Definitions, Standards of Treatment, Promotion and Protection of International Investments: An Introduction

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Abstract

The fact that foreign investments can be beneficial to growth and development is now generally accepted. However, opening up to Foreign Direct Investment has not always been governments' priority. Not to mention that international investments can also challenge States' sovereignty. This pendulum swing between liberalization and restriction has called for regulation. The regulatory effort takes place on three different, yet interrelated plans: domestic legislation, State contracts, and international investment law. The latest has greatly evolved from the early Treaties of Friendship and Navigation to today's mega regional deals offering a complex set of trade rules. In spite of its extreme variety, international investment law finds a form of regulatory coherence around the definition of standards of treatment, protection, and promotion of the investment and investor. These standards are critically addressed in the "Definitions, Standards of Treatment, Promotion and Protection of International Investments" part of our Handbook, which provides the reader with a very accurate and insightful overview of a fast-changing field firmly grounded in public international law and yet touching upon a large variety of other legal domains.

Keywords

United nations · World bank · APEC · ASEAN · Global investment competitiveness report · Group of 20 · Friends of investment facilitation for development · Reform package for the international investment regime

Introduction

The fact that foreign investments can be beneficial to growth and development is now generally accepted. However, opening up to Foreign Direct Investment (FDI) has not always been governments' priority. Not to mention that international investments can also challenge States' sovereignty in many ways from access to resource to the treatment of labor. As reminded by Muthucumaraswamy Sornarajah, international investment law was originally designed in the context of the gunboat diplomacy and has managed to reinvent itself numerous times hence framing dissent, but not necessarily questioning its very foundations.[1] This pendulum swing between liberalization and restriction has called for regulation. The regulatory effort takes place on three different, yet interrelated plans: domestic legislation, State contracts, and international investment law. Initial attempts were clearly made to protect and promote investments and investors against the instability of national regulation in the context of power domination and later decolonization[2].

[1]See Muthucumaraswamy Sornarajah, ▶ Chap. 82, "Resistance to Dominance in International Investment Law."

[2]For a historical and international economic law perspective on the evolution of FDIs, see Choukroune L, Nedumpara J (2021) International economic law. CUP.

If considered essential to the economy, FDIs are not alien to the various risks involved with international deals, which necessitate the existence of investment protection mechanisms including for redress against the possible wrongs engaging the State's responsibility. This apparent unbalance in favor of the foreign investor has only recently captured the attention of a larger community of international law scholars while triggering great interest in civil society and student audiences alike. This new interest is commensurable and parallel to the significant increase of FDI in the past two decades.

Yet international investment law has greatly evolved from the early Treaties of Friendship and Navigation to today's mega regional deals offering a complex set of trade rules with, for instance, the Transatlantic Trade and Investment Partnership (TTIP) various negotiation projects, the concluded Trans-Pacific Partnership (TPP) which later became the Comprehensive and Progressive Agreement for Trans-pacific Partnership (CPTPP) and African Continental Free Trade Area (AfCFTA), or the Regional Comprehensive Economic Partnership (RCEP). With around 3000 International Investment Agreements (IIAs) including 2340 Bilateral Investment Treaties (BITs) in force and 319 Treaties with Investment Provisions (TIIPs) in force too, the scope of international investment law is simply immense[3].

In spite of its extreme variety, international investment law finds a form of regulatory coherence around the definition of standards of treatment, promotion, and protection of international investments and investors. These standards are critically addressed in the "Definitions, Standards of Treatment, Promotion and Protection of International Investments" part of our Handbook, which provides the reader with a very accurate and insightful overview of a fast-changing field of public international law touching upon a large variety of other legal domains.

Foreign Investments Promotion and Protection Agreements

What is there in common between the first original Bilateral Investment Treaty (BIT) between Germany and Pakistan, today's mega trade deals, and the new generations of BITs? The first ever BIT was to protect Pakistan's investments in Wes Germany rather than the other way around. This is contrary to the majority view that the BIT was to protect the West German's investment in Pakistan. However, since then, many BITs were signed between investing developed nations to protect the developed nations investors and their investments in the developing nations. Over time, with more outward FDIs between developing countries, there are more BITs signed between these countries, such as those taking place in ASEAN and many other developing economies.

Times have changed: from a general reluctance to open up too much to FDI, the world has now embraced liberalization policies, while, at the same time, these political choices are under the scrutiny of a global civil society wary of the human and environmental risks generated by international investments. New players have

[3]See UNCTAD for the latest data on IIAs at: https://investmentpolicy.unctad.org/international-investment-agreements

emerged with the much greater role of developing economies and their firms in not only receiving but also generating FDI. As observed by Karl P. Sauvant, while the "activities of Multinational Enterprises have grown substantially over the past three decades," "many of the shortcomings" of the international investment regime "are the result of its expansion during a period when the focus was almost exclusively on the responsibility of host countries."[4] This complexity needs to be better understood and calls for profound changes.

The Expansion of Foreign Direct Investments and the Challenge of the Covid-19 Pandemic

The last three decades have seen the global amplification of international financial flows in the form of foreign direct investments notably. Recent trends are illustrative of the constant state of flux of these FDI. According to the 2019 UNCTAD World Investment Report, Global FDI flows continued to fall in 2018 by 13% to $1.3 trillion. FDI flows to developed economies reached the lowest point since 2004, declining by 27%[5]. However, flows to developing countries remained stable, rising by 2%. As a result, the share of developing countries in global FDI increased to 54%, a record high which produces a number of policy implications of importance for the development of international investment law. Developing Asia is particularly well placed as the largest recipient of FDI in the developing world. Despite a decline of 6%, flows to developing Asia continued to account for one-third of global FDI in 2019. Looking ahead, the UNCTAD expected FDI flows to rise marginally in 2020 but with the Covid-19 pandemic crisis, trends are fast changing.

On 26 March 2020, UNCTAD estimated future decline in global FDI in 2020 caused by Covid-19 will range from 30% to 40%.[6] The highly impacted sectors cover basic materials; consumer cyclicals (including airlines (−116%), hotels, restaurants, and leisure); energy (-208%); and industrials (including automotive (−47%) and electronics).[7] The world's largest MNCs in the automotive, airlines, and tourism sectors have reduced their 2020 earnings estimates by 44%, 42%, and 21%, respectively, on average.[8] Major hotel companies are expecting to reduce 70% of hourly

[4]See Karl P. Sauvant, ▶ Chap. 68, "Multinational Enterprises and the Global Investment Regime: Toward Balancing Rights and Responsibilities."

[5]For updates, see the UNCTAD World Investment Reports at: https://unctad.org/en/Pages/DIAE/World%20Investment%20Report/World_Investment_Report.aspx

[6]UNCTAD, Global Investment Trend Monitor No.35, Impact of the Covid-19 Pandemic on Global FDI and GVC, March 2020,

[7]UNCTAD, Global Investment Trend Monitor No.35, Impact of the Covid-19 Pandemic on Global FDI and GVC, March 2020, The World Bank Group, Supporting Businesses and Investors Investment Climate Policy Responses to Covid-19, 2020.

[8]UNCTAD, Global Investment Trend Monitor No.35, Impact of the Covid-19 Pandemic on Global FDI and GVC, March 2020.

hotel employees, and airlines will cut their employees' pay by 25–50%.[9] As a result of Covid-19, more than two-thirds of multinational investors in developing countries are reporting disruptions in supply chains, declines in revenues, and falls in production. The World Bank's survey on the impact of the Covid-19 pandemic shows projects a worsening investment scenario in the next coming months.[10]

According to the WTO, Covid-19 poses the most daunting challenges to the trade of least developed countries.[11] This is mainly due to the LDC's lack of resources to support economic rebound and the limited number of product ranges exported to few markets. The downward trend trade in products like textiles and clothing and in services mainly in tourism revenues have increased pressure on the LDCs. LDCs are also facing reduced remittances, increasing the needs for FDIs. The WTO states that as migrant workers from LDCs return from host countries affected by the pandemic, flows of remittances, a critical source of foreign exchange for many countries, has also reduced. The reduced remittances may affect these countries in the short term and medium term.[12]

In the era of the Covid-19 pandemic, investment promotion and investment facilitation are becoming more important. In investment promotion, economies are paying attention to several new growth area. They include digital technology, communication technology, and e-commerce related services, which see the upward trend potential. The shifts in habits and the way to do things leads to a substantial shift toward reliance on e-commerce of goods and services and increasing the importance of digital technology. In addition, economies may also look at improving its agriculture sector as a new potential growth and export potential due to the disruption in the global food supply chain.

Further, the Covid-19 pandemic requires a new approach towards conducting businesses and investments. Moving forward, international organizations like the United Nations, the FAO, the OECD, and the World Bank and regional organizations like APEC and ASEAN encourage businesses to adopt the Inclusive and Responsible Business Investment principles. These principles will address the environmental, sustainability, and governance (ESG) issues facing the world. Among issues requiring urgent attention are climate change, labor standards, and ensuring the economic development are shared equitably across the different levels of the society. For example, of late, products from ASEAN Member States, such as rubber gloves and palm oil, face export restrictions by several ASEAN Dialogue Partners. The Dialogue Partners argue that these businesses engaged practices that go against the labor and environmental standards.

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[9] OECD (2020) OECD interim economic assessment, Coronavirus: the world economy at risk.

[10] World Bank Group (2020) Global investment competitiveness report 2019/2020: rebuilding investor confidence in time of uncertainty. World Bank Group, Washington, DC. https://doi.org/10.1596/978-1-4648-1536-2.

[11] World Trade Organisation (2020) The Covid-19 pandemic and trade-related developments in LDCs, Information Note.

[12] World Trade Organisation (2020) The Covid-19 pandemic and trade-related developments in LDCs, Information Note.

Members of the public are becoming more conscious of the impact that businesses and investment have on the environment and the society. This necessitates a reflection of how today's businesses are conducted as well as how investments decisions are made. Investors are encouraged to look into investing in circular economy, green technology, green finance, and green procurement, while embracing the digital technology, promotion of good governance, transparency, and responsive regulations. Businesses are also encouraged to implement the Principles for Responsible Investment in Agriculture under the FOA, and adopt the concept of responsible production and responsible consumption.

Further, economies will start focusing on investment retention and investment facilitation. According to the World Bank's latest Global Investment Competitiveness Report 2019/2020, based on a survey of 2,400 global business executives in 10 large middle-income economies, government policies can influence FDI location decisions.[13] Examples of measures that can rebuild investor confidence include reducing investor risk and increasing policy predictability.

Hence, investment promotion agencies (IPA) can boost their countries' investment competitiveness by better aligning their FDI attraction and retention efforts with market signals and changing investor preferences. Governments can leverage FDI for robust economic recovery from Covid-19 by avoiding protectionist policies, seizing new opportunities from changing FDI and supply chain trends, and fostering global cooperation. To ensure investors' retention, countries may increase coordination between central and subcentral agencies, and sectoral agencies. Investment facilitation tools such the One Stop Center (OSC) and investor-aftercare services need improvements. Some countries are also having a relook at the fiscal and non-fiscal incentive schemes. The best practice is for the incentive schemes to be more targeted towards achieving high quality investments. Some countries are adopting the cost benefit analysis to ascertain that the selected sectors are capable of contributing into economic development and transformation.

FDI as well as international investment law are in a perpetual movement of evolution calling for equally great reforms. States with effective economic liberalization policies have progressively welcomed foreign investment. This evolution has been particularly significant for developing economies and emerging markets where companies need funding to expand their international sales. FDIs are pivotal for the economic development of a nation as the capital inflow of foreign investors permit strengthening infrastructure, increasing productivity, and creating employment opportunities in a given country. While FDIs constitute investment in production facilities, their significance for developing countries is much greater. FDIs' contribution is not only restricted to investible resources and capital formation, but, perhaps more importantly, it also masquerades as a means of transferring

[13] World Bank Group (2020) Global investment competitiveness report 2019/2020: rebuilding investor confidence in time of uncertainty. World Bank Group, Washington, DC. https://doi.org/10.1596/978-1-4648-1536-2.

production technology, skills, innovative capacity, and organizational and managerial practices between locations, as well as of accessing international marketing networks.[14] In light of such a desired stature of FDI, 2017 appeared as a milestone for developing countries, which received $671 billion, or 47% of total global FDI. Investments rose by 9% in developing Asia, which received $476 billion[15].

However, as a consequence, FDIs do carry with them major financial risks for which investors usually need protection against their contribution. They seek reassurance that the contractual protections on the basis of which they have invested will maintain its status quo for the life of their investment and such growing investment flows into emerging markets increasing the need for sophisticated risk management based on strong investment protection. The international protection of investment seeks to safeguard foreign investments against interference by host State. Once the investor has sunk in his resources, it becomes vulnerable to the changes implemented in the host State. Here, the risk of policy changes in the host States could be higher in the lesser developed economies looking to accept FDIs. Many of these economies are still developing various policies that may change from time to time. These economies require a lot more flexibility in policy making. However, these may not sit well with foreign investors seeking policy stability. Hence, there will be tensions between maintaining national policy flexibility and the need to maintain stability sought by investors.

The Covid-19 pandemic can longer assure the policy stability even in the more developed economies. With the Covid-19 pandemic, more economies are looking at some forms of protectionism. Developed economies like the European Union and the United States are becoming more vigilant against what is categorized as "predatory" takeover of strategic assets like biotechnology working on vaccines and digital technology corporations.[16] These economies are undertaking screening of FDIs, instead of allowing total liberalization. On the other hand, developing economies, in the quest to retain and attract FDIs, introduced more facilitative measures. China, India, Indonesia, and Vietnam have introduced new measures to attract, promote, or facilitate investments. China introduced two direct measures to assist investors facing Covid-19, i.e., the "Circular Responding to Novel Coronavirus" which provides for paperless management of foreign investment records and issuance for foreign companies failing to execute contracts during the Covid-19 crisis; and measures to enhance government assistance to foreign-invested projects and enterprises in resuming business and production post-Covid-19. Malaysia has also announced several post-Covid-19 investment climate policies as part of the recovery and reform plans for the Malaysian economy. The measures include special investment promotion fund for Malaysian Investment Development Authority (MIDA)

[14]Padma M, Sauvant KP (1999) Foreign direct investment in developing countries. F&D 36(1): 34.

[15]United Nations Conference on Trade and Development (2018) World investment report 2018: investment and new industrial policies. UNCTAD WIR, ch 1.

[16]See, for example, UNCTAD, Investment Policy Monitor, Issue 23, April 2020.

amounting to almost USD 12 million and a special project implementation unit to assist existing investors to implement their investment projects.

Investment protection seeks to mitigate the risks involved under FDIs and aims to make sure that the investors will be treated fairly when they invest abroad.[17] The desire to draw foreign investment has led most countries to adopt policies that are designed to create a favorable investment climate, sometimes without thinking about long-term consequences as far as sovereignty and regulatory independence are concerned. As a result, realizing that IIAs, especially of the older generation, provide restrictions on the national policy space, more economies are introducing general exceptions and security exceptions in the IIAs and domestic investment laws. These exceptions seek to allow parties' IIAs flexibility to change national policies as and when necessary. The required policy space or flexibility has to be balanced with the protections offered to foreign (and domestic) investors.

There are broadly three investment protection mechanisms offered by the States: investment national legislation, investment contracts, and investment treaties. Firstly, a State may enact investment legislation to ensure certain treatment for investors which may guarantee tax exemption or provide an industry-specific fiscal regime for investors. However, a major concern for investors still remains that any protections contained in national legislation may be subject to revocation by a subsequent government. Sensing this, States are slowly enacting Investment laws at the national level and in some cases even at subnational levels. These investment laws adopt internationally acceptable standards of protections, with modifications to suit national sociopolitical and economic development objectives. Indonesia, Lao PDR, Myanmar, and Vietnam are among the ASEAN Member States having enacted Investment Laws. The investment laws provide basic guarantees like non-discrimination, protection against unlawful expropriation, access to lands, access to free transfer of funds, and the redefined, often a narrow version of the fair and equitable equipment. The Investment Laws also provide a broad scope of exceptions allowing policy space for the Governments.

Secondly, an investor may enter into an investment contract with a host State such as concession agreements and production sharing contracts in the extractive industries, under which investors receive protection against their investment in the exploitation of a State's natural resources. The investment contract may provide protection as against the amendments in law or regulation adversely affecting their interests; however, the effectiveness of such provisions in the face of government action can be variable. The agreement normally includes specific dispute settlement clauses. It is not unusual for these concession agreements to provide for access to international arbitration or referral to third country courts, normally from a more legally developed economies like Singapore or the High Court of England. Thirdly, one of the preferred modes to perforate into FDI

[17]EU (2014) Investment Protection and Investor-to-State Dispute Settlement (ISDS) in EU agreements. European Union. https://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152290.pdf

is to enter into investment treaties with host States, a method that has gained rapid momentum in from the 1990s and with China's emergence as a global economic leader in particular[18]. Investment treaties can be bilateral, i.e., between two States, or multilateral, i.e., between multiple States, and they are known as bilateral investment treaties and multilateral investment treaties, respectively (hereinafter, "BITs" or "MITs"). These treaties commonly include provisions establishing specific protections for investors from the respective States to encourage foreign investment. With the advent of time, investment treaties are often become embedded in the free trade agreement in the form of an investment chapter. The more recent agreement not only cover investment protections but also include at least two other pillars, namely investment liberalization and investment facilitation. Protection and investment dispute provisions are normally linked with other chapters like services, government procurement, and State-owned enterprises.

Increasing Complexity of Investment-Related Agreements

International investment treaties, also known as International Investment Agreements (IIAs), constitute one of the most essential instruments to amplify stability and certainty in investor-State relations.[19] BITs are the classical facet of the international investment regime while Free Trade Agreements (hereinafter, "FTAs") including an investment chapter proliferate, [20] with, for example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), one of the largest trade agreements created after the landmark North American Free Trade Agreement (hereinafter, "NAFTA"), or the Transatlantic Trade and Investment Partnership between the EU and the US, whereas the Energy Charter Treaty (hereinafter, "ECT") is unique in being an industry-specific trade agreement that is not limited by geography. There are currently over 2,300 BITs in force, and although there is no standard form for BITs, many are broadly a collection of similar protections. Several States having "model" BITs exert them as the basis for negotiation of new treaties. Arguably, one of the major benefits of investment treaties and investment treaty arbitration is the creation of a stable legal framework for investment relations based on general international law which domestic regulation on several occasions lacks of. Investment treaties can help create the legal and institutional infrastructure

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[18]See Chaisse J (ed) (2019) China's international investment strategy, bilateral, regional and global law and policy. OUP.

[19]Schill SW (2015) International investment law and the rule of law. In: Lowell J, Thomas JC, van Zyl Smit J (eds) Rule of law symposium 2014: the importance of the rule of law in promoting development. Academy Publishing, Singapore, pp 81–102.

[20]Chaisse J (2016) Conceptual paper on the impact of BITs and FTAs on FDI. ARIC. https://aric.adb.org/pdf/events/aced2016/paper_julienchaisse.pdf

essential for attracting foreign investment into industries and projects that further host State development especially in countries with weak domestic legal regimes and dispute settlement mechanisms,[21] as stated, for example, in the Agenda 21 of the UN Conference on Environment and Development.[22] In the event of disputes, BITs and FTAs may provide with a successful recourse to Investor State Dispute Settlement (ISDS), which may be effective in removing significant disputes between foreign investors and Government agencies from the purview of local courts and tribunals since they may be slow, capricious, corrupt, xenophobic, lack of legal professional capacity or ill-equipped to resolve advanced disputes. However, it is pertinent to note that such also relegate locals, including domestic businesses to the mercies of these inadequate institutions.[23]

International Investment Agreements' Core Elements

As mentioned above, while extremely diverse in their geographical scope, the existing International Investment Agreements (IIAs) share a number of common substantial features. As surprisingly as it might seem, they are not fundamentally different from the first-ever BIT signed between Germany and Pakistan on 25 November 1959. There are a number of reasons to explain these similarities. Not only is it because the system has not been deeply questioned by the different conceptual and political visions on the detriments/benefits of FDIs but also because IIAs are firmly grounded in general international law and the theory of State responsibility. Hence, the core elements, and specifically, the standards of treatment, promotion, and protection found in today's IIAs share similar features. The devil – or maybe the willingness to evolve – being in the details, it is, however, important to study these standards at length and with a historical and political perspective in mind.

International Investments Standards of Treatment, Promotion, and Protection

Governments enter into several bilateral and multilateral agreements on investment protection. These instruments, on the one hand, provide a set of standards that governments consent to abide by with respect to investors from the country with which they signed the agreement and, on the other hand, provide mechanisms

[21]Schill SW (2015) International investment law and the rule of law. In: Lowell J, Thomas JC, van Zyl Smit J (eds) Rule of law symposium 2014: the importance of the rule of law in promoting development. Academy Publishing, Singapore, pp 81–102.

[22]United Nations Conference on Environment and Development (UNCED) (1992) Agenda 21: programme of action for sustainable development (UN Doc A/Conf.151/6/Rev. 1) at para 2.23.

[23]UNDP (2005) Investment provisions in free trade agreements and investment treaties: opportunities and threats for developing countries, 5.

through which investors can seek redressal in the form of damages for the breach of these terms. Although, there exists disparity in textual form, governments usually seek to incorporate similar standards in all the agreements of which the most important provisions to protect foreign investors are *national treatment*, *most-favored-nation treatment*, *fair and equitable treatment* along with *full protection and security*, the ability to repatriate capital and profits in the form of *free transfer of funds*[24], as well as the guarantees of *investors' property rights*. The latest often takes the forms of compensation provisions to be invoked should an investment be expropriated by the host State as well as an obligation to provide for free transfer, which guarantees that investors, directly or indirectly, will be allowed to withdraw the dividends obtained from their investments and send them back to their country of origin. These are "absolute" and "non-contingent" obligations as they limit a State's ability to impose measures on foreign investors even if these measures are applied equally to the investors of the State itself.[25] Additionally, some other common protections found in these instruments include the freedom to invest through admission and establishment of investments to the nationals of contracting States.

All these standards have naturally been addressed in great details in the often technical literature available on IIAs and in international investment law textbooks. However, what matters is to approach these common features with a double lens: that of the international investment technician and that of the international economic lawyer, that is one able to create bridges between the disciplines of international, comparative and national law, as proposed in the different chapters composing this Handbook's "Definitions, Standards of Treatment, Promotion and Protection of International Investments" part.

Demystifying Investor-State Dispute Settlement

Investor-State Dispute Settlement (hereinafter, "ISDS") is a mechanism embodied in investment and trade agreements, which allows investors to enter into different forms of settlement with States over treaty breaches. It is a procedural mechanism authorizing an investor from one country or territory to bring different proceedings, including arbitral proceedings, directly against the country or the territory in which the investment was made. The presence of ISDS provisions can be seen in many international agreements including free trade agreements, bilateral investment treaties, multilateral investment agreements, national investment laws, and investment contracts. If an investor from one country or the "home State" invests in another country or the "host State," both of which have agreed to ISDS, and

[24]In addition, the Myanmar Investment Law 2016 even addressed the free transfer of funds from abroad to domestic and foreign investors. This is because of historical restrictions of capital inflow into the country and domestic investors needs to access to the cheaper foreign capital to support their businesses.

[25]Houde M-F (2006) Novel features in recent OECD bilateral investment treaties. In: International investment perspectives. OECD.

subsequently, the host State violates the rights granted to the investor under public international law, then that investor may sue the host State in neutral arbitration as a recourse to the domestic courts of the host State approach. Although ISDS is invoked as a catch-all term, there exists a wide variety of divergence in scope and process. ISDS provisions are intended to avoid State-to-State conflict, protect citizens abroad, and signal to potential investors that their rights will be enforced. Without ISDS provisions, an investor would normally need to seek the intervention of the government of its home State to enforce its rights through the diplomatic or administrative channels. Treaty-based investment protection represents a major advance in the fair treatment of the concerned parties and the peaceful resolution of disputes. However, of late, ISDS has been under major scrutiny from academia, civil society, and later governments hence leading to the formulation of reform proposals. These different options for reforms are addressed in great details in one dedicated part of our Handbook, but it is already important to allude to them while approaching the international investment standards as disputes are indeed settled on the basis of specific standards provided for in IIAs. Interactions are as great as the reform challenges. Reforming ISDS without deeply transforming IIAs drafting and substance reveals a delicate if not impossible or illogical enterprise.

Multilateral and Regional Approach Towards Investment Facilitation Frameworks

Since the last few years, the concept of investment facilitation has found its way onto the agenda of academic discussions and policy debates on global investment governance.[26] In 2016, UNCTAD released the "Global Action Menu for Investment Facilitation," consisting of 10 Action Plans.[27] The 10 Action Plans are to promote accessibility and transparency in the formulation of investment policies and regulations and procedures relevant to investors; to enhance predictability and consistency in the application of investment policies; to improve the efficiency of investment administrative procedures; to build constructive stakeholder relationships in investment policy practice; to designate a lead agency, focal point or investment facilitator with specific mandates; to establish monitoring and review mechanisms for investment facilitation; to enhance international cooperation on investment facilitation; to strengthen investment facilitation efforts in developing-country partners, through support and technical assistance; to enhance investment policy and proactive investment attraction in developing country partners, through capacity-building; and to complement investment facilitation by enhancing international cooperation for investment promotion for development, including through provisions in international investment agreements.

[26]Berger et al (2019) Investment facilitation for development: a new route to global investment governance, DIE Briefing Paper No 5.

[27]UNCTAD (2016) Trade and development board sixty-third session Geneva, TD/B/63/CRP.2.

In the same year, the Group of 20 (G20) trade ministers agreed on the nonbinding "Guiding Principles for Global Investment Policymaking," which were formally adopted later that year at the G20 Hangzhou Summit. Other international organizations, such as the Organization for Economic Cooperation and Development (OECD), have worked on the issue of investment facilitation as well, which resulted in Policy Framework for Investment;[28] and the Asia-Pacific Economic Cooperation (APEC) also adopted an Investment Facilitation Action Plan in 2008.[29] Furthermore, The World Bank also launched Investment Policy and Promotion (IPP) Logical Framework and refers to investment facilitation as "the most basic and cost-effective activity to support foreign investment promotion".[30]

Recent discussions in the WTO, however, driven by emerging countries, have taken a new route.[31] The adoption of the Trade Facilitation in 2017 has given the right momentum for investment facilitation discussions. The initiatives for the investment facilitation multilateral framework started by the Friends of Investment Facilitation for Development (FIFD), who launched an open-ended Informal Dialogue on Investment Facilitation for Development in the WTO.[32] It continues as an Informal Dialogue, which was developed to a Joint Ministerial Statement (JMS), co-sponsored by 70 Members at the 11th WTO Ministerial Conference in December 2017.[33] The JMS aimed to form structured discussions to develop a multilateral framework on investment facilitation.[34] The Structured Discussion is expected to improve the transparency and predictability of investment measures, streamline and speed up administrative procedures and requirements, enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention, and facilitate greater developing and least-developed Member participation in global investment flows.[35] However, the discussions shall not address market access, investment protection, and Investor-State Dispute Settlement.[36]

Rethinking IIAs and ISDS

The regime of IIAs is hence undergoing a thorough revaluation to align with the global trend of adopting sustainable development goals. The United Nations

[28]OECD (2015) Policy framework for investment 2015. OECD.

[29]APEC (2019) Investment facilitation action plan. APEC.

[30]Novik A, Crombrugghe (2018) Towards an international framework for investment facilitation. OECD.

[31]Berger, Investment facilitation for development: a new route to global investment governance, Op.Cit.

[32]WTO, Trade Dialogues: Investment Facilitation for Development.

[33]Ibid.

[34]Ibid.

[35]Ibid.

[36]Ibid.

Conference on Trade and Development (UNCTAD) is playing a key part in this endeavor and in the formulation of ISDS alternatives in particular[37]. The United Nations Commission on International Trade Law (UNCITRAL), Working Group III (ISDS reform) has also taken the lead, together with the UNCTAD, to rethink ISDS[38]. Improving ISDS is indeed one of the areas at the heart of the IIAs reform debate aimed at overcoming what has been defined as "a legitimacy crisis."[39] The rationale behind the introduction of IIAs was that of supporting and enhancing FDI, however, even after decades of such consideration, no conclusive proof of increased flow of such investment has been furnished. The proponent of IIAs' sole focus on FDI flows is misguided as the complete image would require to measure the contribution of IIAs to sustainable development and the costs, for example, in terms of compromising national policy space. IIAs remain inadequate in serving its purpose as various provisions under it which seek to explicitly protect and promote social and environmental goals have proven to be ineffective and significant decisions by international investment tribunals do not appropriately balance investor rights with the broader sustainable development objectives.[40] Furthermore, IIAs have been criticized owing to their limitation to only treaty claims, for instance, a variation of dispute settlement clauses limited to treaty claims, explicitly referring to "obligations of host States," has recently been interpreted as excluding counterclaims before an ICSID tribunal, some IIAs require lapse of waiting period to solve dispute amicably, only then can investors institute arbitration, at times, they combine waiting periods with the obligation to litigate in a domestic forum requiring exhaustion of local remedies first, for instance, Calvo Doctrine – inspired preference for domestic remedies would deny a foreign investor access to international arbitration at all and some even carve out certain areas from their scope of application, including dispute settlement thereby leading to subject-matter restrictions.[41] Comprehensively, the existence of such complications calls for a need to reorient the international investment law as often demonstrated by the different chapters of this "Definitions, Standards of Treatment, Promotion and Protection of International Investments" part.

[37]See generally the UNCTAD dedicated pages at: https://unctad.org/en/pages/DIAE/DIAE.aspx

See as well, the UNCTAD reform package for IIAs at: https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf

[38]See the different related work sessions and working papers at: https://uncitral.un.org/en/working_groups/3/investor-state

[39]United Nations Conference on Trade and Development (2018) World investment report 2018: investment and new industrial policies. UNCTAD WIR, p 128.

[40]Garcia FJ, Aisbett E, Choudhury B, de Schutter O, Harrison J, Hong S, Johnson L, Kane M, Peña S, Porterfield M, Sell S, Shay SE, Wells LT (2018) Rethinking international investment governance: principles for the 21st century. Columbia Center on Sustainable Investment Books 1.

[41]Bernardini P (2017) Reforming investor–state dispute settlement: the need to balance both parties' interests. ICSID Rev 32(1): 38–57.

Contemporary Evolution of International Investment Law

While some change seems underway, it is yet difficult to gauge treaties drafters' real ambition. IIAs reform too often appears as cosmetic, as a form of modernization, yet without the will to truly respond to the most pressing challenges of our times. There are nevertheless certain contemporary evolutions, which deserve our attention. These are reflected in the drafting of the core IIAs standards as demonstrated in the following chapters.

Modernizing Existing (Old-Generation) Treaties

As alluded to above, over the last decade, investment arbitration has experienced significant criticism culminating into a debate around the investment treaty design,[42] which may be triggered to keep in pace with the evolving international law of foreign investment. International organizations such as UNCTAD, UNCITRAL, or even the Organization for Economic Cooperation and Development (OECD) are now advocating IIAs reform packages. Numerous actors from India to Canada to the European Commission are contemplating investment treaty policies. This reorientation has manifested itself empirically. States are adding new obligations to their treaties, including in relation to investor conduct. Clarifications of existing disciplines and procedures for solving treaty-related disputes are on the rise. Moreover, there is now more conscientiousness around the importance of policy space under investment treaties. Part of the trigger for this change can be attributed to the wave of arbitration claims that succeeded the 1990s' boom in investment treaty signing. There is little knowledge about whether there exists a link between treaty design and the risk of attracting claims for arbitration or to what extent new treaty clauses such as general public policy exception clauses matter in litigation. On the issue, UNCTAD recommends that States consider omitting or reformulating provisions in their future investment treaties to increase clarity and predictability. Some States, such as Canada and the United States, took early measures to this effect by including more explicit and explanatory language in their 2004 model investment treaties. Other like India, Indonesia, and the Netherlands have publicly stated that many of the investment treaties they signed in the past are too vague and insensitive to the balance between investor rights and obligations. Cumulatively, whether we are in a time of productive reform and evolution remains to be seen, however, many a times, evolution does not necessarily result in survival.[43]

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[42]Laudal Berge A, Alschner W (2018) Reforming investment treaties: does treaty design matter?. Investment Treaty New. https://cf.iisd.net/itn/2018/10/17/reforming-investment-treaties-does-treaty-design-matter-tarald-laudal-berge-wolfgang-alschner/

[43]Pearsall PW (2018) The role of the state and the ISDS trinity. AJIL 112: 249–254.

Different Contemporary Approaches

Despite the myriad reformation under international investment treaties, the element of uniformity is amiss. The aim of new treaties to improve balance and flexibility comes at the price of IIA regime being less homogenous. Since the launch of UNCTAD's options for Phase 2 of IIA Reform ("WIR17"), multifarious States have queued to initiate steps to modernize their old-generation treaties. However, an effective approach to harness international investment relations for the pursuit of sustainable development requires holistic and synchronized reform through an inclusive and transparent process, an area where UNCTAD can play an important facilitating role. The reform of investment dispute settlement, for example, lacks synchronization with the reform of the substantive rules embodied in IIAs. However, reorienting the investment policy regime towards sustainable development requires reforming both the rules on dispute settlement and the treaties' substantive rules. The extent of reformation under each case may also vary (significantly) from treaty to treaty, for instance, "limited ISDS" covers a plethora of options which may range from a treaty that requires exhaustion of local remedies to a treaty that sets a 3-year time limit for submitting claims. Approaches of various States can also contrast each other and act as driving forces, for instance, Brazil opting for the "no ISDS" approach, India for "limited ISDS," and the EU for the "standing ISDS tribunal." Reform actions have permeated all levels, be it national, bilateral, regional, or multilateral, covering all five areas of reform set out under UNCTAD's Reform Package for the International Investment Regime. Following the gradual changes in investment treaty making practices over the past 15 years, today's IIAs regime is characterized by a number of distinctive features[44] and although such reformation is aimed at an advanced mechanism, the necessity for a holistic and uniform approach cannot be ignored.

Challenges Ahead

Challenges to international investments are manifold.[45] Firstly, investment treaties implement an asymmetric legal regime by aiming to protect foreign investors without expressly considering the competing rights and interests that are protected under national or international law. The interaction of investment treaties with human rights, public health, environmental law, labor rights, or indigenous rights, and more generally the question of how much space they give to host governments to regulate in the public interest is majorly a concern that must be addressed in order to

[44]United Nations Conference on Trade and Development (2019) Taking stock of IIA reform: recent developments (Issue 3).

[45]Schill SW (2015) International investment law and the rule of law. In: Lowell J, Thomas JC, van Zyl Smit J (eds) Rule of law symposium 2014: the importance of the rule of law in promoting development. Academy Publishing, Singapore, pp 81–102.

assess what kind of legal regime investment treaties further. Secondly, inconsistencies in arbitral awards constitute a problem for legal certainty and predictability and hence for a form of global rule of law. Thirdly, concerns over the issue of accountability of arbitrators in the way they develop the law as there are no supervisory mechanisms that are comparable to the ones at the domestic level, namely a supreme or constitutional court at the apex of the court system and the existence of a legislature that can act against judicial decisions that it considers undesirable by modifying law to be applied by the courts. Fourthly, the concern regarding the presence of bias, the question of an alleged pro-investment bias in their jurisprudence, and lack of independence and impartiality of arbitrators, what is often called a "double-hat problem," i.e., the fact that one and the same person can act as arbitrator in one proceedings and simultaneously as counsel in another case, are valid notions to be addressed. Finally, the provisions dealing with transparency and third-party participation are to be addressed. Reducing uncertainty through express detailed provisions would deter investors from bringing hopeless claims and States from raising indefensible jurisdictional objections.[46] All of enumerated concerns need further deliberation so as to tackle the challenges in the field of FDIs.

Conclusion

FDIs carries with them various risk factors giving room for investment protection mechanisms to kick in. These mechanisms in the form of treaties and other instrumentalities aim to mitigate potential threats; however, much like any other instrument of law, they are exposed to inadequacy and ineffectiveness, more so than in others. Such deficiencies may include but are not limited to existence of bias, ineffectiveness to increase FDI, limited claim remedy available, ambiguity, extended waiting period, no alternative remedy other than the one mentioned, restriction upon the subject matter, lack of transparency, among several others. These shortcomings are not limited in their operation, rather, they may extend to several spheres of a legal relationship.

As it would logically follow, to overcome such limitations, reformation of the instruments was seen as the preferred mode to resolve the concerns; however, such reformation needs to be uniform and holistic which is lacking. Although reform efforts converge in their objective to make the IIAs regime into a more sustainable development-oriented agreement, they are implemented only intermittently by countries and they focus on specific aspects of the regime that are often addressed in isolation. Such divergence and disparity from one instrument to another under the purview of international law is bound to create a debacle as was also contemplated above. Many variations in domestic legislations and treaties and agreements may clash with other international treaties and agreements, therefore, to keep a structured and uniform system of law governing FDIs, a holistic approach is a prerequisite which is presently ignored.

[46]Reinisch A (2013) The scope of investor-state dispute settlement in international investment agreements. APLR 21(1): 3–26.

As noted throughout the different chapters composing the "Definitions, Standards of Treatment, Promotion and Protection of International Investments" part of our Handbook on standards, the need for such reformation and subsequent disparity may possibly emerge through the ever evolving international law of foreign investment. As more players enter into the investment market, the structure is bound to be more complicated. The need for such reconsiderations and debates may also point to the fact that, with time, more and more investors are preferring the mode of FDIs. Reformation and reconsideration are apparent, although it is to be supplemented with mutual cooperation and collaboration to create and value the investment standards created internationally. With the growing economic development worldwide, it will be interesting to see how international investment law transcends its own complications paving a way to a more friendly system of law.

Cross-References

▶ Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application
▶ Local Content Policies and Their Implications for International Investment Law
▶ National Security: The Role of Investment Screening Mechanisms
▶ Non-precluded Measures Clauses: Regime, Trends, and Practice
▶ Standard of Compensation for Expropriation of Foreign Investment
▶ The National Treatment Obligation: Law and Practice of Investment Treaties
▶ The Standard of Most-Favored-Nation Treatment in Investor-State Dispute Settlement Practice