International Journal of Academic Multidisciplinary Research (IJAMR)
ISSN: 2643-9670
Vol. 6 Issue 4, April - 2022, Pages:93-106

The Common Contents of International Investment Agreements

Mohammed Abdu Hassen

Amhara Regional State Justice Bureau.

Abstract: *Foreign investment is regulated by different legal frameworks both at national and international levels. Internationally, the legal framework which governs such investment includes International Investment Agreements (hereinafter referred as IIA). IIA are the most common tools for the promotion and protection of foreign investment. By IIA we are mainly referring to multilateral and bilateral investment agreements, though the former is non-existent in a binding form. The increasing trend/use of IIA in the foreign investment arena and the fact that contents are important means by which IIA objectives are given effect makes it critical to question as to their overall nature and common contents. Thus, this paper tries to make review on the common contents of IIA. In doing so, it tries to describe and examine the common contents, specific statements in the common contents, the variations and recent development such as environmental concerns. The paper argues that even if there could be some variations in the detail, IIA shares common contents and it also argues that the contents of IIA more or less are designed in such a way to benefit the capital exporting countries by avoiding investment restriction. Furthermore, the paper argues that recent concerns are getting increasing attention in the contents of IIA than before.*

Keywords: International Investment Agreements, Bilateral Investment Treaty, Multilateral Investment Agreements, Foreign Investment, Foreign Direct Investment, Investment Dispute Settlement

Abbreviations:
BIT- Bilateral Investment Treaty
FID- Foreign Direct Investment
IIA- International Investment Agreements
ISCID- International Settlement Centre for Investment Disputes
MFN- Most Favoured Nation Treatment
MIA- Multilateral Investment Agreements

1. Introduction

In the past, foreign investment was largely regulated by domestic laws. But, in the last two decades of the 20th century, great changes have taken place in policies and legal structures relating to foreign investment. The rapid changes in foreign investment are expressed in the form of numerous bilateral and multilateral investment treaties which is known as International investment Agreements (herein after referred as IIA). The proliferation of such instruments among other things has direct impacts on the promotion and protection of foreign investment, national sovereignty and liberalization, as well as state's ability to regulate areas such as human health and environmental protection. Both developed and developing countries were eager to negotiate investment agreements for different motives. Industrialized countries wanted to rely on treaties as a more stable basis for their companies wishing to invest abroad since bilateral and multilateral rights and obligations cannot be changed unilaterally, while developing and countries in transition hope to attract foreign investment through the granting of extensive investor protection in treaties.[1]

Based on this motives national governments have entered into this IIA. Multilateral and Bilateral treaties are the kind of IIA which serves as source of international investment law and destined for the promotion and protection of foreign investments, though there is relevant international investment treaty concluded between large number of states to be considered as Multilateral investment treaty (hereinafter MIA).[2]Whatever the case may be Countries are increasingly relying on IIA to promote and protect their investment abroad. And currently it have been said that there are at least more than 2000 BITs, ISCID and MIA drafts in the area.

The contents of IIAs are important means by which its objectives are given effect. When countries conclude IIA, they decide about the issues they wish to include and those they wish to keep outside the scope of an agreement. Even when they decide to include certain issues in an IIA, countries may wish to retain some flexibility regarding the commitments they make which give them some discretion to pursue their national laws and policies while keeping in line with the broad principles of the agreement. To this end, the content and specific statement of IIA is subject of extensive negotiation between the contracting states. With the increasing number and use of IIA in the current foreign investment arena one may wonder about the common contents covered by all IIA, the variations hidden in the detail and the qualitative development occurred through time.
The aim of this review paper is to critically review available literatures on the subject and relevant IIA as necessary so as to identify the common contents of the IIA, to describe how issues have been dealt in each common contents, to examine the variations and recent developments. In doing so, the paper first tries to briefly discuss IIA in general, including meaning, nature and the reason for

[1] Nathalie Bernasconi, International Legal Framework on Foreign Investment,(May, 2003), pp.2-3
[2] M.Sornarajah, The International Law on Foreign Investment,(3rd ed),(Cambridge University Press,2010), p.79

their proliferations. Then, the common contents of IIA, the variations and new developments thereto will be reviewed. And finally conclusion which reflects the result of the review will be provided. However, since the paper has time and scope limitation it should not meant and should not be taken as a definitive work on the subject.

2. International Investment Agreements: Meaning, Nature and Proliferations

2.1 Meaning of IIAs

International Investment Agreements (*i.e.* BITs and MIAs) can generally be defined as a binding international legal instruments entered into by two or more states consensually for the purpose of increasing their investment flow between the state parties IIAs are designed to protect the investments of foreign investors in the state hosting the investment. They accomplish this objective by offering foreign investors of the home State certain legal protections against adverse actions of the host State. The protections offered by such treaties can supplement any contractual arrangements an investor might have entered into with the state.[3]

IIAs in general have two important components: The first component refers to the "substantive" dimension of IIAs, which includes the provisions that define how foreign investments should be treated and protected by host country governments. The second component refers to the "procedural" dimension, which defines and set the dispute settlement mechanisms that can be used by foreign investors to arbitrate alleged breaches of substantive provisions. IIA that is strong with regard to the substantive dimension but which does not contain an adequate dispute settlement mechanism would mean that foreign investors have to rely on the diplomatic protection of their home country or any other unsecured means in case of a dispute. Thus, such kind of agreement can be considered as weak. On the other hand, an agreement with a strong dispute settlement dimension but with weak substantive provisions remains, toothless. [4] Hence, IIA is measured based on different measures: first, for its strength of substantive provisions, second, for its strength of the dispute settlement mechanism and third, which combines the previous two measures which indicates that the given IIA has strength to achieve its objectives. Based on these components IIAs can also be defined as consent based legal agreements which provide substantive and procedural protection to foreign investment.

The Substantive Protections includes payment of compensation in the event of substantial interference with property/investment; protection from actions of the host State which undermine a foreign investor's legitimate expectations, assurance that protected investors receive treatment no less favorable than that accorded to national investors, or investors from third states; and right to freely transfer funds related to the investment.[5] One of the key attractions for investors is that violation of any of these substantive rights is directly enforceable against the Host State through international arbitration. So that, IIA permit investors to pursue arbitration before the International Center for the Settlement of Investment Disputes known as ICSID or any other arbitration organ. The arbitral awards are final and binding on the parties to the dispute, and enforceable.[6]

As mentioned above, IIA mainly refers to BITs and MIA. BITs are signed agreements between two countries exclusively focused on the reciprocal promotion and protection of investments in the territory of the host state by nationals and companies based in the other country party/the home state to the agreement. BITs are different from multilateral treaties in that they are made on an ad hoc basis as to suit the mutual interests of the parties and their ability to give rise to general principles of international law is remote.[7] They usually contain broad commitments by the host state to protect investors from the home state, which can range from an assurance to provide compensation for expropriation; fair, equitable and non-discriminatory treatment; to observe investment contracts and other investment related obligations.[8] Whereas MIAs are investment treaties concluded by large no of states with the aim of bringing about uniform norms and comprehensive code of law for the regulation of foreign investment. Unlike BIT, MIA shows the acceptance of a given rule as international law. However, there are no relevant treaties that furnish a comprehensive code of law on foreign investment except ISCID and draft attempt by OECD and International Chamber of Commerce.[9]

Now days, due to the absence of multilaterally acceptable norms on international investment countries resort for bilateral solutions that would apply in case of any dispute which may arise between them.

2.2 Nature of IIAs

IIAs and the surrounding atmospheres are characterized by different aspects. Today, every country wants foreign direct investment to advance its development process and to this end they have shown practical interest through the adoption of IIAs.[10]

Once consent is given and state become party to any IIA, be it BIT or MIA it, it have binding nature and state is under obligation to act in compliance with what is already agreed up on. Unilateral change and non compliance to the agreements has its own either

---

[3] Gibson, Dunn and Crutcher, Investment Protection Under BIT and MIT,(Sept,2015), p.1
[4] Axel Berger and Max Buge, Determinants of International Investment Agreements: The Case of China,(2014), p.6
[5] Gibson, Dunn and Crutcher , p.2
[6] Ibid
[7] Ibid
[8] Mahnaz Malik, Recent Development in Regional and Bilateral Investment Treaties,(Nov, 2008), p. 1
[9] M.Sornarajah, p. 183
[10] Id, p.79

legal or/and political consequences. This nature is one of the important factors for the increasing trend of IIA. Similarly, any claim related to the norms of international law of foreign investment can be accepted only if it is based on such an accepted source of public international law, as stated in Article 38(2) of the Statute of the International Court of Justice (which establishes the source of international law on foreign investment).

However, the international law on foreign investment which mainly comprises IIA is still in the process of adjustment; its lacks clarity and consistence in many areas resulting from the conflict of interests of states. The conflict relates to the nature of the control that could be exercised over the foreign investment. Host states argue for national control, whereas capital-exporting states and investor argue for greater constraints on national control in the hope of ensuring the protection of foreign investment. This conflict of interest is reflected in IIAs.[11]

In addition, IIAs are signed with very different countries with different underlying motives and a variation with regard to level of protection they provide for foreign investors and investment. The economic assumption is that IIAs are driven by the aim of promoting FDI flows. This economic argument is insufficient to explain South-South IIAs that are not which does not involve substantial investment flows.[12] Thus, it can be argued that the conclusion of IIAs is not only determined by the desire to promote investment flows but also to promote bilateral and multilateral political relationships.

Initially, BITs were concluded between a developed and a developing country, usually at the initiative of the developed country. The developed country typically a capital exporting country entered into a BIT with a developing country which is a capital importing country in order to secure additional and higher standards of legal protection for the investments of its investors. The developing country, on the other hand, sign a BIT as a favorable climate to attract foreign investors. This pattern is changing since the late 1980s, as developing countries and economies in transition began to sign BITs between themselves in great numbers. As a result, the dividing line for BIT partners between capital exporting and capital importing countries no longer holds true and, in many instances, countries approach BITs with the dual purpose of protecting their outward investments while attracting inward investment. But the degree of emphasis that countries place on each of these two objectives varies considerably from BIT to BIT.[13] So, it is not only the number of BITs that has been growing, but also the number of countries involved and the dimensions including countries from all regions.

Furthermore, not only did the number and the dimension of IIA increased, but also there are significant content wise qualitative developments as agreements tended to become more complex, detail and cover a broader set of issues. The basic features of IIAs including their format and principles have more or less changed over the years. Their main provisions typically deal with the scope and definition of foreign investment; admission of investments; standard of treatment; guarantees and compensation in respect of expropriation; free transfer of funds; subrogation on insurance claims; and dispute-settlement provisions.[14] Within these broad subjects the exact content of IIAs provisions varies considerably; even BITs signed by the same country reflect different approaches.

Another important nature of IIAs is that they influence each other. BITs have an influence in the development of regional and multilateral investment instruments and vice-versa is true. IIAs can also influence national laws. For instance NAFTA has been influenced by the US model BITs, and NAFTA has influenced the OECD draft MIA.[15] Due to the prevalence of this kind of scenario there is two line of argument one which states that bilateralism leads to multilateralism and another which states that multilateralism leads to bilateralism. It is therefore, important to review the common contents IIAs. The better approach however is that both of them are not exclusive for their own rather they complement each other.

Finally, IIAs has significant nature of stabilizing practices that have existed and contribute to the creation of customary principles in the area of international foreign investment. This stabilized practice could serve as evidence of customary practices of states in the future. But there is an argument that treaty particularly BITs are lex specialis between the parties rather than as creating customary principles of international law.[16] This counter argument however may not apply at least towards the core common contents of BITs with more or less similar detail statements and the MIA, if any since they tends to reflect more of lex generalis.

2.3 Proliferation of IIAs

A foreign investment is protected by a large number of IIAs, mainly negotiated on a bilateral level which was first negotiated in 1959 between Germany and Pakistan. The proliferation of these agreements has been considered as one of the most remarkable phenomena in international law.[17]The main reasons that lead to the immediate proliferation of IIA are briefly discussed as follows:

With the collapse of communism, there had been creation of a new states and significant shifts in the international economic scene. As a result, due to the fact that there was competition for the limited amount of foreign investment; due to the fact that the ideological norms that were hostile to foreign investment protection had lost its force and replaced by economic philosophy which favors the

[11] Id, p.33
[12] Axel and Max, p.2
[13] UNCTAD,Bilateral Investment Treaties 1959-1999,(Geneva, 2000), pp.1-2
[14] Id, p.20-21
[15] Ibid
[16] M.Sornarjah, p.176
[17] Id, pp.23-24

liberalization of foreign investment regimes developing countries progressively introduced more open policies on foreign investment.[18] And both the south and the north sides began to conclude as many BITs as possible.
To a large extent, after the end of the Cold War the area of foreign investment were also supported by the World Bank and the International Monetary Fund. They required liberalization of entry of foreign investment, national treatment after entry, protection against violation of certain guaranteed standards of treatment, and secure means of dispute settlement as a condition to get financial assistance. States had to sign BIT providing guarantees for the protection of foreign investment. This neo-liberal package significantly influenced attitudes to investment law. Arbitration tribunals also sought to interpret the texts of treaties in such a manner as to secure more liberalization rather than to give effect to the intention of the parties to the treaty. [19] This all factors have contributed to the proliferations of IIA in terms of BIT and MIA.
During the 1990s the pace of BITs has accelerated; the number of newly signed IIAs has increased substantially.[20] With regards to MIAs the Abs–Shawcross Convention on foreign investment was formulated with the support of the International Chamber of Commerce. It state principles which were entirely favorable to capital-exporting countries so that they were unacceptable to developing states. Later, the OECD also has attempted to come up with a MIA in the 1990s, but again the attempt failed largely because of its inclination towards the developed states as well as because of the opposition of NGOs arguing that it took into account only the interests of multinational corporations. The only successful convention in the field is the ICSID Convention which is a procedural convention only setting up machinery for the settlement of investment disputes through arbitration. The reason why it is adopted by the developed states and the World Bank was that, if procedural means for protection were created, then recourse to these procedural means of protection through arbitration would enable the building of substantive principles of investment protection.[21] Despite the aspiration of ICSID still there are no as such international substantive principles on foreign investment.
There is also several regional free trade area treaties related to foreign investment. NAFTA which largely resemble the model BIT of the United States creates a framework for the free movement of investments within the region and provides for a strong investor–state dispute-settlement mechanism by giving the investor a unilateral right to invoke arbitration against the host state. Other regional treaties include the Asian Treaty on the Protection and Promotion of Foreign, COMESA and so on.[22]

3. The Common Contents of IIA

Over the years, the content of IIAs has basically remained the same, especially regarding format, objectives and major provisions. These similarities lead to the development of common contents and mainly incorporate five sets of major provisions. The first set usually outlines the scope and definition of foreign investment. The second set of provisions deal with the rules and conditions for admission of investments and focus on national, most-favored nation, and fair and equitable treatment. In the third set of provisions, the parties usually agree on some kind of guarantee and compensation scheme regarding the loss of investment due to expropriation, war or civil disturbances, guarantees of free transfer of funds and repatriation of capital and profits, subrogation on insurance claims. The fourth set of provision deal with State-to-State and investor-to-State dispute settlement and the fifth set, which deal with issues related to transparency, enforcement of national laws, performance requirements, subrogation, general exceptions and so on.[23]
Though there is no binding MIA on foreign investment which states comprehensive substantive rules that applies in the area, we have the draft MIA attempted by the Organization for Economic Co-operation and Development (OECD) in 1995. Despite its failure, it indicates the differences that exist between countries and their respective conceptions of what should be the content of the ideal code for investment. The Content of the draft MAI is similar in most respects to the investment provisions of NAFTA. NAFTA itself is based on the US model BITs.[24]In that sense, the draft MAI shares the common content of BITs and of course they influence each other since multilateralism is living its life through bilateralism. Therefore, there are standard common contents in all IIA which are incorporated with the belief that they will enable the objective of the IIA to come in to effect, without however forgetting some variations in the statements of the detail rules to be applied as between the parties and some recent content wise developments/innovations.
Having said this, it is important to make review of the common contents of BITs and the Draft MIA, generally the IIAs.

3.1. Preamble:

IIAs begin with a preamble in which the contracting parties state their intentions and the purpose/objectives of concluding the agreement. The preamble does not attract as much attention as the substantive provisions since it does not establish legally binding rights and obligations by itself. However, this does not mean that the wording of preambles is totally irrelevant. The Vienna Convention on the Law of Treaties Article 31 stated that the preamble to a treaty indicates the context of the agreement and is

---

[18]Ibid
[19] Ibid
[20] Ibid
[21] Id, p.80
[22] Ibid
[23] Victor Mosoti, Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between, 26 Nw. J. Int'l L. & Bus. 95 (2005-2006), pp.115-116
[24] Id, p.257

relevant for interpretation of the substantive part of the treaty.[25] For instance, if the preamble has stated the objective of encouraging investment in to another contracting party this statement does not creates a positive duty on the part of the capital-exporting state to encourage its investors to take investments to the other party. Such a positive duty will not be created by the preamble clause itself, unless there is additional substantive duty on to facilitate the making of investments in the host state by giving, at the least assistance and facilities.[26]

In BITs the purpose of the treaty is usually stated to be the reciprocal encouragement and protection of investments. But in reality there is one way flow of investment from the developed state to the developing state and there is an inequality inherent in the very process of making a treaty. Sometimes, BITs are secured by the threats of trade sanctions or by making the treaty a condition for a loan. Despite any argument as to inequality in the bargaining power of the states, the treaty for whatever reason is considered as freely entered into.[27] A recent study by UNCTAD on investment treaties mentions that an increasing number of countries include specific language in the preamble to their treaties aimed at making clear that the objective of investment promotion and protection must not be pursued at the expense of other key public policy goals, such as the protection of health, safety, the environment and the promotion of internationally recognized labor standards.[28]Therefore, Preamble of BITs does not only emphasize on the objectives of investment promotion and protection, but also underline that this goal must not be pursued at the expense of other public interests, such as health, safety, environment and labor**.**

Like BITs the draft MAI has given attention to the preamble as preliminary non substantive content. The draft begins by stating its underlining concerns and premises. Among the concerns paragraph two and six of the preamble are a clear reflection of the classical economic theory of foreign investment which affirm that since international investment is beneficial and has great importance to the world economic development it must be protected as well as higher standard of liberalization should be established. Despite the fact that incorporation of additional paragraph concerning the need for protection of the environment and labour standard was suggested by some representatives of states it was intentionally disregarded.[29]Hence, it is possible to conclude that in one way or another main objective of the draft MIA is protection of foreign investment.

3.2 Definition: Scope of Application

IIAs commonly define important terms used in the agreement. The purpose of such definitions in legal instruments such as BITs and MIA is to determine the scope of application of the rights and obligations enshrined in the agreements and to establishment the jurisdiction of investment arbitral tribunals. Some of the common key terms that are often defined in the treaties include investment and investor.

Among the BITs concluded, we can distinguish several kinds of definitions for the term investment. There is the traditional asset-based and broad definition, with several variations has continued to be the most common approach. A second kind of definition, the use of which has diminished recently is related to a circular or tautological approach which focuses on the features of an investment rather than conceptualizing it (It defines an "investment" as "every kind of investment"). A third approach is a closed-list definition of investment. The Fourth approach is defining investment by excluding certain assets and transactions from the definition.[30]

The tendency of many treaties in the area of foreign investment, particularly the model treaties drafted by the United States and other capital-exporting states, has been to broaden the scope of the definition of foreign investment which is open ended and illustrative covering every kind of asset owned or controlled by an investor of another party. The objective behind this is to ensure that treaty protection could be given to a wide variety of activities associated with foreign direct investment. However, there is also recent trend towards excluding certain assets or transactions from the definition. Recently, Canada adopted a closed-list definition, enumerating in an exhaustive manner the assets that may constitute an investment.[31] Developing countries have also insisted that they prefer a narrow definition of investment. In this regard, they have emphasized that the form of investment they would welcome should be that which seeks to establish lasting economic relations; which gives them the possibility of exercising some effective control over its management. Even if they have asserted that they would be opposed to a definition of investment that covers both FDI and portfolio investment, this assertion of developing country is far from the practice because most existing BITs have adopted a wide, open-ended definition which covers investment that includes FDI, financial and other portfolio investments.[32] Though investments are defined widely, many bilateral investment treaties confine the benefits of the treaty only to investments approved by the state parties to the treaty. This limitation creates two categories of foreign investment originating from the same state party, one which is protected by the treaty because it is approved by the host state party as result of screening foreign investment entry and one which

---

[25] UNCTAD (2007) BIT 1995-2006, Trends in Investment Rule Making,(United Nation Publication, Geneva and New York, Sales No. E.06.II.D.16), p.4
[26] Ibid
[27] M.Sornarjah, p.189
[28] See, UNCTAD, Trends in Rule Making , p.3
[29] The Draft Multilateral Investment Agreement,(OECD, April,1998), Available at, www.oecd.org/daf/investment, Part I, p.7
[30] See,UNCTAD, Trends in Rule Making , p.5
[31] M.Sornarjah, p.10
[32] Victor Mosoti, p.116

is not protected because it lacks such approval. The approval is usually given only to investments that are considered beneficial to the host state.[33]

The draft MAI has also provided definition of investment terms which are important to delimit the scope of application of the agreement. As it has been said earlier, the draft agreement highly resembles the NAFTA agreement in terms of content and detail statements. The NAFTA itself is more of the carbon copy of the US model BITs. Therefore, with the aim of extending protection for each and every kind of foreign investment the term investor and investment are defined in a very border sense. Investment is defined asset basely so as to include any kind of assets owned by investor directly or indirectly. And the lists of protected investments are open ended and illustrative including portfolio and other intangible investments.[34] It was however accompanied by an interpretative note stipulating that in order to qualify as an investment under the MAI, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk.[35]

When we look at the content definition of investment FDI which involves the transfer of physical property constitutes investment and protected by both IIA and Customary international law. On the other hand, Portfolio investment which is normally represented by a movement of money for the purpose of buying shares in a company formed/functioning in another country was not protected even by customary international law. Such investment was attended by ordinary commercial risks which the investor ought to have been aware of. Some argues that there should be no distinction between the two kinds of investments. This view is based on the assumption that there is no distinction between the risks taken by either type of investor. But, this view is not accepted generally in international law, where it is clear that in foreign direct investment the foreign investor takes out of his home state resources which could otherwise have been used to advance the economy of the home state. Portfolio investments, on the other hand, can be made on stock exchanges virtually anywhere in the world and the host state cannot know to whom linkages are created through the sale of shares on these stock exchanges.[36] The current trend is that large extents of treaties are defining investments to include shares. Therefore, the better view is the former, because in addition to the mentioned drawbacks the contribution of portfolio investment to the economic development of the host state is insignificant since it does not involve considerable technological transfer, employment opportunity, generation of hard currency and transfer of skill. As it stands today portfolio investment is not protected unless specifically included in the definition of foreign investment.

Another extension made to the definition of foreign investment through treaties is the inclusion of intellectual property and contractual rights within the meaning of foreign investment. Widespread copying of inventions made in developed states was the reason for the extension of protection to intellectual property rights. The inclusion of contractual rights in definition means the contract which is ordinarily subject to the laws of the host state becomes effectively internationalized and this internationalization enables the foreign investor to have recourse to the remedies that are provided for him under the treaty in the event of a violation of his rights. [37]Therefore, in the majority of IIAs, the definition of investment goes beyond the meaning associated with FDI and it is not as such acceptable to use the term foreign investment and FDI interchangeably.

Concerning the definition of an investor, most BITs have included a definition of investor which covers both natural and legal persons. The question here is what kind of connections a particular investor either a natural or a legal person needs to have with the contracting parties to claim protection under the agreement. The answer usually depends on whether the investor is a natural person or a legal entity; that is why it is addressed two separate categories. Natural person in most BITs refers to the nationals of one of the contracting party but in some BITs permanent residents are also included. On the other hand, various approaches continue to be used to determine the nationality of a legal entity. There has been a tendency in recent BITs to combine the criterion of incorporation or seat with the requirement of having the controlling interest in that country.[38] Under the draft MIA Investor of natural person is defined in terms of nationality or permanent residence and investor of legal person is defined based on organization as per the domestic law of contracting parties, whether for profit or nonprofit purpose.[39]

3.3 Admission and Establishment of Investment:

Admission and establishment is an important common content of IIAs which refers to the entry of investments of one contracting party into the territory of another contracting party. According to customary international law, countries have the right to regulate the admission of foreign investors and their investments in their territories due to economic, social, political or national security grounds. Thus, IIAs are tools used to compromise the customary right of the state.

Currently, two basic models are used in IIAs. One makes the admission and establishment of foreign investment subject to the domestic laws of the host country called the "admission clause" model mostly found in BITs with European and developing countries, and the other model grants foreign investors a right of establishment called the "right of establishment" model mainly found in treaties concluded by the United States, Canada and the Draft MIA. BITs that leave the contracting parties with discretion

[33] Id, p.195
[34] The Draft MIA(OECD), part II p.11
[35] OECD (2008), International Investment Law: Understanding Concepts and Tracking Innovations , p.49
[36] M.Sornarjah, pp.8-9
[37] Id, pp.12-14
[38] See, OECD (2008) , p.7
[39] See, the OECD Draft MIA part II p.11

International Journal of Academic Multidisciplinary Research (IJAMR)
ISSN: 2643-9670
Vol. 6 Issue 4, April - 2022, Pages:93-106

concerning the admission and establishment of foreign investors remain dominant. Nonetheless, treaties that include a "right of establishment" are recently becoming frequent. The right of establishment is provided either through the granting of national treatment and MFN treatment or through the latter treatment only, with respect to its admission and establishment and once the investment has been established. This means that investors of one party will receive treatment not less favorable while investing in the territory of the other party than domestic investors and investors of any other third country.[40] On the other hand most BITs entry/establishment admission requirements includes: delaminating areas reserved for foreign investors, minimum Capital requirement, registration and license requirements and performance requirements (to buy local products and services as input, to employ local labor, to export a percentage of his production).

MIA recognizes the right of establishment to the foreign investors which is at the center of liberalization of investment flows. Accordingly, the national treatment and MFN standards are expected to apply both at pre entry and post entry/establishment phases of the investment (including acquisition, operation, expansion, management, use, sale and other aspect of the investment). This requirement is one of the reasons MIA remained just a draft. [41]Because developing countries wants to maintain their right reject harmful foreign investments at the entry stage so as to increase the economic benefit of FI and they do not want to give uncontrolled access for every FI by virtue of MIA.

3.4 Standard of Treatment:

A provision of standard of treatment is another important common content of IIAs and there are a variety of standards of treatment recognized under BITs and MIA. These standards of treatment include national treatment, MFN, a fair and equitable treatment, international minimum standard of treatment and full protection and security treatment.[42] These general standards of treatment can be categorized in to two groups. First, there are “absolute standards” of treatment, because they establish the treatment to be accorded to the investment without referring to the manner in which other investments or investors are treated. Examples of absolute standards are the provisions on fair and equitable treatment and full protection and security. A second category relates to “relative standards” of treatment. They define the required treatment to be granted to investment by reference to the treatment accorded to other investment. National treatment and MFN treatment are the relative standards. Thus, in the case of national treatment, reference must be made to the treatment of nationals of the host country. Similarly, in determining the content of the MFN standard, reference must be made to the treatment granted to investments from the most favored nation.[43]

BITs usually include one or several standards that are intended to provide criteria to judge whether the treatment given to an investment is satisfactory, and to interpret and clarify how more specific provisions should be applied in particular situations.[44] When we see the draft MIA, it is possible to say that it has mandatorily recognized all kind of available standard of treatments. Every state party is under obligation to give to the foreign investment and the investor fair and equitable treatment, full and constant protection and security, national and most favored nation treatments. And in no case less favorable treatment than that of required by international law cannot be given. This standard of treatments are extended at every level of the investment whether at the establishment or post establishment stage and with respect of its establishment, acquisition, operation, expansion, management, use, sale and other aspect of the investment[45]but they are standards are stipulated only with slight clarifications.

- **National Treatment**

National treatment in IIA context means the obligation of contracting parties to grant investors of the other contracting party treatment no less favorable than the treatment they grant to investments of their own investors. The effect is to create a level playing field between foreign and domestic investors in the relevant market. The draft MIA has provided this standard but when we see BITs not all BITs addresses the national treatment standard in the same manner. Some group of BITs does not deal with the issue at all. The second category of BITs which comprises by far the majority does provide national treatment, but limits its coverage to established investments only. A third group comprises those BITs that provide national treatment to the investors in the pre and post-establishment phase.[46]

National treatment at the stage of entry is regarded as an important right, as it entitles the foreign investor to a right of entry and establishment in the host state. Treaties which aim at liberalization contain such pre-entry rights of establishment. The granting of national treatment after entry may also confer aliens the same privileges enjoyed by nationals. The existence of a national treatment standard could provide a basis for the argument that performance requirements such as export quotas or local purchase requirements should not be imposed upon the foreign investor, at least after entry has been made unless such performance requirements are

[40] M.Sornarjah, pp.21-22
[41] M.Sornarjah, p.259 and See, the Draft MIA part III, P.13
[42] Id, p.201
[43] See, UNCTAD, Trends in Rule Making, p.28
[44] Ibid
[45] See, the OECD Draft MIA, part III p.13 and part IV P.56
[46] See,UNCTAD, Trends in Rule Making , p.33

exempted from the national treatment standard.[47] Even if National treatment seems a good answer in view of the increase of administrative controls over foreign investment it may, however, backfire on the foreign investor. [48] Which means a harsh measure taken against one's own nationals may be extended to the foreign investor and be justified on the basis of national treatment. Developing countries are not the supporter of national treatment since they want to protect their infant industries, encourage export and the use of local resources. For this reasons, it is necessary to include other standards of treatment in the treaty.

- **Most Favored Nation Treatment**

The MFN treatment standard means that investments or investors of one contracting party are entitled to treatment by the other contracting party that is no less favorable than the treatment the latter grants to investments or investors of any other third country. The MFN standard ensures that investments or investors of contracting parties to receive the best treatment that each of them has granted to the investments or investors of any other third country. Thus the MFN standard establishes, at least in principle, a level playing field between all foreign investors protected by IIAs. MFN standard is also one of the key tools that developing countries have at their disposal to benefit from the stronger bargaining power of third countries.[49] [50]
Most issues relating to the MFN standard are the same as have arisen regarding the scope and application of the national treatment principle. As in the case of national treatment, not all recent BITs address the MFN standard in the same manner. Regarding the scope of the standard, two groups can be distinguished. One category of IIAs grants MFN treatment only after the investment has been admitted into the host country. Another group provides MFN treatment in both the pre- and the post-establishment phase (such as the draft MIA and USA model BITs). Again among the BITs granting MFN treatment only in the post establishment phase we can distinguish several categories. There are BITs that once the investment has been admitted, grant MFN treatment to all covered investments. A second category of agreements limit MFN treatment to established investment permitted by domestic legislation. Another group of BITs grants established investments MFN treatment and provides that no new nonconforming measures must be taken which did not exist at the date the BIT entered into force.[51]
In most cases, there are exceptions to this rule such as privileges granted under treaties on the avoidance of double taxation and regional economic integration agreements.

- **Fair and Equitable Treatment**

Fair and equitable treatment is another standard of treatment which appears in the great majority of IIAs. It provides a standard separated from the host country's domestic law. Which means it applies to investments in a given situation without reference to how other investments or entities are treated by the host State. Thus, host governments are unable to resist a claim under this standard by saying that the treatment is no different from that experienced by their own nationals or other foreign investors operating in their economy.[52] Although clauses providing foreign investment with fair and equitable treatment are widespread in IIAs, the standard lacks a precise meaning as to its nature and the required level of commitment. According to some scholars, the obligation to grant foreign investment this standard is not different from the obligation to treat the investment in accordance with the international minimum standard accorded to foreigners under customary international law. Under customary international law, for a country to violate the minimum standard of treatment of aliens(fair and equitable standard) requires a conduct by the government amounting to gross misconduct, manifest injustice, denial of justice, discriminatory measures, bad faith or willful neglect of duty. Other scholars argue that the term should be given its plain meaning and in order to determine whether the standard has been violated a case-by-case application of the test of equity or fairness and reasonableness should be made.[53] [54]Therefore, the former view set more of objective parameter while the later calls for subjective standard.
The draft MIA without directly defining the standard has tried to make some reference to the less favorable treatment accorded under international law, unreasonable and discriminatory measures.[55]
According to survey of the BITs, different categories can be distinguished. First, there are BITs with no such standard of obligation. Second, a significant number of BITs grant covered investments fair and equitable treatment without making any reference to international law or to any other criteria to determine the content of the standard. A third group of BITs explicitly state that such treatment shall not be less favorable than national treatment or MFN treatment granted to the investment or the investor concerned. This approach merges in one single clause the fair and equitable treatment principle with the national treatment and MFN treatment

---

[47] M.Sornarajah, p.202
[48] Id, p.203
[49] Id, p.204
[50] See, UNCTAD,Trends in Rule Making, p.38
[51] Ibid
[52] UNCTAD (2012), Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, Geneva and New York, United Nations Publication, Sales No. E.11.II.D.15, p.6
[53] See, UNCTAD,Trends in Rule Making, p.28
[54] M.Sornarajah, p.204
[55] See, the OECD Draft MIA, part III p.13 and part IV P.56

standards, which are by nature relative parameters of treatment. A fourth group of BITs recognize the standard with additional substantive content (denial of justice, unreasonable/discriminatory measures, breach of other treaty obligations). A fifth category of BITs links the fair and equitable standard to the principles of international law. And the sixth group of agreements linked the standard to the minimum standard of treatment of aliens under customary international law.[56] Hence, the practice is much diversified and the standard is open for controversy.

- **Full protection and security**

The treatment standard provision of IIAs also includes the full protection and security standard to the foreign investment. Like the fair and equitable treatment it adverts to customary or international law standards which require either that the state forces should not be utilized to harm the foreign investor's property or that the state should give protection from violence against the interests of the foreign investor if such violence could be reasonably anticipated. Again, there has been a tendency to expand the scope of this standard to include a wider notion that obliges states to the maintenance of conditions of stability for the investment.[57]

3.5 Transfer of Funds:

The main objective of all foreign investment is to make profits and to repatriate those profits to the home state. If repatriation of the profits is prevented by the host state, this purpose of the foreign investor will be frustrated. The repatriation clause will usually include not only the profits that are made but all other payments such as fees or other entitlements that are paid to the foreign investor and his employees.[58]Thus, transfer of funds provisions in IIAs reflects a tension between two different objectives: on the one hand, to grant the investor the freedom of investment related transfers of funds, and, on the other hand to provide the host country with enough chance to properly administer its monetary/financial policies.

Significant numbers of BITs have included provisions absolutely granting investors the right to make capital transfers in relation to their investment without undue delay, in a freely convertible currency and at a specified rate of exchange. At the same time, a large number of BITs have included exceptions to these obligations, mainly to ensure compliance with specific laws (e.g. on bankruptcy) or to safeguard flexibility for host countries to properly administer financial policies or balance of payments crisis.[59] Generally, the fund transfer provisions of BITs vary in content and degree of specificity. The better and reasonable approach is to strike a balance between the tension of the host state and the investor by creating an obligation to permit the repatriation with some strictly regulated exceptions since financial crisis at some point in time is inevitable. Thus, absolute permission of repatriation is not advisable.

Transfer of fund is also one of the most important content of MIA which aims at the protection of FI. The party states are expected to allow outright in and out free repatriation of all kind of payments relating to investment. The kind of investment related payments which can be freely transferred are listed out unexhaustively.[60]The exception to restrict transfer is also stringently regulated by setting list of standards which are not contained in BITs. Accordingly, a contracting party may delay or prevent a transfer in case one of the listed exceptions is met through the equitable, non-discriminatory and good faith application of measures. [61]

3.6 Expropriation:

One of the reasons why IIAs are concluded is foreign investors concern to protect their investments against the risk of unlawful expropriation. Due to this fact expropriation has continued to get higher place in IIA negotiations and the overall level of similarity on this issue among IIAs is remarkable except on the some details concerning the amount of compensation and the question of indirect expropriations.[62] In general, IIAs recognize the right of host countries to expropriate foreign investments on certain conditions which are part of the international law too.

Although the specific wording may vary, most expropriation clauses have followed the approach of extending protection not only to the direct taking but also to those measures of the host country that may have an effect equivalent to expropriation or are tantamount to expropriation or indirect expropriations (*i.e.,* the slow erosion of the alien's ownership rights through regulatory measures and losses other than expropriation such as war and conflict). In addition to the rule of expropriation many BITs and the draft MIA also have included clauses ensuring non-discriminatory treatment of foreign investors in situations where their property is damaged as a result of war or civil destruction. The problem with expropriation clauses of IIA is that they do not define the term expropriation or nationalization and do not establish any criteria to identify measures having an effect equivalent to expropriation or nationalization. [63] The lack of clarity regarding the degree of interference with the rights of ownership required for a given act/series of acts to constitute an indirect expropriation is still controversial; as a result some BITs have expropriation provisions broad enough to suggest that every measure substantially impairing the value of an investment could be challenged as an indirect expropriation while other has no clue at all.

---

[56] UNCTAD, Fair and Equitable Treatment, pp. 17-18
[57] M.Sornarajah, p.205
[58] Id, p.207
[59] See,UNCTAD,Trends in Rule Making, p.56
[60] Id, part 4, pp. 58-59
[61] Ibid
[62]Id, p.32 and M.Sornarjah, pp.207-208
[63] Id, p.44

Generally, concerning how indirect expropriation is treated BITs can be divided in several categories:- A first group comprises those expropriation provisions that do not include a specific reference to indirect expropriations and it is questionable as to whether the investor of a contracting party could invoke treaty protection in the case of an indirect expropriation. A second category comprises the BITs that protect investments from direct and indirect expropriation.[64]A third category of BITs comprises those agreements that additionally include an implicit guidance regarding the level of interference that would be required for a measure to constitute an indirect expropriation. The 2004 Canadian model BIT and recent BITs of the United States fall within that category.[65] Therefore, to avoid or at least reduce potential interpretative dispute it is better for the contracting parties to set out whether objective or subjective parameters which will help to distinguish between acts or measures of the government.

Concerning conditions for lawful expropriation, capital-exporting economies argued that under customary international law, countries were allowed to expropriate foreign investors provided that the expropriation measure met four conditions: it had to be taken for a public purpose, on a non-discriminatory basis, under due process of law and based upon the payment of prompt, adequate and effective compensation. But, developing countries denied that such conditions were part of customary international law. Due to this denial capital-exporting economies turned to BITs to specifically provide for investment protection against unlawful expropriations and now most BITs include the four substantive requirements mentioned above while minority of BITs holds on appropriate compensation than the hull formula.[66] [67]

Like all BITs the MIA has incorporated expropriation and nationalization clause as substantive content. In principle contracting party states are prohibited from expropriating or nationalizing directly or indirectly the investment of the investor or to take any other measure having equivalent effect which refers to indirect expropriation. Hence, it outlawed both direct and indirect expropriation. The exception to expropriate can be legitimately be utilized only up on the fulfillment of the four international law conditions which are mentioned above. What is more here is that protection of FI from war, conflict, state of emergency and other disturbance is regulated in more specific manner and host state is required to indemnify/compensate or restitute the loss of investment not in less favorable manner than it accords to its domestic investor or investor of any third state.[68] The rules regarding to the protection against expropriation, nationalization and from strife is not even subject to safeguard measures or exception as opposed to customary international law.[69] In effect, it means that a state cannot justify its expropriation measures which do not cumulatively fulfill the four conditions and its discriminatory treatment in the situation of war, conflict and so on by mentioning any safeguard measures or exceptions.

3.7 Dispute Settlement Clause:

IIAs provide a provision for the resolution of disputes arising from the foreign investment by specifying arbitration as a neutral forum for resolution of the dispute. The reason is to increase the level of certainty and predictability that investors need and thus encourage investors of one contracting party to invest in the territory of the other.

Disputes may arise between private parties (e.g. between an investor and its supplier), between an investor and the other contracting party/state, or between the contracting parties/states. Very few BITs contain specific provisions on investment-related disputes between private parties. This article imposes an obligation on the contracting parties to provide investors of the other contracting party with access to their domestic courts, subject to their national laws. Thus, private disputes are subject of domestic laws and courts.[70] However, it is subject to domestic law and court does not necessarily mean that the dispute should be resolved by adjudication only. The party to the dispute may rather agree to solve their dispute by consultation/mediation and even by domestic or international arbitration.

Investor–State dispute settlement provisions are a common feature of most IIAs. This kind of dispute resolution reflects the intention of the contracting parties to provide investors with avenues to directly defend their rights without having to depend on diplomatic protection of their home countries. The fact that investors have at their disposal a means to ensure the host country's compliance with the obligations under IIAs increases the level of certainty regarding the business environment in which investors operate in the host country.[71]Concerning local remedies most of BITs and the Draft MIA do not require investors to exhaust local remedies as a condition for resorting to international arbitration. Within this approach most BITs do not even mention exhaustion of local remedies and others BITs explicitly include an obligation for the parties not to request the exhaustion of local remedies if the investor has opted to submit the dispute to international arbitration. But still limited number of agreements requires that the investor should first exhaust the administrative instances of the host country. Only thereafter or after the expiry of certain period of time is the investor

---

[64] Id, p.45
[65] Id, p.46
[66] Id, p.47
[67] M.Sornarajah, p.209
[68] See, the OECD Draft MIA, part IV pp.56-57
[69] M.Sornarajah, p.261
[70] UNCTAD, International Investment Agreements: Key Issues,(vol.1)(Geneva, 2004),(United Nation Publication, Sales No. E.06.II.D.16), p.35
[71] See, UNCTAD, Trends in Rule Making ,p.100

allowed to pursue international arbitration.[72] [73]Question may arise what will happen when BITs are silent about the requirement of exhaustion of local remedy. In this case it seems that local remedy must be exhausted since states have judicial sovereignty. Investor–State dispute settlement provisions in BITs refer to various existing international arbitration conventions to prescribe the rules governing the arbitration. The institutional arbitration forums most commonly referred in BITs are ICSID and the ICSID Additional Facility Rules (applicable if only one of the contracting parties is a party to the ICSID Convention), the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris or the Arbitration Institute of the Chamber of Commerce of Stockholm as possible venues. BITs also provide for the possibility of submitting the dispute to ad hoc arbitration.[74] State–State dispute settlement mostly arises concerning the interpretation or application of the IIAs such as BITs. Almost all BITs before invoking formal arbitration proceedings mandates the contracting parties to attempt to settle the dispute by consultations or negotiations. A number of BITs also provide that the UNICTRAL arbitration rules to govern the procedure unless the contracting parties agree otherwise. Other treaties authorize the tribunal to determine its own procedure. Most BITs also state that decisions of the tribunal have to be taken by majority vote, be final and binding. The tribunal is required to decide the case on the basis of the BIT, although some agreements also envisage the possibility of the tribunal's taking into account the law of the host country.[75]

The dispute resolution provisions of the draft MIA are more detail than the common BITs. It provides for both state-state and investor-state arbitration. In case of the former dispute may arise over the application or interpretation of the agreement and the draft has provided procedures which are not mandatory whenever the parties agreed for other procedural rules. Before resorting to arbitration, upon the request of one of the disputed party first consultation has to be made (if possible conciliation and mediation have to be tried). It is only after consultation, arbitrational remedy is allowed.[76]In the later case, when there is alleged breach of obligation by the host state which causes loss or damage to the investment, the investor can submit claim for competent court or administrative tribunal the host state, or if any, to dispute settlement body agreed before the dispute arise or by arbitration provided by the MIA (*i.e*. ISCID or UNCITRAL or by rule of arbitration of ICC). Under the draft MIA, similar to most BITs exhaustion of local remedy is not mandatory since the investor is granted discretion to directly choose forum following the failure of the consultation or negotiation. Concerning consent to the international arbitration, every contracting party is required to give its unconditional consent in advance.

3.8 Other Common Contents

- **Performance Requirements:**

Performance requirements are conditions imposed by host countries on investors in connection with the establishment and operation of investments or in exchange for the granting of a particular advantage. The rationale for a country to use performance requirements is to shape certain investor behavior in pursuance of particular policy objectives. They are implemented with the aim of influencing the location, character, costs and benefits of investment. Within this logic performance requirements may aim at generating employment, increasing the demand for local inputs, boosting exports or securing foreign exchange. From the point of view of developing countries, the imposition of such requirements enhances the value of the foreign investment. These countries have been considering performance requirements as an important policy tool to further their development objectives by modifying the behavior of foreign investors and to steer them into the desired direction. Other countries specially the developed persuaded investors to accept performance requirements voluntarily by linking them to the granting of incentives. Some economists suggest that developed countries adopted performance requirements in their own economic development and are now denying it to developing countries.[77] [78]

The main criticism of the use of performance requirements especially making the entry of foreign investors conditional on compliance with them is that they would deter foreign investment rather than being instruments to achieve the desired policy objectives. Furthermore, it is argued that performance requirements are a disincentive for foreign investors, who refrain from investing under conditions impeding the free management of their investments and forcing them to conduct business in ways that reduce their efficiency.[79]

Regarding performance requirements in BITs there are four practices: the majority of recent BITs do not contain any specific provision on performance requirements. One might therefore conclude that contracting parties are free to use performance requirements as far as they are imposed as a condition for the establishment of the investment or applied afterwards on a non-discriminatory basis.[80] Another category of BIT explicitly deals with performance requirements by totally restricting the use of

[72] Id, p.109
[73] M.Sornarajah, pp.219-220
[74] See, UNCTAD, Trends in Rule Making ,p.110
[75] Id, p.127
[76] See, the OECD Draft MIA, part V pp.62-68
[77] See, UNCTAD, Trends in Rule Making ,p.64
[78] M.Sornarajah, p.207
[79] See, UNCTAD, Trends in Rule Making ,p.64
[80] Id, p.65

International Journal of Academic Multidisciplinary Research (IJAMR)
ISSN: 2643-9670
Vol. 6 Issue 4, April - 2022, Pages:93-106

performance requirements. The third BITs restrict the use of performance requirements that are applied after the investment has been established. So that performance requirements imposed at the entry phase are not restricted. The last category of BITs restricts the use of performance requirements on the basis of an exhaustive positive list. Thus, the contracting parties assume the obligation to refrain only from those performance requirements explicitly listed in the provision. Furthermore, this mode limits the use of listed performance requirements both at the pre-establishment phase of the investment and thereafter.[81]

The draft MIA has prohibited setting of performance requirements at all stages of the investment and it come up with more comprehensive list of prohibited requirements. Accordingly, any contracting party cannot impose, enforce or maintain any requirements on FI including:-[82]

- To export a given level of its production(export requirement)
- To achieve given level of domestic content(domestic content requirement)
- To hire local personnel at any position
- To purchase, use of goods and service of its territory
- To require transfer of a given technology
- To enter in to investment jointly

The abolishment of performance requirement by the MIA and BITs is intended to seek advantage for developed states rather than to satisfy the needs of developing countries. Because the later seeks to maintain the requirements to achieve their economic and social objectives by securing local employment, foreign currency, technology transfer, and other benefits of foreign investment. Surprisingly, had the MIA was adopted, it would have result repel or modification of national investment law of developing countries due to their intolerable contradictions.

- **Subrogation Clause:**

Side by side with the dispute settlement clause IIAs provide for subrogation of the claims of the foreign investor who had suffered damage in the home state. This enables the home state to succeed to the investor's claims against the host state after paying out the claims through the insurance schemes for foreign investments run by the home state as if it had suffered the loss itself. The major capital-exporting nations provide such insurance facilities for corporations which make investments overseas.[83]

Subrogation clause[84] is incorporated as substantive content in the Draft MIA as well as in most BITs. Therefore, whenever the home state covers the damage incurred by its investor it is possible to argue that the previous investor-state dispute before the subrogation is materialized will turn out to be state-state dispute settlement by virtue of the treaty clause. And the home state will have the legal standing right to initiate the dispute settlement procedure. At this junction, whether the investor as of right can be part of the proceeding seems arguable since he is the one who alleged the suffering or damage and he is important to prove it.

- **Transparency clause:**

Transparency clause is a recent development in the content of IIA. It impose an obligation on the host countries, home countries and foreign investors to exchange information related to the investment as well as to enable interested investors and other stakeholders participate in the process of domestic rulemaking. Only few BITs include transparency provisions and most BITs have continued to lack any specific provision on transparency. However, gradual it is getting significant progress.[85] The draft MIA has incorporated transparency clause in a more detail manner under its part/section III coverage. However the requirement for transparency has also an exceptions related to legitimate commercial interest to maintain the confidentiality or for effective law enforcement. Accordingly, each contracting and the investor are required to:[86]

- To promptly publish, or otherwise make publicly available, its laws, regulations, policies, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement.
- To promptly respond to specific questions and provide, upon request, information to other Contracting Parties on matters which have impact or relation to the investment
- To provide routine information concerning that investment for information or statistical purposes.
- **Safeguard Measures and Exceptions:**

Now a day's different kind of public concerns are given greater attention while negotiating IIAs especially by developing countries and NGOs. Because of this there is increasing trend towards making it clear that investment promotion and protection must not be pursued at the expense of other key policy objectives such as essential security interests, public order, protection of human health and environment, labour standards and important measures for financial services. Therefore, safeguard measures and exception are

---

[81] Id, p.66
[82] Id, part III, pp. 18-21
[83] M.Sornarajah, p.222
[84] See, the OECD Draft MIA, part IV pp.61

[85] See, UNCTAD, Trends in Rule Making ,p.76
[86] See, the OECD Draft MIA, part III, pp.13-14

a mechanism enabling the contracting parties to strike a balance between investment protection, on the one hand, and the safeguarding of other values considered to be fundamental values or interests by the host countries on the other hand.

Most BITs have included general exceptions to the specific obligations provided in the agreement to underline the responsibilities of contracting parties to safeguard core values while attracting foreign investment. The US and Canada Model BITs are important examples for their incorporation of safeguard provisions.[87] The draft MIA has also given attention for such issue as its substantive content but avoids the issue of environmental and human right grounds to justify any safeguard measures. MIA also prohibited that any safeguard measure/exception shall not affect the rules of expropriation, compensation and protection of investment from strife, as discussed previously under expropriation. Not only this, the balance of payment exception is also highly regulated.[88]

Generally, even if the scope may vary, most IIAs including the draft MIA provides safeguard measures or exceptions which allows the contracting party to take any action which it considers necessary for the protection of its fundamental security/public order, financial(in case of serious balance of payments and financial difficulties) and other core public interests against genuine and serious threat subject to the requirement that such measures should not be applied in a manner which would constitute arbitrary/unjustifiable discrimination between contracting parties or out of bad faith to impose investment restriction measures and should be applied only in proportion to the interest being protected.

4. Conclusions

The result of the review on the common contents of IIAs shows that IIAs concluded over the decades has incorporated more or less common contents addressing basically similar issues so as to achieve their intended motives or objectives. Among the common contents of IIA the core common contents includes; definition of important terms such as investment and investor, admission and establishment clause, standards of protection, transfer of funds, expropriation/compensation and dispute settlement provisions.

However, the fact that IIAs address the same issue under similar content does not mean that there is also absolute similarity in the detail statement, degree of protection and underlying motives between IIAs, for that matter even between BITs as well as between BITs and the MIA. As the discussion is already made above IIAs may follow different approach to address the issue under a given content for different rational. Some IIAs follow more of liberalization and protection approaches such as the US model BITs, the Draft MIA and even some developing countries BITs depending on who their treaty partners are. This kind of BITs and the MIA tends to provide border definition of investment, right of establishment which enables the investor to enjoy National treatment and MFN standards even before its establishment at the entry stage, absolute right of repatriation or with strictly regulated exception, to avoid performance requirements at all level of the investment, provides the hull formula of compensation as well as detail rules for state-state and investor-state dispute settlement. On the Other hand, there are BITs which tends to follow more of regulatory approach trying to strike a balance between the pros and cons of foreign investment. And to this end, they strongly negotiate to narrow the scope of the definition of investment; they set performance requirement both before and after establishment of the investment; the National Treatment and MFN are meant to apply only for already established investment and investor and transfer of fund is well regulated. Furthermore, there is also argument over appropriate compensation *versus* the hull formula and the requirement for exhaustion of local remedy before demanding international dispute settlement system. Such kind of approach is reflected in some of developing and transition economies countries BITs.

The review conducted has also disclosed that there are an emerging trend towards introducing new treaty contents, such as clarifying the scope of the definition of investment and other obligations, stipulating that investment protection should not be pursued at the expense of other essential public policy concerns, providing high transparency requirements in the host state rulemaking, improving the transparency and predictability of dispute settlement procedures, and providing treatment for investment no only after establishment but also at pre-establishment stage. The contents of IIAs are becoming more elaborated, detail and complex from time to time. These recent innovation/development in the content of IIA have so far been limited to the Draft MIA adopted by OECD and BITs concluded by a few countries, including Canada, United States, Japan, the Republic of Korea. Therefore, it remains to be seen whether more countries will adopt this approach in the future or not.

In addition, the review has shown that current IIAs in general, does not expressly and in detail deal with development (economic, social…) matters beyond the inherent objective of promotion and protection of investment. So that there is a need for further clarification of the relationship between investment promotion/protection and to set in advance the best means by which development concerns of the contracting parties particularly the developing countries can be achieved.

Finally, it is important to mention that even if there is no binding MIA, the underlining principles and standard of protection envisaged under the draft MIA are slowly become part and parcel of every BITs. And at some point in time making a clear distinction between BITs and the draft MIA will be difficult, even before consensus to come up with binding MIA is reached. Generally, the current trend seems that the non-binding MIA idea is in the process of shaping the bilateralism, so that the bilateralism in turns will give birth to binding MIA which will provide a comprehensive code to regulate foreign investment.

References

1. Axel Berger and Max Buge, Determinants of International Investment Agreements: The Case of China,(2014)
2. Gibson, Dunn and Crutcher, Investment Protection Under BIT and MIT,(Sept,2015)

[87] Id, p.80 and M.Sornarjah, pp.222-223
[88] See, the OECD Draft MIA, part VI pp.77-80

3. Nathalie Bernasconi, International Legal Framework on Foreign Investment,(May, 2003)
4. M.Sornarajah, The International Law on Foreign Investment,(3rd ed),(Cambridge University Press,2010),
5. Mahnaz Malik, Recent Development in Regional an Bilateral Investment Treaties,(Nov,2008),
6. OECD(2008),International Investment Law:Understanding Concepts and Tracking Innovations
7. The Draft Multilateral Investment Agreement,(OECD,April,1998), Available at, www.oecd.org/daf/investment,
8. UNCTAD, Bilateral Investment Treaties 1959-1999,(Geneva, 2000)
9. UNCTAD (2007) BIT 1995-2006, Trends in Investment Rule Making,(United Nation Publication, Geneva and New York, Sales No. E.06.II.D.16)
10. UNCTAD (2012), Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, (Geneva and New York, UN Publication, Sales No. E.11.II.D.15)
11. UNCTAD, International Investment Agreements: Key Issues,(vol.1)(Geneva, 2004),(United Nation Publication, Sales No. E.06.II.D.16)
12. Victor Mosoti, Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between, 26 Nw. J. Int'l L. & Bus. 95, (2005-2006)