

UTILIZING INTERNATIONAL INVESTMENT LAW FOR ECONOMIC GROWTH AND SOCIAL PROSPERITY IN DEVELOPING COUNTRIES

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Abstract: The article aims at defining the underlining meaning of International Investment Law and seek to evaluate its characteristics. Economic growth and social prosperity are fundamental necessities in developing and least developed countries. The Effective application of International Investment Laws requires integrating fundamental principles and regulatory reforms related to foreign investments by host countries. The article analyses the required effective means of utilizing international investment law and promoting foreign direct investments in developing countries. Furthermore, the discussion will outline the necessary investment environment required in developing countries to realize the benefits of foreign direct investments and conform to international investment practices.

Keywords: IIL, FDI, International investment law, foreign direct investment, dispute resolution methods

1 Introduction

Globalization is a process that impacted today's politics, cultures and economic life everywhere. The process facilitated the growth of trade activities internationally and increased domestic integration into global economic systems [27]. Subsequently, International Investment Law (IIL) evolved over the years to provide structure and mechanisms that promotes international harmony between countries. IIL is pivotal to international investment relations and its security. Therefore, many international institutions established and conventions promulgated to specifically focus on international investment relations. National regulations that conform with IILs benefits from attracting foreign direct investments.

Investment cooperation in light of the international regulatory framework is of considerable advantage to developing nation. The utilization and adoption of its mechanisms yields to prospective economic advantages and domestic advances. Such advances include, and not limited to, education, technology, and societal benefits.

Developed nations promotes an effective and efficient practices that harnesses the use of IIL. Bilateral, regional, and multilateral treaties are essential tools to attract foreign investors in developing countries. Foreign direct investment became an important objective for governments to ensure sustainable growth and promote national developments.

The article aims at defining the fundamental objectives and mechanisms of IIL that can be of benefit to developing countries and least developed economies. Furthermore, the article will outline and discuss the available tools for developing countries to achieve national economic growth across multiple sectors and social prosperity. Finally, the article will discuss the required characteristics of investment environment in developing countries to promote and attract foreign direct investments.

2 Methodology

The article involves specific research methods. A logical, systematic, and critically analytical approach adopted to answer the research questions. This includes identifying regulations structure, history, and its synchronization internationally. The adopted empirical legal research methodology assists in analyzing the available materials concerned with the subject matter. Not only focusing on laws or regulations but also considers the functionality of institutions and organizations in the legal field [14]. Further, the method helps in answering evaluative questions and addresses legal agreements implementation and its difficulties. The normative analyses methodology evaluates the relevant data and analyze its practicality and functionality.

3 Results and Discussion

3.1 Meaning of International Investment Law

The meaning of International Investment law (IIL) can be established by identifying the core aspects surrounding its nature. Specifically, it deals with the regulations covering activities internationally and the settlement of foreign investments. IILs are generally considered as a field of public international law, yet others categorized it under the field of transnational contract law that is governed by domestic legislations and International Law rules [6]. Nonetheless, the application of IIL requires the practicality of three specific features within domestic application. Those features consist of establishing a decentralized approach, organic emergence and a contested yet stable policy [23].

The application of IIL relates to the first outlined feature which refers to countries who became signatory to decentralized international treaties whether bilateral or multilateral [23]. This is the opposite of centralized international treaties and organizations, such as the World Trade organization (WTO) or the United Nations (UN). Instead, decentralized international treaties includes agreements between specific states such as North American Free Trade Agreement (NAFTAs) and other Free Trade Agreements (FTAs) between nations. The scope of IIL extends further and accommodate international dispute resolution agreements within conventions and designated institutions, such as the New York convention on the enforcement of foreign arbitral awards and the International Centre for Settlement of Investment Disputes (ICSID). The decentralized approach assists in harmonizing national practices with international practices [4]. Thus, achieving a higher level of conformity to international standards. This is particularly important for developing countries, as it assists in developing the national regulatory framework to accommodate international perspectives and promote investments.

The second features of IIL are its organic emergence. The essence of IIL was developed through the evolution of international relations and states mutual benefits. Developing countries or countries moving on from an economic crisis promulgate IILs and its decentralized approach due to an emergence of organic specific state reasons. The third feature of IIL is the existence of a domestically contested yet stable policy [24]. To elaborate, international investors may consider investing in a specific country is of high risk since the only method of dispute resolution is national litigation. Therefore, it raises the difficulty of contesting decisions. Arbitration as an alternative dispute method to litigation is considered the most preferred method of dispute resolution for foreign investors. Countries that convey to the New York convention and have a robust internationally practiced Arbitration Laws, such as the UNCITRAL Arbitration law and rules, attracts foreign investors. As a result, states applying IIL adopts a dynamic policy that protect investors.

3.2 Types of investment treaties

IILs evolved over the past 50 years and encompasses several types of international trade agreements. More specifically, states may agree to bilateral, regional, or multilateral investment treaties. Bilateral trade agreements are typically conducted between two countries to promote the investment opportunities between them [10]. Such agreement may focus on specific sectors, such as energy or technology, others accommodate multilateral sectors. An example of a bilateral agreement is the United States (US) and Vietnam bilateral trade agreement signed in 2000. The agreement provided Vietnam with higher economic growth and extended its favored nation status over the years [16].

Regional trade agreements cover countries within specific geographic areas. Such agreements assist in the free movement of goods and services between the signatory states [32]. An example of such agreement is the Asia-Pacific Economic Cooperation (APEC). The APEC 1989 agreements aim to achieve regional prosperity and accelerate economic integration. Within such agreements, countries in specific regional agreements, particularly developing, benefit from integrating a synchronized regulatory framework to facilitate faster and easier movement of goods and advantageous investment climate.

Multilateral trade agreements are those where three or more countries are signatory to a trade agreement. The General Agreement on Tariffs and Trade (GATT) 1948 is an important and influential multilateral trade agreement. GATT was responsible for many years in reducing trade tariffs or quotas between signatory members and helped promote the benefit of international cooperation in trade. Nonetheless, GATT was replaced by the WTO in 1995 [30]. The WTO is considered the main international organization concerned with international trade rules. Its main purpose is to ensure the practicality of free and smooth movement of trade internationally amongst 164 members [33]. Furthermore, the WTO is responsible for enforcing number of trade agreements such as the 1996 Information Technology Agreement (ITA) and the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The evolution of Bilateral, regional, and multilateral investment treaties over the years flourished its use internationally. Such investment agreements or treaties are valuable tools for developing countries to achieve economic growth.

3.3 Fundamental principles of IIL

Effective application of IILs requires integrating fundamental principles related to foreign investments by host countries. The principles may vary or change depending on the investment agreements. Nevertheless, there are concepts which are approved and practiced internationally and expected as an essential requirement. Fair and equitable treatment is an important principle of IIL. The principle is a cornerstone in many international investment treaties [18]. For instance, Article 1105(1) of the NAFTA agreement provides that “*Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security*”. Furthermore, the UN code of conduct on Transnational Corporations emphasizes the obligation of governments to provide fair and equitable treatments in accordance with the laws and regulations practiced by the government and in consistency with International Law [18].

As stated above, the principle is adopted in most international investment treaties. Nevertheless, fair and equitable treatment principle is considered broad under close evaluation. The extent of a fair and equitable treatment will depend mainly on the circumstances of the case at hand and the country adopted regulations. The interpretation varies from a jurisdiction to another. For instance, France considers the application of international public policy in disputes that includes foreign parties [3]. However, other jurisdictions that apply sharia principles will not apply international public policy if a breach of sharia principles occurred. Number of disputes required the interpretation of the fair and equitable treatment principle, such as in *Azurix v Argentina (2006)* and *Occidental v Ecuador (2004)*. The central argument typically evolves around questions regarding the standards of application. Courts and tribunals will consider the minimum standards of fair and equitable treatment and whether breaches of international law occurred by the host state [7]. Nonetheless, the treaty is the primary source of interpretation with regards to the principles, as it dictates the level of protection and stability provided by the host country to foreign investors.

Cooperation is another fundamental principle under IILs practices. The principle involves international cooperation in

relation to the adopted policies [31]. Theoretically, this includes unifying the policies related to international investments. The cooperative efforts led by developed countries aim at reducing the issues associated with international investments and benefits developing countries in promoting foreign direct investments. Host countries adopting clear policies that conform to international practices attract FDI and promote sustainable development.

Unique policies that are influenced by domestic regulations and hostile to international practices are not attractive to foreign investors. Such an approach by a host state affects promoting FDI due to the lack of certainty and protection on investment in the host country. The principle of cooperation assists host countries to adopt incentive policies to attract foreign direct investments. This will create a non-discriminatory and predictable regulatory environment with a stable macroeconomic and an engagement to international trade [31].

States that are aiming to promote international investments must set forth a mechanism of foreign investment protection. The principle of protection complements the principle of fair and equitable treatment and the principle of cooperation. Host countries providing regulatory protection for foreign investment encourage foreign investors. Investment protection policies convey a level of stability and clarity [5]. Means and levels of protection vary depending on the nature of the investments. Nonetheless, the level of protection provided for foreign investors should amount to the minimum standards adhered to internationally. This includes adopting policies that ensure fair and equitable treatment, foreign parties contractual freedom and access to dispute resolution methods [17]. Developing countries that adopt clear protection policies for foreign investment will realize the benefits of FDI and a sustainable development. This requires enacting special regulatory framework and adopting internationally recognized policies. Most importantly, there must be limited governmental interference.

Dolzer and Schreuer considers that the primary ratio of protection and security lays on host states obligation to protect investors from physical violence, including premises invasion, and guarantee against infringements on the foreign investors rights with accordance to the host state laws and regulations [7]. Protection and security clauses are typically part of international investment treaties and expected to be adequately granted by the host country. In the *Wena Hotels v Egypt case (2000)* the authorized tribunal found Egypt liable for not acting to protect the investors adequately prior and after the invasion of state employees to the premises. Nonetheless, the meaning of state protection is not limited to physical protection. In the *Azurix v Argentina (2006)* the tribunal found that a provision of full protection and security extends to beyond physical security. This may include the protection of tangible and intangible assets as found in *Siemens v Argentina (2007)* [26].

The list of principles of IILs are not limited to mentioned above. Host states must have a general recognition to investments for sustainable development. This is represented by the coherent drafting of policies and its implementation by governing and public institution. The drafted policies that outlines the policies are ought to be regularly reviewed to ensure the existence effective, relevant and dynamic policies in the host state.

3.4 Why Foreign direct investment

Foreign directed investment (FDI) is an essential element for globalization. FDI promotes international economic integration through the creation of long-lasting and stable concoctions between national economies [19]. In practice, FDI represents the lasting interest by foreign direct investors to invest in other international economies. This implies the establishment of a long-term agreement between foreign investors and countries with a high degree of management by the investors [19]. Domestic economies can benefit greatly from FDI yet requires the application of the right policy environment that conform to

international practices. Such benefits include infrastructure developments, transfer of technology and economic growth.

Forms of FDI are not limited to governments only. Direct investors can be governments, private individuals incorporated entities and other forms [8]. Based on the FDI definition an entity or a private individual is considered a foreign direct investor if the investment is conducted in a country other than the country of residence of the investors [8].

Undoubtedly, FDI is a main goal and core for developing national economic policies. It is impactful in a direct and indirect ways to the host country [15]. Due to FDI vast benefits most nations adopt a liberal and acceptant view of such investments, whilst limited countries adopt severe restrictions towards foreign investors. Globalization has assisted in the development of FDI and its acceptance [25]. The level of current technology and awareness promoted its acceptance amongst nations and its benefits for developing economies.

Many types of FDI exist and evolved over the years. Greenfield investment is welcomed by host countries due to its nature and advantages [39]. This is when companies decide to expand its investment or build a new production facility in the host country, such as car manufacturers. This type of investment is positively greeted by host countries because it lowers the rate of unemployment, provides the required technology, and connects the host nation to international markets [9]. Other types of FDI include mergers and acquisition or joint ventures.

The importance of FDI lies in facilitating capital growth and economic transformation within developing countries and is considered an essential instrument of external finance. However, social development is an additional benefit of FDI. This is particularly of importance to developing countries. For example, foreign companies operating in host countries may positively influence the economy via its adopted corporate social responsibility policy. Such policies encourage a better practice within the company and public [11]. Furthermore, one can argue that countries' economic growth could lead to social stability whilst providing citizens with a higher standard of life.

Okara questioned FDI's link with political stability within developing countries [21]. The findings showed that FDI in developing countries encourages and promotes political stability. The vast benefits of FDI have been realized over the years. Developing countries have become active in attracting foreign investors to achieve the above-discussed benefits. More than ever the United Nations Conference on Trade and Development (UNCTAD) encompasses 195 countries [34]. One of the UNCTAD main objectives is to support developing nations to realize the advantages of a globalized economy with an effective and fair approach.

FDI in the host state may encourage social progress with a positive impact in many elements. This includes the positive impact within education, infrastructure, technology as well as personal and political progress. A study conducted by Kolstad and Tondel analyzed the relationship between social development and foreign direct investment in developing countries [40]. It was found that FDI encourages political stability and reduces domestic conflicts. The relationship between FDI and social progress is mostly positive. Besides the objective of economic growth, developing countries must consider the positive social impact of FDI and its contribution to the society.

3.5 Settling FDI disputes

International investment agreements have significantly increased over the years. Bilateral treaties have increased from 72 treaties in 1969 to more than 2500 treaties by 2021 [20]. The increasing number of international investments and agreements will subsequently increase the number of disputes that will arise. Therefore, countries hoping for FDI to participate domestically

must ensure a practical and clear dispute resolution method set in place.

Litigation is the traditional method of dispute resolution. It is undoubtedly most desired and preferred by the host state. Nonetheless, foreign investors have grown wary from submitting their disputes with host countries to litigation. Investors claim that litigation in host states courts lack impartiality since they failed in providing sufficient guarantees of protection for the investors [17]. For investors, litigation can be time-consuming, very expensive and complex in the host state.

Alternative dispute resolution methods have evolved to support and encourage international investments. Such methods include Arbitration, Mediation, and Conciliation. Nonetheless, arbitration is considered the most preferred dispute resolution method by foreign investors [37]. This can take the form of an Ad hoc arbitration or an institutional arbitration. Ad Hoc arbitration provides the parties to the dispute with flexibility in selecting the desired arbitration conditions [38]. Such conditions include the applicable law, governing law, seat of arbitration, language and place of arbitration. An Ad hoc arbitration provision in trade agreements between the host state and foreign investors can be exercised if the dispute has arisen. Therefore, the parties must submit to arbitration as an alternative dispute method to litigation.

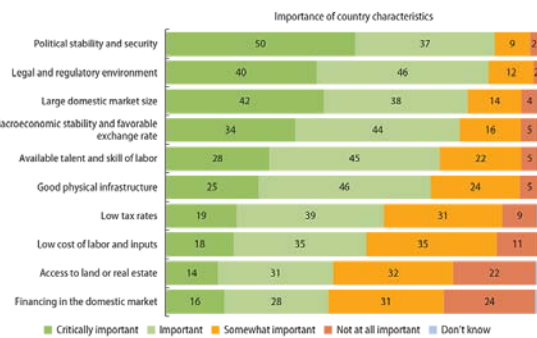
Institutional arbitration provides further protection for FDI, due to its clarity and certainty. The parties in an ad hoc arbitration must identify all the dispute elements and conditions prior to starting the procedure. On the other hand, institutional arbitration can provide further guarantees than an ad hoc arbitration to expedite the process. The International Centre for Settlement of Investment Disputes (ICSID) was established in 1966 and considered as the leading international arbitration institution for international investments. Currently, there are 163 signatory and contracting states to the ICSID. Its main purpose is to protect foreign investments by providing and facilitating investment dispute settlement mechanisms [28]. Furthermore, it aims at promoting investment in developing countries by increasing foreign investors' confidence in protecting their investment via state-investor arbitration.

Settling states and foreign investors' disputes at the ICSID via arbitration will result in a binding final award. According to Article 53 of the ICSID convention "(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention". Alternatively, host states and foreign investors can agree to submit the dispute to other arbitration institutions, such as the London Court of Arbitration (LCIA) or Singapore International Arbitration Centre (SIAC). Furthermore, the 1958 New York Convention is adhered to by more than 160 countries. The convention focuses on the recognition and enforcement of foreign arbitral awards [12]. The New York Convention provides international parties with defined mechanisms for the enforcement of foreign arbitral awards. Foreign arbitral awards are typically enforced by signatory states' domestic courts if no breaches to Article V of the convention occurred.

Arbitration is considered a valuable method of dispute resolution in international investment relations. Many countries have reformed their Arbitration Laws to conform to international arbitration standards and attract foreign investors. For instance, Saudi Arabia has reformed its Arbitration Law in 2012 which is based on the UNCITRAL Model Law on International Commercial Arbitration, to reach a higher level of conformity and attract foreign investors. The old Saudi arbitration law was deemed negative to international arbitration and impractical by foreign investors that resulted in loss of investment opportunities [1]. Host states are urged to develop their Arbitration Laws in accordance with international practices to attract FDI.

3.6 Developing an attractive investment environment

Host states investment environment characteristics are of significance and thoroughly analyzed by foreign investors. FDIs are a long-term and profitable investments, countries aiming to attract FDIs will promote investment incentives that focuses on foreign firms [2]. Such incentives include favorable fiscal policies and reduced corporate tax towards foreign investors, the sustainability of such approach has been questioned. Blomstrom argues that incentives focusing exclusively on foreign investors is not a recommended strategy as it may discourage local investors [2]. Nonetheless, developing countries are required to focus on and enhance specific characteristics in order to utilize and realize the benefits of FDIs.

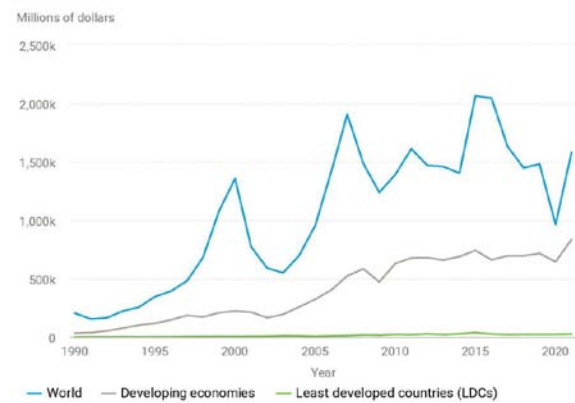


Source: [36]

The above graph indicates the main important characteristics of developing countries analyzed by foreign investors prior to investing. There are number of critically important matters which determines whether the host state is attractive for FDIs or certain developments are required. Political stability and security in the host state is a primary concern for foreign investors. Okara argues that investors favor political stability and security as well as contributes to the development and promotion of political stability in the host state[21]. Foreign investors considers the political stability and security as the most critically important factor upon making an investment decision.

Furthermore, the legal and regulatory environment of host state is the second factor affecting FDI decision. Investors will consider the extent of IILs application in the host state and whether a business-friendly environment is established. This is typically dictated by the laws and regulations related to investment and its security domestically. The legal and regulatory environment of developing countries are a key motivating factor of investment decisions. As pointed in the above figure, it is mostly critically important or important for foreign direct investors. The preferred legal and regulatory environment by foreign investors in developing countries is one which conforms to international practices. For instance, countries that adopts the New York convention and are members of the ICSID convention have a higher level of attracting FDIs. Dispute resolutions with accordance to international practices are desired by foreign investors to protect and secure their investments in the unforeseen future events.

Other factors are of consideration to foreign investors prior to investing in a developing country. This includes the scale of domestic market size, economic stability and exchange rates, the state infrastructure and taxation rate. It is imperative to emphasize that well-constructed and implemented policies adopting by developing countries that aims at the two main factors of concern by foreign investors, political stability, and the regulatory environment will yield to prosperity in the other factors. Investors deciding to invest in developing countries that is politically stable and adopts a positive regulatory environment will assist in developing the country infrastructure and participate in developing labors skills.



Source: [35]

The above graph illustrates the global FDIs inflows between 1990 to 2021. The least developed countries have not witnessed significant rise in FDIs over the past two decades in comparison the world. This includes 33 countries in Africa and 9 in Asia. Undoubtedly, the regional political stability and security as well as the lack of business-friendly environment has been an affecting factor to attracting FDIs. Developing economies have witnessed a steady rise of FDIs inflow over the past two decades reaching from around \$33 million dollars in 1990 to more than \$850 million dollars in 2021. This steady rise can be attributed to globalization and the international investment comparative approach adopted by countries.

Positive investment claimant in developing countries will promote and attract international investments. The general concession is that a host state friendly and open to investments encourages and attracts FDIs. The quality of the regulatory framework adopted by developing countries is detrimental to the FDI inflows. States that adopt IILs practices increases its conformity to international standards. Rule-based and incentive-based approaches must be adopted by developing countries to attract foreign investors. this approach has been adopted by Singapore and resulted to FDI playing a critical role to its economic development [22]. In the late 60s the government of Singapore has provided foreign investors with generous fiscal incentives to attract foreign investments [22]. The incentive-based approach was very successful, and Singapore is considered as a leading example. Similarly, developed its rule-based approach with regards to settlement of foreign disputes. The use of arbitration in Singapore is considered very developed and separated from judicial interference. Allowing the effective and efficient use of arbitration as the preferred dispute resolution method by foreign investors has helped in attracting FDIs. The Singapore international arbitration center is considered a leading international arbitration center selected by foreign parties. Therefore, developing countries hoping to increase FDI need to utilize the available internationally accredited regulatory framework to create a positive environment climate to attract foreign investors that results in economic growth and social prosperity.

4 Conclusion

In conclusion, the nature of IIL has evolved over the years and encompasses number of essential mechanisms and fundamental principles. Developing countries aiming for economic growth can utilize the different types of treaties accredited internationally. Nonetheless, consideration to the fundamental principles of IIL, such as equitable and fair treatment, must be reflected within the national regulatory framework and adopted policies.

Conformity to international practices and the application of IIL in the host state will attract foreign direct investors. This require adopting an effective dispute resolution method to deal with FDI disputes. Developing countries are required to provide an

attractive investment environment, that is politically stable and adopt a regulatory framework that is clear and align with international practices. Furthermore, countries must utilize the rule based and incentive based approach to attract FDI and realize its benefit. Economic growth and social prosperity positively correlate with FDI in the host country and considered advantageous in the long term.

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