

## RETHINKING NEW PROVISIONS IN BILATERAL INVESTMENT TREATIES

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This article examines revised provisions of old-generation bilateral investment treaties generated by the new international investment regime. It offers the analysis of changes in the regulation of investors' rights and obligations, dispute resolution mechanisms and processes as well as renewed approaches to defining investments and indirect expropriation. The author identifies and discusses difficulties associated with the development of new-generation investment treaties and offers the development of a global guideline as a solution to facilitate the reform of international investment treaties.

**Key words:** Bilateral investment treaties; investor-state dispute settlement; investments; indirect expropriation; obligations of investors

In 1959, Germany and Pakistan signed the world's first Bilateral Investment Treaty (BIT) marking the beginning of a new phase in international investment relations. Many countries have followed suit, which resulted in the conclusion of more than 3,000 BITs. With the increase in the number of BITs, the number of disputes arising from such BITs grew exponentially, especially in recent decades. This has called into question the effectiveness of BITs in regulating investment relations. Many states commenced the revision of their BITs with a view to develop innovative approaches to rebalance the powers of states and investors and halt the number of disputes.

This resulted in the emergence of the two major trends in states' investment policies. Some states strive to develop new agreements through negotiations and joint efforts (e.g., Canada, Chile, Australia, Morocco, Peru), while others reject the existing investment regime (e.g., Ecuador, South Africa, Indonesia, Bolivia, Venezuela and Ecuador) [2].

These contrasting approaches generate a variety of ways to rethink BITs:

- unilateral denunciation or withdrawal from treaties;
- termination of treaties by mutual agreement of parties;
- more explicit treaty drafting;
- drafting document of joint efforts (or unilateral) clarifying the intentions of the parties to treaties;
- drafting model treaties;
- drafting authoritative interpretations to treaties;
- introducing amendments to treaties.

Among all the approaches drafting a Model BIT can be the most comprehensive and effective one, reaching long term outcomes, boosting cooperation among states and providing a solid ground for conclusion of new agreements.

Firstly, a Model BIT serves as a starting point in negotiating inclusion of modern provisions in existing BITs or drafting entirely new agreement corresponding to the trends in international investment regime. Secondly, a Model BIT facilitates negotiations on the content of further BITs, which due to different economic, social and political backgrounds of each state party may become challenging. Moreover, the reliance on a Model BIT may be time and cost reducing during negotiations and a drafting stage of a new treaty. Furthermore, a Model BIT provides for clear expression of a state's investment policy.

While the result of negotiations may reflect a compromise of states' positions, reliance on a Model BIT ensures consistency in their treaty practice. This leads to a convenient predictability of investment regime that reduces the risks for each of the parties.

One of the prominent examples of rethinking existing BITs through drafting new model treaty is a Morocco's new model BIT. This document provides for patterns of the main trends, elements and features that are inherent to the new generation of investment treaties [1].

The preamble of Morocco's Model BIT emphasizes the importance of sustainable development. It introduced innovation in the broader definition of investment by envisaging indicators to measure the contribution of investment to sustainable development (increased productive capacity, economic growth, poverty reduction, etc.). The Morocco's model BIT provides for indicative factors to be considered when determining an indirect expropriation, which has been a rare practice before. Furthermore, it introduces detailed obligations of investors. A breach of these obligations precludes investors from resorting to dispute settlement mechanisms specified in a BIT. Finally, Morocco's Model BIT provides for modern dispute resolution provisions, establishing, for instance, limited scope of disputes which can be subject to investor-state dispute settlement (ISDS), limitation period of three years for investors to file a claim and the option of filing a counterclaim if the investor failed to fulfil its obligations. This approach demonstrates an attempt to strike a balance between the interests of investors and a state [2].

Despite the development of model investment treaties, the content of which corresponds to current realities, there are still difficulties on this issue and criticisms of the investment regime in general. Firstly, not all states remain open to cooperation and modernization of BITs. Many governments do not plan to

develop corresponding reforms on the topic. In the environment of diverse policies and inconsistencies, the strategy for those states that choose to modify their investment treaties may be to identify among their current partners those that are reform-oriented and willing to undertake the corresponding reforms. For states that have decided to reform investment treaties, the initial step may be to rank all the BITs into those that require urgent reforms and the rest. Such policy will provide gradual introduction of reforms. States may also choose the appropriate extension of treaty reform whether to introduce limited changes to provisions or undertake a more comprehensive treaty revision.

Secondly, the introduction of human rights, environment, public health within the scope of BITs regulation creates uncertainties with other legal regimes that regulate these spheres.

Thus, the main issue remains unresolved, which is how to address the systemic complexity of the investment regime, including the abovementioned innovative provisions and at the same time provide coherence of investment policies on the international investment arena.

Certain steps can be taken in this regard:

- development of global or at least regional guidelines for international investment policymaking;
- ensuring consistency of policies in both investment sphere and different public policy areas, so as to strengthen cooperation and coherence between different areas, which are involved in investment regime (including at the national level);
- adopting investment treaties reforms systematically and gradually;
- raising awareness and providing for expert information on the issue of reforms;
- undertaking the reforms in a transparent manner.

These measures are indicative and should be implemented jointly as a support to purely legal part of reform implementation (for instance, drafting of provisions or new treaties). The establishment of a guidance will create consistency in the practice of states at the initial stage of drafting agreements. Raising the awareness of states in the need to follow the reforms will avoid the polarization of the investment environment, where some states are actively working to include new provisions in treaties as a response to modern challenges, while others are guided by BITs drafted 30 years ago.

Such steps would help apply the provisions of the new generation of BITs by states which would facilitate their active integration in the process of modernizing the investment regime

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