

Philosophical Correlation between Rational Design Theory and Model Bilateral Investment Treaties

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Abstract

Model Bilateral Investment Treaties have grown parallel to the evolution of Bilateral Investment Treaties; however, little importance have been given to the theoretical premise of the treaty design and raison d'être for framing Model Bilateral Investment Treaties. Even the 2001 project on Rational Designing of International Institution, which discussed theoretical premise of participation of States while concluding international agreements, limited the study to the multilateral agreements, and left out bilateral agreements. However, it could be seen that the modern BIT regime, since its inception, was mounted upon the idea of need. On one hand States needed to import capital for economic development, on the other hand the States needed protection for the investments. Thereby making the regime based only on certain rationales. The development and transitions of Bilateral Investment Treaties and Model Bilateral Investment Treaties evidences the philosophy of Rational Design Theory. The Treaty practice may on occasion do not reflect rational measures, however, the form the philosophical standpoint it does.

Keywords: *Model Bilateral Investment Treaty, Rational Design Theory, Bilateral Investment Treaty, BIT, Treaty Design, MBIT*

I. Introduction

The present research article explores a philosophical correlation between the framing and designing of Model Bilateral Investment Treaties (hereinafter referred to as MBITs) and the Rational Design Theory (hereinafter referred to as RDT). Which means it theoretically enquires about the rationale upon which the designing and framing of MBITs is premised upon, thereafter, examines the

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said rationale against the philosophy of RDT upon which it is premised i.e. “*Our main goal is to offer a systematic account of the wide range of design features that characterise international institutions. We explore theoretically and empirically the implications of our basic presumption that states construct and shape institutions to advance their goals. The most direct implication is that design differences are not random. They are the result of rational, purposive interactions among states and other international actors to solve specific problems*”³. At the outset, it must state that the RDT was an outcome of a project undertaken by Barbara Koremenos, Charles Lipson, and Duncan Lipson in the Autumn of 2001. However, the present study limits itself to the philosophical correlation between the creation of MBITs and the philosophical premise of RDT, as the RDT was examined through conjectures specifically developed for multilateral Treaties and not bilateral agreements.

This research article explores the development of MBITs over the years and examines the philosophy governing the act of creating the MBITs, and traces its correlation with the RDT. Further, explores the developmental stages of the MBITs, the factors influencing the change in designing, how some of the countries responded to the changes. Thereafter, the article examines the theoretical and philosophical correlation between designing the MBITs and upon which the RDT is premised. The study in its route to establish the correlation between RDT and MBITs also engages in examining MBITs practice of few major economies such as The USA, Austria and India, belonging to three continents and have actively engaged to adapt to the changing environment of International Investment Law regime.

Through the research article, it is intended to establish theoretically that MBITs are unique set of documents in the realm of International Law, as there exist no such parallel regime with such unilateral instrument which reflect the State’s intention to engage with a regime. Thus, MBITs reflect the truest form of RDT and are philosophically correlated.

³ Barbara Koremenos, Charles Lipson, and Duncan Snidal. 55 (4):1051-82 “*Rational Design: Looking Back to Move Forward*”. International Organization(2001).

II. Development of Model Bilateral Investment Treaties

MBITs are not a binding document upon any state; as the name suggests, a “Model” treaty text, created by Nation- States independently. The Nation-State has significant liberty in creating the Model text, which is capable of aiding them in negotiating an investment treaty, whether bilateral or multilateral. However, designing the Model treaty text has undergone significant changes over years and development and is still a work in progress. This segment discusses about the development of the Model investment treaty, the alterations, the rationale for framing the model treaty text and trace the root philosophy of the concept of Model treaties.

A. Birth of Investment Treaties and Model Investment Treaties

International agreements with protection of foreign investment could be traced in as early as in Treaty of Peace and Friendship between Great Britain and Spain signed in the year 1667, *inter alia* the Treaty provided for protection of nationals of the contracting States engaged in trade and commerce, in the land of other contracting parties against denial of justice, national treatment. Thereafter, the Treaty of Utrecht in 1713, Treaty of Amity, Commerce, and Navigation between Great Britain and the United States in 1794 had provisions that had modern investment law elements protecting the private properties⁴. The Modern International Investment Law is heavily motivated by political and economic developments in the 19th century, which saw the rise in the concerns relating to the standards of treatment of aliens⁵ , albeit with the significant assistance of Customary International Law on the issue⁶.

Even though elements of modern international investment treaties could be traced as back as the 17th and 18th centuries, it is widely accepted that the Friendship Commerce and Navigation Treaties are precursors to the Modern International Investment Treaties⁷. It is even argued that the FCN treaties act as

⁴ Chester Brown, “Introduction: the development and importance of the model bilateral investment treaty”. Commentaries on Selected Model Investment Treaties, pp.1-5. (2013).

⁵ *Id.*

⁶ *Id.*

⁷ Kunzer,. “Developing a Model Bilateral Investment Treaty”. Law & Pol'y Int'l Bus., 15, p.273 (1983)

precursors to Modern Investment Treaties and continues to inspire modern International Investment Agreements⁸. FCN treaties were the instrument which predominantly designed to protect the interest of nationals of the Contracting States who invested in the other Contracting State, which were similarly placed from the economic standpoint⁹. FCN Treaties addressed the business interests of nationals in the alien contracting States in general and not *prima facie* focused on protecting investments. The Modern International Investment Agreements owe much to the FCN treaties, and certain key provisions and features of FCN treaties have found immense importance in Modern Investment Treaties such as Fair and Equitable Standard and they continue to inspire the modelling, drafting and designing of International Investment Agreement¹⁰. The development of other transactional agreements such as the General Agreement on Trade and Tariffs and the “executive trade agreement device” did reduced the prominence of FCN treaties¹¹. Thus, there was shift from the comprehensive document to a simpler one protecting the right foreign investor’s rights and is largely influenced by the European practice¹².

Since the turn of century the regime witness change trend of capital flow, and the economic status of parties engaging with each other and eventually tracking back to the comprehensive agreements similar to the FCN treaties¹³.

Schill states that the International Investment Law have moved away from the fringes of Public International Law and have contributed to the development of Public International Law over the years. The regime has not only adhered to the existing structure of Public International Law but also shaped it, including the relation of the principle to the sources of International Law¹⁴. Schill notes that the failure to conclude Multilateral Investment Treaty was the genesis of BIT regime. However, contrary to the expectations, these bilateral treaties failed to

⁸ Wolfgang Alschner “Americanization of the BIT universe: the influence of friendship, commerce and navigation (FCN) treaties on modern investment treaty law”, 5 Goettingen J. Int'l L., p.455.(2013)

⁹*Id.*

¹⁰ *Id.*

¹¹ Wolfgang Alschner, *Supra* Note 6

¹² Wolfgang Alschner, *Supra* Note 6

¹³ *Id.*

¹⁴ Stephen Schill. “Sources of International Investment Law.” The Oxford Handbook of the Sources of International Law. (2017).

set themselves apart, especially standards and principles governing the international investment law and continued to appear as mirror versions of each with limited alterations¹⁵. The uncanny similarity in the initial phase of modern BITs were not an occurrence of chance; instead, it was a well thought out result of planned acts by the capital-exporting countries¹⁶. Post Second World War, significant number of nation- State emerged due to independence and decolonisation, these nation- States were in the process of rebuilding it; with the political institutions at a nascent stage and dire need of capital to develop the economy; the polito-economic condition gave the opportunity to the capital-exporting countries to place the well-planned common design upon the capital importing States¹⁷. It marked the introduction of model treaties by the capital-exporting countries, especially the USA, the UK, Germany and Netherlands, who acted in coordination with regard to their investment policies¹⁸. The said models were subsequently promoted by international organisations such as the United Nations Conference for Trade and Development¹⁹. However, the change in capital flow, rise in investment disputes, development of human rights principles the regime underwent certain changes so did the Models existing in the regime.

The journey of the Model Investment Treaty is similar to the journey of the Investment Treaty, and it continues to evolve; the initial phase witnessed the domination of the capital-exporting country, which framed it according to their desire and need, while the capital importing states were not that focussed in developing model text as they desired foreign Investment. The Model Investment Treaty texts experienced diverse development across the economies and timelines²⁰.

B. Development of Model Bilateral Investment Treaties

Before venturing into the development of MBITs, it is of significance to briefly establish the importance of MBITs in contemporary times. A Model Treaty Text assists the States in numerous ways, including, but not limited to,

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Wolfgang Alschner, *Supra* Note 6

facilitating negotiation, reduction in drafting and designing cost, brings in uniformity in approach, establishing State's investment policy, attitude towards the dynamic jurisprudential development, treaty practice in terms of declared investment policy and deviation from thereto²¹, the rationale, reason and importance would be further elaborated upon in the forthcoming segments.

The development of MBITs can be broadly classified in three specific eras as expressed by Vandervelde, which are as follows: a. the Late 1950s till late 1980s, b. The late 1980s till brim of the turn of the century, and, c. Turn of the century till present time²². The three eras witnessed different approaches, reactions, and designing of actual investment treaties.

The first era involved shaping the first generation of BITs. During this era, the capital-exporting countries and developed countries were the ones who had developed MBITs; while negotiating, they presented the model upon which the Treaty could be signed, the treaties were focused on protecting the interests of the investors predominantly against injurious acts of the host states²³. The impact of the Model Treaties created explicitly by the capital-exporting States did little for the regime. Not only the developing countries were still on course shaping and structuring the national institutions and were justifiably suspicious of such instruments as many of the nations had just received independence after decolonisation²⁴. In addition, there was a significant presence of alternate economic theories which was distant from economic liberalisation.

The second phase marked the rise in the conclusion of BITs between states as the developing countries lost their scepticism towards foreign Investment²⁵. The era witnessed growth in investment treaties North-South BITs and South-South BITs, thereby shifting the erstwhile asymmetric characters of the Contracting States to the conclusion of treaties between asymmetric as well as symmetric contracting States²⁶. With the change in capital flow from unidimensional to bi-dimensional and economic characteristics of the contracting States, the regime

²¹ Supra Note 3

²² Kenneth Vandervelde "Model bilateral investment treaties: The way forward". 18 Sw. J. Int'l L., 18, p.307, (2011)

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

witnessed the development of MBITs by the developing countries. However, from the design perspective, the model treaties had a strong resemblance to the Model treaties from the 1st era and the model treaties of developing countries²⁷, thereby failing to represent the needs and desires of the developing countries.

The third phase was an outcome of the backlash against economic liberalisation²⁸. This phase started at the turn of the millennium. The phase of development owes to two prominent factors: the first being the instances of claims instituted against such States who had been the erstwhile capital-exporting countries and had concluded investment treaties designed in accordance with the MBITs framed by them²⁹. The other factor was the rise of environment-related regulations leading to indirect expropriation or regulations and environmental organisation critical of the regime and the investor-state dispute resolution mechanism³⁰. This era has witnessed extensive development of MBITs and a shift from the earlier practice of mirroring the existing models by other nations. States have been focused on developing the Model treaties as per the need of the respective State. The shift in the approach was evident as the treaties moved from the philosophy of cooperation to the philosophy of reason and rationality. However, it is worth mentioning that the approach is yet to find popularity as only handful nation-States have adopted newer MBITs.

A close look in the philosophy and practice reflects that most nations engaged in designing and developing MBITs to further their collective economic goal as a nation based on reasons, as have been more evident in recent years. The South African Development Community developed a treaty template with regard to MBIT and published it in 2012³¹. In its introductory section, it is explicitly stated that the purpose of the SADC is to harmonise and assist the member States to develop their own MBITs. The document states that “*The Member States can choose to use all or some of the model provisions as a basis for developing their own specific Model Investment Treaty or as a guide through any given investment treaty negotiation*”³². Even though the African countries

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ SADC Model Bilateral Investment Treaty Template with Commentary

³² *Id.*

have similar economic status, however, it is worth realising the harmonization even though is appreciated, there exist certain peculiarities associated with certain economies, hence, a blanket objective of harmonisation may not lead to appropriate MBITs designs. Models such as SADC or IISD can at best should act a guiding document to design MBITs.

The progressive development in the Model Investment Treaty designs are evidenced by MBITs, and Investment Treaties concluded by developed countries and developing countries alike. The very change in the design and approaches will be discussed in the following segment, citing examples of global North (USA) and global South (India).

C. Change over the years in the Model Bilateral Investment Treaty

As discussed in the segment enumerated as 2.2, the Model Investment Treaty has undergone significant changes, from being an instrument commanded over by the developed country with predominantly a single point agenda of protecting investors in host States to an instrument in the hands of developed and developing alike, crafted to put forward the investment policies without compromising on the interest of the country on other fronts such as security, sovereignty, environment, etc. Needless to say, that the earlier envisioned simple treaty design had given way to a comprehensive design. This change took decades of progress, change in the direction of capital flow³³, financial crisis, experience, invocation of arbitration clauses³⁴, criticism from quarters that were adversely and unfairly affected³⁵, etc. This segment will examine the changes in approach and attitudes in designing MBITs of the United States, India and Austria as they are representative of three different continents and belong to developed and developing economy. These nation States have actively participated with the regime and have framed multiple MBITs to adapt with the change to establish the reason, rationale, and philosophy of MBITs.

³³ Kenneth Vandevelde , Supra Note 20

³⁴ Wolfgang Alschner and Skougarevskiy, D., 2016. "Mapping the universe of international investment agreements." 19(3) Journal of international economic law, pp.561-588 (2016)

³⁵ Mark Waibel. "The backlash against investment arbitration: perceptions and reality". Kluwer Law International BV.(2010)

The United States of America

Post the Second World War, the United States emerged as an economic powerhouse and champion advocating liberal economic policies³⁶. However, as a nation, it continued to rely upon the FCN treaties as late as the 1980s³⁷, while the European nations had already negotiated significant numbers of BITs in comparison³⁸. In the January of 1982, the U.S. Trade Representative announced the formulation of the prototype BIT, in other words, a document mirroring the concept of the MBITs, which was framed to aid the treaty negotiations³⁹. The Reagan Administration was motivated to introduce the prototype BIT to address the growing concerns with uncertainties associated with the investments by the U.S. investors in developing and least developed countries and improve the environment for international Investment⁴⁰. The prototype was designed with seven principle features⁴¹. Ruttenberg described the objective of the BIT during the Reagan Administration as foreign investors to have a sense of security in terms a. National and/or most favoured nation, b. Compensation in the event of expropriation, c. transfer of capital and profits, and d. Access to arbitration mechanism in the event of any dispute⁴².

The third phase was initiated by the criticisms and backlash against the regime as it demanded a rigorous review of the existing MBITs which led to the outcome of the 2004 MBIT of the United States. Vandelvelde classified the change in the 2004 Model Investment Treaty in four categories which are as follows: a. Developing new exceptions in the host State's obligations (Enhancing Host State's Regulatory power); b. Introducing limitations in the ISDS mechanism by reducing the discretionary power of the ISDS arbitration tribunal by limiting the scope of jurisdiction dissuades from using the ISDS arbitration mechanism (Enhancing Host State's Regulatory power); c.

³⁶ Pribićević, O. "Trump, Brexit and the crisis of the liberal world order". 57(2) Teorija in praksa, pp.471-488.(2020)

³⁷ *Supra* Note 7

³⁸ *Id.*

³⁹ *Supra* Note 6; Ruttenberg, V.H." *The United States bilateral investment treaty program: Variations on the model*". 9 U. Pa. J. Int'l Bus. L.p.121 (1987)

⁴⁰ *Id.*

⁴¹ Wolfgang Alschner, *Supra* Note 6

⁴² *Supra* Note 39

Advocacy regarding creation and facilitation of normative frameworks, such as a higher focus on transparency, environmental rights, labour rights, etc. which considerably reduced the host State's discretion (Promoting best practices); d. Measures focused on revamping the arbitral mechanism by introducing expedited procedure, dismissal of frivolous claims, appellate provisions, expert reports, amicus curiae submissions, etc. (Focused on reshaping and bringing clarity). The changes that the 2004 Model Treaty reflects are evidence of the shift in the approach according to the nation's need and changing characteristics of the international investment regime due to economic and environmental reasons.

In 2012, the United States introduced a MBIT, replacing the 2004 Model. The model was primarily criticised for not bringing many changes. The provisions addressing the treatment standards, expropriation, transfers of capital and profits remained similar to the 2004 Model Treaty⁴³. The arbitration clause reflecting investor-state dispute settlement remained intact and not moving towards the State-State Dispute Settlement mechanism, which was demanded from several quarters⁴⁴. The significant change in the 2012 Model could be apportioned to the inclusion of provision focussed towards improving the standard of transparency relating to laws, judgments, arbitral awards etc.⁴⁵. Other critical inclusion were obligations upon contracting states and the investors to abide by the host states laws on environment and labour related issues⁴⁶. The 2012 Model also included the territorial sea and the part of the high sea as part of territory of State based on Sovereign activities undertaken or Customary Int'l Law⁴⁷.

The United States approach towards the international investment treaty regime evidence that they have undergone continuous change over the years, from FCN to phase-wise versions of Model Investment Treaty starting with the prototype followed by Models of 1994, 1998, 2004 and finally 2012 have

⁴³ Johnson, L.. "The 2012 us model bit and what the changes (or lack thereof) suggest about future investment treaties". 8(2) Political Risk Insurance Newsletter, p.2. (2012)

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id*

⁴⁷ Di Rosa, P. and HEWETT, D.Y.Y.,. "The new 2012 US model BIT: Staying the course". Yearbook on International Investment Law & Policy, 2013, pp.595-607 (2012)

always represented the interest the United States of America in the regime and their policies.

India

For a significant period of time the developing countries aped the Model Treaties of developed States, the gradual changes in the Model treaties design evidence the acknowledgement of the reasons and rationale for participation in the regime. India represents the quintessential developing country actively engaging with the regime.

Post-Independence, the economic policies of India was sceptical towards the International Investment Regime until the cold post-cold war era, as India ventured into free-market capitalism. The shift in approach was influenced by two factors: a. Shift from Soviet Union kind economic policies and b. Inspiration from the Chinese Model opened China for the world economy and allowed market forces to play a significant role in 1978 and achieve substantial growth, as expressed by T.N Srinivasan⁴⁸.

India developed its first MBIT in 1993⁴⁹. This Model treaty was based on the Organisation for Economic Co-operation and Development (OECD) Draft Convention for the Protection of Foreign Property of 1967⁵⁰. The Model Treaty represented that India accepted the existing international standards and practice regarding the protection of investors and Investment⁵¹. It was a conscious decision based on rationale, reason, and objective to make India a favourable country for foreign Investment and overcome the challenges posed by Section 29 of the Foreign Exchange Regulation Act.⁵²

India revised its initial MBIT and developed the Model instrument of 2003 to incorporate an annexure, explaining the concept of indirect expropriation. However, Ranjan states that the claim is not supported by any evidence⁵³. For all practical purposes, the 2003 Model Instrument reflected a similar position as

⁴⁸ Prabhash Ranjan “*India and bilateral investment treaties—a changing landscape*”.29(2) ICSID Review, pp.419-450, (2014).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

1993 one. From 1993 till 2015, India had signed over eighty BITs, closely resembling the OECD Draft Convention of 1967. India engaged with developed as well as developing countries over the period⁵⁴.

The design of Indian BITs, which were significantly influenced by the 1993 prototype and 2003 Model Treaty, did not draw much controversy or conflict until 2011⁵⁵. Dabhol power project was the only incidence that gave certain room for conflicts. However, none of the none BIT claims instituted against India based on the power project resulted in an investor-state arbitral award⁵⁶. However, the White Industries Award altered the earlier view regarding India's exercise of regulatory power. A number of claims were instituted against India on several regulatory measures undertaken by India, such as retrospectively imposed taxes, cancellation and revocation of the spectrum and telecom licenses etc.⁵⁷, which led to the review of BIT practice.

The review of BITs led the pathway for the 2015 MBIT, the model significantly departed from the earlier designs. The Law Commission of India, in its report, notes that the Government website states the objective of the Model of 2015 with two fold objectives as it states "*to provide appropriate protection to foreign investors in India and Indian investors in the foreign country, in the light of the relevant international precedents and practices, while maintaining a balance between the investor's rights and the Government obligations*"⁵⁸, implying that framing of new Model was primarily a reactionary act to the developments in the regime. Even though the development was reactionary and restrictive, it primarily stemmed from the rationale and reason borne out of the national interest and not any external pressure.

The major shift in designing the MBIT could be witnessed in the provisions addressing the definition of Investment, the scope of the Treaty, the standard of treatment, most favoured nation clause, money transfer provision, non-

⁵⁴ *Id.*

⁵⁵ Prabhash Ranjan and Pushkar Anand "*The 2016 model Indian bilateral investment treaty: a critical deconstruction*".38 Nw. J. Int'l L. & Bus., p.1 (2017); Law Commission of India, Report No.260: Analysis of 2015 Draft Model Indian Bilateral Investment Treaty (2015). <https://lawcommissionofindia.nic.in/reports/Report260.pdf> on 24.11.2021

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

precluded measures, investor-state dispute settlement provision⁵⁹ etc. A brief description of primary designing alteration could be seen in a. Shift from asset-based definition to an enterprise-based definition of “investment”⁶⁰; b. inclusion of negative list of investments, exclusion of pre-investment activities, keeping a measure of local Government outside the purview of the investment treaty and express exclusion of taxation policy⁶¹; c. Removal of Most Favoured Nation clause⁶²; d. Incorporating of International Minimum Standard as the benchmark for “Treatment of Investment”⁶³; e. Transfer of money were saddled with restrictions⁶⁴; f. Comprehensive Non-precluded Measures⁶⁵; g. Revamped and restricted design for Investor-State Dispute Settlement mechanism.

A hawk-eye view of the design of the Model of 2015 would reveal that the model is focused on enhancing the regulatory power of the host State significantly and restricting the invocation of Investor-State arbitration. The efficacy of such a Model is a different debate, but as far as the approach of India is concerned, it could be seen that they were not an outcome of any whim or to co-operate. Instead, it is based on rationale, need, and the concerns of the State.

Austria

Austria has donned the roles of capital-exporting and capital importing country⁶⁶ and thus had a keen interest in developing the investment regime. With most of the treaties influenced by the earlier European Model, entailing strong investor protection and limited protection to the policy-making discretion in the hands of host States, thus giving rise to the need to designing of the Treaty from letting it be an offensive tool in the hands of investors

⁵⁹ *ibid*

⁶⁰ Prabhash Ranjan “*India-Brazil Bilateral Investment Treaty – A New Template for India?*”(2020) <http://arbitrationblog.kluwerarbitration.com/2020/03/19/india-brazil-bilateral-investment-treaty-a-new-template-for-india/> (Nov. 24, 2021).

⁶¹ *Id.*

⁶² *Supra* Note 55

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Bernasconi-Osterwalder and Johnson. “*Commentary to the Austrian Model Investment Treaty*”. IISD Report at, 27 (2011)

against the Government of the host States⁶⁷.

The Model Investment Treaty of 2008 is similar to the earlier one, except it is quite not⁶⁸. The objective of the Model of 2008 was to transcend from the philosophy that investment treaties are about the protection of the investors and promotion of Investment to a philosophy wherein investor protection and investment promotion being a mechanism or tool for the attainment of sustainable economic development, this change in philosophy ensured that the rights bestowed by the Treaty were subject to policies governing the environmental concerns, labour laws, the corporate social responsibilities, etc⁶⁹. Thereby, introducing balance between the investors' rights and obligations of the host state and enhanced regulatory powers.

To accommodate the objective laid down in the preamble, there have been changes in the designing of not all but some of the provisions, such as the definition of investors and investments, the provision on expropriation, the inclusion of exceptions to the provision on transfer, the inclusion of provision on environment and labour laws etc.

The definition of investor is significantly similar to the definition provided in the earlier MBIT of Austria, with the prominent difference being qualifying the term of “nationality” with “dominant and effective nationality”⁷⁰. Thereby narrowing the scope of the definition of investors. The earlier definition was a broad one that could introduce a wider ambit of investors, thereby leading to potential incidents of alteration in nationality to take advantage of the investor rights provided in the Treaty. Although the issue was dealt with by some of the arbitral awards, such as the Phoenix Award⁷¹ and Cementownia⁷², nonetheless, the restrictive designing of the investor would eliminate the chance of new interpretations which the Contracting States did not desire, thereby explicitly outcasting the “Mailbox” or “paper” companies from taking undesired advantage of broad definition of an investor.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Model BIT of 2008 Austria.

⁷¹ ICSID Case No. ARB/06/5, Award, April 15, (2009).

⁷² ICSID Case No. ARB(AF)/06/2, Award, September 17, (2009).

The Austrian MBIT of 2008 incorporated the characteristics “commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk” as essential part of the definition of Investments, which was inspired from the controversy stoked by *Salini Test*⁷³.

The National Treatment and Most Favoured Nation clauses were present in the MBIT, however with certain added exceptions such as: a. Obligations of the Contracting States as a member of the United Nations Charter; b. Obligations of the Contracting States as the member of economic integration treaty, c. Obligation met under international agreement or arrangement or domestic legislation regarding taxation⁷⁴. Incidentally, these aforementioned exceptions were also forming the part of the provision on transfer in the Model of 2008. The rest of the exceptions to the right of transfer were not an altered position than the earlier model⁷⁵.

The provision dealing with expropriation provided narrower obligation upon the Contracting State, as the provision keeps the non-discriminatory and reasonable measures in good faith, taken in rare occasions, addressing the legitimate public welfare objectives, such as environment, safety and health⁷⁶. The provision closely resembled the Canadian FIPA⁷⁷.

The Investor-State Dispute Settlement mechanism saw change too, however their approach do not seek to discourage the use of ISDS mechanism. Austrian MBIT explicitly reject the idea of exhaustion of local remedies⁷⁸ however, it closes the door on arbitration of the domestic forum gives an award on merit of the claim, however, the door for arbitration remains open if approached before the conclusion of the proceeding at the domestic forum. From the technical standpoint, the Model Treaty neither has a true “fork in the road” clause, nor an “exhaustion of remedies” clause.

Realising the changing climate in the international investment environment, Austria framed the 2008 MBIT to accommodate the enhanced policy interest of

⁷³ Salini Costruttori SpA v. the Kingdom of Morocco (2001).

⁷⁴ Article 3(4) Austrian Model BIT 2008.

⁷⁵ Article 9(4) Model BIT 2008.

⁷⁶ Article 7 Austrian BIT 2008.

⁷⁷ *Supra* Note 66/.

⁷⁸ Article 15(2) Model BIT 2008.

the Host State within the ambit of the Treaty, thereby creating the balance between the rights and obligations of the parties. The designing of the model was in its totality influenced by its own needs and investment policy, the different approaches from the other MBITs with respect to critical areas evidence that the choices to alter or not, was based on reason and not whimsical or due to undue pressure.

D. Rationale of Model Bilateral Investment Treaties

The MBITs are tremendously influential in negotiation the Treaty, as it acts as the starting point of negotiation and it indeed acts as “efficient and convenient” tool to develop the investment regime of the participating nations⁷⁹. Furthermore, the MBITs acts to reduce drafting and negotiating costs and bring uniformity in the practise across the investment treaties⁸⁰.

A MBIT is not a mere referential document, which comes in aid only during negotiation. Instead, it has a comprehensive role, including interpretation of negotiated treaty. The model acts as “an expression of State’s investment policy”⁸¹. This formulation of the Model Investment treaty could be inspired by several factors, including “aping a foreign system”. However, since the third phase of the Model Investment Treaty described by Vandevelde⁸², the instruments are much evolved and are strongly influenced by the notion of balance⁸³, reaction to the investor-State arbitration⁸⁴, change in the flow of capital, economic position of the contracting parties⁸⁵. Even though the model investment treaty is still being shaped by nation-States, nonetheless, it is designed by the Nations-States, representing its approach towards the International Investment Regime.

⁷⁹ Chester Brown. ed. *“Commentaries on selected model investment treaties”*. Oxford University Press (2013).

⁸⁰ Stephen Schill. *“The multilateralization of international investment law”*,(Vol. 2). Cambridge University Press, p 91 (2009).

⁸¹ *Supra* Note 3.

⁸² *Supra* Note 21.

⁸³ *Supra* Note 66

⁸⁴ *Supra* Note 55

⁸⁵ *Supra* Note 3

The benefits, risks, critical considerations of MBITs were elaborately discussed in a webinar organised by the International Institute of Sustainable Development held on 8th Oct 2018⁸⁶. Ms Patience Okala, Deputy Director & Legal Advisor, Nigerian Investment Protection Commission, shared the Nigerian experience with Model investment Treaty and Investment Treaty practice in length⁸⁷. Briefly stated, she expressed that the MBIT has a diverse role as it includes its benefits in terms of negotiations of treaties, actively laying down priorities of the country, and acts as a statement of the objectives which nation-State desires to address through the Treaty and its goals with respect to sustainable development. Ms Okala drew the analogy of not having a MBIT with “going to war unprepared”⁸⁸. She further shared the difficult experience of Nigerian BITs, which did not meet the needs of the people, especially from the environmental degradation perspective and challenges which cropped up in the Niger-Delta region⁸⁹. The existing Treaty negotiated without the MBITs was with limited focus, addressing the protection of the investors and without heeding the quality of investments made, especially in the Niger-Delta region, where the investors had limited responsibility with significant responsibility protection⁹⁰. The experience in the Niger-Delta region led the Nigerian Government to review the Investment Treaties⁹¹. The Nigerian Government realised that an Inter-Ministerial body, with key agents of Government, who may have an interest in the development of investment regime, must be involved in the review process. Thus, the Investment Promotion Agency, Federal Ministry of Justice, Finance and Foreign Affairs, Inland Revenue Service, Academicians collectively designed the MBIT, thereby expressing a true national position, a rationale need⁹². The Model Investment Treaty included objectives covering sustainable development, balance between extremes of protection, responsibility and obligation, and thereby, create a win-

⁸⁶ IISD Webinar on Model Investment Treaty. Deliberation by Patience Okala and Dr Jonathan Bonnitcha <https://www.youtube.com/watch?v=GQe0Y7U0Bz> Accessed in 20.12.2020

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

win atmosphere for the contracting States and investors⁹³. The MBIT serves as a reference point to the negotiators, assists the negotiators to list out nations priorities, sustainable objectives, and avoid such treaties that run counter with the country's sustainable development⁹⁴. Ms Okala also hinted that prior to the MBIT, the representative leaders often signed treaties for optics and cameras, which has been since curbed as signing a poorly designed Investment Treaty can cost a lot for a nation⁹⁵. The MBIT is a "living document" dynamic in nature and helps the country realise its goal as a collective over the years. It may not be feasible to alter the document frequently, as it must have a certain life span and then. However, it is capable enough to negotiate and be upgraded as and when time demands⁹⁶.

In the afforested webinar, Dr Jonathan Bonnitcha, Senior Lecturer, University of South Wales, and Associate, International Institute Sustainable Development deliberated upon the rationale for a Model and discussed why a nation-State should consider designing and developing a Model Investment Treaty⁹⁷. He expressed that a Model Treaty would permit a nation-State to move towards a considered approach as it allows to attain the policy objectives of a nation-States investment policy, incorporate the desired treaty provisions and analyse the efficacy of the existing treaties⁹⁸. It opens doors for broader input as it considers an inter-ministerial approach, public consultation and expert opinions⁹⁹. The Model Treaty further permits designing based on experiences and allows redesigning the definition, scope, rights, and obligations¹⁰⁰. Once again, Dr Bonnatchia reaffirms the dominant role of the MBIT in the negotiation stage. It allows the opening of negotiation, puts the nation-States in considerably stronger positions, and assists them in preparing for negotiation. It further acts as a resource for faster decision making in the event of a dispute¹⁰¹.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Some of the common challenges encountered by the MBITs, such as practical difficulty, reduction in flexibility, confidentiality concerns, and time and resources, are often unfounded¹⁰². When questioned on the lack of resources with a particular nation-State causing a hindrance in designing a MBIT, Dr Bonnatchia suggested two solutions, one taking the pragmatic approach other and the other a realist approach¹⁰³. He suggested that if a nation-State is short on resources to design a MBIT, then in such a situation, the nation-State might want to stay away from the regime, as the flawed treaty practice from the host country standpoint could lead to heavy cost¹⁰⁴. Whereas the realist approach would be to examine MBITs of similarly placed countries in economic terms and/or resort to the Models designed by the economic groups and adopt them¹⁰⁵.

To summarise, the MBITs have become so significant that it widely accepted, that the nation -States engage with the regime must develop MBITs to effectively use the regime to meet the rationale of the regime, i.e. Protection of Foreign Investment and Economic prosperity of the contracting parties¹⁰⁶.

III. Model Investment Treaty and Rational Design Theory

To understand the correlation between the philosophy of the RDT and the Model Investment Treaty, it is crucial that one examines the philosophy of the RDT and the philosophy of MBITs. In this segment, the fundamentals of the RDT and Model Investment Treaty will be explored, leading to a theoretical correlation between the two.

A. Philosophy of Rational Design Theory

In the Autumn of 2001, Barabara Koremanos, Charles Lipson and Duncan Snidal authored an article titled “The Rational Design of International Design”, which was published in “International Organization”, leading to the formation

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ KENNETH VANDEVELDE,. BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION. Oxford University Press. (2010).

of the premise for Theory of Rational Design. The present segment engages establishing the theoretical and philosophical premise of the concept of Rational Design.

While it is admitted that the concept was essentially practically examined and empirically tested against the backdrop of the international institution, which involved multilateral engagements, however, the philosophy of RDT could not be chained within that box. The philosophy could be effectively traced to the editors' introduction of the special issue, which stated, "*Our main goal is to offer a systematic account of the wide range of design features that characterise international institutions. We explore theoretically and empirically the implications of our basic presumption that states construct and shape institutions to advance their goals. The most direct implication is that design differences are not random. They are the result of rational, purposive interactions among states and other international actors to solve specific problems*"¹⁰⁷. The authors embarked upon the journey which led to the development of the theory based on the design features playing a significant role in the conclusion of treaties. These design features were not random in nature rather far from it. In negotiated agreements, these design features acted as windows to the mind of negotiators acting on behalf of the nation-States. They were the outcome of not mere cooperation, rather "rational" and "purposive interactions" between the negotiators from nation-States on behalf and the said negotiations were undertaken to achieve common and collective goals. The work of Koremenos, Lipson & Snidel is based on the widely acceptable presumption of "rational choice," i.e. "*states use international institutions to further their own goals, and they design institutions accordingly*"¹⁰⁸, and "*They are the self-conscious creation of states*"¹⁰⁹. However, it is of great importance to note that the above presumption holds true even when nation-States enter negotiated bilateral agreements. In the modern era of International Law, it would be incorrect to assume that nation-States engage in bilateral treaties without their consent as the philosophy of "consent"

¹⁰⁷ *Supra* Note 2.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

theory is the premise of International Law *per se*¹¹⁰. However, it must be noted that the price of signing a BIT, is realised much later, especially in the 1st and 2nd generation BITs as they were often governed by the template provided by the developed world, whereas the consent offered by a developing and least developed States during negotiation were often based on expectation economic prosperity, which do not have any quantifiable parameter incorporated within the substantive clause, and remains one of the chief aspirations as reflected in preambles. If one were to assume that nation-States engage in Bilateral Treaty practice without heeding to their own goals, then it would amount to counter-productive and devoid of consent, translating into bringing more significant questions on the table, which runs counter to the development of international law.

Thus, it could be deciphered from the aforementioned arguments that that nation-state engages in negotiated treaty practice, whether multilateral or bilateral in present time it must follow the philosophy of rational designing theory, i.e. Nation-State engage in negotiated treaty practice to further their goals collectively as a nation, to fulfil their collective needs, whether it is economical, environmental, social, or political. These treaty designs based on negotiations are not random or whimsical, rather, act of careful design based on rationale. The rationale may differ for each country but directly traceable to the need of the nation as a collective.

B. Philosophy & Rationale of Model BIT

MBIT is a document prepared at a national platform¹¹¹ created by an individual nation-State, with the assistance of Inter-Ministerial Bodies, academicians, experts from the industries, etc.¹¹² Barring the exception of BLEU, every other country has developed a MBIT created as part of their national strategy. However, it must be noted that BLEU negotiated BIT with other countries as a

¹¹⁰ Barbara Koremenos, Charles Lipson, and Duncan Snidal. "The Rational Design of International Institutions". 55 (4) International Organization :761-99. (2001).

¹¹¹ As classified in the UNCTAD web platform hosting the Model Investment Treaties <investmentpolicyhub.unctad.org>.

¹¹² *Supra* Note 54; *Supra* Note 85.

singular economic unit. Hence, effectively they represented their national position through the regional model¹¹³.

The brief discussion undertaken segment numbered 3.1 helps us trace the development of the MBIT. In addition, the segment helps one realise its dynamic characteristics, evolutionary features, approaches governing the change in designing of the model, and ultimately the benefit and rationale for letting it take place in the regime.

As witnessed, MBITs were not very common during the conclusion of 1st Generation BITs¹¹⁴. It was a tool in the hands of the capital-exporting countries who looked for protection of the investments of their nationals' in the capital-importing countries¹¹⁵. The capital-exporting countries presented their models to negotiate the BITs, which were agreed upon by the capital-importing countries, who believed such agreements would pave the way for the much-desired foreign investments.¹¹⁶ The risks associated with such agreements were not assessed; the benefits were the highlights. The second stage of the MBITs witnessed the initiative of the erstwhile capital-importing states, i.e., the developing countries, towards framing and designing MBITs. However, little experience and failure to assess the potential cost of such treaties became a roadblock to creating a suitable Model Investment treaty to aid them in negotiation. Instead, it was mere aping the developed countries practice¹¹⁷. It was only at the third phase of the MBIT, the countries, irrespective of developed and developing countries, started designing MBITs, which were based on adverse experience, the realisation of the potential cost of such Treaty, concerns regarding restraints over the policy-making powers, the existing skewed balance of rights and obligations of the investors. Instead, the abovementioned realisations led to the beginning of the 3rd phase of MBITs¹¹⁸.

The turn of the millennium was marked by events such as the backlash against the economic liberalisation, the capital-exporting States facing claims from the investors of erstwhile capital importing countries, rise in the environmental

¹¹³ *Supra* Note 110.

¹¹⁴ *Supra* Note 21.

¹¹⁵ *Supra* Note 21 & *Supra* Note 7.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

regulations leading to indirect expropriation¹¹⁹. The events led to the realisation that the countries need to act in accordance with their social, environmental, economic desires. Thereby, needing comprehensive investment policies that gave way to sustainable development and addressing the needs of the people in multiple parameters and achieving the coveted economic development has always been an aspiration of the nation-State, motivating her to negotiate the investment treaties and move away from the erstwhile aping practice. The three stages, which involved three distinct approaches, laid the foundation for the philosophy of designing the MBITs.

The change in the investment policies of developed and developing countries, as evidenced earlier in segments enumerated as 2.2, 2.3 and 2.4 provides the basis, rationale, and reasons for designing the present MBITs.

The *raison d' être* of the MBIT leads us to its philosophical understanding of such documents. Presently, the MBIT plays several roles in the international investment regime, which could be broadly classified into a. Pre-Negotiation, b. Negotiation, Post-Negotiations Stage. During each of these stages, the document helps the nation-State understand the State's need at a national level and reason to participate in the regime, then assert herself with much strength during negotiation. The assertion is based on the reason to participate in the regime and finally assist in interpretation in case of any dispute regarding the understanding of the nation-State.

Pre -Negotiation Stage

It is the stage when the nation-State forms an exclusive committee composed of stakeholders from various fields such as Ministerial Representatives, Government Officials, Academicians, Experts, Practitioners, Industrial Representatives etc¹²⁰. The committee engages in designing the MBIT, which would reflect the needs of the people and pave the path for sustainable development¹²¹. The design outcome of the pre-negotiation stage represents the truest form of the State's need and rationale design of the Treaty.

¹¹⁹ *Id.*

¹²⁰ *Supra Note 86 & Supra Note 55.*

¹²¹ *Supra Note 86.*

Negotiation Stage

At this stage, the Nation-State representative engages in negotiation with other nation-States. The MBIT often proves beneficial on several counts at this stage, such as enhanced clarity on the design and its implications, putting the nation-State relatively stronger than a situation where it did not have such document, reduction in cost negotiation in terms of time and money¹²². It is expected that during negotiation, certain dilution may happen from the MBIT of the pre-negotiation stage, and the truest form of rational design be subjected to delusion. However, it also helps to analyse the extent of deviation while concluding the BIT¹²³. This assessment is essential as it would be a reflection of the success and failure of RDT in the Bilateral Investment Regime.

Post Negotiation Stage

After the conclusion of the Treaty, the role of the MBIT is much reduced; however, it continues to play a significant role in decision making and disputes¹²⁴ as it helps the interpreter peep into the negotiators' minds, even when Treaty has deviated from the Model Treaty.

Thus, it could be reasonably concluded, that the MBIT is a form of document that other areas of treaties have not witnessed. MBIT not only expresses the nation-State's investment policy but also plays a critical role. It represents the *raison d'être* of the nation-State to engage with the international investment regime, thereby being the truest form of rational approach, which a nation-State would desire. Negotiating a treaty may lead to deviation, but the extent of variation determines the place of RDT in the realm of the BIT. It also assists in ascertainment of the extent a State has compromised while negotiation and ultimately consenting to the BIT.

C. The Correlation

The abovementioned discussions in segment enumerated **under B and C** on the philosophy of the RDT and MBITs provide for two distinct philosophies: a theoretical conception, while the latter reflects the development of a philosophy based on the application of the earlier one. The RDT advocates that the Nation-

¹²² *Supra* Note 86; *Supra* Note 80.

¹²³ *Supra* Note 3.

¹²⁴ *Supra* Note 86.

State engages in negotiated treaty practice to further their goals collectively as a nation and fulfil their collective needs, whether economic, environmental, social, or political. These treaty designs based on negotiations are not random or whimsical; instead, an act of careful design based on rationale. Thereby pinning the theory to the need of the nation-State as a collective and development of treaty design in accordance with that. Whereas, MBIT is designed based on the need of the nation-State to engage with the investment regime. When observed, RDT suggests that it is the need of the nation-State which motivates it to sign a treaty; the need represents the rationale. The MBIT is designed to address the need of the nation-State and reflect the investment policy of the nation-State. No other treaty regime has a structured form like the Investment Treaty.

The MBITs reflect the truest form of the nation-State's interest. If RDT is to be traced from the BIT, then there can be no better instrument than the MBIT, as it is a national level document expressing the need, desire and Investment policy of that particular country, without any interference from the other nation-State, thereby, representing pure representation of RDT. However, when a nation-State armed with a MBIT participates in negotiation with other nation-States to conclude a BIT, there will be a certain amount of dilution in the final Treaty. It is the extent of dilution which could help us assess if a particular nation-State successfully adhered to the philosophy of RDT or not in the treaty practice. Nonetheless, the correlation between the philosophy of RDT and the MBIT stands absolute.

IV. Conclusion

MBITs had a long gestation period to come into the shape it is today. It developed through three different eras, each marked by its significance. The growth of the MBIT over the years reflected the change in the negotiating capacities, the experience of the nation-States, nature of parties, the flow of capital, changing climate of the investment regime, the controversial dispute settlement mechanism, the development of alternative principles, balancing of rights and obligations of the investors and Contracting States etc. The experience of nation-State who realised the importance of MBITs highlights their own need and rationale for engagement with the regime. However, certain

factors remained constant through the area that is the philosophy of the MBITs, i.e. rationale for its creation being indeed of the nation-State negotiating based on the model. Even though the MBITs have been in fray from three phases, it is third phase which is the most significant one. The third phase witnessed an extensive rise in MBIT numbers based on backlash against the globalisation, environmental concerns, controversial arbitral awards, and ill-effects of earlier BITs, etcetera. This era witnessed the nation-State, including the developed and developing nation-States with MBIT not through aping but through deliberation and discussion at the national level. Thereby adhering to the philosophy of RDT.

The correlation between the philosophy of RDT and the MBIT is undeniable. As the former suggests, nation-States participate only in treaties whose design fulfils the collective goal of the nation-State, whereas later is application of such rational design by reflecting the nation-State's objectives and policies in the regime of international reflecting the rational choice made with regard to Investment. However, it is challenging to hold such standards of rationality while negotiating a BIT, as the other nation-State also may come with their Model Investment Treaty reflecting their investment policy. It is expected that the negotiated Treaty between two such countries with the MBITs will face a certain amount of dilution. It is the extent of dilution which can help realize the presence or absence of RDT for each Contracting Parties in each of the BITs. Incidentally, even though the MBITs may have philosophical grounding in the philosophy of RDT, most nations- States are yet to realise the importance of the MBITs at their national level, as only handful of States from developed and developing world have engaged in designing of the MBITs. It is imperative that the nation-States intending to engage with the regime, they give due consideration to the idea of MBIT before interacting with the regime.