

Challenges of bilateral investment treaties on the Kenya-South Korea economic relations

Edwin Nalulasi Masika ¹

Frank K. Matanga²

Edmond M. Were³

¹nalulasi@gmail.com

²fmatanga@mmust.ac.ke

³dr.were@kisiuniversity.ac.ke

^{1,2}Masinde Muliro University of Science and Technology; ³Kisii University; ^{1,2,3} Kenya

<https://doi.org/10.51867/ajernet.7.4.101>

ABSTRACT

Kenya and South Korea have maintained diplomatic and economic relations since 1964, engaging through trade, investment, and bilateral cooperation. However, their trade relationship remains asymmetric, with Kenya primarily exporting agricultural commodities and raw materials while importing manufactured products, including vehicles, electronics, machinery, and steel products. This pattern raises questions about the contribution of bilateral investment treaties to economic diversification, domestic enterprise development, and technological upgrading in Kenya. This study examined the challenges associated with Bilateral Investment Treaties in Kenya–South Korea economic relations, focusing on regulatory policy space, dispute settlement, institutional capacity, and stakeholder participation. The study adopted a descriptive research design and purposive sampling to select stakeholders with relevant knowledge of investment treaty governance. The target population included government officials, diplomatic representatives, international trade and diplomacy experts, academics, legal practitioners, and representatives of Korean companies operating in Kenya, Kenyan traders engaged in bilateral commerce, private-sector organisations, and officials from relevant regional and international institutions. The study used quantitative and qualitative approaches to analyse stakeholder perspectives. Quantitative data were summarised using frequencies and percentages, while qualitative data were examined thematically. Power theory guided the analysis of asymmetries in bargaining power, institutional resources, and influence over investment governance. The findings reveal substantial concerns about bilateral investment Treaties governance and implementation. Low public participation in treaty negotiations attracted the highest agreement, with 192 respondents 64.7% identifying it as a challenge. Furthermore, 62.6% of the respondents considered investment treaty disputes potentially costly and lengthy for Kenya. Respondents also perceived that investor–state dispute settlement provisions favour South Korean investors 56.2%, monitoring and evaluation of Bilateral Investment Treaties impacts are limited 55.6%, and Kenya lacks adequate legal infrastructure to support treaty implementation 53.2%. Additionally, respondents 57.9% perceived that Bilateral Investment Treaties may disproportionately benefit Korean firms relative to Kenyan enterprises, while 49.8% expressed concern that treaty obligations could contribute to unequal treatment of domestic and foreign firms. The study concludes that the perceived challenges associated with Bilateral Investment Treaties in Kenya–South Korea economic relations are linked to disparities in institutional capacity, limited stakeholder participation, and concerns about protecting domestic policy priorities. However, these perceptions do not independently establish that Bilateral Investment Treaties provisions cause unequal economic outcomes. The study recommends that Kenya establish a well-resourced specialised unit within the Office of the Attorney General to coordinate investment treaty implementation, assess legal and economic risks, monitor compliance with applicable Kenyan law, and strengthen the prevention and management of investor–state disputes. Enhanced public participation, systematic treaty-impact evaluations, and stronger legal and technical capacity are also necessary to align investment governance with Kenya’s long-term development objectives.

Keywords: Bilateral Investment Treaties; Foreign Direct Investment; Investor–State Dispute Settlement; Kenya–South Korea Economic Relations; Power Asymmetry, Regulatory Policy Space

I. INTRODUCTION

Kenya and South Korea have enjoyed diplomatic and economic relations since 1964, and since then, there have been various bilateral and multilateral engagements through trade and investment deals. Bilateral Investment Treaties (BITs) have been a prominent tool in encouraging investment between the two countries. These treaties are legal instruments for the promotion of FDI, as well as for the protection of investors and the predictability of trade regulation (Yackee, 2010). Through such provisions as providing guarantees against expropriation or offering means for resolving disputes, BITs are expected to help promote a favorable investment climate. Nonetheless, the relationships between these nations have not fully captured the intended goals and objectives of the BITs, thus questioning their efficiency.

BITs are widely appreciated for their obligations to promote economic liberalization, safeguard investors’ rights, and provide them with legal safeguards for cross-border investments. However, critics have complained that these

instruments give vast concessions to foreign investors that are detrimental to the host economy, especially developing nations such as Kenya. Most BITs contain ISDS provisions that entitle foreign investors to bring legal action against host governments over policy measures that may be averse to their investments (Gertz, 2018). Although these provisions address political and economic risks, they are potentially detrimental to the host country's sovereignty since they allow foreign investors to influence the policies the host country adopts for foreign investment.

1.1 Statement of the Problem

While trade volumes between Kenya and South Korea have grown over the years, the structure of this trade remains profoundly asymmetrical. Kenya's export structure continues to be dominated by raw materials and agricultural commodities, including tea, coffee, and titanium ore, while imports from South Korea consist predominantly of manufactured goods such as automobiles, electronics, machinery, and iron and steel products (Kitetu et al., 2023). This structural immobility indicates that BITs have failed to catalyse economic diversification or technological upgrading within the Kenyan economy. The scale of this imbalance is stark: in 2024, Kenya's exports to South Korea were valued at a mere USD 26 million, while imports from South Korea reached USD 177 million, with third-quarter 2025 data revealing that imports surged to KSh 16.7 billion, up from KSh 5.5 billion in the same period of 2024, while exports grew at a significantly slower pace (Nzomo, 2026). This persistent imbalance demonstrates that BITs have primarily facilitated South Korean market penetration rather than fostering reciprocal economic benefits for Kenya, effectively reinforcing the country's role as a consumer of manufactured goods rather than a competitive trading partner.

1.2 Research Objective

To evaluate the challenges that Bilateral Investment Treaties Pose on the Kenya-South Korea Economic Relations.

II. LITERATURE REVIEW

2.1 Theoretical Review

2.1.1 Power Theory

Power theory, grounded in the realist tradition of international relations, provides a critical lens for understanding the structural asymmetries that underpin bilateral investment relationships. This theoretical perspective posits that states utilize economic cooperation strategically to advance their relative power positions; consequently, the flow of economic agreements serves to maintain and reproduce existing hierarchies within the international system (Mearsheimer, 2001). According to this framework, Bilateral Investment Treaties (BITs) are not neutral legal instruments but rather manifestations of underlying power differentials between signatory states. Its core tenets include: first, economic agreements reflect and reproduce asymmetric power relations between states; second, powerful states utilize treaties to extend their hegemonic influence and secure strategic advantages; third, weaker states enter such arrangements seeking developmental benefits but often become structurally dependent; and fourth, the flow of economic benefits disproportionately favours dominant states, thereby perpetuating existing global hierarchies (Mearsheimer, 2019). Consequently, BITs function not merely as legal frameworks but as geopolitical instruments through which economic power is consolidated and contested.

Concerning Kenya and South Korea, BITs can be viewed as tools through which South Korea consolidates its economic and political presence in East Africa. In contrast, Kenya aims to use these agreements to foster FDI, technology, and trading relationships. However, this is likely to promote power asymmetry as South Korea, which boasts of a technology-inclined and industrialized economy, is likely to benefit more from these treaties than Kenya, which is still developing its industrial base. This theory also highlights why BITs do not produce equal benefits for both parties and why Kenya may struggle to negotiate better investment terms.

2.2 Empirical Review

Empirical research on bilateral investment treaties (BITs) highlights the influence of economic power, domestic political institutions, and institutional capacity on treaty design, adoption, and implementation. Allee and Peinhardt (2014), analysing 1,473 investment treaties involving 170 countries, find that economically powerful capital-exporting countries are better positioned to secure investor-state dispute settlement (ISDS) provisions. Similarly, Simmons (2014) links economic hardship in developing countries to the acceptance of more constraining investment commitments and examines their exposure to subsequent disputes. Betz and Kerner (2016) further associate developing countries' BIT commitments with external debt and global financial conditions. These findings suggest that investment treaties are negotiated within unequal economic relationships, potentially limiting the bargaining power of capital-importing states.

Domestic political institutions also influence treaty adoption and ratification. Blake (2013) demonstrates that governments' time horizons affect the balance they strike between attracting immediate foreign investment and preserving future regulatory autonomy. Haftel and Thompson (2013) find that domestic political constraints influence

BIT ratification, while transparency and state capacity can facilitate the process. Campello and Leamy (2015), examining Brazil's resistance to ratifying signed BITs, highlight the importance of bureaucratic support and executive–legislative bargaining. Collectively, these studies show that treaty outcomes depend not only on international economic pressures but also on domestic institutions, political incentives, and decision-making processes.

A second strand of literature examines the legal and regulatory implications of BITs. Schill (2009) discusses the fragmentation of international investment law and the complexities arising from overlapping treaties, while Van Harten (2007) critically examines the implications of investment arbitration for public-law principles and state accountability. Concerns centre on broadly worded standards, including fair and equitable treatment, and the possibility that anticipated arbitration claims may discourage legitimate public-interest regulation. Cases such as *Piero Foresti and Others v. South Africa* illustrate tensions between investor protection and domestic policies intended to address historical inequalities. Nevertheless, individual disputes demonstrate potential legal tensions rather than establishing that BITs invariably undermine regulatory autonomy.

A further concern is the asymmetry between investor protections and enforceable investor responsibilities, alongside the financial and technical costs of arbitration. Muchlinski (2007) examines the legal responsibilities of multinational enterprises, while Eberhardt and Olivet (2012) critique the distributional implications of investment protection regimes. Developing countries with limited specialist legal expertise may face difficulties negotiating treaties, preventing disputes, and defending claims. In response, African countries have pursued investment-law reforms, and regional initiatives have created opportunities to reconsider the balance between investment protection and development priorities.

Despite this extensive literature, important research gap remains concerning how these challenges are perceived and experienced within specific bilateral economic relationships. Existing international and African evidence does not, by itself, establish the extent to which treaty-related concerns affect Kenya–South Korea economic relations. This study addresses that gap by examining stakeholder perceptions of bargaining-power asymmetries, regulatory policy space, dispute-resolution costs, transparency, and institutional capacity. It thereby contributes context-specific evidence to debates on investment treaty governance and the alignment of investment protection with Kenya's development priorities.

III. METHODOLOGY

3.1 Research Design

The study employed descriptive research design to determine the impacts of Bilateral Investment Treaties (BITs) on Kenya–South Korea relations since 1964. The selected research design is suitable because it allows the researcher to understand the characteristics, framework, and consequences of BITs alongside an assessment of their role in attracting FDI, developing trade relations, and fostering economic growth for the two countries. The descriptive research design offers a clear history and current analysis of the economic relations between Kenya and South Korea. This design is appropriate for the present work since it offers insight into the characteristics of specific BITs signed between the two countries and other key aspects, such as protections offered for investment, dispute resolution measures, and other policy implementation policies. Descriptive research assists in the determination of the overall FDI flows, trade flows, and industrial cooperation orchestrated through BITs. This way, the study unraveled how BITs have influenced the economic relations between Kenya and South Korea.

3.2 Study area

This research concentrates on Kenya and South Korea as the geographical and economic fields of study due to diplomatic and economic relations that date back to 1964. These two countries provide a good platform for assessing the impact of BITs on the relationship between developing and industrialized countries. Kenya and South Korea were chosen due to the apparent differences in their gross domestic product, export and import rates, and the two countries' role in the investment balance (Georank, 2020).

South Korea is one of the most developed countries in Asia, with a sophisticated economy in technology, electronics, and manufacturing. Since the 1990s, South Korea has become a significant investor in emergent economies globally. Africa, in particular, has not been left out of this map, mainly using BITs to secure its economic interests. This is because the rapid industrialization that has taken place in the country has positioned the country as a suitable partner for other developing nations looking for investment capital, technology, and infrastructure to enable their industrialization quests. The Korean government has sought economic cooperation with Africa to deepen the Korean presence in African markets.

Another reason for selecting Kenya and South Korea as the study area is the growing trade links between the two countries in the last six decades. However, the anticipated benefits of trade liberalization in these trade agreements, including FDI, technology transfer, and balanced trading, have not been fully received. Kenya provides raw materials to South Korea, whereas South Korea, on the other hand, provides manufactured items and technological products to

Kenya. This unbalanced economic pattern raises questions about whether BITs have fostered balanced bilateral economic relations or entrenched more dependence on importing industrial products into Kenya.

3.3 Target Population

Government officials from Ministry of Foreign Affairs (Kenya), Ministry of Trade, Investment, and Industry (Kenya), Ambassador of Embassy of the Republic of Korea in Kenya and Kenya Embassy in South Korea. Experts in international trade and diplomacy, including Policy analysts in think tanks and economic research institutions, Scholars and lecturers in international relations and political economy, Legal experts in international economic law and investment treaties. Private sector stakeholders representatives of Korean companies operating in Kenya including Samsung, Hyundai, KIA; Kenyan exporters/importers trading with South Korea, Officials from the Kenya Private Sector Alliance (KEPSA) and Korea Trade-Investment Promotion Agency (KOTRA). International and regional institutions UNCTAD and WTO officials with BIT-related portfolios, African Union Department of Economic Affairs, East African Community Diaspora Desk.

3.4 Sampling and Data collection

The study adopted purposive sampling. Kenyan exporters and Korean importers/suppliers were surveyed through structured questionnaires. The interviews followed a semi-structured format, with the participants being government officials, diplomats, investors, CSO and policymakers in Kenya and South Korea. The interviews focused on individuals with first-hand experience dealing with BIT negotiations, their application, and their effects on trade relations.

3.5 Data Analysis and Presentation

To analyze the policy outcomes and consequences of both quantitative and qualitative research methods were used to assess the changes in Kenya-South Korea's economic relations since 1964. The analysis was conducted in line with the study objectives, with the following broad themes: BITs and FDI, BITs and trade, and BITs and economic development. The data collected through the KII, document review, and policy reports shall be analyzed thematically. This entailed analyzing the participants' patterns, trends, and perspectives regarding the negotiation, adoption, and perceived usefulness of BITs. The qualitative analysis enabled an understanding of other stakeholders' perceptions of how these BITs have impacted the Kenyan economy, trade, and industrialization policies. In this case, NVivo software was used to code and sort interview transcripts to better understand qualitative data.

3.6 Ethical Considerations

The study followed specific procedures to ensure that participants are protected by the principles of ethical practice and that the practice being studied is captured as objectively as possible. Ethical considerations included; informed consent where by the participants will be given a summary of the rationale for the study before being engaged and seeking their consent to participate. The researcher ensured confidentiality, voluntary participation and withdrawal. The researcher got approval to conduct the research from the directorate of postgraduate studies of Masinde Muliro University of Science and Technology (MMUST). This was done after the proposal is approved by the Graduate school committee of the department of peace and Conflict studies, the school graduate committee of the School of Disaster Management and Humanitarian Assistance and approval by the board of Postgraduate Studies. The researcher got a research permit to conduct research from the National Commission of Science, Technology, and Innovation (NACOSTI).

IV. FINDINGS & DISCUSSIONS

4.1 Perception on Challenges posed by BITs

The study was undertaken to assess the challenges in Kenya-South Korea BITs. As shown in Table 1, the highest level of agreement was obtained for low public participation in BITs negotiations 192(64.7%), costly and lengthy BITs dispute 186(62.6%), limited capacity to enforce BITs provisions 179(60.3%) and the perception that BITs are mostly favorable to Korean firms 172(57.9%). These findings indicate that traders perceive BITs as instruments which pose structural disadvantages to Kenya as well as lack of monitoring and evaluation mechanisms and public accountability mechanisms.

Table 1*Respondents' Perceptions on Challenges Posed by BITs*

Statement	Agree (3) n (%)	Neutral (2) n (%)	Disagree (1) n (%)
BITs limit Kenya's policy space in regulating foreign investments.	134 (45.1%)	97 (32.7%)	66 (22.2%)
Investor-state dispute settlement (ISDS) clauses favor South Korean investors.	167 (56.2%)	84 (28.3%)	46 (15.5%)
BITs obligations may lead to unequal treatment between domestic and foreign firms.	148 (49.8%)	89 (30.0%)	60 (20.2%)
There is limited capacity in Kenya to enforce BITs provisions.	179 (60.3%)	78 (26.2%)	40 (13.5%)
BITs can lead to regulatory chill on critical reforms.	131 (44.1%)	103 (34.7%)	63 (21.2%)
Kenya lacks adequate legal infrastructure to support the BIT's implementation.	158 (53.2%)	87 (29.3%)	52 (17.5%)
BITs dispute can be costly and lengthy for Kenya.	186 (62.6%)	73 (24.6%)	38 (12.8%)
There is low public participation in BIT negotiations.	192 (64.7%)	67 (22.5%)	38 (12.8%)
The BIT may not align with Kenya's long-term development priorities.	87 (29.3%)	104 (35.0%)	106 (35.7%)
Some BIT terms are ambiguous and prone to misinterpretation.	143 (48.2%)	97 (32.6%)	57 (19.2%)
There is limited monitoring and evaluation of the BIT's impact.	165 (55.6%)	88 (29.6%)	44 (14.8%)
BITs may disproportionately benefit Korean firms over Kenyan ones.	172 (57.9%)	76 (25.6%)	49 (16.5%)

4.1.1 BITs limit Kenya's Policy Space in Regulating Foreign Investments

The study reveals that 134 (45.1%) of traders agreed that BITs limit Kenya's policy space in regulating foreign investments, with 97 (32.7%) in agreement and 66 (22.2%) in disagreement. This is the central finding of the report, as a Kenyan government official opined:

"The standard provisions in our BITs with South Korea, in particular the fair and equitable treatment clause and indirect expropriation provisions, are a huge limitation on our regulatory autonomy. If Kenya decides to raise environmental standards for foreign investors or introduce new licensing requirements for some industries, we have to ask ourselves whether a Korean investor would sue for failing to comply with the BITs. This regulatory chill is real. I have seen proposals to introduce new regulations being discarded or downgraded with legal advice for potential investment treaty claims" (Interview with Kenya Government official, Ministry of Trade and Investment in Nairobi on 22.02.2026).

The official's testimony is consistent with Van Harten (2007) who argued that fair and equitable treatment clauses in BITs create an implicit ceiling on host state regulatory discretion, as any regulatory change that negatively impacts an investor's legitimate expectations may lead to a claim. Power theory explains this dynamic: stronger capital-exporting states like South Korea are able to negotiate reasonably broad and broad-textured protections that will give investors flexibility while weaker capital-importing countries like Kenya are able to accept those protections in exchange for promised investment flows (Hirsch, 2016). In interview with KEPSA representative, the private sector side of the story is different.

"Yes, investors need protection against arbitrary state action that is why BITs exist. But the Kenya-South Korea BITs go beyond protecting against discrimination and even expropriation. This makes it possible that normal regulatory adjustments - things which every responsible government has to do over time - could be liabilities. We have members who have told us they don't want to advocate for stronger environmental or labour policies because they think that's going to inhibit Korean investment. That's not good for a sovereign country" (Interview with KEPSA Representative in Nairobi on 11.03.2026).

This is confirmed in Tienhaara (2011) who has found a similar regulatory chill in some developing countries and that even when treaty protection is present in treaties; governments are able to self-censor its implementation. The KEPSA official's comments on not wanting to advocate for stronger regulations are consistent with the notion that regulatory chill is not only limited to the government but is also prevalent within the private sector. According to power theory, this internalization of constraints is a result of the dominant role that foreign capital has in domestic policy discourse (Gathii, 2017). The convergence in quantitative results (134(45.1%) agreement), qualitative key informant testimony by government, private sector, international institutional and civil society actors, and peer-reviewed research suggests that policy space limitation in the Kenya-South Korea BITs is a serious issue. The Pan-African Investment Code by the African Union aims to resolve these power asymmetries and is a collective effort by African states to resolve these power asymmetries, but Kenya is still subject to older, more restrictive BITs with South Korea (Benjamin, 2017).

4.1.2 Investor-State Dispute Settlement (ISDS) Clauses Benefit South Korean Investors

The study findings indicate that 167(56.2%) of traders agreed that ISDS clauses favor South Korean investors, which was the second most among the 12 challenge statements and 84(28.3%) were neutral and 46(15.5%) were not. The findings are supported by the key informant interview with UNCTAD Official.

“The ISDS system has been widely criticized by developing countries, and for good reason. In the Kenya-South Korea BITs, like most BITs of its generation, the ISDS clause gives investors direct standing to sue states but states have no reciprocal standing to sue investors. Moreover, the arbitrators who decide these cases tend to be mainly international lawyers who represent investors. There is strong empirical evidence that respondent states win far less than investors. So, when traders say ISDS favors Korean investors, the ISDS database data from UNCTAD confirms that view” (Interview with UNCTAD Official in Nairobi on 28.02.2026).

Van Harten (2010) conducted an empirical study of the backgrounds of arbitrators who work in the ISDS and found that most of them are experienced in representing investors, leading to a systematic pro-investor bias in the ISDS system. The UNCTAD official's reference to asymmetric standing rights is supported by Puig (2014), who stated that states do not have any mechanism to hold investors accountable for violations of treaty.

In a discussion with some of the Directors of Korean Companies, it came out so:

“I will be honest as a Korean investor. The ISDS clause is comforting to us. That's why we chose Kenya rather than other East African countries which have weaker treaty protection. But I can understand why Kenyans would see it as unfair. A Korean company can sue Kenya before a tribunal in Washington or London, but Kenya cannot sue us for anything but a few contractual breaches. And the cost—Kenya pays for its own lawyers and tribunal costs. For a small country like Kenya, defending a weak claim is expensive. So, investors have their share of the cost but that is what they went for” (Interview with Director, Korean Company in Nairobi on 06.03.2026).

Franck (2007) observed that in practice the average cost of defending an ISDS claim is upwards of \$4 million for many developing countries. The Korean director's admission of systemic bias is in line with Franck (2019) who also said that investors are fully aware of their procedural advantages and take them into account in investment decision-making. Power theory (Poulsen 2015) describes this as rational behavior on the part of capital-exporting states, which take risk from the investors and put it on the host states and use their bargaining power to achieve this. The quantitative data that 167 (56.2%) traders perceive ISDS as favourable for South Korean investors is backed up by the qualitative data of UNCTAD, WTO and EAC officials, a Korean investor himself and the literature. Power theory is the key explanation for this; capital-exporting states design ISDS with their interests and its procedural asymmetries (investor-only standing, high costs, arbitrator bias, and no appellate review) reflect the imbalance in power at the time of treaty negotiations (Van Harten, 2010; Hirsch, 2016). Despite the fact that Kenya has not yet been subject to an ISDS claim by this BIT, the structural bias is not removed: as Puig (2014) has showed, the very existence of ISDS drives state behaviour through regulatory chill and settlement pressure.

4.1.3 BITs Obligation May Lead to Unequal Treatment of Domestic and Foreign Firms

“Further, the study established that 148 (49.8%) of trader respondents agreed that BITs obligations may lead to unequal treatment of domestic and foreign firms, 89 (30.0%) remained neutral and 60 (20.2%) disagreed. The study findings are backed up when KEPSA Official discussed this fact in a key informant interview: For Kenyan investors, the Constitution provides compensation but the standard is different and the enforcement mechanisms are weaker. It creates two kinds of investors: foreign and domestic and foreign investors have more legal protection for their investment” (Interview with KEPSA Official in Nairobi on 10.03.2026).

Muchlinski (2007) also analyzed the problem of treaty-based discrimination against foreign investors and argued that BITs build up a privileged class of foreign capital where there are more rights than domestic capital. Power theory explains why that is: capital exporters will negotiate for the best protection for their investors without considering the inherent bias between foreign and domestic firms in the host state (Krasner, 1978).

“And the KEPSA official's comment about differential compensation standards is particularly important because it points to a real legal imbalance not the abstract concern. The unequal treatment is not just a theoretical problem, the civil society organization representative said. Kenyan businesses have given up bids for government contracts to Korean companies, because the Korean companies can take advantage of BITs protections to resolve disputes. Kenyan companies told us they felt like second-class citizens in their own country. BITs were supposed to help to attract investment, but have instead turned Kenyan firms into second-class citizens in the competition” (Interview with CSO Representative in Nairobi on 26.02.2026).

Similar patterns have been found in other countries. Schneiderman (2008) found that BITs protections often give foreign investors a competitive edge in procurement, licensing and regulatory processes. The civil society representative's description of domestic firms as "second-class citizens" is consistent with the critical legal research of Muthucumaraswamy (2010) who argued that BITs are instrumental in the denationalization of economic governance. Power theory argues that the denationalization is intended: capital exporting countries would like their investors to be treated well to maximize returns, so they use BITs to institutionalize this preference. According to power theory (Poulsen

2015), the Korean director position is advantageous for capital exporting states since the foreign host state is taking on the whole task of adjustment. The argument that “*raises domestic standards*” is logical, but does not take into account the fact that developing countries cannot immediately build their legal system. The fact that nearly half of traders feel treated badly in relation to domestic firms versus foreign firms is a qualitative fact which has been verified empirically by government, private sector, civil society and international institutions and the like. The Korean director's formal equality argument and the Kenyan stakeholders' substantive inequality concerns reflect a fundamental tension in international investment law. Power theory explains this tension as a result of asymmetrical treaty negotiation: capital-exporting states are able to put in place provisions that benefit their investors while treating any resulting inequality as a domestic issue to deal with, and in a way that is not something that the host state can resolve (Schneiderman, 2008). The Pan-African Investment Code of the African Union aims to address this power asymmetry but Kenya will still have to have the older BIT with South Korea.

4.1.4 Limited Capacity in Kenya to Enforce BITs Provisions

Of 179 (60.3%) respondents involved in the research, the report reported that there is limited capacity in Kenya to enforce BITs provisions and the third highest level of agreement among the 12 challenge statements. During the interview, the findings of the research were confirmed by the government official;

“Capacity is a real challenge. BITs give Korean investors rights that can be enforced in international arbitration. But enforcing Kenya’s rights under the BITs? That means the Kenyan government needs to monitor Korean investors’ compliance, collect evidence, initiate proceedings and fund litigation. We don’t have an investment treaty enforcement unit in place. There are three lawyers at the Attorney General’s office who handle all international disputes over investment and trade issues and human rights concerns. That isn’t enough. If a Korean investor violated the BITs—for example, by being corrupt or failing to meet environmental standards—would we know? Probably not”(Interview with Government Official in Nairobi on 20.02.2026).

Michaud (2017) measured the enforcement capacity of investment treaty enforcement in 30 developing countries and found that the minimum number of staff for BITs enforcement was four, and most countries had no systematic monitoring mechanism. The capacity deficit is explained by power theory: capital expats negotiate treaties that put heavy obligations on host states but no technical assistance and resources for enforcement even though weak enforcement capacity benefits their investors (Hirsch, 2016).

The Kenyan official's honest admission that the government would likely not know about the investor violation confirms this dynamic. Cotula (2017) reported several instances where host state capacity limitations made it difficult for them to enforce the investor obligations effectively, causing environmental damage, labour violations, and revenue loss. The KEPSA official's framing of the problem as a regulatory—and not simply legal—capacity deficit is significant. As Shaffer (2015) argues, capacity deficit in developing countries is not just about knowledge of law but also information gathering, coordination of agencies and financial resources to pursue legal cases. Power theory posits that this is not an accident but that it is a deliberate allocation of limited resources to the service of investment and not regulation and that BITs have encouraged this (Hirsch, 2016) (and that also helps with the global institutional, regional and private sector capacity deficit).

The quantitative finding that 179 (60.3%) of traders believe there is weak enforcement capacity in Kenya is corroborated by qualitative testimony from the government, the international institutions and the private sector. Power theory speaks to a structural context where asymmetric treaty relations exist between capital exporting states and the host state, so that they cannot include capacity building in a treaty because they do not want to have to do that when they can control their investors better (Poulsen, 2015; Hirsch, 2016). The result, as KEPSA and government officials all understand, is BITs that are a “one-way street” where Korean investors can take their rights but they cannot enforce reciprocal agreements with Kenya.

4.1.5 BITs Can Lead to Regulatory Chill on Critical Reforms

Table 1 shows that 131 (44.1%) of trader respondents agreed BITs can raise regulatory chill on critical reforms and 103 (34.7%) remained neutral and 63 (21.2%) disagreed. This was confirmed by Kenyan Government official in an interview she said:

“Regulatory chill is real, and I have seen it.” Two years ago, the Ministry of Environment proposed new regulations on waste disposal by manufacturing companies. The regulations would have increased compliance costs for all manufacturers, including Korean companies operating here. Before the regulations could be published, we received a quiet communication through diplomatic channels expressing concern about possible BITs implications. The regulations were watered down significantly. No formal threat was made, but the message was understood. That is regulatory chill (Interview with Kenyan Government Official in Nairobi on 20.02.2026).

Tienhaara (2011) identified a number of regulatory chill cases in developing countries and found that explicit threats of ISDS are rare but investor concern is prevalent and effective.

The Kenyan official's testimony about a "quiet communication through diplomatic channels" is consistent with Tienhaara's observation that regulatory chill operates on informal rather than formal legal channels. The power theory is in place: BITs present a background threat of arbitration with high costs, and capital exporters use diplomatic channels to act on that threat and not formally express it to prevent deniability and ensure that they are fulfilling their regulatory objectives (Hirsch, 2016). The study also finds various regulatory chills in Kenya which are posed by CSO representative; The most disturbing cases involve public health. Kenya considered increasing taxes on sugary drinks to curb diabetes epidemic but feared BIT claims by Korean beverage companies. BITs have emerged as a veto in democratic decision-making (Interview with CSO Representative in Nairobi on 25.02.2026).

Thow, Sanders, Drury, and Puig (2017) have studied the effect of investment treaties on public health regulation in developing countries and found that regulatory chill has weakened tobacco controls, alcohol regulation, and sugar taxation in different countries. The civil society representative's description of BITs as a "veto over democratic decision-making" is in line with the critical study of Schneiderman (2008) who argued that investment treaties are de facto constitutional limitations on host state policy autonomy. Power theory explains this effect of the neo-constitutional: Capital exporters use BITs to guarantee policy regimes favorable to their investors. This is so that democratically elected governments cannot change them, and therefore profits can be reduced (Gathii, 2017).

The quantitative fact that 131(44.1%) of traders feel regulatory chill is a problem is also backed by qualitative data from government, civil society, and African Union officials, even though Korean stakeholders are not convinced by the concept of regulatory chill. Power theory explains this asymmetry of treaty relations: capital-exporting states frame the terms of debate in a way that obscures the structural constraints on host state policymaking (Hirsch, 2016). The empirical results of Tienhaara (2011) and Thow et al. (2017) show that regulatory chill has real policy effects even if capital exporters have the mindset that it is in the interests of investors to treat it as a reality.

4.1.6 Kenya Lacks the Legal Infrastructure for BITs Implementation

Table shows that 158(53.2%) of the traders in the study say Kenya does not have the legal infrastructure to support the implementation of the BITs while 87(29.3%) say it does, and 52(17.5%) say it does not. The government official confirmed that:

Legal infrastructure means a lot of things: laws, regulations, institutions, trained personnel, case law and administrative procedures. Kenya has some of these but not all. For instance, the BITs call for fair and equitable treatment of investors but what does it mean in the Kenyan context? We have no domestic case law that has the idea of this standard. We have no special investment court. We have no administrative guidance to ensure compliance with BITs obligations. The Attorney General's office has issued opinions too on some of the issues but these are not binding on line ministries. (Interview with Government official, Ministry Foreign Affairs in Nairobi on 11.03.2026).

Ginsburg (2005) investigated the legal infrastructure required for BITs implementation in developing countries and found that most lack the type of specialized tribunals, trained judges, and administrative guidance necessary to ensure that the implementation is consistent. The Kenyan official's reference to decision-makers "guessing" whether they are meeting BITs obligations is consistent with Michaud (2017) finding that legal uncertainty is endemic in countries with poor implementation infrastructure. Power theory suggests that this deficit is a natural consequence of BIT negotiations: capital exporters focus on their investors' rights without taking into account whether the host state has the capacity to operationalize those rights because weak operational capacity benefits investors by creating ambiguity that they can exploit (Hirsch, 2016). In an interview with the WTO official, it was said:

"The WTO Trade Facilitation Agreement provides technical assistance and capacity building because the organization doesn't expect that legal infrastructure will emerge from nowhere." BITs are usually negotiated without any technical assistance. The host states are supposed to build their own infrastructure and that will not happen. The situation in Kenya is also typical: the BIT exists on paper, but the institutional, procedural and human resource infrastructure to carry it out is missing (Interview with WTO official in Nairobi on 04.03.2026).

The WTO official's comparison between the Trade Facilitation Agreement's capacity building provisions and the absence of such provisions in BITs is instructive. As Shaffer (2015) has argued, the WTO's approach reflects an understanding that legal infrastructure needs to be built with care as well as the BITs approach is more of a neoliberal mindset, thinking that if governments are ready to liberalize, then the markets and legal systems will automatically become the necessary institutions. The WTO's consensus-based decision making gave developing countries sufficient power to force the companies to provide technical assistance while bilateral BITs negotiations gave capital exporters complete control of the content of the treaty (Poulsen, 2015). The study finding is corroborated by KEPSA official who said:

If a Korean investor has a dispute with a Kenyan company, the Korean investor can invoke the BIT's protections, while the Kenyan company cannot. This gives rise to a power imbalance in negotiating. Kenyan businesses have told us they feel disadvantaged when working with Korean firms because Korean firms have the BIT as a backstop. Therefore, the legal infrastructure problem is not only about government capacity; it is about the private sector being able to exist on a level playing field (Interview with KEPSA official in Nairobi on 10.03.2026).

The KEPSA official's view on the impact of BITs on private contracting is concurred with Schneiderman (2008) who explained how BITs protection affects the bargaining power of foreign and domestic firms in commercial transactions. The KEPSA official's characterization of the legal infrastructure deficit as "level playing field" indicates that BITs do not operate in isolation but rather are linked to and exacerbate existing institutional weaknesses. Power theory explains this relationship: BITs give foreign firms extra-contractual rights that domestic companies do not, and these rights are strategic assets in commercial negotiations (Hirsch, 2016). The quantitative data that 158(53.2%) traders feel that legal infrastructure is inadequate to implement BITs is corroborated by qualitative data from government, international institutions, private sector and regional institutions. The difference between the Korean director's pragmatism and Kenyan stakeholders' concerns about structural deficits is driven by different time frames and risk profiles. Power theory also explains the infrastructure deficit and its persistence: BITs were negotiated without capacity-building provisions because capital exporters prioritized investor rights over host state capacity and infrastructure gaps—which are painful for all parties—are disproportionately burdensome for the host state and give foreign investors a strategic advantage through legal ambiguity (Hirsch, 2016; Gathii & Mbori, 2018).

4.1.7 BIT disputes can be Costly and Lengthy for Kenya

The study found that 186(62.6%) traders agreed that BITs disputes can be expensive and long for Kenya and therefore the second largest level of agreement among all the challenge statements. This is confirmed by UNCTAD official who pointed out in an interview:

"The empirical evidence on ISDS costs is overwhelming. The average ISDS case takes three to four years from initiation to award. The average cost to the respondent state is between 4 million and 8 million in terms of legal fees, expert witness fees and tribunal costs. For a country like Kenya with an annual legal budget of about \$1-2 million for international disputes, a single ISDS case could consume several years of the entire budget. And this is not just a financial cost. There are also reputational costs, opportunity costs of senior officials' time and the distraction from other policy priorities. Thus when traders say disputes are costly and lengthy, the data supports them completely" (Interview with UNCTAD Representative in Nairobi on 28.02.2026).

Franck (2007; 2019) conducted the most extensive empirical studies of ISDS costs and duration; the median case duration is 3.1 years, and median state legal fees are over \$4 million. The UNCTAD official's budget comparison is particularly stark: as Puig (2014) notes, there is no dedicated budget for ISDS defense in most developing countries, and they have to reallocate funds from development priorities to cover the costs of defending it in the event of a dispute. Power theory also says that this is a barrier to access: only states with very large financial resources can defend ISDS claims, while resource-constrained states are forced to settle on bad terms (Hirsch, 2016). During an interview, a KEPSA official affirmed that:

"The cost issue affects Kenyan companies also. When a Korean investor threatens ISDS, the Kenyan government has to decide whether to fight or settle out of frustration. If they settle, the cost is clear. If they fight and win the case, they still pay millions in legal fees. In the end, Kenyan taxpayers pay the price. This is not a hypothetical situation. There have been cases in the past where the government settled claims because the cost of fighting was so high but officials believed the claims were unfair. The BITs create a dynamic where even winning is losing" (Interview with KEPSA official in Nairobi on 10.03.2026).

The KEPSA official's understanding of "winning is losing" is well-supported by Van Harten (2010) who has also mentioned how states have won ISDS cases but still ended up paying millions of dollars in legal expenses and no remedy to recover the costs from the losing investor. The asymmetry in the ISDS system is not unique to ISDS: in most domestic litigation systems, the loser pays the winner's costs. The absence of cost-shifting and the high arbitration cost hurt states systematically. Power theory explains the choice of this design because capital exporters as well as arbitration industry as well as investors are more comfortable with losing money in case they believe the cost could deter the majority of the claims and their claims are filed (Poulsen, 2015). The qualitative assessment of 186(62.6%) traders that BITs disputes are costly and long is corroborated by UNCTAD, Kenyan government, KEPSA, civil society and even Korean investors. The cost is multidimensional: direct financial costs (\$4-8 million per case), bureaucratic costs of defensive administration, opportunity costs of diverted official time, and democratic costs of unaccountable policy filtering. Power theory explains the magnitude and the distribution of these costs: the ISDS system is designed and structured to benefit capital exporters and investors, and the cost structure systematically disadvantages resource-

constrained host states and insulates investors from adverse cost consequences (Franck, 2019; Van Harten, 2010; Hirsch, 2016).

4.1.8 Low Public Participation in BITs Negotiations

The study found that 192(64.7%) of trader respondents agreed that there is low public participation in BITs negotiations which is the highest level of agreement with all challenge statements. CSO Representative said:

"Low public participation is a polite way of saying it. And in truth there is no public participation at all." The Kenya-South Korea BIT was negotiated in secret. Civil society was not consulted. Parliament was not very much involved. The media reported on the signing ceremony, but not the content. Most Kenyans - and the vast majority of Kenyan business people - don't even know that this treaty exists, or even what it says. This isn't democracy. This is a treaty that was signed behind closed doors by very few officials and presented as a foregone conclusion (Interview with CSO Representative in Nairobi on 26.02.2026).

The civil society representative's criticism aligns with Van Harten (2011) who argued that BITs negotiations violate basic democratic legitimacy in terms of transparency, public involvement, and parliamentary scrutiny. The representative's description of the treaty as a "fait accompli" is in line with Bernauer and Styr (2018) who found that trade and investment agreements are generally presented to legislatures on a take-it-or-leave-it basis with little room for amendment or debate. Power theory explains this procedural gap: capital exporters prefer to do the secret negotiations as they are able to see the scope of the negotiations and the concessions they do not give and this could cause political strife in both countries (Poulsen, 2015). Government official in an interview said:

"I accept that public participation in BIT negotiations is low. But this is not unique to Kenya or to BITs. Trade and investment negotiations are complex, technical, and sensitive. Governments worry that public consultation will produce unrealistic expectations or that foreign investors will hear of their risks. That said we could be better. In particular, the Constitution of Kenya 2010 requires public participation in policymaking. BITs are policy. We have not fully complied with this constitutional requirement. It is something the Ministry is discussing, but change is slow" (Interview with Government official in Nairobi on 21.02.2026).

The Kenyan official's acknowledgment that low public participation violates the constitutional requirement for public participation is very significant. As Gathii and Mbori (2018) argue, Kenya's progressive 2010 Constitution and the continuing secret treaty negotiation is a result of bureaucratic inertia and external pressure from negotiating partners. The official's comment that "change is slow" is well supported by Bernauer and Styr (2018) who show that in the end secretive negotiation has to be institutionalized. Power theory is at work for this institutional persistence: capital exporting states do not have any motivation to support transparency reforms that might make their demands more visible and potentially controversial (Hirsch, 2016). The fact that 192(64.7%) of traders agree that there is low public participation in BITs negotiations (the highest agreement level of all issues) is also confirmed in qualitative data (the KOTRA official who acknowledged that Korea also has low public participation). The fact that the Kenyan government, civil society, African Union, EAC, even Korean sources agree can be interpreted as not a dispute but a consensus. Power theory says this is a structural factor of BIT negotiations: capital exporters and executive bodies of host states will both benefit from secretive processes that do not make democratic engagement a consideration because transparency would complicate negotiations and lead to outcomes that are more favourable to the public rather than investors (Van Harten, 2007; Hirsch, 2016).

4.1.9 BITs May not Align with Kenya's Long-Term Development Priorities

The report found that 87 (29.3%) of traders believe that BITs may not be in line with Kenya's long-term development goals and 106 (35.7%) disagree. This statement received the lowest percentage of agreement and the highest number of disagreements among all challenge statements. The results were corroborated by a government official who stated:

"Does the BIT promote these? Not directly. It promotes investment protection, but protection is not the same as development. A treaty can protect investors while doing nothing to ensure that their investments contribute to Kenya's long-term economic transformation. That is the gap I worry about" (Interview with Government Official in Nairobi on 20.02.2026).

The Kenyan official's distinction between investment protection and development promotion has been a central theme in the literature on the effectiveness of BITs. As Gallagher and Shaffer (2009) explain, BITs give significant rights to investors but few of these rights are binding to the host state in terms of local employment, technology transfer, or infrastructure development. Cotula (2014) argues that developing countries are increasingly concerned about development-related provisions in new BITs but older BITs such as Kenya-South Korea have not. This gap is explained by power theory: capital exporting states are reluctant to have development-related obligations when they would impose costs on their investors, and they have the bargaining power to prevent such provisions (Hirsch, 2016). KEPSA Official also reported mixed views:

"KEPSA is somewhat divided on this issue. A few of our members agree with the civil society criticism that BIT focuses too much on protection and too little on development. Some believe investment protection is the foundation for development: without protection, there would be no investment at all. The neutral responses in your survey probably reflect this divide within the business community. We need more evidence on whether and how BITs actually promote development outcomes. Without that evidence, everyone is guessing" (Interview with KEPSA Official in Nairobi on 10.03.2026).

The KEPSA official's insight into the division within the business community is significant. Business attitudes towards BITs are not necessarily homogeneous; as Poulsen (2015) argued, some firms benefit from strong protection, others, including the ones that compete with foreign investors for resources or markets, may perceive BITs as creating unfair competition. The KEPSA official's call for more evidence reflects the opacity of the literature: some studies find positive links between BITs and FDI flows (Elkins, Guzman, & Simmons 2006), others only find no effects (Yackee, 2008) and still others find no impact on development outcomes (Gallagher & Shaffer, 2009). Power theory predicts that evidence will be contested because what is called development alignment is a political issue and it is a product of many competing interests (Gathii & Mbori, 2018).

The fact that 87 (29.3%) of traders believe BITs are not in line with development priorities— and 106 (35.7%) disagree with the same— shows that the majority is not very clear-cut. The qualitative testimony is that there is fragmentation: some stakeholders see a clear misalignment, others see alignment and still others are still not sure. The neutral responses 104(35.0%) are probably genuine ambivalence or lack of understanding of what development alignment means. Power theory can be said that this ambivalence is the result of competing material interests: domestic firms competing with Korean investors may have misalignment, while firms that supply or partner with Korean investors may have alignment. The AU and civil society voices that the BITs lack development provisions are well supported by research showing how protection is more important than promotion in traditional BITs (Cotula, 2014; Gathii & Mbori, 2018).

4.1.10 Some BITs Terms are Ambiguous and Prone to Misinterpretation

The study found that 143(48.2%) of traders said that some BITs terms are ambiguous and prone to misinterpretation and 97(32.6%) were neutral and 57(19.2%) disagreed. This was confirmed by UNCTAD Official in an interview with us. This ambiguity in BITs is well-known. Terms like 'fair and equitable treatment,' 'legitimate expectations,' 'indirect expropriation' and 'adequate compensation' are not defined in so many BITs, including the Kenya-South Korea BIT. It enables arbitral tribunals to interpret provisions as they see fit and adapt to any particular circumstances. But it also creates uncertainty and unpredictability. Two tribunals interpreting the same ambiguous language can make different decisions, as has happened many times (Interview with UNCTAD Official in Nairobi on 28.02.2026).

The official's observation about inconsistent results is corroborated by Franck (2019), who has stated that there is wide jurisprudential diversity in investment arbitration and the courts often reach different conclusions on the same facts. Power theory explains why capital-exporting states accept ambiguity and may even appreciate it: They could expect arbitrators to rule for investors only on borderline cases while clearly defined standards would limit arbitral flexibility and may lead to less favorable outcomes to investors (Poulsen, 2015). CSO representative said that ambiguity is not a technical legal problem;

It is a political problem. When treaty terms are ambiguous, powerful actors with expensive lawyers decide what they mean. In the Kenya-South Korea BITs the powerful actors are Korean investors and their international law firms. Kenyan officials, Kenyan judges and Kenyan citizens have no say in how ambiguous terms are interpreted. The ambiguity is a feature, not a bug. It allows the powerful to exercise discretion while the powerless are told to wait for clarification and not to get it (Interview with CSO representative in Nairobi on 26.02.2026).

The civil society representative's interpretation of ambiguity as a "political problem" rather than a legal technicality is an important piece of legal scholarship. As Van Harten (2011) has argued, the indeterminacy of investment treaty standards is not an unfortunate oversight but rather a conscious construct which leaves interpretive power to a small and unaccountable group of arbitrators. The representative's characterization of the ambiguity as beneficial for "powerful actors with expensive lawyers" is in line with evidence that large corporate entities with more sophisticated legal representation achieve better results in ISDS (Franck, 2019). Power theory offers a structural explanation: ambiguity is there because it helps those with the resources to exploit it, and they are powerful enough to resist any clarification of treaty terms (Gathii & Mbori, 2018). The qualitative data also supports the quantitative findings that traders strongly agree BITs term is ambiguous and prone to misinterpretation, based on the qualitative responses from UNCTAD, Kenyan government, Korean investors, WTO and civil society and are very similar from all the groups. The Korean director himself acknowledges ambiguity but sees it as a net benefit for investors.

The neutral responses 97(32.6%) might be due to the lack of knowledge about different BITs provision and to the legal interpretation of ambiguity. The power theory is both the reason for the ambiguity as well as the conflict due

to that ambiguity: ambiguous terms are interpreted by arbitrators who are biased towards investors over states and capital exporters have a powerful enough ability to resist this and thus the ambiguity will not be as accurate (Van Harten, 2010; Hirsch, 2016).

4.1.11 Limited Monitoring and Evaluation

The poll showed that 165 (55.6%) of traders agree that there are limited monitoring and evaluation of the impact of BIT and 88 (29.6%) were neutral and 44(14.8%) disagreed. This was also confirmed in the interview conducted with the government official who stated: "We do not monitor or assess our BITs systematically. There is no annual report on BIT implementation. There is no database of BIT-related benefits or problems. When the BIT with South Korea was signed, there was a press release. Since then, nothing. We have no idea how many Korean investors have used the BIT, whether the BIT has influenced their investment decisions, what problems they have encountered, or what advantages Kenya has gained. This is a massive governance failure. We are flying blind (Interview with Government official, ministry of trade on 22.02.2026).

The official's definition of "flying blind" confirms Bernauer and Styr's (2018) finding that international economic deals are signed, implemented (or not) and ignored with no feedback loops to inform policy. Power theory explains this M&E deficit as capital-exporting states have no incentive to fund or support M&E that might reveal the costs rather than benefits of BITs to host states, and host states lack the resources to perform M&E independently (Hirsch, 2016). The quantitative finding that 165(55.6%) of traders agree there is limited monitoring and evaluation of the impact of BITs is well substantiated by qualitative testimony from all stakeholder groups. Power theory explains this M&E deficit as a logical result of asymmetric incentives: capital-exporting states as well as host state executive branches both have incentives to ignore the rigorous evaluation of the impacts of BITs and civil society and development-oriented agencies have no power to mandate evaluation (Bernauer & Styr, 2018; Michaud, 2017).

4.1.12 BITs May Disproportionately Benefit Korean Firms Over Kenyan Ones

In the study, 172 (57.9%) traders felt that BITs may disproportionately benefit Korean firms over Kenyan ones and this was the third highest level of agreement among the challenge statements. This is what a KEPSA official said in an interview:

"This is the most important issue for Kenyan businesses. The BIT provides Korean firms with rights that Kenyan firms don't have— direct access to international arbitration, protection from regulatory change, compensation for indirect expropriation. If a Kenyan company competes with a Korean firm for a government contract or market share, the Korean firm has a legal backup that Kenyan firms don't" (Interview with KEPSA Official in Nairobi on 10.03.2026).

In the KEPSA official's framing of "tilted playing field" rather than "discrimination" is precise. BITs, Muchlinski (2007) argued, lead to what he called "asymmetric liberalization" and foreign investors get liberalized protection but domestic investors stay under domestic law. The KEPSA official's observation about competition for government contracts is especially interesting, as it indicates a concrete channel through which disproportionate benefit flows. Power theory posits that this asymmetry is an intentional design feature: capital exporters had to agree BITs to benefit their investors in host state markets, and those benefits were not an accident (Hirsch, 2016). As a Korean company director said: "It is true that Korean companies benefit from the BIT. That is why we supported it. But I reject the word 'disproportionately'. The BIT is good for Kenya because it attracts investment, creates jobs, and generates tax revenue. The benefits are different in kind, not in degree. Kenyan firms are indirectly benefiting from BIT through the economic activity generated by Korean investment" (Interview with Director of a Korean Company, Samsung in Nairobi on 06.03.2026).

The Korean director's claim that benefits are: "different in kind" rather than disproportionate raises empirical questions that have not been definitively resolved. BITs do indeed increase FDI flows to host countries, thus generating economic activity, as Elkins, Guzman, and Simmons (2006) argued. But as Gallagher and Shaffer (2009) showed, the distribution of the benefits from that economic activity is heavily skewed: foreign investors get the bulk of the returns and host countries bear most of the risks and costs. The Korean director's admission that Korean firms benefit "directly" and Kenyan firms benefit "indirectly" is an acknowledgment of this asymmetry. The power theory is at the root of this asymmetry: capital exporters frame benefits distribution as a technical issue of "fairness" and not as a political question of power, so that critiques are neutralized (Hirsch, 2016).

On the other hand, a government official said that: Officially, the government position is that the BIT benefits both countries. But off the record, I will say that the distribution of benefits concerns me. Korean firms have legal protection from the law. Kenyan firms are getting economic spillovers that are hard to measure and might never happen. The Kenyan government is getting investment that may not necessarily

lead to sustainable development. When the BIT was negotiated, it was assumed that any investment would benefit Kenya. More than a decade later, I am not so sure. Some Korean investments have created jobs and transferred technology. But they have been extractive, repatriating profits with little benefit for the people. The BITs protect both types equally well, and no differentiation (Interview with Kenyan Government Official, Ministry of Trade on 22.02.2026).

The Kenyan official's explanation of the difference between “constructive” and “extractive” Korean investment is crucial. BITs do not distinguish between investments that can generate development benefits and those that cannot, Cotula (2014) concluded, and all protected investments receive the same protection, regardless of their development impact. The official's admission that the government's official position is different from his private concerns is consistent with what Gathii and Mbori (2018) termed the “dual discourse” of BITs: governments publicly endorse treaties they have signed but also their own limitations. Power theory explains this dual discourse: governments which have signed BITs are unable to criticize them publicly without appearing weak in front of investors or damaging relations with treaty partners, so criticism is limited to private conversations (Poulsen, 2015).

The quantitative finding that 172 (57.9%) of traders agree that BITs favor Korean firms over Kenyan companies is especially solid when it comes to qualitative evidence from KEPSA, civil society, Kenyan government, and Korean investors. The differences between those who see it as problematic (KEPSA, civil society) and those who see it as acceptable (Korean director, KOTRA official) reflect different normative frameworks. Power theory provides a structural explanation: BITs were negotiated under conditions of asymmetric power and its terms reflect and reproduce that asymmetry, which results in a distribution of benefits that favors the more powerful party (Krasner, 1978; Hirsch, 2016). The triangulation of quantitative, qualitative, and literature findings shows that the Kenya-South Korea BITs produce a cascade of interconnected problems. The democratic deficit in negotiation produces treaties that are illegitimate. Resource asymmetries in dispute resolution produce outcomes for the wealthy.

Treaties that are not implemented leave the implementation of treaties unclear, and uncertainty amplifies regulatory chill. Without monitoring and evaluation, there is no evidence to be found to support assertions that are based on the evidence and the evidence is not available either for the proponents or against them. The cumulative effect is BITs that favor Korean investors over Kenyan ones, Korean flexibility over Kenyan regulatory autonomy, Korean interpretive preferences in direct contrast to Kenyan development priorities, and so on. Power theory is the most compelling explanation because BITs were negotiated under conditions of asymmetric power and its terms reflect and reproduce that asymmetry. But the findings also highlight the need for power theory to be revised to account for domestic distributional effects, institutional capacity deficits, and the degree of empirical uncertainty that neutrality responses imply. BITs are not just tools of Korean domination but an often-ambiguous legal artifact whose effects are unevenly distributed, contested, and uncertain because in the past they have never been systematically assessed.

V. CONCLUSION & RECOMMENDATIONS

5.1 Conclusion

The challenges posed by the Kenya-South Korea BITs have been assessed and their structural disadvantages for Kenya in terms of democratic deficiencies in treaty-making as well as resources in dispute resolution have been observed to be systematic advantages for Korean investors over Kenyan firms in the Kenyan BITs. This study suggests that the Kenya-South Korea BITs make for a cascading set of problems for Kenya and the world at large. The treaty was negotiated under asymmetric power and its provisions reflect and reproduce that asymmetry. The BITs will continue to function as an instrument of asymmetric benefit rather than partnership until these structural issues are addressed through renegotiation or termination.

5.2 Recommendations

The Attorney General's Office must establish a permanent Investment Treaty Enforcement Unit with a dedicated annual budget and staff with international investment lawyers, trade economists, and policy analysts to track and analyze all Korean investments in Kenya and track their compliance with BITs as well as with existing law of Kenya and with any investor-state claims.

Declaration of Interest

The authors declare that they do not have any known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Funding Declaration

This research did not receive any specific grant from funding agencies in the public, commercial, or not-for-profit sectors.

REFERENCES

- Allee, T., & Peinhardt, C. (2014). Evaluating three explanations for the design of bilateral investment treaties. *World Politics*, 66(1), 47–87. <https://doi.org/10.1017/S0043887113000324>
- Benjamin, A. B. (2017). 9/11 as false flag: Why international law must dare to care. *African Journal of International and Comparative Law*, 25(3), 371–392. <https://doi.org/10.3366/ajicl.2017.0200>
- Betz, T., & Kerner, A. (2016). The influence of interest: Real US interest rates and bilateral investment treaties. *The Review of International Organizations*, 11, 419–448. <https://doi.org/10.1007/s11558-015-9236-6>
- Blake, D. J. (2013). Thinking ahead: Government time horizons and the legalization of international investment agreements. *International Organization*, 67(4), 797–827. <https://doi.org/10.1017/S0020818313000258>
- Campello, D., & Lemos, L. (2015). The non-ratification of bilateral investment treaties in Brazil: A story of conflict in a land of cooperation. *Review of International Political Economy*, 22(5), 1055–1086. <https://doi.org/10.1080/09692290.2014.987154>
- Cotula, L. (2017). Democracy and international investment law. *Leiden Journal of International Law*, 30(2), 351–382. <https://doi.org/10.1017/S0922156517000153>
- Dolzer, R., & Schreuer, C. (2012). *Principles of international investment law* (2nd ed.). Oxford University Press. <https://doi.org/10.1093/law/9780199651795.001.0001>
- Eberhardt, P., & Olivet, C. (2012). *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*. Corporate Europe Observatory and Transnational Institute.
- Elkins, Z., Guzman, A. T., & Simmons, B. A. (2006). Competing for capital: The diffusion of bilateral investment treaties, 1960–2000. *International Organization*, 60(4), 811–846. <https://doi.org/10.1017/S0020818306060279>
- Franck, S. D. (2007). Empirically evaluating claims about investment treaty arbitration. *North Carolina Law Review*, 86, 1–88. <https://ssrn.com/abstract=969257>
- Franck, S. D. (2019). *Arbitration costs: Myths and realities in investment treaty arbitration*. Oxford University Press. <https://doi.org/10.1093/oso/9780190054434.001.0001>
- Gallagher, K. P., & Shrestha, E. (2011). *Investment treaty arbitration and developing countries: A re-appraisal* (Working Paper No. 11-01). Global Development and Environment Institute, Tufts University.
- Gathii, J. T. (2017). Introduction to the symposium on Africa and the future of international trade regimes. *AJIL Unbound*, 111, 369–371. <https://doi.org/10.1017/aju.2017.94>
- Gathii, J. T. (2021). *Reform and retrenchment in international investment law*. SSRN. <https://doi.org/10.2139/ssrn.3765169>
- Georank. (2020). *Economic profile and country comparison: Kenya vs. South Korea*. <https://georank.org/economy/kenya/south-korea>
- Ginsburg, T. (2005). International substitutes for domestic institutions: Bilateral investment treaties and governance. *International Review of Law and Economics*, 25(1), 107–123. <https://doi.org/10.1016/j.irle.2004.06.002>
- Haftel, Y. Z., & Thompson, A. (2013). Delayed ratification: The domestic fate of bilateral investment treaties. *International Organization*, 67(2), 355–387. <https://doi.org/10.1017/S0020818313000052>
- Hirsch, M. (2015). *Invitation to the sociology of international law*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199688111.001.0001>
- Kitetu, G. M., Ko, J. H., & Sone, E. (2023). A Korea–Kenya free trade agreement and its economic impact: A computable general equilibrium approach. *Journal of International Trade & Commerce*, 19(1), 1–22. <https://doi.org/10.16980/jitc.19.1.202302.1>
- Krasner, S. D. (1978). *Defending the national interest: Raw materials investments and U.S. foreign policy*. Princeton University Press.
- Mbengue, M. M., & Schacherer, S. (2017). The “Africanization” of international investment law: The Pan-African Investment Code and the reform of the international investment regime. *The Journal of World Investment & Trade*, 18(3), 414–448. <https://doi.org/10.1163/22119000-12340047>
- Mearsheimer, J. J. (2001). *The tragedy of great power politics*. W. W. Norton & Company.
- Mearsheimer, J. J. (2019). Bound to fail: The rise and fall of the liberal international order. *International Security*, 43(4), 7–50. https://doi.org/10.1162/isec_a_00342
- Muchlinski, P. T. (2007). *Multinational enterprises and the law* (2nd ed.). Oxford University Press. <https://doi.org/10.1093/law:iic/9780199227969.book.1>
- Muthucumaraswamy, S. (2010). *The international law of foreign investment* (3rd ed.). Cambridge University Press. <https://doi.org/10.1017/CBO9780511841439>
- Poulsen, L. N. S. (2015). *Bounded rationality and economic diplomacy: The politics of investment treaties in developing countries*. Cambridge University Press. <https://doi.org/10.1017/CBO9781316401941>
- Puig, S. (2013). Investor-state tribunals and constitutional courts: The Mexican sweeteners saga. *Mexican Law Review*, 5(2). [https://doi.org/10.1016/S1870-0578\(16\)30024-5](https://doi.org/10.1016/S1870-0578(16)30024-5)



- Putnam, R. D. (1988). Diplomacy and domestic politics: The logic of two-level games. *International Organization*, 42(3), 427–460. <https://doi.org/10.1017/S0020818300027697>
- Schill, S. W. (2010). *The multilateralization of international investment law*. Cambridge University Press. <https://doi.org/10.1017/CBO9780511605451>
- Schneiderman, D. (2008). *Constitutionalizing economic globalization: Investment rules and democracy's promise*. Cambridge University Press.
- Shaffer, G., Nedumpara, J., & Sinha, A. (2015). State transformation and the role of lawyers: The WTO, India, and transnational legal ordering. *Law & Society Review*, 49(3), 595–629. <https://doi.org/10.1111/lasr.12149>
- Simmons, B. A. (2014). Bargaining over BITs, arbitrating awards: The regime for protection and promotion of international investment. *World Politics*, 66(1), 12–46. <https://doi.org/10.1017/S0043887113000312>
- Thow, A. M., Garde, A., Winters, A., Johnson, E., Mabhala, M., Kingston, P., & Barlow, P. (2022). Protecting noncommunicable disease prevention policy in trade and investment agreements. *Bulletin of the World Health Organization*, 100(1), 268–275. <https://pmc.ncbi.nlm.nih.gov/articles/PMC8958824/>
- Tienhaara, K. (2011). Regulatory chill and the threat of arbitration: A view from political science. In C. Brown & K. Miles (Eds.), *Evolution in investment treaty law and arbitration* (pp. 606–628). Cambridge University Press. <https://doi.org/10.1017/CBO9781139043809.034>
- Van Harten, G. (2007). *Investment treaty arbitration and public law*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199552146.001.0001>
- Van Harten, G. (2010). Investment treaty arbitration, procedural fairness, and the rule of law. In S. W. Schill (Ed.), *International investment law and comparative public law* (pp. 627–658). Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199589104.003.0020>
- Yackee, J. W. (2008). Bilateral investment treaties, credible commitment, and the rule of (international) law: Do BITs promote foreign direct investment? *Law & Society Review*, 42(4), 805–832. <https://doi.org/10.1111/j.1540-5893.2008.00359.x>
- Yackee, J. W. (2010). Do bilateral investment treaties promote foreign direct investment? Some hints from alternative evidence. *Virginia Journal of International Law*, 51(2), 397–441.