

International Investment Agreements: A Change of Perspectives

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ABSTRACT

International Investment Agreements protect international investment, ensure fair treatment for investors and provide them an effective remedy. Traditional investment standards such as national treatment, most-favoured-nation treatment, fair and equitable treatment, full security and protection, and compensation in case of expropriation are somewhat biased toward the investor and are designed, as much as possible, to provide predictable and transparent investment standards for protection of their property. To strike a balance between the interests of investors and host states, which usually differs from the perspective of personal and social affairs, the content of later IIAs has been changed in a way to develop a mutual consensus, a sustainable relationship and a balanced and flexible approach. The need to resolve issues concerning sovereignty protection, national security and environmental sustainability led to the consideration of strategic objectives for IIAs, providing certain rules for the interpretation of investment provisions, introducing new promotion measures and standards, supplementing existing IIAs with new obligations, and others. This paper provides an analysis of the impact of different perspectives on the development of IIAs. In particular, it will examine a shift from the perspective of an investor to the perspective of a host state in terms of the objectives of IIAs, interpretation of IIA provisions, investment promotion measures, and traditional and new investment standards.

Keywords: International Investment Agreements, investment standards, foreign investor, host state.

I. INTRODUCTION

International Investment Agreements (IIAs) mostly consist of Bilateral Investment Treaties (BITs) between two states. The object of BITs is to establish protection for foreign investors abroad. When Germany concluded its first BIT with Pakistan in 1959, it reflected its investors' perspectives by providing them, as much as possible, predictable and transparent investment standards to protect their property. Normally, a foreign investor wants better protection for his property, good incentives, low taxes, a cheap and capable labour force and good infrastructure, whereas a host state aims to satisfy public interests such as more foreign capital flow, creation of jobs, protection of human rights and sustainable development of the environment. The competing interests of parties have led to a change in

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viewing IIAs.¹ The content of later IIAs has changed in a way that develops sustainability, reflects a mutual consensus, and allows a balanced and flexible approach.

According to the United Nations Conference on Trade and Development (UNCTAD), a flexible approach is necessary for dealing with competing interests. It noted that ‘flexibility might need to be approached in different ways for each individual substantive issue depending on its characteristics and developmental effects’.² In other words, there are no certain rules. However, it states that ‘the choice of approach depends on the conditions prevailing in each country and the particular development strategies pursued by each Government’.³ The change of perspectives in IIAs can be seen from the need to resolve issues concerning sovereignty protection, national security and sustainability, which leads to the expansion of treaty preambles, use of special and differential treatment, and gradual liberalization of industries open for foreign investment.⁴

This paper aims to provide an analysis of the impact of different perspectives on the development of IIAs. In particular, it will examine the shift from drafting and interpreting agreements from the perspective of an investor to the perspective of a host state in objectives of IIAs, interpretation of IIA provisions, investment promotion measures and traditional and new investment standards.

II. STRATEGIC OBJECTIVES FOR IIAs

Most IIAs have remained unchanged since their conclusion, and they still share the common goal of protecting foreign investors abroad.⁵ BITs concluded between developed and developing states were written from the perspective of the investor, and this can be seen from the title of investment treaties such as – ‘the Agreement ... for the promotion and protection of investments’. However, changes in investment flows, the practice of green investments by states, host states becoming home states and vice versa have had an impact on states’ policies to revise the purpose of their IIAs towards including more strategic objectives.⁶

The inclusion of strategic objectives in IIAs means that they describe what investors, home states and host states will do together to fulfil their common and separate interests. In such a way, strategic objectives can become some sort of performance goals for parties, for instance, to create jobs, improve living conditions, obtain good incentives, liberalize investment regimes or promote good governance and the rule of law.⁷

¹ One of the earliest IIAs that reflected the concerns of a host state was the 1981 Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organization of the Islamic Conference. Among the latest agreements with a more balanced flexible approach are the 2016 Comprehensive and Economic Trade Agreement between Canada and the EU (CETA), 2016 Morocco-Nigeria BIT, 2017 Israel-Japan BIT, for example.

² UNCTAD, *International Investment Agreements: Flexibility for Development* (2000).

³ *Ibid.*

⁴ UNCTAD, *International Investment Agreements: Key Issues*, Vol. 1 (2004).

⁵ UNCTAD, *Phase II of IIA Reform: Modernizing the existing stock of old-generation treaties*, IIA Issue Note No.2 (2017).

⁶ UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, 92 (2007).

⁷ Alice Hadley, ‘Do China’s BITs Matter? Assessing the Effect of China’s Investment Agreements on Foreign Direct Investment Flows, Investors’ Rights, and the Rule of Law’ in Doak R. Bishop, James R. Crawford and W. Michael Reisman (eds), *Foreign Investment Disputes: Cases, Materials and Commentary*, (2nd ed., 2014) 42, 43.

The need for better goals for IIAs was partly influenced by the growing support for environmental protection from citizens, NGOs and governments.⁸ For instance, protection of the environment could become a performance goal for some IIAs. Almost all international policy frameworks and initiatives such as the UNCTAD's Policy Frameworks, OECD Framework and China's 'One Belt, One Road' have highlighted the significance of sustainable protection of the environment.⁹ Others may choose the importance of bigger investment flows and economic cooperation as their performance goals to achieve greater investment among parties.¹⁰

III. INTERPRETATION OF IIA PROVISIONS

The interpretation of IIA provisions may differ according to the facts of the case. The objects of IIAs play a significant role in the interpretation of treaty terms, thus leading to this favouring in most cases the perspective of an investor.¹¹ Since there has been much criticism of unexpected results from tribunal interpretations, the method of referring to IIA objects might be impractical if there is an interpretation provided for each provision in an IIA. The method of providing a detailed explanation for each provision and explaining the real intentions behind each condition could help to better guide tribunals. However, in such cases contracting parties and investors could be deprived of flexibility usually given by the broad language of IIAs. For example, the 2012 Southern African Development Community's Model BIT contains a comprehensive commentary to each article of the treaty. Since it was the representative states to the Community who provided the commentary to the treaty, this tends to favour the perspective of the host state, and parties will likely not be as willing to change or compromise it.

There are certain rules for interpretation contained in the Vienna Convention on the Law of Treaties, but contracting states can provide their own rules for the interpretation of their IIAs. For example, the Comprehensive Economic and Trade Agreement (CETA) between

⁸ The first Earth Summit was held in Stockholm in 1972. The World Summit on Sustainable Development was held in Johannesburg (Aug. 26–Sep. 4, 2002), which adopted the Johannesburg Declaration on Sustainable Development. The third UN Conference on Sustainable Development was held in Rio (Earth Summit 2012), which adopted the Resolution entitled 'The Future We Want'. In 2015, the UN GA adopted the Resolution 70/1 entitled 'Transforming our World: the 2030 Agenda for Sustainable Development'.

⁹ UNCTAD, *Investment Policy Framework for Sustainable Development* (2012), SADC *Model Bilateral Investment Treaty Template with Commentary* (2012), UNCTAD, *Investment Policy Framework for Sustainable Development* (2015), OECD *Policy Framework for Investment* (2015); China's 'One Belt, One Road' initiative (2015).

¹⁰ E.g. the preamble of the 2017 Agreement on Investment between Hong Kong, China SAR and ASEAN recognizes 'the importance of enhancing investment flows among the Parties... that the creation of a business-friendly environment will be conducive to the stimulation of business initiative for greater investment among the Parties' and reaffirms that the Agreement is 'part of a wider process of economic integration and trade liberalization among the Parties'.

The preamble of the Investment Agreement between China and Hong Kong provides the following objectives: '[...] to progressively reduce or eliminate substantially all discriminatory measures on investments... to protect the rights of investors and to promote achieving progressive liberalization and facilitation of investments... as well as to further enhance the level of bilateral economic and trade exchanges and cooperation'.

The preamble of the 2016 Morocco-Russian Federation BIT states that it desires 'to intensify economic cooperation for the mutual benefit of the Contracting Parties', intends 'to create and maintain favorable conditions for investments made by investors of one Contracting Party in the territory of the other Contracting Party', and recognizes that 'the promotion and mutual protection of investment will stimulate business activities and improve the well-being of the Parties'. This Agreement is slightly different from the previous ones, since it recognizes the importance of the host state's prosperity.

¹¹ R. Dolzer & C. Schreuer, *Principles of International Investment Law* (1st ed., OUP 2008) 31.

Canada and the EU provides that the Vienna Convention on the Law of Treaties as well as ‘other rules and principles of international law’ should be applicable in the interpretation of this treaty and that its Joint Committee may adopt an interpretation to the treaty that will be binding on a tribunal.¹² This approach for the interpretation of IIAs is usually in the best interest of both contracting states, leaving them room for flexibility and the chance for case-by-case analysis.

IV. INVESTMENT PROMOTION MEASURES

Investment promotion measures are usually public policy measures taken by the government of a state to boost investment flows and employment of that state. Although the promotion of investment favours a host state, the measures developed by the government usually favours a foreign investor. Governments set up investment promotion agencies to attract investment to their countries, regions or cities. While IIAs may contain investment promotion measures, the majority of them do not define what measures contracting states should apply to promote investment.¹³ IIAs also provide subrogation clauses that ensure additional protection for investors in foreign countries on top of tax exemptions, investment incentives and subsidies.

The image of a state is a sort of investment promotion too. Investment-friendly countries are those that offer favourable taxes, have good infrastructure and transparent governmental practices. The national legislation of host states such as laws on foreign investment, national security law, anti-monopoly law, immigration law and others are very important in forming the image of an investment-friendly state.

Some governments may conclude BITs as a sign of investment promotion. That explains why some countries have many BITs but less foreign direct investment (FDI). Although there is no strong correlation between signing BITs and investment flows, states maintain the practice of polishing their model BITs. It should be more important to practice fair and efficient national law for investors.

Among the other measures that governments take to promote investment are to provide assistance to investors with investment regulations of contracting parties, the establishment of ‘contact points’ or ombudsmen to handle complaints from investors and joining the insurance programs such as the ones that the Multilateral Investment Guarantee Agency (MIGA) offers.¹⁴

V. TRADITIONAL INVESTMENT STANDARDS AND NEW POLICY PROPOSALS

According to UNCTAD, the world’s economic and financial crisis caused three major evolutions in BIT practice: termination, denunciation and renegotiation of BITs.¹⁵ During the years 2016–2017, 19 IIAs have been terminated. Nevertheless, some states are more likely to renew their BITs under the new title and providing new conditions while keeping some

¹² Canada–EU CETA (30 October 2016) art. 8.31. The 2015 Norway model BIT also provides the establishment of a joint committee. The joint committee is consisted of the representatives of the contracting parties to handle investment problems, including interpretation, implementation of the agreement, removing investment barriers and exchange of information.

¹³ J.W. Salacuse, *The Law of Investment Treaties* (OUP 2010) 194.

¹⁴ China-Switzerland FTA (6 July 2013) art. 9.1; China-Republic of Korea FTA (1 June 2015) art. 12.19.

¹⁵ UNCTAD, *World Investment Report* (2009).

traditional investment standards as well. For instance, in 2015 Brazil concluded several BITs entitled ‘Cooperation and Facilitation Investment Agreement’, which contain the traditional investment standards and some new provisions such as the practice of transparency, combating corruption and illegality, the appointment of an ombudsman, protection of information and others.

As with the BITs, these new policy proposals for IIAs are significant for the development of domestic laws, with strategic goals that help to liberalize investment regimes and promote good governance and the rule of law in developing states.¹⁶ Traditional investment provisions such as national treatment, the most-favoured-nation treatment, fair and equitable treatment, full security and protection and compensation in case of expropriation were generally considered to be in the longer-term interest of home states rather than host states. Thus, it brought a new practice for IIAs: either to terminate or renegotiate them. Renegotiation of IIA terms is an optimal choice: on the one hand, for the host states to reflect the lessons learned from investor-state dispute settlements, and on the other hand for home states to revise their own conditions. These led to the reconsideration of the definition of investment, listing contracting states’ obligations under fair and equitable treatment, providing guidance for indirect expropriation and even more.¹⁷ The need for a more balanced approach of interests also resulted in the exclusion of some traditional investment standards such as the national treatment and the most-favoured-nation treatment, though they have important functions in IIAs despite in general favouring investors.¹⁸

VI. GLOBAL ISSUES AND THEIR REFLECTION IN IIAs

Viewing IIAs as if they are more than just investment protection treaties will become normal for contracting states over the next decade if non-investment standards continue to grow. Global issues such as climate change, pandemic and combating corruption are already on the agenda of some states concluding investment treaties. On the one hand, the reflection of global issues in IIAs will favour a host state’s environment, on the other hand, it could make IIAs too politicized.

There are conventions supplementing existing IIAs with respect to regulation of common issues. For instance, the UN Convention on Transparency in Treaty-Based Investor-State Arbitration supplements existing IIAs in relation to a fair settlement of international investment disputes. International conventions with specific purposes would likely deal with uncertain areas of investment treaties in a more in-depth way.¹⁹

There are various guiding rules to supplement state approaches to business-related obligations. For instance, the 2011 UN Guiding Principles on Business and Human Rights provides principles with regard to business and human rights. States may incorporate some of these guiding principles into the content of their IIAs. In particular, the preamble of IIAs

¹⁶ Alice Hadley, ‘Do China’s BITs Matter? Assessing the Effect of China’s Investment Agreements on Foreign Direct Investment Flows, Investors’ Rights, and the Rule of Law’ in R. Doak Bishop, James Crawford and W. Michael Reisman (eds), *Foreign Investment Disputes: Cases, Materials and Commentary*, (2nd ed., 2014) 42, 43.

¹⁷ UNCTAD, *World Investment Report* (2015) 109.

¹⁸ India’s model BIT (2015) excluded fair and equitable treatment, MFN treatment and the ‘umbrella clause’. Norway’s model BIT (2015) excluded the ‘umbrella clause’. Other states excluded investor-state dispute settlement clauses, despite the fact that they were believed to be a major advantage of investment agreements to ‘depoliticize’ investment disputes (R. Dolzer & C. Schreuer, *Principles of International Investment Law*, 2nd ed., OUP 2012, at 23).

¹⁹ W. Alschner & E. Tuerk, ‘The role of international investment agreements in fostering sustainable development’ in Baetens F., *Investment Law within International Law: Integrationist Perspectives* (CUP 2013).

often includes soft-law international guidelines such as the Stockholm Declaration on the Human Environment 1972, the Rio Declaration on Environment and Development 1992, the Convention on Biological Diversity 1992, the UN and OECD Conventions against corruption and many others.²⁰

VII. CONCLUSION

The development of investment standards that take into account the interest of states and investors has been a crucial task for contracting states. Many states in their model BITs have gradually broadened or clarified the scope of application of the substantive and procedural provisions of these agreements, included investment facilitation articles and tried their best to eliminate investment barriers. It is undeniable that both investors and host states try to incorporate better standards, which should then be composed from the perspective of both parties. However, in practice many IIAs still maintain the traditional investment standards favouring investors. There remains the challenge to provide a more balanced flexible approach to provide fair and transparent rules for investors and promote sustainable investment for host states. Maintaining a flexible approach is necessary for dealing with competing interests in international investment. The shift from the perspective of an investor to the perspective of a host state is observable in states' approaches by including strategic objectives for IIAs, providing the rules for the interpretation of IIA provisions, applying various investment promotion measures and introducing new investment standards while keeping traditional standards and viewing IIAs as a tool for expressing global concerns.

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²⁰ E.g. China–Republic of Korea FTA (1 June 2015) art.16.1; Austria–Kazakhstan BIT (12 January 2010) preamble; Austria–Tajikistan BIT (15 December 2010) preamble; Austria–Nigeria BIT (8 April 2013) preamble; Austria–Kyrgyz Republic BIT (22 April 2016) preamble.

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