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## QUESTIONING LEGAL IMPLICATIONS OF INTERNATIONAL INVESTMENT AGREEMENTS IN DEVELOPMENT PERSPECTIVE<sup>1</sup>

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### Abstract

Much debate is ongoing regarding International Investment Agreement (IIA) Regime. One of the issues is its effect on economic development strategies of developing countries. This paper aims to examine International Investment Agreements by questioning its legal implications in development perspective. By using a qualitative research design, it addresses each provision that is considered to have an impact on the issues of development and presents the development problems faced in the application of IIAs. Findings suggest that decades of experience shows unexpected results in application of certain clauses and legal implications of IIAs is insufficient in producing benefits for economic development in developing countries. For the future, nevertheless, there is still a room for improvement through renegotiation of the treaties.

**Keywords:** *International Investment Agreements, Bilateral Investment Treaties, Economic Development, International Economic Policy, International Investment Law*

**JEL Classification:** *F21, F43, F53, O19, K33*

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## ULUSLARARASI YATIRIM ANLAŞMALARINI HUKUKİ ÇIKARIMLARININ KALKINMA PERSPEKTİFİNDEN SORGULANMASI

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### Öz

Uluslararası Yatırım Anlaşmaları Rejimi konusunda devam eden pek çok tartışma bulunmaktadır. Bunlardan birisi gelişmekte olan ülkelerin kalkınma stratejileri üzerindeki etkisidir. Bu çalışma, Uluslararası Yatırım Anlaşmalarının hukuki çıkarımlarını kalkınma perspektifinden sorgulamayı amaçlamaktadır. Çalışma niteliksel bir yapıya sahip olup, kalkınma konuları ile ilgili olduğu düşünülen her bir anlaşma maddesini irdelemekte ve bu bağlamda anlaşmaların uygulamasında karşılaşılan sorunları ortaya koymaktadır. Bulgular, yıllarca süren deneyim ile beraber bazı anlaşma maddelerinin beklenmedik sonuçlar yarattığını ve anlaşmaların hukuki çıkarımlarının gelişmekte olan ülkeler için kalkınma açısından fayda üretmekte yetersiz kaldığını önermektedir. Bununla beraber, gelecek için anlaşmaların yeniden müzakere edilmesi yönünde hala fırsatlar bulunmaktadır.

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## 1. Introduction

The foundations of International Investment Agreements (IIAs) were laid after World War II. Since 1950s more than 3.000 IIAs have been concluded. In 1990s signing IIAs become an almost procedural measure. Countries signed IIAs not for the sole purpose of protecting foreign investments but also for maintaining good diplomatic relations between signatories. After mid-2000s growing dissatisfaction appeared as to content and effects of traditional IIAs -*Bilateral Investment Agreements (BITs)*. Recent trend in international economic policy has become to be regulating international investments within regional or bilateral trade agreements, namely *Preferential Trade and Investment Agreements (PTIAs)*. Still, much debate is ongoing regarding the relationship between IIAs and their impact on developing countries.

Legal implications of IIAs, in this paper, are discussed for each provision which is considered to have an impact on the issues of development. This discussion is made under four categories; definition provisions (definition of investment and investor), treatment provisions (most-favoured nation, national treatment, and fair and equitable treatment) enforcement provisions (ISDS) and other provisions (expropriation, exceptions clause, market entry and performance requirements. On the other hand, economic implications of IIAs is another important concern, but in order to analyze in detail rather than a reflecting the issues broadly, it is excluded from the scope of this study. Before the discussion of legal implications, below, as part of introduction, background information is provided about international investment agreements and the concept of economic development.

### 1.1. International Investment Agreements (IIAs)

Today, the term IIA reflects both Bilateral Investment Treaties (BIT) and investment chapters of Preferential Trade Agreements (PTAs or PTIAs). Historically, it dates back to 18th century where Treaties of Friendship, Commerce and Navigation (FCN) were being concluded between States which includes the provisions of rights of foreign investors (Coyle, 2012). However, having lost its foreign investments after World War II, Germany claimed that FCN Treaties did not cover enough protection provisions on foreign investment and formulated a new kind of treaty which is solely based on foreign investment issues (Salacuse, 2013). Thereby, the first bilateral investment treaty (BIT) was signed between Germany and Pakistan in 1959.

International Investment Agreements (IIAs) basically consist of the commitments of the States with regard to protecting foreign investors' rights and decreasing their non-commercial and unpredictable risks in the country they invest. These risks include discrimination or treatment favoring domestic investors, poor legal procedures to follow or remedies in case of a dispute arises, expropriation, difficulties in transfer of funds and profits, possible damages to the property in times of war or internal disturbance. By providing this protection, IIAs are expected to contribute predictability and stability in the host countries.

On the other side of the medallion, protecting foreign investors' from these risks is expected to improve investment and business climate. Also, as these agreements increasingly take place as a chapter in PTIAs<sup>1</sup>, the issue of protection of rights extended to be promotion of investments and liberalization in economic governance<sup>2</sup>. Therefore, developing countries consider these agreements as a mean for increasing Foreign Direct Investments (FDI), thereby increasing knowledge, technology and capital flow to their countries. To illustrate, in Turkey's Ministry of Economy website it is stated that the main purpose of signing IIA's is to increase capital and

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<sup>1</sup> Between 2000-2010, approximately 100 IIAs concluded each year and only less than %10 of them were PTIAs. After 2010, the numbers started to decrease but the share of PTIAs in them increased considerably. For example in 2014, only 31 new IIAs were negotiated and almost half of them were PTIAs (UNCTAD, 2015).

<sup>2</sup> This trend started with NAFTA and investment rules negotiated in the context of many regional and bilateral trade agreements seem to emulate it (Berger, 2015)

technology flow among contracting parties and establishing the terms of treatment for foreign investors in host countries (2018).

For these reasons, we can claim that IIAs have different dimensions and implications for the parties involved. However, it is clear that developing countries, by protecting and sometimes giving more than “less favourable treatment” to foreign investors, expect from IIAs to contribute to their economy in terms of FDI and economic development.

### **1.2. Economic Development**

The ultimate aim of economic development, to put it simply, is to create and increase the wealth of every social segment of a nation. However, multifaceted and complicated problems of economic development led to various theories, explanations and arguments in the field (World Bank, 2000).

Before 1970s, strong economic growth (measured by Gross National Product -GNP) was considered to be a most useful tool for other aspects of development (Todaro and Smith 2009). The narrow meaning and aim of development, that is economic growth, caused nations to center their policies basically on the faster growth of GNPs. However, the experience in 1950s and 1960s has demonstrated that growth in national income would not necessarily led to higher life standards for a nation’s population (Dang and Suit, 2015). By analyzing per-capita income increases on one hand, poverty, inequality and unemployment on the other, Seers (1969) emphasized the need for a correction in development objectives. In 1970’s and 1980s reduction of poverty, inequality and unemployment was taken into account besides economic growth as goals of economic development. In 1990s governments started to set wider objectives for economic development such as more equal income distribution, improvements in access to health and education services, and better environmental conditions (Dang and Suit, 2015). In the same vein, World Bank in its Development Report (1991) emphasized the importance of these factors as well as referring to concept of quality of life in defining economic development. After 1990s the interaction between development and environment led to creation of the notion of sustainable development. However, today, the definition of sustainable development has become to exceed the issues related to environment, it also aims to improve the quality of life with more complete and extensive manner by covering economic prosperity, social equity etc. (Dang and Suit, 2015). Lastly, recent works of United Nations has largely drew attention to the issue of economic development. United Nations Millennium Development Goals (MDGs) in 2000 and Sustainable Development Goals (SDGs) in 2015 defined the most pressing problems in developing countries and assigned quantitative targets for each one. These issues include, inter alia, poverty, hunger, primary universal education, gender equality, child health, maternal health, environmental sustainability and global partnership.

Today the issue of economic development still maintains its importance in international policy making, particularly in trade and investment topics which are the two main drivers of international economy policy. For example, we have experienced, unfortunately, inconclusive trade negotiations in Doha Development Round by the Members of World Trade Organization (WTO) between 2001-2015. As for international investment, today we can observe that the most important factor hampering multilateral investment negotiations are the debates and lack of compromise between developed and developing economies regarding the issues of differences in their economies. Therefore, due importance has always been and still being paid, in practice, by the governments to the relationship between trade, investment and economic development.

### **2. Legal Implications of IIAs**

IIAs, by presenting an international legal framework, are praised for their effects on increasing predictability for international investors. However, in host country point of view, predictability might decrease deriving from the risks of broadly and vaguely drafted provisions. Also, some provisions have been criticized for constraining the policy space of the countries and limit their right to regulate. Considered altogether, IIAs might effect countries’ overall development

strategies. Below we are going to analyze these provisions under four categories: (i) definition provisions (definition of investment and investor); (ii) treatment provisions (most-favoured nation, national treatment, and fair and equitable treatment); (iii) enforcement provisions (investor-state dispute settlement); (iv) other provisions (expropriation, exceptions, and market entry and performance requirements).

## 2.1. Definition Provisions

### 2.1.1. Definition of Investment

Traditional BITs, which generally emulates those of European countries', defines investment as an "asset invested by an investor a Party in the territory of the other Party". Such definition is open-ended and grants protection to all types of assets, aiming for promotion of investment-attraction. However, by expanding the reach of IIA, it might lead to unexpected liabilities that was not contemplated by the parties (UNCTAD, 2017a). Considering weaker institutional and bureaucratic capacities of developing countries, against capabilities of strong and flexible MNEs, with various type of investments, the risk of unexpected liabilities could increase and diversify.

Therefore, some countries, interestingly mostly developed ones, started to sign BITs in which investment is defined narrowly with a closed list (e.g. NAFTA) or refer to "direct investment" (e.g. Investment Chapter of Australia-Thailand FTA). Others limit the scope of the definition of investment by including characteristics of investment such as "commitment of resources", "expectation for profit" or "assumption of risk". Further criteria included in recent IIAs such as "a certain duration" in Canada-EU CETA (2016) or "establishing lasting economic relations" in Nigeria-Turkey BIT (2011) (UNCTAD, 2017b).

Indian model BIT (2015) suggests an additional criterion: "investment's positive contribution to (sustainable) development. However, a policy debate is still ongoing in this regard because of the difficulties in the application, namely the indicators to be used to measure the contribution to sustainable development and its negative effect in terms of predictability (UNCTAD, 2017b). A narrow enterprise-based definition of investment is another suggestion in Indian model BIT.

### 2.1.2. Definition of Investor

The definition of investor in IIAs basically regulates which investors are protected and can file a case against host states. Similar to definition of investment, it could expand the reach of an IIA against a host country. In traditional IIAs an investor generally refers to "nationals or any legal entity incorporated or constituted under the laws of contracting parties." However, through ownership chains, entities which are owned by a parent company in a third country could be regarded as an investor (note that some MNEs prefer to constitute in more advantageous countries in terms of IIAs and ease of international business operations.) According to UNCTAD (2017b) approximately one third of ISDS claims between 2010 and 2015 were brought by claimants that are subsequently owned by a parent company in a third country. That is to say, the country in which the parent company is based is not a party to that particular IIA. Moreover, more than %25 of these companies, which are called as "mailbox companies", do not have substantial operations in the treaty country.

To deal with this circumvention, some countries included different requirements in the definition such as "having substantial business/economic activities" or "having their headquarters" or both, in the other contracting party. For example, Chile-Turkey BIT (1998) defines investor as "any legal person ... incorporated or constituted under the law in force of either Contracting Parties and *having their headquarters together with effective economic activities* in the territory of that Contracting Party."

Another option recently practiced is including "denial of benefits" (DoB) clause. It allows host country to deny treaty protection to the companies which are controlled by their parent companies based in a third country that is not a party to that IIA and have no substantial business activities in

the country they are established (UNCTAD, 2017b). Discretion tends to be granted to the host State to apply the clause.

## 2.2. Treatment Provisions

### 2.2.1. Most Favoured Nation (MFN)

MFN clause secures that a foreign investor receives the best treatment (prevent it from “*less favourable treatment*”) that the host country grants to the investors from third countries. The MFN principle, therefore, intends to secure a “level playing field” between investors of different foreign nationalities (UNCTAD, 2010).

According to UNCTAD (2017b), in litigation practice, only a small number of investors claimed that they have been discriminated against host States’ more favourable treatment to investors of third states. Rather, investors mostly relied on the MFN clause to access more “investor-friendly” provisions in IIAs concluded by the host State with third countries. For example, some of them invoked MFN clause to avoid dispute resolution requirements such as a set period of time that investors normally are obliged to seek local remedies before bringing the case into international arbitration. However, in several cases which involve broadly drafted MFN clauses, tribunals deemed this escape possible as the claimant addressed another IIA signed by the host State with a third country in which this kind of requirements were absent (UNCTAD, 2017b).

As a result, application of MFN clauses in this way leads to “cherry picking” the most advantageous provisions from different IIAs of the host States, thereby practically nullifies individual treaty negotiations of a given developing country. For example, a hardly gained concession in a negotiation such as conditions to use local inputs may be overthrown with the application of a broad MFN clause.

This frustration of the MFN clause led countries to take measures in this regard. Some countries radically chosen to “wipe it out” from their IIAs. Investment chapters of India-Malaysia FTA (2011), EU-Singapore FTA (2004), ASEAN-Australia-New Zealand FTA (2009) and Japan-Singapore FTA (2002) do not include MFN clause. A frequently invoked option for this problem is to qualify MFN clause by stating that it requires a consideration of investors or investments that are “*in like circumstances*”. Incorporating such provision allows for safeguarding the right to regulate and increase the policy space, although defining a criteria for comparison between investors or investments is challenging (UNCTAD, 2017b). With saying that, there are some countries attempted to set out criteria or a guideline to determine on whether like circumstances are present (e.g. Article 17.2 of the Investment Agreement for the COMESA Common Investment Area (CCIA), not in force). Another measure could be proposed is specifying that MFN treatment does not apply to other treaties’ ISDS provisions and/or substantive obligations undertaken them. Even a PTIA signed by two developed economies, namely Canada–EU CETA (2016), clarifies that substantive obligations in other IIAs are not, in themselves, regarded as “treatment” (UNCTAD, 2017b).

### 2.2.2. National Treatment (NT)

Similar to MFN, NT clause aims to level playing field with comparable domestic investors by protecting them against nationality-based discrimination. However, for a number of reasons countries might be willing to accord more favourable treatment to local investors. For example, a country might pursue a policy of supporting local start-ups, or, in more traditional protection point of view, it might wish to strengthen specific local industries.

This issue is closely related to development economics, and different solutions - circumventions- have been used or suggested. For example, sensitive policy areas such as specific subsidies for local start-ups could be excluded in the agreement with clear statements. Also, in pre-establishment NT clauses, some industries could be excluded with a negative list approach. Another option could be including “like circumstances” in NT clause and specify criteria for the comparison as set forth in Indian Model BIT (2015). Some countries prefer to omit –or wipe out-

the national treatment clause altogether in their IIAs (e.g. United Arab Emirates-Viet Nam BIT (2003)). Some prefer to moderate the clause by stating “Contracting Parties *may negotiate to accord* national treatment...” in the NT provision (see Article IV of ASEAN Agreement for the Protection and Promotion of Investments, 1987). Although small in number, some UK and Swiss BITs permit special treatment for small-sized industries—by derogating from the national treatment obligation—if such treatment does not “substantially impair” or “significantly affect” the investments of foreigners (Peterson, 2004). Lastly, although rarely invoked, is making national treatment “subject to domestic laws and regulations” (UNCTAD, 2017b).

### 2.2.3. Fair and Equitable Treatment (FET)

The FET clause aims to protect foreign investors from government malpractice that is not captured by other standards of protection. Due to its broadly defined nature, it seems to fill the gaps left by more individual clauses (Dolzer and Schreuer, 2008). It is sometimes hailed for its potential role to promote good governance in host States. However, thanks to its open-ended and broadly undefined nature in traditional IIAs, it has become to be an all-encompassing provision which foreign investors able to address any type of governmental practice which they consider as not being fair. Almost all ISDS cases, as a result, includes a claim of a FET breach (UNCTAD, 2017b).

Since of the notions of “fairness” and “equity” are difficult to prescribed legally, subjective innerpretations of the tribunals could lead to unanticipated and far-reaching results, leaving the host states’ more open and susceptible to investor claims. Inconsistent interpretations, in this regard, set a slippery ground for the host countries making the compliance with their international commitments more confusing (Spears, 2010). Also, when the IIA text does not contain a link between FET and customary international law, FET standard might be associated with minimum standard of treatment contributing to slippery slope by more unexpected interpretations. Another concern is the use of the FET standard to protect investors’ “legitimate expectations”. UNCTAD (2017b) reports that far-reaching use of the concept of “legitimate expectations” has the potential to limit states’ manoeuvre ability in making changes regarding investment-related policies or developing new policies, albeit made for public good, if they adversely affect individual foreign investors.

As all-encompassing FET standard caused above-mentioned complications, new-generation IIAs started to use precise drafting in the text. Some refers to the minimum standard of treatment (MST) of aliens under customary international law (CIL) to qualify the FET standard (UNCTAD, 2017a). Some countries use positive or negative list, either indicative or exhaustive, of State obligations in order to reduce the risk of far-reaching interpretations by tribunals against States. And lastly, as in MFN and NT, some countries choose to omit FET clause in their IIAs altogether (e.g. Australia–Singapore FTA - 2003), or just refer it in the preamble of the IIA (e.g. Turkey–United Arab Emirates concluded in 2005) (UNCTAD, 2017b).

### 2.3. Enforcement Provisions (ISDS)

Investor-State-dispute-settlement (ISDS), which is a form of international arbitration, is the enforcement mechanism and one of the key tools of IIAs. In recent years, increasing number of ISDS cases has taken attention in the field of international economic policy. Also, the interpretations of IIA provisions by some arbitral tribunals is claimed to be expansive, unexpected and inconsistent therefore leading to wide dissatisfaction of the current ISDS practice (UNCTAD, 2015).

According to Berger (2015), counterintuitively, not high percentage of ISDS claims are brought against “poor developing countries” with “insufficient domestic legal systems”. He clarifies this phenomena by referring to limited amount of investments flows to these developing countries. However, middle income-countries which have relatively well-functioning legal and political systems have been the ones litigated the most (Williams, 2014).

Much of the criticism made against ISDS mechanism could be recognized and contemplated in development perspective. These criticism as well as assessment of “pros and cons” of ISDS have led the countries make an effort to change their positions on it. According to UNCTAD (2017b) “cons” or the criticism revolve around the following issues: Foreign investors are provided with rights exceeding those of local investors, expected benefits are considerably low as against to the exposure of legal and financial risks derived from tribunal awards, ISDS leads to “regulatory chill”<sup>1</sup>, it is quite costly for developing countries’ users and it provides minor additional value when domestic legal system is well-established and well-functioning. There are other problems in ISDS system which are indirectly linked with development aspect. For example, awards of tribunal is final and binding, that is to say if the tribunals give erroneous decisions there is no appeal chance in ISDS. This issue is critical because investment disputes often emerge from important public policy regulations such as environment, health and safety issues. Therefore, the final and erroneous award of the arbitration tribunal might affect the whole society. Also, arbitral proceedings and awards of tribunals are in most cases non-public and even sometimes confidential. This leaves developing countries with insufficient human capital and technical knowledge more isolated to the process of international arbitration.

## 2.4. Other Provisions

### 2.4.1. Expropriation

Expropriation provisions in IIAs generally cover both “direct” and “indirect” forms of expropriation. As outright -direct- expropriation of a property owned by a foreign investor is very unlikely to happen today, the attention has been given to indirect expropriation which takes place more in the claims directed against host states (Berger, 2015). Indirect expropriation covers acts, whose effects are “tantamount to” or “equivalent to” a direct, formal taking. That is to say, those applications of states which generally contain “total or near-total deprivation of an investment or destruction of its value” but not incorporates a legal transfer of title to the State might be considered as indirect expropriation. Additionally, it could be an outright seizure in which the formal title of the foreign investor is still held, despite the investment could not be utilized by the investor anymore (Dolzer and Schreuer 2008).

After FET, indirect expropriation is the standard resorted most frequently by the investors in ISDS cases (Berger, 2015). Criticism have been made against the indirect expropriation provision on the grounds of its vaguely defined nature as above-mentioned provisions, leaving arbitration tribunals with a great space for interpretation. In this way, as in the case of FET standard, it provides foreign investors greater space to proceed against host-country regulations or practices that have little to do with merely economic considerations. UNCTAD (2017b) report, in this regard, states that: *“Investors have used provisions on indirect expropriation to challenge general non-discriminatory regulations that have had a negative effect on their investments (e.g. a ban or the imposition of restrictions on a certain economic activity on environmental or public health grounds). This raises the question of the proper borderline between expropriation (for which compensation must be paid) and legitimate public policy-making (for which no compensation is due).”*

Recently, some IIAs started to define criteria for an indirect expropriation such as economic impact of the host-country measure or the character of the measure (for instance whether it results in a direct economic benefit to the host-country). Another alternative could be specifying that “normal regulatory activities” (e.g. good faith applications with non-discriminatory basis in relation to certain public policy goals) would not violate indirect expropriation clause (UNCTAD, 2017b). Lastly, countries might eliminate indirect expropriation term in the IIA leaving investors to

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<sup>1</sup> In order to avoid disputes host countries avoid introducing new legislation or stay reluctant to adopt appropriate public policies.

pursue private investment insurance instead. However, one should also take in the consideration that it might result in increased risk perception for the foreign investors.

#### 2.4.2. Exceptions Clause

Traditional IIAs rarely contain express public policy or national security exceptions. Exception clauses, as recently included in some IIAs started to formulate it in a way that resembles Article XX of the GATT and Article XIV of the GATS (well-known exception clauses of the two popular WTO Agreements). As such, exception clause aims at balancing investment protection with other public policy objectives and intends to decrease States' exposure to risk of being claimed against such measures. It increases the legal certainty for host States by, in some cases, explicitly allowing for measures, which are normally challengeable in accordance with particular IIA, to be prescribed by certain conditions defined in the clause. Therefore, it has a considerable effect of increasing certainty and predictability on often vaguely defined IIA's obligations.

However, not always an exception clause justifies each obligation. It should be noted that the link between each IIA provision and the exceptions clause is tied by the language used in the text (e.g. whether requires stricter tests/looser test or includes a "self-judging" necessity clause) and thereby interpretations of the arbitrators. Also note that, negotiations of IIAs lead to exclusion of some obligations from exception clauses<sup>1</sup>. Another possibility on the other hand, although less likely, negotiations could lead to inclusion of the broader development objectives as an exception. For example, a developing country might negotiate for a positive list of objectives in trade, financial and developmental needs, or more traditional ones such as protection of public good and order in relation with health, environment, morals etc.

#### 2.4.3. Market Entry and Performance Requirements

Recent IIAs include market entry provisions (generally in PTIAs, similar to commitments made in General Agreement on Trade in Services -GATS "mode 3") and prohibit the use of performance requirements. In market entry provisions, according to Berger (2015), developing countries give consent to protect foreign investors in the pre-establishment phase, thereby granting them free entry, except only for some critical sectors. Also, through provisions that prevents the use of performance requirements, such as imposing an obligation to utilize of domestic resources in the investment, developing countries usually exceed the commitments made in WTO agreements, particularly those made in the Agreement on Trade-Related Investment Measures (TRIMs) (Berger, 2015). The trend of inclusion pre-establishment obligations, namely market entry commitments and performance requirements, effects developing countries' potential flexibility in adoption of specific industrial policies. Note that, TRIMs is criticized for its greater focus on economic growth rather than broader development needs of countries (Malhotra, 2004).

### 3. Findings

Based on the discussion above, we reflect the problems faced and current solution/suggestion for each provision of IIAs in development perspective.

Table 1: Summary of legal implications

| Provision  | Problem  | Solution/Suggestion                                   |
|--|--|---|
| <b>Definition Provisions</b><br>- Definition of Investment | Vaguely and broadly drafted text results in:<br>- Increased reach of IIA<br>- Increased risk of unexpected liabilities | - Limited definitions<br>- Adding additional criteria |

<sup>1</sup> Although it is not an IIA, Exceptions clause of The Energy Charter Treaty's on Exceptions does not apply to expropriations clause.

|   |  |   |
|---|--|---|
| - Definition of Investor  | - MNE's flexibility in the place of constitution for parent companies<br>- Increased reach of IIA and risk of unexpected liabilities   | - Limited definitions<br>- Adding additional criteria<br>- Adding Denial of Benefits (DoB) clause   |
| <b>Treatment Provisions</b><br>- Most-Favoured Nation<br><br>- National Treatment<br><br>- Fair and Equitable Treatment | - "Treaty shopping" of other IIAs of host country for more advantageous provisions<br>- Increased liabilities<br><br>- Prevents host country to support local industries<br><br>- Serves as "all-encompassing" provision<br>- Leads to inconsistent interpretations<br>- Decrease the ability to change investment related policies because of "legitimate expectations" | - Omit the clause<br>- Include "like circumstances"<br><br>- Omit the clause<br>- Include "like circumstances"<br>- Moderated NT clause<br>- Include negative list in pre-establishment clauses<br><br>- Omit the clause<br>- Only refer in the Preamble<br>- Refer to Minimum Standard of Treatment (MST)<br>- Use a positive or negative list illustrating the fair/equitable treatment |
| <b>Enforcement Provisions</b><br>- Investor-State Dispute Settlement (ISDS)   | - Greater rights for foreign investors than those of domestic investors<br>- Leads to regulatory chill<br>- Lack of sufficient legitimacy and transparency as well as inconsistent interpretations<br>- No appeals mechanism   | - No current solution<br>- Many suggestions, including standing arbitration mechanism.  |
| <b>Other Provisions</b><br>- Expropriation<br><br>- Exceptions<br><br>- Market entry and performance requirements       | Lack of definition for indirect expropriation leading to;<br>- decreased ability and flexibility in public policy making<br><br>Generally not included leading to;<br>- decreased ability and flexibility in public policy making<br><br>- Effects future industrial policy making   | - Omit the clause<br>- Qualify the definition using a positive or negative list<br><br>- Including public policy and national security clause<br><br>- Omit the clause<br>- Negotiate in detail with general development and industry goals   |

Source: **Composed by Author**

Among solutions and suggestions, above, to the current problems in IIAs, the most striking one is to omitting the clause altogether. This might seem like a radical measure. However, these IIAs mostly depend on the texts which were drafted decades ago, where the world economy had not possess the complexity that it has today and not integrated this much. Therefore, countries were not facing the risks that they are facing or potentially will face today. Moreover, there are already cases where countries omit these clauses, such as omission of the FET clause in Turkey–United Arab Emirates IIA.

Other solutions mostly depend on limiting the definitions such as adding “like circumstances” as it appears in international trade agreements, referring to minimum standard of treatment only or even in some clauses using a positive list. Similar to omitting a clause, these measures also has been adopted in several IIAs as explained above. Therefore, the claim that this measures or solutions are radical or difficult to integrate has been nullified by previous applications.

#### 4. Conclusion

In the light of all that has been said and findings reached, we will conclude the discussion by presenting our views based on these findings.

Legal implications of IIAs are unpleasant, if not disappointing, in development perspective. Together with the trend of liberalization, the number of IIAs signed increased throughout the world. However, decades of experience show unexpected results in application of certain clauses, in development perspective. Exposure to unexpected liabilities led some countries to avoid the risks with new drafting of the texts in new IIAs. These solutions or suggestions do not entirely exclude the risk of liability altogether but it tries to allow for a more appropriate balancing of investor and State interests. However, this “avoidance” approach, in a way, demonstrates the negative effect of traditional IIAs on producing efficient development strategies. Therefore, developing countries, by canalizing its human resources, should push for renegotiation of the treaties (international trade agreements as well) as there is still a room for improvements. The goal of negotiations should be maintaining a larger policy space and safeguarding the right to regulate, while providing legal certainty to investors.

To conclude, IIAs’ role in international economic policy making can not be ignored. A mild tradeoff for countries seems to exist between signing IIAs and using its signaling effect of stability and predictability for attracting FDI, and not signing IIAs thereby maintaining larger policy space and providing better supporting opportunities to local industry. The latter seems less plausible for developing countries in a world integrated with global value chains. Therefore, countries do sign IIAs with possible getaway opportunities in treaty text. However, legal implications suggest that IIAs (especially stand-alone BITs) are producing insufficient results in terms of economic development and the need for renegotiation of these treaties is increasing.

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