with the applicable law and evidence. The UNCITRAL draft guidelines may serve as a starting point for State practice, but they are not binding on tribunals unless incorporated or otherwise applicable.

The form of the UNCITRAL reform instruments will determine the scope of their application. The legal effects are different for a guideline, multilateral instrument, optional protocol or treaty-specific incorporation. Thus the article compares institutional development and binding treaty law. It also does not say that Working Group III will automatically “attach” its future instruments to existing Canada-UAE or Australia-Pakistan treaties.

Procedural reforms such as early dismissal, security for costs, third party funding disclosure, transparency and joint interpretations can impact the cost and time of public interest disputes. Some of these mechanisms are directly exemplified in the Canada-UAE FIPA, such as third-party funding disclosure, security for costs and optional expedited arbitration for claims below CAD 10 million (Government of Canada, 2026). The comparison shows how procedural design can supplement, but not replace, substantive drafting.

The Advisory Center on International Investment Dispute Resolution is relevant in terms of capacity, especially for States with limited access to specialist arbitration and quantum expertise. “Capacity assistance cannot be considered as a substantive defence to investor claims. Its contribution is institutional: it can improve a State’s ability to present evidence, contest valuation and effectively participate in treaty proceedings.

Joint interpretations may reduce uncertainty where the treaty gives the contracting parties a recognised role in interpretation. They are especially helpful when dealing with provisions like FET where a treaty party may want to clarify the interpretation of a standard without reopening the entire agreement. They are not automatically binding in each treaty, as the article implies, but their effectiveness depends on the treaty text and on the rules of interpretation of the tribunal that are applicable.

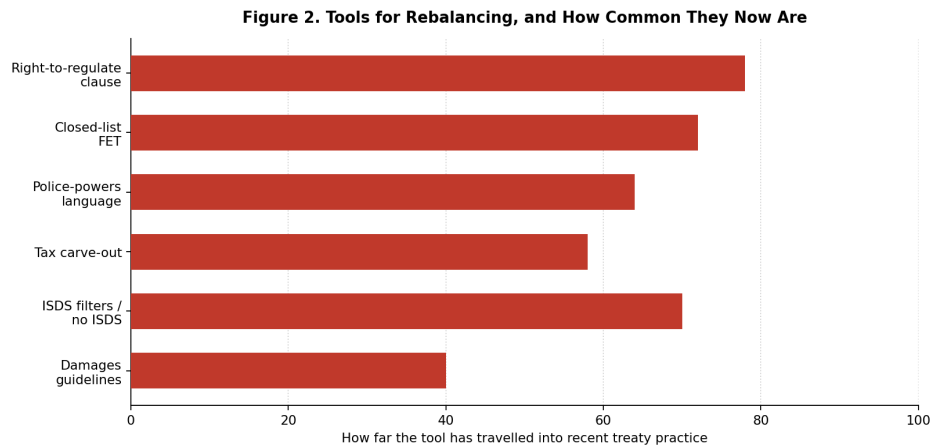
Legitimacy and independence are addressed by codes of conduct, restrictions on double-hatting and transparency rules, not by the substantive scope of the right to regulate. They still count for institutional credibility. The article treats these as secondary safeguards that can be implemented

as part of the larger reform package, and does not argue that ethics rules can cure an overbroad substantive treaty.

8. DISCUSSION

Figure 1 is an authorial conceptual illustration, not a measured index. It offers treaty generations along two illustrative dimensions – investor protection and regulatory space. However, the underlying numerical values were not generated from a reproducible coding protocol in the original draft. The figure is therefore retained so as to preserve the author's conceptual comparison, and the revised text explicitly disclaims any statistical or empirical significance.

Fig. 2. Tools for rebalancing, and how common they are today.



Note. Illustrative. Damages guidelines remain a Working Group III draft in 2026.

Table 2.

Fields of public interest and the treaty tools that keep them governable.

Public-interest field	Typical investor claim	Treaty tools that preserve space
Environment / climate	FET and indirect expropriation after a permit change	Police-powers language; climate listed as legitimate objective
Public health	Packaging, advertising, product bans	General exceptions; Philip Morris-style police powers
Taxation	Retrospective tax or denial of a holiday	Tax carve-outs; joint-tax-filter clauses
Resource licensing	Refusal or cancellation of a mining lease	Covered-investment definition; legality requirements
Emergency / security	Screening, forced divestment	Essential-security exceptions; FIRB / ICA style screens

The comparative analysis supports a program of layered drafts. First, FET should be defined with sufficient precision to ensure that a general regulatory change does not amount to a treaty breach, while providing sufficient protection against denial of justice, targeted discrimination and manifestly abusive conduct. Secondly, expropriation annexes should define the economic impact, duration, expectations and character of the measure and, where relevant, codify police-powers protection. Third, legitimate public interest objectives should be identified where the parties intend them to inform interpretation. Fourth, taxation should be dealt with by a clear distribution of jurisdiction and filters, not ambiguous silence. Fifth, the design of ISDS should be consistent with the substantive criterion. Sixth, the rules concerning damages must be applied according to the applicable law and not be used to create a de facto substantive exception.

It cannot be assumed that a general right to regulate recital, an unfinished UNCITRAL working paper or a political declaration defeats a claim based on a treaty. Legal effect depends on the status

of the source and the terms of the treaty. The best reforms are thus those taking place in the treaty itself or through a legally recognised interpretive mechanism.

The comparison is not one of national ‘best practice’. Canada has an extensive operative right-to-regulate architecture; Australia combines treaty renegotiation with a policy of excluding ISDS from new treaties; India has moved from the restrictive 2016 Model to more differentiated recent treaty practice; the United Kingdom combines legacy BITs with newer FTA and CPTPP arrangements; and Pakistan remains exposed to older treaty architecture while renegotiating at least one major BIT. These are alternative answers to the same structure problem.

MFN clauses need special attention since they may interfere with treaty specific protections. Modern treaties are increasingly clear as to whether MFN can be used to import dispute-settlement procedures and substantive obligations in other treaties. For example, the Canada–UAE FIPA explicitly states that the ISDS procedures under other treaties are not “treatment” for purposes of its MFN provision (Government of Canada, 2026). The lesson from the drafting is that a well-drafted FET provision can be undermined if the treaty architecture surrounding it allows for indirect expansion of substantive protection.

Equally important is a threshold question dealing with the definition of investment. Broad asset-based definitions may capture more than enterprise-based definitions, but they do not necessarily exclude all portfolio or contractual interests; the exact language of the treaty is determinative. The scope may be further specified by requirements of legality, duration or contribution characteristics. The article therefore approaches the investment definition as a component of regulatory balance rather than a mere jurisdictional technicality.

Sunset clauses offer some older treaty protection after termination, but they can be for different lengths of time depending on the treaty. Thus, it is a misnomer to consider fifteen years as a survival period for all. The proper legal approach is to identify the particular clause of termination and the period of termination. India’s termination program and Australia’s renegotiation of older BITs highlight why the surviving stock of treaties can be as important as the model text currently preferred by a State.

The relationship between BITs and FDI should also be stated with caution. The literature does not put forth a simple causal proposition that treaties necessarily increase investment. Nor does the article need to make such a proposition to make its legal argument. Its focus is narrower: investment treaties establish enforceable legal standards and rights of dispute settlement, and thus treaty design impacts the legal exposure of public regulation. Empirical assertions about investment effects should therefore be substantiated by specific studies, not by inference from treaty practice.

9. CONCLUSION

International investment law can accommodate both investor protection and regulatory autonomy, but the balance is treaty-specific rather than automatic. The strongest contemporary drafting approach aligns substantive standards, exceptions and procedural design. FET should identify the conduct that constitutes a breach; indirect-expropriation provisions should clarify the treatment of bona fide public-welfare regulation; public-interest objectives should be expressed in operative language where the parties intend them to have interpretive weight; and taxation, investment definitions and ISDS should be addressed expressly.

The comparative evidence shows divergence rather than a single common-law model. Canada uses a detailed modern FIPA architecture; Australia is renegotiating older BITs and excluding ISDS from new agreements; India is recalibrating the restrictive 2016 Model through newer treaties and a proposed model refresh; the United Kingdom combines legacy instruments with newer FTA and

CPTPP commitments; and Pakistan remains shaped by older treaties while pursuing renegotiation. The cases demonstrate that “right to regulate” is best understood as a package of treaty choices rather than a stand-alone principle.

The research questions can therefore be answered in three propositions. First, FET and indirect expropriation remain the principal substantive points at which regulatory measures can generate claims, but their application depends heavily on treaty wording and arbitral interpretation. Second, drafting devices—closed or customary-minimum FET formulations, expropriation annexes, public-interest clauses, tax filters, precise investment definitions and MFN controls—can reduce uncertainty without eliminating investor protection. Third, ISDS reform and damages guidance can improve consistency, cost and valuation, but they cannot by themselves rewrite substantive obligations in existing treaties.

The article’s contribution is consequently methodological as well as doctrinal: regulatory space should be analysed through the interaction of substantive treaty text, interpretive jurisprudence and remedial architecture. This avoids two common errors—treating every regulatory dispute as evidence of regulatory chill, and treating every right-to-regulate clause as a complete defence. The more precise conclusion is conditional: States can design treaties that leave substantial room for legitimate regulation, but the outcome remains dependent on the applicable instrument and the facts of the dispute.

The practical implication is that future treaty drafting should be read as an integrated system. A clause on FET cannot be assessed without the investment definition, MFN provision and expropriation annex; a right-to-regulate clause cannot be assessed without its relationship to exceptions; and damages reform cannot be assessed without the substantive breach standard. The article therefore recommends treaty-specific analysis rather than a universal “investor versus State” model. That approach better reflects the current diversity of international investment law.

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◆ Funding

This research received no external funding

◆ Conflict of Interest

The authors declare that they have no known financial or personal conflicts of interest that could have influenced the work reported in this paper.

◆ Data Availability Statement

All data used in this study are derived from publicly available legal sources, including statutes, judicial decisions, treaties and published academic literature cited in the references. No new datasets were generated or analysed.

◆ Ethical Statement

Ethical approval was not required because this study is based exclusively on publicly available legal documents, judicial decisions, treaties and published literature, and did not involve human participants, animals or confidential data.

◆ AI Use Disclosure

Generative artificial intelligence tools were used in a limited and assistive capacity during the preparation of this manuscript, primarily for idea development, language refinement, and grammatical correction. The authors retain full responsibility for the originality, accuracy, analysis, interpretation, and final content of the manuscript.

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